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Case Comments

Constitutional Law: Exclusion of Women From Jury Does Not Deny Equal Protection

Defendant, a woman, was indicted for murder in Mississippi, a state which by statute prohibits women from serving on either grand or petit juries. Claiming that the total exclusion of women from jury service denied her equal protection of the laws as guaranteed by the fourteenth amendment, defendant moved to quash the indictment. The motion was sustained in the lower court. On appeal the Supreme Court of Mississippi reversed, holding that the legislature has the power to prescribe qualifications for jurors, and that a classification based on sex is reasonable and thus does not deny the defendant equal protection of the laws. State v. Hall, 187 So. 2d 861 (Miss. 1966).

Drawing from the English common law, the framers of the Constitution preserved specifically the common law right to trial by jury for all crimes triable in the federal courts. Since

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1. See Miss. CODE ANN. § 1762 (Supp. 1964).
2. Since the Magna Charta, the legislative body has had the power to prescribe the qualifications for jury service so as to keep the jury abreast with the demands and conditions of the day. Strauder v. West Virginia, 100 U.S. 303 (1879); Tynan v. United States, 297 Fed. 177 (9th Cir.), cert. denied, 266 U.S. 604 (1924).
3. The court relied upon the following language in Strauder v. West Virginia:
   "We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. . . . Its aim was against discrimination because of race. . . ."
100 U.S. 303, 310 (1879). Strauder held, inter alia, that discrimination by race in the selection of jurors was a denial of equal protection of the laws as guaranteed by the fourteenth amendment. The dictum cited above, however, became the cornerstone of the states’ authority to exclude women from the jury rolls. See, e.g., Brown v. Allen, 344 U.S. 443 (1952); Williams v. South Carolina, 237 F. Supp. 360 (E.D.S.C. 1965); Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 656, cert. denied, 284 U.S. 684 (1931).
5. U.S. CONST. art. III, § 2, cl. 3.

Although the Constitution does not command that the states adopt trial by jury, when such an institution is adopted, its operation must be fair and impartial within the constitutional limits. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Patton v. United States, 281 U.S. 276 (1930).
the common law jury was confined to males, a “jury” in the minds of the framers of the Constitution undoubtedly meant a body of twelve men duly impaneled as the triers of fact. Consequently, insofar as the Constitution required a trial by jury, it did not require the seating of women thereon.

With the expansion of women’s rights, many states statutorily departed from the traditional common law exclusion of women from jury service. These enactments were upheld despite the contention that a jury containing women violated the constitutional right to a trial by a jury of twelve men. However, the Constitution and the laws of the United States long remained silent with respect to a woman’s right to sit on a state or federal jury, permitting women to sit as jurors only if they were so qualified in the state in which the federal court sat. In 1957, the Civil Rights Act conferred upon women the right to sit as jurors in any federal court, regardless of state law. Mississippi is the only state which now excludes women from jury service by state law.

In response to defendant’s contention that she was denied equal protection, the court in the instant case held that this

6. 3 Blackstone, Commentaries 362 (6th ed. 1774). See Note, Jury Service for Women, 12 U. Fla. L. Rev. 224 (1959). In one instance the common law apparently recognized that women were competent to serve as jurors. The exception arose when a woman claimed pregnancy either to establish the fact that there was an heir to the estate or to stay execution for a capital crime until she delivered the child. Women jurors were empaneled to resolve this issue of fact. 3 Blackstone, op. cit. supra at 362.


8. In some states the legislatures passed laws requiring jury duty of women, while others merely gave them the privilege. See Hoyt v. Florida, 388 U.S. 57 (1961); Fay v. New York, 332 U.S. 261 (1947); State v. Rosenberg, 155 Minn. 37, 192 N.W. 194 (1923). See generally Crozier, supra note 4; Rudolph, Women on Juries—Voluntary or Compulsory, 44 J. Am. Jud. Soc'y 206 (1960-61); Sex, Discrimination, and the Constitution, 2 Stan. L. Rev. 691 (1950). In England, the Sex Disqualification Removal Act, 1919, 9 & 10 Geo. 5, c. 71, § 2, provided that all persons qualified and liable to serve as jurors shall be summoned to serve on juries without distinction of sex.


10. See Wright v. United States, 165 F.2d 405 (8th Cir. 1948); 62 Stat. 951 (1948).


clause in the fourteenth amendment was intended to apply only to instances of racial inequality. In addition, the court rejected the argument that the expansion of women's political rights included their legal rights, stating that jury service was not one of the privileges and immunities accorded to women as citizens either by the Constitution or by a broad interpretation of the nineteenth amendment. Furthermore, since the power to establish qualifications for jurors is in the legislature of the state, the only standard that need be observed is that any classification be reasonable. Since classification by sex was not unreasonable in light of the legislature's determination that women should be able to continue their service as mothers, wives, and homemakers and be spared the "noxious atmosphere" of the courtroom, the court concluded that the defendant was not deprived of her right to equal protection.

Although the equal protection clause of the fourteenth amendment may have been initially designed to preclude state imposed discriminations as to race, recent applications have made it clear that other unreasonable classifications are also pro-

13. The court relied on the reasoning used in Strauder v. West Virginia, 100 U.S. 303 (1879), and the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), to the effect that the fourteenth amendment was intended to apply only to cases of racial discrimination. Recent cases, however, have tended to expand the amendment. See notes 17, 20 infra.

14. 187 So. 2d at 865-66. See State v. Walker, 192 Iowa 823, 185 N.W. 619 (1921); State v. Emery, 224 N.C. 581, 31 S.E.2d 858 (1944). The instant court drew an analogy from Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), where the Court held the right to vote was not one of the privileges and immunities of citizenship such that the fourteenth amendment automatically conferred upon women the right to vote.

When state statutes provide that jurors shall be selected from the body of electors, the effect of the amendment is to enlarge the eligible list ipso facto so as to include women. See United States v. Roemig, 52 F. Supp. 857 (1943); State v. Walker, supra; State v. Rosenberg, 155 Minn. 37, 192 N.W. 194 (1923). Contra, In re Opinion of the Justices, 237 Mass. 591, 130 N.E. 685 (1921).

15. The Constitution only requires that jury selection represent a cross-section of those eligible for jury service within the community, see Brown v. Allen, 344 U.S. 443 (1952); Smith v. Texas, 311 U.S. 128 (1940); Strauder v. West Virginia, 100 U.S. 303 (1879), not that classes in the community be mathematically represented. See United States v. Flynn, 106 F. Supp. 966 (1952); United States v. Foster, 83 F. Supp. 197 (1949). However, in Flynn, the court remarked that each class must be fairly represented and that the requirements are met if the state does not "deliberately or systematically discriminate against either sex . . . ." 106 F. Supp. at 980.

16. 187 So. 2d at 863. Chief Justice Ethridge, dissenting, felt the question of whether absolute denial of the right to serve on a jury on the basis of sex alone was a violation of the fourteenth amendment was not considered.
hindered. Support for a broadened interpretation regarding qualifications of jurors is found in *Hernandez v. Texas* in which the Supreme Court held the equal protection clause applicable to discrimination in jury service based on nationality. In so doing, the Court noted that it has long been recognized that the exclusion of a class of persons from jury service on grounds other than race or color may deprive a defendant who is a member of that class of equal protection of the laws. Significantly, a three judge court has recently held the total exclusion of women from jury service an arbitrary classification and therefore a denial of equal protection of the laws. The court stated that:

Jury service is a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens, regardless of sex. The Alabama statute that denies women the right to serve on juries in the State of Alabama therefore violates that provision of the Fourteenth Amendment to the Constitution of the United States that forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." The plain effect of this constitutional provision is to prohibit prejudicial disparities before the law. This means

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19. *Id. at 477.*
20. *White v. Crook,* 251 F. Supp. 401 (1966). The court speaking directly to the issue of whether the total exclusion of women from jury service constitutes a denial of the equal protection of the laws said:

The argument that the Fourteenth Amendment was not historically intended to require the states to make women eligible for jury service reflects a misconception of the function of the Constitution and this Court's obligation in interpreting it. The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. *It is therefore this Court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society. When such an application to the facts in this case is made, the conclusion is inescapable that the complete exclusion of women from jury service in Alabama is arbitrary.*

*Id. at 408.* (Emphasis added.)

The White court distinguished *Hoyt v. Florida,* 368 U.S. 57 (1961), and *Fay v. New York,* 332 U.S. 261 (1947), in that those cases were concerned with systems of jury selection under which service by women was on a voluntary basis, while in Alabama, as in Mississippi, women were totally excluded.
prejudicial disparities for all citizens—including women.\textsuperscript{21}

Therefore, there seems little doubt that the Constitution proscribes sex as a basis for classification with regard to the right of a citizen to participate in the fundamental processes of government.\textsuperscript{22}

The rationale that excluding women from jury service permits them to continue their primary function as mothers, wives and homemakers, and protects them from the filthy, obscene, and noxious atmosphere of the courtroom does not meet the constitutional requirement of reasonableness. That some cases do contain a certain amount of filth and obscenity cannot be denied, but to infer that it is so rampant in the American courtroom that women should be totally excluded from jury service is far from reasonable. It is absurd that a female defendant can be defended by a female attorney, prosecuted by a female prosecutor, judged by a female judge, confronted by female witnesses, all before an audience of female spectators and yet, because women are not to be exposed to the "noxious atmosphere" of the courtroom, be required to have an all male jury.

Further, the argument that women as a class are so engaged in the needs of the home that they would be unable to perform adequately as jurors is questionable. Only a small portion of mothers have, at any one time, children who require constant care, and these women could easily be excused from jury duty. In this respect, women differ little from men who are engaged in daily occupations.

Admitting \textit{arguendo} that the exclusion of women from jury service is a reasonable classification complying with the requirements of the equal protection clause, such a law may be unreasonable as a violation of the defendant's rights under the due process clause.\textsuperscript{23} The sixth and fourteenth amendments guarantee to all defendants the right to a trial by an impartial jury.\textsuperscript{24} Arguably, the systematic exclusion of women from the grand jury in \textit{Hall} deprived the defendant of the impartiality

\textsuperscript{21} 251 F. Supp. 401, 408 (1966).
\textsuperscript{22} See note 11 \textit{supra}. By the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000(e), the federal government has prohibited, with respect to labor, discrimination based solely on sex.
\textsuperscript{23} \textit{Cf.} Billingsley v. Clayton, 359 F.2d 13 (5th Cir. 1966).
\textsuperscript{24} Gideon v. Wainwright, 372 U.S. 335 (1963), and Pointer v. Texas, 380 U.S. 400 (1965), have regarded separate provisions of the sixth amendment as being included in the protective provisions of the fourteenth amendment.
guaranteed by the fourteenth amendment.\textsuperscript{25} In \textit{Fay v. New York},\textsuperscript{26} the Supreme Court held that the exclusion of women from jury service did not deprive the defendant of due process of law stating that “woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free... if his state has lagged behind what we personally may regard as the most desirable practice... .” However, implicit in the Court’s opinion and expressly stated by the dissenters is the idea that judgment by an impartial “cross-section” of society cannot be obtained if women are excluded, either by law or practice, from jury service.

\textit{Ballard v. United States},\textsuperscript{27} decided earlier in the same term as \textit{Fay}, involved the denial of the federal statutory right of women to serve as jurors in federal courts sitting in states which allow women jurors. The dissenters in \textit{Fay} spoke as the majority and per Justice Douglas, expressed their feeling that:

> The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make one iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.\textsuperscript{28}

Thus, in its role as trier of fact, it is highly unlikely that an all male jury, because it lacks the experience, attitudes and values of one-half of the community, provides the impartiality needed to guarantee a fair trial.\textsuperscript{29}

Moreover, the role of the jury can no longer be said to be

\textsuperscript{25} Cf. \textit{Sheppard v. Maxwell}, 384 U.S. 333 (1966). See also \textit{Griffin v. Illinois}, 351 U.S. 12 (1956), where the Court regarded the Illinois law as being an unreasonable classification with regard to indigents, thus a denial of equal protection, and a denial of due process by foreclosure of appellate review to those who were members of the unreasonably excluded class.

There is no expressed constitutional provision as to the classes of persons entitled to render jury service, but the law does require that qualified persons not be excluded from jury service on a class basis. Systematic and purposeful exclusion of qualified persons cannot be reconciled with the American concept of an impartial trial. Prejudices against certain classes tend to affect the judgment of jurors and result in a denial to members of such classes the full and complete enjoyment of constitutional guarantees. . . .

\textit{Billingsley v. Clayton}, 359 F.2d 13, 15-16 (5th Cir. 1966).

\textsuperscript{26} 332 U.S. 261, 290 (1947).

\textsuperscript{27} 329 U.S. 187 (1946).

\textsuperscript{28} \textit{Id.} at 193-94.

solely that of trier of fact. "[T]he jury can be said to do equity, to legislate interstitially, to implement its own norms, or to exhibit bias." If it be true that the jury acts to subdue the inevitable harshness of the law and to act as a buffer between the state and the people, then to ignore the important status of women in society is to defeat both the jury’s role as trier of fact and as a societal check supplementing our constitutional protections.

*State v. Hall* is a vestige of the provincial attitudes which have surrounded the inferior status of women in society. It seems clear that systematic exclusion of women from jury service, either by statute or by practice, creates grave constitutional questions regarding a defendant’s rights under the equal protection and due process clauses of the fourteenth amendment. The Supreme Court has recognized the destructive effects of class discrimination in many areas, especially when the rights of a criminal defendant are involved. Consequently, predicting the future demise of sex as a discriminating factor in jury service seems clearly warranted.

**Damages: Curtailment of Life Expectancy**
**Not Allowed as Separate Element**

While aboard ship plaintiff suffered an irreversible heart injury which shortened his life expectancy. He brought an action under the Jones Act for personal injuries, contending that the negligence of defendant’s agents aggravated his heart injury and further curtailed his life expectancy. In response to a specially framed interrogatory, the jury returned a 25,000 dollar special award for the further curtailment of plaintiff’s life expectancy. The trial judge granted defendant’s motion to modify the verdict by eliminating this special award. The Third Circuit reversed and remanded for a new trial on the issue of damages, holding that recovery for curtailment of life expectancy may not be allowed as a separate element of damages, but may be included under the usual rules of damages. *Downie v. United States Lines Co.*, 359 F.2d 344 (3d Cir. 1966).

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Although no American court, with one possible exception, has allowed recovery for the curtailment of life expectancy as an independent element of damages, compensation for this injury has been awarded under related categories. Thus, damages may be allowed for the plaintiff's fear and apprehension of a premature death and an award for loss of future earnings generally is based upon the plaintiff's life expectancy before the injury. English and Canadian courts, however, have long permitted recovery for the curtailment of life expectancy as an independent element of damages.

A fear of speculative awards has been the most common reason given by American courts for refusing to allow recovery for

3. See Sox v. United States, 187 F. Supp. 465 (E.D.S.C. 1960). An award was given to a child who had suffered severe and permanent prenatal injuries. The trial judge based this award on, "(a) compensation for the injury and resulting impairment of mind and body . . . and (c) deprivation of normal life expectancy." Id. at 469. The trial court in Downie discussed Sox: "There is no discussion of the question, no citation of authority, and it is not clear whether the court regarded the deprivation of expectancy as a separate item of recovery, or as merely bearing on the extent of the injury. We do not regard the case as a trustworthy precedent." Downie v. United States Lines Co., supra note 2, at 196.


the curtailment of life expectancy. This reasoning has been criticized on the ground that such an award is no less speculative than that allowed for the loss of future earnings. Moreover, the rule against speculative awards applies only to uncertainty of causation; once the injury is shown to have resulted from the defendant's wrong, the difficulty in ascertaining the amount of damages should not bar recovery.

Another objection to allowing such an award is that it would result in duplication of damages, since the jury already takes the curtailment of the plaintiff's life expectancy into account when assessing an award for fear and apprehension of a premature death. It would seem, however, that this objection weighs more heavily in favor of allowing the award. Since such combined awards are in reality being granted, it would seem advantageous to recognize an award for curtailment of life expectancy as an independent element of damages, so that excessive awards under both categories may be better controlled.

Although the objections that have been raised to the award may not be persuasive, neither do the English decisions provide a sound basis for allowing it. The English position is that one has a right to his normal life expectancy, and an impairment of that right requires compensation. While this seems to be more

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12. Rhone v. Fisher, 224 Md. 223, 167 A.2d 773 (1961); 13 Syracuse L. Rev. 158 (1962). English courts consider these two awards to be conceptually independent. Thus, in Rose v. Ford, [1937] A.C. 826, the deceased never completely regained consciousness after her injury. The trial judge refused to allow an award for curtailment of life expectancy on the apparent assumption that the basis of the award was the victim's fear and apprehension of a premature death. The Court of Appeals held that the trial judge was mistaken in this view, since the award is for an absolute loss, independent of the victim's state of mind. Rose v. Ford, [1936] 1 K.B. 90. This view was sustained by the House of Lords on further appeal. Rose v. Ford, [1937] A.C. 826.


14. This rule was stated by Lord Wright, concurring in Rose v. Ford, [1937] A.C. 826, 848:

A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given. ... In one sense it
of a conclusion than a justification, one commentator has found a philosophic basis for this position, arguing that one's interest in his life has a dimension of length as well as breadth:

Surely the victim suffers as real a loss in such a case [the shortening of his life expectancy] as another sustains from a crippling injury which narrows, without shortening, the free expression of his personality. To assess the dimensions of interests of personality we are bound by common sense to multiply the breadth of life by its length.

By this analogy the reduction of the plaintiff's life expectancy correspondingly reduces the total amount of enjoyment that he would normally derive from his existence. Thus, an award of damages would be justified as compensation for the enjoyment the plaintiff will lose due to his shortened life expectancy.

The court in the instant case refused to allow an award for the curtailment of life expectancy as an independent element of damages because of the danger of a speculative award. It would, however, allow recovery for the loss of certain “measurable components of injury” resulting from such curtailment, which are to be ascertained by the usual rules of damages in tort actions.

Under these rules, recovery would be allowed for “the physical and mental effects of the injury on his [plaintiff's] ability to engage in those activities which normally contribute to the enjoyment of life . . . .” The court brought the curtailment of

is true that no money can be compensation for life or the enjoyment of life, and in that sense it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all because none could be adequate.

15. See Smith, supra note 13, at 788-89.
16. Id. at 789.
17. In commenting on the English rule, the court stated: We believe that the rule is not feasible because of the incalculable variables which may enter into any attempt to place a value on life; absent some workable criteria, a damage award would be base speculation. Although we are unwilling to adopt the per se theory it does not follow that damages for the curtailment of one's life expectancy, based on measurable components of injury, are not recoverable. We believe that a fair and just result can be achieved by resort to the rules of damages usually applied in tort actions.

359 F.2d at 347.
18. 359 F.2d at 347. “Examples of provable elements are: inability to dance, bowl, swim or engage in similar recreational activities; inability to perform customary household chores; and, inability to engage in the usual family activities.” Id. at 347 n.3. Elements allowed by other courts include loss of ability “to enter into and enjoy these boyhood games and pastimes . . . .” Kasiski v. Central Jersey Power & Light Co., 4 N.J. Misc. 130, 133, 132 Atl. 201, 202 (Sup. Ct. 1926), to play the violin, Scally v. W. T. Garratt & Co., 11 Cal. App. 138, 104 Pac. 325 (1909), and to enjoy “the natural and ordinary uses of a healthy mind.
life expectancy under this rule by classifying it as a permanent injury. Compensation for the lost years is then to be given by basing the award allowed by the above rule upon the plaintiff's normal life expectancy. It thus appears that the Downie rule stands for two propositions: (1) the award for the plaintiff's loss of ability to engage in activities which are prohibited to him during his lifetime is to be based on his normal life expectancy, and (2) the plaintiff's award for the curtailment of his life expectancy is to be restricted to "those activities which normally contribute to the enjoyment of life."

The result brought about by part (1) of the rule would seem to be sound. The defendant should not be allowed to mitigate his damages by showing that he has shortened the plaintiff's life expectancy. Otherwise, as the Downie court noted, the tortfeasor would be benefited at the expense of his victim. The limitation in part (2) of the Downie rule distinguishes it from the English decisions, where no attempt is made to condition the plaintiff's recovery upon the loss of his ability to engage in certain activities. This limitation in the Downie rule has two unfortunate effects. First, the interpretation of key words in the rule such as "activities" and "normally" could unjustifiably limit the plaintiff's award. The court's enumeration of certain provable elements such as the "inability to dance, bowl, swim or engage in similar recreational activities . . . ." suggests that the word activities in the rule may be limited to those pursuits involving physical exertion. However, since the plaintiff will be precluded from partaking in any activities after his death, he is no less deprived of the opportunity to follow such pursuits as the enjoyment of fine wines, a parent's enjoyment in the upbringing of his children, contemplation of beauty, or the quiet reflection on one's life. Therefore, there would seem to be little justification for limiting activities to pursuits involving physical exertion. The Downie rule requires that compensable


19. It is assumed that the plaintiff's injury, in addition to curtailing his life expectancy, also prohibits him from engaging in some of his usual activities. This would seem to be the usual situation. However, if the plaintiff could prove no present disabilities, he could recover only under part (2) of the rule.

20. 359 F.2d at 348.

21. Id. at 347.

22. Id. at 351 (dissenting opinion).

23. It may, of course, be easier for the plaintiff to prove his pursuit of physical activities, since they can be easily identified by disim-
activities be those which normally contribute to the enjoyment of life. Though bowling apparently meets this requirement, one might speculate about a plaintiff who finds enjoyment in solving complex mathematical problems. It seems clear that this limitation would allow each plaintiff only partial recovery, unless all his pleasures are considered normal.

Second, these limitations in the Downie rule have an additional unfortunate effect. A trial judge would have to make the difficult decision of what activities come within the rule, remembering that an addition to or wrongful omission from the undefined list of compensables would point the way for an appeal.24

In comparison, the English courts have been more concerned with the individual plaintiff's loss of future happiness. The case of Benham v. Gambling25 provided several criteria by which this loss may be measured. For example, the award is to be measured with respect to the circumstances of the particular plaintiff rather than judged by a presumption "that human life is, on the whole, good."26 Naturally, activities enjoyed by the plaintiff would be relevant in assessing the award. The problem of speculative damages has been partially solved by reliance upon precedent to develop standards as to what constitutes a reasonable award. Thus, the assumption by the House of Lords in Rose v. Ford27 that 1000 pounds is a reasonable award for the curtailment of the life expectancy of a twenty-three year old girl to four days has been adopted by the trial courts as the standard for estimating awards in other cases.28 Though the adoption of an arbitrary standard may be a tenuous solution, it

24. See 359 F.2d at 351 (dissenting opinion).
26. Id. at 166. Several other criteria were developed in this case. For example, the length of time that the plaintiff's life expectancy has been shortened is relevant though not determinative, for "the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life." Ibid. Also, smaller awards should be given in the case of a small child because of the greater uncertainty in his future. For an analysis of the criteria developed in Benham v. Gambling, see Smith, supra note 13, at 810-12.
28. Rose v. Ford provided a convenient measuring rod for many harassed judges . . . . [I]t is to their credit that they generally used the standard as a balance wheel for their reckoning, not as a substitute for independent analysis; as a ceiling rather than as a floor.

Smith, supra note 13, at 807. But see Kahn-Freud, Expectation of Happiness, 5 Modern L. Rev. 81 (1941).
does suggest a means of assessing awards with reasonable consistency.

Apparently the Downie court attempted to find a compromise. It drew back somewhat from the American rule prohibiting recovery for the curtailment of life expectancy and permitted the plaintiff to receive partial compensation for this loss. Unfortunately, however, the guidelines provided by the court are unworkable and arbitrary. If damages are to be given for the wrongful curtailment of life expectancy, their basis should be made as comprehensive as possible by adopting the English method of assessing the award.

Decedent’s Estates: California Law Allows Residents of Soviet Union To Inherit

Decedents, who died domiciled in California, left real and personal property to beneficiaries who were residents and citizens of the Soviet Union. Under California law a nonresident alien may take as a beneficiary of a California estate only upon proof that inheritance rights are granted to American heirs of estates in the country of the beneficiary. The California Supreme Court held that inheritance rights are granted to citizens of the United States by the Soviet Union and allowed the Soviet citizens to inherit. In re Estate of Larkin, 52 Cal. Rptr. 441, 416 P.2d 473 (1966).

The California statute requiring reciprocity of inheritance rights was first enacted in 1941 during a nation-wide movement seeking to prevent the transfer of American estates to persons residing in the Axis countries. At this time, it was widely

1. CAL. PROB. CODE § 259.2.
2. CAL. STAT. ch. 895, § 1 (1941).

Several states enacted statutes similar in substance to the California statute. See, e.g., IOWA CODE ANN. § 567.8 (Supp. 1964); MONT. REV. CODE ANN. § 91-520 (1964); OKLA. STAT. tit. 60, § 121 (1966); ORE. REV. STAT. § 111.070(1)(a) (Supp. 1957). Other states enacted statutes requiring the nonresident alien to show that he would have the use, benefit and control of all property sent to him. See, e.g., MASS. ANN. LAWS ch. 206, § 27A (Supp. 1964); MICH. STAT. ANN. § 27.3178 (306a) (Supp. 1959); N.J. REV. STAT. 3A:25-10 (1953); N.Y. SUFF. CT. ACT § 269-a.
feared that property passing to such persons would be confiscated by one of the totalitarian governments, and used against American interests.\(^4\) State legislators were also motivated by the refusal of the German government to allow citizens of the United States to take as beneficiaries of German estates.\(^5\)

Upon the elimination of the threat of confiscation by a hostile German government in 1945, the California statute was amended to place the burden of establishing a lack of reciprocity on the person challenging the right of the nonresident alien to inherit.\(^6\) The purpose of the amendment was to relieve the hardship caused by withholding badly needed funds from residents of defeated and occupied countries.\(^7\) However, in 1947, the California legislature repealed the 1945 statute and enacted a statute essentially identical to the 1941 legislation.\(^8\)

Under the present statute, the California courts have usually found that the Soviet Union and other communist countries do not grant reciprocity.\(^9\) These decisions have been premised upon a dislike of the Communist legal and judicial system, the existence of laws discriminating against aliens, and the lack of understandable inheritance laws.\(^10\) The fear has also been expressed that estates sent to communist countries may be confiscated, the property used to the disadvantage of the United States, and the testator's intentions frustrated.\(^11\)

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5. See Heyman, supra note 3, at 226.
7. See Chaitkin, supra note 3, at 308.
11. See note 10 supra; Heyman, supra note 3, at 230.
The Larkin court construed the California statute to require "no more than a demonstration that the law of the foreign country, as written and consistently applied in practice, enables our citizens to inherit economically significant property interests on terms of full equality with the residents of that country." In finding that Soviet law satisfied this requirement, the court relied upon the testimony of Russian and American experts on Soviet law in the trial record. Each of these experts testified that the applicable provision of Soviet law, though ambiguous in its language, is interpreted by Soviet legal authorities as conferring upon aliens the same civil rights, including the right of inheritance, as are enjoyed by Soviet citizens. The court's conclusion was further supported by the testimony of seven persons who had received property from Soviet estates and by several Soviet court cases recognizing the inheritance rights of aliens.

The Attorney General argued that the policy of the statute precluded granting inheritance rights to residents of countries having a governmental structure and foreign policy such as that presently maintained by the Soviet Union. Based on the holding in Clark v. Allen that state regulation of the devolution of decedents' estates to foreign heirs can invade the exclusive power of the federal government in the area of foreign relations, and state legislation governing inheritance rights is valid only if its effect on foreign relations is indirect and incidental, the Larkin court felt precluded from basing construc-

12. 52 Cal. Rptr. at 444, 416 P.2d at 476.
15. See 52 Cal. Rptr. at 452-53, 416 P.2d at 484-85.
17. Since the result of a finding that the Russian beneficiaries could not take would have been escheat to the state, the State of California was a party to the action.
18. 331 U.S. 503 (1947).
tion of the statute on foreign policy considerations. The court found that such a construction would involve more than an incidental invasion of the foreign relations power of the federal government and would endanger the constitutionality of the statute.\(^{21}\)

The policy of the federal government regarding inheritance by the citizens and residents of communist countries has never been made clear. In reply to the requests of state courts for a statement of federal policy in this area, the State Department has uniformly maintained that the regulation of inheritance rights is a matter within the exclusive control of the states.\(^{22}\) However, these State Department replies always cite a treasury regulation prohibiting the sending of government checks to certain communist countries\(^{23}\) and several state court decisions which have relied on the regulation in denying distribution to residents of communist countries.\(^{24}\) In addition, the United States has refused a Soviet request that an agreement on inheritance rights be negotiated, asserting the matter to be within state jurisdiction,\(^{25}\) although it has entered into several treaties with other countries which contain provisions regulating inheritance rights.\(^{26}\) Thus, while the ostensible policy of the federal government regarding inheritance by Soviet citizens appears to be one of official neutrality, the State Department replies encourage the states to deny distribution to Soviet citizens.

It was probably the intent of the California legislators that residents of communist countries should not take as beneficiar-
ies of California estates. In observing this unwritten objective, the California courts prior to Larkin served the apparent policy of the federal government by discouraging distribution to residents of communist countries without officially taking any action which would imperil hopes for a cold war thaw.

As a matter of statutory construction and application, the correctness of the Larkin decision cannot be denied. The test established by the statute is clear: is there reciprocity of inheritance rights? The evidence presented by the beneficiaries proved that Soviet law grants reciprocal inheritance rights to American citizens. The prior California decisions which had looked to communist policies and governmental structure introduced factors having no relevance to the unambiguous statutory mandate. By looking to the evidence in an unbiased manner, the Larkin court avoided all irrelevancies and reached the conclusion required by the statute.

In recent years, several state courts have allowed distribution to heirs residing in the satellite countries. The Larkin decision has extended this trend to encompass Soviet citizens. If the policy of the federal government is to prevent distribution of decedents' estates to heirs residing in communist countries, a firmer and more public stand is necessary to implement that policy. However, the delicacies of international relations make such an open declaration of policy unlikely.

Estate Planning: Fixed Income Provision Disqualifies Marital Trust

Decedent's will established a residuary trust which gave his widow a life interest and a general testamentary power of ap-

27. See Heyman, supra note 3, at 231. See also 35 Mass. L.Q. 34 (1950).
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pointment over the corpus. It directed the trustee to pay her a fixed monthly stipend from the income, and from the corpus if necessary, for the duration of her life. The Internal Revenue Service denied the executor's claim for a marital deduction on that portion of the corpus which would yield the monthly stipend, as calculated by annuity tables. In an action for refund of the resulting estate taxes, the district court held for the executor. On appeal the Third Circuit denied the marital deduction, holding that unpredictable market conditions made the use of fixed interest rates unfeasible for estimating the amount of corpus necessary to supply a fixed trust income. The widow might not always be entitled to all the income from a specific portion of the trust, contrary to the requirements of Internal Revenue Code of 1954, § 2056(b)(5), since the fixed income provision would deny distribution of part of the income if interest rates rose. Northeastern Pa. Nat'l Bank & Trust Co. v. United States, 363 F.2d 476 (3d Cir. 1966).

The marital deduction was created by the Internal Revenue Act of 1948 in response to widespread dissatisfaction with prior law. Under the Internal Revenue Code of 1939, a decedent's entire estate was taxed in common law states, while in community property states one half of the estate passed untaxed to the surviving spouse as that spouse's share of the community property. Congress attempted to remedy this inequality by including community property within the estate tax exactions of the 1942 act; but this patchwork amendment caused serious hardships in community property states, and it became evi-

1. The widow was to receive $300 per month until testator's youngest child reached eighteen and thereafter $350 per month for the rest of her life.
2. The formula was that used by the Treasury Department in valuation of annuities, life estates, terms for years, remainders, and reversions. Treas. Reg. § 20.2031-7, -8 (1958).
4. Section 2056(b)(5) provides a qualified exception to the terminable interest rule of § 2056(b)(1) as follows:
   (5) Life estate with power of appointment in surviving spouse. In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion . . . . (Emphasis added.)
dent that a new theoretical approach was needed. In consequence, Congress designed the marital deduction to equalize the geographic impact of the estate tax and to eliminate difficulties incident to the prior provisions. The 1948 act returned community property states to their pre-1942 position and, in all other states, allowed half the estate to pass untaxed to the surviving spouse, thereby postponing taxation of that portion until the survivor's death. The marital deduction trust qualifying under section 2056(b)(5) quickly became a popular form of marital deduction gift. As litigation occurred over the technical requirements of the section, the marital deduction trust encountered rigid interpretation by the courts. Thus, it was held that the surviving spouse was entitled to the deduction only if she received all income from the entire trust. The Internal Revenue Code of 1954 liberalized this requirement by providing for a marital deduction where the surviving spouse received all income from a specific portion of a trust. But treasury regulations restrictively construed "specific portion" to mean either a fractional or percentile share.

In 1962, Gelb v. Commissioner allowed a marital deduction where the surviving spouse had a power of appointment over the corpus of a trust, less a specific dollar portion thereof. In that case a widow was entitled to all the income from a residuary trust and had a power of appointment over the corpus, subject to a power in the trustee to invade corpus for another beneficiary up to 5,000 dollars per year. The court indirectly calculated the specific portion over which she alone had a power of appointment by determining the maximum amount of corpus which could be diverted to the other's use. The present value of 5,000 dollars was multiplied by the second beneficiary's life expectancy, as
CASE COMMENTS

computed from mortality tables, and that product was subtracted from the corpus. The widow's share thus represented the entire corpus less a sum estimated by actuarial computation. The court held that this share qualified for the deduction. In so doing it disapproved Treasury Regulation 20.2056(b)-5(c) insofar as it limited a qualifying specific portion to a fractional or percentile share, noting that neither section 2056(b)(5) nor its legislative history required such a construction.\(^7\)

On facts similar to those of the instant case, the Seventh Circuit, in *Citizens Nat'l Bank of Evansville v. United States*,\(^18\) relied upon *Gelb* to approve a marital deduction wherein annuity tables were used to calculate the specific dollar portion of a trust corpus necessary to yield 200 dollars per month at 3\(\frac{1}{2}\) per cent interest for the rest of the surviving spouse's life. Conceding that a dollar amount might qualify as a specific portion,\(^19\) the Commissioner argued that selection of a fixed interest rate to calculate a static corpus income in the future was inappropriate, since interest rate fluctuation makes it impossible to predict a constant yield. The income of a sum so determined therefore would not meet the requirement that the spouse be entitled to all the income.\(^20\) The court interpreted *Gelb* to have inferentially approved actuarially computed specific portions\(^21\) and held the underlying principles of that case to be controlling.\(^22\)


\(^{17}\) See 16 Vand. L. Rev. 261 (1962) (argument that specific portion cannot be a dollar amount).

\(^{18}\) 359 F.2d 817 (7th Cir. 1966).

\(^{19}\) Id. at 820, n.8.

\(^{20}\) Int. Rev. Code of 1954, § 2056(b)(1), known as the terminable interest rule, provides in part: "(1) General Rule.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed . . . ." In the instant case deceased's will left a remainder in default of the widow's exercise of the power of appointment, thus making the trust provisions a terminable interest under the rule. Consequently, if the trust provisions did not fall within § 2056(b)(5), which is a qualified exception to § 2056(b)(1), the latter section would disallow a marital deduction for the trust.

\(^{21}\) Citizens Nat'l Bank of Evansville v. United States, 359 F.2d 817, 820 n.11 (7th Cir. 1966).

\(^{22}\) Citizens Nat'l Bank of Evansville v. United States, supra at 821. Since *Gelb* involved the "specific portion" requirement of § 2056(b)(5), the language pertaining to the actuarially computed present value of
The majority in the instant case, however, found the Commissioner's argument in *Citizens* persuasive. It observed that improving market conditions would cause income in excess of the stipend to be accumulated and concluded this fact disqualified the deduction, since in the future the widow might not be entitled to all the income from a specific portion.\footnote{23} The majority distinguished *Gelb*, declaring the issue in that case to be the "specific portion" requirement, as opposed to the "all the income" requirement presently before the court.\footnote{24}

The issues raised by *Citizens* and the instant case pose the general question: when can computations which involve interest rates appropriately be used to determine the terms of a trust which will qualify under section 2056(b)(5) as an exception to the terminable interest rule? Clearly, the results of such computations must meet two tests: the spouse's interest must be a specific portion of the corpus; and the spouse must be entitled to all the income from that portion. If it is allowed that the sum determined in *Gelb* was a specific portion, *Gelb*'s use of interest rates satisfied both requirements, since the spouse was there entitled to all the income, however much it might fluctuate. *Citizens*, however, found inferential authority in the *Gelb* method of calculation to use actuarial tables to determine what income the widow would receive from a trust. This extension of the *Gelb* principle is permissible only if the result falls within the statutory limits of the second requirement. If the words "all the

\$5,000 would appear to be dicta. It is not clear that the negative use of actuarial computation to determine a sum which will be subtracted from a trust corpus represents authority for the positive use of such calculations to determine a sum which must meet the requirements of § 2056(b)(5).

\footnote{23. The dissent argued that the effect of future market fluctuation on income should not be considered, relying on *Jackson v. United States*, 376 U.S. 503 (1964), which held the deduction must be determined at the time of decedent's death. However, *Jackson* involved a widow's allowance subject to termination on her death or remarriage. The Court held it improper to wait to see whether the interest was in fact defeased in order to include it within a marital deduction. Arguably, this undermines the dissent, since the majority in the instant case did not contend the deduction should await an examination of future market conditions. Just as the possibility that the spouse will remarry or die in *Jackson* existed at decedent's death, so did the possibility of market fluctuation in the instant case. Thus the terminable interest rule should disqualify both deductions. See note 20 supra.}

\footnote{24. See 363 F.2d at 483, 484. The court added: "Under the facts of *Gelb* only the life expectancies were subject to variation." *Id.* at 483. This would appear to be incorrect, in view of the fact that the present valuation of the \$5000 by definition includes interest rate calculations. *Gelb* v. Commissioner, 298 F.2d 544, 551 (2d Cir. 1962).}
income” contain no flexibility, the possibility that income might have to be accumulated will disallow the deduction.25

Because ambiguous, treasury regulations construing the right to income qualification provide little aid in framing the proper interpretation. Treasury Regulation § 20.2056(b)-5(f) (1) states that the requirement is met if:

[T]he effect of the trust is to give her [spouse-beneficiary] substantially that degree of beneficial enjoyment of the trust property during her life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust.

If it can be demonstrated empirically that a life beneficiary normally receives a yield of between three and four per cent, arguably a marital deduction trust structured to produce a fixed income of 3½ per cent should be allowed as providing the surviving spouse with substantially that degree of enjoyment of the trust property which a life beneficiary receives.26 Under this approach, however, the possibility of income accumulation remains. Treasury Regulation § 20.2056(b)-5(f)(7), declares, “An interest passing in trust fails to satisfy the condition . . . to the extent that the income is required to be accumulated in whole or in part . . . .”

This requirement27 parallels similar language from a Sen-

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25. This conclusion does not follow necessarily from the presence of interest rates in the method of computation. If an absolute ceiling could be determined for income, for example by a statute preventing trust investments from receiving more than 3½ per cent regardless of the market, a sum could be calculated from which it would be impossible for the income to exceed a fixed amount, thus preventing the possibility of accumulation. The instant case recognized this fact: it should be noted in passing that it would be unrealistic to conceive of an unlimited income potential from a trust whose trustees, by law, must stay within the bounds of certain guide lines. Such a consideration may play a part in another case at another time. Here, however, appellee . . . [can] invest the corpus to produce an income in excess of the monthly stipend. Northeastern Pa. Nat’l Bank & Trust Co. v. United States, 363 F.2d at 481, n.13 (1966).

26. “Presumably, specific portion does not mean anything more than a designation of the amount of the surviving spouse’s interest which makes it feasible to compute the amount of the marital deduction.” LOWNDES & KRAMER, op. cit. supra note 11, at 407.


An interest passing in trust will not satisfy the condition . . . [that the beneficiary be entitled to all the income] if the primary purpose of the trust is to safeguard property without providing the spouse with the required beneficial enjoyment. Such trusts include not only trusts which expressly provide for the accumulation of the income but also trusts which indirectly accomplish a similar purpose.
ate report\textsuperscript{28} which explained in detail the provisions of section 2056(b)(5), "The surviving spouse must be entitled to the income from the corpus annually, or at more frequent intervals. This requirement disqualifies any trust the income of which is required to be accumulated . . . ."

Thus, since the treasury regulations would seem to demand a strict construction of the right to income provision, especially with respect to possible income accumulation, the above "empirical" approach is not likely to meet with judicial favor.

Nevertheless, the Citizens court purported to give section 2056(b)(5) a liberal construction, in the belief that such an approach was most in accord with a congressional intent to equalize the geographic effect of the estate tax.\textsuperscript{29} It must be noted, however, that the marital deduction was created as a means to that goal, and not as an end in itself. Little in the legislative history\textsuperscript{30} of the marital deduction points to a liberal intent in the sense of giving common law jurisdictions a gratuitous tax benefit.\textsuperscript{31} To the contrary, Congress first tried to establish geographic equality in 1942 by taxation of community property. Only in the face of serious administrative and other difficulties six years later did Congress subordinate its revenue interest to the elimination of such problems. Further, there are a great many areas where, in practice, the marital deduction itself has caused inequalities.\textsuperscript{32} Absent legislative efforts to readjust

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\item \textsuperscript{28} S. REP. No. 1013, 80th Cong., 2d Sess. (1948).
\item \textsuperscript{29} Citizens cited Dougherty v. United States, 292 F.2d 331, 337 (6th Cir. 1961), and United States v. Stapf, 375 U.S. 118, 128 (1963) for the following proposition: The purpose of the marital deduction provision was to extend to spouses in common law states the advantages of married taxpayers in community property states, by permitting the surviving spouse to acquire free of estate tax up to one half of the decedent's adjusted gross estate . . . and to bring about a two-stage payment of estate taxes . . . .
\item \textsuperscript{30} See S. REP. No. 1013, 80th Cong., 2d Sess. (1948).
\item \textsuperscript{31} The argument has been advanced that since both spouses contribute equally to a marriage, though in different ways, it is a harsh rule which denies to a surviving spouse, especially a widow, that portion of the total which she helped accumulate, simply because title is not in her name. Anderson, \textit{supra} note 12, at 1132.
\item \textsuperscript{32} A senate report noted that the marital deduction was not a panacea: It is recognized that complete equalization of the estate and gift taxes can not be achieved because of the inherent differences between community property and noncommunity property. However, the new provisions will result in equality in the important situations.
\end{itemize}
these disparities, it is not at all clear that congressional intent requires the judiciary to override the plain meaning of "all the income from a specific portion" in the taxpayers' favor.

Evidence: Waiver of Physician-Patient Privilege

In an action for personal injuries defendants attempted to depose plaintiff's physician to obtain information concerning the alleged injuries. Plaintiff's attorney advised the physician that such information was privileged and instructed him not to testify. Failing to acquire the needed information, defendants applied for an order requiring the physician to testify on pretrial depositions. The lower court denied the motion. On appeal, the Supreme Court of Alaska reversed, holding that by commencing a personal injury action plaintiff waived the physician-patient privilege to the extent that his physician could be required to testify on pretrial depositions as to the injuries alleged. Mathis v. Hilderbrand, 416 P.2d 8 (Alaska 1966).

Although the physician-patient privilege has never been recognized under the common law, the majority of states have created the privilege by statute. Unlike attorney-client and priest-penitent privileges, which have a common law origin, the scope of protection of the physician-patient privilege, the 'classic case,' that is, where the husband owns all the property at common law and he dies first, is equalization achieved; in the other situations postulated, substantial inequality exists between the two property systems." Anderson, supra note 12, at 1099.

33. Several commentators have suggested that deductions be determined as a function of the total estate of both spouses. Anderson, supra note 12, at 1133; Sugarman, Estate and Gift Tax Equalization—The Marital Deduction, 36 Calif. L. Rev. 223, 280 (1948).

2. For a list of states which recognize the physician-patient privilege and for the statutes involved, see 8 Wigmore, Evidence § 2380 n.5 (McNaughton rev. 1961) [hereinafter cited as Wigmore].
4. The statutes only protect a patient from disclosure of information in judicial proceedings. Also, the statutes do not protect those patients most concerned with keeping the information confidential.
formation protected, the actions in which the privilege may be invoked, and the manner in which the privilege may be waived depend upon the judgment of the legislature. The statutes allow the communicant patient to prohibit his physician from revealing, in a judicial proceeding, confidential information obtained during the professional relationship. The privilege is based upon the belief that the harm caused by the disclosure of such information outweighs the good derived from the unhindered pursuit of truth.

As with other privileges, the physician-patient privilege may

Many states require the physicians to report gun shot wounds, abortions, and the presence of certain diseases. Such information may lead to criminal prosecution, investigation by the health department into a patient's sexual activity, or long quarantine periods. However, the practitioner often refuses to make a positive diagnosis of these maladies and consequently does not file a report.

5. The statutes typically protect only that information which is necessary to the physician for diagnosis or treatment. State v. Emerson, 266 Minn. 217, 123 N.W.2d 382 (1963). However, because courts are reluctant to decide what information fulfills this requirement, they include all information which the physician acquires in a confidential setting and which is not equally available to a layman. See DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 145-76 (1958) [hereinafter cited as DEWITT].

6. Since an action under a workmen's compensation statute is not a true adversary proceeding, several states have provided that common law and statutory rules of evidence do not apply. Many states require examination by a physician but limit testimony of a patient's attending physician to information subsequent to the injury. Such testimony does not waive the privilege as to other proceedings. Other actions in which the physician-patient privilege is inapplicable include actions for malpractice, wrongful death, personal injury, and for the recovery of insurance benefits. See generally DEWITT 235-65.


8. E.g., N.Y. Civ. Prac. Law § 4504(a); UTAH CODE ANN. 78-24-8 (4) (1953).

9. See Arizona & N.M. Ry. v. Clark, 235 U.S. 669, 677 (1915); McCORMICK, EVIDENCE § 108 (1954) [hereinafter cited as McCORMICK]. It has never been entirely clear why New York broke with tradition, becoming the first state to recognize the privilege. N.Y. REV. STAT. II, 406 (1829). The Report of the Revisers, N.Y. STAT. III, 737 (1838), indicates that the revisers were influenced by the necessity of full disclosure for adequate treatment, the fear that an individual would not consult a physician if there was no privilege, and the argument that physicians' professional honor would lead to concealment or perversion of truth. The multitude of statutes in the 1828 code pertaining to the reporting of epidemic diseases demonstrates the revisers' concern with public health. The revisers may have created the privilege in an attempt to protect the carriers of these diseases from tort liability arising after disclosure to public officials.
be expressly\textsuperscript{10} or impliedly waived.\textsuperscript{11} Regarding waivers, three options are available to a plaintiff. First, he may refuse to waive the privilege, thus denying the defendant access to privileged information. However, he thereby limits himself to general statements about his medical condition,\textsuperscript{12} and may also expose himself to adverse comment concerning his reluctance to have this information revealed in court.\textsuperscript{13} Secondly, plaintiff may partially waive the privilege\textsuperscript{14} early in the pretrial period. By exposing this information to defendant's depositions, plaintiff gains the use of this information at trial without further waiver and insulates himself from adverse comment. Finally, plaintiff may waive the privilege either immediately before or at trial. He thereby prevents the defendant from making effective use of this information,\textsuperscript{15} while fully utilizing this information for his own purposes.\textsuperscript{16}

It is obviously inequitable to allow the plaintiff the tactical advantage resulting from late waiver. Several states have corrected this situation by legislation providing that the commence-

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\item Although it would appear that any revelation of privileged information would destroy the purpose of the privilege, courts have held that the information must be revealed in a judicial proceeding before the privilege is waived. Polish Roman Catholic Union of America v. Palen, 302 Mich. 557, 5 N.W.2d 463 (1942). The information must also be revealed voluntarily or without the compulsion of the judicial process. See Ostrowski v. Mockridge, 242 Minn. 265, 65 N.W.2d 185 (1954); Harpman v. Devine, 133 Ohio St. 1, 10 N.E.2d 776 (1937). Hence, if the party opponent reveals privileged information, either on deposition or on cross-examination, and the privilege is asserted, the privilege has not been waived. Briggs v. Chicago Great W. Ry., 248 Minn. 418, 80 N.W.2d 625 (1957).
\item See DeWitt 409-10; McCormick § 106; 8 Wigmore § 2389.
\item Nelson v. Ackermann, 249 Minn. 582, 83 N.W.2d 500 (1957). However, the courts are hopelessly divided upon this issue. See Annot., 116 A.L.R. 1170 (1938). In some jurisdictions it is possible for the defendant to force the plaintiff to assert the privilege in front of the jury. See Annot., 144 A.L.R. 1007 (1943).
\item See authorities cited supra note 11; DeWitt 396-97.
\item In Kriger v. Holland Furnace Co., 12 App. Div. 2d 44, 48, 208 N.Y.S.2d 285, 290 (1960), the court, in dictum, stated that when the plaintiff, by asserting the privilege, denied the defendant access to medical information and then presented this information at trial, the information would come as surprise evidence, necessitating a continuance and possibly a mistrial.
\item Dubois v. Clark, 253 Minn. 556, 93 N.W.2d 533 (1958).
\end{enumerate}
ment of an action for personal injuries constitutes waiver.\textsuperscript{17} In other states, use of pretrial conferences offers a solution. Here a judge may limit the scope of injuries to be alleged and evidence to be presented.\textsuperscript{18} The judge may also use this opportunity to order plaintiff to waive the physician-patient privilege as to any information to be presented at trial.\textsuperscript{19}

Courts unwilling to use the pretrial conference have implied a waiver of the privilege predicated upon the bringing of suit. However, they have differed as to the standards used in determining whether waiver is required, the time at which such a determination must be made, and the effect of such a determination.

Some courts will not allow a case to be placed upon the trial calendar until the privilege has been waived. In \textit{Kriger v. Holland Furnace Co.},\textsuperscript{20} a personal injury action, plaintiff asserted the privilege to frustrate the defendant's attempts to depose her physician, although she admitted that the privilege would have to be waived at trial. The court held that the privilege did give her the absolute right to privacy, but since she was unwilling to disclose information which must eventually be revealed, she could not force the court to proceed to trial. Other courts maintain that plaintiff must produce during the pretrial period evidence which he in good faith contemplates will not be protected at trial. This was the holding in \textit{Mariner v. Great Lakes Dredge & Dock Co.},\textsuperscript{21} wherein the court found

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\item \textit{E.g.}, \textsc{Cal. Civ. Proc. Code} § 1831, which provides:
\begin{quote}
... That where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify.
\end{quote}
\item Nev. Rev. Stat. § 48.080(4) (1963) is virtually identical. Minnesota is considering a broader statute which would provide for waiver of the physician-patient privilege in any action in which the plaintiff voluntarily put his physical, mental, or blood condition at issue.
\item See \textsc{Alaska R. Civ. P.} 16, which is similar to \textsc{Fed. R. Civ. P.} 16.
\item See Dubois v. Clark, 253 Minn. 556, 560 n.1, 93 N.W.2d 533, 536 n.1 (1958), where the court said that the pretrial conference could be used to determine the scope of waiver. 1A \textsc{Barron & Holtzoff, Federal Practice and Procedure} § 473 (Wright ed. 1960), takes the position that courts may be less liberal in allowing amendments of the pretrial order to enlarge the permissible scope of evidence. See also 60 \textsc{Yale L.J.} 175 (1951).
\item 203 F. Supp. 430 (N.D. Ohio 1962). It is interesting to note the similarity of reasoning and language in \textit{Mariner} and the instant case and the dissimilarity in their holdings. In \textit{Greene v. Sears, Roebuck &
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that defendant should have information during the pretrial proceedings which he probably would have at trial.

Similarly, in the instant case the decision rests upon the assumptions that the privilege invariably will be waived at trial, and that there is no valid reason for postponing the time of waiver until trial. Consequently, the privilege should not be recognized during the pretrial period. However, it is clear that a personal injury action can be successfully prosecuted without waiving the privilege.22 Secondly, it is clear that plaintiff's tactical advantage of postponing the time of waiver until trial was created by the legislature. However, the court, without acknowledging the legislative origin, dismissed the privilege by characterizing it as a possible obstacle to the pursuit of truth and of no purpose.

The holding of the instant case,23 however, is novel and has several important ramifications. While numerous commentators have advocated the position that commencement of a personal injury action should always constitute waiver of the privilege24 and several states have accomplished this result by statute,25 prior cases only accelerated waiver when it became clear that the privilege must eventually be waived.26 Also, under prior

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23. Although the issue was framed in general terms, the majority actually held:

We are convinced that a rigid enforcement of the privilege under the facts of this case would serve no useful purpose and might result in injustice. We accordingly hold that the plaintiffs in this personal injury action waived the physician-patient privilege by the commencement of the action to the extent that attending physicians may be required to testify on pretrial deposition with respect to the injuries sued upon.

416 P.2d at 10.

24. See 8 Wigmore § 2389. Wigmore argues that:

The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist.

Ibid.

25. See note 17 supra.

decisions a plaintiff, upon determination that the privilege would have to be waived, could either abandon suit or waive the privilege. 27 The instant case provides no such alternative for the privilege is waived by commencing the action. This difference becomes significant if the action is subsequently dismissed and plaintiff's medical condition is relevant in some later case. The privilege may be lost, 28 and, contrary to the policy behind the privilege, confidential information would be used against the patient without his consent.

Another ramification of the instant case, although similar to all decisions which accelerate the time of waiver, is the effect of making plaintiff's evidence available during pretrial discovery. The permissible scope of discovery is much wider than that allowed by the rules of evidence. Thus information privileged under the statute and irrelevant at trial may be revealed. The opportunity to reveal this information could be used as a threat to coerce plaintiff into abandoning the action; 29 or the information actually obtained, but irrelevant to the injuries sued upon, could be used to give the defendant an improper advantage, such as causing the plaintiff to appear to be a hypochondriac. 30

The instant case has also created a new dilemma. Because the holding does not set out any real standards as to the scope of waiver, either there will be unrestricted waiver as to all medical information, even remotely connected with the injuries sued upon, or the trial court will have to utilize a pretrial conference to determine the scope of waiver. The former alternative is unthinkable, for it would allow needless invasions of plaintiff's privacy, and would go far beyond what has formerly been the scope of any waiver. Furthermore, because the


Courts have generally been unwilling to abrogate the statutory privilege, feeling that this is best left to the legislature. E.g., Boyd v. Wrisley, 228 F. Supp. 9 (W.D. Mich. 1964); Polin v. Saint Paul Union Depot Co., 159 Minn. 410, 199 N.W. 87 (1924); Kime v. Niemann, 64 Wash. 2d 394, 391 P.2d 955 (1964).

27. See Greene v. Sears, Roebuck & Co.; Mariner v. Great Lakes Dredge & Dock Co.; Kriger v. Holland Furnace Co., supra note 26. In these cases the ruling of waiver was prospective.

28. Once the privileged information has been revealed, the courts hold that there is no interest to be protected and that the privilege is waived. Clifford v. Denver & R.G.F.R.R., 188 N.Y. 349, 80 N.E. 1094 (1907).


injuries would be alleged in general terms, there would have to be a full hearing to determine what injuries would actually be alleged at trial.

If such a pretrial conference is necessary, it is difficult to understand what has been accomplished by this case. The Alaska Rules of Civil Procedure already provide for a pretrial conference. This conference seems ideally suited to deal with the physician-patient privilege. Here the judge has the power to force the parties to prepare their cases and determine what evidence they wish to present. Because of the plenary powers given him, the judge may stipulate that information may be revealed at the conference without waiving the privilege. Thus, after hearing all the evidence, he would be in the best position to determine whether or not it would be equitable to allow the plaintiff to maintain the privilege until trial, and if not, to what extent the privilege has to be waived. At this point plaintiff would have to determine whether to abandon the suit, or waive the privilege as to the required information. At trial, plaintiff would be bound by this determination and could not introduce previously protected evidence.

Finally, it is difficult to accept the proposition that it is solely for the court to decide whether or not to recognize the physician-patient privilege. Under prior decisions there were standards by which it was determined whether the privilege had to be waived, and there was some point at which plaintiff had the choice either to drop the suit or to waive the privilege. No such standards are provided by the instant case, since the privilege will always be waived, and no such choice is left to plaintiff, except the initial determination to commence an action. Thus, both the discretionary and voluntary aspects of waiver have been removed, making the practical effect of this decision the abrogation of the statutory privilege. No language in the statute warrants the interpretation that the physician-patient privilege does not apply to personal injury actions.

31. ALASKA R. CIV. P. 8(a), which is similar to FED. R. CIV. P. 8(a), calls for a simple, concise, and direct statement of the claim. This, when viewed in conjunction with the FED. R. CIV. P., ILLUSTRATIVE FORMS 9 & 10, indicates that the pleadings provide insufficient information for this determination.
32. ALASKA R. CIV. P. 16, which is similar to FED. R. CIV. P. 16 but much more specific in articulating the pretrial procedure.
33. Ibid.
34. ALASKA R. CIV. P. 43(h) (4): Physician-Patient Privilege. A physician or surgeon shall not, against the objection of his patient, be examined in a civil action or proceeding as to any information acquired
Consequently, the instant case raises the question of the respective roles of the judiciary and the legislature. This question is of particular importance here because of the controversy regarding the merits of the privilege. In defense of the privilege it is argued that a patient, compelled by the desire to preserve his physical well-being, involuntarily reveals to his physician facts about himself which he may not wish to disclose. Since the right to talk freely and to allow unlimited physical examination is essential to a therapeutic relationship, it is a value to be fostered. In opposition to the privilege it is argued that the privilege does not promote good health or protect a patient where he needs it most—out of court—and that the privilege allows a patient to conceal his true physical condition while putting it at issue in court. In a conflict requiring the balancing of the public's medical welfare and the desire for the unhindered pursuit of truth, the resolution should be based upon factual evidence and value judgments, both of which are better left to the legislature.

Trade Regulation: Proof of “Section of the Country” Not Necessary Under Section 7 of the Clayton Act

The Government brought an action against the Pabst Brewing Company charging that its acquisition of the Blatz Brewing Company violated section 7 of the Clayton Act. The District

35. See 8 WIGMORE § 2380a
37. See note 5 supra.
38. The most frequent criticism of the physician-patient privilege is that it allows the plaintiff to keep out of court what is undisputedly the best testimony—that of his physician. McCormick § 108; 8 WIGMORE § 2380a. Although this is true, application of the privilege does not deny the court all medical testimony, since the majority of courts have the power to require medical examinations. This physician-patient relationship is not privileged since the purpose of the examination is not treatment. Browne v. Brooke, 236 F.2d 686 (D.C. Cir. 1956). The only advantages the attending physician has are the confidence of the patient and a knowledge of his past medical history.

1. [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in com-
Court dismissed the action at the close of the Government's case for failure to prove that Wisconsin or the three state area of Wisconsin, Illinois, and Michigan was a "relevant geographic market" in which to test the acquisition, or that the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the United States, the only relevant market. On appeal, the Supreme Court reversed holding that the Government was not required to prove a particular "section of the country." United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

At the turn of the century the structure of American industry was undergoing a major change as small firms were merged into giant corporations. Since the Sherman Act proved ineffective in halting this movement, the public interest required new legislation to control the increase in monopoly power and the corresponding decrease in competition. Section 7 of the Clayton Act was enacted to prohibit certain practices which were not unlawful as monopolistic under the Sherman Act, but which were potential monopolies. Because the original provisions of section 7 only prohibited capital stock acquisitions, it proved inadequate and was subsequently amended to include merger by the acquisition of corporate assets. In addition to removing this inadequacy, the wording of the statute was altered by amending the phrase "any section or community" to read...
"any section of the country." In quoting from Standard Oil Co. v. United States, the Senate Report suggested that the relevant section of the country would be "an area of effective competition, or a trade area." Thus, although Congress was unwilling to provide an objective standard for determining the appropriate section of the country, there is no doubt that the concept of a relevant geographic market was intended to be integral to the application of the section.

In prior decisions, the Court has stressed the necessity of establishing a relevant geographic market in finding a section 7 violation. In Brown Shoe Co. v. United States, the Court acknowledged that the legislative history behind "the deletion of the word 'community' in the original Act's description of the relevant geographic market" displayed Congress' concern with the adverse effects of a merger only "in an economically significant 'section' of the country." Such a determination was needed to provide a frame of reference: an "'area of effective competition' . . . determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country') . . .," within which to ascertain the potential extent to which competition could be lessened.

While several later decisions simply assumed that a rele-

11. The language the Senate Report quoted from Standard Stations was that "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition . . . ." Id. at 299 n.5. S. REP. No. 1775, op. cit. supra note 9, at 6. See Note, Section 7 of the Clayton Act: A Legislative History, 52 COLUM. L. REV. 766, 778 (1952).
12. The Senate minority view stated "the term 'any section of the country' is not defined in the bill but would have to be determined by the Federal Trade Commission or the court." 96 CONG. REC. 16442 (1950) (remarks of Senator Donnell). Senator Kefauver answered this point by stating, "the use of the term 'any section of the country' is not new to section 7 of the Clayton Act. The present section 7 uses the term 'any section or community.' It is difficult to follow an objection to a simplification and narrowing of terms by dropping the words 'or community.'" Id. at 16453. The legislative history indicates the term "in any community" was dropped because it was feared this might go so far as to prevent any local enterprise in a small town from buying out another local enterprise. S. REP. No. 1775, op. cit. supra note 9, at 4. See generally Note, Section 7 of the Clayton Act: A Legislative History 52 COLUM. L. REV. 766, 778-79 (1952).
14. Id. at 320.
15. Id. at 324.
16. Id. at 335.
vant geographic market had been proven, United States v. Philadelphia Nat'l Bank indicates that the Court has not dispensed with the requirement of proving a section of the country by showing an economically significant geographic market. In that case, the Court reaffirmed the geographic market analysis used in Brown Shoe, holding that the phrase section of the country was "not where the parties . . . do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."

Consequently, it is clear that Congress envisioned, and the courts implemented, the concept of an economically relevant geographic market. Such terms as area of effective competition, area of competitive overlap, and economically significant section of the country were used to define the phrase any section of the country. These terms provided a description of an economic construct which could be related to antitrust policy in defining a geographic market. Although an extremely complex procedure, defining the geographic market is neces-

25. For example, the Senate Report commented on the area of effective competition as follows: In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country. S. REP. No. 1775, op. cit. supra note 9, at 6.
sarily a major determinant of antitrust policy,27 as only within a market context can the terms monopolization, concentration, or competition acquire meaning.28

Although both Brown Shoe and Philadelphia Bank were cited in Pabst, these cases were neither distinguished nor expressly overruled. The Court merely stated that "the failure . . . to prove . . . what constitutes a relevant . . . 'geographic' market is not an adequate ground on which to dismiss a § 7 case,"29 implying that in the future an analysis different from an economic one will be required in establishing the section of the country in an alleged section 7 violation.30

In defining a relevant geographic market, the Court should attempt to attain two primary goals: a standard which will provide a predictable result for businessmen contemplating merger,31 and one that can be administered by a court without

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27. Justice Fortas recognized this in his concurring opinion in Pabst: "It is true that the search for the relevant market is frequently complicated and elaborated beyond reason or need—sometimes for purposes of delay or obstruction. But the search is nevertheless essential. It is not a snipe hunt." 384 U.S. at 562.


29. 384 U.S. at 549.

30. One article has indicated that as long as Pabst stands, geographic market determination is not an essential prerequisite in establishing a § 7 violation, but the article assumes that the concept of a relevant geographic market will be resurrected. Hale & Hale, Delineating the Geographic Market: A Problem in Merger Cases, 61 Nw. U.L. Rev. 538, 540 (1966). A § 7 case decided just a few months before Pabst indicated a Federal District Court still felt proof of a geographic market was necessary. See United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), aff'd, 35 U.S.L. WEEK 3161 (U.S. Nov. 8, 1966).

However, it is doubtful that Pabst was intended to be this broad. One article has commented on Pabst as follows:

Only time and another case will tell whether the Pabst case and its broad language has in fact so drastically changed the law. We believe that, despite the apparent broad sweep of the Court's language, the delineation of the geographic market ought and will continue to be considered a factor in anti-merger litigation . . . .

Hale & Hale, supra at 540.

31. One writer suggests that it is impossible to predict the probable legality of a proposed merger. He feels that an extended factual inquiry is necessary which just cannot be made prior to the merger. Elman, The Need for Certainty and Predictability in the Application of the Merger Law, 40 N.Y.U.L. Rev. 613, 624 (1965). However, this writer addressed himself to the predictability of whether a merger may tend to lessen competition, and not to a determination of the relevant market. If the relevant market can be predicted, it seems that under
being overwhelmed with voluminous economic analysis. The underlying policies of antitrust legislation must be considered in achieving a balance between these two factors.

The primary goal of antitrust policy is said to be the limitation of market power to the extent it is not incompatible with efficiency and progressiveness in a particular industry. Although this is an economic objective, it is generally accepted that antitrust law is concerned with more than purely economic considerations. In Philadelphia Bank, the Court obviously recognized that limitation of market power will not always result in the attainment of efficiency and progressiveness in the particular industry, yet it held that an undue percentage share of the relevant market is a violation of section 7. Since the Court dispensed with any economic analysis concerning the effect on efficiency and progressiveness, the fear of concentration may well have been the Court's concern. Although it has been said that the primary goals of antitrust law are centered on economic considerations, it does not follow that a substantial economic analysis is necessary in determining the relevant geographic market.

By examining prior decisions in light of the underlying policy of the antitrust laws, it is arguable that Pabst is not as unprecedented on geographic market determination as it may

Philadelphia Bank no extended factual inquiry is then needed to determine if the proposed merger is invalid under § 7. All that must be examined is the share of the market the merged company will have, and whether there is a trend toward concentration in that industry.


33. The Court should be free to accept a reasonable approach to defining the geographic market, as apparently it has not adopted a method yet. Instead, it has worked with a "kaleidoscope" of factors in determining each case. Bock, The Relativity of Economic Evidence in Merger Cases—Emerging Decisions Force the Issue, 63 Mich. L. Rev. 1355, 1364-65 (1965). It has been suggested that the Court is using the right approach when it sets up broad general terms describing the geographic market and then applies these to the economic fact considerations of each case. See Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1318-19 (1965).

34. Kayser & Turner, op. cit. supra note 28, at 45.

35. Rill, supra note 32, at 901.

36. 374 U.S. at 363.

37. See Bock, supra note 33, at 1355. It has also been argued that the goal of antitrust law is to preserve an industry of small businesses. Dean & Gustus, Vertical Integration and Section 7, 40 N.Y.U. L. Rev. 672, 687 (1965). However, this type of discrimination is improper under antitrust policy. Antitrust law is not intended to protect an inefficient small businessman. Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum. L. Rev. 422, 439 (1965).
appear. *Brown Shoe* and *Philadelphia Bank* when read together seem to suggest that the greater the concentration in the industry, the smaller the relevant geographic market is found to be.  

The Court is apparently willing to bend the relevant geographic market to obtain the desired result. By stating in *Pabst* that no proof of a relevant geographic market is required, the Court seems concerned solely with the fear of concentration in our economy.

Although *Pabst* could be read as eliminating the need to prove a geographic market, it is more reasonable to suggest that the Court is merely attempting to obviate the necessity of a complex economic analysis. If the chief concern of Congress is to stem the increase of anticompetitive concentration, the focal point in the determination of the market share should be the ease of entry into a geographic area of an industry. Since an industry which is easy to enter is in little danger of anticompetitive concentration, it would appear that the relevant geographic market could be delineated by an entry-blocking determination. This is the position enunciated by Justice Harlan in his concurring opinion. No comprehensive economic data would be necessary. If transportation costs, the need for vast initial expenditures, product images, or other factors effectively impede the entry of new competitors, a definable area of competition may be established.

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38. See Bock, *supra* note 33, at 1359. If the relevant geographic market is defined narrowly enough, a case such as *Philadelphia Bank* is an easy one. See Bock, *supra* note 33, at 1359; Rill, *supra* note 32, at 904.


42. It must be remembered that entry blocking does not necessarily lessen competition, but that it is its potential to do so which makes it bad. See Blake & Jones, *supra* note 37, at 444. Also, the mere possibility of a merger with a firm already in the market lowers the entry barriers significantly. *Kayesen & Turner*, op. cit. *supra* note 28, at 128.

43. See 384 U.S. at 555.

44. Some of the things Justice Harlan considered in determining economic barriers for the State of Wisconsin included: (1) most of the beer sold in Wisconsin was produced locally—the same beer could be sold in different states at different prices; (2) marketing techniques were such that out of state brewers were at a competitive disadvantage; (3)
It is clear that the standards to be applied in defining "any section of the country" must be enunciated by the courts.\textsuperscript{45} \textit{Pabst} does not seem to provide an effective approach to this problem, although the removal of the necessity of complex economic analysis is a beginning. The solution suggested by Justice Harlan goes further in providing a relatively predictable and easily administrable method of analysis.