RECENT DEVELOPMENTS

LIBEL—PRIVILEGE OF *New York Times v. Sullivan* HELD APPLICABLE TO STATEMENTS MADE OF AND CONCERNING A NON-PUBLIC OFFICIAL—*Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966)*—For several years Linus Pauling, an internationally prominent scientist who was awarded the Nobel Prize in Chemistry in 1954, and more recently the Nobel Peace Prize, has been a leader in efforts to promote a nuclear test ban treaty. In 1958, he submitted to the United Nations a petition containing the signatures of 9,234 scientists throughout the world which called for an international agreement to end nuclear testing. Two years later the Senate Judiciary Committee's Subcommittee on Internal Security, engaged in hearings concerning test ban activities, ordered Pauling to produce the letters by which those signatures had been transmitted to him. His refusal to produce the transmittal letters did not result in disciplinary action by the sub-committee, but it did cause some public comment.

On October 10, 1960, the St. Louis Globe-Democrat published an editorial entitled "The Glorification of Deceit" which falsely stated that Pauling had been cited for contempt of Congress upon his refusal to produce the letters.

A civil libel action brought by Pauling for publication of this false statement resulted in a verdict and judgment for the newspaper. The United States Court of Appeals for the Eighth Circuit affirmed the judgment on the ground that the alleged libel came within that area of the first and fourteenth amendments to the United States Constitution which affords a privilege to critical comment, including false statements of fact, made without malice.[1] This decision extended the privilege of *New York Times Co. v. Sullivan*,[2] applying it to one who, unlike the plaintiff in *New York Times*, was not a public official.

In *New York Times*, where an elected city commissioner sought to recover for false statements made of him in the conduct of his office, the United States Supreme Court held that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'. . . ."[3] The limits of this prohibition have received a clearer definition in a number of subsequent cases which have dealt with the scope of the term "public official" as well as that of "official conduct."

Though the plaintiff in *New York Times* was an elected official, the privilege has been held to apply as well to appointed officials.[4] It has been further held to encompass persons who are merely candidates for public

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1 Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966).

2 376 U.S. 254 (1964).

3 *Id.* at 279-80.

4 Pape v. Time, Inc., 354 F.2d 558, 559 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966).

office[5] and those who are no longer in office, at least while their official acts remain matters of present importance.[6] Among those who have been brought within the scope of the "public official" designation are a police lieutenant,[7] a deputy sheriff,[8] a candidate for Congress,[9] a county recreation manager,[10] and a local judge;[11] and it is clear, as the Supreme Court pointed out in *Rosenblatt v. Beer*,[12] involving an appointed county official, that the "designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[13] It was further pointed out in that case that the determination of whether or not one is a "public official" for purposes of *New York Times* must be measured by federal, rather than state, standards.[14]

The only limitation which has been placed on the potential scope of "public official" is found in footnote 13 of *Rosenblatt*: that the defamed government employee must hold such a position as would likely invite public scrutiny apart from that resulting from the particular defamatory statement involved before he comes within the "public official" category. Thus a janitor employed by the government would not be classed a "public official" in a suit by him for a false statement that he has been stealing state secrets, even though he came under public scrutiny as a result of that statement.[15]

The limitation on the scope of the privilege contained in the requirement that the defamatory statement concern the subject's "official conduct" to be privileged has been rendered virtually meaningless by *Garrison v. State of Louisiana*.[16] In *Garrison*, the Supreme Court reversed a conviction for criminal libel against a district attorney for his statement imputing laziness and dishonesty to certain judges. The court stated that the *New York Times* privilege includes "anything which might touch on an official's fitness for office"[17] and that it "is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed."[18] Since almost anything which might be said about a public official could likely be found to touch upon his fitness for office, once the subject of the comment

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[5] State v. Browne, 86 N.J. Super. 217, 206 A.2d 591 (App. Div. 1965); Block v. Benton, 44 Misc. 2d 1053, 255 N.Y.S.2d 767 (Sup. Ct. 1964).

[6] Rosenblat v. Baer, 383 U.S. 75, 87 n.14 (1966).

[7] Gilligan v. King, 48 Misc. 2d 212, 264 N.Y.S.2d 309 (Sup. Ct. 1965).

[8] Thompson v. Saint Amant, 184 So. 2d 314, 321 (La. App. 1966).

[9] Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964).

[10] Rosenblatt v. Baer, 383 U.S. 75 (1966).

[11] Garrison v. Louisiana, 379 U.S. 64 (1964).

[12] 383 U.S. 75 (1966).

[13] *Id.* at 85.

[14] *Id.* at 84.

[15] *Id.* at 86-87 n.13.

[16] 379 U.S. 64 (1964).

[17] *Id.* at 77.

[18] *Id.*

is termed a "public official," there would seem to be almost no limitation on the statements that may be made about him with impunity, absent actual malice.

The Supreme Court has expressly left open the possibility that there may be other bases than "public official" upon which to apply the privilege. In a footnote to *New York Times* the Court pointed out that it had no occasion to consider how far down into the lower ranks of government employees the "public official" concept extended "or otherwise to specify categories of persons who would or would not be included."[19]

In *Rosenblatt* the Court further expressed its reluctance to confine the privilege to statements made of and concerning "public officials" in a footnote:

> We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern.[20]

If the purpose for the privilege is, as the Court said in *New York Times*, to stimulate the vigor and variety of public debate and make it "uninhibited, robust, and wide open" by removing the kind of self-censorship likely to result from doubt of one's ability to prove the truth of his statements or fear of being put to the expense of such proof,[21] then there is a logical difficulty in limiting the privilege to "public officials."

> Public debate cannot be uninhibited, robust, and wide open if the news media are compelled to stand legally in awe of error in reporting the words and actions of persons of national prominence and influence (not "public officials") who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of thinking.[22]

The court in *Pauling* was directly confronted with the problem of confining the scope of *New York Times* to government employees when in fact,

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[19] 376 U.S. at 283 n.23.

[20] 383 U.S. at 86 n.12. The footnote cited indicates at the very least a recognition by the majority of the Court that there might be other bases for the application of the privilege: and two Justices, Douglas and Black, have more affirmatively recognized a need for an extension of the privilege, stating in concurring opinions in *Rosenblatt* that the privilege should not be predicated on arbitrarily labelling one a "public official," 383 U.S. 94 at 95 (concurring opinion by Black, J.), and that "the question is whether a public *issue*, not a public official, is involved," 383 U.S. 88, 91 (concurring opinion by Douglas, J.).

[21] New York Times Co. v. Sullivan, 376 U.S. 254, 270, 279 (1964).

[22] Walker v. Courier-Journal and Louisville Times Co., 246 F. Supp. 231, 234 (W.D. Ky. 1965).

a "lobbyist, a person dominant in a political party, the head of any pressure group, or any significant leader may possess a capacity for influencing public policy as great or greater than that of a comparatively minor public official who is clearly subject to *New York Times*."[23] That court concluded "that a rational distinction cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of national policy will be less important to the public interest than will criticism of government officials."[24] Thus the court found it necessary to bring comments made about Linus Pauling within the prohibition of the *New York Times* privilege.

While the court in the instant case has extended the privilege beyond the "public official," applying it as well to one who has "thrust himself into the vortex of the discussion of a question of pressing public concern,"[25] it does not expressly define that which *Walker v. Courier-Journal and Louisville Times Co.*[26] termed the "public man" (as opposed to the "public official").[27] The court in *Pauling*, however, does stress four factors, the presence of which may in a particular situation place one in the class of "public men," enabling false statements made about him to fall within the *New York Times* privilege: (1) the subject's public prominence; (2) the voluntariness of his entry into the discussion of an issue; (3) the subject's apparent influence in the resolution of the issue; and (4) the independent public importance of the issue itself.[28]

In so far as one is a "public official" for purposes of *New York Times* he is necessarily a subject of public interest, since the responsibility for some excercise of public power has been placed upon him.[29] This public interest goes not only to the manner in which such power is exercised, but also to the official's qualifications to exercise it.[30] The public interest in the so-called "public man" is not necessarily identical to the interest in a "public official," for there has been no formal delegation of power or responsibility to the "public man;" however there is a comparable public interest in the "public

23 Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196 (8th Cir. 1966).

24 *Id.*

25 Rosenblatt v. Baer, 383 U.S. 75, 86 n.12. (1966).

26 246 F. Supp. 231 (W.D. Ky. 1965).

27 *Id.* at 234.

28 Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 195-96 (8th Cir. 1966). From the recent Supreme Court decision of Time, Inc. v. Hill, 385 U.S. 374 (1967), it is clear that these four factors are not required for application of the *New York Times* privilege in an action brought under the New York right of privacy statute; this, however, does not remove their application to a libel action. The Court points out in *Hill* that the rules controlling the privilege in a libel action might well be different from those in a right of privacy action because of the increased interest of the state in protecting against damage to one's reputation (as opposed to the state interest in protecting his privacy).

29 According to Garrison v. Louisiana, 379 U.S. 64 at 77 (1964), "[t]he public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants."

30 Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

official" and the "public man" to the extent that the latter has the capacity to substantially influence opinion and guide public policy.[31] It is because of the public interest in this capacity that the court in *Pauling* finds it necessary to bring the "public man" within *New York Times*.[32] Thus, one might conclude that, when no such capacity exists, there cannot be a sufficient public interest upon which to base an extension of the privilege; therefore the subject of comment must be a person of some prominence or repute above that of the common mass of men before he can be a "public man" and the comment thereby privileged.

Rosenblatt made clear that there must be an independent, rather than a resultant, public interest in the person about whom the statement is made before such person can be termed a "public man."[33] Just as the janitor who is made the subject of public scrutiny by a false statement that he is stealing state secrets does not by this resultant public interest become a "public official," neither does the average person become a "public man" when a false statement that he is the moving force in the American Nazi Party results in his subjection to public scrutiny and comment. Only when, independent of any publicity or reputation generated by the defamatory statement, the subject of the statement has succeeded in gaining a place of public prominence and repute, can he be brought within the "public man" category and thereby made subject to the privilege.

In the instant case Linus Pauling was found to have sufficient prominence as a result of his scientific achievements and his activities in trying to promote a nuclear test ban treaty; while in *Walker* the plaintiff was a retired general who, as the court pointed out, "identifie[d] himself in his own Complaint, . . . [as] a person of 'political prominence.' "[34] Not only did both men hold positions of prominence in their respective fields, but both also had succeeded in generating publicity through discussion of public issues prior to the publicity resulting from the alleged defamation; thus in each case the requisite prominence was found to make the plaintiffs "public men."

Despite the fact that public prominence was stressed in *Walker* and *Pauling*, it may not be as important in the "public man" concept as it would first appear. Although prominent people are by definition the subject of some form of public interest, the privilege is concerned only with the kind of public interest which arises from one's capacity to influence the outcome of public issues and to guide the formation of public policy. To the extent that one gains this capacity through prominence and reputation, these are certainly important considerations in determining whether such person comes within

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[31] *See* Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966); Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231 (W.D. Ky. 1965); Pauling v. National Review, Inc., 49 Misc. 2d 975, 979, 269 N.Y.S.2d 11, 16 (Sup. Ct. 1966).

[32] 362 F.2d at 196.

[33] Rosenblatt v. Baer, 383 U.S. 75 (1966).

[34] 246 F. Supp. at 233.

the *New York Times* privilege; but there are situations in which the capacity to influence the resolution of issues is gained through an avenue other than prominence and reputation. Such capacity may result from one's relationship with a government official, as in the case of the lobbyist[35] or the law partner of a public official.[36] When the capacity upon which the public interest is based is thus derived from a source other than public prominence, one's public prominence may become a factor of less importance in bringing him within the "public man" category and under the operation of the privilege.

The third factor necessary to bring one within the "public man" designation is that his presence at the center of a public issue be voluntary; that is, that he has thrust himself into the vortex of the discussion, as opposed to having been thrust there by outside forces. Thus, a newspaper which falsely charges a person arrested for a crime with committing that crime is not entitled to the *New York Times* privilege, if the person charged is not a "public official" and has not otherwise brought himself within the "public man" category.[37] In such a case the person defamed has done nothing to voluntarily subject himself to public scrutiny and therefore cannot be said to have reasonably foreseen that his activities would be taken cognizance of by the press, "thus magnifying the chance that . . . they would be 'erroneously reported.' "[38] Likewise, one guilty of the crime charged might be said to have thrust himself into the vortex of discussion, but this question need not be reached since the defense of truth provides complete protection.

In the instant case, the court found Pauling's voluntary entry into the discussion of a public issue to be his continuing efforts aimed at stopping nuclear tests, his collecting of signatures and submission of a petition to the United Nations, and his attempts to have the United States enjoined by judicial decree from the further testing of nuclear bombs.[39]

In *Walker*, the court found the requisite voluntariness in the plaintiff's very presence at the scene of the riots which resulted from the enrollment of Negroes in the University of Mississippi. The test of voluntariness appears to be whether the subject could have reasonably foreseen, as he could in these

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[35] The court in *Pauling* does feel that the lobbyist would come within the *New York Times* standards. 362 F.2d at 196.

[36] *See* Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (Sup. Ct. 1964), *aff'd*, 15 N.Y.2d 1023, 260 N.Y.S.2d 29, 207 N.E.2d 620 (1965).

[37] An example would be Sheppard v. Maxwell, 384 U.S. 333 (1966), where Dr. Sheppard's conviction for the murder of his wife was reversed because of the prejudicial comments made by certain newspapers before and during his trial. Upon retrial Dr. Sheppard was acquitted of the murder charge. Because Sheppard could hardly be considered to have thrust himself into the vortex of public life, those newspapers which accused him of commission of the murder should not receive the protection of the *New York Times* privilege in the event that a libel suit is brought against them.

[38] Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231, 234 (W.D. Ky. 1965).

[39] Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196 (8th Cir. 1966).

cases, that there would be a magnification of his activities by the news media, thus increasing the possibility that such activities would be erroneously reported.[40]

The fourth factor, the presence of which warrants the extension of *New York Times* to statements made about one who is not a government official, has not so much to do with the person who has entered the discussion of an issue as with the issue itself. In *Rosenblatt* such issue was termed one "of pressing public concern;"[41] in *Pauling* it was called "an issue which was important, which was of profound effect, which was public and which was internationally controversial;"[42] and in *Walker* the court spoke of "matters of grave public concern."[43] Since the privilege is based on the public interest involved, it logically follows that its application should be tied to the public importance of the issue under discussion. No matter how potentially influential a person might be, if he confines his activities to matters of minimal public importance, such activities will not likely generate any great amount of public interest. Furthermore, one who has so confined his activities can hardly be held to reasonably have foreseen that they would be magnified by the news medea, and therefore to have thrust himself into such a position as would invite widespread news coverage.

Once the presence of the above four factors has been detected, thus classifying the subject as a "public man" for purpose of applying the *New York Times* privilege, we are still faced with the question as to the nature of the conduct of the "public man" which can be commented upon with impunity.

Despite the fact that the "official conduct" requirement, as set out in the *New York Times* case, appears to have little or no effect as a limitation on the scope of privileged statement, it would seem that the privilege as extended in *Pauling* prohibits a "public man" from recovering damages for a defamatory falsehood relating to his "public conduct." The question then is whether or not the "public conduct" requirement will be a more effective limitation on the privilege than the "official conduct" requirement has been.

Just as the Supreme Court in *Garrison* found that "official conduct" includes both the exercise of official power and one's qualifications to undertake that exercise, so "public conduct" would seem to include both the exercise of public power and the qualifications to do so. In both cases the public interest is the same, that is, the interest in one's capacity to guide and influence the resolution of public issues. Whether such capacity comes from being a "public man" or from holding an official position, the public interest must extend beyond one's official or public activities and include such matters as motive, honesty, and ability. The public interest being the same, whether

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[40] Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231 (W.D. Ky. 1965).

[41] 383 U.S. at 86 n.12.

[42] 362 F.2d at 195.

[43] 246 F. Supp. at 234.

one is a "public official" or a "public man," the scope of the privilege can be no less.

This appears to be the view of the court in *Pauling* as evidenced by the following:

> It would seem, therefore, that if such a person ["public man"] seeks to realize upon his capacity to guide public policy and in the process is criticized, he should have no greater remedy than does his counterpart in public office.[44]

The court equates the "public man" with the "public official" in such a way that, so far as the scope of the privilege is concerned, the "public man" apparently becomes in effect a "public official." If this is true, then the "public conduct" requirement has no more efficacy than the "official conduct" requirement. The result is that once the subject of comment is found to be a "public man" there would seem to be almost no limitation on the statements that may be made about him with impunity, absent actual malice.

CRIMINAL LAW—INSANITY DEFENSE—WISCONSIN COURT'S PARTIAL ACCEPTANCE OF A.L.I. DEFINITION SPOTLIGHTS DIFFICULTY OF RECONCILING COMPETING POLICY GOALS—*State v. Shoffner, 8 Wis.2d 640, 100 N.W.2d 339 (1966)*—During the last few years, many courts and legislatures have been faced with the problem of what relation mentally defective offenders should have to the criminal law. Wisconsin, during the past ten years, has been trying to define what standard should be used in determining non-responsibility because of mental problems. The analysis which the Wisconsin courts and legislature have employed illustrates most of the considerations which are being employed today by judicial bodies in developing various standards.

The M'Naghten standard, adopted by the legislature, was the Wisconsin test until 1955 when the legislative committee, feeling the test was inadequate, dropped it from the code.[1] The legislative committee did not define a new test and assumed the M'Naghten test would continue until the legislature acted (as yet it has not). In 1960,[2] the Wisconsin Supreme Court considered the problem of the insanity test, but because of the facts involved in the case, they did not make any changes. The A.L.I. test was explicitly rejected in *State v. Esser*, the court holding that it had power to change the test but would retain a modified M'Naghten standard.[3]

The issue was raised again in *State v. Shoffner*, where the defendant pleaded not guilty by reason of insanity to charges of burglary, arson, and

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[44] 362 F.2d at 196.

[1] Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 367.

[2] Kwosek v. State, 8 Wis. 2d 640, 100 N.W.2d 339 (1960).

[3] State v. Esser, 16 Wis. 2d 567, 115 N.W.2d 505 (1962). Insanity is an abnormal condition of the mind which renders the defendant incapable of understanding the nature and quality of the alleged act, or incapable of distinguishing between right and wrong.

armed robbery. Testimony indicated that, although he knew "right from wrong," he was suffering from an undifferentiated type of schizophrenia and may have lacked substantial capacity to conform his conduct to the requirements of the law.[4] Shoffner was convicted under the M'Naghten test, and he appealed, urging that the court should have applied any one of the four more liberal tests.[5] After balancing the factors involved, the court retained the M'Naghten test, but remanded, allowing the defendant the election of being tried under the A.L.I. formulation on condition that he assume the risk of nonpersuasion and waive the statutory provision placing the burden on the state.[6]

I. The Role of the Criminal Law

Criminal law is one of the ways society attempts to protect things of value or, as phrased by Goldstein and Katz, "the meaning of responsibility is liability to punishment; and if the criminal law does not determine who are to be punished under given circumstances, it determines nothing."[7] Punishment (and therefore the criminal law) aids society by *protecting* the community from proven offenders, *deterring* potential offenders, *rehabilitating* past offenders, and by providing a means of *retribution* to the community.[8] The mental element of the criminal act, mens rea, has served as the necessary connective link between the wrongful act and the punishment. The mental element is the shorthand means by which courts identify those persons upon which society wishes to inflict punishment in order to achieve the goals of protection, deterrence, etc. Mens rea makes punishment meaningful in light of the various goals.

The theoretical imperfections in the concept of mens rea are at the heart of the problems of finding an adequate "insanity" defense. In dealing with this defense courts are, from the inverse point of view, concerned with the same policy considerations involved in the mens rea concept. In essence the courts are defining in reverse what mental element will serve to implement the policies and goals subsumed by punishment.[9] Unfortunately, in most instances no attempt has been made to define what mental element should be

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[4] State v. Shoffner, 31 Wis. 2d 412, ——, 143 N.W.2d 458, 460 (1966).

[5] *Id.* at ——, 143 N.W.2d at 460-61, the tests being: A.L.I., Model Penal Code, § 4.01 (1962); United States v. Currens, 290 F.2d 751 (3d Cir. 1961); British Royal Commission on Capital Punishment, Report, ¶ 333 (1949-53); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[6] *Id.* at ——, 143 N.W.2d at 465.

[7] Goldstein & Katz, "Abolish the Insanity Defense—Why Not?" 72 Yale L.J. 853, 854 n.1 (1963). *See* C. Mercier, Criminal Responsibility 31 (1905) stating criminal law is concerned with punishment for legally disapproved acts.

[8] Waelder, "Psychiatry and the Problem of Criminal Responsibility," 101 U. Pa. L. Rev. 378, 386 (1952).

[9] State v. Shoffner, 31 Wis. 2d 412, ——, 143 N.W.2d 458, 461 (1966). Was the accused "affected . . . to a degree that society cannot in good conscience, hold him responsible for the conduct as a crime, i.e. punish him."

adopted as maximizing the goals of punishment, and this backdoor approach of defining mens rea has become necessary.[10]

Two authors argue that even with current research in the insanity area, legal scholars have not yet come to grips with this problem of the functioning of mens rea.[11] Another author poses the problem in this way, "The quest for a formula for mental responsibility has led to a maze of mumble-jumble. The trouble perhaps is not with this formulation of a rule, but rather with the basic idea of having any formula at all."[12] Considering the imperfections in other relevant factors, such as the doctrine of free will, this criticism seems very legitimate.

II. Free Will and Determinism

Free will is the underlying concept which legitimizes criminal punishment. The doctrine, oversimplified, assumes that each person has the ability to make free choices and that punishment in some way can therefore influence the choice the person makes or is justified because the person with free choice is responsible and blameworthy. Judge Wilkie stated that only those "who commit these acts with a freedom of choice," are held accountable for crimes.[13] Judge Hallows stated, "I believe that a test of criminal responsibility should include or be stated in terms of the free will of man because it is that concept of the nature of man upon which we have traditionally and morally placed responsibility and is in accord with current-day medical science."[14]

The realization that this concept of free will is at best only partly true[15] has produced a real threat to historic concepts of criminal law. This threat is particularly evident in relation to the insanity defense since one of its underlying theories is that not all people have free choice.[16] To accept an extreme

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[10] *See*, Sayre, "Mens Rea," 45 Harv. L. Rev. 974, 1016-26 (1932) stating that there is not one mens rea but many metes reae. *See also*, P. Brett, An Inquiry into Criminal Guilt 41-42 (1963) who argues that mens rea is in essence nothing but a group of excuses, and that his approach is significantly different from the theory that mens rea is a positive requirement of the criminal act.

[11] Goldstein & Katz, *supra* note 7, at 859-61; Dubin, "Mens Rea Reconsidered—A Plea for a Due Process Concept of Criminal Responsibility," 18 Stan. L. Rev. 322, 325 (1966), "A patient study of past as well as contemporary efforts to articulate the mens rea concept leads one into a verbal maze of legislative, judicial, and scholarly imprecision wherein the expression itself loses almost all meaning."

[12] Slovenko — Super, "The Mentally Disabled, The Law, and the Report of the American Bar Foundation," 47 Va. L. Rev. 1366, 1385 (1961).

[13] State v. Shaffner, 31 Wis. 2d. ——, 143 N.W.2d 458, 475 (1966).

[14] State v. Esser, 16 Wis. 2d 567, 612, 115 N.W.2d 505, 529 (1962).

[15] S. Rubin, Psychiatry and Criminal Law 55 (1965).

[16] Katz, "Law, Psychiatry, and Free Will," 22 U. Chi. L. Rev. 397, 398 (1955) stating that many psychiatrists have insisted upon the abandonment of the concept of responsibility based on free will and moral blameworthiness, which has resulted in a fear by lawyers of a trend toward determinism. "[W]hile the above framework of determinism in an abstract sense may be logically acceptable, there still remains a tremendous

deterministic point of view would undermine many of the grounds for punishment and particularly threaten the moral basis. It must be remembered, however, that to some extent punishment fits into this total scheme as a contributing stimulus to conditioning behavior.[17] Therefore, this threat may not be as serious as first imagined. In fact, there are many instances where theories of determinism and free will are mixed in the law today.[18]

Responding to the threat of determinism, courts today often react negatively to any deterministic theories. Judge Fairchild not only explicitly questioned the reliability of psychiatric research and opinion, but also expressed the fear that liberalization from a deterministic point of view would exculpate those who should be punished.[19] "Whether a man is or is not held responsible for his conduct is not a medical but a legal . . . question."[20] Judge Hallow's solution is to treat criminal law "as if" free will existed.[21] It would seem that to maximize results for the future, an attempt must be made to work with reality.

III. The Goals of Punishment

The generally recognized considerations which must be weighed in order to determine when a sanction should be imposed include deterrence, protection, rehabilitation, and retribution. In essence, a defense of insanity must attempt to incorporate the legitimate policy arguments which surround each goal or factor.

This is a difficult problem since it is a policy question[22] and, as Judge

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gap between the broad framework and its translation into workable legal formulae. If for no other reason than this, traditional jurisprudence would find it to be not only 'mere nonsense' but objectionable nonsense." Kaplan, "Criminal Responsibility," 45 Ky. L.J. 236, 237-38 (1956). *See*, State v. Lucas, 30 N.J. 37, 84, 152 A.2d 50, 75 (1959) (Weintraub, concurring opinion):

> [O]n the other hand, the psychiatric approach inevitably challenges this basis for a finding of personal blameworthiness. Psychiatry does recognize the existence of a volitional apparatus, but conceives it to be inseparably integrated with the intellect and the emotions. From its objective view, no man can be said (or shown) to have selected the dimensions of these faculties and have to be the authors of any of them. . . . Upon that approach the sick and the wicked would be equally free of blame in a personal sense. There could be no denominator which in terms of justice to the individual would differentiate one from the other.

17 Katz, *supra* note 16, at 399.

18 Kaplan, *supra* note 16, at 238 mentioning juvenile courts, probation and parole, and wide interpretation of M'Naghten.

19 State v. Esser, 16 Wis. 2d 567, 589, 115 N.W.2d 505, 517 (1962).

20 *Id.* at 586, 115 N.W.2d at 515.

21 *Id.* at 615, 115 N.W.2d at 530. "[L]awyers and psychiatrists can agree that a great majority of the people should be treated *as if* they had free will." *See*, Katz, *supra* note 16, at 398.

22 Waelder, "Psychiatry and the Problem of Criminal Responsibility," 101 U. Pa. L. Rev. 378, 386 (1952); Birks & O'Flynn, "Some Problems in the Theory and Practice of

Hallows states, "Underlying the various concepts are fundamental differences in the purpose of punishment and the function of criminal law, the differences in philosophical thought, and differences in theories of psychiatry and especially of the nature of man, his personality, and his mental process."[23] The court in *Shoffner*, concluding that possibly no standard for determining when a person should be exculpated for being mentally defective is perfect and each alternative can legitimately be subjected to criticism, chose a solution whereby the defendant would himself choose among these factors, *i.e.* decide which test to be tried under.[24] What, then, are the underlying policies surrounding each goal which the court tried to harmonize, and how do they affect the "insanity defense"?

A. *The Deterrent Goal*

One of the main functions of punishment is to deter people from committing antisocial acts. In one sense it is designed to deter the actor from recidivisim, and, in another sense, punishment of one is designed to deter others. Some question exists whether punishment deters at all, and one criminologist argues that the recidivistic criminal seeks punishment.[25]

Deterrence is not a major factor in the retention of punishment of mental defectives since the defense, by definition, applies to the non-deterrable—those who do not know right from wrong or who are not able to control their behavior.[26] Deterrence is a consideration, however, where the question is whether the defense of insanity should be extended to those persons, such as neurotics, whose behavioral defects are marginal. Some contend that based on this factor alone society should not exculpate marginal groups such as this because they are to some extent deterrable, a consideration which is often in the minds of the court.[27] Judge Fairchild stated, "Persons so afflicted (neurotic and sociopathic problems) are less likely to be found insane under the M'Naghten definition. . . . [I]t seems probable that many people who are afflicted with exaggerated, sometimes warped, urges, may well be deterred from unlawful self-gratification by fear of detection and punishment. Society has an interest in prevention of crime which is served by such deterrence."[28] Considering only deterrence, it is illogical to punish the non-deterrable, the important questions being when is a person only marginally mentally defective and therefore deterrable, and how can such a person be identified.[29]

Criminal Punishment," 1963 N.Z.L.J. 253, stating because of various orientations, there are different theories of punishment.

[23] State v. Esser, 16 Wis. 2d 567, 616, 115 N.W.2d 505, 531 (1962).

[24] State v. Shoffner, 31 Wis. 2d. 412, ——, 143 N.W.2d 458, 461 (1966).

[25] Campbell, "A Strict Accountability Approach to Criminal Responsibility," Fed. Prob., Dec. 1965, at 33.

[26] Waelder, *supra* note 22, at 379.

[27] Davidson, "Irresistible Impulse and Criminal Responsibility," Crime and Insanity, 47 (R. Nice ed. 1958).

[28] State v. Esser, 16 Wis. 2d. 567, 595, 115 N.W.2d 505, 520 (1962).

[29] *See*, Katz *supra* note 16, at 400.

B. *Protection*

The protective function served by punishment is a less controversial factor than deterrence, because in most states, as in Wisconsin, a defendant who is found not guilty by reason of insanity is generally sent to a state mental facility and not released until he is declared safe to return to society.[30] Some question exists concerning the capability of present day hospitals to adequately handle criminal insanity problems.[31] Not only are hospitals not designed to handle security problems, but the cost of new facilities is high. However, it is arguable that punishment per se is more expensive.[32] With hospitalization there is the inverse problem of overprotection, since the defendant may be detained longer if sent to a mental institution than if convicted. Thus society may be punishing for having certain traits, which raises constitutional problems. Protection is not a goal served by punishing mental defectives and, from this point of view, society probably benefits by liberalizing the plea of insanity.

C. *Rehabilitation*

Rehabilitation, through either punitive sanctions or reeducation, is a goal subserved by criminal punishment. With respect to insanity, "we are largely concerning ourselves with the difference in the institutional treatment of the defendant."[33] Judge Wilkie pointed out that, regarding mental incompetents, mental care will better serve both the defendant and society.[34]

Cameron argues that one of our prime concerns should be the "proper management of the so-called criminally insane and prevention of criminal activity on the part of mentally disordered persons."[35] As a doctor, he would recommend treatment rather than punitive sanctions for those suffering from mental illness, retardation, or psychopathy. "Proper management of a mentally disordered offender must take account of his particular problems and needs, as well as those of society. In fact, it may be argued on philosophical grounds that unless society fully considers the needs and individual rights of its members, its own ends are not well served."[36]

It is interesting to note that, in Wisconsin, persons convicted of crime will be transferred to a mental institution if they have mental problems. This factor played a significant part in the Wisconsin court's conclusion that con-

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30 Wis. Stat. Ann. §957. 11(3), (4), (1958); *see*, State v. Shoffner, 31 Wis. 2d 412, ——, 143 N.W.2d 458, 474 (1966).

31 Diamond, "From *M'Naghten* to *Currens*, and Beyond," 50 Cal. L. Rev. 189, 192, 204 (1962).

32 *See*, Campbell, *supra* note 25.

33 State v. Shoffner, 31 Wis. 2d 412, ——, 143 N.W.2d 458, 474 (1966).

34 *Id. See also*, J. Sellin, The Penal Code of Sweden 8 (1965) pointing out that sanctions should foster the offender's adaption to society.

35 Cameron, "Did He Do It? If So, How Shall He be Managed?" Fed. Prob., June 1965, at 3.

36 *Id.* at 5.

victing mentally disturbed defendants was not necessarily violative of the rehabilitative goal.[37]

A consideration involved concerning rehabilitation is the extent to which harm is done by imprisoning mentally disturbed offenders with other convicts. Another question is the extent to which such offenders can benefit from hospitalization rather than punitive incarceration. If it is true that those who are punished the most are the sickest of all,[38] it seems that no matter how inadequate, a mental hospital would be better than a prison. Concededly, psychiatric treatment is indeed limited with certain mental patients, such as sociopaths, benefiting very little from psychiatric treatment.[39] What is needed are more developments in the area of truly rehabilitative institutions,[40] and more understanding and cross-fertilization of ideas among lawyers, social scientists, and doctors.[41]

D. *Retributive—Moral*

The turnkey factor in all instances must be how the retributive goal of punishment, the blameworthiness concept, is viewed by the decision makers. Retribution is not a purely logical factor but is based on human emotional response to crime. For this reason it is a very hard factor to deal with, particularly for lawyers, who are trained to think in logical rather than emotional terms. It appears that in most cases the way this factor is weighed by a court (or legislative body) determines the choice of an insanity definition.

Weintraub stated that, "so long as we have two processes which may be employed to deal custodially with anti-social conduct, one criminal and the other civil, the test for their application must be the existence or non-existence of blameworthiness in a personal sense."[42] Cameron feels that exculpation occurs when our "collective conscience" can not impose blame,[43] but would agree with Singer that too much emphasis is placed on the theory of blameworthiness, and concepts of "responsibility" as such are valueless and merely cloud the issue.[44] Who is correct?

The Wisconsin court has placed stress on the factor of blameworthiness. In *Shoffner*, the majority reiterated a prior holding, stating, "the question faced by society when a mentally-ill person engaged in offensive conduct made punishable by law is 'whether at the time . . . the accused was . . . affected

37 State v. Esser, 16 Wis. 2d 567, 590-95, 115 N.W.2d 505, 517 (1962).

38 Diamond, *supra* note 31, at 198.

39 Waelder, *supra* note 22, at 382.

40 *See*, Cameron, *supra* note 35, at 6.

41 *See*, "Insanity as a Defense," 37 F.R.D. 365, 396 (1964) wherein Judge Biggs states that U.S. courts are backward in accepting psychological research and many treat psychiatrists like witch doctors. *See also*, Geis, "Sociology, Criminology and Criminal Law," 7 Soc. Prob. 40 (1959) pointing out that the minimal cross-fertilization of disciplines is due to deep-seated commitments to diverse view points and has caused many problems.

42 State v. Lucas, 30 N.J. 37, 83, 152 A.2d 50, 75 (1959).

43 Cameron, *supra* note 35, at 3.

44 H. Singer, in J. Wigmore, Illinois Crime Survey 743 (1929).

by the mental illness to so substantial a degree that society can not, in good conscience, hold him responsible . . . .' "[45] Two of the judges would have alternatively instructed the jury that the plea of insanity raised this particular question and that they, the jury, were to function as the conscience of the community and determine the issue of culpability based on the quoted standard.[46] The majority also based their refusal to change from the M'Naghten test on their feeling that it is not producing unjust results.[47] Judge Wilkie followed Kaufman's position that after certain facts are known about a man, society as a whole must decide whether he should be held accountable. He stated that, unfortunately, people are being judged by the social standards of Victorian England and, with the vast strides in public awareness, M'Naghten "can no longer be blandly accepted as representing the 'moral sense of the community.' "[48] He believes that modern society approves of a standard which would allow exculpation based on a volitional defect and concludes, "the judgment that a person is not considered responsible for his acts which would otherwise be criminal because of his mental condition at the time of his act is a moral judgment . . . ."[49]

There are basically three sub-parts to this moral-retributive goal, each of which deserves analysis before full understanding may be had of the dynamics of decisions which incorporate the general goal.

Expiation is commonly thought of as paying one's debt to society, the offender being required to submit to punishment as a reparation to his fellow man and to the moral law for the offense he has committed against it.[50] This theory-philosophy, although widely accepted, faces some ardent critics, particularly among the social scientists.[51] Campbell states that, if punishment is accepted as an end in itself, concepts of deterrence and reformation have little import.[52] Campbell's position corresponds closely with the contention that a volitional test of exculpation has not been successful because of unquestioned ideas of collective conscience and religious and moral traditions.[53] Dubin asserts that this moral blameworthiness theory, although supposedly lacking the arbitrary elements of the "vengeance theory, will fail as an impossible attempt to define moral standards."[54]

Weintraub strongly asserted the contrary that, "no definition of criminal responsibility and hence of legal insanity can be valid unless it truthfully

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[45] State v. Shoffner, 31 Wis. 2d 412, ——, 143 N.W.2d 458, 461 (1966).

[46] *Id.* Noting, however, that this procedure was recommended to, but turned down by, the British Royal Commission on Capital Punishment Report.

[47] State v. Shoffner, 31 Wis. 2d 412, ——, 143 N.W.2d 458, 464 (1966).

[48] *Id.* at ——, 143 N.W.2d at 471.

[49] *Id.* at ——, 143 N.W.2d at 472. *But see, infra* note 80. In light of current research Wilkie's picture of society may be seriously questioned.

[50] Birks & O'Flynn, *supra* note 22, at 254.

[51] Campbell, *supra* note 25, at 33.

[52] *Id.*

[53] Goldstein & Katz, *supra* note 7, at 864.

[54] Dubin, *supra* note 11, at 339.

separates the man who personally is blameworthy for his makeup from the man who is not . . . ."[55] But in relation to reparation this raises the more difficult question of why the "insane" defendant should be distinguished from the sane defendant. Have not both injured society?

One school of thought avoids the issue by finding that society is holding the wrong people morally responsible, *i.e.* it is society that must be punished rather than have the accused suffer vicariously. However, this approach also seems to beg the question of whether punishment is morally defensible on grounds of reparation.[56]

A number of writers have raised serious questions as to whether expiation is defensible either morally or logically, the main argument being that there is no justice in punishment.[57] Although lawyers and legislators would often like to think they are dealing solely with logical constructs, in defining what is exculpatory, obviously each must eventually answer the more difficult moral question.

Vengeance, the true retributive goal, was ably expressed by Sir James Stephen when he said, "the criminal laws stands to the passion of revenge in much the same relation as marriage to the sexual appetite."[58] Vengeance raises a mixture of moral and psychological questions. For example, a person who is hit in the head by a swinging door often responds by kicking it back. The criminal law, however, tempers its response with moral overtones and refuses to "kick back" at certain people—including the mentally ill. Why should this be so?

The historical development of community-imposed sanctions has often been cited as arising to replace private retaliation. This goal today may be merely a fiction due to the complexity of modern society;[59] however, society may need punishment as an outlet for aggression.[60] One problem with which

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[55] "Insanity as a Defense," *supra* note 41, at 371.

[56] *See*, Waelder, *supra* note 22, at 386-87, questions punishing society and the concept of vicarious liability.

[57] *See*, D. Abrahamsen, Who Are the Guilty? 288 (1952), who argues that "We cannot really 'pay' for a misdeed, even with our lives . . . . More important, when society and the law created by society continues with the ancient idea that offenders . . . must give 'an eye for an eye and a tooth for a tooth,' they are not only being barbaric, they are being superficial, inhuman, and, in fact, evil themselves." Birks & O'Flynn, *supra* note 22, at 254, argue that from theological grounds punishment is wrong, "without a God-like knowledge of the inner secrets of the heart and mind of the offender, with which alone his motives and his temptations can be judged, it is impossible to assess the nature and degree of punishment required to expiate the guilt of his offense." *See generally* L. Fuller, The Morality of Law (1964); E. Pincoffs, The Rationale of Legal Punishment (1966); M. Ginsberg, On Justice in Society 163 (1965).

[58] J. Stephen, General View of the Criminal Law of England 99 (1863).

[59] Birks & O'Flynn, *supra* note 22, at 254.

[60] Goldstein & Katz, *supra* note 7, at 856 n.11; *See*, Waelder, "The Concept of Justice and the Quest for a Perfectly Just Society," 39 F.R.D. 413 (1965) (Aggression is an inherent quality of man.) *See*, Waelder, *supra* note 22, at 387, the need for retribution is a quality of man.

social research might help the jurist is the extent to which the need for retribution is an inherent quality of man.

Pound took the position that even if vengeance is a quality of man, it is one to be controlled. "It has its roots in the deep-seated instinct, and must be reckoned with . . . . Moralists and sociologists no longer regard revenge or satisfaction of a desire for vengeance as a legitimate end of penal treatment. But jurists are not yet agreed. Many insist upon the retributive theory in one form or another, and Anglo-American lawyers commonly regard satisfaction of public desire for vengeance as both a legitimate and a practically necessary end."[61]

Denunciation, or the demand for justice, may be a hybrid of the two prior factors; it is more properly the satisfaction of the *community* sense of justice that is obtained through punishment. One of the reasons for punishment is reinforcement of the community's standards of right and wrong. With the factor of denunciation, perhaps more than with any other factor, the feelings (and ignorance) of the general populace are brought to bear. Judge Briggs contended that, even with the mentally ill offender, the average man in the street would rather see him boiled alive than treated, and probably many judges' attitudes are similar.[62]

The Wisconsin court seemed concerned with denunciation, as evidenced by numerous references to the moral sense and conscience of the community. Judge Wilkie, as mentioned earlier, was concerned with this factor, particularly in reference to determining what the moral sense of the community is. The majority of the court seemed to see the defining of the community's moral sense as a question for the legislature, which Dubin would criticise as "buck passing" and as a means by which courts justify unjust results.[63] It would seem, however, if the moral sense of the community is of primary concern, that the legislature would seem best qualified to make the determination of what the standard is.

At least two different theoretical approaches exist, both of which justify denunciation as a legitimate goal. Kaplan, drawing from the theories of Arnold, argues that punishment serves a socially integrative function whereby

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[61] Pound, "Criminal Justice in the American City—A Summary," 10 Crim. & Del. 415, 430-31 (1964). *See*, Kennedy, "Justice is Found in the Hearts and Minds of Free Men," Fed. Prob., Dec. 1961, at 5, contends "So let us reject the spirit of retribution and attempt coolly to balance the needs of deterrence and detention with the possibilities of rehabilitation." Birks & O'Flynn, *supra* note 22, at 254-55, arguing that this is not a Christian philosophy and that retribution "is quite contrary to enlightened modern views and to the practice of our courts which today properly give full weight to mitigatory factors such as provocation, temptation, poverty, ignorance, age, the influence of others and the like. Justice is indeed tempered and properly tempered, with mercy . . . ."

[62] "Insanity as a Defense," *supra* note 41 at 395-96. *See*, Arens & Susman, "Judges Jury Charges and Insanity," 12 How. L.J. 1, 9 (1966), where researchers report the prevailing attitudes of Washington D.C. court judges were "essentially indistinguishable from those of an 18th century English court."

[63] Dubin, *supra* note 11, at 347.

the disequilibrium in society caused by the criminal act is brought back into harmony. It reinforces the concept of the "good life" and relieves anxiety in society.[64] Waelder's theory is more extended:

> [T]he complete elimination of the concept of retribution from the legal system may not be without danger . . . . If the law no longer must conform . . . to moral standards, utilitarianism or expediency becomes its only guide. The emancipation . . . begun at first for humanitarian purposes, may eventually have consequences not so humanitarian. Once everything can be done that appears to be socially useful . . . a course has been charted that may well end in despotism. Liberal positivism, in its humanitarian distaste for the harsher aspects of traditional morality, may, by undermining the authority of traditional morality, become the path breaker of more ruthless successors.[65]

The foregoing are the primary factors which, under our current procedures, must be weighed to determine when exculpation should occur because of mental impairment. Because of our present knowledge, experimentation is perhaps the best way to arrive at the optimum balance of the factors.

IV. The Constitutional Problem

Strangely, in this area of immense controversy, the Supreme Court has, until recently, remained silent, and there are few constitutional considerations which either limit or promote an insanity defense. However, it seems that in the near future the Court may look closely at the entire area of mens rea.

The main case is *Davis v. United States*[66] which implied that insanity does go to the underlying mental element of the crime and that sanity must be proved by the prosecution. Without overruling *Davis*, the Court in *Leland v. Oregon* concluded that the states could define any test of insanity they wished and place the burden of proof on the defendant as long as the prosecution was still required to prove all the elements of the offense;[67] the majority failed to realize, as was pointed out by Black and Frankfurter, that insanity, being a legal construct, is merely the absence of the mens rea element.[68]

Dubin argues that the next step was *Robinson v. California*,[69] which

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[64] Kaplan, "Barriers to the Establishment of a Deterministic Criminal Law," 46 Ky. L.J. 103, 105-07 (1957).

[65] Waelder, *supra* note 22, at 387.

[66] 160 U.S. 469 (1895).

[67] Leland v. Oregon, 343 U.S. 790, 801 (1952), "The science of psychiatry has made tremendous strides since [the M'Naghten] test was laid down . . . , but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from the criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility . . . . In these circumstances it is clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty'."

[68] *Id.* at 804-06 (Dissenting opinion).

[69] 370 U.S. 660 (1962).

could have precedent value in considering the constitutionality of present insanity defense statutes. "If it is a violation of the 8th and 14th amendments to punish one for being in an involuntary status, such as drug or alcholic addiction or insanity, then it would be equally unconstitutional to punish involuntary acts that may flow from the status. If a state . . . can not punish one for the crime of having a common cold, it surely should not be able to punish one for "acts" of sneezing, coughing, or perspiring."[70] Whether this conclusion necessarily follows may be questioned since the "act" introduces the important element of harm.

The Supreme Court recently, in *Pate v. Robinson*, held it was violative of due process to deny the defendant the right to a sanity hearing before trial where there was evidence to raise a reasonable doubt as to his competency to stand trial, and that the conviction of a legally incompetent defendant violates due process.[71] Whether this decision will have any impact on the defense of insanity at the time of the act is yet to be seen.

V. Procedural Problems

Once a test of insanity is developed, the second most bothersome question is always who should have the risk of non-persuasion? The question is important in that it might be possible to define a very liberal test, yet make the burden of proof insurmountable. Generally, the decision of placing the burden is a policy decision based on many of the same factors used to define a standard. Indeed, one of the reasons the court in *Shoffner* retained the M'Naghten test was the fact that the State, by statute, has the burden of proof. One of the prime reasons some members of the court agreed to the A.L.I. test was just this switching of the burden to the defendant (contrary to A.L.I. formulations). This concession was the catalyst which allowed Wisconsin to "back into" the Model Penal Code standard.

Realizing that the designation of the risk of non-persuasion is a policy question, it still appears that the only reasonable basis upon which it can be asserted that the burden should be on the defendant is if insanity is treated as a pure defense or some type of mitigatory factor.[72] The better reasoning

[70] Dubin, "Mens Rea Reconsidered—A Plea for a Due Process Concept of Criminal Responsibility," 18 Stan. L. Rev. 332, 387 (1966).

[71] Pate v. Robinson, 383 U.S. 375, 378-86 (1966).

[72] Goldstein & Katz, "Abolish the Insanity Defense—Why not?" 72 Yale L.J. 853, 854 (1963), insanity can either be treated as evidence to leave in doubt some material element or as a defense, a protection of a preferred value. H. Weihofen, Mental Disorder as a Criminal Defense 219-20(1954), states that courts which place the burden of proof on the defendant do so on policy and theoretical grounds, the theory being that since there is a presumption of sanity which defendant must overcome, insanity is therefore an affirmative defense. The policy why the burden should not shift after the presumption being overcome seems to be a fear of fraud and acquittals based on feigned insanity. This appears to be a questionable policy in light of present day standards of psychiatric skill. *See*, 9 J. Wigmore, Evidence § 2486 (3rd ed. 1940), the question of burden of proof is a policy question and the innovation of placing the burden of proof of insanity on the accused is based on experiences of abuses of the contrary practice.

and authority seems to hold that the prosecution should have the burden to prove sanity. "The defendant is entitled to an acquittal if the jury has reasonable doubt as to his sanity . . . . Under this rule all the defendant is required to do is to raise a reasonable doubt of his sanity, as compared with proving his insanity by a preponderance of the evidence or beyond a reasonable doubt. This view is unquestionably the logical one. It is consistent with the presumption of sanity and the rule that the defendant's guilt must be established beyond a reasonable doubt."[73]

A most important consideration, which is often ignored, is the relationship of the presumption of sanity, presumption of innocence, and burden of proof. The presumption of innocence is almost an inherent concept of natural law, guaranteed by the Supreme Court, and possibly a requirement of due process.[74] It is no more than a shorthand statement that the burden of proving guilt is on the prosecution. In contrast, the presumption of sanity should be a vehicle to save the government the trouble of proving sanity in those cases where the issue is not raised. Therefore, it might more properly be stated that the presumption of sanity relates to the risk of non-production of evidence and is in no way a barrier to placing the risk of non-persuasion on the prosecution. Once this burden of raising evidence is met by introducing a minimal amount of evidence, there is no reason consistent with the presumption of innocence that should shift the risk of non-persuasion to the defendant.[75]

VI. The Practical Problem

After all the scholars finish theorizing, the reality of the world must be faced, in that the jury will exculpate whomever they choose. The Wisconsin court in *Esser* explicitly realized this, and two of the members suggested this as an alternative.[76] The problem of jury control is magnified in Wisconsin since the courts permit the jury to hear any testimony which relates to the defendant's condition and then later instruct them on a relatively narrow standard. This procedure may create a "standardless standard . . . [since] instructions under the majority rule or any standard come too late to counteract effectively the image created in a jury."[77]

Current research seems to support these fears. In one study, it was found that juries spend 50 per cent of the time in exchanging personal experiences, 25 per cent in procedural questions, 15 per cent in reviewing the facts and

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[73] 1 F. Wharton, Criminal Evidence § 31 (12th ed. 1958). *E.g.*, United States v. Currens, 290 F.2d 751, 761 (3d Cir. 1961); Holloway v. United States, 148 F.2d 665, 666 (D.C. Cir. 1945); Davis v. United States, 160 U.S. 469, 486-89 (1895). *But see*, State v. Quigley, 26 R.I. 263, 58 A. 905 (1904).

[74] 3 L. Overfield, Criminal Procedure Under the Federal Rules § 26:97 (1966).

[75] G. Williams, The Proof of Guilt 184-86 (3rd ed. 1963). *See also*, 9 F. Feldbrugge, Law in Eastern Europe 181 (1964) noting in Russia that the prosecution must prove sanity.

[76] State v. Esser, 16 Wis. 2d 567, 596, 115 N.W.2d 505, 515 (1962). *See also*, State v. Shoffner, 31 Wis. 2d 412, ——, 143 N.W.2d 458, 461 (1966).

[77] State v. Esser, 16 Wis. 2d 567, 619, 115 N.W.2d 505, 532 (1962).

only 8 per cent on the court's instructions.[78] A related study found that the crucial factor seemed to be how the jury perceived the evidence and that juries instructed under a M'Naghten test and those under a Durham test, looked to a cognitive standard in making their decisions. The experimenters found that, because of bias or ignorance, jurors do sometimes misinterpret instructions.[79] These findings are not surprising considering the knowledge people have about mental illness. In a survey taken in 1955, it was found that the average man looked at mental illness exclusively as a complete breakdown in the cognitive functioning and, as a necessary consequence, a serious loss of self-control.[80] In a more recent study, researchers found that jurors manifest a startlingly "low comprehension of the charges" and, in essence, jurors determine their own law. Concepts related to the "wild beast" test and a right-wrong cognitive failure are used by the juries in guiding their deliberations. The research reported a very low understanding and much confusion on the part of the jurors as to the presumptions and burdens of proof.[81]

This research, although not conclusive, should certainly raise some concern for our present system of determining criminal responsibility.

VII. Possible Solutions

Because of the seeming impossibility of using the mens rea concept to balance these practical and theoretical problems and adequately determine who should be punished, many suggestions for a change in our basic approach to criminal punishment have been offered.

Most of the proposals are variations on a format which would have at its base a concept of absolute responsibility—a question of fact, did the accused bring about the harm?—and then a separate moral judgment of what should be done with him. Such a proposal would be an extension of the bifurcated trial.[82] This approach even seems to be suggested by the some of the judges as an alternative in *Shoffner*.[83] The approach is supposed to have the advantages of being less rigid, eliminating jury confusion, and more clearly separating the important issues in light of modern knowledge. It can be argued that this, in a rather clumsy fashion, is what we are attempting to do today, particularly in instances such as homicide, the degrees of which depend on varying mental elements.

The most logical of these proposals is one which purports to maximize

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78 James, "Status and Competence of Jurors," 64 Am. J. Soc. 563 (1959).

79 James, "Juror's Assessment of Criminal Responsibility," 7 Soc. Prob. 59 (1959).

80 Arens, Greenfield & Susman, "Jurors, Jury Charges and Insanity," 14 Cath. U. Am. L. Rev. 1, 8 (1965) reporting a survey taken by Star and corroborated by a survey of lawyers taken in 1960.

81 *Id.* at 1-23.

82 Cameron, *supra* note 35, at 4-5; Campbell, *supra* note 25, at 33-36; "Insanity as a Defense," (Judge Biggs), *supra* note 41, at 395; Hinkle, "Alternative to Tests of Criminal Responsibility," 110 Crim. & Del. 10 (1964).

83 State v. Shoffner, 31 Wis. 2d 412, ——, 143 N.W.2d 458, 461 (1966). *See*, quote cited in text *supra* note 45.

the balance of these competing goals of punishment by employing either punishment, custody, or therapy, depending upon the degrees to which the defendant is dangerous, deterrable, and treatable.[84]

In any formulation involving strict liability concepts, there are large problems, including gaps in knowledge, lack of trained personnel, expense, legal-political-public resistance, and most important, the practical and constitutional problem of safeguarding individual rights. As now formulated, the concepts of due process and equal protection are not amenable to any major change in criminal law philosophy.[85]

Before any decisions are made to retain the present system or make any changes, it would be wise to observe programs of other jurisdictions, particularly the results of the new Swedish Penal Code (1965).[86] Sweden's legislature has dropped any differentiation of responsibility based on mental inpairment and, instead, has differentiated the type of "consequences" such a mentally ill, feebleminded, or otherwise seriously impaired person is to receive. All such offenders receive mandatory special care (hospitalization, etc.) which is in keeping with the philosophy of the code, prevention rather than retaliation.

Possibly by sponsoring more social research and analyzing the successes and failures of the various tests and programs, a formulation can be derived which will best balance the various factors.

WORKMEN'S COMPENSATION—STATUTE OF LIMITATIONS—DEATH CLAIM—*Ingalls Shipbuilding Corp. v. Harris, 187 So. 2d 886 (Miss. 1966)*—The statute of limitations for an employee covered by workmen's compensation commences to run at the time of the injury. If the employee subsequently dies from the injury, when does the statute of limitations commence to run on the dependents' claim for death benefits?

Audley Harris died on March 23, 1963 of an acute myocardial infarct which allegedly resulted from heart attacks suffered in 1958 and 1960 while he was in the employ of Ingalls Shipbuilding Corporation. Decedent left the employ of Ingalls late in 1960 and thereafter was self-employed. He died without filing any notice of injury or presenting any claim for compensation for injuries resulting from the heart attacks. The widow, Mrs. Lona Harris, and minor son, Audley Harris, Jr., seeking death benefits under the Mississippi Workmen's Compensation Act,[1] filed a claim on August 29, 1964

[84] Slovenko & Super, "The Mentally Disabled, The Law and the Report of the American Bar Foundation," 47 Va. L. Rev. 1366, 1386-87, reporting Waelder's formulation. *See also*, S. Rubin, Psychiatry and the Criminal Law (1965).

[85] *See*, State v. Lucas, 30 N.J. 37, 83-88, 152 A.2d 50, 74-76 (1959) (Weintraub, concurring opinion) urging caution in venturing from the present view of criminal responsibility.

[86] Sellin, *supra* note 34.

[1] Miss. Code Ann. §§ 6998-01 to 6998-59 (1952).

against Ingalls and American Mutual Liability Insurance Company, the insurer. The Attorney-Referee sustained a plea of the two-year statute of limitations, holding that, since decedent filed no notice nor claim within two years of the injury, the claim of the decedent's dependents was barred.[2] The full Commission reversed, holding that the statute of limitations did not begin to run against the dependents' claim until the death of the husband-father.[3] The Circuit Court of Jackson County affirmed and Ingalls appealed to the Mississippi Supreme Court, which affirmed the determination of the Commission.[4]

In reaching its decision the Mississippi Supreme Court relied on the wording of the applicable statute which requires that application for benefits must be filed "within two years from the date of injury or death."[5] The court reasoned that, since death claims are generally considered on a separate basis and since Mississippi has only one statute of limitations, "the more equitable and just construction of this statute is that the two-year statute of limitations begins to run from the date of death as to the claim of dependents."[6]

In reaching this result the court distinguished its earlier holding in *Proctor v. Ingalls Shipbuilding Corporation.*[7] In *Proctor*, the claim of an employee for compensation was denied after a full commission hearing for lack of a compensable injury. After his death his dependents filed a claim for death benefits. Ingalls interposed a plea of res judicata. In upholding that plea, the Mississippi Supreme Court reasoned that the sustaining of a compensable injury by the employee was the basis for both the employee's and the dependents' causes of action. A full hearing and determination of whether there was in fact a compensable injury was thus binding not only on the employee, but also on his dependents.[8]

The *Harris* and *Proctor* cases involve an underlying determination of the extent to which the dependents' claim is dependent on that of the employee's. The *Harris* case in construing the statute of limitations holds that the claims are independent. *Proctor* holds that, since both claims are premised on the fact that the employee incurred a compensable injury, there is sufficient identity of causes of action and privity of parties to invoke res judicata. Thus *Proctor* emphasizes the dependency of the claims. The better view seems to be that the claims are quite independent. Moreover, to the extent that *Proctor* stresses the dependency of the claims, it is erroneous, and the Mississippi Supreme Court in *Harris* has indirectly overruled *Proctor.* A general survey of the statutory provisions and case decisions supports the conclusion that *Proctor* is incorrect.

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2 Ingalls Shipbuilding Corp. v. Harris,—Miss.—, 187 So. 2d 886, 887 (1966).

3 *Id.*

4 *Id.* at —, 187 So. 2d at 888.

5 Miss. Code Ann. § 6998-18 (1952).

6 Ingalls Shipbuilding Corp. v. Harris,—Miss.—, 187 So. 2d 886, 888 (1966).

7 Proctor v. Ingalls Shipbuilding Corp., 254 Miss. 907, 183 So. 2d 483 (1966).

8 *Id.* at 912, 183 So. 2d at 486.

The statute of limitations adopted by the various jurisdictions are divided into three general classifications:[9] (1) those under which the time for filing claim for death benefits begins to run at the date of death;[10] (2) those under which the time begins to run at the date of the fatal accidental injury or last payment in accident cases or the last exposure in occupational disease cases;[11] and (3) those which provide a certain period from the date of death in which to file claim, provided the death occurs within a certain longer period from date of injury.[12] The legislatures in enacting, as well as the courts in interpreting, these statutes have had to decide the issue of dependency. The more generally accepted view as evidenced by the statutory provisions and court decisions is that, since a dependent has no claim until the death of the employee and since the claims are for different losses incurred by the respective claimants, the claims are independent and the employee cannot destory the dependents' claim.[13] Perhaps the leading case expounding this position is *Industrial Commission v. Kamrath*,[14] in which the Ohio Supreme Court held that, since the claims of the employee and of his dependents

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[9] 12 W. Schneider, Workmen's Compensation Text § 2364 (1960).

[10] Ala. Code tit. 26, § 296 (1958); Alaska Stat. § 23.30.105 (1962); Ariz. Rev. Stat. Ann. § 23-1061 (1956); Colo. Rev. Stat. Ann. § 81-13-5 (1963); Del. Code Ann. tit. 19, § 2361 (1953); Fla. Stat. Ann. § 440.19 (1966); Ga. Code Ann. § 114-305 (1956); Hawaii Rev. Laws § 97-52 (1955); Idaho Code Ann. § 72-402 (1949); Ill. Ann. Stat. ch. 48, § 138.6 (Supp. 1966); Ind. Ann. Stat. § 40-1224 (1965); Kan. Gen. Stat. Ann. § 44-520a (1964); Ky. Rev. Stat. Ann. § 342.185 (1963); La. Rev. Stat. § 23:1209 (1964); Me. Rev. Stat. Ann. ch. 39, § 95 (1965); Mass. Ann. Laws ch. 152, § 41 (1965); Md. Ann. Code art. 101, § 39 (1964); Mich. Stat. Ann. § 17.165 (1960); Miss. Code Ann. § 6998-18 (1952); Mo. Ann. Stat. § 287.430 (1965); Neb. Rev. Stat. § 48-133 (1943); Nev. Rev. Stat. § 616.500 (1963); N.H. Rev. Stat. Ann. § 281:17 (1955); N.M. Stat. Ann. § 59-10-13.6 (1953); N.Y. Workmen's Comp. Law § 28 (1965); N.C. Gen. Stat. § 97-24 (1963); N.D. Cent. Code § 65-05-01 (1960); Ohio Rev. Code Ann. § 4123.84 (Page 1965); Okla. Stat. Ann. tit. 85, § 43 (1952); Pa. Stat. Ann. tit. 77, § 602 (1952); S.C. Code Ann. § 72-303 (1962); S.D. Code § 64.0611 (1939); Tex. Rev. Civ. Stat. Ann. art. 8307-4a (1967); Vt. Stat. Ann. tit. 21, § 656 (1959); Va. Code Ann. § 65-84 (1950); Wash. Rev. Code Ann. § 51.28.050 (1962); W.Va. Code Ann. § 23-4-15 (1966); Wis. Stat. Ann. § 102.12 (1957).

[11] Ark. Stat. Ann. § 81-1318 (1960); Conn. Gen. Stat. Ann. § 31-168 (1960); Ill. Ann. Stat. ch. 48, § 138.6 (Supp. 1966); Iowa Code Ann. § 85.26 (1949); La. Rev. Stat. § 23:1209 (1964); Minn. Stat. Ann. § 176.151 (1966); Mont. Rev. Codes Ann. § 92-601 (1964); Neb. Rev. Stat. § 48-133 (1943); Nev. Rev. Stat. § 616.500 (1963); N.H. Rev. Stat. Ann. § 281:17 (1955); N.J. Stat. Ann. § 34:15-51 (1959); N.Y. Workmen's Comp. Law § 28 (1965); N.C. Gen. Stat. § 97-24 (1963); Okla. Stat. Ann. tit. 85, § 43 (1952); Ore. Rev. Stat. § 656.265 (1965); Pa. Stat. Ann. tit. 77, § 602 (1952); R.I. Gen. Laws Ann. § 28-35-57 (Supp. 1965); Tenn. Code Ann. § 50-1003 (1966); Utah Code Ann. §35-1-68 (1953); Wyo. Stat. Ann. § 27-105 (1959).

[12] Cal. Labor Code § 5406 (1955); Hawaii Rev. Laws § 97-52 (1955); Kan. Stat. Ann. § 44-520a (1964); Me. Rev. Stat. Ann. ch. 39, § 95 (1965); Md. Ann. Code art. 101, § 39 (1964); Mich. Stat. Ann. § 17,165 (1960); Minn. Stat. Ann. § 176.151 (1966); Nev. Rev. Stat. § 616.500 (1963); N.D. Cent. Code 65-05-01 (1960).

[13] W. Schneider, note 9 *supra*.

[14] Industrial Comm'n. v. Kamrath, 118 Ohio St. 1, 160 N.E. 470 (1928).

are for different losses which each has incurred—loss from injury as distinguished from loss from death—and since the dependents have no cause of action until the death of the employee, the cause of action of an injured employee accrues at the time of injury and that of his dependents at the time the employee dies from the injury.[15] The United States Supreme Court has also adopted this position in construing the relevant section of the Federal Employers' Liability Act[16] by holding that the dependents' claim is independent of the employee's.[17] Thus a clear distinction has been drawn between the employee's claim for compensation and that of his dependents for death benefits. The *Harris* case has adopted this majority view.

The doctrine of res judicata has traditionally required identity of cause of action and of person and parties to the action.[18] In order to sustain a plea of res judicata both conditions must be met. An examination of the application of this doctrine in the *Proctor* case reveals that it was misapplied since at least one, if not both, of the requirements was not met. The causes of action are not identical. The employee's claim is for *his* pecuniary loss resulting from an injury sustained by *him* in the course of *his* employment. The employee or his legal representative must make application for compensation and the benefits are paid to the employee. An argument can also be made that the parties are neither identical nor privy. Although the dependent has a monetary interest in the claim of the employee because he is dependent on the employee, and although his claim is factually based on a compensable injury sustained by the employee, still no statute permits the dependent to file claim for the injury or to receive directly any compensation for the injury. The statutes treat the parties as distinct, each party having his own procedure for filing and his own rate of recovery. Thus the statutory scheme seems sufficient evidence of legislative intent not to hold the parties privy and not to establish a "mutuality of interest."[19]

The leading case applying the doctrine of res judicata is *Lanning v. Erie Railroad*;[20] a New York court held that, although the parties are not identical, both claims arise from and are dependent on the same compensable injury; therefore, a prior determination of the employee's claim is binding on the employee's dependents.[21] The leading case holding contra is *Industrial Commission v. Davis*[22] in which the Ohio Supreme Court held the claims to be distinct; an alternative ground of decision was that a prior determination by an administrative agency is not such a judgment as to be binding upon a later hearing by the commission.[23]

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15 *Id.* at 2, 160 N.E. at 472.

16 45 U.S.C. 56 (1964).

17 St. Louis, I.M. & S. Ry. v. Craft, 237 U.S. 648 (1915).

18 Black's Law Dictionary 1469 (4th ed. 1951).

19 *Id.* at 1361.

20 Lanning v. Erie R.R., 265 App. Div. 576, 40 N.Y.S.2d 404, *aff'd per curiam*, 291 N.Y. 688, 52 N.E.2d 587 (1943).

21 *Id.* at 577, 40 N.Y.S.2d at 405.

22 Industrial Comm'n. v. Davis, 126 Ohio St. 593, 186 N.E. 505 (1933).

23 *Id.* at 596-97, 186 N.E. at 506.

The cases applying res judicata rely heavily on the factual dependency of the claims and parties. They hold that both causes of action rest on the existence of the same compensable injury; therefore, the causes of action are identical, and because the employee was relied upon for support, the dependent is in privity with him. The cases refusing application of the doctrine stress the legal independency of the claims and parties. Res judicata is not properly applicable and the facts cannot be so emphasized as to attempt such an application, even though the dependent's claim is based on the fact that a compensable injury was sustained by the employee. The fact that the employee could not prove a compensable injury should not bar the dependent from reaching the merits of his claim—that the employee died from a compensable injury. The dependents' claim is grounded on the fact that the employee sustained, not proved, a compensable injury.

To illustrate the defective reasoning of *Proctor,* assume that an employee was injured, but failed to file within the statutory period and was thus denied recovery. Under the holding in *Proctor,* upon the death of the employee, the dependents' claim would be barred by the erroneous application of res judicata. The dependents, however, should not be barred from reaching the merits of their claim even though the employee did not use due diligence in pursuing his claim; but rather the dependents should have an opportunity to prove that death resulted from a compensable injury. The same result should follow where the employee filed within the statutory period, but was unable to recover on the merits. Since the dependents have a different cause of action, they should not be prevented from presenting their case on the ground that the employee was unable to prove a compensable injury; but rather they should be permitted to litigate their cause of action.

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—ELECTRONIC EAVESDROPPING HELD AN ILLEGAL SEARCH AND SEIZURE—*Hajdu v. State, 189 So. 2d 230 (Fla. Dist. Ct. 1966)*—Defendant was convicted for the unlawful practice of medicine based on evidence collected over a radio transmitter.[1] Mrs. White, an employee of detective Behrens, who was working for the State Board of Medical Examiners, visited defendant and complained of an unwanted pregnancy. Defendant performed an internal pelvic examination and informed Mrs. White that she was pregnant. The entire conversation was transmitted to detective Behrens by means of a radio transmitter hidden in Mrs. White's purse. At defendant's trial Behrens was allowed to testify as to what he heard over the radio transmitter. Mrs. White was not called as a witness.

On appeal defendant argued his fourth amendment right to privacy[2] had

[1] Hajdu v. State, 189 So. 2d 230 (Fla. Dist. Ct. 1966).

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

been invaded and that the court erred in permitting testimony to be presented by Behrens in violation of this constitutional right. The Third District Court of Appeals of Florida reversed his conviction holding that testimony gathered by a radio transmitter violated the right of privacy guaranteed by the fourth amendment of the United States Constitution as that right is applied to the state.[3]

> Members of the public are called upon to observe all laws and they have a right to expect that State authorities will do likewise before invading their homes and disturbing this constitutional right to privacy.[4]

The right to privacy discussed in the *Hajdu* case is at best a vague and ill defined constitutional right. Neither the Constitution nor any of its amendments specifically mention a right to privacy and strict interpretation of its clauses might lead one to believe that there is no constitutional right to privacy. A more liberal reading of the Bill of Rights reveals that this right to privacy is bound up, not in any specific amendment but in several amendments, if not in the spirit of the Bill of Rights itself.[5] The first amendment, for example, has important guarantees which are aspects of the more general right to privacy. The freedom of association involves a right to privacy in associations.[6] The fifth amendment freedom from self incrimination is also an aspect of privacy.[7]

The aspect of the right to privacy dealt with in the *Hajdu* case is covered by the fourth amendment as incorporated into the fourteenth amendment by *Mapp v. Ohio*.[8] Legal writers debate whether the use of electronic eavesdropping devices is a search and seizure under the fourth amendment or whether the control of such devices could best be accomplished through another constitutional amendment.[9] However, the real issue involved is not which amendment applies, but the nature of the right to privacy. Does the right to privacy extend to electronic eavesdropping? If so, is the right to be protected from electronic eavesdropping absolute or limited; finally, if limited, what is the limitation?

That the right to privacy includes the right to be at least partially free from electronic eavesdropping is already well settled in the law. Even the earlier cases which permitted the use of eavesdropping devices never claimed

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3 189 So. 2d 230, at 232.

4 *Id.* at 234.

5 "Nowhere in the Constitution is a general right of privacy mentioned, but several facets of the privacy idea were given effect throughout." Goldstein, "The Constitutional Rights of Privacy—A Sizable Hunk of Liberty," 26 Md. L. Rev. 249, 250 (1966).

6 *Id.* at 252.

7 *Id.*

8 367 U.S. 643 (1961).

9 For example, see "Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework," 50 Minn. L. Rev. 378 (1965) for an excellent discussion of various alternatives to applying the fourth amendment.

that such devices could be used free of all control.[10] The question was finally settled by *Silverman v. United States*,[11] the "Spikemike" case, where the Supreme Court struck down the use of an electronic eavesdropping device. The Court stated that use of such devices by means of a physical trespass violates the fourth amendment right to privacy.[12]

Since it is clear that the right to privacy puts some limitation upon the use of electronic eavesdropping devices, the only question remaining is the extent of that limitation. Although many justices have advocated it,[13] the Supreme Court has thus far refused to make the limitation absolute and forbid all electronic eavesdropping. Instead the Court has been struggling with several rules which would control the use of electronic eavesdropping devices without absolutely forbidding them.

Most prominent of the rules advanced to limit the use of electronic eavesdropping devices is the trespass-nontrespass rule. In *Silverman v. United States*,[14] the police while investigating a gambling operation inserted a "spikemike" into a party wall. The instrument was a spike about a foot long with a microphone inside. It was driven into the wall until it hit a heating duct in defendant's apartment. The heating duct acted as a sounding board allowing the police to hear everything that went on inside defendant's apartment. The Court said that reconsideration of earlier cases[15] would be unnecessary in deciding this case since those cases could be distinguished.[16] The Court held that as the eavesdropping had been accomplished by a physical invasion of defendant's premises, the use of the electronic device was in violation of the fourth amendment.[17] The lack of such a trespass was felt to be a controlling element in the earlier decisions and thus a controlling distinction in this case.

In a later case[18] the Court made clear that a technical trespass was not necessary but the least physical intrusion would be sufficient to render the

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[10] Goldman v. United States, 316 U.S. 129 (1942), and Olmstead v. United States, 277 U.S. 438 (1928), implied that the use of the eavesdropping device would not have been allowed had there been a trespass.

[11] 365 U.S. 505 (1961).

[12] *Id.* at 509.

[13] Mr. Justice Brennan joined by Justices Douglas and Goldberg dissenting in Lopez v. United States, 373 U.S. 427, 446 (1963); Mr. Justice Douglas concurring in Silverman v. United States, 365 U.S. 505, 512 (1961); Justices Frankfurter, Douglas, and Burton dissenting in On Lee v. United States, 343 U.S. 747, 758, 762, 765 (1952); Mr. Justice Murphy dissenting in Goldman v. United States, 316 U.S. 129, 136 (1942); Justices Holmes, Brandeis, and Butler dissenting in Olmstead v. United States, 277 U.S. 438 (1928); all advocating that the right to privacy forbids all use of electronic eavesdropping devices.

[14] 365 U.S. 505 (1961).

[15] On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942); and Olmstead v. United States, 277 U.S. 438 (1928).

[16] 365 U.S. at 509 (1961).

[17] *Id.* at 511.

[18] Clinton v. Virginia, 377 U.S. 158 (1964).

electronic eavesdropping a violation of the fourth amendment. In this case the police were investigating acts of prostitution. They stuck a small listening device into a party wall, thereby gathering the evidence upon which defendant was convicted. The Supreme Court of Appeals of Virginia held that there was no physical penetration into the defendant's premises and therefore no violation of the fourth amendment; the penetration was slight such as one made by a thumb tack.[19] Yet, in a per curiam opinion, the United States Supreme Court reversed based on *Silverman v. United States*.[20]

The trespass rule seems to be more of a technicality than a viable rule of law. In *Goldman v. United States*,[21] the court held that the use of a detectaphone, a device placed against a party wall for the purpose of eavesdropping, was constitutional since it involved no trespass.[22] Yet the use of a very similar device was forbidden in *Clinton v. Virginia*,[23] because in the latter case the device pricked the wall it was placed against. The distinction between the devices in Goldman and Clinton is a fine one, but hardly founded upon the public policy requiring protection of privacy. The policy, guaranteeing a right to privacy, goes to the foundations of the democratic principle.[24] Totalitarian regimes survive on their ability to keep their own conduct secret, while using various devices, such as electronic eavesdropping, to keep informed of activities of those potentially subversive to their regime.[25] Clearly the danger of electronic eavesdropping is that its use may become too widespread; that devices will be used not only to detect crime but also to spy upon political insurgents, to learn industrial secrets and to keep tabs on intellectuals so that they will not advocate ideas not generally accepted by the American public.

Eavesdropping devices have become far too sophisticated for the trespass-nontrespass distinction. Devices have been developed which are so sensitive they do not require a trespass to be effectively used.[26] Thus one who wishes to eavesdrop, yet stay within the law, can do so easily by selecting a more sensitive device which requires no trespass to be applied. The result of the trespass-nontrespass rule is not an effective limitation on eavesdropping but merely a limitation upon the type of device used. The rule does nothing to prevent the use of eavesdropping where the use would conflict with our notions of democracy. As a means of enforcing the policy which is basic to the right of privacy, the trespass-nontrespass rule is worthless.

A rule similar to the trespass-nontrespass rule is the constitutionally protected area rule. The principle behind this rule is that there are certain

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19 Clinton v. Commonwealth, 204 Va. 275, 130 S.E.2d 437, 442 (1963).

20 377 U.S. 158 (1964).

21 316 U.S. 129 (1942).

22 *Id.* at 135.

23 377 U.S. 158 (1964).

24 *See* Westin, "Science, Privacy, and Freedom: Issues and Proposals for the 1970's," 66 Colum. L. Rev. 1003, 1017 (1966), for a discussion of the function of privacy in democratic society.

25 *Id.* at 1018.

26 Some of these devices are described *id.* at 1006-1010.

areas where a person has a right to privacy and other areas where no such right exists. In *Lanza v. New York*,[27] the Court held that a jail is not a constitutionally protected area. Information gathered there by means of an electronic eavesdropping device was therefore not gathered in violation of the fourth amendment and could be used as a basis for questioning in a legislative hearing. Defendant's conviction for refusal to answer these questions was upheld. In its opinion the Court said:

> A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's "house," and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab. Yet, . . . a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.[28]

The constitutionally protected area rule does not define the right to privacy, but arbitrarily distinguishes where it does and does not exist. Once a court determines that defendant was in a constitutionally protected area, the issue of whether there was an unlawful invasion of that area must still be determined.[29] Thus the constitutionally protected area rule may be just a corollary to the trespass-nontrespass rule. On the other hand, the rule may have independant significance if the courts consider every electronic eavesdropping which violates a constitutionally protected area as being unreasonable. Thus in *United States v. Stone*,[30] a Texas district court held that use of an eavesdropping device, which did not involve a wiretap, in a telephone booth was a violation of the fourth amendment.

> An electronic device placed in a protected area by government agents without knowledge of the defendant and transmitting a telephone conversation of defendant is as much a physical trespass and violation of the right to privacy as is the making of an unlawful physical entry. . . .[31]

The court relies more on the violation of a protected area than on a physical trespass because, the booth being a public one, no trespass was committed by the placing of the eavesdropping device. Thus the constitutionally protected area rule seems to have independant significance in this case.

The rule, however, is no better than the trespass-nontrespass rule as a means of enforcing the public policy requiring a right to privacy. It is based on an assumption that the right to privacy can be turned on and off depending upon an arbitrary distinction between locations of victims. In the trespass cases, the distinction between lawful and unlawful electronic surveillances

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[27] 370 U.S. 139 (1962). Since this decision was based on a four to three vote, its value as precedent may be limited.

[28] *Id.* at 143.

[29] *Id.* at 142.

[30] 232 F. Supp. 396 (N.D. Texas, 1964).

[31] *Id.* at 400.

depends upon the location of the device. In the constitutionally protected area cases the distinction depends upon the location of the victim of the surveillance. But the policy to be enforced by protecting the right to privacy does not depend on the location of victim or device. That policy requires the promotion of free discussion and thought without fear of being overheard by electronic devices. Free discussion is an objective to be promoted in all places, both public and private, and therefore should be promoted in all places by a rule which does not distinguish one location of a victim from another. Thus like the trespass-nontrespass rule, the constitutionally protected area rule does not make an effective distinction between cases where electronic eavesdropping should and should not be permitted.

A third rule to distinguish cases of lawful and unlawful electronic eavesdropping is suggested by an argument presented in earlier eavesdropping cases, the risk theory. When a defendant utters words which are incriminating in nature he assumes the risk that they will be overheard. In *Olmstead v. United States*,[32] the Court said that the defendant assumed the risk that words uttered over telephone wires might be intercepted.[33] Later in *Goldman v. United States*,[34] the same argument was applied to an electronic surveillance; the defendant took the risk that his words would be overheard by an electronic device.[35]

The risk theory is based on circular reasoning and provides no rule upon which to distinguish cases. No defendant who utters incriminating words consciously believes the words he utters will be used against him in court, nor is it likely he would utter those words if he were aware in fact of the risk he was taking. When the courts say that he takes a risk, they do not mean that he takes that risk consciously, but that he takes the risk because they are going to put that risk upon him. The issue then is one of when the court is going to impose that risk and that issue is the same question with which the court started out, *i.e.*, in which cases does the Constitution free the defendant from the risk of an electronic surveillance? Thus the risk theory provides no rule upon which to distinguish cases but merely provides a slightly different way of stating the issue.

A fourth possible rule to distinguish cases where the right of privacy does or does not permit the use of electronic eavesdropping is suggested by *Massiah v. United States*.[36] In that case defendant was released on bail after being indicted for illegal possession of narcotics. Colson, a friend of defendant's and a co-conspirator in the narcotics violation, engaged defendant in an incriminating conversation while sitting in Colson's automobile which the police had wired with a radio transmitter. The Court ignored the obvious question of right to privacy presented by the use of the electronic eaves-

32 277 U.S. 438 (1928).
33 *Id.* at 466.
34 316 U.S. 129 (1942).
35 *Id.* at 135.
36 377 U.S. 201 (1964).

dropping device. Instead they decided the case on the sixth amendment right to counsel:

> We hold that the petitioner was denied the basic protections of that guarantee [*i.e.*, the sixth amendment guarantee] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.[37]

Use of electronic eavesdropping devices can be limited by protecting other rights, particularly the right to counsel. This rule, however, is really no rule at all. In cases where the use of an electronic eavesdropping device violates another right, such as the right to counsel, the court must protect that right even were they to admit that the use of the electronic device was not unlawful. Such cases need not be decided upon the right to privacy because there are other grounds for deciding them. But in the cases where only the right to privacy is violated, a *Massiah* type of decision is not possible. In such a case some other test will be needed to determine whether the use of the listening device has violated the right to privacy. If there is a constitutionally protected right to privacy, then that right must be enforced regardless of whether another constitutionally protected right has been violated.

A further means of limiting the use of electronic eavesdropping devices and thereby protecting the right to privacy was suggested in Chief Justice Warren's concurring opinion in *Lopez v. United States*.[38] Davis, a police officer, went to defendant's office to question him concerning nonpayment of a cabaret tax. Defendant offered Davis a bribe and asked him to return later to discuss the matter further. When Davis returned he carried hidden on his person a tape recorder upon which he taped incriminating statements made by defendant with regard to his tax evasion and the bribe. Defendant was tried for attempted bribery and at the trial Davis testified as to the conversations he had with the defendant. The tapes were admitted into evidence to corroborate his testimony. On appeal the Supreme Court held that the use of the hidden tape recorder did not violate defendant's fourth amendment rights.[39] In his concurring opinion, Chief Justice Warren suggested that the tapes were properly used here but that the use of the tapes was limited to merely corroborating testimony of the witness as to the words heard. If the case were like *On Lee v. United States*,[40] where the listening device was used as a means of avoiding putting an unsavory character, Chin Poy, who would be subject to impeachment on the witness stand, Chief Justice Warren said he would vote to overrule *On Lee*.[41] In that case, Chin Poy entered defendant's shop wearing a concealed transmitter and talked to defendant

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[37] *Id.* at 206.

[38] 373 U.S. 427, 441 (1963).

[39] *Id.* at 440.

[40] 343 U.S. 747 (1952).

[41] 373 U.S. 427, 441 (1963). Note that the four dissenting justices would also vote to overrule On Lee and therefore a majority of the court felt On Lee should be overruled.

concerning a narcotics charge on which defendant was out on bail. Lee, a federal agent, listened to the conversation from outside. At the trial, Chin Poy was not called as a witness, presumably because of his own involvement in the narcotics offense. However, agent Lee testified to the conversation between defendant and Chin Poy. The Court refused to reverse defendant's conviction holding that the use of the concealed transmitter did not amount to a search and seizure in violation of the fourth amendment.[42]

The distinction drawn by Chief Justice Warren between *Lopez* and *On Lee* is an effective means of limiting the use of electronic eavesdropping devices. Recently in *Hoffa v. United States*,[43] the Court held that testimony of a government "spy" as to conversations overheard while with defendant in a constitutionally protected area does not violate the fourth amendment.[44] Although the case involves only a spy, no eavesdropping device having been used, the case is significant in that it refused to extend the right to privacy to protect individuals from being spied upon even in a constitutionally protected area. If testimony of a spy is admissible as to what he overheard, a tape made by the same spy should be admitted to corroborate the spy's testimony. The tape is a more accurate representation of what was actually said. Tapes, unlike spies, do not have losses of memory, cannot quote out of context, give some indication of the demeanor of the speaker by revealing the tone of voice used and do not commit perjuries. Thus the use of the tape may be beneficial to defendant's interest as well as harmful.

The argument for Chief Justice Warren's distinction, however, is based on the assumption that the *Hoffa* decision is based on sound policy. The basic question involved in *Hoffa* is the same as in *Hajdu*. How much protection is the right to privacy to be given? The same policy which governs electronic eavesdropping devices also governs "spy" cases.[45] An electronic surveillance can be used without the defendant being aware that his conversation is being overheard, whereas the defendant does have notice that someone is overhearing his conversation in a "spy" case. This may be the controlling distinction between electronic surveillances and non-electronic spying. Yet, since the defendant is never aware that he is speaking in the presence of a spy, the spy has the same quality of secretness which is claimed to distinguish his use from use of an electronic device. If the right to privacy is the right to keep one's words and thoughts to one's self or limit them to only the audience for which they are intended, then that right is subverted when the words are spread to a public audience, whether by electronic means or by a spy. Therefore, the use of a spy violates the right to privacy in the same way as an electronic device. To justify the use of an electronic device to corroborate the testimony of a spy is to justify one unlawful act by another.[46]

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[42] 343 U.S. 747, 754 (1952).

[43] 385 U.S. 293 (1966).

[44] *Id.* at 303.

[45] See notes 24 and 25 *supra* and the accompanying text.

[46] Chief Justice Warren also falls into the same circular argument involved in the risk theory. He claims that the victim of a spy assumes the risk that the spy will talk

The last method suggested by the courts to control the use of electronic eavesdropping devices is the use of the search warrant. If electronic surveillances are search and seizures governed by the fourth amendment, then their use should be restricted by that amendment in the same way as other search and seizures—by issuance of search warrants. In *Osborn v. United States*,[47] the Court upheld the admission into evidence of tapes made by a spy who carried a secret recorder. This spy had submitted a detailed affidavit of criminal offenses which the tape would reveal to a federal district court. The judges of this court had authorized the use of the tape recorder based on this affidavit. The Supreme Court held that as the tapes were authorized by court order they were properly admissible and did not violate the fourth amendment.[48]

The holding in the *Osborn* case leaves some interesting issues unanswered. Although the Court did not expressly apply the fourth amendment in upholding the use of the court order to justify the tapes, language in the decision seems to indicate that the Court did apply that amendment. The Court said that the affidavit met the "requirement of particularity" of the fourth amendment and that the procedure used to get the court order met the precondition of that amendment for a lawful electronic surveillance.[49] If the Court upheld the use of the tape recorder only because it was done with a court order complying with the fourth amendment, then the Court has recognized that an electronic surveillance is a search and seizure which is regulated by the fourth amendment. If the *Osborn* case means that electronic surveillances are to be treated as search and seizures, then such surveillances must be regulated by the fourth amendment and can only be permitted when authorized by court order. The Court in *Osborn* does not clearly answer the question of whether the use of eavesdropping devices is always to be regulated by the fourth amendment, even though the Court seems to apply that amendment in this case. Nor did the Court overrule the many prior decisions which held that an electronic surveillance is not a search and seizure.[50] The issue of whether the Court, by *Osborn*, has adopted the fourth amendment requirements as a control on the use of electronic eavesdropping remains unanswered.

Mr. Justice Brennan discussed the use of search warrants as a control

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but does not assume the risk that an unknown person listening to the conversation with the spy by means of an electronic device will be a witness. But again the victim assumes the one risk and not the other because the court imposes that risk upon him.

47 385 U.S. 323 (1966). This was a companion case decided along with Hoffa v. United States, 385 U.S. 293 (1966).

48 385 U.S. at 331. *See also* People v. Berger, 18 N.Y.2d 638, 272 N.Y.S.2d 782, 219 N.E.2d 295, *cert. granted,* Berger v. New York, 385 U.S. 967 (1966) which deals with the use of § 813-a, N.Y. Code of Criminal Procedure, a statute authorizing ex parte orders of the court permitting use of electronic surveillance.

49 385 U.S. 323, 329-330 (1966).

50 Cases cited note 10 *supra*.

on the use of electronic surveillances in his dissent in *Lopez v. United States*.[51] Justice Brennan is not sure whether a constitutionally acceptable warrant can be devised allowing the use of electronic eavesdropping devices. He points out that because such devices are indiscriminate, a warrant would be difficult to devise which could limit their use to the particular words searched for.[52] A warrant authorizing such a device would be similar to a general warrant authorizing a general search for any incriminating words. Such general warrants are the type which the fourth amendment was devised to avoid.[53] However, says Justice Brennan, the problem of drafting a warrant sufficiently particular to meet the fourth amendment requirement[54] is no argument for eliminating this requirement before permitting electronic surveillances. In fact, it is an argument in favor of applying the standard for search warrants to electronic surveillance.[55] Because electronic surveillances are indiscriminate in what words are seized, collect more evidence and not the fruits or instrumentalities of the crime and cannot be conducted with notice given to the suspect,[56] they should be limited to cases where authorized by warrant. These are the evils the fourth amendment was meant to cure and the standard of that amendment should be applied to the source of those evils, the electronic surveillance. Justice Brennan goes on to suggest that because the rules for issuance of a warrant are flexible, a warrant which conforms to the fourth amendment requirements but authorizes an electronic surveillance is possible.[57] But in any event no electronic surveillance should be permitted where such a warrant was not obtained.

Electronic surveillance is a useful police device in which society has an interest because of the added police protection it affords. Crime syndicates are often immune to any other form of police detection and undeniably the elimination of the use of that device will, in some cases, eliminate the only effective means of gathering evidence. To completely eliminate the use of electronic eavesdropping devices would put on society the risk that some crime may go undetected. The use of the search warrant may be the only effective means available to the courts to strike a balance between the need of society to be protected from crime and the need of a democratic system to protect the right of its citizens to privacy. The standard for issuance of warrants must be strict. Courts should not authorize the use of electronic eavesdropping devices unless it is clear that no other method of effectively gathering evidence is available. The showing of probable cause for making the surveillance should conform to a higher standard of certainty than in ordinary search and seizures. Finally, the courts must exercise their discretion in

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51 373 U.S. 427, 463-466 (1963).

52 *Id.* at 465.

53 *Id.* at 464.

54 U.S. Const. amend. IV.

55 373 U.S. 427, 464 (1963).

56 *Id.* at 463.

57 *Id.* at 464.

issuing these warrants with a realization of the seriousness of the act they authorize.

The use of the search warrant is the only viable method of discriminating between the electronic surveillances necessary to crime detection and those which violate the policy inherent in the right to privacy. If the courts fail to properly exercise their discretion in issuing search warrants, the only alternative means of protecting the right to privacy is to declare that right absolute and thereby forbid all use of electronic eavesdropping devices. If, as Mr. Justice Brennan suggests,[58] proper warrants are not possible, then the courts must recognize that the need to protect privacy exceeds the danger that some crime will go undetected.

Finally, the need for legislation in this area is evident. The only means the courts have of protecting the right to privacy from invasion by electronic eavesdroppers is through the exclusionary rule, *i.e.*, excluding from admissible evidence the fruits of electronic surveillances, and by tort remedies. The use of such devices threatens our basic concepts of free thought and discussion. The occasions to use them are broader than the court rules which control only the use of the information obtained from the electronic surveillances and not the surveillances themselves. Thus the need for legislation controlling this unwarranted invasion of privacy is greatly needed.

Examination of the underlying policy of the right to privacy reveals the need to include the right to be free from electronic surveillances within the guarantees of that right. Once the need for protection from electronic surveillance has been recognized, the means of accomplishing that protection are to forbid all such surveillances or to find a rule which can distinguish valid and invalid surveillances. The use of the search warrant and the fourth amendment offers the best means of protecting the right to privacy while maximizing the protection of society from crime. However, failure of the fourth amendment rule as an effective control of the use of electronic eavesdropping devices would leave no alternative rule and absolute prohibition of their use would then be necessary.

TORTS—A MASTER'S LIABILITY WHEN AN INJURED PARTY COVENANTS NOT TO SUE HIS SERVANT—*Holcomb v. Flavin, 34 Ill. 2d 588, 216 N.E.2d 811 (1966)*—Jack Holcomb suffered injuries as a result of a collision between his automobile and one driven by Wilbur Barnard. Holcomb filed suit against Barnard, but upon Barnard's payment of 16,000 dollars Holcomb executed a covenant not to sue Barnard and dismissed the suit. Thereafter, Holcomb brought suit against Virginia Flavin alleging that she was the employer of Barnard and that Barnard at the time of the collision was her servant. Defendant Flavin pleaded as a defense to the action the execution by Holcomb to Barnard of the covenant not to sue, claiming that such covenant also barred plaintiff's cause of action against her, and on a motion for summary

[58] Lopez v. United States, 373 U.S. 427, 463-466 (1963).

judgment the trial court found for the defendant. An Illinois Court of Appeals, however, reversed the trial court, stating that the effect of a covenant not to sue a servant was not to release the master.[1]

Since all parties construed the agreement between plaintiff and Barnard to be a covenant not to sue, the question presented on appeal to the Illinois Supreme Court was whether the execution of a covenant not to sue an agent or servant serves to discharge his principal or master. The court held that the covenant not to sue the servant or agent released the master or principal.[2]

The execution of a covenant not to sue by an injured party to one of a number of persons who might be liable for the same tort was an outgrowth of dissatisfaction by lawyers with the court's treatment of a release given in the same situation.[3] A release given to one of a number of persons who might be jointly liable has traditionally been held to release all those who might be jointly liable.[4] Three reasons have been offered in support of such a rule:[5] (1) the belief that the old rule of construction, that a deed is to be construed against the grantor, ought to be applied to a release;[6] (2) the desire of courts to assure that claimants would be limited to one satisfaction;[7] (3) the theory that where joint liability existed there could be only one cause of action, joint liability being indivisible liability.[8] These reasons have suffered much criticism by commentators in recent years.[9]

The original common law rule of strict construction was that the release of one trespasser releases all because the *deed* by an injured party will be construed strictly against that party.[10] Courts applied this rule to releases.[11]

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1 Holcomb v. Flavin, 62 Ill. App. 2d 245, 210 N.E.2d 565 (1965).

2 Holcomb v. Flavin, 34 Ill. 2d 558, 216 N.E.2d 811 (1966).

3 W. Prosser, Torts § 46 (2d ed. 1955); Comment, 36 Tex. L. Rev. 55, 56 (1957).

4 *E.g.*, Rushford v. United States, 204 F.2d 831 (2d Cir. 1953); Ford Motor Co. v. Tomlinson, 229 F.2d 873 (6th Cir.), *cert. denied*, 352 U.S. 826 (1956); Cantor v. County of Santa Clara, 139 Cal. App. 2d 441, 293 P.2d 894 (1956); Miller v. Pelroth, 95 Conn. 79, 110 Atl. 535 (1920); Atlantic Coast Line R.R. v. Boone, 85 So. 2d 834 (Fla. 1956); Bidwell v. DeBolt, 221 Ind. 600, 50 N.E.2d 875 (1943); Garbe v. Halloran, 150 Ohio St. 476, 83 N.E.2d 217 (1948); Restatement, Torts § 885 (1939).

5 *See generally* Havighurst, "The Effect of a Settlement With One Co-Obligor Upon the Obligations of the Others," 45 Cornell L.Q. 1 (1959).

6 E. Coke, Commentary Upon Littleton, 2 Coke Upon Littleton § 376, at 232a (18th ed. C. Butler & F. Hargrave 1853); *see* Devy v. Connecticut Co., 89 Conn. 74, 78, 92 Atl. 883, 884 (1915).

7 Lamoreaux v. San Diego & Ariz. Eastern R.R., 48 Cal. 2d 617, 311 P.2d 1 (1957); Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934); First Merchants Nat'l Bank v. Bank of Waverly, 170 Va. 496, 197 S.E. 462 (1938).

8 Matheson v. O'Kane, 211 Mass. 91, 94, 97 N.E. 638, 639 (1912); Duck v. Mayer, [1892] 2 Q.B. 511, 513.

9 4 A. Corbin, Contracts § 931 (1951); F. Harper & F. James, Torts § 10.1 (1956); W. Prosser, Torts § 46 (2d ed. 1955), Havighurst, *supra* note 6; Note, 22 Minn. L. Rev. 692 (1938); Note, 33 Notre Dame Law. 291 (1951).

10 *See* authorities cited note 6 *supra*.

11 Havighurst, *supra* note 5, at 7.

Perhaps this was done because it was felt that when one gave a release to another, the person released was exonerated from any culpability, and it appeared inconsistent to allow an injured party to exonerate one joint obligor and enforce a claim against the other. However, releases are no longer looked upon as deeds but as contracts,[12] and there is no rule of construction applicable to contracts which requires strict construction of a release against a releasor. A contract is generally construed against the drafter of the contract.[13] Since most releases are drafted by the releasee rather the releasor, the rule would now require that the release be construed against the releasee, the converse of the traditional rule.

The objection that a double recovery might occur where a release of one does not release them all has little merit.[14] If a release given to one for less than full satisfaction acts to release all other joint obligors, the injured party will never be compensated. On the other hand, since the amount paid by one obligor must always be credited to the liability of all other obligors, a double recovery is impossible.

The concept that joint liability was indivisible liability had its origin in the common law writ system, under which there was the right to have only a single cause of action heard. There could be but one party on each side. However, a plaintiff could join several joint obligors in one indivisible cause of action, and they were looked upon as a single entity thus satisfying the requirement that there be only one party on each side. If the plaintiff sued only one of those who was jointly liable and obtained a judgment, this judgment, whether satisfied or not, bound only the party sued and barred any further action against the others.[15] These principles were applied to releases, and thus it was held that a release of one joint obligor releases all.[16] It is unfortunate that this common law concept of an indivisible cause of action has been used to justify the application of the common law release rule because the concept has no present-day relevance.[17] The theory was one of procedure and was developed in order to enable a plaintiff to join the several joint obligors in the single cause of action which he was permitted. Under twentieth century liberal rules of joinder, a plaintiff generally may join all persons in one action as defendants if there is asserted against them any right to relief arising out of the same transaction and if any question of law or fact common to all defendants will arise in the action.[18] Thus, plaintiffs have no difficulty in joining all joint obligors in a cause of action, and

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12 Hamilton v. Edmundson, 235 Ala. 97, 101, 177 So. 743, 746 (1937).

13 Restatement, Contracts § 236 (1932).

14 Prosser, "Joint Torts and Several Liability," 25 Calif. L. Rev. 413, 425 (1937).

15 *See generally* Comment, 24 So. Cal. L. Rev. 466 (1951); Havighurst, *supra* note 5, at 6.

16 Havighurst, *supra* note 5, at 6; *see* cases cited note 8 *supra*.

17 Prosser, *supra* note 14, at 424.

18 Fed. R. Civ. P. 20(a); Prosser, *supra* 14, at 416; Comment, 24 So. Cal. L. Rev. 466, 470 (1937).

because of the statutory rules there is no need for a theory justifying the procedure.

For the reasons set out above, the common law release rule was attacked as tending to defeat the fair expectations and intentions of the parties to the release, and thus the use of the covenant not to sue developed in such situations as a means of avoiding the application of the rule.[19] Courts adopted the rule that unlike a release, a covenant not to sue one of several joint obligors did not operate as a covenant not to sue or a release to all.[20]

The release had the effect of extinguishing the cause of action.[21] Thus, when a release was given to one of several persons who were jointly liable, the releasor's right to bring a suit against any of the remaining joint obligors no longer existed, and all the parties were relieved from any further liability to the releasor. The theory behind the covenant not to sue, however, was different. A covenant not to sue neither extinguished the cause of action nor exonerated joint obligors. It was merely a covenant not to enforce an existing cause of action. The covenant was construed to bar further action against the covenantee and not to extinguish the cause of action nor discharge the remaining joint obligors from liability to the injured party.[22]

Nevertheless, the rule that a covenant not to sue one joint obligor does not release the other has not been uniformly adhered to by courts where the question, as it was in the instant case, was whether a covenant not to sue a servant operates to bar suit against the master.[23] The split of authority is well illustrated in the two appellate opinions in *Holcomb*. The Illinois Court of Appeals held that such a covenant did not bar a cause of action against the master,[24] and the Illinois Supreme Court held conversely.[25]

The court of appeals found no reason for extending the rule that release of a servant's liability also releases the master's liability to the situation where instead of using a release the servant terminates his liability by a covenant not to sue.[26] This position, which has been taken in a number of other juris-

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[19] *See* material cited note 3 *supra*.

[20] *E.g.*, Caruso v. Chicago, 305 Ill. App. 571, 27 N.E.2d 545 (1940); Haney & Campbell Mfg. Co. v. Adaza Co-op Creamery Co., 108 Iowa 313, 79 N.W. 79 (1899); Burke v. Burnham, 97 N.H. 203, 84 A.2d 918 (1952).

[21] Coopey v. Keady, 73 Ore. 66, 76, 144 P. 99, 101 (1914); *See* Havighurst, *supra* note 5, at 8; Note, 36 Tex. L. Rev. 55, 56 (1957).

[22] McDonald v. Goddard Grocery Co., 184 Mo. App. 432, 171 S.W. 650, 651 (1914); 2 S. Williston, Contracts § 338A (rev. ed. 1936); 4 A. Corbin Contracts §§ 932-933 (1951). *See* Note, 36 Tex. L. Rev. 55, 56 (1957).

[23] *E.g.*, Simpson v. Townsley, 283 F.2d 743 (10th Cir. 1960); Terry v. Memphis Stone & Gravel Co., 222 F.2d 652 (6th Cir. 1955); Smith v. South & Western R.R., 151 N.C. 479, 66 S.E. 435 (1909); Karcher v. Burbank, 303 Mass. 303, 21 N.E.2d 542 (1939); Max v. Spaeth, 349 S.W.2d 1 (Mo. 1961); Stewart v. Craig, 208 Tenn. 212, 344 S.W.2d 761 (1961).

[24] Holcomb v. Flavin, 62 Ill. App. 2d 245, 210 N.E.2d 565 (1965).

[25] Holcomb v. Flavin, 34 Ill. 2d 558, 216 N.E.2d 811 (1966).

[26] Holcomb v. Flavin, 62 Ill. App. 2d 245, 210 N.E.2d 565 (1965).

dictions,[27] is a logical one if the distinction between the covenant not to sue and the release (that the covenantor merely agrees not to enforce his cause of action while a release exonerates) is allowed to control the substance of the instrument.

Courts recognizing the distinction between a covenant not to sue and a release have too often been content to let the form of the instrument dictate the result. In the instant case, for example, since the parties had labeled the instrument in question a covenant not to sue, the court of appeals felt compelled to ignore the substance of the instrument and based its decision on the label used by the parties. The Illinois Supreme Court, however, as have a number of other jurisdictions,[28] chose to pay closer attention to the substance of the agreement and the probable intent of the parties involved. The court held that under certain circumstances a covenant given a servant does extinguish the cause of action against the master when that master's liability would have been based solely on the doctrine of respondeat superior.[29]

Two reasons were given by the Illinois Supreme Court in support of its holding: (1) such a holding prevents circuitry of action;[30] (2) since the liability of the master for the torts of his servant is solely derivative, an exoneration of the servant must necessarily release the master.[31] Certainly where one who is injured by a negligent servant collects a judgment against the servant's master, the master may then be indemnified by the servant.[32] The possibility that there may be two suits arising out of a single tort existed regardless of whether the injured party executed a covenant not to sue the servant. *Holcomb,* therefore, does not reduce the number of possible suits, but merely discourages the execution of a covenant not to sue the servant.

The liability of a master for the torts of his servant is derivative,[33] and exoneration of the servant does not release the master,[34] but the covenant not to sue has been traditionally construed so as not to exonerate the servant.

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[27] Ellis v. Jewett Rhodes Motor Co., 29 Cal. App. 2d 395, 84 P.2d 791 (1938); Shippy v. Peninsula Rapid Transit Co., 97 Cal. App. 367, 275 P. 515 (1929); Louisville Times Co. v. Lancaster, 142 Ky. 122, 133 S.W. 1155 (1911); Wilson v. City of N.Y., 131 N.Y.S.2d 47 (Sup. Ct. 1954); Gomez v. City Transp. Co., 262 S.W.2d 417 (Tex. Civ. App. 1953); Blackwell v. Ship Channel Development Co., 264 S.W. 223 (Tex. Civ. App. 1924).

[28] *See* cases cited note 23 *supra.* How the courts of Ohio would decide this issue is not yet clear. There have been two cases with dictum to the effect that a covenant not to sue an employee will discharge an employer. Ford Motor Co. v. Tomlinson, 229 F.2d 873 (6th Cir.), *cert. denied,* 352 U.S. 826 (1956); Kelly v. Ford Motor Co., 104 Ohio App. 185, 139 N.E.2d 99 (1957).

[29] Holcomb v. Flavin, 34 Ill. 2d 558, 216 N.E.2d 811 (1966).

[30] *Id.* at 563, 216 N.E.2d at 815.

[31] *Id.* at 565, 216 N.E.2d at 814.

[32] 1 F. Harper & F. James, *supra* note 9, at § 10.2; Restatement, Restitution § 96 (1937); Restatement, Judgments § 107 (1942).

[33] Karcher v. Burbank, 303 Mass. 303, 21 N.E.2d 542 (1939); Pangburn v. Buick Motor Co., 211 N.Y. 228, 234, 105 N.E. 423, 425 (1914).

[34] Hobbs v. Ill. Cent. R.R., 171 Iowa 624, 152 N.W. 40 (1915); Restatement (Second), Agency § 217 A, comment *b* (1958); Annot. 78 A.L.R. 365 (1952).

Thus, the court, in order to release the master from possible liability, is construing the instrument according to its substance in light of the facts of this particular situation to be a release and is disregarding the form of the document.

The supreme court's approach is commendable in that the outcome of the case gives effect to the probable intention of the parties when considering the nature of the settlement. Plaintiff received 16,000 dollars from the servant. The plaintiff alleged that the money was given in return for a covenant not to sue the servant.[35] It is conceivable that a servant in this situation might wish to make a purchase of peace of mind which would not purport to satisfy the injured plaintiff's claim. But it is doubtful that such a servant would pay 16,000 dollars just for peace of mind.

Several courts from other jurisdictions, faced with similar problems, have expressly based their decisions upon the issue of whether or not adequate compensation has been given.[36] The Federal District Court for the District of Columbia has stated that it is immaterial whether the instrument is called a release or a covenant not to sue, the outcome depending upon whether or not the settlement amounted to full reparation. This question was to be determined not merely from the fact of the settlement but as the facts of the particular situation dictated.[37]

The Supreme Court of Washington expressed the view that although a writing is appropriately drawn to make it a covenant not to sue, the court must construe the writing in light of the facts and circumstances surrounding its execution to ascertain whether it was in *substance* and effect given for payment which was reasonably compensatory.[38]

The basic theme in these decisions is that concepts based solely on the form of the instrument will not be determinative, the vital issue being whether the plaintiff's claim has been satisfied. This is a matter of intent of the parties to be determined in the light of the language of the instrument, the amount paid, and the surrounding circumstances.[39]

The courts in the above cases have stated affirmatively the type of reasoning which the Illinois Supreme Court has implicitly given effect to by its decision in the present case. By examining the terms of the instrument in the present case to determine if there was an intent to give and accept satisfaction, it might be noted that the plaintiff made no specific reservation of a right to proceed against the master.[40] The instrument generally stated that it

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35 Holcomb v. Flavin, 34 Ill. 2d 558, 559, 216 N.E.2d 811, 812 (1966).

36 Clapper v. Original Tractor Cab Co., 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960); McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Gronquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954); Weldon v. Lehman, 226 Miss. 600, 84 So. 2d 796 (1956); Black v. Martin, 88 Mont. 256, 292 P. 577 (1930); Haney v. Cheatham, 8 Wash. 2d 310, 111 P.2d 1003 (1941).

37 McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943).

38 Haney v. Cheatham, 8 Wash. 2d 310, 111 P.2d 1003 (1941).

39 Prosser, *supra* note 14, at 425 nn.75-76.

40 Holcomb v. Flavin 34 Ill. 2d 558, 562, 216 N.E.2d 811, 813 (1966).

was a covenant not to sue and made no mention at all of the defendant in this suit.[41] This would be some indication that the plaintiff was satisfied with the compensation he was receiving and that he had no intention of instigating any further action. Furthermore, because the instrument made no explicit mention of a right to sue the master, the servant would be justified in construing the insrument as being given in return for complete satisfaction. The amount paid to the plaintiff was 16,000 dollars.[42] From the payment of this substantial sum, it could be inferred that the money was full compensation for the plaintiff's injuries and that the intention of the parties was that it be treated as such.

Finally, in considering the surrounding circumstances of this situation, it is probable that the servant intended this payment to be in final settlement of the plaintiff's cause of action. It is unlikely that the servant would have paid 16,000 dollars if he intended for the plaintiff to be free to sue his master, since the plaintiff's recovery against the master would enable the master to seek indemnification from the servant.[43] The end result would be that the servant had paid an amount above that which he had considered to be full compensation. In light of the above reasoning and the compelling policy factors whicht favor encouragement of fair settlements, the decision of the Illinois Supreme Court was a desirable one.

CRIMINAL LAW—PRETRIAL PSYCHIATRIC EXAMINATIONS—*State v. Olson, 143 N.W.2d 69 (Minn. 1966)*—In a criminal case where the defendant will rely upon the defense of insanity at the time of the alleged crime, may the prosecution obtain a court order directing the defendant to submit to a pretrial psychiatric examination, or may the defendant successfully contest the order on the ground that it violates his constitutional privilege against self-incrimination?

The Minnesota Supreme Court was faced with this problem in *State v. Olson*.[1] The state, anticipating that the accused would rely on the defense of temporary insanity, asked the court to order the defendant to submit to a pretrial psychiatric examination to determine his mental condition at the time of the crime. The lower court so ordered over the objections of defendant's attorneys: (1) that such a compulsory examination would violate his constitutional privilege against self-incrimination, and (2) that since Minnesota has no statute dealing with such examinations the court could not order the examination without the defendant's consent. On appeal the Minnesota Supreme Court sustained both of these objections in an alternative ruling and thus issued a writ of prohibition against the pretrial psychiatric

41 *Id.* at 563, 216 N.E.2d at 814.

42 *Id.* at 559, 216 N.E.2d at 811.

43 See authorities cited note 32 *supra*.

1 143 N.W.2d 69 (Minn. 1966).

examination.[2] This note will be concerned only with the problems raised by the first objection—whether the constitutional guarantee against self-incrimination applies to a pretrial psychiatric examination?

The question arising in *Olson* was virtually unexplored in the courts until a short time ago, although there was much litigation concerning the constitutionality of pretrial psychiatric examination statutes. Twenty-one states[3] have statutes providing for a psychiatric examination of the defendant by court-appointed experts who may be summoned by the court to testify at the trial to determine mental condition at the time of the crime.[4] Although the constitutionality of these statutes has often been challenged,[5] with but one exception[6] they have been upheld as constitutional.[7] However, while the

[2] In so holding, the court was following French v. District Court, 153 Colo. 10, 384 P.2d 268 (1963). In French the defendant had two trials on two different charges against him pending at the same time. He was found not guilty by reason of insanity in the first trial and then changed his plea to not guilty by reason of insanity in the second trial. The prosecution moved for and was granted a psychiatric examination of the defendant, but the defendant refused to cooperate with the examining physicians. The court then struck the defendant's plea and his attorneys appealed to the Colorado Supreme Court. This court reversed, holding that "the statute which prescribes the procedures to be followed upon the entry of a plea of not guilty by reason of insanity cannot operate to destroy the constitutional safeguards against self-incrimination." French v. District Court, *supra* at 14, 384 P.2d at 270.

[3] For a listing of such states see Model Penal Code § 4.05, Comment (Tent. Draft No. 4, 1955).

[4] *E.g.*, Ohio Rev. Code Ann. § 2945.40 (Page 1953) provides:

> In any case in which insanity is set up as a defense . . . the court may commit the defendant to a local hospital for the mentally ill, or the Lima state hospital, where the defendant shall remain under observation for such time as the court directs not exceeding one month. The court may in such case appoint one or more, but not more than three, disinterested qualified physicians, specialists in mental diseases, to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing . . . . The expert witnesses appointed by the court may be called by the court and shall be subject to examination and cross-examination by the prosecuting attorney and counsel for the defendant. The appointment of such expert witnesses, and their testifying as witnesses, shall not preclude the prosecuting attorney or defendant from calling other witnesses to testify on the subject of insanity . . . .

[5] The constitutionality of these statutes has been challenged on the grounds, *inter alia*, that the statutes invade the province of the district attorney (where the court may appoint experts on its own motion, as may be done in Ohio), that they delegate to the judicial department powers belonging to the executive, that they either magnify the importance of the expert testimony before the jury or else violate the right to jury trial on the issue of insanity, and that the statutes violate the privilege against self-incrimination. For a thorough discussion of the cases upholding these statutes as constitutional, *see* Annot., 32 A.L.R.2d 434 (1953).

[6] People v. Dickerson, 164 Mich. 148, 129 N.W. 199 (1910).

[7] Hunt v. State, 248 Ala. 217, 27 So. 2d 186 (1946); Clement v. State, 213 Ark. 460, 210 S.W.2d 912 (1948); People v. Strong, 114 Cal. App. 522, 300 P. 84 (2d App. Div.

statutes themselves are constitutional there might be situations in which the application of these statutes would be unconstitutional. The California Supreme Court spelled out this distinction in *People v. Strong*[8] when it declared that the California statute[9] requiring the court to appoint psychiatrists to examine the defendant when he uses insanity as a defense was constitutional, but went on to say:

> We fail to see any merit in the contention that under section 1027 a defendant is compelled to be a witness against himself. Nothing in the section compels him to submit to an examination. If he does so the action is purely voluntary. To assert his constitutional rights all that is required is for him to stand mute and possibly, also, to refuse to permit the examination, when the appointed expert undertakes to proceed; and whether he does so or not there is no compulsion.[10]

The court in *Strong* thus left the door open for a finding that in certain cases where compulsion is used the result might be unconstitutional. There is much dictum in the early cases construing the constitutionality of pretrial psychiatric examination statutes which seems to say that a compulsory mental examination does not violate the accused's privilege against self-incrimination.[11] This dictum has been picked up in later cases and stated as a general rule of law.[12] But, as was pointed out in *Olson*, "in these cases defendant had cooperated in the examination and had not asserted the privilege against self-incrimination."[13] Thus a distinction can be drawn between the situation in *Olson* where the defendant made a timely objection and most of the early cases holding these statutes constitutional, where the self-incrimination objection was raised after defendant had already fully cooperated with the state.

The privilege against self-incrimination applies only to situations in

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1931); Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933); Blocker v. State, 92 Fla. 878, 110 So. 547 (1926); Noelke v. State, 214 Ind. 427, 15 N.E.2d 950 (1938); State v. Genna, 163 La. 701, 112 So. 655 (1927); Commonwealth v. Di Stasio, 294 Mass. 273, 1 N.E.2d 189 (1936); State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951); Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930).

[8] 114 Cal. App. 522, 300 P. 84 (2d App. Div. 1931).

[9] Cal. Pen. Code § 1027 (West 1956).

[10] People v. Strong, 114 Cal. App. 522, 530, 300 P. 84, 87 (2d App. Div. 1931).

[11] Cases cited *supra* note 7.

[12] *E.g.*, State v. Myers, 220 S.C. 309, 311, 67 S.E.2d 506, 507 (1951), where the court said:

> [I]t is now almost uniformly held that where insanity is interposed as a defense, the compulsory examination of an accused by experts for the purpose of determining his mental condition and testifying in regard thereto does not violate either the constitutional privilege of the accused of not being compelled to be a witness against himself or the constitutional guaranty of due process of law. (The court then cited earlier cases in which no compulsion was used.)

[13] State v. Olson, 143 N.W.2d 69, 71 (Minn. 1966).

which the accused may, by his own testimony, expose himself to criminal liability.[14] Therefore, there would be no valid grounds for a defendant's refusal to submit to such an examination if the statements made by the defendant during the examination were not admissible as evidence in any trial. Thus, the Illinois statute[15] provides that no statement made by an accused in any competency examination, whether the examination is made with or without defendant's consent, shall be admitted in evidence against the accused on the issue of guilt in a criminal proceeding.[16] Such a rule seems reasonable, but has caused many problems in application. The judge may instruct the jury to disregard all statements made by the psychiatrist when the jury is determining the guilt of the accused, but in reality any statements of the psychiatrist which seem to link the defendant with the crime will tend to prejudice the jury on the question of whether or not the defendant committed the crime with which he is charged. This was certainly one of the reasons why the *Olson* court decided not to order such an examination. In *State v. Whitlow*,[17] a case with substantially the same facts as *Olson*, the New Jersey Supreme Court avoided this problem by stating that it was aware of the difficulty of the separation of the guilt issue from the insanity issue but that although the jury might be confused on this point there were many other problems in a trial which were equally confusing to the jury. The *Olson* court criticized this stand taken in *Whitlow*.[18]

The court in *Whitlow* concluded that an accused could be compelled to submit to a pretrial psychiatric examination. The reason that these two courts reached opposite results was because they placed their emphasis upon two different and conflicting values. First, there is the interest of society in allowing the state's expert psychiatrists to examine the accused so that all relevant facts may be presented in court in order to facilitate reaching a correct decision in the case. Otherwise, the defense has a decided advantage over the prosecution which has to counter the testimony of expert witnesses with the testimony of lay witnesses. On the other hand, a defendant should have the right to refuse to incriminate himself or give the state any aid in constructing links in the chain of evidence relating to guilt. The *Olson* court placed a heavier emphasis on the latter value to reach its result, quoting

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14 U.S. Const. amend. V.

15 Ill. Ann. Stat. ch. 38, § 104-2(d) (1964).

16 *Accord*, Model Penal Code § 4.09 (1961).

17 45 N.J. 3, 210 A.2d 763 (1965).

18 State v. Olson, 143 N.W.2d 69, 72 (Minn. 1966), states:

> It has been suggested that such inculpatory statements of an accused to an examining state psychiatrist be admitted only on the issue of insanity, and that the jury be so instructed . . . . It is difficult, however, to conceive of a jury not considering such evidence on the issue of guilt . . . . The fact, nevertheless, remains that if the court orders relator here to submit to a psychiatric examination by the state as to his insanity at the time of the crime . . . he would be compelled to carry on conversations against his will.

State v. Gardiner[19] that "[b]etter an occasional miscarriage of justice than that the constitutional rights of the meanest man should be disregarded."[20] The *Whitlow* court, on the other hand, felt that more emphasis should be placed on the inequality that would exist at trial if the state were prevented from conducting a pretrial psychiatric examination. The court said:

> To allow the accused to obtain his own expert, and after a private and unlimited conference with him and examination by him, to plead insanity, and then put forward the privilege against self-incrimination to frustrate like activities by the prosecution is to balance the competing interests unfairly and disproportionately against the public.[21]

The Minnesota Supreme Court, feeling that the determination of proper safeguards for the defendant should be made by the legislature and not the courts, stopped after finding in *Olson* that a compulsory pretrial examination would violate the defendant's privileges against self-incrimination. In *Whitlow*, however, having found that such examination did not violate the privilege, the court was forced to set up guidelines for preserving an accused's rights. The court was thus faced with the problem of what to do in the event that the defendant either refused to obey the order or else once at the examination simply refused to talk to the examining psychiatrists. In New York the problem has arisen in two reported lower court decisions.[22] In both cases the judges ruled that since the defendant's attorneys had informed them that they would advise their clients to remain silent, it would be useless to order a psychiatric examination on the prosecution's motion because there would be no way to enforce such an order. Assuming that the defendant does remain silent and refuses to submit to an examination, then, what steps may be taken to bring about compliance with the order? Under recent Supreme Court decisions the prosecutor probably would not be able to comment on the defendant's refusal to cooperate in the examination.[23] In *Whitlow* the court decided that the introduction of expert testimony should be on a quid pro quo basis. Should the defendant stand mute and refuse to converse with psychiatrists appointed by the court then he would not be able to introduce his own expert testimony—at least not until he gave the state psychiatrists the opportunity to make the same type of examination that the defense psychiatrist(s) had made. This is a stand very similar to that taken in Wisconsin by statute.[24] The Wisconsin statute states:

> No testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the

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[19] 88 Minn. 130, 92 N.W. 529.

[20] *Id.* at 139, 92 N.W. at 533.

[21] State v. Whitlow, 45 N.J. 3, 11, 210 A.2d 763, 767 (1965).

[22] People v. Fazio, 132 N.Y.S.2d 108 (C.P. 1954); People v. Higgins, 196 N.Y.S.2d 1019 (C.P. 1960).

[23] Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964).

[24] Wis. Stat. Ann. § 957.27(2) (1961).

> expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused, if such opportunity shall have been reasonably demanded.[25]

There are many different ways of gathering insight into the mental condition of an accused. The defendant could be given a battery of psychological tests, the psychiatrist could conduct a limited mental examination in which the alleged crime is not alluded to, or the psychiatric examination could be exhaustive and complete.[26] The question of whether all of these procedures are within the scope of the privilege against self-incrimination, or whether it applies only to an exhaustive psychiatric examination, is a very difficult problem and this note takes no stand on this issue. In most instances a full discussion of the offense is regarded as necessary to a professional determination of the defendant's mental condition at the time of the crime.[27] The New Jersey court in *Whitlow* held that the prosecution's psychiatrists should have the same latitude in examining the defendant as the defense psychiatrists. The court felt that this too should be done on a quid pro quo basis; if the defense psychiatrists examined the defendent on all matters, the defendant would have to allow the prosecution's psychiatrists to make the same examination, or else have his expert testimony limited to those matters about which the state's experts were allowed to question him. According to the court the defendant should be asked if he has cooperated fully with his own psychiatrists, allowing them to delve into all details during the examination. If unqualified cooperation, including discussion of the crime, is conceded, then:

> [D]efendant should be informed that at the trial of the case the hearsay objection will be applied to exclude any history or statements as to the crime or otherwise, furnished by him to his psychiatrists during their interview and examination—unless and until the same cooperation is given to the State's examiners. Then at the trial, if the accused testifies with respect to his mental condition or as to the circumstances of the crime, and then offers psychiatric testimony, the court may suspend the proceedings and refuse to receive such expert proof until defendant submits to a proper examination by the State's psychiatric experts.[28]

It seems likely that in the future more states will use the procedures recommended in *Whitlow* and written in statutory form in Wisconsin. The state courts that are concerned about the effect that the psychiatrist's statements may have upon the issue of guilt may continue to hold as the courts did in *Olson* and *French v. District Court*.[29] A possible solution to this might be to bar all incriminating statements from being admitted in the trial,

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[25] *Id.*

[26] *See* State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965).

[27] *Id.* at 25, 210 A.2d at 774-75.

[28] French v. District Court, 153 Colo. 10, 384 P.2d 268 (1963).

[29] 2 J. Wigmore, Evidence § 562, at 644 (3d ed. 1940).

limiting the psychiatrist to a simple statement regarding his opinion of the defendant's mental condition. However, it is usually stated that an expert witness may be required to state the grounds upon which he bases his opinion,[30] since the opposing side should be able to challenge the facts upon which the opinion was based. Another possible solution, the bifurcated trial, has been explored in several states.[31] In the bifurcated trial separate trials are held on the issues of guilt and insanity, the trial on guilt usually being held first. However, this procedure has been found to be unsatisfactory in some cases since the state must prove a *mens rea* in the trial to determine guilt, and this would necessarily mean trying the mental element to some extent in the first trial in order to establish guilt.

This note has dealt only with the pretrial mental examination and its enforcement in given situations. It should be noted in closing, however, that the court in *Olson* apparently ruled out only compulsory pretrial examinations, thus avoiding the legislating that the New Jersey court had to do in *Whitlow*. One paragraph in *Olson* would seem to suggest that if the defendant attempted to introduce his own expert testimony *at the trial*, the court would consider such attempt as a waiver of the privilege against self-incrimination and order the defendant to submit to an examination at that time. The court stated:

> It seems apparent as things now stand that relator's defense will be temporary insanity at the time of the commission of the alleged offenses. Should such a defense be in fact presented, the state in rebuttal will be able to present its own evidence as to his mental condition. Naturally it will have to conduct its own psychiatric examination of relator in order to present such evidence. Thus if the examination is conducted at some point after the trial has begun, there might have to be a recess and a disjointed trial could result.[32]

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30 *E.g.*, Cal. Pen. Code § 1026 (West 1956) provides:

> When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.

The Colorado statute is different, leaving it to the discretion of the court whether or not to have separate trials on the issues of guilt and insanity. Colo. Rev. Stat. Ann. § 39-8-3(1) (1963) provides:

> When a defendant pleads not guilty by reason of insanity at the time of the alleged commission of the crime, and joins with it another plea or pleas not involving insanity, including the plea of not guilty . . . the case, in the discretion of the court, may be either set for trial on the insanity issue alone, or may be set for one trial upon all issues raised by all pleas entered.

31 People v. Wells, 33 Cal.2d 330, 202 P.2d 54 (1949).

32 State v. Olson, 143 N.W.2d 69, 72 (Minn. 1966).

Perhaps the court would consider the psychiatrist's testimony to be a waiver because, since he would probably be testifying as to what the defendant had told him in the examination, the defense would in theory be putting the defendant on the stand. At any rate, this paragraph seems to be inconsistent with the rest of the opinion, and the effect, if any, of this paragraph has yet to be seen. It could be inferred that perhaps the courts in *Olson* and *Whitlow* are not so far apart after all, and that the only basic difference between the two decisions is the stress that *Whitlow* places upon an immediate examination by the prosecution's psychiatrists, while the *Olson* court is willing to delay the time of the state's psychiatric examination until the trial itself takes place.

AGENCY—LIABILITY FOR TORTS OF BORROWED SERVANT—*New York Central Railroad v. Northern Indiana Public Service Company, 221 N.E.2d 442 (Ind. Ct. App. 1966)*—The borrowed servant problem arose in the principal case under the following facts. The plaintiff raliroad company owns a set of tracks over which the defendant electric company erected power lines. An indemnification agreement between the parties that the defendant would indemnify the railroad for all damages or claims which the railroad suffered as a result of the location of the power line "except such as may be caused by the sole negligence of First Party (NYC), its agents or employees."[1] After the power line had been built, the railroad undertook replacement of the track rails. The railroad hired a crane with operator from a corporation engaged in the crane rental business to unload the rails from a gondola car which had been parked beneath the power line. The railroad foreman directed placement of the mobile crane alongside the gondola car. Movement of the crane during unloading operations was directed by hand signals from the railroad foreman because the sides of the gondola car were sufficiently high to block the operator's view of the rails located in the gondola car.

During operations, Johnson, a railroad employee stationed in the gondola by his foreman, grasped the tongs on the end of the crane pully and was electrocuted because the boom of the crane came in contact with the power line. At the time of the accident the crane operator could not see the end of the boom because of the sun's glare.

The railroad settled a suit by Johnson's widow stemming from the accident for 30,000 dollars, and then brought suit under the indemnity contract to recover their expenditure from the electric company. Judgment was entered against the railroad because the trial judge found that the crane operator was acting as the agent of the railroad. *Held*, affirmed because the appellate court found sufficient evidence of probative value to support the lower court's special findings that the crane operator was the servant of the railroad.

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[1] New York Cent. R.R. v. Northern Ind. Pub. Serv. Co., 221 N.E.2d 442, 444 (Ind. Ct. App. 1966).

The controversy could have been settled by an interpretation of the indemnity agreement entered into between the two parties. More particularly, the intended meaning of the term "sole negligence" could have been the center of attention. On appeal, however, both parties agreed that the determinative question involved the borrowed servant doctrine, that is, was the crane operator an agent or employee of the railroad.[2] If the crane operator were an employee of the plaintiff, the exception to the indemnity clause was controlling as all other persons involved were acknowledged railroad employees. If, however, the crane operator were not an agent of the railroad and if his negligence contributed to the accident, the indemnity exception would not operate and the defendant would have been liable.

Under the well established doctrine of respondeat superior a master is liable for torts committed within the scope of the servant's employment regardless of fault on the part of the master. It is also established that "a servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others."[3] Notice that the word "may" is used. Thus, while a servant may change masters, this change occurs only in certain circumstances. Determining which master shall be liable when a servant on loan from a general employer to a special employer commits a tort is one of the most confused[4] and difficult but yet common problems in the law of agency.[5] The tests devised by the courts in the field of borrowed servants are basically not in conflict and, in fact, are often used to complement each other. Yet the tests are so general and depend so much upon which facts of a situation are emphasized that inconsistencies appear when a court attempts to look to precedent in deciding cases.[6]

Two basic tests have been used frequently by courts in determining whether the general or special employer should be considered the master of the borrowed servant. First is the whose business test, which puts primary emphasis on whether the servant was furthering the business of the special or general employer at the time the tort occurred.[7] This test, consistent with the general policy behind the doctrine of respondeat superior, appears to be based on the premise that the master who benefits from the servant's acts should be liable for any tortious consequences of these acts. The whose business test has limited usefulness because in most cases, as in the principal case,

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[2] *Id.* at 446.

[3] Restatement (Second) of Agency § 227 (1958).

[4] *See* Cardozo, "A Ministry of Justice" 35 Harv. L. Rev. 113, 121 (1921).

[5] Mechem lists cases dealing with borrowed servants as one of the three most common groups of cases in the field of agency. F. Mechem, Outline of the Law of Agency § 453 n.81 (4th ed. 1952).

[6] *See, e.g.*, White v. Bye, 342 Mich. 654, 664, 70 N.W.2d 780, 784 (1955); Rhinelander Paper Co. v. Industrial Comm'n, 206 Wis. 215, 217, 239 N.W. 412, 413 (1931).

[7] *See* Standard Oil Co. v. Anderson, 212 U.S. 215, 221-22, 225 (1909); Byrne v. Kansas City Ft. S. & M.R.R., 61 Fed. 605, 607 (6th Cir. 1894); Devaney v. Lawler Corp., 101 Mont. 579, 589, 56 P.2d 746, 749 (1936).

the servant is furthering the work of both his general and special employers. Both are being benefited by the servant's labor. Consequently, unless the servant has substantially deviated from the business of one of his two employers, this test provides no real basis for determining which employer should be liable. It is also impossible to differentiate by the degree of benefit, since in the principal case and in others, the servant's efforts benefit the general and special principal equally.

The second common test is the control test. It seeks to place responsibility for the servant's tort upon the employer having the right to control the servant's actions at the time the tortious act occurs.[8] The theoretical basis for the test is the desire to impose liability upon the employer who was in the best position to prevent the injury.[9] This basis is inadequate in that it is inconsistent with the premise that direct fault need not be shown to hold a master liable for his servant's acts. Furthermore, it is weakened by the irrelevance of control in the area of frolic and detour in agency law.[10] The courts, in applying the control test, have failed to define what is meant by control. Are the courts speaking of broad control such as the power to discharge the employee, which is usually retained by the general employer, or of detailed on-the-spot control, which is usually exercised by the special employer? The courts which emphasize control in the broad sense make the general employer liable; whereas, if detailed on-the-spot control is emphasized, the special contractor is held liable. In any case under the control test, the result depends almost entirely upon which facts the courts wish to emphasize, because in almost all the cases both the general employer and the special employer exercise some type of control over the servant.

In the principal case the court, taking a realistic view of precedent concerning the borrowed servant problem, admitted that the cases cannot be reconciled, and observed that in the vast majority of borrowed servant cases the lower courts were affirmed. "Most of the language represented attempts to affirm rather than specifically develop rules of law."[11] In proposing that liability should turn upon "the right to control relative to the specific act in question,"[12] the court admitted that some facts indicated that the general employer had a measure of control relative to the specific act in question,[13] while other facts were quite sufficient to have supported a trial court finding

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[8] *See* Nepstad v. Lambert, 235 Minn. 1, 12, 50 N.W.2d 614, 620 (1951).

[9] *Id.*

[10] Smith, "Scope of the Business: The Borrowed Servant Problem," 38 Mich. L. Rev. 1222, 1233 (1940).

[11] New York Cent. R.R. v. Northern Ind. Pub. Serv. Co., 221 N.E. 2d 442, 448 (Ind. Ct. App. 1966).

[12] *Id.* at 450.

[13] *Id.* at 449. These facts are that the general employer (1) had the right to hire and fire the servant, (2) paid the servant's wages, (3) had charge of general care and maintenance of the machine, (4) was in business of renting machines, and (5) the operator (servant) was a semi-skilled employee.

that the special employer had the right of control.[14] Thus the trial court was affirmed, but this court articulated a truth about any form of control test which seems to have escaped most courts:

> [M]any of the borderline cases are attempting to find a single legal relationship within the doctrine of respondeat superior which in reality does not exist, i.e., between the two employers it is not necessary and rarely does it exist in these borderline cases that only one employer had the right to control as to the very act in question.[15]

One problem that should be brought out in connection with the court's use of a control test based on the specific act of negligence is that, in some cases, the specific act of negligence is difficult to determine. The court assumed that the negligent act in this case was touching the power line. But it might be considered negligent to have placed the crane beneath the wires. If the placement were considered negligent, does not that change the consideration of control? Who had the right to control the placement of the crane? In other cases the negligent act might not be conducive to isolation at all.

A major source of difficulty which courts have had in adopting and using a test to determine liability in borrowed servant cases comes from the fact that few courts have considered any policy reasons for placing liability on one employer instead of the other. The tests used by the courts in the past are based on principles derived to determine not which of two masters is liable but whether the master-servant relationship exists between the servant and one of the two employers.[16] The answer is ambiguous because the question is inappropriate.

An attempt by Professor Talbot Smith to develop an analysis of the borrowed servant problem, which avoids the ambiguities of the control and whose business tests, and which has a basis in accepted principle related specifically to determining which of two employers is liable for a borrowed servant, resulted in the scope of business test.[17] Professor Smith started with the basic assumption that "a business must pay the reasonable cost of its passage."[18] Thus a special employer should be liable for the torts of a bor-

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[14] *Id.* at 449, 450. These facts are (1) the lessor had no indication for what the machine was to be used, (2) the railroad foreman took charge of crane and servant, (3) the crane operator worked in close co-operation with other employees of the railroad, (4) the crane operator could not see into the gondola car and thus had to depend on hand signals given by the foreman, (5) lease of the machine was to continue for an indeterminate period at the option of the railroad, (6) the nature of work being done was within the scope of business of the railroad, and (7) the railroad foreman was an experienced crane operator.

[15] *Id.* at 451.

[16] *See, e.g.*, Standard Oil Co. v. Anderson, 212 U.S. 215 (1909), which is one of the most quoted cases in the field.

[17] Smith, "Scope of the Business: The Borrowed Servant Problem," *supra* note 10.

[18] *Id.* at 1248.

rowed servant if committed within the scope of his business just as a master should be liable for the torts of his servants committed within the scope of employment. Professor Smith looked at the problem primarily from the viewpoint of liability on the special employer. To use his test three questions must be asked: (1) Who is the borrowing (or hiring or renting) employer? (2) What is the normal scope of his business? (3) Has a portion of the normal business operation been farmed out?[19] Thus liability is imposed "if the questioned act is within the scope of the business, within its normal sphere of operations, [and] within the boundaries reasonably fixed by the usual conduct of similar enterprises."[20] Apparently the only time it would not follow is when "there has been in fact and in good faith a permissible (not inherently dangerous, etc.) farming out of the operation in question."[21] This farming out would require a prior agreement carried out in good faith so that in legal terms the borrowed servant would be an independent contractor as to the special employer while still being an employee of the general employer. Thus the general employer could be held liable. Under the scope of business test, the special employer is liable if the borrowed servant is used within the special employer's normal business activities while the general employer is liable if he is not so used.

To be meaningful, the scope of business test must be interpreted in the same manner as scope of employment. A few courts have utilized the scope of business test in reaching a decision.[22] It has been applied in these cases, not as originally intended, but in connection with the control test. Professor Smith's article was discussed favorably in *McFarland v. Dixie Machinery & Equipment Company* but the court failed to adopt his test saying:

> Whether the borrowed employee is doing something within the normal scope of the special employer's business is certainly a most important factor in determining the degree of severance and transfer [of employment from general to special employer] but so is the matter of who is exercising or may exercise the right of control in directing the details of his physical activities therein.[23]

The only case which used the scope of business test in the manner advocated is *White v. Bye*[24] in which the defendant, Bye, was the lessor of a crane and operator. Utley was the general contractor who leased the crane for use in construction of a Buick plant. Wilcox, an independent contractor, was erecting boilers in a power house. At the time of the accident, Wilcox had borrowed the crane and operator; his employees were directing the crane by

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19 *Id.* at 1249.

20 *Id.*

21 *Id.* at 1251.

22 McFarland v. Dixie Machinery & Equipment Co., 348 Mo. 341, 153 S.W.2d 67 (1941); Wylie-Stewart Machinery Co. v. Thomas, 192 Okla. 505, 137 P.2d 556 (1943); Hilgenberg v. Elam, 145 Tex. 437, 198 S.W.2d 94 (1946).

23 McFarland v. Dixie Machinery & Equipment Co., 348 Mo. 341, 351, 153 S.W.2d 67, 71 (1941).

24 342 Mich. 654, 70 N.W.2d 780 (1955).

hand signals. The negligence of the crane operator was unquestioned. The court used the whose business and control tests, but also used the scope of business test independently of the other tests. Concerning application of the scope of business test to the facts, the court asserted:

> Wilcox was in the boiler business . . . . The lifting of the cable in this instance required but a few moments which probably constituted a small fraction of the time Wilcox expended in erecting the boilers. Under such circumstances we feel that the use of a crane for that purpose was not within the normal scope of Wilcox's business.[25]

Thus the general employer (Bye) was held liable as employer while Wilcox and Utley were held not to be employers of the crane and operator and therefore not liable. This somewhat narrow interpretation of scope of business seems proper as compared with the broad interpretation given scope of employment because, in the borrowed servant cases, the plaintiff will always be allowed to recover against one of the employers; the question is simply which employer. First, scope of employment is necessarily a broader concept; an attempt is made to allow an innocent injured plaintiff to recover against one who, having some connection with the subject of litigation, can satisfy the judgment. Second, since in the borrowed servant cases the employee is almost always within the scope of business of the general employer, the same principle that a business should bear the cost of its passage applies to the general employer. The special employer is to be looked to first, but presumption of his liability should be rebuttable where the facts require.

One advantage of using the scope of business test is that it will normally produce a concrete result while the result in the control and whose business tests depends on the facts emphasized. Thus by use of the former analysis the parties to a litigation can more easily see who is ultimately liable without reference to a court and may be more able to settle their dispute by private agreement. Another advantage of the scope of business test is that if the parties do bring their case to trial, the court and jury need consider fewer of the facts and circumstances surrounding the employment of the borrowed servant. This would permit trials to be less time consuming. As for the appellate court, it need not merely accept the trial court's verdict as emphasizing the right facts but can apply the test itself in order to render trial court's decisions more uniform. Furthermore, the scope of business test should meet no opposition from those who value a spreading of the risk of loss. Under this standard a business concern will always be liable, assuming the special employer and general employer will be made joint defendants, which would seem to be the normal procedure under Rule 20 of the Federal Rules of Civil Procedure,[26] which has been adopted in many states.[27] This

[25] *Id.* at 663, 70 N.W.2d at 784.

[26] The pertinent part of Fed. R. Civ. P. 20 (a) is as follows:

> All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect

means that the loss can be passed on to those using the services or goods of the employer, which loss eventually devolves upon the general consumer. Alternatively, the employer could buy insurance and pass that cost onto the general consuming public.

The only criticism the principal case had of the scope of business test is not well taken because the court apparently misunderstood how the test is applied. The court said:

> [T]his test can result in much the same confusion as the control test due to the fact that in the borderline cases, as in the facts at bar, an operator leased with the crane is many times operating within the scope of business of both employers.[28]

It is true that the employee is frequently within the scope of business of both employers, but the result is still clear because the scope of business test applies in the first alternative to the special employer.

One problem inherent in the scope of business test is that of how narrowly or broadly scope of business should be interpreted. As indicated above in connection with the *White* case, valid reasons exist for a rather narrow interpretation. The only other forseeable problem in applying the scope of business test is that of determining when a special employer has farmed out a part of his normal business operations. This seems analagous to the respondeat superior problem of determining whether a person is a servant or an independent contractor. A large body of case law, which has arisen concerning the relationship of independent contractor, seems applicable to the farming out question. While a businessman can farm out a part of his work and hand it over free of liability to an independent contractor,[29] the courts have been very careful about what types of work[30] can be farmed out and under what circumstances.[31] This close scrutiny by courts concerning permissibility of farming out a portion of the business activities and delegating the accompanying liability is necessary; otherwise a businessman could avoid liability by a simple farming out of his more risk laden activities. Nor should the farming out to an insolvent independent contractor of a permissible activ-

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of or arising out of the same transaction, occurrence, or series of transactions or occurences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

27 As of 1965, 19 states had adopted all or substantially all the Federal Rules of Civil Procedure. Am. Jur. Desk Book Doc. No. 128 (Supp. 1965).

28 New York Cent. R.R. v. Northern Ind. Pub. Serv. Co., 221 N.E. 2d 442, 449 (Ind. Ct. App. 1966).

29 *See* Still v. Union Circulation Co., 101 F.2d 11, 13 (2d Cir. 1939).

30 Liability for inherently dangerous work cannot be delegated. Downey v. Union Paving Co., 184 F.2d 481, 485 (3d Cir. 1949).

31 *Cf.* Nelson v. American Cement Plaster Co., 84 Kan. 797, 115 Pac. 578 (1911).

ity relieve the special employer of liability for tortious conduct occurring within the scope of employment. A business should pay the cost of its passage. Professor Smith provides for this latter contingency by his requirement of a good-faith farming out. The requirement of good-faith can be broadly interpreted to prevent injustice in many cases on more or less equitable considerations, and certainly to allow the innocent injured partly to satisfy his judgment.

The scope of business approach applies in the first alternative to the special employer. Arguably, equally valid reasons exist for holding the general employer liable in the first alternative. Both the special and general employer benefit from the activity of the employee and both exercise some degree of control over the responsible employee. As mentioned above, the borrowed employee is working within the scope of the business of the general employer since in the normal case the general employer's business is renting servants. Therefore the same fundamental principle applies to the general employer that a business should pay the costs of its passage. One factor which seems to favor liability in the first alternative on the general employer is that the general employer, being somewhat of a specialist in his business, is in a better position to assess business risks and guard against them by purchasing insurance or acting as a self-insurer.

Another possible approach to determining liability in borrowed servant cases is to hold both the general employer and special employer liable and allow contribution between them. Professor Mechem argues that this would be a simple and practical solution since both employers are getting some kind of benefit from the work and both are exercising control in some sense.[32] A few cases adopt this dual liability.[33] Such an approach, however, merely restates the basic problem in terms of contribution. Who is to determine the degree of contribution and upon what basis? Should the injured party himself decide from whom he wishes to collect? If the court determines contribution, it must develop some method for doing so. Thus the courts are faced with the same problems they currently encounter.

The dual liability solution favored by Professor Mechem does make it easy for the injured third party plaintiff to recover, but the scope of business test or its converse also provides a sure recovery for the injured plaintiff. The major difference between the latter approach and the Mechem approach is that of certainty concerning who will bear the losses. Therefore the scope of business approach or its converse seems preferable because in this area certainty is arguably the major consideration once recovery by the plaintiff is assured. With recovery assured, it makes little difference which employer is ultimately liable since either can adequately insure against the risk without prohibitive cost and pass the cost on to the general public. It is suggested

32 F. Mechem, *supra* note 5, at 458.

33 *E.g.*, Dickerson v. American Sugar Refining Co., 211 F.2d 200 (1954); Siidekum v. Animal Rescue League, 353 Pa. 408, 45 A.2d 59 (1946); Gordon v. S.M. Byers Motor Car Co., 309 Pa. 453, 164 Atl. 334 (1932).

that there is equal justice in making either employer fully liable as long as the employer who is liable has foreknowledge of the certainty of his liability. A hard and fast rule with minimal exceptions holding either one of the employers fully liable would clear up the problem in this area.

STATUTES OF LIMITATION—ACTION NOT COMMENCED OR ATTEMPTED TO BE COMMENCED WITHIN MEANING OF THE OHIO SAVING STATUTE—*Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966)*—Seeking to recover damages for personal injuries arising out of a collision, which presumably occurred in Coshocton County, between an automobile driven by Richard A. Waters and his own automobile, Kenneth H. Mason filed his petition and praecipe in the Coshocton County Common Pleas Court on February 20, 1961, two days before the two-year statute of limitation had run. The praecipe directed that summons be issued to the sheriff of Washington County for service upon the defendant within that county, and service was promptly made. The defendant, however, was a resident of Morgan County and for that reason the court, on September 25, 1963, sustained his motion to quash the residence service made upon him by the sheriff of Washington County. On the day service was quashed, plaintiff caused an alias summons to be issued to the sheriff of Morgan County, which summons was left at defendant's usual place of residence in Morgan County. Defendant's motion to quash the second service was overruled, as was his motion to dismiss. He then answered plaintiff's petition setting forth, as a first defense, that the court lacked jurisdiction of his person, and, as a second defense, that the action was barred by the statute of limitation.

After trial, judgment was rendered in favor of the plaintiff, which judgment was affirmed by the Court of Appeals for the reason that section 2305.19 of the Ohio Revised Code, the "saving statute," gave plaintiff one year from the ruling on the motion to quash the original service to commence a new action.

On appeal, the Ohio Supreme Court held that plaintiff's first action was not "commenced or attempted to be commenced" under sections 2305.17 2305.19 of the Ohio Revised Code, and therefore the plaintiff did not have a right to bring the second action under the saving statute because the granting of the motion to quash the service of summons was not a *failure* under the saving statute.[1] The court reasoned that until the common pleas court acquired jurisdiction over the person of the defendant and the action had thereby been commenced, there is nothing to fail, either on the merits or otherwise.[2]

Section 2305.19 of the Ohio Revised Codes provides as follows:

> In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff

[1] Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966).

[2] *Id.* at 216, 217 N.E.2d at 216.

> fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, . . . may commence a new action within one year after such date . . . .[3]

This statute contains three prerequisites that must be met before a plaintiff is given another year to commence a new action: (1) the plaintiff must have commenced or attempted to commence an action; (2) subsequent to that, a judgment for plaintiff must be reversed, or plaintiff must fail otherwise than upon the merits; and (3) at the date of such reversal or failure, the time limited for the commencement of such action must have expired. The absence of any one of these prerequisites results in the plaintiff being denied the additional year in which to commence a new action under the saving statute.

The third prerequisite, that the statute of limitations has run, needs little discussion. The saving statute lifts the bar of the statute of limitation is those cases coming within its provisions. If at the time of the failure otherwise than on the merits, or the reversal, the statute of limitation has *not* run, there is no bar to be lifted, and the plaintiff may, independent of this statute, file a new petition and praecipe and commence a new action before the statute of limitation runs.

There has, however, been some question as to the date of reversal or failure; whether it is the date when the plaintiff fails in the trial court, or the date on which the appellate court affirms the trial court's judgment. In the majority of jurisdictions, the rule is that the date of affirmance on appeal, rather than the date of the trial court's judgment, constitutes the date of failure from which the one year extension period begins.[4] The earlier Ohio cases have taken the position that the date of failure is the date of the judgment in the trial court;[5] the more recent cases have adopted the majority view.[6]

The second prerequisite to the application of the saving statute, that either a judgment for plaintiff be reversed, or that he fail otherwise than upon the merits, deserves discussion in light of the instant case. Ohio courts have emphasized the words "fails" and "failure" in the saving statute. Thus, in *Siegfried v. Railroad Company*[7] the court held that a voluntary dismissal without prejudice was not a failure, stating: "To fail, implies an effort or purpose to succeed. One cannot, properly, be said to fail in anything he does not undertake, nor, in an undertaking which he voluntarily abandons."[8] In

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[3] Ohio Rev. Code Ann. § 2305.19 (Page 1953).

[4] Annot., 79 A.L.R.2d 1270 (1961).

[5] Atcherly v. Dickinson, 34 Ohio St. 537 (1878); Price v. Kobacker Furniture Co., 25 Ohio App. 44, 158 N.E. 551 (1927).

[6] LaBarbera v. Batsch, 5 Ohio App. 2d 151, 214 N.E.2d 443 (1966), *rev'd on other grounds*, 10 Ohio St. 2d 106, 225 N.E.2d—(1967); Colello v. Bates, 88 Ohio App. 313, 100 N.E.2d 258 (1950); Albers v. Great Cent. Transp., 32 Ohio Op. 200 (C.P. 1945).

[7] 50 Ohio St. 294, 34 N.E. 331 (1893).

[8] *Id.* at 296, 34 N.E. at 332.

Cero Realty Corporation v. American Manufacturers Mutual Insurance Company,[9] the Ohio Supreme Court held that a plaintiff failed otherwise than upon the merits within the meaning of the saving statute where his dismissal (though voluntary) was attributable to an adverse ruling of the court. The voluntary dismissal in *Cero* came only after the trial court had sustained a demurrer to the plaintiff's petition for misjoinder of defendants.

But merely failing is not enough to give the plaintiff the benefit of the saving statute; there must be a failure "otherwise than upon the merits." Merits implies a consideration of substance, not of form; of legal rights, not mere defects of procedure or the technicalities thereof.[10] In Ohio, the following have been termed failures otherwise than upon the merits: action in a federal district court which dismissed the action for want of jurisdiction of the subject matter;[11] action in a municipal court not having jurisdiction of the subject matter;[12] an improper crossclaim,[13] and an action dismissed because of misjoinder of defendants.[14] If the dismissal is by the *court* for any of the reasons enumerated in section 2323.05 of the Ohio Revised Code,[15] the plaintiff has been held to have the benefit of the saving statute.[16] Plaintiff's failure was held to be otherwise than upon the merits where service was quashed because served on return day,[17] or because the sheriff filed a false return.[18] The same result was reached where the court dismissed plaintiff's

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9 171 Ohio St. 82, 167 N.E.2d 774 (1960).

10 Kimberlin v. Stoley, 49 Ohio App. 1, 194 N.E. 885 (1934).

11 Wasyk v. Trent, 174 Ohio St. 525, 191 N.E.2d 58 (1963); Pittsburg, C., C. & St. L. Ry. v. Bemis, 64 Ohio St. 26, 59 N.E. 745 (1901).

12 Kittredge v. Miller, 12 Ohio C.C.R. 128 (Cir. Ct. App. 1896), *aff'd mem.*, 56 Ohio St. 779, 49 N.E. 1113 (1897).

13 Jacobs v. Haggerty, 97 Ohio App. 553, 127 N.E.2d 775 (1953).

14 Darling v. Home Gas & Appliances, Inc., 175 Ohio St. 250, 193 N.E.2d 391 (1963); Cero Realty Corp. v. American Mfrs. Mut. Ins. Co., 171 Ohio St. 82, 167 N.E.2d 774 (1960); Hizar v. Cowan, 51 Ohio App. 1, 199 N.E. 196 (1935).

15 Ohio Rev. Code Ann. § 2323.05 (Page 1953). An action may be dismissed without prejudice to a future action:

> (A) By the plaintiff; before its final submission to the jury, or to the court, when the trial is by the court;
>
> (B) By the court, when the plaintiff fails to appear at the trial;
>
> (C) By the court, for want of necessary parties;
>
> (D) By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence;
>
> (E) By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action;
>
> (F) By the plaintiff, in vacation, on payment of costs.

16 Siegfried v. Railroad Co., 50 Ohio St. 294, 34 N.E. 331 (1893).

17 Meisse v. McCoy's Adm'r., 17 Ohio St. 225 (1867).

18 Colello v. Bates, 50 Ohio St. 294, 34 N.E. 331 (1893); Mulcahy v. Mutach, 51 Ohio App. 407, 1 N.E.2d 651 (1935).

action for failure to amend[19] or to prosecute the action.[20] In *Burnett v. New York Central Railroad Company*,[21] a case involving improper venue, the United States Supreme Court stated by way of dictum that had petitioner's action been one arising under Ohio law, rather than the Federal Employers' Liability Act, he would have had an additional year in which to file his action in the proper court due to the operation of the Ohio saving statute.[22] This dictum is probably inconsistent with holdings of the Ohio cases decided before *Burnett*.[23] The Ohio cases have not distinguished improper venue from failure to obtain service of summons, and thus held the saving statute inapplicable because the action was not commenced or attempted to be commenced.

The third prerequisite, whether the plaintiff has commenced or attempted to commence an action within the meaning of the saving statute, is primarily a question of statutory interpretation. By its language, section 2305.17 of the Ohio Revised Code determines the manner in which an action is commenced for purposes of the saving statute.[24] Prior to its amendment effective October 30, 1965, there was conflict as to whether that section determined the manner of commencing an action for purposes of the saving statute. Some courts held that section 2703.01 of the Ohio Revised Code[25]

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[19] Cassidy v. Ohio Pub. Serv. Co., 83 Ohio App. 404, 83 N.E.2d 908 (1947); Rudd v. City of Reading, 32 Ohio Op. 89 (C.P. 1941).

[20] Lamb v. Sebach, 52 Ohio App. 362, 3 N.E.2d 651 (1935).

[21] 380 U.S. 424, 426 (1965).

[22] *Id.* at 432.

[23] *See* Hoehn v. Empire Steel Co., 172 Ohio St. 285, 175 N.E.2d 172 (1961); Timens v. Bernard Pipe Line Co., 4 Ohio App. 2d 249, 212 N.E.2d 73 (1965).

[24] Ohio Rev. Code Ann. § 2305.17 (Baldwin 1964). Commencement of Action.

> An action is commenced within the meaning of sections 2305.03 to 2305.22, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year.

Before its amendment effective October 30, 1965, this statute read:

> An action is commenced within the meaning of sections 2305.03 to 2305.22, inclusive, and section 1307.08 of the Revised Code, as to each defendant, at the date of the summons which is served on him or on a codefendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action is commenced at the date of the first publication, if it is regularly made.
>
> Within the meaning of such sections, an attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within 60 days.

[25] Ohio Rev. Code Ann. § 2703.01 (Baldwin 1964). Summons to be issued on petition.

> A civil action must be commenced by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.

provided the manner of commencing an action for purposes of the saving statute, and that section 2305.17 determined only the date of commencement for purposes of the statutes of limitation,[26] the date of commencement not being a factor in the application of the saving statute. However, the amendment of section 2305.17 adopted the majority view that that section provided the manner of commencing an action for the purposes of the saving statute.

The 1965 amendment to section 2305.17 may have the effect of enlarging the application of the saving statute in those cases where the plaintiff has attempted to commence his first action. This effect may come about because amended section 2305.17 no longer contains the phrase "attempted to be commenced." Prior to the amendment Ohio courts had held that these identical words should have the same meaning in both Code sections.[27] This, however, had the effect of severely limiting the application of the saving statute due to the restricted meaning given "attempted to be commenced" as used in section 2305.17, and thus in the saving statute. The courts had held that there is no attempt to commence an action within the meaning of either section unless the defendant is properly served within 60 days of the time the plaintiff files his petition and praecipe.[28] The unfortunate result of such an interpretation, and one clearly not compelled by the plain meaning of the language of section 2305.17, was to read "attempted to be commenced" out of the saving statute. Such a construction is wrong because in any situation in which the court would hold that the plaintiff had "attempted to commence" his action, the court would also hold that the plaintiff had "commenced" his action. Since the Ohio courts rejected the idea that "attempted to be commenced" in the saving statute had reference to a situation involving less than proper service of summons,[29] that phrase had no effect upon the application of the saving statute. The deletion of the portion of section 2305.17 relating to an "attempt to commence" an action frees the courts to look elsewhere for the meaning of that phrase as it is used in the saving statute. Furthermore, since section 2305.17 now defines commencement as service within one year of the filing of the petition and praecipe, it would seem that courts will be compelled to define "attempted to be commenced" as something less than that, thus precluding the continuation of the old meaning of that phrase wherein an attempt to commence occurs where service is made within 60 days. "Attempted to be commenced" could be used to describe a situation where the defendant is served within the one year period, even though not properly, as in the *Waters* case. This would seem to be a logical dividing line between an action commenced and an action attempted to be commenced.

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[26] Pilgrim Distrib. Corp. v. Galsworthy, Inc., 148 Ohio St. 567, 76 N.E.2d 382 (1947); Crandall v. Irwin, 139 Ohio St. 463, 40 N.E.2d 933 (1942); Templeman v. Hester, 65 Ohio App. 62, 29 N.E.2d 216 (1940).

[27] Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966); Oliver v. Dayton, 91 Ohio L. Abs. 419, 191 N.E.2d 741 (C.P. 1963).

[28] Cases cited note 27 *supra;* Juhasz v. Corson, 171 Ohio St. 218, 168 N.E.2d 491 (1960); Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285 (1954).

[29] Cases cited note 28 *supra.*

There is some authority for drawing the line at that point. The first Ohio saving statute, enacted in 1831,[30] was similar to the present statute with one exception: it did not contain the phrase "or attempted to be commenced." Thus the original statute saved only those actions which had actually been commenced, that is, where the defendant was properly served. In 1894 the saving statute was amended to include not only actions already commenced, but also those in which commencement had only been attempted.[31] If the courts were correct in their view that commencement was defined in terms of service, it would appear that it was the legislative purpose to extend the protection of the saving statute to those situations where there had been less than effective service of summons upon the defendant.

At least two Ohio courts have held that there may have been an attempt to commence an action for purposes of the saving statute even when valid service is not made upon the defendant. In *Mulcahy v. Mutach*,[32] the saving statute was held applicable where the action had not been commenced within the meaning of section 2305.17 because the defendant had been served at his place of business and the sheriff's return indicated that there had been proper residence service. After defendant's motion to quash service had been sustained, the court permitted the plaintiff to refile under the saving statute. Since there was no effective service, and therefore no commencement, this court must have been holding that there was an *attempt* to commence.[33] *Colello v. Bates*[34] involved another false return. The court followed *Mulcahy*, holding that plaintiff had one year from the date of dismissal to refile under the saving statute. Therefore, the courts would not be without precedent in holding that "attempted to be commenced" in the saving statute includes those cases in which the defendant is served within the one year period of section 2305.17, but the service is not properly made. A more difficult question concerning "attempt to commence" is in determining the minumum a plaintiff could do and still be held to have attempted to commence an action. It would seem that he must at least file a petition so it can be said that he has something to fail. It would also seem reasonable that some bona fide attempt to serve the defendant must be made.

The final point to be discussed concerning the saving statute is the apparent confusion existing in the Ohio courts with respect to the elements of its application. In the *Waters* case the Ohio Supreme Court held the saving statute inapplicable because the second element of the statutes application was missing, a failure otherwise than upon the merits. Its reason for so hold-

30 51 Ohio Laws 61 (1853).

31 91 Ohio Laws 73 (1894).

32 51 Ohio App. 407, 1 N.E.2d 651 (1935).

33 An exception to this rule is where a minor defendant is not served in the manner prescribed by § 2703.13 of the Ohio Revised Code. There the saving statute has been held inapplicable, almost without exception. *See* Miller, "Failure to Proceed Correctly Against Minor Defendants," 23 Ohio St. L.J. 461 (1962). This unfortunate situation has been relieved to some extent by the enactment in 1965 of § 2309.261.

34 88 Ohio App. 313, 100 N.E.2d 258 (1958).

ing was that the action must first be commenced, or attempted to be commenced, before there could be a failure otherwise than upon the merits. As authority for the position, the court relied mainly upon *Kossuth v. Baer*.[35] In that case the plaintiff filed his petition and praecipe causing summons to issue, but no service was ever made upon the defendant. After the statute of limitation had run, the court ordered the petition dismissed since no service was obtained. Plaintiff again filed suit, claiming the right to do so under the saving statute. The court held the saving statute inapplicable because the first action was never commenced. In other words, notwithstanding the filing of the petition and praecipe and the issuance of summons, no case ever matured to the point where the court had any jurisdiction over the defendant or had the power to make any order based on the allegations in the petition filed. The court stated that there was no pending case to be "dismissed," so merely struck it from the files. "Therefore, as to the petition filed in Lorain County, we hold that plaintiff did not fail 'otherwise than upon the merits.' It seems axiomatic that a nonexistent case cannot be dismissed."[36] Clearly, when the court is saying that plaintiff did not fail otherwise than upon the merits, it is not expressing the thought that plaintiff failed on the merits. Rather, the court is saying plaintiff did not fail at all, because he did not have an action to fail, either on the merits or otherwise.

Logically it may be correct to say that since there was no commencement, there was no attempt, and if no attempt, there is nothing to fail; if there is nothing to fail, then plaintiff cannot fail in the manner necessary to receive the benefits of the saving statute. The court, nevertheless, should not base its decisions upon such a peripheral point. As stated above, there are three separate elements necessary for the application of the saving statute; where any one is missing, it has no application. The commencement or attempted commencement of plaintiff's action is one of the elements. Since the court in *Mason* had already decided the action was not commenced or attempted to be commenced, this alone would have been sufficient reason to hold the statute inapplicable. Grounding the decision on plaintiff's not failing otherwise than upon the merits only confuses the meaning of the phrase, and places unintended emphasis upon the word "fails."

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[35] 161 Ohio St. 378, 119 N.E.2d 285 (1956).

[36] *Id.* at 384, 119 N.E.2d at 288.