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Constitutional Law: College Regulations Employed in Suspension of Student Demonstrators Upheld

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Case Comments

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Appellant college students were suspended for two semesters by college officials for involvement in unruly and disruptive demonstrations against the college administration in which college property was destroyed. Esteban arrived at the scene of the first demonstration as it subsided and refused to leave at the request of a college official. Later, he swore at college officials and threatened injury to a resident assistant. Roberds was part of the crowd on both evenings and talked to others about the events that were occurring but did not perform any of the violent acts. After the suspensions appellants filed complaints demanding injunctive relief and reinstatement, but were denied both.[1] After written charges and notice had been given both, the suspensions were upheld by the federal district court.[2] The Eighth Circuit Court of Appeals affirmed,[3] *holding* that the administration could find that both had been participants in the demonstrations, that the college regulations used in suspending them were not void for vagueness and that the petitioners' first amendment rights had not been violated. *Esteban v. Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969), *cert. denied,* 398 U.S. 965 (1970).

First amendment rights were first judicially recognized in the academic environment in 1923 when the United States Supreme Court held that the due process clause of the fourteenth amendment prevents states from prohibiting the teaching of for-

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1. Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967). The district court initially found that there was uncertainty as to the grounds upon which disciplinary action was to be taken and that neither Esteban nor Roberds had been given the opportunity to present their versions of the case. New hearings were granted to both. Both were allowed written statements of the charges, a hearing before the president of the college, inspection of affidavits which the college intended to submit at the hearing, the right to present their case through affidavits and witnesses, the right to counsel, the right to question witnesses giving evidence against them, the right to make records of the events, and the right to have the president's findings in writing as to the disciplinary action taken against them. *Id.* at 651-52.

2. Esteban v. Central Mo. State College, 290 F. Supp. 622 (W.D. Mo. 1968).

3. Jurisdiction in the federal courts was based on 28 U.S.C. § 1343 (3) & 42 U.S.C. § 1983 (1964).

eign languages to students.[4] Not until *West Virginia State Board of Education v. Barnette*[5] in 1943, however, did students who were subjected to adverse regulations or discipline seek judicial relief. Since *Barnette*, many cases involving academic discipline have come to the courts—most in the wake of *Dixon v. Alabama State Board of Education*,[6] the pathbreaking decision which stated that students at public institutions of higher learning do have certain constitutional rights that the courts will recognize and protect. Prior to *Dixon*, the greatest obstacle to judicial review[7] of alleged violations under the fourteenth amendment was the argument that school attendance was merely a revocable privilege.[8] Courts took the position that students had no "rights" deserving of protection by the courts from unreasonable treatment.[9] A student's interest in receiving an education was seen as a mere privilege so that the only rights of the student capable of enforcement were those provided by statute or the student's contract with the university.[10] A second impediment to review was the need to establish that the state had sufficient contacts with the academic institution to bring the latter's action under

4. Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v Iowa, 262 U.S. 404 (1923). For the law in this area see Note, *Reasonable Rules, Reasonably Enforced-Guidelines for University Disciplinary Proceeding*, 53 MINN. L. REV. 301 (1968); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968). For a complete setting and critique of the present law see Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

5. 319 U.S. 624 (1943). The Court held that under the first amendment, students in public schools could not be compelled to salute the flag nor be suspended for failure to do so.

6. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

7. Historically, courts used two other theories to refrain from intervening in academic affairs. The proposition that the school stands *in loco parentis* emphasized that the school takes the place of the parents, and thus makes rules for the students as the parents could make. *See* Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913). The contractual theory emphasized that upon enrollment, the student became bound by the terms and conditions found in college publications and thus broad discretionary powers were reserved to the college. *See* Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957). Both of these theories have been discredited at the college level. *See* Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 729 (M.D. Ala. 1968).

8. *See* Note, *supra* note 4, at 303.

9. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934); Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959).

10. Goldstein v. New York Univ., 76 App. Div. 80, 83, 78 N.Y.S. 739, 740 (1902). *See also* John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); Frank v. Marquette Univ., 209 Wis. 372, 245 N.W. 125 (1932).

the "state action" requirement of the fourteenth amendment.[11]

Beginning with *Dixon*, courts officially recognized the importance of higher education to students[12] and the need for procedural due process in schools prior to expulsion or disciplinary action. *Dixon* held that college officials must at least exercise "the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense."[13] Although focusing on procedural due process, the *Dixon* court also opened the door to review of substantive due process issues[14]—the reasonableness of school regulations,[15] the reasonableness or arbitrariness in the application of these regulations[16] and the harshness of penalties imposed when a regulation is violated.

With the emergence of civil rights demonstrations and college activism, students and protesters have begun to attack the constitutionality of various campus regulations,[17] particularly

11. In the case of land grant colleges administered and supported by the state, "state action" theories pose no problem. For theories dealing with private institutions see Note, *supra* note 4, at 305.

12. The court of appeals in *Dixon* stated:

> It is not enough to say, as did the district court in the present case, "The right to attend a public college or university is not in and of itself a constitutional right." . . .
>
> . . . .
>
> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing.

294 F.2d at 156-57.

13. *Id.* at 157. At least one court, although later reversed, has gone so far as to say that various trial type hearing requirements are also necessary in high school suspensions. The court stated that the need for procedural fairness when dealing with juveniles in public schools is as great as the need for fairness in dealing with similar disciplinary action at the college level. Madera v. Board of Educ., 267 F. Supp. 356 (S.D. N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

14. 294 F.2d at 157 where the court stated:

> Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement. The possibility of arbitrary action is not excluded by the existence of reasonable regulations.

15. *See, e.g.*, Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968); Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1st D. Ct. App. 1967).

16. *See, e.g.*, Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968); Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190, 203 (M.D. Tenn. 1968).

17. *See* Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968); Barker v. Hardway, 283 F. Supp.

those which may curtail first amendment freedoms by prior restraint.[18] In one of the most recent decisions dealing with school regulations, *Tinker v. Des Moines Independent Community School District*,[19] the Supreme Court struck down a high school regulation that required students protesting the Vietnam war to remove their black armbands during school hours. The Court held that first amendment rights do apply to students, even to high school students, but limited "in light of the special characteristics of the school environment."[20] When there is a showing of substantial interference with proper school discipline, school officials may reasonably regulate to maintain discipline within the school and to carry out the purposes of the educational institution.[21] The Supreme Court found in *Tinker* that school officials had sought to punish students for purely "silent, passive expression of opinion, unaccompanied by any disorder or disturbance . . . ."[22] The Supreme Court rejected the reasoning of the trial court that the regulations were reasonable due to school officials' fear of disturbance. The Court stated that the right to freedom of expression cannot be eroded merely because of an apprehension of harm or conflict, reasoning that under our constitutional system certain chances must be taken.[23] Applying this rationale to student demonstration, the Court would not seem willing to allow a college administration to ban *all* demonstrations merely because of a fear that disturbances might result much less because the administration disagreed with or disliked the reasons for the demonstration. However, the demonstration could be

228 (S.D. W.Va. 1968), *aff'd*, 399 F.2d 635 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968).

18. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967).

19. 393 U.S. 503 (1969). *See* Comment, 54 MINN. L. REV. 721 (1970).

20. 393 U.S. at 506.

21. *Id.* at 513. The Court relied on two cases from the Fifth Circuit, Burnside v. Byars, 363 F.2d, 744 (1966) and Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (1966). *Burnside* stated that students have a constitutional right to wear "freedom buttons" in school as a medium of expression as long as this does not cause disorder or the infringement of the rights of others. In *Blackwell*, the evidence showed that those wearing "freedom buttons" caused disturbance and interfered with the rights of others by pinning buttons on other students. The court held this not to be constitutionally protected expression.

22. 393 U.S. at 508.

23. *Id.*

subject to reasonable and nondiscriminatory regulations of time, place and manner; if the demonstration substantially or materially interfered with the orderly processes of the school or invaded the rights of others, the administration would have a valid right to control it and to discipline the disrupters.[24]

The *Esteban* court applied the *Tinker* standard to a disruptive demonstration and ruled that it was not clearly erroneous to find that both Esteban and Roberds were "participants" in unruly demonstrations and therefore subject to expulsion. In so doing the court deferred to the trial court's procedural approach of reviewing the sufficiency of the evidence produced in the disciplinary proceedings conducted by school officials.[25] The case against Esteban was clear. Although the evidence did not show that he was actually involved in the demonstration, he was found to have insubordinated a college official, directed obscene language at a school official and threatened a resident assistant, each of whom were attempting to prevent any further mob violence.[26] There was no showing of a denial of freedom of speech because Esteban was disciplined on the basis of conduct disrespectful to his superiors.[27]

The case against Roberds, however, proceeded on different facts, and is deserving of careful analysis. Prior to the demonstrations, Roberds had been placed on disciplinary probation. He had asked the dean of men what repercussions his involvement in future demonstrations or disturbances would have on his probationary status. He was told that "any action on your part which may reflect unfavorably upon either you or the institution can be considered grounds for suspension."[28] The evidence also revealed a letter written by Roberds to his state representative concerning the school's regulations and the way the

24. *See* Wright, *supra* note 4, at 1037-59.

25. The scope of review of the district court seems to have been based on the "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education," 45 F.R.D. 133 (1968) which states at 147: "The third requirement is that no disciplinary action be taken [by the academic institution] on grounds which are not supported by any substantial evidence." On review the federal district court would determine only if the challenged disciplinary action lacked support by "substantial evidence." This scope of review seems identical to that of a federal district court reviewing an action of a federal agency. *See* Administrative Procedure Act § 10e, 5 U.S.C. § 706 (1967).

26. 415 F.2d at 1080.

27. *Id.* at 1092 (dissent).

28. *Id.* at 1081.

institution was being operated.[29] The findings showed that Roberds was present as part of the crowd on both evenings, and that on both occasions he conversed with members of the crowd, the second night discussing the events that were occurring and his disgust with the college.[30] Roberds termed his presence as that of a "spectator" as opposed to a "participant" in the violent acts. The president of the college, who made the only evidentiary findings concerning Roberds, verified that he was indeed only a "spectator."[31]

The regulations in effect at the time stated that participation in an unlawful mass gathering would be grounds for dismissal. The regulation, however, also indicated that spectators, who by their presence added to the problem, could be considered participants and would be held as responsible as the actual disrupters.[32] The court found Roberds to have been within the regulation because of his presence as part of the crowd and his conversation with both participants and onlookers.[33] Since Roberds had been placed on disciplinary probation, the court implied that he was certainly capable of performing misdeeds.[34] By writing to his representative and communicating with the dean of men,

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29. The letter stated:

> I assure you, I do not stand alone in my disgust with this institution. From suppression of speech and expression to ridiculous, trivial regulations this college has done more to discourage democratic belief than any of the world's tyrants. . . . My comrades and I plan on turning this school into a Berkeley if something isn't done.

Id.

30. 415 F.2d at 1080-81.

31. "Mr. Roberds has repeatedly admitted attending the demonstrations on both nights but qualifies his attendance as being that of a spectator and *the evidence does not show otherwise* . . . ." Id. at 1082 (emphasis added).

32. *Id.* The regulation stated:

> When a breach of regulations involves a mixed group, ALL MEMBERS ARE HELD EQUALLY RESPONSIBLE.
>
> Conduct unbefitting a student which reflects adversely upon himself or the institution will result in disciplinary action.
>
> Mass Gatherings—Participation in mass gatherings which might be considered as unruly or unlawful will subject a student to possible immediate dismissal from the college. Only a few students intentionally get involved in mob misconduct, but many so-called 'spectators' get drawn into a fracas and by their very presence contribute to the dimensions of the problems. *It should be understood that the College considers no students to be immune from due process of law enforcement when he is in violation as an individual or as a member of a crowd* (emphasis added).

Id. at 1082.

33. *Id.* at 1084-85.

34. *Id.* at 1088.

he also showed his intent to participate in a demonstration.[35] Thus, the court reasoned that although Roberds did not cause any physical damage, he was a participant by being present and voicing his beliefs.[36] The court concluded that there was "substantial and certainly adequate support for the inferences the trial court drew and for its findings."[37]

The *Esteban* court in refuting Roberds' free speech and free assembly arguments went directly to *Tinker*, admitting that while students do have constitutional rights, Roberds' actions disclosed "actual or potentially disruptive conduct, aggressive action, disorder and disturbance, and acts of violence and participation therein"[38] and were, therefore, not protected.

Roberds' final argument, that the regulation was void for vagueness and overbreadth, was summarily dismissed by the court. Roberds' argument took three approaches. He contended that the regulations were similar to city ordinances which have been struck down because of insufficient definition. Second, he argued that "young people should be told clearly what is right and what is wrong, as well as the consequences of their acts."[39] His third approach was that the regulations "chilled" his first and fourteenth amendment rights.[40] The majority initially stated that the "charges against Esteban and Roberds did not even refer to the regulations"[41] and that Roberds was disciplined because of participation in the face of specific warning from the dean.[42] The court reasoned that even if the charges did refer to the regulation, there was no reason to draw analogies between student discipline and criminal procedure, since a college has its own purpose quite different from that of the criminal

35. *Id.* at 1084-85.

36. *Id.* at 1085.

> He was there as "a part of the gathered crowd." He, too, may not have stopped any automobile or rocked it or forced out its occupants or damaged property, but these incidents took place and were caused by the mob, and he was a part of that mob . . . one may participate by being present and "talking it up" as Roberds concededly did.

37. *Id.*

38. *Id.* at 1087. The court also relied on Barker v. Hardway, 283 F. Supp. 228 (S.D. W.Va.), *aff'd*, 399 F.2d 638 (4th Cir.), *cert. denied*, 394 U.S. 905 (1968) which stated that acts and conduct exceeding the bounds of peaceful protest and in violation of rules and regulations is subject to the power of the administrative authority to take all necessary action and to invoke disciplinary procedures in effect against those responsible.

39. 415 F.2d at 1087.

40. *Id.* at 1088.

41. *Id.*

42. *Id.*

law.[43] The court stated that regulations in the academic area can be flexible and reasonably broad and that such regulations pose no constitutional problem since they are more like codes of general conduct than criminal statutes.[44]

The major deficiencies in the *Esteban* decision stem from evidentiary problems. The district court would review student disciplinary action taken by school authorities only to determine if the challenged action was supported by substantial evidence.[45] The court of appeals stated that its standard of review was whether, on the entire record, the findings of the district court were or were not clearly erroneous.[46]

Judge Lay, dissenting, argued that federal courts do not have jurisdiction under the Civil Rights Act[47] to review student disciplinary actions except in limited circumstances. He contended that federal courts lack the competence to judge disciplinary procedure in the area of public education and should therefore defer such action to the schools, localities, and finally the states as the ultimate protectors of their own schools.[48] However, he argued that when conflicting evidence exists as to a

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43. *Id.* In regard to the regulation involved in this case, *supra* note 32, the court found that it was not difficult to understand and that even "the college student, who is appropriately expected to possess some minimum intelligence, would not find it difficult."

44. 415 F.2d at 1088. The court distinguished between this regulation and the regulations in Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967) and Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967) both of which were struck down because of prior restraint on first amendment rights. In *Hammond*, students gathered together as a group to demonstrate peacefully in violation of a rule against unauthorized demonstrations. The college regulation was struck down because it prohibited all demonstrations without prior approval without limiting its applicability to disruptive demonstration. In *Dickey*, a student editor published an editorial criticising the state legislature and governor and was expelled because of a rule forbidding such publication. The regulation was struck down because the regulation in effect required forfeiture of the right to free speech as a condition to enrollment. 415 F.2d at 1089.

45. Esteban v. Central Mo. State College, 290 F. Supp. 622, 631 (W. D. Mo. 1968).

> The term "substantial evidence" is construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision.

Hearings on S.674, S.675 and S.918 Before the Subcomm. on Administrative Procedure of the Senate Comm. on the Judiciary, 77th Cong., 1st Sess., pt. 3, at 1356 (1941). *See* note 31 *supra.*

46. 415 F.2d at 1083. *See* FED. R. CIV. P. 52(a) (1968).

47. 42 U.S.C. § 1983 (1964).

48. 415 F.2d at 1090-91.

denial of a federal right under the Civil Rights Act, a federal court should make its own *independent* findings of fact and conclusions of law as to whether in fact or law a state has denied the plaintiff a federal right. The dissent concluded that a federal court should not review the "substantiality" of the evidence as found by the school authorities or any other agency of the state.[49]

Requiring a trial de novo on a claim relating to a denial of a federal right[50] seems justifiable in certain circumstances but may have some serious drawbacks. It is certainly true that some college administrators will be more concerned with maintaining orderliness than in protecting the dissemination of unpopular viewpoints and attacks against their administration. Thus, there would be the constant possibility of bias or prejudice in a college hearing not present in a federal court on a trial de novo. Similarly, administrators are not uniformly capable of distinguishing what they consider to be desirable or acceptable as regulations from what a court would consider acceptable on constitutional grounds. Thus there may be an element of arbitrariness in a hearing conducted by the school administration which would not be present in a federal court.[51] Finally, it appears that federal judges are best equipped to handle and decide constitutional issues; college administrators are best able to determine the type of discipline required in the classroom.[52]

The adverse effects of granting a trial de novo at the federal level, however, are numerous. Although problems of prejudice and arbitrariness might be alleviated, the institutional autonomy of a college or university might be unduly impugned in reaching these goals. A system that would allow independent findings of fact and conclusions of law by a federal court may to some degree deter academic decision-makers from fully exercising their own independent judgment even within the boundaries set by due process;[53] that is, administrators might yield to acts

49. *Id. See, e.g.*, Fay v. Noia, 372 U.S. 391, 421 (1962).

50. On a trial de novo, plaintiff would have the burden of proving, by the preponderance of the evidence, that his federal rights were denied. *Id.* at 1092 (dissent).

51. *See* Perkins, *The University and Due Process*, in PARADOX, PROCESS AND PROGRESS 33 (R. Roskens & R. White eds. 1968).

52. Charles Alan Wright says "the courts are expert in applying the first amendment and the due process clause, but the persons on campus are the experts in deciding the academic value of a particular piece of work." Wright, *supra* note 4, at 1070.

53. For a discussion of the adverse effects of granting a new hearing and trial at the federal level plus other effects of judicial review of

which would not be constitutionally protected to avoid the possibility of ensuing court action. There is also the possibility of shifting the burden of decision-making to the courts. A trial de novo on all aspects of the case would be time consuming and expensive; administrators would be compelled to spend a greater amount of time on legal questions and less time on the overall functioning of the college. If, on the other hand, the findings and conclusions of law of the administrative disciplinary body are accorded some weight on review, it is submitted that such administrators would be less likely to hesitate to fulfill their proper function. Judicial deference, tempered with judicial scrutiny should cause college administrators to act reasonably and fairly, knowing their decisions will be subject to reversal.

The conclusion appears to be that the college or university must have some autonomy in conducting disciplinary proceedings, including those where a federal right is involved. Even if the courts are going to defer certain administrative functions to the disciplinary bodies of the college and review only under a "substantial evidence" test, they must not abdicate their responsibility to protect students against overly zealous administrative action.

In *Esteban* the court failed in this responsibility. The evidence purporting to show participation by Roberds in a violent demonstration actually shows just the contrary. Nor could the evidence sustain a finding that Roberds' conduct violated the standard of constitutionally protected conduct recognized in *Tinker*. The fact that he was at the demonstration is inconclusive because the president of the college admitted that Roberds was merely a "spectator"[54] and both the district and appellate courts concluded that the president was justified in this conclusion. The fact that he wrote to his state representative and conversed with the dean of men concerning conduct inconsistent with that of a "spectator" does not make him a "participant" in the act itself when the evidence surrounding the demonstration itself established the contrary. In short, from the evidence presented, it cannot be said that Roberds himself disrupted classwork, invaded the rights of others or caused substantial disorder such that under *Tinker* the college would have the right to discipline him.

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college disciplinary proceedings, see Byse, *The University and Due Process: A Somewhat Different View*, in PARODOX, PROCESS AND PROGRESS 51 (R. Roskens & R. White eds. 1968).

54. 415 F.2d at 1082.

Finally, the *Esteban* court concluded that regulations such as those involved in the disciplinary proceedings are constitutional, there being no requirement that regulations be framed definitively.[55] However, if substantive due process is to have any meaning at all for students, a regulation must be framed in a manner which is both fair and reasonable.[56] The regulation at Central Missouri[57] fails in these respects because it is capable of many interpretations. Words like "participation," "unruly and unlawful," "spectators" and "presence" all create definitional problems, as *Esteban* illustrates, and if not defined clearly leave too much for the unqualified discretion of those who apply the regulation. Phrases and sentences such as, "many so-called 'spectators' get drawn into a fracas and by their very presence contribute to the dimensions of the problems"[58] pose questions of interpretation. Does this phrase mean that all "spectators," even those standing by or brought to the scene of the demonstration by the commotion, are to be treated the same as disruptive demonstrators because by physically being there they add to the problems of control and incite the violent to even greater destruction? Or does the phrase in the regulation apply only to those who initially merely watch but eventually become partakers in the activities of the disrupters?[59]

Secondly, the regulation fails because it reaches behavior protected by the first amendment.[60] The Central Missouri regulation, applied in the manner in which the president applied it, puts both peaceful demonstrators and those present as mere onlookers

55. *Id.* at 1088.

56. *See* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1064 (1969). Wright says:

> If rules of this generality are permissable then students have gained something, but not very much, from the decisions requiring procedural safeguards to be observed. It will do a student very little good to be given every protection of procedural due process ever thought of anywhere if, in the end, he may be expelled because the tribunal is free to apply a subjective judgment about what is acceptable conduct. This would be neither fair nor reasonable.

57. *See* Regulation quoted *supra* note 32.

58. *Id.*

59. The president of the college stated that the regulation "is to prevent *an unauthorized gathering of students which gatherings are . . . made up of a great number of spectators. It is the spectators that create the mass which in turn leads, as in this case, to incidents of unruly and violent action.*" 415 F.2d at 1093 (dissent).

60. This is commonly called the "overbreadth" concept. One who has violated a statute by conduct not constitutionally protected may still have the statute declared void on its face if it also purports to reach other behavior that is constitutionally protected. *See* Aptheker v. Secretary of State, 378 U.S. 500, 516-17 (1964).

in the same class as the disrupters. Such a regulation effectively "chills" the first amendment rights of onlookers and peaceful demonstrators.[61] Students have two choices—either to assert their constitutional rights and attend college at the mercy of the disciplinary body or to leave their constitutional rights at home.

The Seventh Circuit has passed on the question of how definitive school regulations should be and has come to the conclusion that "the constitutional doctrines of vagueness and overbreadth are applicable, in some measure, to the standard or standards to be applied by the university in disciplining its students . . . ."[62] This seems to be the better of two worlds if courts are going to uphold student freedoms within the academic arena.

In the final analysis, a balance must be reached between student rights, including the right to demonstrate and express views, and the right of the college or university to create reasonable rules and regulations. In *Tinker*, the Supreme Court moved towards this balance by recognizing both the right of students to exercise first amendment freedoms and the right of colleges to maintain order and discipline. In *Esteban*, the Eighth Circuit[63]

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61. [T]he *regulation in this instance makes it clear that spectators will be considered to be contributing to the mass gathering and will be subject to similar disciplinary action.*" 415 F.2d at 1093-94 (dissent).

62. Soglin v. Kauffman, 295 F. Supp. 978, 991 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969). In *Soglin*, the University of Wisconsin asserted authority to discipline disruptive students, 295 F. Supp. at 982-83: (1) for 'misconduct'; and (2) for violations of chapter 11:02 of the Laws and Regulations of the University which provided [students] "may support causes by lawful means which do not disrupt the operations of the University. . . ." The district court struck both of these grounds down as being vague and overbroad and stated that:

> [S]uch vagueness or overbreadth, or both, are impermissible in the First Amendment area when the potential of serious disciplinary sanction exists. When the standards of vagueness and overbreadth are applied to Chapter 11.02, however mildly, I am obliged to find it invalid. Neither the element of intention, nor that of proximity of cause and effect, nor that of substantiality, for example, is dealt with by its language. Nor does it contain even the most general description of the kinds of conduct which might be considered disruptive of the operations of the university, nor does it undertake to draw any distinctions whatever as among the various categories of university "operations."

Id. at 993.

63. At this time there seems to be a definite conflict between the Seventh and Eighth Circuits concerning the requirements of specificity in regulations. The *Esteban* court explicitly rejected the holdings of the *Soglin* lower court. However, the Seventh Circuit affirmed the *Soglin*

retreated from this balance by tipping the scales in favor of the college's inherent power to discipline to the detriment of individual student rights.

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decision, 418 F.2d 163 (1969), stating:

> To the extent that Esteban v. Central Missouri State College . . . refuses to apply standards of vagueness and overbreadth required of universities by the Fourteenth Amendment we decline to follow it.

Id. at 168.

Constitutional Law: Failure of Local Board to Reopen Selective Service Classification Held Denial of Due Process

Defendant, prosecuted for refusing induction into the armed forces, contended that he was denied due process when his local draft board, contrary to selective service regulations,[1] refused to reopen his I-A classification after he had furnished evidence that he was satisfactorily pursuing a full time course of undergraduate instruction. The district court found no violation of due process since the noncompliance with the regulations had not been prejudicial to the defendant.[2] The Court of Appeals for the Eighth Circuit, per Lay, J., reversed, *holding* that the board's failure to reopen defendant's classification constituted a violation of due process and was also prejudicial. *United States v. Rundle*, 413 F.2d 329 (8th Cir. 1969).

The courts will generally overturn the classification of a registrant only in instances where the classification has no basis in fact[3] or where there has been a violation of procedural due

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1. 32 C.F.R. § 1625.3(b) (1969) provides:

> The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form No. 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class I-S because he is satisfactorily pursuing a full-time course of instruction at a college, university or similar institution of learning.

32 C.F.R. § 1625.14 (1969) states:

> The reopening of the classification of a registrant by the local board *shall* cancel any Order To Report for Induction (SSS Form No. 252) or Order To Report for Civilian Work and Statement of Employer (SSS Form No. 153) which may have been issued to the registrant. . . .

(emphasis added).

2. United States v. Rundle, 300 F. Supp. 477 (S.D. Iowa 1968).

3. At one time, a substantial number of cases pertaining to section 10(a)(2) of the Selective Training and Service Act of Sept. 16, 1940, ch. 720, § 10(a)(2), 54 Stat. 893, interpreted the phrase "[t]he decisions of such local boards shall be final . . ." to mean that in a criminal prosecution for refusing induction the courts could not review the propriety of a registrant's classification. Judicial inquiry was limited solely to a determination of whether a registrant, in fact, had received an induction notice and had failed to report. Falbo v. United States, 320 U.S. 549 (1944); United States v. Flakowicz, 146 F.2d 874, 875 (2d Cir. 1945); Biron v. Collins, 145 F.2d 758, 759 (5th Cir. 1944); United States v. Sauler, 139 F.2d 173, 174 (7th Cir. 1943). However, the Supreme Court disapproved this approach in Estep v. United States, 327 U.S. 114, 122 (1946):

> The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review

process[4] or "blatant" lawlessness by the board.[5] Although a registrant has been able to obtain direct judicial review in certain instances of patently illegal acts,[6] the courts normally review the propriety of a classification only when it is used as the basis for a habeas corpus petition for release from the armed service or as a defense to prosecution for refusing induction.[7] If the registrant is convicted, he may be imprisoned for not more than five years or fined not more than $10,000 or both.[8]

The criminal penalties and the narrow scope of judicial review[9] have caused courts to state that the local boards must

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> which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local board was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

This scope of review was applied to the Selective Service Act of June 24, 1948, ch. 625, § 10(b)(3), 62 Stat. 619, which contained the same finality provision as the Selective Training and Service Act of 1940. The Military Selective Service Act of 1967, 50 U.S.C. § 460(3) (Supp. IV, 1967) explicitly incorporates the "no basis in fact" scope of review:

> No judicial review shall be made of the classification . . . except as a defense to a criminal prosecution instituted under section 12 of this title . . .: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

4. Witmer v. United States, 348 U.S. 375 (1955).

5. Oestereich v. Selective Service System, 393 U.S. 233 (1968). Blatant lawlessness, in this context, is distinguishable from a violation of due process in that the denials of due process concern procedural defects, whereas lawlessness involves the use of extra-legal considerations in determining a registrant's status.

6. *Id.* at 238. In Clark v. Gabriel, 393 U.S. 256, 258 (1968), the Court held that the use of an injunctive suit to enjoin induction would be sustained as a means of reviewing a registrant's classification only when board action was in conflict with rights explicitly given the registrant by statute and not dependent upon an act of judgment by the board.

7. 50 U.S.C. § 460(3) (Supp. IV, 1967) quoted note 3 *supra*.

8. 50 U.S.C. §§ 462(a) & (b) (Supp. IV, 1967). However, the United States Attorney's Office in Minnesota normally drops any criminal action pending against a registrant who agrees to undergo induction. Parole boards also show a willingness to grant parole to anybody convicted of violating the Selective Service Act if such party will enter the armed service. Interview with Earl J. Cudd, First Assistant to the United States Attorney of Minnesota in St. Paul, Minnesota, January 19, 1970.

9. In reality, the scope of judicial review of the selective service process is much broader than what theory would indicate. Approximately 30 percent of the convictions in Minnesota for violation of the Selective Service Act are eventually reversed. *Id.*

follow selective service regulations to the letter and that a failure to do so will constitute a violation of due process and nullify any order of the board.[10] In practice, however, the courts reduce this self-enunciated principle of strict adherence to rhetoric by using either a "harmless error" or "substantial right" approach. The former rule provides that due process is satisfied unless the board's failure to comply with regulations prejudicially affected the registrant.[11] The judiciary has not attempted to formulate a comprehensive definition of prejudice in this context, but rather has taken a case-by-case approach. Examination of the cases, however, indicates that the essential element in establishing prejudice is a showing that the registrant could have effectively used that which he has been denied, or that the board's error was material to the classification received.[12]

The controverted area of the harmless error rule lies in the allocation of the burden of proof for prejudice. The allocation is

10. *E.g.*, Olvera v. United States, 223 F.2d 880, 882 (5th Cir. 1955).

11. Witmer v. United States, 348 U.S. 375, 384 (1955); Eagles v. Samuels, 329 U.S. 304, 314 (1946); United States v. Spiro, 384 F.2d 159, 161 (3d Cir. 1967); United States v. Perez, 372 F.2d 468, 469 (4th Cir. 1967); Yaich v. United States, 283 F.2d 613, 620 (9th Cir. 1960).

12. Some of the best examples of the need to show effective use or materiality in order to establish prejudice occurred in the mid-1950's with regard to 32 C.F.R. § 1604.41. Between January 1, 1952 and December 31, 1954, this section provided that "[a]dvisors to registrants shall be appointed by the Director of Selective Service. . . . The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office." (Currently, 32 C.F.R. § 1604.41 (1969) uses the permissive word "may" rather than the mandatory "shall".) Numerous boards failed to comply with the regulation and registrants prosecuted for refusing induction alleged that such noncompliance constituted a denial of due process. This contention was generally rejected by the courts on the ground that the registrant was not injured by the noncompliance because he knew of his right of appeal or he never requested assistance from the board. Uffelman v. United States, 230 F.2d 297, 301 (9th Cir. 1956); United States v. Phillips, 143 F. Supp. 496, 502 (N.D. W. Va. 1956), *aff'd*, 239 F.2d 148 (4th Cir. 1956); United States v. Rowton, 130 F. Supp. 189, 192 (W.D. Ky. 1955), *aff'd*, 229 F.2d 421 (6th Cir. 1956). Other examples of nonprejudice resulting from noncompliance with regulations include a failure to reopen formally a registrant's classification per regulation even though the board actually does consider the individual's new claims and does notify him of his continuance in his present classification (Witmer v. United States, 348 U.S. 375, 384 (1955)), a failure to offer registrant three types of civilian work which meet regulation specifications where the registrant has categorically refused any type of civilian work (Yaich v. United States, 283 F.2d 613, 620 (9th Cir. 1960)), and an inadequate summary of registrant's religious beliefs made by the local board where the appeal board had a copy of the canon laws of registrant's church and a brochure of its essential teachings (Tyrrell v. United States, 200 F.2d 8, 11 (9th Cir. 1952)).

critical since the outcome of a case will often be determined by who has the burden of proving prejudice—the Government or the registrant.[13] The courts are currently divided on the issue. A minority of courts place the burden of proving that the irregularity was non-prejudicial on the Government.[14] This allocation is justified in terms of the criminal penalties imposed upon violators of the Selective Service Act. The rationale is that the presumption of innocence applies and is best implemented by placing the burden of proof upon the Government.[15] The majority position, which places the burden of proving prejudice on the registrant, is justified as a means of separating individuals who seek to exploit mere technicalities from those who have legitimate grievances.[16]

The substantial right theory is the second approach mitigating the strict adherence principle. Under this approach, the determinative factor for finding a violation of due process is whether the board's deviation involved a substantial right or merely a formality. If the defect involves a substantial right, there is an automatic violation of due process. No precise definition of substantial rights has been formulated other than an indication that they are those things which the judiciary views as generally necessary for a fair determination of a registrant's status.[17] Prime examples of substantial rights are the right to have a classification reopened when new evidence about a regis-

13. *See* Wilson, *The Selective Service System, An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2157 (1966).

14. The jurisdictions which have dealt with this issue are the First, Third, Fifth, Sixth, Seventh and Ninth Circuits. Only the First and Seventh Circuits have placed the burden of prejudice on the Government. *See* United States v. Freeman, 388 F.2d 246, 250 (7th Cir. 1967); United States v. Spiro, 384 F.2d 159, 161 (3d Cir. 1967); Pate v. United States, 243 F.2d 99, 104 (5th Cir. 1957); Steele v. United States, 240 F.2d 142, 146 (1st Cir. 1956); Kaline v. United States, 235 F.2d 54, 59 (9th Cir. 1956); Rowton v. United States, 229 F.2d 421, 422 (6th Cir. 1956).

15. Steele v. United States, 240 F.2d 142, 146 (1st Cir. 1956).

16. United States v. Lawson, 337 F.2d 800, 813 (3d Cir. 1964); Kaline v. United States, 235 F.2d 54, 59 (9th Cir. 1956); United States v. Mekolichick, 234 F.2d 71, 73 (3d Cir. 1956). Such logic seems highly relevant to the issue of whether an irregularity should constitute a violation of due process per se or whether some prejudicial effect should be required. Such an argument, however, does not address the question of who should bear the burden of proof on the issue.

17. Substantial right, in essence, represents a conclusion by the court that something is so fundamental to its sense of fairness or to the procedural safeguards of the system that as a general policy matter, noncompliance will not be tolerated. The possibility of prejudice, in a broad sense, undoubtedly has a role in determining how fundamental a particular provision is.

trant's status is presented[18] and the right to have notification of classification after the board has evaluated the new evidence.[19]

The problems of the harmless error and substantial right theories were squarely presented to the Eighth Circuit in the instant case. Defendant was a student at Iowa State University who was delinquent in his tuition payments and consequently failed to obtain university certification of his attendance. He was classified I-A and on May 5, 1967 received a notice to report for induction on June 28th. On May 8th, defendant requested a II-S classification, since he was in school but had not paid his tuition. Four days later the university verified his claim but the local board failed to take any action. On June 23rd, defendant withdrew his request for a student deferment and requested conscientious objector status. Pursuant to the recommendation of the State Director of Selective Service, the local board voted unanimously not to reopen the classification.[20]

18. Davis v. United States, 410 F.2d 89 (8th Cir. 1969); United States v. Freeman, 388 F.2d 246 (7th Cir. 1967); Miller v. United States, 388 F.2d 973 (9th Cir. 1967); United States v. Vincelli, 215 F.2d 210 (2d Cir. 1954). 32 C.F.R. § 1625.2 (1969) provides: "[t]he local board *may* reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true would justify a change in the registrant's classification" (emphasis added). In Olvera v. United States, 233 F.2d 880, the court interpreted "may reopen" as obliging the board to reopen if the registrant presented new data which if true would justify reclassification. This right to reopen seems to be fundamental because it relates directly to a decision on the merits and to the right of personal appearance and appeal. See note 19 *infra*.

19. United States v. Fry, 203 F.2d 638 (2d Cir. 1953); United States v. Stiles, 169 F.2d 455 (3d Cir. 1948); United States v. Strebel, 103 F. Supp. 628 (D.C. Kan. 1952). 32 C.F.R. § 1625.12 (1969) provides "[w]hen the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof. . . ." The rationale of emphasizing such notice is that it is necessary for a registrant to know of the board's action before he can exercise his right of personal appearance before the local board and of appeal to the state board (32 C.F.R. § 1625.13 (1969)). These rights are viewed as fundamental safeguards against arbitrary action by the local board.

20. Certain other facts should be mentioned as supporting the court's conclusion that Rundle was malingering. 413 F.2d at 334. The defendant had been delinquent in his tuition payments four times previously and had been classified I-A and then II-S upon eventual university certification of his attendance. The local board indicated a willingness to recommend postponement of Rundle's induction so he could finish summer school and obtain his degree. Rundle refused to authorize the university to release certain routine information regarding his enrollment in summer school and his baccalaureate status. He also submitted a letter denouncing the Vietnam war and requested a Peace

Defendant, prosecuted for refusing induction, contended that the board had acted arbitrarily in refusing to reopen his classification as required by regulation.[21] The district court found no violation of due process because defendant was not prejudiced by the board's failure to follow regulations. The court based this finding on the following factors: defendant had refused to cooperate and provide the board with further information about his schooling,[22] registrant's I-A classification would have been appropriate a few days later because of the end of the school quarter and defendant had voluntarily terminated his studies at the end of spring quarter.

The Eighth Circuit found that the board's failure to reopen registrant's classification deprived him of a substantial right, and that such a deprivation constituted a violation of due process per se regardless of prejudice. The court also found that the board's failure to follow regulations prejudiced the defendant in three ways. First, he was deprived of his right to continue his studies. Under selective service law, defendant's deferment lasted from September to September and not from September to May.[23] Second, the refusal to reopen defendant's classification per regulation deprived him of his right of personal appearance before the local board and of his right of appeal to the state board. Third, the failure to cancel registrant's induction order imposed upon him a higher burden of proof for his conscientious objector claim. Had there been no induction order outstanding, defendant would simply have had to make a prima facie case for conscientious objector status. However, with such an order outstanding, the registrant had to show that his con-

Corps deferment before making his eleventh hour conscientious objector claim.

21. *See* note 1 *supra.*

22. Logically, Rundle's failure to cooperate should have no bearing on the question of whether board failure to follow regulations was prejudicial.

23. Though not dispositive, the court's conclusion that defendant's II-S deferment entitled him to 12 months in which to complete his senior year's work can be challenged on two grounds. First, the board's willingness to postpone induction so that defendant could graduate, if he demonstrated that he was in fact going to attend summer school, eliminated any complaint about being deprived of a right to graduate. Second, if defendant in fact was not going to attend summer school, the court's interpretation of a blanket 12 month deferment for a graduate would be at loggerheads with Local Board Memorandum No. 43, July 26, 1968, SELECTIVE SERVICE LAW REPORTER ¶ 2174, which in commenting on the 12 month provision of 32 C.F.R. § 1622.25(b) (1969), stated "Student classifications should be reopened when the student ceases to be in the status for which he was deferred."

scientious objector claims resulted from circumstances over which he had no control.

The principal criticism of *Rundle* concerns the court's intermingling of the prejudice and substantial right concepts. The thrust of the opinion is certainly that the right to have a classification reopened as specified by regulation is so important and fundamental that any failure by the local board to comply is a denial of due process.[24] However, the court obscures this basic conclusion by its undertaking to demonstrate that the registrant was prejudiced by the board's failure to adhere to regulations.[25] Also, the court's explication of how Rundle was in fact prejudiced by the board's action fails to deal with the adversity element essential to proving prejudice. Rather, two of the three findings of prejudice are couched solely in terms of deprivation of a right to continue one's studies or deprivation of a right to personal appearance and appeal.[26] Because substantial right and harmless error are distinct approaches to the question of due process, confusion results from the mixing of such terminology. Adding to the confusion of the court's analysis is its failure to definitively state what constitutes a substantial right and what criteria are to be used in the determination.

Another major problem with the *Rundle* decision relates to the court's position on conscientious objector claims submitted after an induction order has been mailed. The court states that the registrant has a higher burden of proof when an induction order is outstanding since he must show that his conscientious objector claims stem from circumstances over which he had no control.[27] Lacking such an outstanding order, the registrant would merely have to make a prima facie showing of a change in status.[28] This approach is simply an adoption of the view that belated conscientious objector claims may or may not be based upon a change in circumstances over which the registrant had no control.[29] The drawback of this tack, which the

24. 413 F.2d at 334.
25. *Id.* at 333.
26. *Id.*
27. *Id.*
28. Vaughn v. United States, 404 F.2d 586 (8th Cir. 1968).
29. *See* United States v. Geary, 368 F.2d 144 (2d Cir. 1966); Keane v. United States, 266 F.2d 378 (10th Cir. 1959). Some jurisdictions have held that belated conscientious objector claims always involve a change in status over which the registrant had control. United States v. Jennison, 402 F.2d 51 (6th Cir. 1968); Davis v. United States, 374 F.2d 1 (5th Cir. 1967); United States v. Ali-Majied Muhammad, 364 F.2d 223 (4th Cir. 1966). Others have held that such a claim is never a change

court fails to overcome, is the difficulty of developing any type of meaningful criteria for its application.[30]

In the future, the court should refrain from using the substantial right approach on due process questions. It is too mechanical and does not deal with the equities of a given factual situation. Furthermore, it is an imprecise analytical tool. The definition of substantial right has been propounded by other courts only in the broadest of terms, as that right necessary for a fair operation of the system;[31] such a definition is conclusory in nature and provides no criteria for decision-making. The prejudice requirement, on the other hand, constitutes a more flexible and functional analytical tool. It can cope with the nuances of individual cases and, if the burden of proving prejudice is placed on the Government,[32] it strikes a reasonable balance between individual rights and the interests of society.

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in status over which the registrant had control. United States v. Underwood, 151 F. Supp. 874 (E.D. Pa. 1953).

30. Note, *Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption*, 72 YALE L.J. 1459 (1963). Arguments have been made that congressional intent best accords with the view that conscientious objector claims always involve a change in circumstances beyond the control of the registrant. Proponents maintain that such an approach can be readily and consistently applied and will have only a negligible impact on the efficiency of the selective service system. *Id.* at 1467.

31. *See* text accompanying notes 17-19 *supra*.

32. *See* text accompanying notes 13-16 *supra*.

Jurisdiction: Transnational Rental Business Not Amenable to Process in Wrongful Death Action Arising in Foreign Jurisdiction

A U-Haul cargo trailer, pulled on Nebraska highways, struck a pedestrian on a bridge, inflicting fatal injuries. The driver of the car had rented the trailer, owned by defendant U-Haul Company of North Carolina, from a U-Haul dealer in California. In a wrongful death action, plaintiff, as administrator of the pedestrian's estate, sought to establish jurisdiction in Nebraska over defendant U-Haul Company under the Nebraska Nonresident Motor Vehicle Statute,[1] the Nebraska Business Corporation Act[2] and the Nebraska long-arm statute.[3] The Eighth Circuit Court of Appeals affirmed the district court's denial of jurisdiction, *holding* that defendant U-Haul Company was not amenable to service of process under the Nonresident Motor Vehicle Statute because it was not involved in the "use or operation" of the trailer on Nebraska highways; nor was the defendant amenable to service of process under the Business Corporation Act because U-Haul Company of North Carolina was not "doing business" within the state. *Peterson v. U-Haul Company*, 409 F.2d 1174 (8th Cir. 1969).

Obtaining personal jurisdiction over a foreign corporation

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1. NEB. REV. STAT. § 25-530 (1964). The statute in part provides:
> (1) The use and operation by a nonresident of the State of Nebraska or his agent of a motor vehicle . . . within . . . Nebraska, shall be deemed an appointment, by such nonresident, of the Secretary of State . . . upon whom may be served all legal processes in any action . . . against him, growing out of such use or operation of a motor vehicle . . . within this state.

2. NEB. REV. STAT. § 21-20, 114 (Supp. 1967). This "doing business" statute is part of Nebraska's Business Corporation Act and provides:
> Whenever a foreign corporation shall do business in this state, and fails to appoint or maintain a registered agent in this state, . . . the Secretary of State shall be an agent of such corporation upon which . . . process . . . may be served.

3. NEB. REV. STAT. § 25-536 (Supp. 1967). The statute provides for personal jurisdiction over a corporation in a cause of action which arises from the corporation's "transacting any business" in Nebraska, *Id.* § 25-536(1)(a), or causing tortious injury in Nebraska by an act or omission outside the state if the corporation "regularly does or solicits business, or engages in any other persistent course of conduct, or derives *substantial* revenue from goods used or consumed or services rendered" in the state. *Id.* § 25-536(1)(d) (emphasis added). The statute is copied from the UNIFORM INTERSTATE & INTERNATIONAL PROCEDURE ACT § 1.03 (1962). The district court in *Peterson* did not discuss section 25-536 but the court of appeals considered its applicability to the issues.

has been a constant source of judicial controversy.[4] Early cases followed the notion that a corporation could not be sued in other than the state of its incorporation and any activity which a corporation conducted outside its state of incorporation was dependent upon the permission of the government within whose jurisdiction the corporation desired to operate.[5] With the proliferation of multistate corporations, it became incumbent upon the courts to make provision for suits by and against such entities in foreign states.[6] The "consent" and "presence" theories,[7] originally used for the assertion of in personam jurisdiction over foreign corporations, eventually merged into the "doing business" theory.[8]

The due process limitations upon the extent to which a state court can assert personal jurisdiction over a foreign corporation were enunciated by the Supreme Court in *International Shoe Company v. Washington.*[9] To be subjected to in personam jurisdiction, the corporation must have certain "minimum contacts" with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[10] A more precise test was not formulated since a consideration of the "quality and nature" of individual facts was deemed necessary to determine the reasonableness of allowing the suit to be brought in that state.[11] Subsequent decisions have held that

4. *See* Kurland, *The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of State Courts* From Pennoyer to Denckla: A Review,* 25 U. CHI. L. REV. 569 (1958); Note, *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 919-23 (1960).

5. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839); Pomeroy v. New York & N.H.R.R., 19 F. Cas. 965 (No. 11,261) (C.C.S.D. N.Y. 1857); Day v. Newark India-Rubber Mfg. Co., 7 F. Cas. 245 (No. 3685) (C.C.S.D. N.Y. 1850).

6. *See* Note, *Personal Jurisdiction over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie,* 31 U. CHI. L. REV. 752, 767 (1964).

7. *See* Bullington, *Jurisdiction Over Foreign Corporations,* 6 N.C.L. REV. 147 (1928).

8. For a good discussion of this history, see Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930).

9. 326 U.S. 310 (1945). *See also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312-14 (1950); Milliken v. Meyer, 311 U.S. 457 (1940), *rehearing denied,* 312 U.S. 712 (1941).

10. International Shoe Co. v. Washington, 326 U.S. 310 at 316 (1945), *quoting from* Milliken v. Meyer, 311 U.S. 457, 463 (1940). The Court further stated: "[Due process] demands may be met by such contacts with the state of the forum as make it reasonable . . . to require the corporation to defend the particular suit which is brought there." *Id.* at 317.

11. *Id.* at 319. *See* Kurland, *supra* note 4, at 623:

the commission of a single act is sufficient to allow assertion of jurisdiction.[12]

The *International Shoe* test, phrased in terms of "minimum contacts," "fair play" and "substantial justice," has been interpreted as the maximum permissible exercise of in personam jurisdiction. A state may, however, establish jurisdictional standards less inclusive than the constitutional limitations.[13] Thus, a foreign corporation's defense of lack of jurisdiction may be founded on either or both of two theories: (1) statutory law which provides the criteria for obtaining jurisdiction over foreign corporations and (2) the constitutional guarantee of due process.[14]

Consequently, since *International Shoe*, many states have revised their "doing business" statutes to take advantage of the increased area of permissible jurisdiction.[15] Since the concept of "doing business" is not easily defined,[16] it has been suggested

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> The Supreme Court opinions have revealed some if not all of the factors which are to be taken into consideration in reaching a conclusion on the issue of *in personam* jurisdiction. They do not reveal how each factor is to be weighed in combination with the others.

Thus the question of jurisdiction became primarily a factual determination for the trial court. *See also* Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959).

12. McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *See also* 18 W. FLETCHER, PRIVATE CORPORATIONS § 8715 (rev. ed. 1969).

13. *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957). However, the state need not assert jurisdiction to the limits of the due process clause. Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, *rehearing denied*, 343 U.S 917 (1952). *Cf.* Uppgren v. Executive Aviation Services, Inc., 304 F. Supp. 165 (D. Minn. 1969).

14. *See* Note, *Doing Business—A Re-Examination*, 12 W. RES. L. REV. 89, 90 (1960).

15. "Doing business" was the test which determined whether, in federal diversity cases, a foreign corporation could be subjected to jurisdiction in plaintiff's forum. *See* Note, *Doing Business as a Test of Venue and Jursidiction Over Foreign Corporations in the Federal Courts*, 56 COLUM. L. REV. 394, 404-08 (1956). The quantum of activity which is necessary to subject a foreign corporation to service of process is not standardized. Whether the general language of a "doing business" statute authorizes service in a certain case is a matter of the particular state's interpretation of its statute. Litsinger Sign Co. v. American Sign Co., 11 Ohio St. 2d 1, 227 N.E.2d 609 (1967).

16. Consolidated Flour Mills Co. v. Muegge, 127 Okla. 295, 297, 260 P. 745, 747 (1927). As one court aptly put it: "Perhaps there is no question in the law more complicated and confused as the one attempting to define what is 'doing business' within a particular territory or jurisdiction . . . ." Snowden v. Masonic Life Ass'n of Western New

that a uniform federal standard as to what constitutes "doing business" should be applied in diversity cases.[17] At present, however, it is the federal courts' responsibility to apply the law of the state as declared by that state's legislature or by its highest court.[18] If there are no controlling state decisions, the federal court must decide the case as it believes the highest state court would decide it.[19] Since states are not required to provide jurisdiction where parties meet the minimal constitutional requirements,[20] a two step analysis—viewing state statutes first and then applying due process standards to the statute—is used by the majority of the federal courts.[21] The statutory phrase "doing business," however, has rarely been extended to the constitutional limits of in personam jurisdiction.[22] As a result, some states have departed from the "doing business" concept and have increased the purview of in personam jurisdiction by formulating statutes based on other grounds.[23]

York, 244 Ky. 286, 290, 50 S.W.2d 569, 570 (1932). Commentators often equate the concept of doing business with the *International Shoe* test for asserting in personam jurisdiction over foreign corporations. *See, e.g.*, 18 W. FLETCHER, *supra* note 12, §§ 8711, 8713, 8713.1.

17. Arrowsmith v. United Press Int'l, 320 F.2d 219, 234 (2d Cir. 1963) (Clark, J. dissenting opinion); Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960) (Clark, J. majority opinion); Pike v. New England Greyhound Lines, Inc., 93 F. Supp. 669 (D. Mass. 1950). Green, *Federal Jursidiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961); Note, *Diversity Jurisdiction of the Federal Courts over Foreign Corporations*, 49 IOWA L. REV. 1224, 1228 n.21, 1244-45 (1964).

18. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

19. Southern Farm Bureau Cas. Ins. Co. v. Mitchell, 312 F.2d 485 (8th Cir. 1963); Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159 (D.S.D. 1967); *See* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 8, n.6.5 (Wright ed. Supp. 1968); 18 W. FLETCHER, *supra* note 12, § 8706; C. WRIGHT, FEDERAL COURTS § 58 (1963).

20. Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, *rehearing denied*, 343 U.S. 917 (1952); Simpkins v. Council Mfg. Corp., 332 F.2d 733 (8th Cir. 1964).

21. Bowman v. Curt G. Joa, Inc., 361 F.2d 706, 711 (4th Cir. 1966): "This concept of requiring the federal courts to follow the jurisdictional lead of the state courts in diversity cases has apparently been adopted by the vast majority of the federal circuits." *See also* Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963) (overruling Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960)).

22. Note, *Recent Interpretations of "Doing Business" Statutes*, 44 IOWA L. REV. 345 (1959). "The fundamental principle guiding the state courts in interpreting their 'doing business' statutes seems to be the maintenance within the jurisdiction of a regular, continuous course of business activity." *Id.* at 349.

23. These are the so-called long-arm statutes. *See, e.g.*, UNIFORM INTERSTATE & INTERNATIONAL PROCEDURE ACT § 1.03; ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968); MINN. STAT. § 543.19 (1967); WIS.

A state's nonresident motor vehicle statute may provide another ground for asserting in personam jurisdiction over a foreign corporation. Presently, every state has adopted some form of nonresident motor vehicle statute[24] and several states have "use and operation" statutes.[25] The "use" concept is admittedly broader than that of "operation."[26] "Operation" is generally interpreted as the actual physical handling of the motor vehicle,[27] whereas "use" is considered to cover the nonresident owner of the vehicle.[28] However, the definition of "use" has not been extended to include the nonresident lessor where his lessee is involved in an accident. The rationale for this rule is that the statutes require a *respondeat superior* relationship and the lessee and nonresident lessor are not so related.[29]

In *Peterson*, defendant U-Haul Company of North Carolina[30]

STAT. ANN. § 262.05 (Supp. 1969). *See also* O'Connor & Goff, *Expanded Concepts of State Jurisdiction Over Non-Residents: The Illinois Revised Practice Act*, 31 NOTRE DAME LAW. 223 (1956). In some states the courts have construed their state's jurisdiction statutes to make them consistent with the *International Shoe* doctrine. *See, e.g.*, Mechanical Contractors Ass'n of America, Inc. v. Mechanical Contractors Ass'n of Northern Cal., Inc., 342 F.2d 393 (9th Cir. 1965); Bible v. T.D. Publishing Corp., 252 F. Supp. 185 (N.D. Cal. 1966); Fisher v. Mon Dak Truck Lines, Inc., 166 N.W.2d 371 (N.D. 1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

24. In Hess v. Pawloski, 274 U.S. 352 (1927), the Supreme Court sustained the constitutionality of the Massachusetts Nonresident Motorist Statute. The case was cited with approval in *International Shoe*. For a listing of the states and their respective statutes see Jox, *Non-Resident Motorists Service of Process Acts*, 33 F.R.D. 151, 153-54 n.5 (1964); Gibbons, *A Survey of the Modern Nonresident Motorist Statutes*, 13 U. FLA. L. REV. 257 n.2 (1960).

25. *E.g.*, ILL. ANN. STAT. ch. 95-½, § 9-301 (Smith-Hurd 1958); MINN. STAT. § 170.55 (1967); NEB. REV. STAT. § 25-530 (1964); OKLA. STAT. ANN. tit. 47, § 391 (1962); S.D. COMPILED LAWS ANN. § 15-7-6 (Supp. 1969); WIS. STAT. ANN. § 345.09 (Supp. 1969). These nonresident motor vehicle statutes provide for service of process over a nonresident who has been using or operating the motor vehicle within the forum state. *See* note 1 *supra*.

26. *See* Rose v. Gisi, 139 Neb. 593, 596, 298 N.W. 333, 335 (1941).

27. *Id.*; Larsen v. Powell, 117 F. Supp. 239, 241 (D. Colo. 1953). Operating a motor vehicle applies only to the person actually driving the car and not the nonresident owner. Morrow v. Asher, 55 F.2d 365 (N.D. Tex. 1932); Flynn v. Kramer, 271 Mich. 500, 261 N.W. 77 (1935).

28. Larsen v. Powell, 117 F. Supp. 239, 241 (D. Colo. 1953) (Colorado court interpreting Nebraska's Nonresident Motor Vehicle Statute).

29. *E.g.*, Boulay v. Pontikes, 93 F. Supp. 826 (W.D. Mo. 1950); Gately v. U-Haul Co., 350 Mass. 483, 215 N.E.2d 743 (1966); Hayes Freight Lines v. Cheatham, 277 P.2d 664 (Okla. 1954).

30. In *Peterson*, the driver of the car leased the U-Haul trailer owned by defendant U-Haul Company of North Carolina from a Cali-

was not authorized to do business in Nebraska, and maintained no office, telephone, agents, bank account or service facilities in the state.[31] Defendant's sole business activities within Nebraska were: (1) the occasional presence of trailers owned or at least licensed by defendant, (2) receipt of rental fees derived from one-way or round-trip rentals initiated in North or South Carolina to a point of destination in Nebraska and (3) benefits derived from U-Haul advertising in Nebraska and from the protection of the trade-name "U-Haul" under Nebraska law.[32]

Plaintiff asserted jurisdiction under all the relevant Nebraska statutes. He asserted that defendant came within the purview of the Nebraska Nonresident Motor Vehicle Statute[33] because, (1) the driver was acting as defendant's agent in using the trailer on Nebraska highways and (2) defendant was engaged in the "use" of the trailer within the meaning of that statute.[34] Plaintiff also argued that defendant was subject to jurisdiction under the "doing business" provision of Nebraska's Business Corporation Act[35] and under the provisions of the recently adopted Nebraska long-arm statute.[36]

Rejecting all of plaintiff's arguments, the *Peterson* court denied jurisdiction under the aforementioned statutes. The initial issue confronting the court was whether defendant was amenable to process under Nebraska's nonresident motorist law—either through an agency relationship or under the "use" con-

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fornia dealer. Although defendant U-Haul denied it was the "owner" of the trailer in question, the court assumes that it was for purposes of asserting jurisdiction. 409 F.2d 1174, 1176-77 n.2. The rental agreement provided for the driver to leave the trailer at a destination in South Dakota. Defendant U-Haul is part of an integrated group of many corporations and entities comprising the U-Haul Rental System. The Rental System is comprised of four divisions: Fleet Owners (capital investors), Arcoa, Inc. (performs accounting and various advisory services for the other divisions of the System), Rental Companies (responsible for licensing, marketing and supervision of maintenance and repair of trailers that appear in the states in which they are authorized to operate) and Rental Dealers (rent trailers to public). As one of the Rental Companies, defendant is responsible for advertising, licensing of trailers and maintaining and repairing trailers within North Carolina and South Carolina, their authorized area to do business. Defendant receives a percentage of the rental income of transactions made within its authorized area of operation.

31. 409 F.2d at 1182 n.10.
32. *Id.* at 1182.
33. *Id.* at 1176. *See* note 1 *supra.*
34. 409 F.2d at 1176, 1179.
35. *Id.* at 1176. *See* note 2 *supra.*
36. 409 F.2d at 1183. *See* note 3 *supra.*

cept. Although no Nebraska court had previously been confronted with this particular situation, the Supreme Court of Nebraska had determined that the statute must be strictly construed and applied only to persons specifically named therein.[37] Relying upon this directive of strict construction, as well as cases from other jurisdictions,[38] the *Peterson* court denied the existence of an agency relationship based upon the lease agreement.[39] In addition, the court concluded that the defendant's mere ownership of the trailer did not constitute "use" as meant by the statute. The court reasoned that the term "use" is directed at a more immediate and physical employment of the vehicle than merely the abstract "use" as a capital investment.[40]

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37. Rose v. Gisi, 139 Neb. 593, 595, 298 N.W. 333, 335 (1941); *accord*, Youngson v. Lusk, 96 F. Supp. 285 (D. Neb. 1951); Covert v. Hastings Mfg. Co., 44 F. Supp. 285 (D. Neb. 1942); Downing v. Schwenck, 138 Neb. 395, 293 N.W. 278 (1940). Plaintiff urged that a Nebraska statute, which imposes joint liability on the owner and lessee of any leased trailer, made the driver the agent of defendant. NEB. REV. STAT. § 39-7135 (1968) provides: "The owner of any leased . . . trailer shall be jointly and severally liable with the lessee and the operator thereof for . . . the death of any person . . . resulting from the operation thereof in this state." The court denied that the statute established an agency relationship for purposes of the nonresident motorist law and concluded that to hold so would defeat legislative intent.

38. *E.g.*, Gately v. U-Haul Co., 350 Mass. 483, 215 N.E.2d 743 (1966).

39. Gately v. U-Haul Co., 350 Mass. 483, 215 N.E.2d 743 (1966). Boulay v. Pontikes, 93 F. Supp. 826 (W.D. Mo. 1950). MO. ANN. STAT. § 506.210 (Supp. 1968) is a "use and operation" statute very similar to Nebraska's. The Missouri court held that the driver of a leased car was not the agent of the lessor within the purview of the nonresident motor vehicle statute since the statute contemplated "a relationship that has all the legal consequences of *respondeat superior* considered from a tort liability standpoint." 93 F. Supp. at 828.

The Nebraska court has said that an agency "cannot be established by the acts or declarations of the alleged agent, but must be proved by the acts or declarations of the principal." Berg v. Midwest Laundry Equip. Corp., 175 Neb. 423, 425, 122 N.W.2d 250, 252 (1963). In *Gately*, the court analyzed the transaction as

> nothing more than the rental of the trailer in Ohio to transport the plaintiff's personal property into [Massachusetts] and the ultimate surrender of the trailer at a prearranged place in Boston in order to terminate responsibility under the rental agreement.

350 Mass. at 485, 215 N.E.2d at 744.

40. 409 F.2d at 1180. By holding that defendant was not "using or operating" the trailer on Nebraska highways, the court avoided the issue of whether a trailer was a motor vehicle within the purview of the statute. The *Peterson* court relied on Hayes Freight Lines v. Cheatham, 277 P.2d 664 (Okla. 1954), where an Illinois corporation leased a semi-trailer which it owned to a Kansas company licensed to do business in Oklahoma. The Oklahoma court found that under the Oklahoma Non-

The second issue in *Peterson* was whether defendant was "doing business" within the meaning of Nebraska's Business Corporation Act.[41] In determining what constitutes "doing business," the Nebraska Court has considered the facts of each particular case, rather than following any all-embracing rule.[42] However, Nebraska does require defendant's actual physical presence plus "the conduct of activities, more or less continuous" within the state.[43] The court concluded that U-Haul's business activities within Nebraska and the mere presence of an occasional trailer of defendant's were not sufficient contacts to meet Nebraska's requirements for "doing business."[44] The court reached this conclusion despite its recognition of the benefits which defendant derived from the success of the Rental System in Nebraska.[45] The activities of an affiliated corporation doing business within a state are not sufficient justification for the assertion of jurisdiction over a nonresident affiliate.[46] Even if it were shown that the various corporations were set up for the primary purpose of escaping legal obligations,[47] it would still be necessary to inquire whether the nonresident has the requisite minimum contacts with the state of a particular forum.[48] The

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resident Motorist Statute, OKLA. STAT. ANN. tit. 47, § 391 (1962), neither the Kansas company nor its employee represented the lessor as agents or otherwise. Accordingly, the Oklahoma court denied jurisdiction holding that the trailer was not "used or operated" by the owner or its agents on Oklahoma's highways.

41. Litsinger Sign Co. v. American Sign Co., 11 Ohio St. 2d 1, 227 N.E.2d 609 (1967). *See* note 15 *supra.*

42. Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N.W.2d 151 (1957); *accord,* Dale Electronics, Inc. v. Copymation, Inc., 178 Neb. 239, 132 N.W.2d 788 (1965); Berg v. Midwest Laundry Equip. Corp., 175 Neb. 423, 122 N.W.2d 250 (1963).

43. 409 F.2d at 1182-83. *See also* Dale Electronics, Inc. v. Copymation, Inc., 178 Neb. 239, 132 N.W.2d 788 (1965).

44. 409 F.2d at 1183. *Cf.* Hanson v. Denckla, 357 U.S. 235, 253 (1958); Stewart v. Bus & Car Co., 293 F. Supp. 577 (N.D. Ohio 1968); Williams v. Connolly, 227 F. Supp. 539 (D. Minn. 1964); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

45. 409 F.2d at 1184. *See* note 32 *supra.*

46. *See* Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 336 (1925); Lopinsky v. Hertz Drive-Ur-Self Systems, 194 F.2d 422 (2d Cir. 1951); Ludwig v. General Binding Corp., 21 F.R.D. 178 (E.D. Wis. 1957); Nagl v. Northam Warren Corp., 8 F.R.D. 130 (D. Neb. 1948).

47. 409 F.2d at 1185. *Cf.* Darling Stores Corp. v. Young Realty Co., 121 F.2d 112 (8th Cir. 1941); Commerce Trust Co. v. Woodbury, 77 F.2d 478 (8th Cir. 1935). *See generally* Mull v. Colt Co., 178 F. Supp. 720 (S.D.N.Y. 1959).

48. Velandra v. Regie Nationale des Usines Renault, 336 F.2d 292, 297 (6th Cir. 1964). The existence of dealers and a subsidiary corpora-

Peterson court avoided this issue, however, by concluding that the U-Haul System was not a subterfuge to escape legal liability.[49]

The final issue confronting the *Peterson* court was the applicability of Nebraska's recently enacted long-arm statute. The court concluded that, although the Nebraska Legislature intended to broaden the bases for asserting jurisdiction, the statute still required defendant's actual presence in the state plus some regular or persistent course of conduct.[50]

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tion doing business within the state did not constitute sufficient contact between the parent company and the State of Michigan to permit exercise of in personam jurisdiction over the parent corporation.

49. 409 F.2d at 1185.

50. *Id.* at 1183. The comment following section 1.03 of the UNIFORM INTERSTATE & INTERNATIONAL PROCEDURE ACT (1962), which Nebraska adopted as its long-arm statute, states that "transacting any business" within the meaning of section 1.03(A)(1), (NEB. REV. STAT. § 25-536(1)(a) (Supp. 1967)), should be given the same interpretation as given it by the courts of Illinois. "Transaction of business" is generally interpreted as requiring less contact with the state than "doing business." Steele v. DeLeeuw, 40 Misc. 2d 807, 808, 244 N.Y.S.2d 97, 99 (Sup. Ct. 1963); but Illinois still requires some physical presence by the defendant or his agent. Kropp Forge Co. v. Jawitz, 37 Ill. App. 2d 475, 480-81, 186 N.E.2d 76-79 (1962). In referring to section 1.03(a)(4), (NEB. REV. STAT. § 25-536(1)(d) (Supp. 1967)), which authorizes the exercise of jurisdiction when the tortious act takes place without the state but the injury occurs within the state, the comment interpreted the section to be more restrictive than the Illinois statutes and Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Arguably, the Nebraska legislature adopted this statute with the intent of protecting the small business, nonresident defendant. This reasoning is not particularly persuasive since the courts can protect this defendant through *forum non conveniens* principles. However, there may be some ground to support a limitation on court power by limiting jurisdiction, rather than confidence in court discretion, in the notion that leaving it all up to individual disposition of individual cases will create too much preliminary litigation of jurisdictional issues with no guaranty of better disposition.

The UNIFORM INTERSTATE & INTERNATIONAL PROCEDURE ACT (1962), has been referred to as "a *conservative* statement of contemporary American thinking . . . ." von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1152 (1966) (emphasis added). A good commentary providing a survey of the types of long-arm statutes available in other jurisdictions and the theory behind and problems arising in drafting and interpreting a long-arm statute is found in Note, *Personal Jurisdiction in Nebraska: The Need for a Long-Arm Statute*, 45 NEB. L. REV. 166 (1966). Rhode Island's approach to extending in personam jurisdiction to the limits of due process is unique. Its statute provides the court with jurisdiction as long as the nonresident has the necessary minimum contacts with Rhode Island to satisfy federal due process requirements. R.I. GEN. LAWS ANN. § 9-5-33 (Supp. 1967). However, this approach only shifts the burden to the courts to delineate the limits of due process. The

The *Peterson* court, although sympathetic with plaintiff's predicament, correctly interpreted the applicable Nebraska law. The result is thus unfortunate, in that jurisdiction was precluded, not by constitutional barriers,[51] but because Nebraska does not extend its jurisdictional arm to the limits expressed in Supreme Court decisions.[52] Although Nebraska's adoption of a long-arm statute increases the permissible area for assertion of in personam jurisdiction, it is still short of the constitutional limits of due process.[53] Thus, business corporations are still encouraged to do business in Nebraska at the expense and inconvenience of its own citizens who are forced to prosecute claims against a foreign corporation in a foreign forum.

The *Peterson* court could have resolved the case differently through an imaginative construction of the Nonresident Motor Vehicle Statute—particularly in light of the trailer-liability statute. The latter statute makes the "owner of any leased . . . trailer . . . jointly and severally liable with the lessee and operator thereof for . . . the death of any person . . . resulting from the operation thereof in [Nebraska]."[54] It does not seem unreasonable to approach the nonresident motor vehicle statute with the assumption that, if at all possible, it should be interpreted so as to give practical effect to the trailer-liability statute.

It is apparent in the *Peterson* decision that the relative fairness of the parties' interests was insufficiently emphasized. The multistate character of defendant's activities, involving foreseeable risk of serious harm to individuals in other states, should be sufficient to require defendant to come to the plaintiff.[55] If

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Illinois and Wisconsin long-arm statutes provide examples of extending in personam jurisdiction over a nonresident to the ultimate limits of due process. ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968); WIS. STAT. ANN. § 262.05 (Supp. 1969).

51. A foreign corporation, which performs a single act or consummates a single transaction can be subject to the jurisdiction of the forum—irrespective of additional contacts with the state. *See* note 12 *supra*. The harshness of the decision is reflected by plaintiff's inability to assert in a Nebraska court that defendant U-Haul of North Carolina is jointly and severally liable with the driver. *See* NEB. REV. STAT. § 39-7135 (1968).

52. *See* Hanson v. Denckla, 357 U.S. 235 (1938); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

53. *See Id.*

54. NEB. REV. STAT. § 39-7135 (1968).

55. *See* von Mehren & Trautman, *supra* note 50, at 1167, 1172. *Cf.* Uppgren v. Executive Aviation Services, Inc., 304 F. Supp. 165 (D. Minn. 1969) where a helicopter manufactured by a corporation with

a corporation places its trailer in the stream of national commerce, it is certainly utilizing the privilege of conducting business activities within each state into which its trailers may ultimately travel. Besides direct benefits in the form of rental income, U-Haul receives indirect benefits from the operation of the Rental System in the Nebraska market, including protection of its tradename under Nebraska law. Since Nebraska must open its borders to such commerce, it should protect the interest of its injured residents by providing them with a forum for suit.[56]

If the Nebraska Legislature desires to extend its jurisdiction over nonresident defendants, it must do so through better legislation. One possible solution, to preclude another decision comparable to *Peterson*, would be to explicitly approve the interrelationship of the nonresident motor vehicle statute and the trailer-liability statute. A broader solution is to adopt a long-arm statute expanding the court's jurisdictional power to the constitutional limits—relying on *forum non conveniens* for protection of defendants who should not be forced to litigate in Nebraska.[57] To provide Nebraska plaintiffs with a convenient forum against elusive nonresident defendants, the Nebraska Legislature and courts must be willing to assert in personam jurisdiction to the limits of due process or otherwise force resident plaintiffs to seek adjudication of their claims in a foreign forum.

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its sole place of business in Maryland was sold in Maryland but crashed in Minnesota. The court refused jurisdiction under Minnesota's single act statute, holding that under the facts of this case due process bars in personam jurisdiction. The court applied the "foreseeable use" test and found that although the corporation might have foreseen the use of its helicopter in interstate commerce it could not have foreseen substantial use in Minnesota.

56. *See* note 50 *supra*.

57. *Id.*

Torts: Drug Manufacturer Held Negligent for Failure to Use Detail Men to Warn Physicians of Dangerous Side Effect

Appellant drug manufacturer was engaged in promoting the sale of a new prescription drug[1] for the treatment of arthritis. During the promotion it became apparent that a small hypersensitive group of users suffered from deteriorating vision as a side effect. Appellee's doctor prescribed the drug for her in 1958 and she used it daily until late 1964, at which time an examination disclosed that her vision was rapidly deteriorating. It was later confirmed that the drug caused her injury. Upon learning of the side effect, appellant attempted to notify the medical profession in three ways: 1) by inserting a warning in the Physician's Desk Reference (PDR),[2] 2) by sending out "product cards"[3] and 3) by sending a "Dear Doctor" letter to doctors.[4] Notwithstanding these protective measures, the Eighth Circuit *affirmed* the lower court's finding of negligence[5] based on the manufacturer's failure to instruct its "detail men"[6] to warn physicians about the dangerous side effect. In support of this holding, the court added that the manufacturer's methods of warning had not met industry custom. The court also held that the negligence, if any, of appellee's doctor could not act as a superseding cause to absolve the appellant of liability. *Sterling Drug, Incorporated v. Yarrow*, 408 F.2d 978 (8th Cir. 1969).

Prior to the emergence of manufacturers' strict liability, negligence was the major recourse available to an injured user of

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1. The drug's generic name is chloroquine phosphate and its brand name was "Aralen."

2. The PDR is a reference to about 90 percent of the drugs on the market. It consists of information given by manufacturers and is commonly referred to by the physician in prescribing drugs. It is currently an open question as to whether the PDR is subject to FDA authority as labeling. *See* text accompanying notes 35-38 *infra*.

3. This card gives new information on a drug and is usually the same information as that appearing in the PDR.

4. This letter suggested trimonthly eye examinations while the patient was on the drug, but letters of this type are usually sent by bulk mail and are therefore not given much attention by doctors.

5. Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159 (D.S.D. 1967) (court sitting without a jury).

6. A "detail man" is the salesman who contacts the doctor on behalf of the manufacturer. He promotes the sale of drugs but differs from the ordinary salesman to the extent that he usually has some background in chemistry. The information that he gives doctors comes exclusively from the manufacturer.

a defective product. Since it was possible to manufacture defective products without being negligent, this remedy proved inadequate. Various theories of no-fault liability developed in response and two basic premises underlie all of them.[7] The first is that no rational reason requires the few unlucky users to shoulder the entire burden of their injury when they were not at fault. By shifting the risk of injuries resulting from defective products to the manufacturer, the cost is borne by all purchasers of that product. The second premise is that the manufacturer should be made aware of the real cost of defective products. The manufacturer can then allocate resources efficiently between the cost of defects in terms of litigation and the cost of attempting to eliminate the defects. The result is likely to be a standard of care somewhat higher than the due care standard. Moreover, since the products will bear their true cost, products which consumers are unwilling to buy will be eliminated.[8]

With judicial adoption of various theories of strict liability, proof of negligence is no longer necessary in most product liability cases. In jurisdictions following the *Restatement (Second) of Torts*, all one need prove is that: 1) the product was put into commerce in a defective condition unreasonably dangerous to the user, 2) the seller was engaged in the business of selling such a product and 3) the article was expected to and did reach the user without substantial change in the condition in which it was sold.[9]

Strict liability for defective products, however, is subject to one important exception in *Restatement* jurisdictions. Some products are by their very nature "unavoidably unsafe," yet the sale of such products is justified by their relative advantages. The most salient example of an "unavoidably unsafe" product is the Pasteur treatment for rabies, which very often results in serious consequences. Marketing and administration of the vaccine are justified because rabies leads to a dreadful death. A product in this category, when "properly prepared, and accompanied by proper directions and *warning*, is not defective, nor is it *unreasonably* dangerous . . . ."[10] Therefore, the manufacturer

7. *See generally* McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960); Prosser, *The Fall of the Citadel, (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

8. Calabresi, *Some Thoughts on Risk Distribution and The Law of Torts*, 70 YALE L.J. 499 (1961).

9. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

10. RESTATEMENT (SECOND) OF TORTS § 402A, comment K (1965) (first emphasis added).

of an "unavoidably unsafe" drug is not subject to strict liability but is required to make reasonable efforts to warn the medical profession of the side effects inherent in the drug.[11]

Conventional wisdom of the pharmaceutical industry held that since hypersensitive persons did not know of their condition, a warning about potentially dangerous side effects would be futile.[12] Thus, a manufacturer could assert the hypersensitivity of the plaintiff as a complete defense. In *Sterling Drug, Incorporated v. Cornish*,[13] however, the Eighth Circuit followed the minority view[14] and held that the manufacturer had a duty to reasonably warn plaintiff's doctor notwithstanding plaintiff's hypersensitivity.[15] The court said this was particularly true where the product was a *prescription* drug. While the duty to warn was not discharged by a simple change in the manufacturer's product card,[16] the *Cornish* court did not say what type of warning would be considered reasonable. The court found that the defendant's "Dear Doctor" letter was not sent in time to aid plaintiff's doctor.[17] Thus, the question of whether a timely letter would have discharged the manufacturer's duty to warn was not discussed.

In *Yarrow*, the same court that decided *Cornish* was dealing with the same drug, side effect, manufacturer and warning devices. Although the "Dear Doctor" letter to Mrs. Yarrow's doctor was found to be timely,[18] the trial court also found that doc-

11. Sterling Drug, Inc. v. Cornish, 370 F.2d 82, 85 (8th Cir. 1966). The *Cornish* court did not deal with the standard as it applies to "unavoidably unsafe" products but stated that the standard in those terms applies generally.

12. *See generally* 2 L. FRUMER, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 29 (1959), 2 R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 8.3 (1961); Keeton, *Some Observations About the Strict Liability of the Maker of Prescription Drugs: The Aftermath of MER/29*, 56 CALIF. L. REV. 149 (1968); Noel, *The Duty to Warn Allergic Users of Products*, 12 VAND. L. REV. 331 (1959); Annot., 26 A.L.R.2d 963 (1952).

13. 370 F.2d 82 (8th Cir. 1966).

14. *See* Gober v. Revlon, Inc., 317 F.2d 47 (4th Cir. 1963); Wright v. Carter Prods., 244 F.2d 53 (2d Cir. 1957); Braun v. Roux Distrib. Co., 312 S.W.2d 758 (Mo. 1958).

15. 370 F.2d at 85.

16. The court reasoned that the difference between over-the-counter drugs and prescription drugs is that a doctor, in dealing with a prescription drug, could weigh the relative value of the drug against the seriousness of the side effect. A doctor could also look for the side effect and possibly counteract it.

17. Plaintiff took the drug from November of 1958 to December of 1964 but the warning letter was not sent until January of 1963, and consequently the damage was very likely already done.

18. The warning letter was sent in January of 1963. Mrs. Yarrow was examined in March of 1963 and found to be normal.

tors are inundated with mail from drug houses and consequently do not have time to read it all. The Eighth Circuit reasoned that since the manufacturer should have foreseen that doctors would not read the letters, such warning failed to discharge the manufacturer's duty to exercise reasonable care.

The *Yarrow* court noted that the custom of the industry was to use the "most effective method"[19] of warning the medical profession of dangers in the use of drugs. The court noted that doctors rely on detail men as the most effective conduit of information from the manufacturer. The court concluded that since the channel of communication between detail men and physicians already existed, it would not have been an unreasonable burden to have detail men, in the course of their regular calls, personally warn doctors of newly discovered side effects.

The manufacturer argued that even if it were negligent, the plaintiff's injury was proximately caused by the intervening negligence of plaintiff's doctor. The court rejected this theory solely on the basis of its previous decision in *Cornish*[20] wherein it held that no question of intervening proximate cause was present. The *Cornish* court had said that if the manufacturer failed to make reasonable efforts to warn the doctor, it was liable "regardless of anything the doctors may or may not have done."[21]

The *Yarrow* court attempted to support its holding by citing expert testimony to the effect that the industry custom is to use the "most effective method" to warn physicians. But in fact, a custom is "a usage or practice of the industry."[22] It is usually used to make objective the otherwise nebulous standard of due care. To couch custom in evaluative terms such as "most effective method" negates the purpose for discussing custom. Moreover, the evidence and other sources indicate that the custom of the drug industry is to warn doctors precisely in the manner used by the manufacturer in *Yarrow*.[23] The proper way of holding the manufacturer to a standard higher than the one it had met would have been to hold that the custom itself was unreasonable.

A better method for adding support to its holding would have been to find the manufacturer also liable on the basis of fraud or misrepresentation.[24] When a person makes a statement

19. 408 F.2d at 992.
20. 370 F.2d 82 (8th Cir. 1966).
21. *Id.* at 85.
22. BLACK'S LAW DICTIONARY 461 (4th ed. 1968).
23. *See* notes 30-36 *infra*.
24. These theories apparently were not argued by the plaintiff.

and subsequently acquires new information which makes it untrue or misleading, that person must disclose such information to any one whom he knows is still acting on the basis of the original statement.[25] Doctors must act on information that comes to them from manufacturers because manufacturers control nearly all drug information sources. Products come from the manufacturer, detail men are under specific instructions from the manufacturer, and the PDR is even published by a pharmaceutical manufacturing interest.[26] Literally no organized, unbiased source of drug information is available to the doctor. The manufacturer should therefore be held to a very high standard in informing doctors of potential side effects from or defects in drugs.

The court's blanket treatment of the intervening negligence of plaintiff's doctor, if taken literally, would mean that even where the doctor knows of the possibility of side effects, the manufacturer could still be held liable. Such an interpretation seems unreasonable. If the doctor's malpractice is a superseding act, it certainly should have the potential effect of absolving the manufacturer's liability.[27] The problem lies in determining what acts of the doctor supersede those of the manufacturer. A doctor clearly should not be held liable when his error lies in justifiably relying upon a faulty or unreasonable representation of the drug manufacturer or for merely prescribing the drug.[28] In other situations, however, it may be convincingly argued that the doctor should be held liable.[29]

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25. W. PROSSER, LAW OF TORTS 711 (3d ed. 1964).

26. The PDR is published by Medical Economics, Inc., a subsidiary of Litton Publications, Inc., a division of Litton Industries, Oradell, New Jersey.

27. *See generally* C. STETLER & H. MORITZ, DOCTOR AND PATIENT AND THE LAW 86-91 (4th ed. 1962); D. LOUISELL & H. WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES § 2.12 (1960); Lindberg & Newcomer, *Adverse Drug Reactions*, 1 TRAUMA 3 (Oct. 1959).

28. *See* Parker v. State, 201 Misc. 416, 105 N.Y.S.2d 735 (Ct. Cl. 1951), *aff'd*, 280 App. Div. 157, 112 N.Y.S.2d 695 (1952).

29. One commentator has set out five categories of negligence for which the doctor should be held the proximate cause of the injury:

(a) Prescription of a large overdosage of the drug or otherwise not following the manufacturer's directions;
(b) Treating a patient with an obviously adulterated or spoiled drug, especially where its deleterious condition was due to the doctor's acts;
(c) Prescribing a drug without first following the manufacturer's instructions on testing for allergic reactions or taking a history of such reactions;
(d) Use of a drug experimentally for a condition not indicated in the manufacturer's literature; and

Despite the *Yarrow* court's oversights, its holding of no adequate warning is supported by sources[30] that tell of letters to detail men from the manufacturer which contain false statements as to the nature of the side effects[31] and as to any Federal Drug Administration (FDA) action taken upon the drug;[32] furthermore, the general practice of manufacturers is to ignore side effects completely or dilute the warning with reassuring phrases such as "virtually free from side effects" or "with few significant side effects."[33] Reports relate that the detail man's maxim for handling doctors is, "If you can't convince them, confuse them."[34]

(e) Perhaps, prescription of the wrong drug.

Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 947, 988-89 (1964).

30. The following excerpt appeared in THE NEW REPUBLIC and was also read into the Congressional Record:

> The William S. Merrill Co. (a division of Richardson-Merrill) whose anti-cholestral drug MER/29 was ultimately taken off the market because of side-effects that included liver damage, hair loss, hepatitis and cataracts, promoted MER/29 with elaborate patter manuals asking detail men to assure doctors that the drug worked, was safe, and should be prescribed. Salesmen were told, in sentences puncutated with multiple exclamation marks, to memorize a pitch and know it well enough that it could not be seen through as "canned." They were instructed to affect excitement ("You owe it to yourself-to your company-to the millions of people who need MER/29, to be enthusiastic! ! !") and told how to deliver the line ("Lean forward-toward the doctor. Automatically tighten your stomach muscles as you make your presentation. This forces a change in the inflection of your voice and paves the way for deeper penetration of the benefits you are describing.") Finally, the detail men were told how to shift any doctor's suspicions about a Merrill drug to medicine made by other firms ("Even if you know your drug can cause the side-effect mentioned, chances are equally good the same effect is being caused by the second drug. You let your drug take the blame when you counter with a defensive answer. Know how to answer side-effects honestly, yes, but get the facts first. Doctor, what other drugs is the patient taking? Been doing it for years? Why didn't you tell us then?") This line supposedly got the clottish physician to attribute undesirable side-effects to Upjohn or Lilly. The tactic was rationalized because, rhetoric aside, the cause was good: "There is no longer any valid question as to its (MER/29) safety or lack of significant side-effects."

Sanford, *Drug Peddlers*, THE NEW REPUBLIC 16-17 (Sept. 21, 1968), *quoted in* 114 CONG. REC. 12710-711 (daily ed. Oct. 12, 1968). For a comprehensive treatment of drug industry practices, *see* M. MINTZ, THE THERAPEUTIC NIGHTMARE (1965); R. HARRIS, THE REAL VOICE (1964). *See also* Ruge, *Regulation of Prescription Drug Advertising: Medical Progress and Private Enterprise*, 32 LAW & CONTEMP. PROB. 650 (1967).

31. S. REP. No. 448, 87th Cong., 1st Sess. 194-95 (1961) (an interim report of the Senate Judiciary Committee's Subcommittee on Antitrust and Monopoly of value) [hereinafter cited as *Kefauver Report*].

32. *Id.*

33. *Id.* at 198-99. Many more examples of statements used by the industry to dilute warnings appear at this citation.

34. *Id.* at 191.

Doctors not only rely heavily[35] upon detail men but in many cases such representatives are the physician's sole source of drug information.[36] It is ironic then, that the authority of the FDA is limited to "labeling" and "advertising" neither of which has been extended to include oral communications. The original version of the 1962 amendment[37] to the 1938 Federal Food, Drug, and Cosmetic Act[38] would have included oral clauses as advertising but that provision was not enacted. If *Yarrow* is read to hold that detail men *must* warn doctors orally, it represents a judicial attempt to fill the gap left by Congress. The result is highly desirable in view of the apparent practice of the industry but one must not consider it a panacea. Problems of proof will arise as with all oral statements subject to litigation. Moreover, detail men in actuality may not be a very effective method of warning due to their self interest in selling drugs.

A better reading of *Yarrow* is that the use of detail men is only one possible method of warning. The duty to warn might be discharged in various other ways depending upon the severity of the side effect. The manufacturer could send out the same warning devices but use registered mail. It could call the doctor's attention to the warning by indicating such on the envelope, thus distinguishing the warning mail from the ordinary promotional mail. Assuming the warning letter was adequate, these techniques would tend to shift the duty to the doctor to read and heed the warning.

Notwithstanding the court's unclear treatment of industry custom and malpractice on intervening proximate cause, the value of *Yarrow* as precedent is that the drug industry in the future must make a more concerted effort to warn where the side effect is serious. But since the detail man's face-to-face contact with doctors is extremely important to the manufacturer's promotion of new drugs, the drug industry will probably interpret the case as proposing detail men as only one method of warning. Considering the detail man's practice of misleading doctors, plaintiffs' lawyers would do well to emphasize discovery with a view to presenting their case under a fraud or misrepresentation theory. Decisions under these theories would have a

35. 114 Cong. Rec. 12711 (daily ed. Oct. 12, 1968); *Kefauver Report*, *supra* note 31, at 155-56, 190.

36. *Kefauver Report*, *supra* note 31, at 190.

37. S. REP. No. 1552, 87th Cong., 1st Sess. § 4(A)(7) (1961).

38. 52 Stat. 1040 (1938), *as amended*, 21 U.S.C. §§ 301-92 (1964, Supp. II, 1965-66).

more direct effect on what detail men say than will the *Yarrow* approach. The remaining questions are what warning techniques will satisfy the duty to warn and if detail men must warn, when must they warn and what must they say.

Torts: Invasion of Privacy—Disclosure of Contents of Wrongfully Obtained Documents of Public Figure[1]

In June and July of 1965, four persons, employees and former employees of United States Senator Thomas J. Dodd, entered the Senator's private offices secretly at night and removed from the files thousands of documents of a highly compromising character. The documents were photocopied and returned in secret to the Senator's offices before their removal was discovered. The copies thus obtained were given to Jack Anderson, the associate of the late Drew Pearson, co-author of the muckraking Washington Merry-Go-Round column, which appeared in the Washington Post and 600 other newspapers. Based on this information, a series of about two dozen columns were devoted to Senator Dodd beginning in the winter of 1966. These columns charged, among other things, that Dodd was under the corrupt influence of a lobbiest, that he had diverted money raised for his political campaigns into his personal treasury and that he had accepted money from businessmen in return for preferring their interests in the government. Senator Dodd brought an action against Pearson and Anderson on theories of defamation, conversion and invasion of privacy.

Plaintiff moved for summary judgment on the defamation theory. The district court, per Judge Holtzoff, ruled[2] that the case was incapable of a summary disposition of a libel theory because a public official could prevail in a defamation action only on showing defendant's actual malice, which in the court's view, was a jury question.[3] Plaintiff then discharged the libel allegation from his complaint and moved for a partial summary judgment on the issues of conversion and invasion of privacy.[4] Judge Holtzoff denied the motion on the invasion of privacy claim, and dismissed that matter from the action on the ground

1. *See* Comment, 21 SYR. L. REV. 365 (1969).
2. Dodd v. Pearson, 277 F. Supp. 469 (D.D.C. 1967).
3. The presence of a defamation count in the complaint was almost frivolous. Since New York Times v. Sullivan, 376 U.S. 254 (1964), it is well established that a public official may not obtain a recovery for defamatory words unless they have been uttered with "actual malice," *i.e.*, were knowingly false or were uttered with a reckless disregard for their truth or falsity. Senator Dodd's complaint, moreover, would have been defeated even by traditional common law defenses to libel, since it was nowhere denied that the statements published by Pearson were true, and truth would generally be a complete defense to an action of defamation.
4. Dodd v. Pearson, 279 F. Supp. 101 (D.D.C. 1968).

that there was a substantial public interest in the publication of the incriminating documents. But he granted the partial summary judgment on the matter of liability for conversion, expressing dubiety about the probable monetary value of the recovery. Defendant appealed the judgment. In *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), the United States Court of Appeals for the District of Columbia Circuit, per Judge J. Skelly Wright, affirmed the district court's dismissal of the invasion of privacy theory, and reversed the lower court's judgment with respect to the conversion.

Invasion of privacy is a relatively new cause of action in tort. Its origin is generally traced to the article *The Right of Privacy* by Warren and Brandeis.[5] Although this tort grew slowly, the interest that it protected could generally be vindicated on other theories. During the past 20 years, the "right of privacy" has enjoyed a precipitous bull market. Dean Prosser, whose scholarship everywhere pervades the cases, has detailed four major "branches" of this action: intrusion, public disclosure of private facts, false light in the public eye and appropriation.[6] It is with the first two branches that this Comment is concerned.

In most jurisdictions there is a recognized right to be free from the unjustified intrusions of others.[7] Originally, only

5. 4 HARV. L. REV. 193 (1890). Judge Cooley made mention of a "right to be let alone" even earlier. T. COOLEY, TORTS 29 (2d ed. 1889).

6. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

7. There is, of course, no ancient common law right of privacy. *In re* Hart's Estate, 193 Misc. 854, 83 N.Y.S.2d 653 (1948). But to one extent or another, some sort of "right to be let alone" has been recognized by almost all jurisdictions. Alabama, Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948); Arizona, Reed v. Real Detective Publ. Co., 63 Ariz. 294, 162 P.2d 133 (1945); Arkansas, Olin Mills v. Dodd, 234 Ark. 495, 353 S.W.2d 22 (1962); Delaware, Barbieri v. News-Journal Co., 189 A.2d 773 (Sup. Ct. 1963); Florida, Harms v. Miami Daily News, Inc., 127 So. 2d 715 (Ct. App. 1961); Georgia, Walker v. Whittle, 83 Ga. App. 445, 64 S.E.2d 87 (1951); Hawaii, Ferergstrom v. Hawaiian Ocean View Estates, 441 P.2d 141 (Sup. Ct. 1968); Idaho, Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961); Indiana, State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); Illinois, Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (Ct. App. 1952); Iowa, Bremmer v. Journal Tribune Publ. Co., 247 Iowa 817, 76 N.W.2d 762 (1956); Kansas, Johnson v. Boeing Airplane Co., 175 Kan. 275, 262 P.2d 808 (1953); Kentucky, Gregory v. Bryan-Hunt Co., 295 Ky. 345, 174 S.W.2d 510 (1943); Missouri, Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); New Jersey, McGovern v. Van Riper, 137 N.J. Eq. 24, 43 A.2d 514 (1945), *aff'd*, 137 N.J. Eq. 548, 45 A.2d 842 (1946); Ohio, Friedman v. Cincinnati Local Joint Executive Bd., 6 Ohio Supp. 276, *rev'd on other grounds*, 86 Ohio App. 189, 90 N.E.2d 447 (1941); Oregon, Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P. 2d 438 (1941); Pennsylvania, *In re* Mack, 386 Pa. 251, 126 A.2d 679

physical intrusions were recognized as redressable, suggesting the equal applicability of conventional trespass doctrines.[8] It is now plain, however, that the ambit of this branch of the tort is much wider. Intrusion by wiretap, by overly zealous trailing and by electronic eavesdropping apparatus have been redressed by various courts.[9]

To maintain an action for intrusion, no publication of any information obtained by unjustified intrusion is necessary to perfect the wrong.[10] Neither publication nor intent to publish need be alleged or proved; all that is required is that there be an intrusion into plaintiff's solitude or seclusion and that the intrusion be unjustified.[11] "It is clear that there must be something in the nature of prying or intrusion. . . . It is also clear that the thing into which there is prying or intrusion must be, and is entitled to be private."[12]

The second Prosserian category is "public disclosure of private facts."[13] Three components make up this branch of the privacy action: first, private facts must be publicly disclosed; second, the facts disclosed must be private, and not public facts;[14] and third, the facts disclosed must be such as would be offensive to a person of ordinary sensibilities.[15] Dean Prosser argues that the public disclosure branch protects the interest

(1956), *cert. denied*, 352 U.S. 1002 (1957); South Carolina, Holloman v. Life Insurance Co. of Virginia, 192 S.C. 454, 7 S.E.2d 169 (1940); South Dakota, Truxes v. Kenco Enterprises, Inc., 80 S.D. 104, 119 N.W.2d 914 (1963).

In addition, New York and Wisconsin have recognized the right of privacy by statute, pre-empting judicial law making on the subject. No recent court has been found to say that there is no real interest in privacy worthy of judicial protection absent statutory decree.

8. *See, e.g.*, De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881).

9. Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958) (bugging a dwelling): Fowler v. S. Bell Tel. and Tel. Co., 343 F.2d 150 (5th Cir. 1965); LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 201 N.E.2d 533 (1963) (bugging telephones). The leading case in the field of electronic eavesdropping is Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964). Defendant landlord had concealed a microphone in the bedroom of the dwelling he had leased to plaintiffs. When they discovered it, they brought suit on the "intrusion theory" and recovered. Chief Justice Kennison, for a unanimous Supreme Court, ruled that defendant's act was an invasion of plaintiffs' solitude or seclusion and "was a violation of their right of privacy and constituted a tort."

10. Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Fowler v. S. Bell Tel. and Tel. Co., 343 F.2d 150 (5th Cir. 1965).

11. *Id.*

12. Prosser, *supra* note 6, at 390-91.

13. *Id.* at 393.

14. *Id.* at 394.

15. *Id.* at 396.

in reputation "with the same overtones of distress that are present in libel and slander"[16] except that here there is no defense of truth.

In contrast to the action for invasion of privacy, the action for conversion is a venerable institution in the common law. Possibly more than any other civil wrong, conversion has been elusive of definition. "[A]fter all," said Baron Bramwell, "no one can undertake to define what a conversion is."[17] The name of the wrong comes from "the classic count in trover"[18] which "alleges that the plaintiff was possessed, as of his own property, of a certain chattel; that he afterwards casually lost it; that it came to the possession of the defendant by finding; that the defendant refused to deliver it to the plaintiff on request; and that he converted it to his own use, to the plaintiff's damage."[19] The sort of property which might be made subject to an action for conversion was originally governed by the fiction of losing and finding,[20] so that, at first, only "tangible property" could properly be the subject of the action. This is clearly no longer the law[21] since stocks, bonds, checks, notes and bills of exchange, insurance policies[22] and even judgments[23] have been held capable of being converted.

Dean Prosser has defined the nature of conversion thus: "Conversion is an intentional exercise of dominion or control over a chattel, which so seriously interferes with the right of another to control it that the actor may justly be required to

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16. *Id.* at 398. Prof. Bloustein differs with this analysis of the nature of the interest protected. Bloustein suggests that the true gravamen of the action is not the "reputation" interest, but rather the interest in human dignity and individuality, to which the public disclosure is an affront. Bloustein, *Privacy as an Aspect of Human Dignity, An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 981 (1964).

17. Burroughs v. Bayne, 5 H. & N. 296 (Exch. 1860).

18. Ames, *The History of Trover*, 11 HARV. L. REV. 277 (1897).

19. *Id.*

20. W. PROSSER, LAW OF TORTS § 15 (3d ed. 1964).

21. Comment, *Conversion of Choses in Action*, 10 FORD. L. REV. 415 (1941).

22. *Id.* at 419, 422.

23. *Id.* at 423. In Rivinus v. Langford, 75 F. 959 (2d Cir. 1896):

> One partner without authority settled a judgment with the debtor for less than the full amount and executed a satisfaction piece. The other partner recovered from the offending partner the difference between the full amount of the judgment and the amount of the settlement. This decision is to be noted especially since it recognized the conversion of an intangible right where no unlawful dominion was exercised over tangible evidence.

Id.

pay the other the full value of the chattel."[24] Prefaced to this excursion, which later was incorporated by the Second Restatement of Torts, was this caveat:

> [T]here is probably no type of act or conduct on the part of a defendant which is always, under any and all circumstances, a conversion; . . . as to any particular type of act the existence of this tort is a matter of the seriousness of the interference with the plaintiff's rights, which in turn will depend upon the interplay of a number of different factors, each of which has its own importance, and may, in a proper case, be controlling.[25]

The different factors enumerated were: "(a) the extent and duration of the actor's exercise of dominion or control; (b) the actor's intent to assert a right in fact inconsistent with the other's right of control; (c) the actor's good faith; (d) the extent and duration of the resulting interference with the other's right of control; (e) the harm done to the chattel; (f) the expense and inconvenience caused to the other."[26] It is apparent that the discretion of the courts operates in these cases to determine whether, on a given state of facts, the action will lie; and because the various factors to be considered are numerous, and all but imponderable, it appears that the conversion area is one where the discretion of the court has the widest possible play. In all but the plainest of cases, it would seem that a court could properly reach the conclusion that the ingredient factors of conversion were not present in the proper proportions, and that the lesser wrong of trespass to chattels would more properly lie. The fact of this uncertainty has been betimes the occasion of scholastic sulking.[27] Nevertheless, the property of aetherial unpredictability is a fixture of the law of conversion.

In the district court conversion and invasion of privacy were pleaded as alternative theories of recovery. This argument rests on the assumption that plaintiff's possessory rights in the documents abstracted from his office were substantially enough interfered with to support an action for conversion. Judge Wright found that the intermeddling was insufficient to amount to a conversion and reversed the judgment of Judge Holtzoff on that issue.[28] The difference in the holdings of the district and ap-

24. Prosser, *The Nature of Conversion*, 42 CORN. L.Q. 168, 173-74 (1957).

25. *Id.* at 173.

26. *Id.* at 174.

27. "Surely such a serious liability as that of the defendant in trover ought not to depend upon such an uncertain test." Clark, *The Test of Conversion*, 21 HARV. L. REV. 408, 414 (1908).

28. "[N]ot every wrongful interference with the personal property of another is a conversion. Where the intermeddling falls short of

pellate courts may be explained simply as a divergence of opinion as to whether receipt of the purloined information was "a substantial enough interference" with property to amount to a conversion, rather than simply a trespass to chattels.

In this connection it might properly be noted that "possessory" rights are not the only species of rights which will support an action for conversion;[29] thus, Judge Wright's having determined that plaintiff's possessory rights were insufficiently disturbed does not dispose of the conversion issue. There may be some non-tangible right in the documents which will ground the action for conversion. Plaintiff might have argued that the interest in privacy—which is a non-possessory interest—could stand in the place of possession. But this argument would demand that invasion of privacy be seen as a reciprocal, rather than as an alternative theory of recovery. Judge Holtzoff noted: "[T]he publication of the material of which the plaintiff complains is not protected by the cloak of the right of privacy, because the publications relate to his activities as a high-ranking public officer, namely, Senator of the United States, in which the public had an interest."[30] Apparently, the "public disclosure" branch was what Judge Holtzoff had in mind; but it is not at all clear from the several opinions in the case that the "intrusion" interest might not have been enough upon which to predicate a recovery for conversion.

Judge Wright underscored the possibility that the two branches might be differently treated when he stated that the damage said to inhere in the publication must be strictly distinguished from the damage said to inhere in the intrusion.[31] As to the former, the *New York Times* rule[32] apparently applies to prevent a public official from recovering absent a showing of actual malice. As to the intrusion itself, the logical rule would be to hold liable the intruders, and anyone connected with them by ordinary rules of privity or agency, but to draw the line of liability at third persons unconnected with the intrusion. The court of appeals stated this rule[33] but immediately drew its

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the complete or very substantial deprivation of possessory rights in the property, the tort committed is not conversion, but the lesser wrong of trespass to chattels." 410 F.2d 701 (D.C. Cir. 1969).

29. *See* notes 21-23 *supra* and accompanying text.
30. 279 F. Supp. 101, 105 (D.D.C. 1968).
31. 410 F.2d at 705-06.
32. *See* note 3 *supra.*
33. 410 F.2d at 705-06.

meaning into question by stating curtly that Pearson and Anderson were not connected with the intrusion itself, but only with the publication, an act protected by a constitutional rule.[34] The liability for intrusion reflects a dignitary value which goes to the manner of acquiring information.[35] The intruder may well be privileged to publish information improperly gained without liability for the publication, but still be liable for the intrusion itself. It would, for example, be intolerable to frame a rule of law which permitted Jack Anderson to read the contents of anyone's files or private papers on the off-chance that some marketable scandal would show up. But that was not the situation in *Dodd*. In *Dodd*, the intruders knew exactly what they were looking for in their victim's files. They had seen most of the documents before and knew of certain others. Undoubtedly they could testify as to what they knew of their former employer's cupidity without liability of any sort attaching. It might be argued, therefore, that a privilege exists for them to collect data to corroborate their memories. In *Lopez v. United States*,[36] an Internal Revenue agent, wired for sound, recorded the defendant's bribe offers on a machine. Defendant argued that the recording ought not to be permitted into evidence. The Supreme Court rejected this argument. For the majority, Mr. Justice Harlan wrote,

> Stripped to its essentials, petitioner's argument amounts to say-

34. James Boyd, the ringleader of the intruders, writes in his memoire of the affair of going to see Jack Anderson and telling a tale of corruption, veniality and knavery on the part of Dodd. Anderson is quoted as saying, "If we can substantiate half of this, it will be the most significant disclosure of corruption in Washington in forty years. . . ." J. BOYD, ABOVE THE LAW 115 (1968). Boyd then states, "A working relationship was thus begun." *Id.* Several forays were made into Dodd's files during the ensuing weeks; the products of the forays were removed from the Senate Office Building to an office several miles uptown where they were photocopied by Opal Ginn, Jack Anderson's secretary. When Boyd and a co-conspirator arrived at the uptown address to begin the job of photocopying, "Opal Ginn was waiting, cool with conspiratorial aplomb." *Id.* at 125. In Boyd's opinion at least, defendants and intruders were indeed bound together. If they were bound together, it follows that there would be liability for intrusion in the defendants unless some privilege could be found to intercept that liability.

35. An analogy might be drawn to the law protecting trade secrets. There is no rule preventing one company from acquiring information kept secret by a competitor, so long as a tolerable tactic is undertaken to acquire it. Reverse engineering, for example, is perfectly acceptable. But bribing an insider or taking the sought-for information by burglary will not be permitted. *See* E.I. Du Pont de Nemours Powder Co., 244 U.S. 100 (1917) (opinion of Holmes, J.); Morison v. Moat, 9 Hare 241, 68 Eng. Rep. 492 (1851).

36. 373 U.S. 427 (1963).

> ing that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. . . . We thing the risk that the petitioner took in offering a bribe . . . fairly included the risk that the offer would be accurately reproduced in court. . . .[37]

Perhaps an analogous argument could be made in *Dodd*. The intrusion liability is a dignitary matter; but that point should not detain us, for among these intruders, Dodd had no figleaf to cover his shame. These intruders already knew of the documents which they sought. Since they already had information, there should be no objection to their obtaining *precise* information.

It might, of course, be argued that, after all, one who places a microphone in a marital bedroom, like the landlord in the *Hamberger*[38] case, is not apt to "find out" anything he did not generally suspect before. It may therefore be necessary to find a general justification for the act of intrusion grounded in an overmastering public policy. In the *Dodd* case, that justification could be found in the *Code of Ethics for Government Service*[39]: "Any person in government service should: . . . (IX) expose corruption wherever discovered." As a general rule, that duty would confer a privilege to inform the proper persons of the alleged corruption. In the case of suspected corruption in a low-ranking employee, the privilege might extend no further than advising the employee's supervisor. Clearly, a privilege of different scope should attach to the alleged corruption of a United States Senator.[40]

Plaintiff might plausibly have argued the existence of a right in his files analagous to the common-law right of a writer of a letter to the first publication thereof. The fact that such an argument seems not to have been made is consistent

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37. *Id.* at 439.

38. Hamberger v. Eastman, 106 N.H. 107, 207 A.2d 239 (1964). *See* note 9 *supra*.

39. House Doc. No. 103, 86th Cong., 1st Sess. (1958).

40. Boyd justified his actions on this very theory.

> To whom do you go to get a United States Senator investigated? . . . I doubted that we could go to the F.B.I. or to its parent, the Justice Department, with any more assurance than we could go to the Senate. . . . A United States Senator was regarded as an ambassador from a state, an independent sovereign among his peers, . . . a maker of laws and a selector of judges. The Constitution itself protected him from certain kinds of interference and arrest. About him had been spawned an undergrowth of official attitudes and immunities which rendered him all but above the law. Only public opinion, we judged, had the power to cut through this web. . . . Drew Pearson and Jack Anderson came immediately to mind.

J. BOYD, ABOVE THE LAW 111 (1968).

with plaintiff's theory that the conversion and privacy wrongs were alternative rather than reciprocal, since plaintiff, one supposes, took the physical interference with his documents to be self-evidently determinative of the conversion issue. Judge Wright suggested, however, that even if the common-law copyright argument had been made, it would not have changed the result in his court. The court stated that the law has developed a norm of no-protection for the taking of mere ideas. An exception is made for certain ideas, their diacritical feature being that protectable ideas may be instruments "of fair and effective commercial competition."[41] None of plaintiff's papers falls into that category as far as can be seen. "Insofar as we can tell," added Judge Wright, "none of [Dodd's papers] amounts to literary property."[42] In this, Judge Wright was altogether mistaken. He retrogresses to a much earlier time in the law when judges arrogated to themselves the decision as to what was literature and what was not. Dodd's files are, by the standards of most modern courts, "literary property," inasmuch as courts will never (with apparently a few exceptions) decide what is literature and what is not.[43] It is unfortunate that Judge Wright chose not to confront the "literary property" difficulty directly, inasmuch as it provided an opportunity to articulate a logical extension of the *New York Times* doctrine, to wit, that the law of copyright or literary property may not be invoked to sequester information which otherwise could be published by a person without fear of liability for defamation or invasion of privacy. Although that rule seems never to have been announced by any court, it is in principle sound in light of the developing constitutional jurisprudence in the area and in light of the dictates of a fair public policy. Although plaintiff did not raise this issue for argument, the court of appeals did, and it was remiss in failing to bring it to a craftsmanlike resolution.[44]

Dodd presented a curious set of facts which is apt to arise seldom, if ever, again. The peculiar mix of an alleged series of great wrongs, attributed to a person who is a public official, squarely within the *New York Times* rule, and an intruder who is under no duty not to reveal the official's wrongdoing,[45] and

41. 410 F.2d at 708.
42. *Id.*
43. *See* Note, 44 IOWA L. REV. 705, 708-09 (1959).
44. *See* 410 F.2d at 706 n.23.
45. RESTATEMENT (SECOND) OF AGENCY § 395, comment f (1958), states that an agent is under no obligation to keep secret the confidential matters of his principal if such secrecy would cloak wrongdoing.

who may well have an affirmative legal duty to reveal it, poses one of the least sympathetic cases imaginable for the upholding of a right to be free from intrusion—the right to be let alone. The rule in *Dodd,* stated in its narrowest sense, is that one who intrudes upon the private files of a United States Senator will not by his intrusion transmit liability to a non-participating donee-beneficiary of his foray, even where the beneficiary was aware of the manner in which the material was obtained. It is not at all clear that if the victim were someone other than a United States Senator, or if the intruder had no colorable privilege of intrusion, or even if the alleged justification for the intrusion were any less than that in *Dodd,* that the no-liability result should necessarily obtain. Indeed, there is more than a speculative interest in clarifying this point. The intrusion format which appeared in *Dodd* was employed on at least one other occasion by the same defendants. In *Liberty Lobby v. Pearson,*[46] a hireling of Jack Anderson infiltrated the staff of Liberty Lobby, Inc., an organization which propagandizes right wing political ideas. The hireling copied certain documents from the organization's files and forwarded the copies to defendants who prepared exposé columns of the usual sort. Prior to publication, Liberty Lobby discovered the leak and sought an injunction forbidding the publication of the columns. The district court, per Judge Holtzoff, denied the injunction on a prior-restraint rationale, relying on *Near v. Minnesota.*[47] *Near* apparently has been taken as a constitutional mandate that publications shall not be subject to previous restraint, irrespective of what cause of action may arise on account of their publication. While it could be limited to its particular facts and confined to instances where the state sought a *criminal* prosecution for words,[48] it is almost certain that *Near* would everywhere be taken as controlling the *Liberty Lobby* situation.

After the Pearson column blasting the operation of Liberty Lobby was published, it does not appear that the organization took further action against Pearson. As a matter of logic, it does not seem that if a further remedy had been sought, a rule like the one in *Dodd* would have been appropriate. Even if it had been held that the privacy right of a corporation were subject to less consideration than that of a natural person, and re-

46. 261 F. Supp. 726 (D.D.C. 1966).
47. 283 U.S. 697 (1931).
48. *See* Note, *Vindication of Reputation of a Public Official,* 80 HARV. L. REV. 1730, 1738 (1967).

covery had been denied on that ground, it is plain that the public interest in the machinations of a private propaganda mill is not of the same magnitude or character as that attaching to the alleged corruption of a United States Senator. Further, it is not at all clear that public policy confers a privilege on Jack Anderson's deputies to purloin every scabrous tidbit they can find.

A special problem is raised when the intruder is a public agency and the victim of the intrusion is apparently a private man. This is the fourth amendment difficulty adverted to in the concurring opinion of Judge Tamm.[49] He points out that it is illogical that public authorities should be constrained in their perusal of private documents by the strictures of the fourth amendment while private journalists, who compulsively wrap themselves in the sanctimonious flag of "the public interest," are constitutionally free to seize such documents as they will. It is not at all clear, as has been argued, that private journalists are as free as the *Dodd* opinion might at first seem to suggest; but nevertheless, there are manifestly significant differences, in terms of eventual consequences, between the seizure of documents by Jack Anderson on the one hand, and a Department of Justice prosecutor on the other. The resources and power of government furnish a fertile ground for an everlasting malignity which no single private entrepreneur could hope to match. This fact alone would justify the logic of declining to apply the fourth amendment to private journalists.[50]

Invasion of privacy has grown from a *faux pas* to a tort, and from a tort to an industry.[51] It is entirely possible that advances in the technology of snooping will require of the law rules of absolute inflexibility which would make the slightest invasion of privacy, however defined, subject to strict penalty, irrespective of any supposed justification. Apparently, we have not reached that point yet; if we are lucky, we never will. The courts must be astute to consider cases pertingent to the privacy interest with a more-than-routine care. To apply the rule in *Dodd* with an uncritical latitude could lead from the troubling situation to the intolerable.

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49. 410 F.2d at 708.

50. There is a second and more obvious response to Judge Tamm's reservations: historically, the amendments to the Constitution have applied to limit the prerogatives of federal or state government. Their application has never extended prohibitively to private men.

51. *See, e.g.*, S. DASH, R. SCHWARTZ & R. KNOWLTON, THE EAVESDROPPERS (1959).