
**DEFENDANTS UPJOHN CO. AND ELI LILLY & CO.** manufactured pharmaceutical products bearing their trade-marks for which they established resale prices; the Ohio Fair Trade Act\(^2\) makes these prices binding on resellers who accept the goods with notice.\(^3\) Hudson, the owner and operator of a retail drug chain in Cleveland, purchased defendants' products from wholesalers in Michigan. Although Hudson had received notice of the established retail prices,\(^4\) it subsequently sold below the stipulated minimum retail resale prices and sought a declaratory judgment that the Ohio Fair Trade Act was invalid under the state constitution and federal law. The trial court held the act to be void as an unlawful delegation of legislative authority to fix prices.\(^5\) The court of appeals reversed.\(^6\) The Ohio Supreme Court affirmed,\(^7\) holding that

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\(^1\) Resale price maintenance is a system by which the manufacturer or his distributor prescribes the minimum price at which a trade-marked, branded, or identified product may be resold.


\(^3\) Resellers are bound by the "implied contract" concept of the Ohio Act. § 1333.28 (1) provided: "'Contract' means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity . . . and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling . . . shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

\(^4\) The manufacturers sent letters to all Ohio retailers of their products, inviting them to enter into written fair-trade contracts. More than 1,400 Ohio retailers of their products (about 65\% of all the retail pharmacists in Ohio) signed fair-trade contracts. Hudson did not.

\(^5\) 1960 Trade Cas. 77,075 (Ohio C.P. 1960).


\(^7\) 174 Ohio St. 487, 190 N.E.2d 460 (1963). The decision was affirmed by a three-to-four vote. The Ohio Constitution, Art. IV, § 2, provides: "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."
the doctrine of "implied contract" within the Ohio Fair Trade Act neither delegates the legislative power of price fixing nor unconstitutionally deprives resellers of property since price maintenance under these provisions results from the voluntary actions of the parties involved. On appeal, the United States Supreme Court, in an opinion by Mr. Justice Goldberg, affirmed the Ohio Supreme Court decision; the Ohio Fair Trade Act, as applied to these facts, was held within the provisions of the McGuire Act exempting certain resale price systems from the prohibitions of the Sherman Act. The court held that, since the manufacturers had entered into many written contracts with retail pharmaceutical establishments in Ohio, Hudson could be considered a "contractor" or a "nonsigner" having entered into "contracts" within the meaning of the McGuire Act; "and that under such circumstances Congress plainly intended 'to let State fair trade laws apply . . . with respect to nonsigners as well as signers'." The Court did not consider the constitutionality of the McGuire Act.

The vertical price-fixing or resale price-fixing controversy has been under consideration since 1911, when the Supreme Court held that contracts fixing resale prices violate the antitrust laws. Shortly thereafter, the first federal resale price maintenance bill was introduced in Congress; similar bills were introduced continuously thereafter. State legislative sanction, known as "fair-trade" legislation, was not passed until 1931 when the State of California permitted contracting parties to bind themselves to fixed prices. Binding only contracting parties proved unworkable, and the act was amended in 1933 to bind "nonsigning" dealers as well.

Thirteen other states had adopted similar legislation by 1936 when the Supreme Court in the Old Dearborn case upheld the constitutionality of fair-trade acts as applied to intrastate commerce. Pressure for federal legislation in the mid-thirties resulted in the enactment of the Miller-Tydings Act enabling a state to apply its fair-trade law governing intrastate commerce to products which were resold within its borders after moving in interstate commerce. With the apparent removal of antitrust obstacles, forty-five states had enacted fair-trade law by 1941.

The Miller-Tydings Act generally exempts "contracts or agreements prescribing minimum prices for the resale of a commodity" if the contract is valid in the state in which the resale is to be made; but the Supreme Court held this exemption to be applicable only to contracts "in their normal and customary meaning" and not to nonsigner provisions "whereby recalcitrants are dragged in by their heels and com-

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11 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
12 The Stevens Bill, H.R. 13305, 63d Cong., 2d Sess., was introduced on February 12, 1914.
15 See FTC, REPORT ON RESALE PRICE MAINTENANCE XXVII-XXVIII (1945).
18 Fair-trade statutes have never been enacted in Alaska, Missouri, Texas, Vermont, or the District of Columbia, and Nebraska has repealed its act.
Congress reacted to the Court's narrow construction by passing the McGuire Act, substantially reiterating the language of Miller-Tydings with respect to resale price maintenance contracts in section 2, and adding an exemption in section 3 for arrangements made under the authority of state laws which provide that "willfully and knowingly . . . selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so . . . selling is or is not a party to such a contract or agreement, is unfair competition." The Supreme Court has refused to hear appeals challenging the constitutionality of the McGuire Act because of lack of a substantial federal question. The Court denied certiorari in the only case squarely presenting the question.

Four state courts have held their fair-trade acts generally unconstitutional; while courts in twenty-two states have invoked state constitutional provisions to strike down nonsigner clauses, holding that they deprived retailers of property without due process of law, or that they constituted an unlawful delegation of legislative authority to private persons, or that they were not a valid exercise of the state police power.

The nonsigner section of the earlier Ohio Fair Trade Act was struck down on all three grounds. Faced with the declaration of unconstitutionality, the Ohio Legislature responded by passing the current act, replacing the nonsigner section with an "implied contract" clause.

This innovation introduced by the 1959 Ohio act was primarily a change of focus. Instead of depending on a contract made between the seller and a single retailer to establish the basic structure of fair-trade, the new act permitted the same result to be accomplished either by contract or by notice. The revamping gives trade-mark owners a continuing property right in their trade-mark, and through this right, a right to prevent price cutting on their products, on the theory that such acts are trade-mark defamation.

This is only the second time the Supreme Court has considered the McGuire Act. The first instance was in 1956 when the Court held a situation of horizontal price-fixing to be beyond the limits of the McGuire Act. In dictum the court said: "[The McGuire Act] specifically exempts from the antitrust laws price fixing under 'fair trade' agreements which bind not only retailers who are parties to the agreement but also retailers who refuse to sign the agreement."

Although the opinion here may be a mere restatement of that case, without any

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special questions which might be raised by the facts of this case or by particular features of the Ohio Act, the Court is clear that when the statutory language and the legislative history clearly indicate the purpose of Congress, that purpose must be upheld. Congress' duty is to decide if it is good policy to permit such laws. The fact that the Ohio constitutional limitations forced its state legislature to adopt unique formulations for conventional solution is not relevant to this congressional policy.

Attorney and Client—Right of Court Appointed Counsel to Compensation

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.¹

PROCEDING IN FORMA PAUPERIS, Edward J. Dillon, after pleading guilty to a charge of armed bank robbery, petitioned to set aside his conviction and sentence in a collateral attack remedy under 28 U.S.C. § 2255 (1958). Petitioner was denied assistance of counsel to present his motion by the Oregon district court. From an adverse judgment, petitioner appealed to the Ninth Circuit Court of Appeals which reversed and remanded for consistent proceedings, finding error in the district court's refusal of petitioner's requests for counsel. Taking the appellate court's remand as a direct command to appoint counsel, the district court assigned Manley B. Strayer, a prominent and experienced Oregon lawyer, the task of representing the indigent Dillon throughout the rehearing of his § 2255 proceedings. After conclusion of his services to Dillon and upon the suggestion and invitation of the district court, Mr. Strayer filed application for compensation and expenses for his service to Dillon and the court. Treating only of the constitutional rights of attorneys and avoiding ethical entanglements, the court held that the assignment of counsel by the bench to represent an indigent is a "taking" of the attorney's compensable "property" for a "public use"

¹ Mr. Justice Black in Armstrong v. United States, 364 U.S. 40, 49 (1960).
and entitles such attorney to just compensation within the meaning of the Fifth Amendment.\textsuperscript{2}

In writing the opinion, Judge East relies heavily on the spirit of Mr. Justice Black's interpretation of the Fifth Amendment's just compensation clause, \textit{supra}. The cost and expense of furnishing legal representation for the indigent, in the fulfillment of the constitutional guarantee of due process in criminal proceedings, is "the now recognized organic obligation of the sovereign in connection with the administration of criminal law..."\textsuperscript{3}; and "some people," that is, the legal profession, should not be made to bear such public burden alone. An attorney's license to practice law, his time and expertise, his law office help, facilities and supplies, and his out of pocket expense are, what the court calls, "compensable property."

Whether or not a lawyer's services are compensable as "property" under the just compensation clause is determined by whether or not an attorney can be said to have a legally protected "property right" in the practice of his profession. It has been said that to gain compensation under the Fifth Amendment, one must have a legally protected economic interest or advantage in the thing taken.\textsuperscript{4} A lawyer's profession should be considered an economic interest. As for legal protection of this interest, Chief Justice Warren has said in \textit{Greene v. McElroy}\textsuperscript{5} that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. ..."\textsuperscript{6} "Property" is an attorney's profession, "liberty" is his freedom to practice his chosen profession. Thus, if the professional integrity of lawyers is protected by the due process clause of the Fifth Amendment, as a property right and interest, it may well be argued that it is also protected by the just compensation clause of that amendment in the face of a "taking for a public use."

There is ample authority that a court may decide what is a "taking" by the government and what is "compensable property."\textsuperscript{7} As for a judicial determination of what is a "public use," it appears the courts have a limited power.\textsuperscript{8} In the principal case, the court urges that the taking is a type of "group taking." The legal profession as a whole bears the public burden to defend indigents. When an individual attorney is called upon to assume that burden for the profession, he must be compensated. Here, we see the court's reliance on Mr. Justice Black's statement, \textit{supra}. It is questionable whether the application of this statement, or any of the traditional statements concerning compensation for the taking of physical property, is realistic in the present situation. Is there in fact a taking, or just a professional burden which lawyers accept

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  \item \textsuperscript{2} Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964).
  \item \textsuperscript{3} \textit{Id.} at 493.
  \item \textsuperscript{4} United States v. Willow River Power Co., 324 U.S. 499 (1945).
  \item \textsuperscript{5} 360 U.S. 474 (1959).
  \item \textsuperscript{6} \textit{Id.} at 492.
  \item \textsuperscript{7} See Armstrong v. United States, \textit{supra} note 1.
  \item \textsuperscript{8} See Shoemaker v. United States, 147 U.S. 282, 298 (1893):

  "[T]he courts have power to determine whether the use for which private property is authorized by the legislature to be taken is, in fact, a public use..."

  This seems to necessitate legislative authorization of a taking before the courts can act on a determination of a "public use." Fed. R. Crim. P. 44 and 18 U.S.C. \$3006 (1958) could be considered legislative authorization for a taking of an attorney's services in defense of an indigent accused.
\end{itemize}
as a responsibility of their practice? The legal profession, by its nature, is clothed with public responsibility. To divorce this consideration from a determination of a lawyer's role in defending the indigent accused does not reflect a clear picture of the lawyer's true relation to the workings of justice.

Traditionally, an attorney assigned by the court to defend an indigent accused cannot recover public compensation for his services in the absence of a statute authorizing such compensation. It has been held that neither a state constitutional mandate that an accused shall have the right to appear and defend in person and by counsel, nor a similar mandate that private property may not be taken without just compensation, would make the public liable for the services of an attorney appointed by a court to defend an indigent.

In Dillon, Judge East also chooses to ignore a prior federal decision which flatly denied compensation to counsel assigned by a United States Circuit Court to defend an accused Indian. This is the sole federal declaration on the subject. In this case, the petitioners urged an implied obligation of government under the Sixth Amendment in support of their claim. The court found:

The amendment of the constitution provides that the accused shall enjoy the right to have counsel. This is a declaration of a right in the accused, but not of any liability on the part of the U.S.

The rationale for denying attorneys compensation in these instances is the consideration of the attorney, while he is defending an indigent accused, as an officer or arm of the court in administering justice.

At present, the great majority of the states have statutes controlling, in one way or another, the compensation of court appointed attorneys. These statutes relieve the courts of the necessity, if any, of making such decisions as in the principal case. The statutory method is merely applied.

On August 20, 1964, two months after the principal decision, the Criminal Justice Act of 1964 was enacted. In effect, the Act gives Federal Commissioners and district courts the power to appoint compensated private attorneys for indigent defendants. Representation is authorized "at every stage of the proceedings from his [defendant's] initial appearance before the United States Commissioner or court through appeal."

For the majority position, see generally 5 AM. JUR. Attorneys at Law §157 (1936), and Annot., 130 A.L.R. 1440 (1940).

For a complete picture of state standards of compensation for court appointed attorneys and a study of the various means of providing indigents with defense counsel, see EQUAL JUSTICE FOR THE ACCUSED (1959), a study by a special committee of the Association of the Bar of the City of New York and the National Defender Association. See also Note, 49 CALIF. L. REV. 954, 958-959 (1961).


U.S. CODE CONG. & AD. NEWS, supra note 14, at 2784.
The payment for services is to be made at a rate of $15 per hour for time expended in court or before a United States Commissioner, and $10 per hour for out of court time. The per-hour stipulations shall not exceed a $500 maximum in felony cases and a $300 maximum in misdemeanor cases. When a defendant is unable to pay for services other than counsel, such as investigative fees and ballistic reports, incident to his defense, the Act authorizes such payments up to maximum of $300.

The stated purpose of the Criminal Justice Act of 1964 is "to promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States." The Act attempts no classification of a lawyer's services given upon court appointment and remains silent on such Fifth Amendment terms as "just compensation," "compensable property," and "taking for a public use." Presumably, therefore, this Act will have the same effect as the majority of state statutes in this area and will be treated as a legislative authorization of compensation for court appointed attorneys. The statutory method of payment will be applied with no further inquiry into whether a lawyer has a constitutional right to such compensation which must meet the standards of the Fifth Amendment. If, however, the thesis of Dillon is accepted and extended, then the requirements of the Fifth Amendment logically must be applied to judge the constitutionality of the Criminal Justice Act; that is, whether it does in fact allow just compensation for the lawyer's services taken by the court for a public use.

The present Criminal Justice Act of 1964 is a step toward meeting the needs of criminal justice today. It takes the pressures and hardships of self-financing off the court appointed lawyer, casts the purpose of appointment and reimbursement in its proper light, and at the same time recognizes not only the professional ethics, but also the realistic economics of the attorney as observed by lawyer Abraham Lincoln: "A lawyer's time and advice are his stock in trade."

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16 Id. at 2785. The Act, however, states that under the extraordinary circumstances of a protracted proceeding, the chief judge of the circuit may authorize additional increments beyond the maximum limits.


On the night of June 14, 1960, Nathan Jackson entered a Brooklyn, N. Y., hotel with a woman companion, one Nora Elliot. At the registration desk, Jackson told Miss Elliot to leave, then drew a gun, robbed the desk clerk, and ordered the clerk and others present into an upstairs room. As Jackson left, he was apprehended on the street by a policeman. A struggle ensued, shots were exchanged, and the officer was killed. The wounded Jackson sought help at a hospital. There, he gave a statement to a detective; later, after injections of the soporific drugs demerol and scopolamine, he was questioned by the District Attorney's office, and a formal confession was obtained.

In New York, a confession offered by the prosecution is excluded if clearly coerced, but if its voluntariness is questionable, the ultimate determination of whether or not it was coerced is made by the jury. Thus, in such cases, the judge must receive the confession and leave the final determination of the voluntariness, as well as the veracity, of the confession to the jury. In a preliminary hearing to determine whether or not the confession was voluntary, the judge is not required to exclude the jury, and may not even be permitted to do so.

Jackson was convicted and sentenced to death; after exhausting his state remedies, Jackson filed a petition for habeus corpus. On certiorari to the United States Supreme Court, in an opinion by Mr. Justice White, it was held that the New York procedure in question violated the due process clause of the Fourteenth Amendment, and that where a jury is asked to determine both the voluntariness and truthfulness of a confession, it cannot be assumed to have reliably found the confession to be voluntary. The Court also found Jackson entitled to a hearing in the state courts, as to the voluntariness of his confession. If such hearing resulted in a determination that the confession was coerced, he would then be entitled to a new trial. If the state did not initiate these proceedings within a reasonable time, Jackson would be entitled to his release.

Defendants in criminal cases are deprived of due process of law if their convictions are founded, in whole or in part, on an involuntary confession, whether or not there is evidence aside from the confession sufficient to support the conviction. The defendant has a constitutional right to object to the use of the confession and to have

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1 N. Y. Code Crim. Pro. §395.
4 People v. Randazzo, 194 N. Y. 147, 87 N. E. 112 (1909).
a fair hearing and a reliable determination on the issue of voluntariness, uninfluenced by the truth or falsity of the confession. 10

In holding that the New York procedure in question did not afford petitioner a reliable determination of the voluntariness of the confession offered at his trial, and consequently deprived him of due process of law afforded by the Fourteenth Amendment, the Court reversed its decision in Stein v. New York. 11 There the Court found no deprivation of constitutional rights to the defendants under the identical procedure, although the Court was cognizant of the disadvantages to the accused inherent therein. 12

In Stein the Court based its decision on alternative assumptions regarding the manner in which the jury could have disposed of the coercion issue. It could either have determined the disputed issues of fact against the accused, found the confession voluntary, and therefore properly relied on it; or, it could have found the disputed facts in favor of the accused and found the confession involuntary, and then, in accordance with the instructions of the court, disregarded the confession and based its conviction on the other evidence.

In the principal case the Court held that both of these methods endangered the rights of the accused; 13 in the Court's view in Jackson there was an obvious and quite serious danger under the procedure in question, that a defendant's testimony as to the voluntariness of his confession would not be given credence by the jury simply because it believed that he was guilty as charged. 14

Dissenting opinions by Justices Black, Clark, and Harlan, maintained that the jury is entitled to determine the voluntariness of a confession along with the other factual issues in the case, and that the holding unsoundly downgraded trial by jury; also, that states should be free to allocate the trial of issues between the judge and the jury, whether in criminal or in civil cases. 15

Jurisdictions in the United States follow three general rules of procedure in regard to criminal confessions. In addition to the New York procedure, found unconstitutional in the principal case, there is the so-called "Orthodox" or Wigmore rule, in which the judge hears all the evidence, then rules on voluntariness for the purpose

10 Rogers v. Richmond, supra note 8.
12 Petitioners suffer a disadvantage inseparable from the issues they raise in that this procedure does not produce any definite, open, and separate decision of the confession issue. Being cloaked by the general verdict, petitioners do not know what result they are really attacking here . . . This method of tying the coercion issue to a jury is not informative as to its disposition. Sometimes the record permits a guess of inference, but where other evidence of guilt is strong, a reviewing court cannot learn whether the final result was to receive or reject the confession as evidence of guilt. Perhaps a more serious, practical cause of dissatisfaction is the absence of any assurance that the confessions did not serve as make weights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard. Id. at 177-178.
13 Jackson v. Denno, supra note 7, at 381.
14 Id. at 382.
15 Id. at 401, 423, 427.
of admissibility of confession; the jury then considers voluntariness as affecting the weight or the credibility of the confession.\textsuperscript{16}

The third rule is the "Massachusetts rule." Under the Massachusetts rule in its strict form, the judge hears all the evidence and rules on voluntariness before allowing the confession to be admitted. If he does find the confession to be voluntary, the jury is then instructed that it also must find that the confession was not involuntary before it may consider it.\textsuperscript{17} This rule is impliedly sanctioned by the Court in the majority opinion.\textsuperscript{18}

Writers and commentators have supported the proposition that a jury cannot reasonably be expected to determine both the voluntariness and the veracity of a confession;\textsuperscript{19} their suggestions are recognized in the principal case.

The rule announced in the principal case has subsequently been accepted in several jurisdictions. It has been held in Pennsylvania that a trial court's refusal to grant a hearing as to the voluntariness of the defendant's confession, out of the presence of the jury, violated the Fourteenth Amendment since the defendant could attack the voluntariness of the confession before the jury only at the price of waiving his privilege against self-incrimination. The court there said that while this issue did not appear in \textit{Jackson}, since Jackson testified on all issues, the fact that one federal right would have to be waived in order to vindicate another federal right was in and of itself a violation of due process.\textsuperscript{20}

In \textit{State v. Owen}, the Arizona trial judge's statement that it was up to the jury to determine voluntariness of the statement or confession of a criminal defendant, required a reversal of conviction. The court there held that whenever a question is raised as to voluntariness of a criminal confession, it was for the judge to resolve that question outside the presence of a jury, in accordance with \textit{Jackson}.\textsuperscript{21}

However, it has been held that the New York procedure in question does not violate the Fourteenth Amendment so long as the confession is the only evidence on which the jury could find the defendant guilty. Since there was no other evidence, there was no necessity for the court to make a preliminary finding.\textsuperscript{22}

The significance of the \textit{Jackson} case will undoubtedly also be felt in other juris-

\textsuperscript{16} Id. at 411.
\textsuperscript{17} Id. at 417.
\textsuperscript{18} Id. at 378.
\textsuperscript{19} In his article on the allocation of the responsibility of involuntary confessions, Meltzer notes:

It may be urged that the commitment of our system to jury trial presupposes the acceptance of the assumptions that the jury follows its instructions, that it will make a separate determination of the voluntariness issue, and that it will disregard what it is supposed to disregard. But that commitment generally presupposes that the judge will apply the exclusionary rules before permitting evidence to be submitted to the jury.


\textsuperscript{22} People v. Milford, 33 U. S. L. WEEK 2128 (N. Y. City Aug. 25, 1964).
dictions which, like New York, have relied on the holding in Stein. Judges in such other jurisdictions must now exclude juries from preliminary hearings as to the voluntariness of confessions.

Constitutional Law—Free Exercise of Religion—Illegal Use of Toxic Drugs—

*People v. Woody*, 40 Cal. Rptr. 69, 394 P.2d 813 (1964)

A group of Navajos met in an Indian hogan one night to perform a customary religious ceremony. After introductory incantations, the leader passed a dish of small red cactus buttons; each adult male partook, biting into them and sucking out their bitter juice. Contained in these buttons was peyote, the principal constituent of which is mescaline, a drug rendering on its consumers several extraordinary and unpredictable effects. A hallucinogen, it produces visual sensations in some, effects similar to schizophrenia, dementia praecox, or paranoia in others, but in most a feeling of brotherhood and intense comprehension. This nocturnal ceremony was interrupted by California state police who arrested members of the congregation for violation of the California Health and Safety Code, Section 11500 of which specifically proscribes unauthorized use of peyote. One of the Indians handed the officer a photostatic copy of the Articles of Incorporation of the Native American Church of the State of California. At trial defendants argued that conviction under the statute would unconstitutionally violate free exercise of religion. Conviction was affirmed by the District Court of Appeals, and, on appeal, the Supreme Court of California held: application of the statute to the facts of this case was unconstitutional.

The immunity afforded religious beliefs by the First Amendment is absolute and extends against all governmental levels. Religious practices, however, may be subject to governmental regulation "when principles break out into overt acts against peace and good order." Nonetheless, interference against First Amendment freedoms will not be tolerated unless there is a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .," and unless the "conduct or actions so regulated . . . (represent) . . . some substantial threat to public safety, peace or order."

4 It is said that the source of this concept is found in Jefferson's Bill for Establishing Religious Liberty, 12 Hening's Statutes 84; 2 Howson, History of Virginia 298; Reynolds v. United States, 98 U.S. 145 (1878).
Judgment in this area is complicated by the presence of two imponderables. First, what immediacy and substance must attach to the threat to warrant governmental intrusion? Second, how great is the threat to public welfare posed by the conduct in a given case?

Case law shows the expected variance on the gravity of danger necessary to justify proscription. *Reynolds v. United States* upheld federal prohibition of polygamy in application against Mormons, even though the practice was deemed a requirement of the Mormon religion. The "compelling state interest" rested on sociological data to the effect that polygamy leads to patriarchal principles which "when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in communities with monogamy."*v*

A parent, in *Prince v. Massachusetts*, had allowed her child to sell *Watchtower*, a journal published by Jehovah’s Witnesses, in violation of a child labor law. The United States Supreme Court upheld conviction over the protests that proselytizing was an integral part of the religion. The court speculated, however, that the decision might have been otherwise had such a prohibition extended only to adults, as the state’s power “to control the conduct of children reaches beyond the scope of its authority over adults, ...”*vi*

More recently, the South Carolina Supreme Court declared a Sabbatarian who refused employment on Saturday for religious scruples ineligible to receive unemployment compensation. The court concluded that the danger of spurious claims which threatened to dilute the fund and the disruption of work scheduling constituted sufficient grounds for state intervention. The United States Supreme Court, reversing, held that no showing of a mere relationship to some “colorable state interest would suffice; in this highly sensitive constitutional area, ‘(o)only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.’”*vii*

The Court further held that vital state interests notwithstanding, it would “plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”*vii*

The United States Supreme Court had three years earlier rendered a series of decisions apparently beyond reconciliation with *Sherbert*. In *Braunfeld v. Brown* a conviction under a Sunday blue law was upheld. The strong state interest in pro-

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* Supra note 4.
* Id. at 166.
viding one uniform day of rest for all workers could be protected, the Court found, only by declaring Sunday to be that day of rest. In addition, "Requiring exemptions for Sabbatarians . . . present an administrative problem of such magnitude as to afford the exempted class so great a competitive advantage that such a requirement would have rendered the entire statutory scheme unworkable." 8

There is equal uncertainty concerning the extent of the threat to public welfare represented by the use of peyote. Although technically not a narcotic, there seems little doubt that California has the right to regulate its use. 17 While the medical profession has not, apparently, flatly termed the drug dangerous, the wide variety of violent and unpredictable reactions counsel against its presence in the family medicine chest. 16 Professional ambivalence as to its danger allowed the District Court of Appeals and the Supreme Court of California to report analyses roughly contradictory. 16 Agreement was nonetheless reached on the facts that mescaline is not habit-forming like a narcotic, 16 results in no withdrawal symptoms, 16 and "works no permanent deleterious injury to the Indian." 16 These considerations were probably the critical ones.

There are, moreover, additional factors not emphasized in the opinion which indicate that the decision, confined to its facts, was entirely correct. The community affected was small, relatively isolated, and steeped in ethnic traditions. Had the arrest occurred in a multiple dwelling in Los Angeles County and the "religious society" been one of college students, the court, notwithstanding constitutional disability from inquiring into the bona fides of a religious practice, 16 might easily have found a "compelling state interest".

Perhaps the case illustrates another growing problem. The trend of decisions from Prince 15 to Braunfeld, 16 to Sherbert, 16 and the principle case indicates the increase of the burden the state must sustain in demonstrating a genuinely compelling need for the regulation sought over religious practices allegedly immune. Recent decisions in a related area, however, also illustrate the broadening of the constitutional prohibition against "an establishment of religion." 16 One may speculate that as greater

8 Supra note 6, at 408-9.
9 Reetz v. Michigan, 188 U.S. 505 (1903).
10 "... anxiety can be mild or acute; it can be accompanied by tenseness, hostility, delusions, melancholia, or depression. Hostility is especially manifest if the subject feels threatened by his environment; paranoid ideas are not infrequent; rage may sometimes be displayed. Anxiety is common but not the rule. Some subjects are indifferent or even stupefied. Others become gregarious, humorous, and euphoric; they smile fatuously, giggle, and laugh, often inappropriately. Periods of anxiety and of euphoria may sometimes alternate. In every case, regardless of the previous symptoms, the reaction ends in a depressive phase that can last for a few hours or for days after all other responses have subsided." Sze, General Pharmacology, 234 Mescaline (1962).
11 Compare People v. Woody, supra note 1, at 715 with People v. Woody, supra note 2, at 74.
12 Goodman, Pharmacological Basis of Therapeutics, 175 (1956).
13 Ibid.
14 People v. Woody, supra note 2, at 74.
18 Sherbert v. Verner, supra note 6.
concessions and exceptions are made for religious practices, and as these practices are placed further beyond the reach of conventional social legislation, such concessions will ultimately come under attack by the Establishment Clause. The anomaly was noted by Mr. Justice Stewart, concurring in *Sherbert.* That decision was related to *Engel v. Vitale,* which ruled the New York Board of Regents prayer a violation of the Establishment Clause, from which decision Mr. Justice Stewart had dissented. Accordingly, to grant immunity for the unrestricted use of products in the regulation of which the State has a relatively strong interest is perhaps to grant a concession of proportions such as to “establish” that concession.

The principal case well illustrates the need for case-by-case analysis in “this highly sensitive constitutional area.” Principles enunciated in it, applied to even slightly enlarged factual situations could well result in unacceptable conclusions. Perhaps the growing doctrine of pre-eminence of First Amendment immunities for religious practices over the “state’s compelling interest” has been extended, for the moment, to the limit of its prudent application.

**Criminal Law—Statutory Rape—Evidence of Defendant’s Ignorance of Victim’s Age Admissible—*People v. Hernandez,* 39 Cal. Repr. 361, 393 P. 2d 673 (1964).**

The defendant was convicted of statutory rape under Cal. Pen. Code § 261 which places the woman’s legal age of consent at eighteen. The prosecutrix was seventeen years and nine months old at the time of the offense; she had known the defendant for several months and voluntarily engaged in the act of intercourse. The trial court rejected the defendant’s evidence, based on statements made by the witness herself, of his bona fide and reasonable belief that the prosecutrix was eighteen. On appeal, the Supreme Court of California, relying on §§ 20 and 26, held that the rejection constituted reversible error.

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2 *Supra* note 6, at 415.
2 *Supra* note 6, at 406.

1 Cal. Pen. Code § 20: “In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence.” § 26: “All persons are capable of committing crimes except...persons who committed the act...under an ignorance or mistake of fact, which disproves any criminal intent.”

The crime of statutory rape has been invariably regarded as one governed by strict liability. The courts, without exception, have rejected the defense of an honest and reasonable mistake of fact, the underlying reason being that defendant's act would not be entirely innocent even if the facts had been as he believed. It is considered that the defendant's conduct has fallen below an acceptable standard, and that his claim for acquittal is based not on the ground that he thought his actions proper, but only that he believed that there was no penalty imposed for such conduct.\(^8\) The classic case illustrating this attitude is *Regina v. Prince*,\(^8\) in which the defendant was charged with taking a girl under sixteen years of age from the possession of her father. The defendant believed the girl's statement that she was eighteen, and the jury found his belief to be reasonable. However, the court upheld the conviction, deciding that the legislature had intended to exclude the requirement of mens rea, that the defendant's conduct was wrong regardless of the girl's age, and that he therefore had assumed the risk of the girl being under sixteen.

An early California case, *People v. Ratz*,\(^6\) relied on *Prince* in a decision involving a charge of statutory rape in which the defendant claimed that the prosecutrix had led him to believe she had reached the age of consent. Disregarding the defendant's contention that since he thought that the prosecutrix was of age, he therefore lacked the necessary criminal intent, the court stated that if the defendant engages in an act of illicit intercourse "the protection of society, the family, and the infant demand that he do so in peril of the fact that she may be under age."\(^7\) Until overruled by the instant case, the decision in *Ratz* was regarded as the controlling law in California.\(^7\)

Operating under similar tenents, other jurisdictions reject a defense of mistake as to the girl's age as immaterial to the question of guilt or innocence.\(^9\) But ignorance of her actual age may lessen the penalty.\(^9\) A defense based on the female's consent is also refused; the law has fixed the age of consent, and her willing participation is irrelevant except to determine the degree of the offense.\(^10\) In some statutes the chastity of the prosecutrix is an essential element of the crime,\(^11\) or will determine its degree.\(^11\) If the statute specifies the age of the male, he will not be subject to prosecution when below that age.\(^12\) However, in most instances, the only issues with which

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\(^2\) 13 Cox Crim. Cas. 138 (Crim. App. 1875).
\(^3\) 115 Cal. 132, 46 P. 915 (1890).
\(^4\) Id. at 135, 46 P. at 916.
\(^5\) Supra note 2.
\(^8\) Norton v. State, 327 Ark. 783, 376 S.W.2d 267 (1964); N. D. Century Code § 12-30-01 (1960); State v. Nagel, 75 N.D. 495, 28 N.W.2d 665 (1947).
\(^9\) E.g., *FLA. STAT. ANN.* § 794.05 (1944), Hickman v. State, 97 So. 2d 37 (Fla. 1957); see also *Model Penal Code* § 213.6 (4) (Proposed Official Draft, 1962), which makes promiscuity of the prosecutrix a defense.
\(^10\) E.g., *KY. REV. STAT.* § 425.100 (1963), McCloud v. Commonwealth, 303 S.W.2d 299 (Ky. 1957).
the court is concerned are the age of the prosecutrix and whether or not intercourse took place.\footnote{See People v. Johns, 173 Cal.2d 38, 343 P.2d 92 (1959); State v. Armijo 64 N.M. 431, 329 P.2d 785 (1958).}

The court in Hernandez rejects the theory that the defendant assumes the risk of the female’s being under age, and that the necessary intent exists in his consciously intending to proceed regardless of her age. When a defendant participates in a mutual act of sexual intercourse, believing, upon reasonable grounds, that his partner is beyond the age of consent, he has not proceeded with disregard for her age nor consciously taken any risk. “Instead he has subjectively eliminated the risk by satisfying himself on reasonable evidence that the crime cannot be committed.” The court concludes that although this contention has been rejected, the courts have not satisfactorily explained “the nature of the criminal intent present in the mind of one who in good faith believes that he has obtained a lawful consent before engaging in the prohibited act.” (Emphasis added.)

Hernandez is the latest in a series of decisions which indicates the California Supreme Court’s policy of interpreting its statutes as requiring criminal intent for conviction. In three earlier cases\footnote{People v. Winston, supra note 17.} the court refused to impose strict liability in areas where its application has been regarded as justifiable. In People v. Winston,\footnote{People v. Vogel, supra note 17.} the court discovered the defendant’s intent to possess narcotics from the surrounding circumstances, but announced that the mere possession of narcotics, without knowing them to be such, would not sustain a conviction. And, in People v. Vogel,\footnote{People v. Stuart, supra note 17.} in which the defendant had remarried in the belief that his wife had obtained a divorce, the conviction of bigamy was reversed on the grounds that the defendant should have been permitted to present evidence of his bona fide and reasonable belief that he was free to remarry. Finally, the court acquitted the defendant pharmacist in People v. Stuart\footnote{People v. Stuart, supra note 17.} of both manslaughter and of violating CAL. PEN. CODE § 380 which makes it a felony to prepare a prescription inaccurately from which a death results. The facts indicated that the defendant had not been negligent and could not have been aware of the error leading to the death. The court held that violation of CAL. HEALTH AND SAFETY CODE § 26280 was not the unlawful act required by the misdemeanor-manslaughter doctrine. An act which is unlawful in this context is one which is accompanied by intent or criminal negligence, not merely the violation of a public welfare statute. The court then proceeded to hold that § 380 did not impose absolute liability for an accident which was not the result of a failure to use the required skill. Even though the violation concerned a statute which involves public welfare, Judge Traynor carefully constructed his decision around §§ 20 and 26.\footnote{Supra note 1.} Nevertheless, his
result in this case is not an isolated one; the same conclusion was reached earlier in a New York case similar to Stuart.²⁸

Winston, however, could have been disposed of under the widely recognized view that it involved a violation of the police power which dispenses with intent as an element of criminal liability.²⁹ And California might again have joined a majority of the courts by agreeing that cases of bigamy are governed by strict liability. Evidence of a reasonable mistake has been almost as frequently rejected in this area as in statutory rape,³⁰ and the departure in Vogel was an important forerunner to Hernandez. Both decisions rely on §§ 20 and 26.³¹ These, however, are simply codifications of the common law doctrines of mens rea and mistake of fact, and, therefore, concepts which presumably would govern the construction of the penal statutes in all jurisdictions. "‘[I]t has never been suggested that these exceptions [lack of intent and mistake of fact] do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication.' "³²

The wisdom of applying the doctrine of strict liability to cases concerning even regulatory offenses has recently been questioned.³³ There is much greater reason to reject its application where a true crime is involved; under such circumstances the defendant is faced with the penalty and odium of a criminal conviction, but is denied the essential safeguards usually afforded by the criminal law.

Nor it it any longer tenable, if indeed it ever was, for the courts to reject the defense of reasonable mistake to charges of statutory rape on the grounds that it is in the interest of public policy. To base such rejections on the theory that the male is always solely responsible for the offense is to misconstrue present reality. Moreover, the requirement of honesty and reasonableness, which must be met before the defense of mistake can prevail, would as sufficiently insure the protection of the young and naive as does an inflexible imposition of strict liability regardless of the circumstances. To say that the defendant's conduct is wrongful despite a reasonable mistake is to beg the question. The defendant intended to do an act against which there is no law, and the question presented is whether he should be convicted of an offense to whose elements he did not assent. The decision in Hernandez may indicate that the courts are now willing to give a more just and thoughtful answer.

³⁰ See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960).
³¹ Supra note 1.
ON OCTOBER 4, 1960, SHORTLY AFTER departing from a Boston airport, a commercial airliner, scheduled to fly from Boston to Philadelphia, plunged into Boston Harbor. Numerous actions for personal injury and wrongful death were instituted and in most of the actions the plaintiffs have alleged that the crash resulted from the defendants' negligence in permitting the aircraft's engines to ingest some birds. Over 100 actions were brought in the United States District Court for the District of Massachusetts and more than forty-five actions in the United States District Court for the Eastern District of Pennsylvania. The present case concerns forty of the actions brought in the Pennsylvania District Court by the personal representatives of the Pennsylvania decedents. The defendants, pursuant to 28 U.S.C. § 1404(a) (1948), moved for transfer of venue to the United States District Court in Massachusetts. The District Court granted the motion and held that the transfer was justified whether the transferred actions are governed by the laws and choice of law rules of Pennsylvania or of Massachusetts and that transfer was not precluded by the fact that the personal representatives had not qualified to sue under Massachusetts law. On appeal, the plaintiffs obtained a writ of mandamus from the Court of Appeals ordering the District Court to vacate its order of transfer. The Court of Appeals reasoned that since Fed. R. Civ. P. 17(b) provided that “capacity to sue or be sued shall be determined by the law of the state in which the district court is held” and since the plaintiffs had not qualified to sue in Massachusetts at the time the suit was brought in Pennsylvania, then transfer was prohibited, for the Massachusetts District Court was not a court, under § 1404(a), “where the action might have been brought.” The Court of Appeals relied upon Hoffman v. Blaski as establishing that “unless the plaintiff had an unqualified right to bring suit in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a).”

The United States Supreme Court granted certiorari, and in an opinion by Mr. Justice Goldberg, reversed the judgment of the Court of Appeals. It held that both the Court of Appeals and the District Court erred in their fundamental assumptions regarding the state law to be applied to an action transferred under § 1404(a) and accordingly the case was remanded to the District Court for consideration of factors neglected in the original determination of transfer. The Court concluded that the transferee court must apply the law of the transferor forum in all matters, including conflict of laws rules as directed by Klaxon v. Stentor Elec. Mfg. Co.
The Court held that Rule 17 (b), and § 1404 (a) are not to be construed together. If, under Rule 17 (b), the plaintiff has the capacity to sue in the federal court where the action is first brought, as determined by the state law of that forum, then transfer to a more convenient forum will not be precluded, provided there is proper venue, because of incapacity to sue there. The Court of Appeals' attempt to extend the criteria for transfer enunciated in *Hoffman v. Blaski* to include the capacity to sue, in addition to proper venue, was rejected.

The Court reasoned that a change of substantive law accompanying a transfer of venue would not be consistent with the “interests of justice”, nor with the underlying purpose of § 1404 (a). If the transferee court were free to apply whichever law it wished, the plaintiff might be subject to an elimination or modification of his cause of action in that forum.

The real purpose of the defendant's motion to transfer, and the plaintiff's insistence against transfer, seems to spring from the defendant's desire to bring the case under the Massachusetts wrongful death act, the so-called “Lord Campbell Act.” This act restricts damages for wrongful death to $20,000 dollars. The defendant reasoned that if the law of the transferee forum were applied then damages would be at most the statutory maximum. On the other hand, if Pennsylvania law were to be applied, its conflicts law must also apply as directed by *Klaxon*, and that law requires that the case be governed by the law of the place of the tort. The Pennsylvania State Court had not at the time of this case decided whether it would apply all of the law of the state where the tort occurs or only part of it, reserving the measure of damages for its own determination. Ignoring a foreign state's limitation on damages on grounds of public policy is the law of New York as laid down in *Kilberg v. Northeast Airlines, Inc.* and *Pearson v. Northeast Airlines, Inc.*

*Van Dusen v. Barrack* underscores the real problem which arises out of the conflict of laws disparities among the states and the uncertainty and divergence of opinion as to the law to be applied when a tort occurs and what portion of that law is to be applied. Because of the relative advantages of one state's conflicts theory over another, forum shopping exists and will continue, to some degree, because of our federal-state system. The solution often proposed to eliminate this evil is that of uniformity in the law. Forum shopping between federal and state courts within the same state was brought to an abrupt halt when *Swift v. Tyson* was overruled by *Erie R. R. v. Tompkins*. *Erie* has produced uniformity within a state as between its state courts and its federal courts; however in diversity cases involving defendants of considerable size, doing business in a great number of states for the purpose of venue, *Erie* coupled with *Klaxon* now produces, in tort areas, a great deal of federal forum shopping.

The problems, uncertainties and disparities that arise in diversity cases because of

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This case adopted the *Kilberg* rule, note 10 infra.

*9 N.Y.2d 34, 172 N.E.2d 526 (1961).*

*309 F. 2d 553 (2d Cir. 1962), cert. denied, 372 U.S. 912 (1963).*

*16 Pet. 1 (1842).*

*304 U.S. 64 (1938).*
the decision in *Klaxon* are patent; it remains now to explore the possibilities of alleviating or at least minimizing the problems. Although *Klaxon* reaches into every field of law in cases of diversity, and merits thorough discussion, for purposes of this note it will be confined to the problems and possible solutions in the area of torts involving interstate carriers and more specifically airplane accidents. Responsive action alleviating federal forum shopping in this area and its concomitant injustices and irregularities fall within the purview of either the Court or the Congress with the latter seeming to be the more propitious.

First, the Supreme Court could overrule *Klaxon v. Stentor Mfg. Co.* and promulgate a federal common law of conflicts of laws. It has been said, however, that *Klaxon*, of necessity, must be upheld because it rests on a constitutional basis as an extension of *Erie*. Notwithstanding the fact that the constitutional basis of *Erie* was never briefed nor argued, even those who would praise *Erie* have opined that “... the constitutional basis of *Erie* does not apply to choice of law issues even when diversity is the sole basis of federal jurisdiction and *a fortiori* when it is not.” Those who are less than enthusiastic about *Erie* make their feelings on the constitutional basis of *Klaxon* quite plain and persuasively reason that under the Full Faith and Credit Clause *Klaxon* is wrong. The constitutional basis of *Klaxon* is at best tenuous and as Mr. Justice Jackson observed, "Indeed, I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution."

The application of a uniform conflicts of laws rule to all litigants involved in a single airplane crash would eliminate the anomalous situation which arises where the estate of one passenger might recover without limit whereas that of the man sitting next to him could get only a small, statutorily fixed sum. "One of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness." Although uniformity in conflicts’ rules could be effected by the Court, it does not seem so disposed nor does its judicial machinery seem to admit of result oriented decisions. It is a Court created problem but perhaps once the Court has opened Pandora’s Box it no longer has the instruments of recall.

If the task of Conflict of Laws is to understand, harmonize, and weigh competing interests in multistate events, and if the desideratum of uniformity will be approached most satisfactorily by evolving rules that deliberately seek these objectives, then we seem hardly ready for a set of precepts imposed in the process of Supreme Court decision as fixed canons of constitutional law. If we eschew an enforced uniformity and pursue these objectives we may find that our canons need much more analysis and that in particular fields the constructive

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work of achieving uniformity is more appropriately a legislative than a judicial task.  

A federal statute declaring a rule of liability to passengers on the part of interstate carriers—and the rule would not have to be stated in any detail—would end these disparities. From the practical point of view, perhaps in order to avoid swamping the federal courts with personal injury suits, such a statute should be limited to airplane accidents. The reasoning of those espousing federal preemption of the aviation disaster field seems most cogent. Since compliance by the airlines with the Civil Aeronautics Board and Federal Aviation Agency regulation is mandatory, should not the issue of noncompliance with the regulations resulting in death to people of many states give rise to a federal question to be decided by federal law? Notwithstanding the logic of a federal law, consider the practicality and justice of a federal law. Since the passengers usually come from different states and the airline is liable in many, under the present law, the actions are likely to be brought in a variety of forums, possibly with diverse choice of law rules resulting in varied decisions on the same issue. If this area were raised to a federal question, then Klaxon by necessity would not apply, since jurisdiction in the federal courts would not be based on diversity.

The nature and mode of commercial interstate travel in the United States today indeed has a federal flavor and laws necessary to treat it as such are long overdue. Van Dusen v. Barrack does not solve this underlying and more important problem, but to the contrary, the decision highlights it.


In 1944 the plaintiff, while serving in the U.S. Navy, was treated for a sinusitis ailment. For X-ray purposes, a radio-active contrast dye, umbrathor, was inserted

Friendly, supra note 14, at 88.
Friendly, supra note 14j at 88.

Umbrathor is the trade name for a non-stabilized colloidal solution of thorium dioxide. The stabilized solution of thorium dioxide is known as thorotrast. The non-stabilized formula should not be taken internally.
into his sinus. The plaintiff was discharged from service in 1945, but continued
to receive treatment from Veterans Administration personnel. In 1956 cancer was
discovered in his left maxillary sinus, due to the radioactive substance. The Veterans
Administration physicians had assumed the substance to be a nonradioactive iodized
oil, an innocuous compound commonly used during x-ray of the sinus tract. The
plaintiff was required to undergo radical surgery including removal of the left eye,
left cheek bone, left palate and upper teeth, and much of the bone structure and
tissue on the left side of his face. Held: Government physicians were negligent in
failing to remove umbrathor, and they had a duty to follow up the cases in which
such a dangerous drug was administered, even though the patient never returned to
a government physician. The plaintiff was awarded $725,000 damages. Schwartz v.
United States.\(^2\)

The federal government immediately appealed the decision, but before the appeal
was heard, the case was settled for $525,000.\(^3\)

The plaintiff’s claim was brought under the Federal Tort Claims Act\(^4\) (herein-
after referred to as FTCA) which provides that “The United States shall be liable,
respecting . . . tort claims, in the same manner and to the same extent as a private
individual under like circumstances. . . .” Although FTCA contains no provision
specifically applicable to veterans or servicemen, the courts, in a series of celebrated
cases, have allowed veterans and servicemen to recover damages for wrongful acts not
incident to the performance of military duties. In Brooks v. United States\(^5\) a soldier
on furlough died from wounds inflicted in a collision with a military vehicle. The
Court held that a member of the armed forces may recover under FTCA for injuries
not incident to service. Conversely, the Supreme Court has noted that a peculiar re-
lationship exists between a member of the armed forces and superior military
authority. Therefore, to envelop injuries to servicemen incident to active military
duty would subject every injury sustained by a member of the armed forces in
execution of military orders to the examination of a court of justice.\(^6\) The case of
United States v. Brown\(^7\) was the first to allow a veteran to recover under FTCA for
aggravation of an injury initially sustained during active military duty, though the
Court made the finding that the injury was not incident to the performance of mili-
tary duty. In terms of legal impact, Brown seems to have secured for veterans equiva-
tlent footing with that of civilians in asserting claims under FTCA.\(^8\)

Schwartz is notably devoid of reliance upon prior court opinions as to its sub-
stantive findings of negligence. Conceivably, the court considers the rules, principles,
and tests upon which the court must be guided so well defined that little value would
result from documenting them; or, alternatively, that proof of the cause\(^9\) of injury is

\(^3\) Source: Vincent H. Cohen, Esq., U.S. Dept. of Justice, counsel for the defendant.
\(^5\) 337 U.S. 49 (1949); See Note, 50 COLUM. L. REV. 827 (1950).
\(^7\) 348 U.S. 110 (1954).
\(^8\) See Note, 2 N.Y.L.F. 110 (1956).
\(^9\) As a general rule, medical negligence does not require the plaintiff to prove causation by
direct and concrete evidence, excluding every other cause. It is sufficient to show by circum-
stantial evidence the reasonable probability that the defendant’s negligence produced the
conclusively attributable to the defendant by any reasonable rule. In any case, Schuartz was adjudicated in the light of the locality rule which makes the federal government liable for the negligent and wrongful conduct of its employees—where the United States, if a private person, would be liable—under the law of the state in which the tortious act was committed.  

Applying the criteria of the controlling jurisdiction, Pennsylvania, in the leading case of Remley v. Plummer it was established that a physician or surgeon has a duty to maintain the standards of reasonable skill and diligence ordinarily exercised in his profession in the community, having due respect for the advanced state of the art at the time of treatment. In Schuartz, the federal government’s defense was predicated upon the contention that the carcinogenic properties of umbrathor were not generally known prior to 1956, and there was no cause to suspect its deleterious effects. The court found that grave warnings of the hazards of umbrathor had appeared in major medical journals in the 1930’s, and research confirming its carcinogenic properties was reported in the 1940’s. Moreover, the court said the defense was not responsive to the cause of action since the negligence in this case was the result of failure to take reasonable steps to remove the substance, regardless of its contents. The court also cited its findings that the plaintiff’s medical records, which had been transferred from St. Albans Veterans Administration Hospital to the Philadelphia Naval Clinic in 1945, had not been used as an original source of information, despite the significance of these records. It was found that the records contained the word “umbrathor” in capital letters.

Pennsylvania’s standards of practice are further laid down in McHugh v. Audet, a case in which a young mother died following an operation based upon an alleged mistaken diagnosis. In affirming the lower court’s opinion that the physician was not negligent, the Court of Appeals said that a physician is not responsible for an error of judgment unless it is grossly inconsistent with the degree of skill which it is the duty of every physician to possess. But, the court also said that a departure from prevailing practices, unless justified by the circumstances, may constitute a prima facie case of malpractice.

One of the implications of McHugh seems to suggest that to administer any new drug or introduce a new procedure, represents, potentially, the essence of a departure from established medical practice. This type of reasoning, translated in Schuartz, apparently led to the court’s conclusion that the defendant was negligent in not having sought out those who had received the umbrathor in order to warn them of the potential hazards.

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13 Supra note 4.
15 Supra note 2, at 540.
16 Ibid.
17 Ibid.
19 Id. at 399.
that it created the risk of devastating injury.'" Schwartz does not make it clear whether, given the proper combination of circumstances, FTCA is being interpreted as providing the basis upon which recovery may be had against the federal government as though it were absolutely liable for the negligence of its employees, notwithstanding that FTCA requires either the commission, or omission, of a negligent act. Regardless of the intention of the court, its decision had the effect of allowing recovery based upon a principle which comes precariously close to the doctrine of *res ipsa loquitur*: "... when harm is done, that harm is clearly the result of a want of due care." The fact that Schwartz does not draw from prior opinions indicates the dearth of comparable decisions. A similar case, potentially a promising one with regard to clarifying governmental liability under FTCA in the private injury area, was Mahoney v. United States. In Mahoney an action was brought alleging that exposure to radioactive chemicals and toxic gases caused by the negligence of the U.S. Atomic Energy Commission in the operation of its Oak Ridge Diffusion Plant, had produced leukemia and Hodgkin's disease in the plaintiff. The plant was operated by an independent contractor. The court dismissed the complaint on the ground that the plaintiff failed to show the government proximately negligent to an extent causing disease or injury. Respecting absolute liability, the court said, by way of dictum, that the government is not liable merely as a consequence of ownership of an inherently dangerous commodity.

The practical effect of Schwartz is that it establishes a new standard of care under which negligence may result from failure to take affirmative steps to seek out those having been exposed to new drugs or medicines, even when a patient never returns for treatment, nor indicates the presence of injury.

Sales—Extension of Seller's Warranty—Uniform Commercial Code § 2-318—

Plaintiff, a hotel manager, acting on behalf of his employer, the hotel which was catering a wedding party, purchased four bottles of champagne from defendant. While plaintiff and other hotel employees were preparing to serve the wine, a cap from one of the bottles suddenly ejected, propelled through the air and hit plaintiff in the eye, causing serious injury. Plaintiff brought suit based upon an alleged breach of the implied warranties (1) that the goods were adequately and safely

37 Supra note 2, at 540.
38 Supra note 2, at 541.
packaged and (2) that the goods were fit for the ordinary purposes for which they were sold.

The lower court, following the holding of the recent Pennsylvania case, *Hochgertel v. Canada Dry Corp.*,1 sustained defendant's demurrer and dismissed the complaint. On appeal, the supreme court held: plaintiff was a *buyer* within the definition of the Uniform Commercial Code and was entitled to the benefit of seller's warranties.

The Uniform Commercial Code § 2-318 provides that

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.2

Comment 3 states that

This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

In *Hochgertel*, the plaintiff, a bartender in a fraternal lodge, was injured by the explosion of an unopened bottle of soda water, purchased by his employer. The supreme court held that the manufacturer's implied warranty of fitness did not extend to the plaintiff, the employee of the purchaser, as he was not within the scope of § 2-318. The same court distinguished the present case from *Hochgertel*, in that plaintiff was "the actual purchaser even though he be an employee of the party to whom title to the product passed."3 The court concluded that "since the plaintiff was cast in the important role of 'buyer' and consummated the 'contract to buy' for his employer, the fact that he is an employee does not exclude him from the benefits of the warranty and deprive him of a right of action."4

The Code defines *buyer* as "a person who buys or contracts to buy"; *purchaser* as "a person who takes by purchase"; and *purchase* as a "voluntary transaction creating an interest in property."5

If plaintiff is the *actual purchaser*, as the court states, then, according to the Code, an *interest in property* should be created in him. However, the court, in the same sentence, states that title passed to plaintiff's employer. It would appear that plaintiff was merely acting on behalf of his employer when he performed the act of purchasing the wine, and he is not a *purchaser* in his own right. If the term *buyer* is relied on, a similar conclusion is reached. Plaintiff was not a *buyer* in his own right,

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4 *Id.*
but was performing the act of buying for his employer. Also, if plaintiff was the *buyer/purchaser*, there was no need for the court to consider § 2-318, since this section assumes that a seller's warranty extends to his buyer.

The effect of the *Yentzer* decision, while giving perfunctory reaffirmance to the *Hochgertel* limitation, was to allow an injured employee of the purchaser to bring an action against the seller for breach of implied warranty. If the wine had been delivered to the hotel, instead of being picked up by plaintiff, his action would have failed, unless, of course, the court overruled *Hochgertel*.

The outcome of the case is within the spirit of § 2-318 since it extended the seller’s implied warranties to a person whom it was “reasonable to expect . . . may use, consume or be affected by the goods and who is injured in person by breach of the warranty.” It is possible that the court could have reached the same decision by reconsidering the strict limitation it put on § 2-318 in *Hochgertel*.

“Section 2-318 makes a frontal attack on a portion of the privity rule.” This attack is not all inclusive, though, and the courts are free to enlarge or restrict the developing case law on whether a warranty extends to others than those categorized in the section.

In *Hochgertel*, the court concluded that “in no case in Pennsylvania has recovery against the manufacturer for breach of an implied warranty been extended beyond a purchaser in the distributive chain.” One of the purposes for which the Pennsylvania legislature adopted the Code was “to make uniform the law among various jurisdictions.” Thus, in considering the reasonableness of extending the warranty under § 2-318 in both *Yentzer* and *Hochgertel*, the court, in addition to examining Pennsylvania case law, should have looked to the case law developing in other jurisdictions to preserve the uniformity intended by the Code.

Section 2-318 does away with the contract concept of warranty in the instances in which it is applicable. Originally a breach of warranty sounded in tort. Late in the eighteenth century, such an action would lie in contract. The nature and character of warranty is “a freak hybrid born of the illicit intercourse of tort and contract.” The Code “is an effort to free the practices of merchants from legalisms and to establish a truly functional law merchant.”

Some courts have adopted the theory that a warranty is not a contract warranty or a tort warranty, but is a new and independent one imposed by law as a matter of policy. This theory is consonant with § 2-318 as the warranty imposed by law ex-

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14 Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1126 (1960).
15 PA STAT. ANN., tit. 12A, § 1-102 (2) (c) (1954).
tends to "any consumer or user who, in reasonable contemplation, might be injured."

Also, courts have extended an implied warranty to any reasonable user and held a manufacturer strictly liable when a product is involved that creates a hazard if defective. In almost every jurisdiction, including Pennsylvania, strict liability is imposed when an imminently or inherently dangerous product is involved.

Finally, the recently developing case law in several jurisdictions demonstrates that the courts are permitting injured employees to recover against sellers and manufacturers for breach of implied warranty. The test arising from these decisions is the same as that of § 2-318; i.e., is it reasonable to expect that the employee may use, consume or be affected by the goods and be injured in person by breach of the warranty?

Underlying the decisions which have extended a warranty to the ultimate reasonably contemplated user is a basic social policy "that the burden of accidental injuries due to defective chattels be placed upon the producer, he being best able to distribute the risk to the general public through prices and insurance."

Therefore, the Pennsylvania court could have extended the seller's warranty to the employee in Hochgertel as (a) he was a reasonably contemplated user of a defectively manufactured product; (b) § 2-318 is based on the "reasonably contemplated user" test and an extension of the section should be based on the same test; (c) the trend of the developing case law in other jurisdictions favors an extension to such a user; (d) the Pennsylvania legislature adopted the Code to provide uniformity of the law merchant with other jurisdictions; and (e) social policy requires such an extension.

The same court in Yentzer extended a seller's warranties to an employee of the purchaser by judicial manipulation of the terms buyer and purchaser. The result of the decision is fair, but it would have had a sounder base on the above reasons. Yentzer indicates perhaps the eventual overruling of the Hochgertel limitation.


18 Among such products in the cases cited by Justice Traynor in Greenman, supra note 16, are bottles, grinding wheel, vaccine, insect spray, surgical pin, automobile, automobile tire, home permanent, hair dye, and airplane.

19 See Annot., 74 A.L.R.2d 1205 (1959).


21 Jakubowski v. Minnesota Mining and Manufacturing, supra note 17 at 281: "In addition to social policy there is the difficulty of proving negligence, even with the aid of res ipsa loquitur; the wastefulness and uncertainty of a series of warranty actions carrying liability back through the retailer and jobber to the original maker; the practice of reputable manufacturers' standing behind their goods as sound business policy; and the public interest served by giving the consumer or user maximum protection at the hands of someone—the producer who, as a practical and moral matter, is the one best able to afford it."