COMMENTS

CONFLICTS OF LAWS—DIVERSITY JURISDICTION—FEDERAL LAW CONTROLS OVER STATE LAW REGARDING THE ATTORNEY WORK PRODUCT*

Twenty-six years ago Justice Brandeis signaled the kickoff of one of the hardest fought and most confused legal contests of the century. Erie R.R. v. Tompkins1 set out the official rules for the state law–federal law conflict in diversity of citizenship litigation. Those rules were unclear from the beginning and although new ones have been formulated from time to time, the officials have failed as yet to establish a concrete set of workable guidelines. Notwithstanding this chaotic state, the federal team is apparently about to snatch a victory from what seemed to be total defeat prior to 1958.

Recently the United States District Court for the District of Delaware briefly entered the contest. In Ortiz v. H.L.H. Products Co.2 the court acknowledged that it was bound by the Erie rule: “The question ... [is] whether the rulings of the Delaware courts as to attorney work-product privileges should be applied in a diversity case, under Erie R. Co. v. Tompkins. ...” However, that was as far as the court went in discussing Erie or Erie-related rules. Judge Layton promptly proceeded to play by an entirely different set of rules—Hickman v. Taylor.4 The method by which he discarded Erie is unclear. His teammates and the spectators will get little enlightenment on the question so clearly stated. It should not be expected, however, that he will be penalized by reversal since the dominant policy is for a federal victory.5

Hickman v. Taylor5 defined the scope of the attorney-client privilege. The holding has been epitomized by Professor Moore in his treatise on federal practice.

(1) Information as to facts of the case and statements of


1. 304 U.S. 64 (1938).
3. Id. at 43.
6. Supra note 4.
witnesses obtained by the adverse party's attorney are not within the common law attorney-client privilege;

(2) Even the broader policy against invasion of the attorney's privacy and freedom in preparation of the case does not make them absolutely immune, but

(3) The party asking for disclosure is bound to show that the situation is a rare one having exceptional features which make the disclosure necessary in the interest of justice, and

(4) Where the party seeking discovery has obtained or is able to obtain the information asked for elsewhere, he has not met the burden.7

It is clear, therefore, that the statement and photographs in the Ortiz case do not come within the federal definition of the attorney-client privilege. Hickman, however, was a non-diversity case and, therefore, controlling only if federal rather than state law regarding privileges is applicable.8 Federal law would be applicable only if (1) the Delaware rule conflicts with one of the Federal Rules of Civil Procedure or (2) the privilege invoked is only a "form and mode" of enforcing a substantive right and "not bound up in the rights and obligations of the parties." In Hanna v. Plumer,9 the Supreme Court pointed out that there are two lines of cases involving conflicts between state and federal law in diversity cases which pose entirely different questions and which are gauged by entirely different standards. First, if the conflict is covered by one of the Federal Rules of Civil Procedure, that rule must prevail.10 On the other hand, if the Federal Rule is not applicable, then the Erie doctrine applies,11 as supplemented by Guaranty Trust Co. v. York12 and Byrd v. Blue Ridge Rural Elec. Co-op.13

The essence of the original Erie doctrine was that state law

8. Professor Wright says "the scope of discovery is governed entirely by the federal rules. State law as to the scope of discovery is of no force in federal court." Wright, Federal Courts 310 (1963). But Judge Layton's statement that "the state of the law on this question is confused," Ortiz v. H.L.H. Products Co., 39 F.R.D. 41, 43 (D. Del. 1965), indicates that, either he disagrees with Professor Wright or does not think the statement of the law is so broad as to cover the question of privilege. If the statement were correct and applicable, there would be nothing confusing about the law.
10. Id. at 470.
11. Ibid.
The doctrine of Guaranty case added the limitation that "outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court." This case de-emphasized the substantive-procedural aspect of the Erie rule and stressed the underlying policy of Erie—discouragement of forum shopping. The result was that state law must apply even in procedural matters if it appeared likely that a procedural rule might determine the outcome of the litigation. Carried to its extreme, the Guaranty limitation allowed state procedural rules to practically preempt federal procedure in diversity cases because almost any purely procedural rule could determine the outcome. In 1958, Byrd v. Blue Ridge Rural Elec. Co-op. attempted to remedy this situation by putting another weight in the balance in favor of federal law. To the determination of whether the application of a federal procedural rule would likely affect the outcome in a significant way must now be added a further one—are there "countervailing considerations" reflecting substantial federal policies which outweigh in final balance the aim of like result. The Erie-Guaranty-Byrd doctrine, therefore, can be stated generally as follows: State law governs purely substantive matters. State law may govern in procedural matters where the matter is not covered by one of the Federal Rules and where a procedural rule will likely determine the outcome, provided that there exists no federal "countervailing considerations" which outweigh the policy of like result.

The two lines of cases are (1) those cases where one of the Federal Rules of Civil Procedure covers the controversy and (2)

14. This is often referred to as the substantive-procedural dichotomy. Justice Brandeis said in the Erie opinion that Congress is powerless to declare "substantive rules of common law in a state," Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). The dichotomy was completed by Justice Reed's statement in a concurring opinion that "no one doubts federal power over procedure." Erie R.R. v. Tompkins, 304 U.S. 64, 92 (1938).
where it does not. In the first situation Hanna is authority for the proposition that the Federal Rule must prevail and that the Erie–Guaranty–Byrd doctrine does not apply. In the second situation the Byrd case, as the latest case in the Erie line, controls.20

In Ortiz, Judge Layton did not discuss the Erie doctrine. Nor did he cite either Byrd or Hanna. Consequently the opinion gives no clear indication which, if either, of those cases is applicable. Apparently he concluded that the privilege invoked here was only a "form and mode of enforcing a substantive right," since state law still must govern substantive matters.21 It further appears that either he concluded this "procedural" rule would not affect the outcome of the litigation or that there existed strong countervailing federal considerations. If this can be assumed, the case is an indication of how discovery, pursuant to Federal Rule 34,22 will fare under the Erie–Guaranty–Byrd doctrine. The alternative possibility—that the Delaware rule conflicts with Rule 34—is rejected because (1) the court could have ended the matter and avoided much confusion simply by citing Hanna v. Plumer23 for the proposition that where a Federal Rule covers the matter it will prevail over any conflicting state law24 and (2) Rule 34 expressly exempts from discovery matter which is privileged. The Rule itself does not define the kind or degree of privilege which will be recognized.25 However, Hickman v. Taylor26 could be construed as qualifying the term "privilege" in Rule 34 and thus becoming an integral part of that Rule. With this construction the court could have said the Delaware rule conflicts with Rule 34 and that Hanna v. Plumer27 governs. A third and more cogent reason for rejecting this alternative is that Judge Layton framed the question in terms of Erie.28

21. Ibid.
23. Supra note 20.
25. The pertinent part of Rule 34 provides that:
   Upon motion of any party showing good cause therefor . . . the court in which an action is pending may (1) order any party to produce . . . any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things not privileged. . . . (Emphasis added.)
Fed. R. Civ. P. 34.
Although the *Erie* question arose in *Byrd* only as a side issue and although *Byrd* did not expressly overrule any *Erie* related case, it was a landmark decision in that it renders those cases applying a strict “outcome determinative” test practically void as precedents on *Erie* questions. After *Byrd* that test survives only as a “policy” to be weighed, in each case, against “affirmative countervailing federal considerations.”

*Monarch Ins. Co. v. Spach* adds that “not the least of these countervailing considerations is the indispensable necessity that . . . [the federal court system] must have the capacity to regulate the manner by which cases are to be tried.” This mere policy of the federal court system, then, may be an adequate countervailing consideration to outweigh the competing policy of “like result.” *Monarch* was cited by the Court in *Hanna*. There the policy of “federal capacity to regulate the manner by which cases are to be tried” was perfected at least in so far as one of the Federal Rules covers the situation. In short, *Byrd* “demonstrates the wholesome desire of the Supreme Court to sustain control of uniform procedure in the federal judicial system, and to vindicate its complete independence of state practice.” It follows that pre-*Byrd* cases must be reexamined.

In applying this current philosophy to the specific question of “privileges,” the water is still muddy. The *Erie-Guaranty-Byrd* doctrine still retains the substantive-procedural dichotomy. In *Monarch*, the court continued to recognize that:

[M]any so called procedural rules may represent local policy on a level more fundamental than the regulation of remedy or practice as such and that by incidental effect or by design such rules in that sort of context are sometimes indistinguishable from principles traditionally regarded as substantive.

This statement had reference to the question of privileges. It can be assumed that this court was aware of those cases, cited in *Ortiz*, holding specifically that “privilege is a matter of pro-

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30. 281 F.2d 401 (5th Cir. 1960).
31. Id. at 407.
procedure,35 and cannot be said to be in accord with that premise. The question still remains is "privilege" a matter of procedure—only a form and mode of enforcing a substantive right—or is it bound up with the rights and obligations of the parties? Furthermore, is a federal court at liberty to determine the kind and degree of state created privileges which are exempt from discovery?

The majority of diversity cases dealing with discovery under Rule 34 have applied state law with regard to privilege36 but the reasons for doing so have been varied. Some of them have considered Erie to require it, characterizing privilege as a matter of substance.37 It should be noted, however, that, although the term "privilege" is applied in these cases inclusively and without qualification, the kind of privileges dealt with were mainly privileged communications as distinguished from photographs, documents, and the like. On the other hand some cases38 have said "privilege is a matter of procedure and therefore federal law governs." Most of these cases originated in a single jurisdiction39 and were based upon a quote from Professor Moore's treatise on Federal Practice.40 Again the term "privilege" was applied without qualification but unlike the other line of cases, ironically, the privileges dealt with were not of the communications type but involved tangible things like documents and photographs.

In Ortiz, Judge Layton did not expressly label either type of privilege. Taking note of the distinction which had been drawn in the aggregate by the courts acting independently, he applied a theory which is different from either line of cases but the opinion might be construed as concurring in result with both lines. He said blandly that:

[T]here is no intention here to permit discovery under the Federal Rules to invade those special fields of privileged communications long established by sound public pol-

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38. Supra note 34.
39. The District Court of the Northern District of Ohio.
40. See Panella v. Baltimore & O. R.R., 14 F.R.D. 196, 197 (N.D. Ohio 1961). This appears to be the first case involving Rule 34 where a party opposed the application of state law regarding a work product privilege.
icy . . . . However, the Delaware decisions have interpreted the attorney-client privilege so broadly as to include what, in reality, is generally regarded as an attorney's work-product without regard to the equitable qualifications of good cause established by Hickman v. Taylor.41

This, for all practical purposes, is the same as saying that federal law controls since this kind of privilege is generally respected even in non-diversity cases.42 Presumably, however, the case holds that if there exists such a state created privilege which is not also provided for by federal law, state law will control. This apparently recognizes that the communications privileges, "long established by sound public policy," are substantive, whereas all other privileges are matters of procedure.

It should be re-emphasized that the Ortiz case does not follow any of the lower federal court cases in classifying "privilege" as substantive or procedural. It does not expressly say that federal law controls or that it does not. It does not cite either Byrd or Hanna or give any clear indication that either case applied; the language of those cases is not detectable in the opinion. It does not discuss Erie in any form. It does, however, seem to comport with the tenor of those cases and the result would likely be affirmed by the Supreme Court. Unfortunately, it does not tell how it comports. Consequently, it sheds little light on the question of how does the Erie–Guaranty–Byrd doctrine affect discovery proceedings in diversity cases, particularly on the question of state created privileges. Furthermore it is not perfectly clear that that doctrine was applied in Ortiz. The essential language of the Byrd case is conspicuously absent from the Ortiz opinion. The outcome determinative limitation of Guaranty was retained in Byrd only as a "policy" to be balanced against

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42 The federal courts normally recognize a communications privilege if it meets the following four conditions:

(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 Wigmore, Evidence § 2285 (McNaughton Rev. 1961). For federal cases in which this test was applied see, e.g., Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953); United States v. Fuku, 84 F. Supp. 967 (E.D. Ky. 1949).
"affirmative countervailing federal considerations." Although that language was not used in Ortiz the principle was apparently applied. If it was, the countervailing consideration seems to be that:

The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

By going directly from the Erie issue to the Hickman conclusion the court left the bar as confused as ever with regard to how the Erie—Guaranty—Byrd doctrine affects discovery of matter protected by state created privileges. Notwithstanding this shortcoming, the decision, when cast in the light of Byrd and Hanna, reflects the Supreme Court’s present mood to apply federal procedure in any diversity case unless the opposing state law is clearly substantive.

It appears that Ortiz stands for the following propositions:

(1) At least to the extent that a state created attorney-client privilege includes what Hickman v. Taylor labeled “nothing more than work product,” the privilege is merely procedural—only a form and mode of enforcing a substantive right—and is governed by federal law.

(2) State created privileges “long established by sound public policy” will continue to be recognized by the federal court. Presumably this means privileged communications recognized at common law.

(3) Even if a state does show strong policy reasons for creating the privilege and even if denial of the state privilege does produce a substantially different result from that which would otherwise attain, affirmative countervailing federal considerations may require the result. Presumably the countervailing consideration present in Ortiz is that the expansion of the common law concept of the privilege “helps to provide, without any real necessity, an obstacle to the administration of justice.”

44. Supra note 41 at 45.
45. 329 U.S. 495 (1947).
46. Supra note 41.
considerations could be the hardship which the deponent would suffer if state law applied or the policy of uniformity in federal procedure which seemed to weigh heavily in Byrd and Monarch.

In conclusion, Ortiz, when read in the context of Byrd and Hanna, represents another bold step forward in removing the barriers to uniformity of federal practice and procedure. The result is an accurate reflection of the present thinking of the Supreme Court. Unfortunately the opinion is not likely to clear up much of the confusion which has heretofore existed in this area of the law since Judge Layton did not address himself to the Erie question which he stated as the issue. Notwithstanding the unanswered question of how the result was reached it seems safe to say it is correct—that photographs and statements of witnesses obtained by counsel in preparation for trial are not absolutely immune from discovery in a diversity case regardless of a contrary state rule. In such cases the standard is Hickman v. Taylor.

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47. Supra note 41.
48. Supra note 45.
CONSTITUTIONAL LAW—FIRST AMENDMENT—OBSCENE LITERATURE STANDARDS RE-EXAMINED*

In a series of three cases the United States Supreme Court again faced the controversial issue of the standard to be applied in determining whether material is obscene and therefore not entitled to first amendment protection. The decisions have resulted in a long-awaited clarification of the prevailing standard; but, perhaps of even more importance, was the modification and broadening of the scope of the test. The latter result should be welcomed both by moralists and by qualified users of materials formerly deemed obscene; but the reception by pulp publishers will probably be less than enthusiastic.

In the first case, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 1 a civil equity suit had been brought against the book commonly known as Fanny Hill to have the book declared obscene. 2 The trial court entered a final decree which adjudged Memoirs obscene and declared the book was not within the protection afforded by the first and fourteenth amendments to the Constitution or by the laws of Massachusetts. In affirming, the Massachusetts Supreme Judicial Court held that the "social value" test of Roth v. United States 3 did not require that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene. 4 The United States Supreme Court reversed and held that a book cannot be proscribed unless it is found to be utterly without redeeming social value. 5

In Mishkin v. New York 6 the defendant had been convicted by the Court of Special Sessions of the City of New York 7 of violating § 1141 of the New York Penal Law 8 and § 320(2) of

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1. 86 Sup. Ct. 975 (1966).
5. 86 Sup. Ct. 975 (1966).
8. Section 1141 of the Penal Law, in pertinent part, provides:

1. A person who . . . has in his possession with intent to sell, lend, distribute . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic, or disgusting book . . . or who . . . prints, utters, publishes...
the General Business Law.\(^9\) The Appellate Division declared the General Business Law provision an unconstitutional abridgment of freedom of expression, but affirmed the obscenity conviction without further opinion.\(^10\) The Court of Appeals affirmed without opinion.\(^11\) On appeal Mishkin contended that the \textit{Roth} test of "prurient appeal to the average person" was not satisfied because the materials in question were designed for and distributed to sexual deviants exclusively and, in fact, "instead of stimulating the erotic, they disgust and sicken." In affirming, the Supreme Court of the United States held that the prurient-appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of a clearly defined sexual deviant group for whom the material is designed to whom distributed.\(^12\)

In \textit{Ginsburg v. United States}\(^13\) the defendant, along with three corporations under his control, had been convicted\(^14\) on twenty-eight counts of an indictment for violation of the federal obscenity statute.\(^15\) Each count alleged that a resident of the Eastern District of Pennsylvania received through the mail either one of Ginsburg's publications challenged as obscene or an advertisement telling how the publication might be obtained. The Court of Appeals for the Third Circuit affirmed.\(^16\) Ginsburg's contention, on appeal, was that his materials had considerable social value and importance as evidenced by their prior use by the medical profession and others. His conviction was affirmed by the United States Supreme Court in holding that

or in any manner manufactures or prepares such a book ... or who ...

2. In any manner hires, employs, uses, or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them, is guilty of a misdemeanor ...

9. This law required that every publication other than newspapers, magazines, or other periodicals shall have conspicuously printed in certain specified places the name and address of the publisher or printer.


15. Every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device or substance and Every ... advertisement ... of any kind giving information ... by what means any of such mentioned matters ... may be obtained ... Is declared to be nonmailable matter ... Whoever knowingly uses the mails for ... delivery of anything declared by this section to be nonmailable ... shall be fined not more than $5000 or imprisoned not more than five years, or both ...


in close cases, evidence of pandering may be probative with respect to the nature of the material in question.\textsuperscript{17}

The first reported decision in America concerning obscene literature was \textit{Massachusetts v. Holmes}\textsuperscript{18} which, ironically, also involved the book, \textit{Memoirs of a Woman of Pleasure}.\textsuperscript{19} Since that time all the states have acted with vigor to protect their citizens from the evils of the obscene, the indecent, and the immoral.\textsuperscript{20}

It was not until 1948 that the issue of constitutional protection for "obscenity" was first raised in the Supreme Court. But in that case, \textit{Doubleday \& Co. v. New York},\textsuperscript{21} the Court failed to meet the challenge and without opinion affirmed by an equally divided court\textsuperscript{22} the conviction in the New York Court of Appeals.\textsuperscript{23}

In \textit{Roth v. United States}\textsuperscript{24} the Court for the first time held that "obscenity" was not entitled to the constitutional protection of the first and fourteenth amendments and did not require a showing of "a clear and present danger" to be so excluded, though that requirement had been previously indicated.\textsuperscript{25} In addition the Court established the constitutional standard to be applied to both federal and state statutes proscribing obscenity. As set out in \textit{Roth} the test defines obscenity as that which is

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\item 17. 86 Sup. Ct. 942 (1966).
\item 18. 17 Mass. 336 (1821).
\item 20. For examples of varied approaches from state to state in suppressing obscenity, see generally Lockhart and McClure, \textit{supra} note 19, at 313, 324-50. In 1930 Massachusetts convicted the seller of Theodore Dreiser's \textit{An American Tragedy}, the court ruling that it was not error for the jury to hear only the objectionable excerpts nor to prevent the defendant from synopsizing the book as a whole for the jury. Compare Westberry, \textit{Georgia Scrubs Its Newsstands}, 70 CHRISTIAN CENTURY 1498 (1953) listing the criteria applied before the Georgia State Literature Commission seeks judicial action; the general and dominant theme of the material, the degree of sincerity of purpose, the literary or scientific worth, the channels or distribution, the contemporary attitudes of reasonable men toward the theme, the types of readers which may reasonably be expected to peruse the publication, evidence of pornographic intent and the impression on the mind of the reader on reading the book as a whole.
\item 21. 335 U.S. 848 (1948).
\item 22. Justice Frankfurter did not participate.
\item 23. 297 N.Y. 687, 77 N.E.2d 6 (1947).
\end{thebibliography}
without the slightest redeeming social importance and whose dominant theme, taken as a whole, appeals to the prurient interest of the average person, applying contemporary community standards. The Court specifically rejected the two main points of the early leading standard set out in Regina v. Hicklin, sometimes known as the “susceptible person test.” Judging material by the effect of an isolated excerpt upon a particularly susceptible person, the Court said, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.

In Roth the question of obscenity vel non was not raised and the finding by the fact finders that the materials were obscene was accepted by the Court. The test has, however, been reiterated and delineated in a series of cases following Roth; but in none of these cases has the Court found any materials to be obscene. Kingsley Int’l Pictures Corp. v. Regents of the Univ. of New York held that motion pictures are within the basic protection of the first and fourteenth amendments and that the presentation of an “immoral” concept—that adultery may be desirable—does not bring the film (Lady Chatterly’s Lover) within the obscenity exception under Roth. Smith v. California held that dissemination of books is constitutionally protected and that mere possession of obscene materials for the purpose of selling is not punishable without a showing of knowledge of their contents. Manual Enterprises, Inc. v. Day reversed the barring from the mails of magazines designed for homosexuals, two Justices agreeing that the “prurient interest” standard of Roth encompasses the concept of “patent offensiveness” which affronts community standards of decency. Jacobellis v. Ohio held that the film Les Amants was not obscene under Roth, two Justices

27. Id. at 489.
34. 370 U.S. 478 (1962).
agreeing\textsuperscript{36} that "contemporary community standards" must be finally decided by the Court on the basis of "national standards."	extsuperscript{37}

Once again in \textit{A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts}\textsuperscript{38} the Court was widely split in finding \textit{Fanny Hill} not obscene. Mr. Justice Brennan speaking for the Chief Justice and Mr. Justice Fortas found that the Massachusetts court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." Mr. Justice Stewart concurred in the result because the only material not entitled to constitutional protection is "hard-core pornography."\textsuperscript{39} Justices Black and Douglas concurred in the result because the first amendment precludes any governmental censorship of the expression of ideas.\textsuperscript{40} Justices Clark and White, in dissenting, pointed out that the "social importance test" stated in \textit{Jacobellis} was not a majority opinion and in \textit{Roth} social importance was not a standard for determining obscenity but a justification for excluding obscenity from constitutional protection.\textsuperscript{41} Thus, while not the majority view, the "utterly devoid of social value" test will undoubtedly prevail with the present makeup of the Court.

The Court was both more united and more far-reaching in its decisions affirming the convictions of Mishkin and Ginzburg. In \textit{Mishkin v. New York}\textsuperscript{42} the Court further defined and "adjusted" the "average person" of the \textit{Roth} test. The materials in question had been prepared at Mishkin's direction to depict the practices of flagellation, fetishism, and lesbianism. The Court held the \textit{Roth} test was satisfied because the prurient-interest

\textsuperscript{36} Brennan and Goldberg, JJ.
\textsuperscript{37} See generally 17 S.C.L. Rev. 639 (1964) which raises the question of how a local jury may be expected to make a determination by applying national standards and suggests a compromise between the rights of trial by jury and freedom of expression.
\textsuperscript{38} 86 Sup. Ct. 975 (1966).
\textsuperscript{39} For a discussion of the "core problem" see Lockhart and McClure, \textit{Censorship of Obscenity: The Developing Constitutional Standards}, 45 MINN. L. Rev. 5, 49-68 (1960); Lockhart and McClure, \textit{supra} note 19, at 320-24. The three possible arguments are: Pornography does or should mean the same thing as obscenity; pornography is different from obscenity; pornography is a more severe degree of obscenity. In \textit{Mishkin} the Court seems to have clarified its position, per Mr. Justice Brennan. "The New York courts have interpreted 'obscenity'...to cover only so-called 'hard-core pornography'...[T]hat definition of 'obscenity' is more stringent than the Roth definition..." \textit{Mishkin} v. \textit{New York}, 86 Sup. Ct. 958 (1966).
\textsuperscript{40} 86 Sup. Ct. 975, 981 (1966).
\textsuperscript{41} \textit{Id.} at 989-99.
\textsuperscript{42} 86 Sup. Ct. 958 (1966).
requirement for this type material is "to be assessed in terms of the sexual interests of its intended and probable recipient group." The Nicklin test is still to be disapproved in two respects: (1) Examination of isolated excerpts will not be sufficient; and (2) the effect on "the most susceptible person" will not be significant if the material is designed for and disseminated to a different group or to the public at large. Thus the Court has essentially reached the so-called "variable obscenity" standard and the standard proposed by the Model Penal Code. This approach certainly seems to advance the aims of the obscenity statutes while permitting still further freedom to the qualified users in the scientific and literary fields. But the Court, already burdened as the "super censor" and overseer of private morals has not lightened its load by taking on the task of passing on the probable appeal of a publication to the "sick" and the sexually deviant, or even to the scientist, for that matter.

In Ginzburg v. United States the Court went even further in adopting the Model Penal Code view of obscenity. Ginzburg's magazines (Eros and Liaison) and other publications obviously were not devoid of social value and, in all probability, contained considerably more than Fanny Hill. But Ginzburg did not sell the material for its social value; rather, he was in "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of [his] customers." In this respect the Court considered it of probative value, among other things, that Ginzburg unsuccessfully sought mailing privileges from the postmasters of Intercourse and Blue Ball, Pennsylvania before finally settling for Middlesex, New Jersey.

44. Lockhart and McClure, supra note 39, at 68-88.
45. MODEL PENAL CODE § 251.4(1) (proposed Official Draft, May 4, 1962): "Material is obscene if considered as a whole, its predominant appeal is to prurient interest . . . . Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."
47. 86 Sup. Ct. 942 (1966).
48. MODEL PENAL CODE, supra note 45, at § 251.4(2): "a person commits a misdemeanor if he . . . (c) sells, advertises or otherwise commercially disseminates material, whether or not obscene, by representing or suggesting that it is obscene."
49. 86 Sup. Ct. 942, 945 (1966).
50. Id. at 945.
Thus to this extent, *Ginzburg* and *Mishkin* stand for the same concept: The recipient group is material—in *Ginzburg* to determine whether the social value will be redeeming; in *Mishkin* to determine whether the appeal will be prurient. In *Ginzburg* the major extension seems to be that the Court is not restricted to the contents of the publication in determining its offensiveness but may look to extrinsic evidence of pandering or exploiting an interest in obscenity for its own sake. In *Mishkin* and *Ginzburg* the Court did not abandon the concept embodied in the *Roth* standard; rather, it recognized its shortcomings and emphasized that it will not ignore the setting and circumstances which may be the determinative factor for questionable materials in the application of *Roth*.\(^{51}\)

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\(^{51}\) *Id.* at 949-50.
CRIMINAL LAW—ALCOHOLISM—CHRONIC ALCOHOLIC CANNOT BE ARRESTED FOR PUBLIC DRUNKENNESS*

Recently, the United States Court of Appeals for the Fourth Circuit held in the case of Driver v. Hinnant¹ that a chronic alcoholic could not be criminally prosecuted for public drunkenness. Driver's last arrest and conviction marked his two hundred and third apprehension for public drunkenness or related offenses. As a result, Driver, age 59, has spent two-thirds of his life in jail. This seems appalling, yet statistics show that there are approximately five hundred thousand men and women similarly situated in the United States.² Of the two million arrests made annually in the principal cities for all crimes, forty per cent are made under public intoxication statutes, and an additional ten per cent are for disorderly conduct which usually involves public intoxication.³ Judge Murtaugh of New York City,⁴ a recognized authority on the chronic alcoholic offender, classifies drunks into three categories; the average or occasional drunk, the typical social alcoholic, and the homeless, undersocialized, skid-row derelict, many of whom are alcoholic.⁵ It is this third type, the "skid-row bum," which accounts for the mass arrests which take place throughout the country. It is this type of person which presents one of the greatest challenges to our "civilized" twentieth century society.

The concept of alcoholism as a disease was first espoused in the United States one hundred and sixty-two years ago.⁶ Today this concept is almost unanimously accepted.⁷ The official definition of alcoholism reported by the World Health Organization's Expert Committee on Alcoholism is:

Any form of drinking which in its extent goes beyond the traditional and dietary use or the ordinary compliance with the social drinking customs of the whole community con-

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* Driver v. Hinnant, ___ F.2d ___ (4th Cir. 1966).
4. Judge Murtaugh is the Chief Justice of the Court of Special Sessions of New York City.
5. Murtaugh, supra note 3.
6. Trotter, Essay, Medical, Philosophical and Clinical on Drunk- eness (1804).
cerned, irrespective of the etiological factors leading to such behavior, and irrespective also of the extent to which such etiological factors are dependent upon heredity, constitution, or acquired physiopathical and metabolic influences.\(^8\)

This broad statement defines alcoholism without going into the cause, which is largely unknown.\(^9\) Generally the person who becomes an alcoholic starts to over-drink because he seeks an escape from problems and responsibilities; he finds this escape in alcohol.\(^10\) As he uses more and more alcohol, he arrives at a point where one drink causes him to lose control of his behavior. Even though he may sense what is happening he has absolutely no control over his actions, and often continues to drink until he reaches an oblivious state. This type of person is physiologically as well as psychologically addicted.\(^11\) One expert notes that the reason for such a person's physical dependence upon alcohol is unknown, but he suggests the possibility that the body undergoes a biochemical change at some point which varies with each individual. After this change, the person can no longer safely have even one drink.\(^12\)

In spite of the fact that the concept of alcoholism as a disease has received almost complete acceptance, the method of dealing with people like Joe Driver is the rule in nearly every American city and town.\(^13\) This treatment of the chronic alcoholic has been analogized to that given the mentally ill in the nineteenth century.\(^14\) The reasoning of the courts when these cases are appealed can best be shown by an excerpt from *Easter v. District of Columbia*:

Appellant was not punished because of his addiction to alcohol. He was convicted of being intoxicated in public. Any person whether alcoholic or not, who is drunk in any

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13. Notable exceptions include New York City where in 1935, Magistrate Frank Oliver held that a case of public intoxication that contained no allegation of another offense, would not be heard in New York's City Courts. This practice has continued to this day and the New York City public intoxication statute is no longer used. As a result, drunk arrests made under the disorderly conduct statute comprise about three per cent of the city's total arrests as compared to the national average of nearly fifty per cent of arrests which are made under public intoxication and disorderly conduct statutes.
public place in the District of Columbia is subject to the same penalty.\textsuperscript{15}

The courts purport to stay within the doctrine of Robinson \textit{v. California}\textsuperscript{16} that a man cannot be punished for his status. This reasoning is, at best, questionable.\textsuperscript{17} Robinson can easily be read as saying that it is as unconstitutional to punish the symptoms of a sick person as it is to punish the disease itself.\textsuperscript{18}

The theories behind treating these individuals as criminals apparently are the same as the underlying theories for the punishment of any criminal—retribution, deterrence, and rehabilitation. Once the fact that alcoholism is a disease is accepted, the theory of retribution—incarcerating the person for the wrong he has committed against society—is totally inapplicable. The deterrence theory, at first glance, seems warranted. The natural inclination is to feel that if a person is punished for doing something he is less likely to do it again. Recent research suggests, however, that this theory is as inapplicable as retribution. The alcoholic drinks compulsively out of an innate desire to escape the realities of life.\textsuperscript{19} Incarcerating him in an attempt to deter him from drinking has proved absolutely futile.\textsuperscript{20} One need only look at the record of Driver, arrested two hundred and three times for public drunkenness or related offenses, to see the lack of any deterrent effect of putting the alcoholic in jail.

The concept of rehabilitation is the only objective of the criminal process which is close to solving the problem posed by the chronic inebriate. Looking at this theory from the criminal standpoint, however, it is apparent that it is not an acceptable working solution. Doctors generally agree with other experts in the field that alcoholism is symptomatic of many complex phy-

\textsuperscript{15} 209 A.2d 625 (D.C. 1965).
\textsuperscript{16} 370 U.S. 660 (1962).
\textsuperscript{17} "Intoxication cannot in law or fact be separated from chronic alcoholism." News Syndicate Co. Inc., 44 L.A. 308 (1964); Hoff, \textit{Alcoholism}, The Encyclopedia of Mental Health 179 (1963).
\textsuperscript{18} Robinson \textit{v. California}, 370 U.S. 660 (1962). Nowhere in this opinion did the court say that a drug addict could properly be convicted for illegal procurement, possession, or use of a narcotic drug caused by addiction.
\textsuperscript{19} Block, \textit{Alcoholism}, 40 (1965).
\textsuperscript{20} "The results of our investigation negate completely the assumption that incarceration acts as a deterrent to the chronic public inebriate." Pittman \& Gordon, \textit{Revolving Door: A Study of the Chronic Police Case Inebriate} 139 (1958); "Present procedures are failing to reduce the growth of the overall alcoholic problem in Washington. Not only are more arrests being made involving more people, but the procedure apparently has very little effect as a deterrent to the individual." \textit{Report of the Committee on Prisons Probation, and Parole in the District of Columbia}, 92 (1957).
sical, psychological and sociological factors but not limited to any one.21 Accordingly, to rehabilitate the alcoholic, all of these factors need attention. No one therapy or method will likely be sufficient.22 Yet with very few exceptions, all that an alcoholic who is in the city or county jail can hope for is to have himself cared for physically with possibly an occasional visit by a psychiatrist. This is largely the rule in spite of the fact that responsible authorities have stated that alcoholism has the highest recovery potential of all the major health problems in the United States today.23

Penal incarceration, therefore, does the chronic alcoholic no good. In fact, the process of skid-row to jail to skid-row which these people go through leads gradually to complete deterioration of the individual, and he eventually becomes institutionalized with this constant shifting developing into his pattern of life.24 This may be as bad or worse than just leaving the person alone and doing nothing at all about him.

When, as in Driver, the inadequacy and cruelty of the criminal process becomes apparent, the problem of what to do with these people develops. They are obviously in need of physical and psychological care, but is this enough? Studies have shown that the derelict type of drunk who presently clutters our courts and jails is for the most part completely unsocialized. These persons have no home, no family life and their only friends are people just like themselves. They live on relief or hold jobs only long enough to accumulate the money to regress into their habitual state of inebriety. When the courts decide not to jail one of these people, all they can do at the present time is release him. His next move is inevitable; he will get drunk again, often within an hour. Obviously, something more than just not penalizing these people needs to be done. However, at the present time no one wants to assume the responsibility for starting programs to rehabilitate the public drunk despite the fact that many of

23. Ibid.; "The best medical opinion before our committee was to the effect that from thirty to fifty per cent of the chronic alcoholics could be helped if alcoholism were treated as a health problem rather than a crime." Rehabilitation of Alcoholics, Hearings before the Sub-Committee on Health, Education, and Recreation, of the House Committee on the District of Columbia, 93 Cong. Rec. 3357 (1947).
them could recover completely.\textsuperscript{25} Many conventional social and medical agencies say that the problem is not their responsibility. The police say that it is the responsibility of the courts; the courts point to the penal institutions and they counter with the duty of health and mental hygiene agencies.\textsuperscript{26} Judge Murtaugh has suggested that the police and judiciary should stop passing the buck and assume a position of leadership toward understanding the plight of these individuals. Fortunately the courts in some of our cities have seen fit to undertake programs to help the chronic inebriate,\textsuperscript{27} but the great majority of cities and counties continue to treat the revolving door offender as a criminal. An end to this maltreatment will come only when society decides to face up to the problem and accepts the fact that the chronic drunkenness offender is not a criminal but is a sick person who not only needs but deserves a chance to redeem himself from his pathetic way of life.

WAYNE S. TIMMERMANN

\textsuperscript{25} See note 23, \textit{supra}.


\textsuperscript{27} Cities and counties with programs now in progress include: Los Angeles, Atlanta, Miami, New York, and Detroit. The excellent format for the program in Detroit is set out below.

Standards for Handling of Drunk Offenders in the Denver County Court

\textbf{Standard No. 1—Pre-court Custody}

It is the policy of the court, whenever possible, to release defendants when sober on personal recognizance with an order to appear in court at a specific time. Exceptions should be (1) Where six or more drunk arrests have occurred within the preceding twelve-months' period and (2) Where defendant is in default on a previous personal recognizance.

\textit{Comment:} I am not aware that this method has previously been attempted anywhere, but our Denver experience indicates that such a program is quite feasible. We have released thousands under this system with three noteworthy results:

1. Jail operations have been simplified due to the ability to reduce pre-court population.
2. Release of prisoners upon sobriety for later court appearance has created no noticeable additional police problem and
3. Having drunk defendants "walk in" to court rather than be brought in under guard creates a much more satisfactory court experience. Contrary to what might be expected, the vast majority do appear usually properly dressed, shaven and frequently with employment. See Form A.

\textbf{Standard No. 2—Fines for Early Offenders (One to Five Arrests within Year)}

The fine should be set as follows:

\begin{tabular}{ll}
First Offense & \$10.00 \\
Second Offense & \$10.00 \\
Third Offense & \$30.00 \\
\end{tabular}
Fourth Offense ........................................ 40.00
Fifth Offense .......................................... 50.00

Comment: Any suggested fine schedule appears arbitrary and the suggested basis may well appear light; however, it is rather pointless to require a fine that is not within the reach of the average person to pay. Seldom will a drunk docket defendant, even if employed, make as much as $10.00 per day; thus, even the minimum fine is more than a day's work. It has been our experience that ninety per cent or more cannot pay even this schedule if brought directly to court from jail. If first released for several days, many will be able to pay the fine.

Standard No. 3—Payment of Fine in Lieu of Court Appearance

First and second offenders only will be given the privilege of disposing of their cases by the payment of the $10.00 fine, and without the necessity of a personal appearance in court, and these offenses are listed on our General Violations Bureau Schedule of Fines.

Standard No. 4—Denver Court Honor Class

All drunk docket defendants and others suspected of having a drinking problem should be invited to attend the Denver Court Honor Class held every Monday evening at 8:00 p.m. in the courtroom. See Form B.

Standard No. 5—Probation

Defendants appearing in court with from one through five arrests within a twelve-months' period should be given the option of paying the fine or going on "probation". Probation in such case is to last three weeks and is to consist of the requirement that a defendant shall attend at least three meetings of the Denver Court Honor Class, Alcoholics Anonymous or other similar meetings. See Form C. If the defendant chooses to pay the fine but requests a stay of execution, the court will look favorably upon a reasonable stay provided the prior record of defendant shows no past defaults or failures to appear.

Comment: This is a compromise between the voluntary Alcoholics Anonymous theory and the direct compulsion method. Another attempted method which may alternately be used with equal success is the "delayed sentence" in which the defendant is required to appear back in court after a specified period to report his progress and at which time to receive his sentence. The "stay of execution" may also be used under circumstances requiring a specific report back as to progress as a possible condition precedent to a suspended sentence. Any method would probably achieve about equal results. We use the option system most of the time because it gives a ready formula for fining those who do not choose probation. Also, since the fine is not unreasonable, the defendant has more of a free choice. Even though he will normally make the choice of probation, it may at least be presented to him as his own choice. Possibly, this illusion is unnecessary but, in our experience, a more satisfactory meeting takes place where this attitude is created.

Standard No. 6—Procedure Where Defendant Has Previously Defaulted in Payment of Fines or Has Failed to Appear

In cases where defendants with arrests of not more than five times within the preceding twelve months are brought before the court with circumstances indicating that the defendant has previously defaulted in the payment of a fine, or has failed to appear after a personal recognizance release, the court will generally adhere to the regularly scheduled fines but will not extend the privilege of probation or additional stays of execution. The defendant might also be charged with "failure to appear" as a supplementary charge but, in most cases, such will be unnecessary as he will already be penalized by being denied probation or stay of execution.

Standard No. 7—Sentence for Those Arrested Six or More Times within the Year

In this situation, it is recommended that the minimum sentence should be 90 days in jail with a notation on the docket—"subject to parole". This will
be the indication that the judge desires the parole staff at the County Jail to investigate the individual and make subsequent recommendations to the court. Any actual parole, or sentence modification, would, of course, be done by court order. An exception to the 90-day sentence might be made where there has been a substantial period of time, without police difficulties, prior to the last arrest. This is especially true where the defendant gives evidence that he has made some effort to solve his drinking problem. Under these circumstances, the court might well, once again, consider probationary-type treatment.

Comment: It will be noted, whereas virtually no defendant is sentenced to jail during his first five arrests, that after this the policy suddenly changes to long sentences. The reasons may be stated as follows: The cost of continued arrest will eventually be greater than confinement. Moreover, by this time, it should appear obvious that the defendant has not responded to previous methods. Generally, we have narrowed the ranks by the process of elimination to the most extreme cases in which the prognosis for recovery is poor. The question may be asked: Why not graduated imprisonment such as 15 days, 20 days, etc.? The answer is twofold (1) Short confinement is costly and without benefit to society. A satisfactory work program is impossible or difficult. (2) The chances of successful rehabilitative treatment are virtually nil for so extreme a case in such a short time.

Standard No. 8—Serving Sentences

All sentences should be served with hard constructive and beneficial work which will benefit both society and the defendant where the defendant is physically able of such work.

Comment: There is some therapy in work but not in “busy work”. A part of the cost of a good rehabilitation program can be borne by the fruits of beneficial labor of prisoners. The most cruel imprisonment is idleness. A great need of many defendants is discipline and a demonstration of the rewards of that discipline. The work effort of a prisoner should be one of the decisive considerations in determining whether to grant parole.

Standard No. 9—Classification and Therapy during Confinement

Every prisoner should be classified and tested as to the best possible program during confinement and as to the most effective time and method of release.

Standard No. 10—Release

It is desirable that a release not be simply “on the street” but an individualized thing with the objective being the most effective integration into society and the least likelihood of recidivism. If experience and custody indicate the desirability of a supervised release, a prisoner may, by court order, be released under parole custody (usually after at least half of a sentence is served) and with specific post-release conditions.

FORM A

DEFENDANT’S PERSONAL RECOGNIZANCE

Date ________________________________

Name ________________________________

By Order of the Presiding Judge of the Denver County Court, the above-named defendant, who has been arrested upon the charge of drunk, or drunk and vagrancy and who is now, in the opinion of the undersigned officer of the Denver City Jail, sober and capable of caring for himself, is hereby ordered released on Personal Recognizance upon the following conditions:

1. That he will appear in court at 8:00 o’clock A.M. on the __________ day of _____________, 19____, Room 200, Police Building, 13th and Champa, Denver, Colorado.

2. Pending this court appearance, he will not drink any alcoholic beverage, nor enter any bar, tavern or other establishment holding a liquor license,
nor will be loiter about the streets, sidewalks or other public places in the City and County of Denver.

3. That he will appear in court, as above stated, properly dressed, shaven and cleaned up.

I hereby agree to keep the above conditions.

Name ____________________________
Address ____________________________
Telephone No. ____________________________
Release authorized by: ____________________________
Officer, Denver City Jail

FORM B
MUNICIPAL COURT OF THE CITY AND COUNTY OF DENVER

INVITATION
DO YOU WANT TO DO SOMETHING ABOUT YOUR DRINKING PROBLEM? YOU SHOULD!

IF you are one who "cannot handle his liquor", that is, you decide to take only a drink or two but, after doing so, find that you cannot resist drinking to excess;

IF you know you should stop drinking alcoholic beverages, but find yourself unable to do so;

IF you believe that a life lived without the use of alcohol would be a bleak and dreary existence—something totally undesirable;

IF, after careful consideration, you realize that you need help;

THEN it would be well to seek a means of correcting this condition.

ANYONE who has an honest desire to stop drinking and is willing to acquire a new mental attitude can remain dry.

The Municipal Judges of the City and County of Denver are concerned and believe you can be helped if you are one of those who, of your own individual initiative, honestly wants to stop drinking. If you are one who realized he is powerless over alcohol and above all else desires to enjoy life and want help with your drinking problem, then you are INVITED to attend a meeting of an Honor Group of such persons who want to quit drinking.

This group meets every Monday at 8:00 P.M. in the Court Room or the 2nd floor of the Police Building, 13th and Champ Streets.

No fee or charge for attendance and you will not be embarrassed.

FORM C

Date ____________________________ Name ____________________________

You have been granted probation provided you comply with the following terms:

1. You must attend three meetings of the Denver Court Honor Class, and your presence must be noted on this form by the Chairman of each meeting and by the Chairman of other meetings noted.

MEETINGS
Monday 8:00 P.M.—Police Bldg.
As an alternative you may attend any AA meeting. For information as to time and place of meetings, call (322-3674).

VERIFICATION OF ATTENDANCE

DATE ____________ CHAIRMAN ____________
2. You must return this form to the Court on or before ________________
3. Failure to do so will result in a warrant for your arrest.

__________________________
Judge
CRIMINAL LAW—JUVENILE PROSECUTION—ADMISSIBILITY OF CONFESSION WHEN JUVENILE COURT WOULD HAVE JURISDICTION AT THE TIME CRIME WAS COMMITTED*

While attempting robbery on March 8, 1960, Eddie Harrison and two companions committed murder. Subsequently, on March 18, 1960, Harrison became eighteen years of age. The following day, March 19, Harrison was charged with larceny and in addition was sentenced to jail for traffic violations. The charges and incarceration stemmed from offenses committed on March 18 and had no connection with the attempted robbery and homicide.

On March 21, 1960, Harrison’s companions confessed their complicity in the felony, implicating Harrison. Upon confrontation, Harrison made certain admissions from which the police secured enough evidence to charge him for murder. Based upon this complaint, Harrison for the first time was charged by the juvenile court.

Pursuant to waiver of juvenile court jurisdiction, Harrison was convicted in the District Court for the District of Columbia. On appeal the conviction was reversed by the Circuit Court holding that the inculpatory statements, though voluntarily made while incarcerated for subsequent crimes, should be excluded when the crime in question was committed at an age requiring juvenile court jurisdiction.²

In recent years the treatment of juvenile delinquents³ has been notably characterized in most cases by the absence of criminal

* Harrison v. United States, 14 F.2d 6 (D.C. Cir. 1926).

1. In the first district court trial, defendant Harrison was represented by an imposter, whose masquerade was discovered while appeal was pending. The case was remanded with instructions that the district court entertain a motion for new trial. On grounds of double jeopardy newly appointed counsel refused to so move. To prevent the ends of justice from being defeated, the court of appeals ordered a new trial. See United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); see also Downum v. United States, 372 U.S. 734 (1963); Gori v. United States, 367 U.S. 364 (1961).

2. On appeal from conviction in the second district court trial, a division of the D.C. Circuit Court in an opinion by Judge Danaher sustained admission of Harrison's oral confession while reversing the conviction on other grounds. (3-to-0). (one concurring in part). In considering only this issue, the court en banc on rehearing barred admission with a vigorous dissent by Judge Danaher.

3. A juvenile delinquent is generally defined as a juvenile who has violated any law of the United States or any state law, and whose violation is not punishable by death or life imprisonment. 11 D.C. Code § 905 (1961); accord, S.C. Code Ann. § 15-1103 (9) (1962).
sanction. The juvenile, who is generally considered to be any person under eighteen years of age, is given this preferential treatment on the basis of doubtful capacity and in the belief that the interests of society are best served by rehabilitation through solicitous care and training. When the juvenile commits an offense the state assumes the position of pares patris and cares for the child. As reflective of this now traditional attitude, the District of Columbia Juvenile Court Act provides that

the [juvenile] court shall have original and exclusive jurisdiction of all cases and in proceedings... concerning any person under 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia prior to having become 18 years of age... .

The right to jurisdiction by the juvenile court, however, does not always insure the juvenile of conclusive insulation from criminal prosecution. In certain instances, the court may exer-

4. As Judge Prettyman has said in Pee v. United States, 274 F.2d 556, 558 (D.C. Cir. 1959):

[The juvenile who has committed an offense] is not accused of a crime, not tried for a crime, not convicted of a crime, not deemed to be a criminal, not punished as a criminal, and no public record is made of his alleged offense. In effect he is exempt from the criminal law.


7. Ibid.


[the children's court shall have exclusive original jurisdiction... to hear and determine all cases or proceedings involving the hearing, trial, parole, probation, remand or commitment of children... in the case of a juvenile domestic relations court, who are actually or apparently under the age of seventeen years or who were under the age of seventeen years when the act of offense is alleged to have been committed or the right of action in such case or proceeding accrued...]

10. The Juvenile Court Judge for the District of Columbia has set forth the following determinative criteria with respect to waiver of jurisdiction:

(1) Serousness of the alleged offense.

(2) Whether alleged offense was committed in an aggressive, violent, premeditated or wilful manner.

(3) Whether alleged offense was committed against person or property.

(4) Prosecutive merit of the complaint.

(5) Desireability of trial and disposition of the entire offense in one court where associates in the alleged offense are adults who will be charged with a crime in the United States District Court.

(6) Sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

(7) Previous juvenile record.
exercise its statutory authority to waive jurisdiction over the offense therein causing the juvenile to be subjected to the full criminal process. Since the non-punitive atmosphere of the juvenile court is conducive to free admission, such waiver places the juvenile in the precarious position of having these statements used against him in the criminal court. It is obvious the prosecution can not proceed under the "regular" and juvenile procedures concurrently, nor can it proceed partially under each. Consequently, original detention by the juvenile court induces response to rehabilitative surroundings without regard to protection, should the right of waiver be exercised. Increased time differential, between the act and confession, makes the problem more acute and in the event of waiver the prosecuting court faces a difficult question. Are the rights of juveniles to be in disparity of those afforded adults in prosecution for similar offenses? Although there are decisions protecting adult rights this problem is inherent to the juvenile system and can be resolved only through its applicable legislation and case law.

In Pee v. United States the defendant was seventeen years old and had been charged in the juvenile court with serious felonies. After retention of Pee for two weeks, the juvenile court waived its jurisdiction in favor of prosecution which subsequently, on the basis of pre-waiver statements, resulted in Pee's conviction. On appeal the case was remanded to the lower court for

(8) Prospects of adequate protection of the public and the likelihood of reasonable rehabilitation.
11. D.C. Code § 914 (1961) provides:
If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and proceed to trial under the regular procedure of the court which would have jurisdiction of such offenses if committed by an adult... accord, S.C. Code Ann. § 15-1171 (1962).
14. See, e.g., Escobedo v. United States, 378 U.S. 478 (1964) (right to counsel when questioning becomes accusatorial); Mallory v. United States, 354 U.S. 449 (1957) (right to be taken before magistrate within reasonable time). Though these cases are illustrative of protecting adult rights, Harrison was originally charged by the juvenile court which has no such requirements. Since it is not possible to use both procedures, a fortiori, the issue must be determined from judicial decisions involving the juvenile process.
15. 274 F.2d 556 (D.C. Cir. 1959). But see, State v. Smith, 32 N.J. 501, 161 A.2d 520 (1960). This case held that pre-waiver statements by a child were admissible in subsequent adult proceedings but is distinguishable on the basis that New Jersey courts did not follow the Mallory rule.
hearing to determine the application of the Federal\textsuperscript{16} and \textit{Mallory v. United States}\textsuperscript{17} exclusionary rules to these pre-waiver statements. The case is not directly applicable to the \textit{Harrison} situation but the fundamental thinking laid the foundation for the decision in \textit{Harling v. United States}.\textsuperscript{18}

Since the nature of the juvenile process is exempt from criminal connotations, as a practical matter the Federal and \textit{Mallory} exclusionary rules have no general application.\textsuperscript{19} To avoid the inappropriateness of these strict safeguards to the flexible and informal proceedings of the juvenile court, \textit{Harling} establishes as a basis for exclusion the fundamental fairness to the juvenile and preservation of the integrity of the system. In a fact situation similar to \textit{Pee}, the case barred admission, in the event of subsequent waiver and criminal trial, of statements elicited from a juvenile while he was subject to the jurisdiction of the juvenile court. The court remarked that a contrary holding would "be tantamount to a breach of faith with the child, since he cannot be charged with knowledge of either his privilege against self incrimination or the Juvenile Court's power to waive its jurisdiction."\textsuperscript{20} With \textit{Harling} as a precedent, it seems compelling that the Harrison confession be excluded. There is a contention, however, that \textit{Edwards v. United States}\textsuperscript{21} construes the Juvenile Court Act\textsuperscript{22} as encompassing only situations where the juvenile has been \textit{actually charged}.

Waiving its jurisdiction, the juvenile court allowed Edwards to be tried for forcible robbery. At the trial one of his accom-

\begin{itemize}
\item\textsuperscript{16} \textit{Fed. R. Crim. P.} 5(a).
\item\textsuperscript{17} 354 U.S. 449 (1957).
\item\textsuperscript{18} 295 F.2d 161 (D.C. Cir. 1961).
\item\textsuperscript{19} \textit{Harling v. United States}, 295 F.2d 161 (D.C. Cir. 1961).
\item\textsuperscript{20} \textit{Id.} at 163.
\item\textsuperscript{21} 330 F.2d 849 (D.C. Cir. 1964).
\item\textsuperscript{22} \textit{Supra} note 9.
\item\textsuperscript{23} In \textit{Harrison v. United States}, \textit{supra} note 13 at \textit{-----} (dissenting opinion)
\end{itemize}

Judge Danaher concludes this from what the court said in \textit{Edwards}:

The \textit{Harling} case bars the Government from using against an accused in a criminal trial a confession or admission officially obtained from him \textit{when he was a juvenile detained under the auspices of the Juvenile Court,} where the latter court has subsequently waived its jurisdiction and transferred the accused for trial to the District Court. Our ruling in \textit{Harling} resulted from the special practices which follow the apprehension of a juvenile. He may be held in custody by the juvenile authorities--\textit{and is available to investigating officers}--for five days before any formal action need be taken. There is no duty to take him before a magistrate, and no responsibility to inform him of his rights . . . . \textit{Harling} is a simple recognition that it would be unfair to the individual juvenile and a mockery of the juvenile system to allow unrestricted use of evidence, \textit{gathered through such procedures}, in the adult court.
plies, who had been placed on probation by the juvenile court, testified. Objection was made to this testimony on the ground that the witness' identity was learned from a confession given while in custody of the juvenile court. In affirming allowance of the testimony, the court on appeal said that the "purpose of Harling is not to deter improper police conduct" since "evidence obtained through juvenile custody is not necessarily 'fruit of the poisonous tree'" 24 but merely points out that "fruit of an untainted tree may become poisonous when improperly used." 25 The inference here is not that the juvenile must be actually charged to exclude admissions, but simply is a recognition of possible exclusion required by some factual circumstances. 26

When special treatment is afforded juveniles, there is always a risk of harm to society from those with criminal propensity. A more subtle risk of social harm rests in the protection given juveniles who are old enough to know and understand the legal consequences of their criminal acts. 27 Indicative of this is the voluntariness of Harrison's confession which was motivated by a desire for self preservation and given at an age precluding juvenile protection. 28 Serious consideration is to be given this interest, but where it reduces protection of the juvenile, it can serve only to impair the system. 29

To avoid such impairment it is "clear that the exclusion of admissions . . . applies . . . to all statements when [the juvenile] is subject to the exclusive jurisdiction of the juvenile court." 30 Since compliance with Congressional instruction 31 requires that the provisions of the Juvenile Court Act "be liberally construed" in accomplishing the rehabilitative purposes of the law, exclusive jurisdiction exists from the moment the juvenile

27. Ibid.
28. When confronted by his companions, Harrison asked police officers, "Well, what did they tell you?" Though ignorant of the felony-murder doctrine, he then proceeded with the skill of any layman to exonerate himself in relating his own version of the crime.
30. Id. at —
commits the offense. Consequently, this syllogism establishes inadmissibility of the Harrison confession. In preserving parens patriae, the court in effect has refrained from condemning Harrison to the anomaly of being too old for juvenile court protection and yet too young for adult protection. Otherwise, the juvenile proceeding would serve only as an adjunct to and part of the adult criminal process.

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32. Harrison v. United States, supra note 13. Compare United States v. White, 153 F. Supp. 809 (D.D.C. 1957). In facing the actually charged jurisdictional problem the court found also other independent and complete answers:


(2) Anticipatory equity jurisdiction—though there is no criminal "case or controversy" until a crime is formally charged, the court has anticipatory equity jurisdiction to "reach forward" and control improper preparation of evidence. See Smith v. Katzenbach, —— F.2d —— (D.C. Cir. 1965).

33. Harrison v. United States, supra note 13. In South Carolina the Harrison situation cannot arise because a juvenile over seventeen years of age will not to be subject to jurisdiction of the juvenile domestic relations court. S.C. Code Ann. § 15-1171 (1962). This type problem should never arise because S.C. Code Ann. § 15-1202 (1962) provides that no "confession, admission or statement made by [a child] to the [juvenile domestic relations] court or to any officer thereof while he is under the age . . . of seventeen years . . . shall ever be admissible as evidence against him or his interest in any other court."
TRADE REGULATIONS—VENUE UNDER SECTION TWELVE OF THE CLAYTON ACT

Jurisdiction and venue are often confused and used synonomously in the legal profession, although the basic distinction is quite clear. Jurisdiction is the power to decide a case on the merits, whereas venue relates to the place where the suit may be heard.1 Jurisdiction under the antitrust laws is given to the federal district courts2 and consequently little controversy arises. Venue, however, under the special provisions of the Clayton Act has caused much controversy and has led to many varying interpretations. It appears well settled now that when section twelve3 was added the intention of Congress was to enlarge the venue provision so as to relieve the injured party from the often “insuperable obstacle” of having to sue in some distant forum in which the corporation may be found,4 and to assist the government in enforcing the act by allowing private suits to be more easily brought through the more liberal venue provision.5

Consequently, the quantum of business which must be transacted by a corporation to support venue in an antitrust suit is less than the “doing business” requirement necessary to sustain service of process in other cases.6 Section twelve of the Clayton Act reads as follows:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district wherein it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of

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4. This section supplements the remedial provision of the anti-trust act for the redress of injuries resulting from illegal restraints upon interstate trade, by relieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be “found”... often an insuperable obstacle... and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business and bring it before the court by the service of process in a district in which it resides or may be “found”.
which it is an inhabitant, or wherever it may be found.

(Emphasis added.)

It is with the words "transacts business" within this section that this discussion will be concerned. As Mr. Justice Frankfurter said in his concurring opinion in United States v. Scophony, "whether a corporation is found or transacting business is a question of fact and turns on the unique circumstances of a particular situation." It depends upon the type of business involved and does not necessarily mean that offices, agents, or even a "product" in the physical sense must be present. For instance, a company could transact business by rendering supervisory and management services, and actual sales of a corporation are not necessary.

"The source of trouble lies in the use of verbs descriptive of the behavior of human beings to describe that of entities characterized by Chief Justice Marshall as 'artificial . . ., invisible, intangible, and existing only in contemplation of law.'" All corporate action being vicarious, any test of "transacting business" is difficult to apply.

The first test laid down by the Supreme Court was in the leading case of Eastman Kodak Co. v. Southern Photo Materials Co. There the Court said that "a corporation is engaged in transacting business in a district . . . if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." The essential words of the test became "ordinary and usual" and "substantial." This test was followed until 1948 when the Supreme Court in Scophony expanded the test to "the practical everyday business or commercial concept of doing or carrying on business of any substantial character." This remains as the test today.

Sunbury Wire Rope Mfg. Co. v. United States Steel Corp. continued the broadening trend of the Scophony test where the

13. Id. at 373.
14. Supra note 11, at 807.
court said that the test was whether "sales would appear to be substantial from the average businessman's point of view." 15

Recently, the Circuit Court of Appeals for the District of Columbia in B. J. Semel Associates, Inc. v. United Fireworks Mfg. Co., Inc. 16 seemed to apply the most liberalized version of the test yet. It did away with the technical meanings used in the test and substituted the question as if asked of one ordinary businessman: "Do you do any business in state X?" The court has more recently applied the same standard in Levin v. Joint Comm'n on Accreditation of Hosp. when it said, "we doubt that the Commission, as a practical matter, either does, or prefers to, think of itself as not exercising its functions in the district." 17 It apparently has brought about the realization of the definition of "transacting business" to the practical everyday concept.

The Semel decision, which was solely a question of venue, was based on the frequent telephone conversations between the plaintiff and the defendant and the amount of sales involved. The court seems to reason that the telephone is a substitution of or mere advancement over the use of salesmen in business dealings. And indeed, in many instances, it is. It should be noted, however, that the conversations were not solicitations.

The defendant had no office, property, or personnel in the District of Columbia; it used no salesmen, sales agents, or advertising in the district to solicit business. Price lists were mailed into the District only upon specific request. The defendant had three customers in the District to whom sales were made pursuant to unsolicited requests received in Dayton, Ohio, and all deliveries were F.O.B. Dayton with transportation completely arranged by the buyer. Over a two-year period, sales to two of the customers totalled about 2,700 dollars. During this same period, sales to the plaintiff totalled about 167,100 dollars. The court said although physically remote the contacts of the defendant were continuous and substantial. This case apparently furthers the theory that the only way to avoid venue is to confine one's business to completely intrastate activities. 18

18. 355 F.2d 827, 833 (D.C. Cir. 1965) (dissenting opinion).
While some cases consider the quantity\(^\text{19}\) or percentage of sales,\(^\text{20}\) some the absolute amount as opposed to percentage,\(^\text{21}\) others say that small sales are not the test of substantiality.\(^\text{22}\) This was probably best stated in *Donlan v. Carval*:\(^\text{23}\) "The amount of percentage necessary to make business substantial may vary, depending upon the context in which the question arises . . . . [A]lthough the dollar amount was small, the sales were continuous . . . ." In *Levin* it was more recently said that the fact that a corporation's business may be insubstantial and irregular will not automatically negate section twelve's applicability. The small sales percentage can be an important element in the corporation's purposes, and it may in combination with similarly small operations "account for the very sizeable scope of the corporation's business."\(^\text{24}\) Generally, unless the quantum of activity is very small the corporation will be transacting business.\(^\text{25}\)

The word "continuous" appears to play a major part in the determination of what is "substantial"\(^\text{26}\) as does the word "frequent."\(^\text{27}\) While the venue provision has broad meaning it still "embraces elements of substantiality of business done, with continu

ity in character."\(^\text{28}\) It therefore seems that where a volume of sales is lacking in terms of dollar value the court will still find venue if there is any continuity in small sales.

Some courts may base their decision on whether the sales are solicited and continuous. A single unsolicited sale by a small company, which amounted to a significant portion of its total sales for that year, might not amount to transacting business for venue purposes. But, a continuous series of solicited sales over

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24. *Supra* note 17, at 517.
25. *Supra* note 5.
long periods of time and amounting to a small percentage of total sales for a large company would amount to transacting business.\textsuperscript{20} If sales are extremely light, sporadic, and unsolicited, it does not amount to transacting business.

Passage of title or risk of loss of an article sold does not control, but delivery within the concept of section twelve is delivery in the practical everyday business or commercial concept.\textsuperscript{30} This negates any attempted avoidance of venue by the use of F.O.B. terms. However, delivery itself even without F.O.B. terms does not necessarily subject a defendant to venue jurisdiction if the delivery is insubstantial.\textsuperscript{31}

Thus it appears that no one particular activity alone will be determinative of whether a corporation is “transacting business,” but that the decisions are usually based on a combination of elements.

Although the court in \textit{Scophony} disapproved the checklist theory in deciding whether a corporation “transacts business” the following list from the \textit{New York University Law Review} may be of some help in furnishing guidelines since in the end the decision is largely factual and must be based on some manifestations of doing business:

1. Place to do business: office, factory, warehouse, repair facilities or research facilities.
2. People to carry on business: directors, officers, employees, sales representatives, agents, registrar, transfer agent or agent to receive process.
3. Tangible property: real estate, inventory, leased premises, bank accounts, and corporate records or books of account.
4. Subjection to state regulation: secured certificate of incorporation or license to do business, paid franchise tax or filed state tax returns.
5. Business operations: sales volume, purchases, solicitation by salesmen within the district, solicitation by mail or telephone from without the district, contractual negotiations

in the district, orders accepted in the district, passage of title within the district or making of executive decisions.


7. Goodwill Activities: visits by officers and employees, advertising or other promotional activity.32

Whether venue is established will be governed, therefore, by the "own peculiar set of facts [of each case]; and it is the totality of acts and conduct ... rather than isolated and fragmented items thereof which govern."33

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32. Note, Venue in Private Antitrust Suits, 37 N.Y.U.L. REV. 268, 283 (1962). This is an excellent, well documented article on venue in antitrust suits generally.