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THE ECA GUARANTIES AND THE PROTECTION
AND STIMULATION OF FOREIGN PRIVATE
INVESTMENT

John T. Miller, Jr.*

The presence of a trend in domestic or international affairs should never blind us as to the basis upon which it rests nor excuse us from the necessity of analyzing at each step the wisdom of a government’s conduct in following the trend. In the field of foreign private investment we are presented with the start of such a trend; a trend toward the encouragement of private investment abroad by means of governmental guaranties against loss due to certain risks peculiar to such types of investment. We would like in the course of this article to take a rapid look at the basis for this trend by first discussing the deficiencies of the traditional a posteriori protection of investments which brought on the demand for positive protection, and secondly, by showing that the guaranty provisions of recent legislation are the culmination of many years’ efforts on the part of our State Department to find a satisfactory combination of a priori or positive protection measures.

Negative Protection of Investments

Negative or a posteriori protection refers to those remedial measures taken by one State against another State which has caused injury to a national of the first State after the injury has occurred. The State Department of the United States has always attempted to avoid injury to American businessmen abroad by maintaining friendly commercial relations with foreign governments; but until recently the only redress available to an injured citizen was to be sought through normal diplomatic channels. Let us take a look at the problems involved in the interposition by a State in behalf of its national.

When an alien enters the territory of another State, by his presence

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he submits to the laws of the State and agrees to seek redress for injury in its courts. This is due to the fact that a State is, subject to the requirements of international law, sovereign over all persons and property within its borders. However, a State is not completely free to do what it will with aliens. It must treat their person and property with a certain consideration. The breach of an international obligation in the treatment of the person or property of an alien constitutes an international delinquency which makes the State causing the injury responsible to the State of which the alien is a national. If proper redress is not locally available to the injured party, the State of which he is a national is authorized by a universally recognized customary rule of international law to protect him by interposition in his behalf.

The United States Government has the right then under international law to interpose in behalf of its nationals in cases involving an international delinquency. But who are its nationals? As far as international law is concerned, a national of a State is any person called its national by that State. In other words, the conferring of nationality is strictly a domestic matter. Consequently a State may, if it wishes, refer to an association of persons having a juridical personality as its national. Under Anglo-American law a corporation is considered to be a national of the place where it has been incorporated. Therefore, the United States Government may interpose against another State not only for injuries caused its nationals who are human beings, but also in behalf of nationals who are corporations incorporated in the United States. This is important in view of the fact that American corporations, rather than private individuals, have made the heaviest investments of private capital abroad since the end of World War II. We must hasten to add, however, that the State Department as a rule will interpose only in behalf of United States corporations in which there is a substantial American interest.

Since the Delagoa Bay Arbitration the United States has adopted the attitude that it is justified in interposing in behalf of its nationals who are investors in foreign corporations. There it interposed against the Portuguese Government in behalf of an American national who was a shareholder in a Portuguese corporation. Although this principle appears

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2 Cf., Feilchenfeld, Foreign Corporations in International Public Law, 8 J. Comp. Leg. & Int'l L. 81-106, 260-274 at 83 (1926).
3 5 Hackworth, Digest of International Law 839, 840 (1943).
4 2 Moore, International Arbitrations 1865-1899 (1898).
quite simple and logical at first sight, it has caused much opposition, especially in Civil Law countries where nationality determines the status and capacity of persons; and, in the beginning, the United States Government itself took the view that since a foreign corporation is a citizen of another state it should, when injured, pursue its remedies in that State just as any other ordinary citizen is required to do.\textsuperscript{5}

In the Romano-Americana dispute between Great Britain and the United States arising from the destruction of property belonging to an American-owned Rumanian corporation, the British Government claimed that cases of justifiable interposition fall into only two classes:

\begin{enumerate}
\item [(1)] [those] where the action of the Government against whom the claim is made has in law or in fact put an end to the Company's existence or by confiscating its property has compelled it to suspend operations; (2) [those] where by special agreement between the two Governments a right to claim compensation has been accorded to the shareholders.\textsuperscript{6}
\end{enumerate}

The second type of case is obvious and needs no discussion here. But the first classification can not be justified by analogy to municipal law as the British experts seem to allege, not even to the Company Law of England.\textsuperscript{7} The shareholder under municipal law does not have a right to actual surplus assets until after the firm is wound up, \textit{i.e.}, after liquidation. Consequently, an injury to a firm which is not yet liquidated is not considered to be an injury to the shareholder.\textsuperscript{8} Strictly speaking, a government is no more justified in putting forward the claim of a national who is a shareholder in a defunct, but not yet completely liquidated, firm than it is in the case of a national who is an investor in a going concern. In each case the rights of the shareholder under corporation law are the same. What then is the basis upon which the State may justify its interposition in favor of nationals who are investors in a foreign corporation?

The veil of corporate personality was given to associations of men in order to expedite justice in suits by and against groups of businessmen acting in concert, and to facilitate the accumulation of the capital needed as a result of the Industrial Revolution and the world-wide expansion of trade and commerce. The persona was created to fill a peace-time

\textsuperscript{5} The Antioquia Case, 6 Moore, Digest of International Law 644 (1906).

\textsuperscript{6} 5 Hackworth, Digest of International Law 843 (1943).

\textsuperscript{7} Beckett, Diplomatic Claims in Respect of Injuries to Companies, 17 Trans. Grotius Soc. 190 (1932).

\textsuperscript{8} The nitrate establishments of the Tarapaca Case, 6 Moore, Digest of International Law 646 (1906).
domestic need. So just as in wartime a nation will not permit the cloak
of corporate personality to be used by enemies of the State as a Trojan
horse, in the international field capital-exporting States do not let the
veil of corporate personality conceal the fact that the real owners, those
who are actually injured in the long run when the firm is unjustly
damaged through governmental action, are the investors.\(^9\)

To justify interposition, however, it appears to be generally recognized
that two conditions should prevail: (1) the nationals who are being
protected must have a substantial interest in the foreign corporation,
and (2) the acts causing the damage must be imputable to the State
against whom the claim is brought.

Can the defendant State reject the right of the claimant State to inter-
pose or to recover? Once the claimant State can show that the injured
party is its national and has been injured through the fault of the de-
fendant State, for which injury there is no adequate local redress, the
latter can not rightfully reject the claim under international law. Of
course the size of the recovery in such a case of justifiable interposition
will depend on the facts.

The Calvo clauses found in many contracts made by United States
nationals investing in Latin American countries have been held by these
countries to deny our nationals the right to the help of their government.
However, the attitude of our State Department is to the effect that a
national "can not deprive the government of his nation of its undoubted
right of applying international remedies to violations of international
law committed to his damage."\(^{10}\) In other words, if a State injures an
alien who is bound by a Calvo clause by an act considered internationally
illegal, and the case does not concern a simple matter of contractual
obligations, the alien's government may interpose in his behalf.

The defendant State may question the fact that the injured person
in whose behalf interposition is made is really the national of the
claimant State. This is especially true where the party allegedly injured
is a corporation. In the case of the I'm Alone, the British Government
proceeded against the United States under the Liquor Convention of
1924 for the allegedly illegal sinking on the high seas of a rumrunner of
Canadian registry belonging to a Canadian corporation. In fact, the
owners of the Canadian corporation were American nationals who were

\(^9\) U. S. Foreign Rel. 1913 at 993-1010 (Dep't State 1920).

\(^{10}\) North American Dredging Co. v. United Mexican States, Opinions of the Commis-
sioners (General Claims Commission) Under the Convention Concluded Sept. 8,
1923 Between the United States and Mexico 25 (1927).
using the ship to violate the prohibition laws of the United States. The Commission set up to determine the liability of the United States for the sinking ruled that no compensation should be paid for the loss of the ship and cargo because those in de facto ownership and control were nationals of the United States, the defendant government.11

The weak link in the system of negative protection arises from the status of the injured national vis-à-vis the two States concerned: namely, the foreign State causing the injury, and the State of which he is a national.

International law is regarded as a law of nations. Although there has been much written in recent years on the patent injustice of this state of affairs, individual persons are today treated as the "objects", not the "subjects" of international law. The individual cannot himself seek a direct remedy against the State which is responsible for his injury, unless permission to do so is granted in advance. In the absence of such relief, an injured person must appeal to his own government to act as his advocate. Once his government takes up the case in his behalf, the matter is thenceforth treated as an injury caused by one State to another State. It is an action between States for an injury suffered by one of them.

The injured party cannot force his government to act on his behalf. In the absence of local statute to the contrary, his government is free to espouse or reject his claim, or, in the event of recovery, to refuse to pay him all or a part of what it recovers if it sees fit.12 Since the government is concerned with many problems in its foreign affairs which are often more important than the recovery of the just claims of one of its citizens against another State, politics may enter into every case in which redress or protection is sought. A small country may refrain from protesting in behalf of its nationals because it is weak; or, paradoxically, it may infringe on the rights of the nationals of a large country knowing that due to the position of that country in the eyes of the rest of the world it will not forcibly intervene. The absurdity of this arrangement is vividly apparent today in the seizures of alien property in the satellite countries of eastern Europe by Communist-dominated governments. It is apparent that nothing short of an armed intervention can assure a just settlement of these confiscations.13 Under the circumstances, the

12 C.f., E. M. Borchard, Diplomatic Protection of Citizens Abroad 359, 384 (1915).
13 Unless the wronged government happens to be holding assets belonging to the offending government or its nationals.
injured States are not in a position to intervene in view of the danger of provoking another World War.

All of this means that the injured national’s ability to obtain interposition may depend solely on his capacity to attract governmental attention to his case, and such a capacity usually depends on such factors as the importance of his contacts in government circles and the amount of influence which he can bring to bear on officials, as well as on his size, wealth and national importance. Such a situation is certain to result in unequal treatment of nationals.

Assuming that the injured person finds himself in a position where he can profit from the interposition of his government, what are the remedies and relief which might be employed in his behalf?

If the investor’s government (let us call it State A) feels that his injury involves the international responsibility of the other State and takes up the claim in his behalf, an international case is said to have arisen and the difficulty will be settled by the means recognized as legal for the settlement of any other international dispute.

State A may employ amicable or nonamicable modes of redress. These may range from diplomatic negotiations, the use of good officers, mediation, conciliation, and arbitration, to the suspension of diplomatic relations, a display of force, retortion, reprisals, and even armed intervention.14

**Amicable Modes**

Diplomatic negotiation is the first method employed. Through its diplomatic representative State A brings to the attention of the defendant State B the claim made against it and demands redress. Sometimes the claim is thus negotiated directly by State A but it may interpose by backing up the efforts of the investor who himself is seeking to negotiate the claim with State B. In the majority of cases the claim is settled at this stage of the diplomatic process. Consequently it is preferred by the investor who wants adequate, prompt and effective relief.

If State B rejects the claim or otherwise refuses to negotiate it on the terms established by State A, the case may drag its way through one or more of the other types of amicable settlement—good offices, conciliation, mediation or arbitration—before relief is obtained. However, we must again remember that once State A espouses the investor’s claim, the investor has no more control over the matter. The claim may be withdrawn, compromised or otherwise settled without his consent.

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14 E. M. Borchard, Diplomatic Protection of Citizens Abroad 439 (1915).
Of the more advanced, and normally more time-consuming, processes, we would like to say a word only about arbitration.

Arbitration has been defined as "the determination of a difference between States through a legal decision of one or more umpires or of a court, other than the Permanent Court of International Justice,\textsuperscript{15} chosen by the parties."\textsuperscript{16} Since a State cannot be brought before a tribunal without its consent, a \textit{compromis} must be concluded between the States concerned by which they agree to submit the dispute to arbitration. Frequently arbitration treaties are concluded after the difference has arisen, but States often arrange for a \textit{clause compromissaire} in a treaty by virtue of which they agree to arbitrate any difference that may arise in the future between them relating to the subject-matter of the accord. The more normal course today is to provide for the settlement of disputes by a judicial decision of the International Court of Justice. From the investor's point of view, justice will be better served if States A and B are already bound by a treaty obliging them to arbitrate the difference, or to submit it to the International Court of Justice for judicial decision.

\textbf{Nonamicable Modes}

There are occasions when State A is entitled under international law to employ force in order to protect its nationals.\textsuperscript{17} Today, however, as a result of bilateral and multilateral treaties, but more particularly as a result of the fact that most governments no longer look upon its use as practical from the long-run point of view, the employment of force has fallen into desuetude, superseded by arbitration of differences. A further difficulty is present now in that a legitimate intervention by force would be apt to set off another world conflict.

\textbf{Relief and Damages}

As we indicated, the claimant government is not obliged to give the wronged national in whose behalf it interposed an equitable share in what it receives as an award, though in practice such apportionment is ordinarily made. Therefore it is worthwhile to consider what sort of damages the claimant State is entitled to receive when it interposes in behalf of a wronged national. Oppenheimer says:

The only rule which is unanimously recognized by theory and practice is that

\textsuperscript{15} Now called the International Court of Justice.

\textsuperscript{16} 2 \textsc{Oppenheimer}, \textit{International Law} 21 (6th ed., Lauterpacht, 1944).

\textsuperscript{17} \textit{Cf.}, \textsc{Stowell}, \textit{Intervention in International Law} 2 (1921).
out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such expiatory acts as are necessary for a reparation of the wrong done. What kind of acts these are depends upon the special case and the discretion of the wronged State. It is obvious that there must be a pecuniary reparation for a material damage; and at least a formal apology on the part of the delinquent will in every case be necessary.18

Although it may be difficult to assess the advantage which the investor will obtain from the apology given to his government, he may eventually receive a sum equal to the "material damages" which he has suffered. But what constitute "material damages"?

By the terms of the compromis the States may agree as to the kinds of damages which may be awarded by the tribunal to which the case is submitted. But in the absence of such a provision, the tribunal will apply its own rules, and these do not necessarily correspond to those used by municipal courts. The claimant State may always recover for direct damages, but the weight of international jurisprudence denies recovery of indirect or consequential damages.19 However, there are contrary opinions. Indirect damages which are remote, speculative or conjectural have been uniformly disallowed. But some arbitral tribunals have attempted in the past to make a distinction between indirect losses which may be fairly considered as certain (profits of an established business) and those which are speculative and remote, awarding damages in the case of the former.20

In sum, under a system of negative protection the injured investor may not be able to get the same award before an international tribunal that he would be able to obtain in a municipal court where greater indirect damages may be included in the determination of damages; he must often wait an unconscionably long time before he is redressed, during which time his funds are tied up and he is unable to put his ideas and initiative to use; his case may become a political football, it may be compromised, rejected or settled without his consent; and the tribunal deciding his claim may often sit at a point quite distant from him, applying a law with which neither he nor his attorney are acquainted. These are all reasons why the present a posteriori international practice is not adequate either from the point of view of an investor who has

20. For a complete analysis of the problem of indirect damages see, 3 Whiteman, Damages in International Law 1765-1874 (1943).
been injured as a result of an act for which a foreign State is internationally responsible, or from the point of view of stimulating future investment abroad.

**Positive Protection of Investments**

It is always better to make arrangements in advance to avoid an injury than to attempt to make amends afterwards. It is also better to insure against possible loss than to rely solely on a damage suit for redress. These commonplaces hold true in the case of international investments. Injury to the investor can be forestalled in advance, in whole or in part, by treaties and agreements between States. Losses can be shared through governmental or private insurance arrangements. We call this positive protection. Future investment is much more encouraged by such measures than it is by a conditional promise of governmental diplomatic assistance in the event of injury. This is due to the fact that the investor can know in advance more precisely what risks he runs in placing his funds abroad.

However, we must remember that we can never get entirely away from the necessity of interposing against another State when it injures the person or property of foreigners in violation of treaty provisions and the customary rule of international law. Let us now consider the measures of governmental protection, assistance and insurance presently in use in the United States.

**Double Taxation Agreements**

An investor is unjustly burdened when he must pay taxes in two countries on the same income, the total of which taxes is greater than he would be obliged to pay in any one country. As long as such conditions prevail, existing investments abroad tend to wither and further investments are discouraged.

Double taxation relief may be provided either by national law or by treaty between States. National laws may give relief by granting the taxpayer credit for taxes already paid in another country on the same income. Such relief may be granted regardless of whether or not reciprocity is secured from the other government.

Although there were cases of double taxation treaties to be found before the first World War, the movement for such treaties did not really get underway until after that time. Two organizations have carried the burden of examining ways and means of meeting the technical difficulties
inherent in the problem of double taxation and of developing model conventions. They are the International Chamber of Commerce, which started work in 1920, and the Financial Committee of the League of Nations, which launched investigations in 1921 and which was superseded in 1929 by a permanent Fiscal Committee named by the Council of the League. Three Draft Conventions of 1928 were sent by the Committee to various nations to be used as models for future bilateral treaties. These model conventions have had wide-spread influence on taxation treaties subsequently negotiated.21

Due to the complexity of the problem, multilateral treaties cannot be used to grant adequate double taxation relief. This is evidenced by the failure of the first multilateral convention signed at Rome in 1922, and by the inability in 1928, after the Model Conventions were drawn up, to assemble enough States who were in favor of a multilateral convention to justify calling an international conference.22

Today the tendency is toward the negotiation of general bilateral taxation agreements which seek to avoid taxing the same income twice; to provide for credit against local taxes when a tax has already been paid on the same source in the other country; and further to provide close cooperation between the taxing authorities of the two countries in order to ensure that the treaty serves its purpose and that there is no fiscal evasion. A good example is the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income between the United Kingdom and the United States concluded on April 16, 1945.23 Unfortunately this type of treaty has not been widely adopted. Other types of existing bilateral double taxation treaties grant less adequate relief.

**Commercial Treaties**

1) **Multilateral treaties.**

Efforts have been made to lend encouragement to investments and to provide protection for investors through the medium of multilateral commercial treaties. To date, they have not been successful.

The Havana Charter for an International Trade Organization of the United Nations of March 24, 1948, recognizes the value of international

22 Id. at 33.
23 For a study of this treaty see, Koch, *The Double Taxation Convention* (1947); 60 Stat. 1377 (1946).
investment as well as the fact that the international flow of capital will be stimulated if opportunities and security for investments are provided.\textsuperscript{24} To reach these ends, members of the ITO are to undertake:

(i) to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments, and
(ii) to give due regard to the desirability of avoiding discrimination as between foreign investments.\textsuperscript{25}

Apart from the fact that this Charter has not gone into effect as yet, it is obvious that due to the difference of opinion between capital-exporting and capital-importing States as to what constitutes “adequate security” the clause is meaningless in such a multilateral agreement.

This is borne out by the fact that an attempt to provide security for investments on a more limited geographical scale failed as a result of the clash between the doctrines of the Latin American countries and the United States at Bogotá in May, 1948. In the Economic Agreement of Bogotá all of the States recognized the need for international investment in underdeveloped regions as well as the fact that the international flow of such capital would be stimulated by opportunities and security. They also agreed as to the role that a foreign investment should play in an underdeveloped country. But there was no common agreement on the provisions of Article 25 which provided that “Any expropriation shall be accompanied by payment of a fair price in a prompt, adequate and effective manner.”\textsuperscript{26} Eight capital-importing countries\textsuperscript{27} made specific reservations to this provision on the ground that such matters should be subordinated to the constitutional laws of each country. Such statements offer little consolation to present or encouragement to future investors in these regions.

Multilateral treaties of this nature may serve to cut down the nationalistic opposition to foreign investment but they do not meet the needs of the situation as far as protection is concerned. As with the case of double taxation, bilateral treaties may offer more hope.

2) \textit{Bilateral Treaties}

Commercial treaties usually seek for the nationals of each State a position of equality with those of the most-favored nation doing business

\textsuperscript{24} 1 \textit{Int. Trade Rep.} \textsuperscript{17,501-17,508} (1949).
\textsuperscript{25} \textit{Id.} at \textsuperscript{17,509}.
\textsuperscript{26} Economic Agreement of Bogota, (Ninth International Conference of American States) \textsuperscript{9} (May 2, 1948).
\textsuperscript{27} Argentina, Cuba, Ecuador, Guatemala, Honduras, Mexico, Uruguay, and Venezuela.
in the other State. "Friendship" treaties go further in seeking a degree of equality with local nationals coupled with certain specific safeguards. We find, for example, provisions for taxation at rates no higher than those imposed on local citizens, and for the right to take, hold and use land for certain enumerated purposes on the same terms as nationals.

In practice, these treaties do not appear to be effective for our purposes today. Foreign investors are being injured by practices—such as foreign exchange controls, administrative regulations, and nationalizations, not to say anything of general conditions of economic and political instability in some countries—for which no adequate provision has been made in these treaties. As a result, whenever investors can get a high yield on equity capital in their own country, as was the case in the United States in 1949, they will not take the risk inherent in investing in foreign countries.

3) Bilateral "due process" treaties.

Due to this ineffectiveness of the ordinary bilateral commercial treaty, it has been found necessary to negotiate a new type of treaty providing more adequate safeguards to international investors. We have at the present time four examples of these new treaties, prototypes of a series formulated by our State Department. They are the treaties of Friendship, Commerce and Navigation with China, Italy, Uruguay, and Ireland. These treaties contain specific provisions with regards to nationalization or expropriation by one country of property belonging to nationals of the other country. Article VI, paragraph 2, of the China Treaty provides that:

The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation.

The article further provides that the recipient of such compensation

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28 119 British and Foreign State Papers: 1924 at 370 (Librarian's Dep't of Foreign Office 1924).
29 Treaty of Friendship, Commerce and Consular Rights between the United States and Austria of June 19, 1928, Article 1; 47 Stat. 1876 (1931).
30 November 4, 1946.
31 February 2, 1948.
33 January 21, 1950.
shall be able to withdraw it by obtaining foreign exchange in the currency of the country of which the recipient is a national upon the best terms available when application is filed.

This sort of treaty serves two very useful purposes. First, it forces the government of the capital-exporting country to clarify its position with regards to the protection of the investments of its nationals, thus clearing away some of the vagueness which, until recently left the national at all times uncertain as to how he should invest abroad in order to be assured protection. Second, it binds the capital-importing country to a definite international obligation based on treaty. Failure to meet this obligation gives the capital-exporting State the right to interpose. This is important in the light of the opposing opinions held by nations as to when international responsibility ensues where foreign investors are injured.

The success of Communism in China since the United States-China treaty went into effect dramatically shows the fatal weakness of these "due process" treaties as far as the private investor is concerned. Such treaties can not guarantee the stability of governments.

Governments of capital-exporting countries can afford to wait several years or even decades for the reappearance in China of a government which respects private property rights and international obligations before pressing claims in behalf of nationals who have been injured by communistic measures. But the investor—unless he be a large corporation with scattered, varied assets, only a part of which have been injured—cannot afford to wait. He must be recompensed promptly if justice is to be done him. Only in this way can he put his skill, initiative and capital back to work before the injury becomes irreparable. But how can we quickly recompense an investor for his loss and at the same time allow his government to patiently await a propitious time before presenting a claim in his behalf? The answer seems to lie in some form of insurance for the foreign investor.

4) "Investment" treaties.

The State Department is at present attempting to negotiate treaties designed especially to protect and to stimulate the flow of American foreign private investment. Such treaties will probably contain dispositions guaranteeing the right of the investor to withdraw his earnings and capital from the country where the investment is made, as well as the payment of compensation in case of expropriation. The efforts on the part of the foreign State to live up to the terms of such a treaty would
do much toward the creation and maintenance of an environment conducive to private investment.

**Guaranties of Private Investments**

In view of the inadequacies of commercial treaties as well as of the negative measures for protection, it was to be expected that our Government would seek by other means to insure its investors against risks peculiar to foreign investment once it became a national policy to encourage the investment of American private capital in certain areas abroad. The risks peculiar to foreign investment today include: (1) non-convertability of currency, (2) confiscation or seizure, (3) destruction by riot or revolution, and (4) subsequent interference by some revolutionary or other type of government, rendering the further transaction of private business impossible.\(^{34}\)

At present the only governmental guaranty program in effect does not cover all of these risks.

**The ECA Guaranties**

The only governmental guaranties in force in any country today are those provided for by the United States in the Economic Cooperation Acts of 1948\(^{35}\) and of 1950.\(^{36}\) Under the earlier of these two Acts, the Administrator was authorized to issue a limited form of guaranty to new American dollar investments in participating countries. This guaranty covered the transferability into United States dollars of the proceeds of the investment. For the purpose of the guaranty it made no difference whether such proceeds had been received as income from the investment, in whole or in part, or as compensation for the sale or disposition of all or any part of the property representing such investment. Due to a multiplicity of reasons, the guaranty provision was not successful during the first two years of its existence. Unstable economic and political conditions in many countries coupled with a wave of nationalizations discouraged international investments. Further, new investments were not encouraged by the guaranty because it did not cover enough of the major risks, for example confiscations and destructive administrative interferences. It appears too that large enterprises have not been willing to place themselves in a position where the

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\(^{34}\) See the statement of Norman Littell, *Hearings before the Senate Committee on Banking and Currency on S. 2177*, 81st Cong., 1st Sess. 88 (1949).


\(^{36}\) Pub. L. No. 535, 81st Cong., 2d Sess. § 103(c) (June 5, 1950).
Federal Government can investigate or interfere with their internal affairs, as might be the case when application is made for a guaranty or where the Federal Government is called on to pay off on a guaranty.

In order to overcome the deficiencies of the simple guaranty of transferability, the House of Representatives attempted to expand the guaranty to cover losses on an investment resulting from expropriation and confiscation by any government; destruction by revolution or war; or from any law or regulation which in the opinion of the Administrator of the ECA would prevent the further transaction of the business. However, since the Senate bill did not add to the existing authorized coverage, a compromise was reached whereby the Economic Cooperation Act of 1950 amended the Act of 1948 to permit:

(2) the compensation in United States dollars for loss of all or any part of the investment in the approved project which shall be found by the Administrator to have been lost to such person by reason of expropriation or confiscation by action of the government of a participating country.

To be eligible to receive a guaranty under the terms of the ECA Acts, the investor must be a citizen of the United States, or a corporation, partnership, or other association created under the laws of the United States, or of any State or Territory and substantially beneficially owned by citizens of the United States. The General Counsel of ECA interprets this to mean that the person guaranteed must also fill these conditions throughout the life of the contract of guaranty. Such an interpretation is very important because there exist in certain foreign countries, especially Switzerland, large amounts of private capital which are seeking safe investment outlets. We should not be so naive as to overlook the possibility that these investors, profiting from the anonymity of ownership offered by the corporate structure as well as by the sale of corporate securities on exchanges throughout the world, might attempt to place sizable amounts of their funds in American corporations which in turn have large guaranteed investment holdings abroad.

As any good insurer would do in the case of a great risk, the Government of the United States has been "reinsuring" itself against loss in the case of the transferability guaranties by negotiating agreements with the countries in which the investments are to be made which

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38 Pub. L. No. 535, 81st Cong., 2d Sess. § 103(c) (June 5, 1950).
assure the convertability of the guaranteed funds. Provision is made for such negotiations in the Economic Cooperation Agreements in force between the United States and each of the participating countries.

We must remember that these two ECA guaranties have not been enacted simply to supply the deficiencies of a posteriori or even of positive protection of foreign private investments. The aim of Congress has been to increase the participation of private enterprise in promoting economic recovery in the ERP countries and their territories. Consequently, the guaranties apply only to new investment, not to American investments made in these countries before the legislation was enacted.

These guaranties have another weakness which is similar to that found in the system of negative protection and which we criticized earlier in this article. Politics enter into the determination of the type of investment to be covered by the guaranty as well as of the geographical area in which it is to be made available. Thus we find that the major criteria for determining the eligibility of intended industrial investment under the transferability guaranty have been:

The need for the products in the participating nation; the amount of dollar imports the country would thereby save; the creation of new exports; and the soundness of the investment from the standpoint of European recovery as a whole.40

If these two guaranty provisions are eventually extended to new investments in all underdeveloped countries under President Truman's Point IV program, the territorial discrimination will be somewhat ameliorated. But still the difficulty will remain that all of the risks peculiar to investment abroad today are not covered, and investments made before the legislation enters into effect are not eligible to be guaranteed against loss resulting from these risks.

Upon payment pursuant to a guaranty, the United States Government becomes owner of any currency, credits, assets or investments on account of which such a payment is made.41 In order to avoid suffering a complete loss on the guaranty, and in view of the fact that an international delinquency may be involved, the Government will be obliged to proceed against the State in which the investment was made, utilizing a posteriori measures. All of which means that the Government may one day find itself proprietor of sizable holdings or claims in other countries. If these claims are not or cannot be easily liquidated, for example, by

40 Third Report to Congress of the Economic Cooperation Administration, 47-48 (1950).
the purchase of strategic raw materials in the country in which the guaranteed investment in question had been made, they may come to constitute a particularly bitter point of issue empoisoning the relations between the two States concerned.

Since the Government is authorized to charge up to 1 per centum per annum on transferability guaranties and up to 4 per centum per annum on expropriation or confiscation guaranties,42 it may find in the long run that the guaranty program pays its own way making it unnecessary to use taxpayer's money to subsidize it. If this comes to be a fact it might be found possible to either establish a new governmental institution, or to utilize an existing one, which will, for a fee, insure any American private investment abroad. Preferred rates could be offered to investments made in industries and areas which it has become a part of our foreign policy to encourage.

**Conclusion**

The private person who invests his funds abroad seeks an environment sympathetic to such an activity. He is not primarily interested either in diplomatic assistance in the event of damage or in the payment of an insurance indemnity in case of loss. He would prefer to see his investment continue to work and earn in the foreign country. Consequently, any activity on the part of the United States Government which will assure the continued existence in foreign countries of an atmosphere friendly to private investment coming from abroad is desirable; whether this consist in the negotiation of friendship and commerce treaties, in aid to ensure economic recovery and stability abroad, or in an arms aid program which ensures that the foreign governments will not go communist.

The deficiencies present in the positive and negative diplomatic programs for the protection of American private investment abroad have, since the end of World War II, impeded the flow of private capital from the United States to foreign countries which have needed it in order to get back on their feet after the war, to develop their resources, and to raise the standards of living of their people. The ECA guaranties have been enacted not to replace but to supplement the existing system by meeting some of its deficiencies. Considered in this light we can see that the ECA guaranty program, though not a panacea for all our foreign investment problems, especially in areas overrun by a rampant imperialistic communism or in States enjoying a nationalistic socialism, can help to meet the capital needs of some areas of the world.

AMERICAN WAR CRIMES TRIALS IN EUROPE
MAXIMILIAN KOESSLER*

INTRODUCTION

A REMARKABLE statement was made by Winston Churchill almost on the eve of World War II. He said:

We cannot tell whether Hitler will be the man who will once again let loose upon the world another war in which civilization will irretrievably succumb, or whether he will go down in history as the man who restored honor and peace of mind to the great Germanic nation and brought it back serene, helpful and strong, to the forefront of the European family circle.¹

Of these alternative visions, unfortunately the first one became a grim reality though not to the full extent of the consequences anticipated by the great statesman. Civilization has not succumbed, as yet. However, a grand scale destruction of human lives and of cultural and material values, unprecedented in modern history, was the disastrous impact of the war frivolously launched by Hitler upon a world still suffering from the aftermath of World War I. It is not sufficient consolation that it proved a boomerang to the Axis powers.

To start such a war was certainly a crime in the moral sense of the word. Whether it was in addition a crime under international law has been much discussed by learned writers before and after the International Military Tribunal in Nuremberg answered the question in the affirmative.² There are those who challenge the correctness of this result.³ Others admit the ex post facto character of the "Nuremberg Law" on aggressive war but consider it nevertheless good law.⁴ One

¹ Jur. D., Austrian University of Czernowitz (1912); M.A., Columbia University (1941); LL.B., Columbia Law School (1945). Formerly, Attorney, War Crimes Group, U. S. Army; Member, Legal Division, Military Government for Bavaria (1946-1949). Engaged for many years in the practice of law in Vienna, Austria. Author of numerous articles in American and European political science and legal periodicals. Member of the Vienna, Austria and New York Bars.


⁴ For instance: Gross, The Criminality of Aggressive War, 41 Am. Pol. Sci. Rev. 205 (1947). More numerous, however, are the writers who agree with the "Nuremberg Law"
distinguished scholar reversed his previously published view while the Nuremberg trial was proceeding.  

The lead of the International Military Tribunal in Nuremberg was followed in other war crimes adjudications, especially in its Far Eastern counterpart, the Tokyo trial. A contrary view was expressed by one of the Tokyo judges, Justice Pal (India), in a dissenting opinion quoted by Mr. Justice Douglas of the Supreme Court of the United States in his concurring opinion on related petitions for a writ of habeas corpus. Justice Pal took a nihilistic position regarding the legality of the Tokyo trial:

The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance.

It would seem that at least pro futuro the "Nuremberg Law" on the crime of aggressive war has been definitely established through recognition by the United Nations.

World War II, as conducted by Germany and Japan, has set a record in modern history of a series of most shocking atrocities. This does not

on aggressive war throughout, that is also regarding the denial of its ex post facto character. For instance: Goodhart, The Legality of the Nuremberg Trial, 58 JURID. REV. 1, 14 (1946).

5 Glueck, The Nuremberg Trial and Aggressive War 5 (1946), to be compared with Glueck, War Criminals: Their Prosecution and Punishment 38 (1944).


7 Judgment of the International Military Tribunal for the Far East, Part A, Ch. II, at 26 (1948), after quoting from the pertinent portions of the Nuremberg Judgment: "With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord. . . ."


refer to occasional excesses of individuals which are regrettable but unavoidable in a war. Rather it refers to those crimes which were perpetrated on a grand scale in cold blood, according to policy directives issued right from the top of the government involved.

Warfare, even if legitimate and limited to actions in pursuit of military objectives, is a shameful plight of humanity.\textsuperscript{11} It could be avoided if conflicts between nations would not be decided by the law of the jungle but by peaceful means similar to those applied for the settlement of conflicts between private individuals. However, a substantial number of World War II atrocities, especially those perpetrated by Germans, had not even the apparent justification of a pursuit of military objectives. They added to the evil necessarily inherent in war, the abject feature of a ruthless and cruel policy of subjection, persecution and even extermination of “inferior races”, as Nazi arrogance had branded them.

Tortures of a medieval kind, the performance of which would shake even the most callous visitor of a “Grand Guignol” theater, were applied by Hitler’s henchmen both for purely “ideological” purposes and in apparent pursuit of war objectives.\textsuperscript{12} The infamous institution of concentration camps furnishes an illustration of the merger of non-military and military motives in some of the German war crimes and “crimes against humanity”. Originally instruments of political terror, they became during the war also sources for the supply of slave labor.\textsuperscript{13} To exploit them was not repellent to German industrial concerns of worldwide reputation.\textsuperscript{14}

The conscience of humanity required that such nefarious deeds should

\begin{itemize}
\item \textsuperscript{11} Kelsen, Peace Through Law, Preface, p. viii (1944), stating: “... war is mass murder, the greatest disgrace of our culture...”
\item \textsuperscript{12} German torturing practices in occupied Norway were proven in the Norwegian war crimes trials against Klinge and Bruns respectively. 3 Law Reports, op. cit. supra note 6, at 1, 15. See also, 6 Law Reports, op. cit. supra note 6, at 211.
\item \textsuperscript{13} “That the employment of concentration camp inmates under the circumstances disclosed by the record was a crime there can be no doubt. The conclusion is inescapable that they were mostly Jews uprooted from their homes in occupied territories and no less deportees than many of the other foreign workers who were forcibly brought to Germany. The only difference was that they had to go through all the horrors of a concentration camp under the supervision of the S.S. before they finally landed at the firm of Krupp. The Krupp Trial, 10 Law Reports, op. cit. supra note 6, at 69, 145. On slave labor as a war crime: analytical note in 9 Law Reports, op. cit. supra note 6, at 52.
\item \textsuperscript{14} Employment of concentration camp inmates by I. G. Farben and Krupp plants respectively, 10 Law Reports, op. cit. supra note 6, at 25, 96.
\end{itemize}
not remain unpunished. The different view of a minority of men of good will was no less unrealistic than the extremely opposite approach of the collective guilt advocates. To avoid enemy reaction under the pretext of retaliation, only a few war crimes trials were held on the Allied side while the fighting was going on. However, preparations were made for the punitive proceedings which were to follow the armistices in Europe and the Far East respectively. Taken as a whole, and especially in view of their unprecedented number, they represent the largest judicial enterprise recorded in the history of mankind. The scene of those trials was a changing one. The program was fanning out into remote parts of the globe. They are reflected in a mass of documentary material which would seem to be a valuable source of in-

15 In retrospect: Taft, *Punishment of War Criminals*, 11 Am. Soc. Rev. 439 (1946), alleging, at 441: “It is the writer’s contention that punishment of war criminals will increase the probability of World War III”.


17 Jackson, *Report to the President*, 12 Dep’t State Bull. 1071 (1945), stating that authorization for the trial of war crimes by the field forces had been withdrawn “... because of the fear of stimulating retaliation through execution of captured Americans on trumped-up charges”. However, a different policy was obviously followed by the Russians in holding the Kharkov Trial in December, 1943. See: THE TRIAL IN THE CASE OF THE ATROCITIES COMMITTED BY THE GERMAN FASCIST INVADERS IN THE CITY OF KHARKOV AND IN THE KHARKOV REGION (Translated from the Report published in Pravda), Foreign Language Publishing House, Moscow (1944). The trial against Ernest Peter Burger and others, including Richard Quirin, before a military commission specially appointed by President Roosevelt in his capacity as Commander in Chief of the Army and Navy, 7 Fed. Reg. 5103 (1942), was probably a war crimes trial and, if so, the only American one conducted in the pre-armistice period of the war. On the case in general see: Ex parte Quirin, 317 U. S. 1 (1942); Hyde, *Aspects of the Saboteur Cases*, 37 Am. J. Int’l L. 88 (1943).

18 Final statistics on the trials for war crimes or crimes against humanity, that is those in addition to the various treason or “quising” trials, are not yet available. However, sufficiently illustrative are the following figures of pertinent trial records received by the United Nations War Crimes Commission before its phasing out. They are: 809 American, 524 British, 256 Australian, 254 French, 30 Netherlands, 24 Polish, 9 Norwegian, 4 Canadian trial records and one Chinese. 15 Law Reports, op. cit. supra note 6, Foreword, p. xvi. See also: HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR, United Nations War Crimes Commission, Appendix IV (1949).

19 For instance, an American military commission on the Marshall Islands tried the Jaluit Atoll Case. 1 Law Reports, op. cit. supra note 6, at 71.
formation and inspiration for quite a few intellectual and technical fields, including: law, history, foreign affairs, diplomacy, logistics, psychological warfare, propaganda, journalism, sociology, psychology, psychoanalysis, psychiatry, medical jurisprudence, ethnology, judaism, ethics. Various branches of law are among the prospective beneficiaries, especially: international law, military law, criminal law, law of criminal procedure, law of evidence, comparative law.20

In the emotional atmosphere of the periods immediately preceding and immediately following the end of the fighting war, there was much clamoring on the Allied side for administrative or executive rather than judicial determination of the fate of the top Axis criminals.21 Two different lines of reasoning were represented in the arguments of those who either suggested or approved such an approach. According to one of them, it was not necessary to go into the trouble of an orderly trial in view of the established guilt of the individuals in question for which only the death sentence could be an adequate retribution. According to the other, more sophisticated proposition, an administrative or executive fiat in exercise of the "right of the victor" is more consistent with faithfulness to the ideal of justice than the allegedly hypocritical resort to judicial proceedings under perhaps ex post facto law.

Those who successfully discouraged such a policy, mostly did it on the ground of its questionable wisdom and its inconsistency with the dignity of the Allied nations.22 Their view was most energetically challenged by Justice Pal in his aforementioned dissenting opinion in the Tokyo trial:

As the law now stands, it will be a "war crime" stricto sensu on the part of the victor nations if they would "execute" these prisoners otherwise than under a due process of international law.23

Even apart from the unfelicitous precedent of the Leipzig trials after

21 For instance, Mr. Warren's suggestion, Proc. Am. Soc'y Int'l L. 51 et seq. (1943). See also: Byrnes, Speaking Frankly, at 182 (1947), stating that "Secretary Stimson objected . . . to the proposal of Mr. Morgenthau's plan that so-called archcriminals should be put to death by the military without provision for any trial. . . ."
22 Jackson, Report, op. cit. supra note 17, at 1073. See also, Goodhart, supra note 4, at 18-19.
23 International Japanese War Crimes Trial, supra note 9, at 178 (1946-1948).
the first World War, it was a matter of course that the Allied governments could not entrust to domestic courts in the Axis countries the trial of war criminals who had atrociously victimized Allied nationals. Permanent international courts, exercising criminal jurisdiction upon complaints of victor nations as well as defeated countries, are a most desirable future development, but not in existence even at this date. The lofty proposition of an eminent American scholar that the prospective war crimes tribunals should be exclusively composed of nationals of neutral countries, went probably too far in a fundamentally sound approach. An admixture of a limited quota of neutral nationals would however have added to the prestige of the tribunals and to the authority of their judgments. The argument that this was practically not feasible in view of the absence of really neutral countries and to avoid undue delay in the beginning of the trials, is hardly persuasive. It might even have been considered and was suggested by Professor Glueck to give nationals of defeated countries who had been active in resistance to their criminal systems of government, a slight representation in the composition of the courts in question.

Special war crimes tribunals, exclusively composed of Allied nationals, partly of a multi-national character, partly under the authority of a single Allied nation, were established. They were unduly disparaged as

24 Glueck, War Criminals, op. cit. supra note 5, at 34, referring to "the tragi-comedy of the Leipzig trials".
25 Recently German courts in the American Zone, specially authorized by the occupation authority, came to be engaged in the trial of war crimes which Germans had committed against prisoners of war or against civilians in occupied countries. In one such case, a jury in Munich found the defendant guilty of having in 1941-1942 murdered inhabitants of the Jewish Ghetto in Tomaszow (Poland). He was sentenced to death. Murder case against Max Raettig, Landgericht Munich I, file number 1 Ks 4/49 (8/49), judgment announced on May 21, 1949. The death sentence was, however, abolished in Western Germany before the execution of this judgment. Art. 102 of the so-called Bonn Constitution, officially designated as Basic Law for the Federal Republic of Germany.
26 Historical Survey of the Question of International Criminal Jurisdiction, United Nations, Lake Success (1949); Neumann, supra note 20, at 141.
30 Glueck, War Criminals, op. cit. supra note 5, at 180.
representing "victors' justice". Their underlying philosophy emphasized "justice" rather than "victors". It was planned and generally achieved to give the defendants a fair trial and to dispense justice rather than to satisfy feelings of vengeance, although it was sometimes a severe brand of justice.

Somewhat different from the legalistic attitude of the American representatives at the First World War Peace Conference, a member of the Supreme Court of the United States, Mr. Justice Jackson, was leading among those who promoted the establishment of the International Military Tribunal in Nuremberg the pattern of which was closely, though with minor divergencies, followed in the establishment of the International Military Tribunal for the Far East. The ideas expressed by Mr. Justice Jackson in his first pertinent report to President Truman, appear inextricably interwoven with this so-called London Charter. It also shows a certain impact of theories of the Soviet-Russian scholar, Trainin, who is probably responsible for a particular feature of the "Nuremberg Law" which has been, rightly or wrongly, criticized as introducing a "crime by association."

As intimated hereinbefore, there were in addition to multi-national trials, those sponsored by a single Allied nation. The most numerous

31 Belgion, Victors' Justice (1949), reviewed by this writer in 36 A. B. A. J. 37 (1950). Reel, The Case of General Yamashita 242 (1949), claims with regard to all the war crimes trials: "... they are not really trials in the sense that there is an honest possibility of acquittal." This statement is amazing in view of the relatively large number of reported acquittals in war crimes trials.


34 Supra note 17.


ones in this group are probably the American trials, and the most important ones, those that were conducted by American military commissions or military government courts in Germany, commonly referred to as “The Dachau Trials”.

**The Dachau Trials**

Apart from the twelve Nuremberg trials the character of which has been judicially recognized as international rather than purely American, World War II war crimes trials in the American occupation zone of Germany were conducted either before military commissions or before specially appointed military government courts. Most, though not all, of these non-Nuremberg trials took place in Dachau (Bavaria), within an American military compound established on the site of the one-time German concentration camp. Therefore, the whole group is conveniently referred to as the “Dachau Trials”. Their great importance, overshadowed by the publicity of the spectacular Nuremberg proceedings, appears from the following statistical data of the Army:

The United States sponsored a total of approximately nine hundred war crimes trials involving over three thousand defendants. About half of these cases were tried in Germany. The second largest group is represented by the trials in Japan. There were relatively few American war crimes trials in Austria, Italy, the Philippines, China and the Pacific Islands respectively, with the trials in the Philippines ranging highest in number among these minor groups. From the above mentioned Ger-

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58, 80 (1944), speaks of “quasi-international courts” According to Schwarzenberger, The Judgment of Nuremberg, 21 Tulane L. Rev. 329, 338 (1947), the Nuremberg Tribunal was “... international more in form than in substance ... more akin to a joint tribunal under municipal law than to an international tribunal in the normal sense of the word.”

39 Including, for instance, the Malmedy Case or the Buchenwald Concentration Camp Case in which Ilse Koch was one of the defendants. Clay, Decision in Germany 252-255 (1950). Most, but not all of those trials were conducted in Dachau. For instance, the important case involving the lynching of seven American fliers on the Island of Borkum was tried by a military government court in Ludwigsburg. For general aspects of other cases tried in Ludwigsburg, see: Kolander, War Crimes Trials in Germany, 18 Pa. Bar Assoc. Q. 274 (1947).


42 I Law Reports, op. cit. supra note 6, at 111.

43 Letters of Colonel Edward H. Young, Chief, War Crimes Division, Department of the Army, Office of the Judge Advocate General, respectively dated 7 and 21 February 1950.
man defendants, 1,380 were convicted and 241 acquitted by the respective trial courts. The sentences adjudged in the same group of cases included 421 death sentences, not all of which were approved on review, and of which 255 have been executed so far. There were 194 sentences of imprisonment for life adjudged by the trial courts of which about 136 were approved.

Little was known about the Dachau trials outside the small circle of those officially concerned or directly affected by them, until they came within the searchlight of publicity in connection with Congressional investigations of the sentence finally meted out to Ilse Koch, one of the defendants in the Buchenwald Concentration Camp Case, and of certain methods of pre-trial investigation applied in the Malmedy Case.44 It is most unfortunate that this particular feature of the last mentioned trial, isolated rather than inherent in the whole group, has cast a cloud upon its aggregate.46

What actually happened in the course of the Malmedy investigation is highly regrettable46 but has been grossly overstated and dramatized on the basis of self-serving and ex post facto accounts of convicted defendants whose atrocity stories in inflammatory versions were enthusiastically swallowed by the American reader.47 Credence was given to them not only

44 Clay, op. cit. supra note 39, at 254; Malmedy Massacre Investigation, Hearings before a Subcommittee of the Committee on Armed Services on S. Res. 42, United States Senate, 81st Cong., 1st Sess. (1949).
45 See Clay, op. cit. supra note 39, at 253:
"It is unfortunate that later the Malmedy case cast some discredit on these trials as a whole, although improper methods in obtaining evidence were charged only in this instance."
46 This is especially so since it occurred at a time when and in a country where we were supposed to set a pattern of non-Nazi ways and means of administration of justice. The understandable indignation at most shocking German atrocities committed on a large scale during the Battle of the Bulge, and the particular situation of an extreme difficulty in establishing the specific guilt of certain individuals, are an explanation but no justification of the use of methods which have greatly harmed the prestige of American justice in Germany and the moral effect of war crimes trials not directly tainted thereby.
47 Unwarranted allegations of a highly vitriolic nature were published under the heading American Atrocities in Germany in The Progressive (February 1949). They appeared under the by-line of Judge Edward L. Van Roden (Pennsylvania) who subsequently disclaimed his authorship and the correctness of part of the contents. The article had meanwhile been given a great amount of publicity, especially by the activities of the National Council for the Prevention of War. See testimonies of Judge Van Roden and of Mr. Finucane in Hearings, supra note 44, at 225, 301, 949, 1073, 1102 and pertinent conclusions of the Baldwin Committee in Malmedy Massacre Investigation, Report of Subcommittee
in Germany where they became the basis for a campaign from the ecclesiastical side, but also outside of Germany by persons ready to jump to conclusions before careful examination of the facts involved, especially by writers engaged in attempts to discredit any and all of the war crimes trials in Germany. No physical mistreatments worthy of mention have been proved with regard to the Malmedy massacres, in the light of the respective reports of all the three committees which made special studies of this matter. According to the report of the Raymond Board, the improper use of tricks and of moral duress could be established. The performance of mock trials as one of the techniques of the pre-trial investigation of the Malmedy Case, has been singled out and branded by the report of the Baldwin Committee.

The elimination of the fictional or at least unproven part of the alleged irregular investigation techniques, does not remove the deplorable character of their remainder. It is not of importance in this connection whether or not they overstepped the boundaries of admissibility under Anglo-American rules of evidence obtained by ruses or tricks. Nor is it relevant to the point in question whether or not the methods complained of were substantially identical with those applied in important cases by police investigators all over the world, though disparaged as "third degree" techniques. Under no circumstances should

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of the Committee on Armed Services on S. Res. 42, United States Senate, 81st Cong., 1st Sess., 29 et seq. (1949).

48 Testimony of Dr. Aschenauer, Hearings, supra note 44, at 1455.


50 Simpson Commission, headed by Judge Gordon A. Simpson (Texas); Administration of Justice Review Board, headed by Col. John M. Raymond; Baldwin Committee, headed by Senator Raymond E. Baldwin. Sen. Rep. supra note 47, summarizing findings of Simpson Commission (at 28), results reached by Raymond Board (at 30) and conclusions of Baldwin Committee (at 34-35) concerning alleged physical mistreatments. Full texts of findings of Simpson Commission and of Raymond Board respectively, in: Hearings, supra note 44, at 1196-1197.

51 Conclusions of Raymond Board in Hearings, supra note 44, at 1204-1205.


they have occurred in connection with an American war crimes trial in Germany. Moreover, they proved a boomerang to the judicial undertaking in the putative interest of which they were applied. In view of the irregularities complained of, those who had the final say on findings and sentences in the Malmedy Case, were inclined to lean over backward in favor of the defendants affected. Thus quite a number of individuals seemed to have escaped a well-deserved retribution.

Turning now to certain general aspects of the Dachau trials, it may be stated that their external appearance was closely akin to normal proceedings under the courts martial system of the United States Army. The tribunals were exclusively composed of American officers, at least one of whom would normally have had legal training or experience like the “law member” of a court martial. While an outward difference thus existed between the Dachau tribunals composed of officers and the Nuremberg courts composed of civilians in spite of their designation as “military tribunals”, the underlying philosophy of the two groups of trials was the same. In both of them, the judges approached their difficult and delicate task in a truly judicial spirit and with the best intention of avoiding any emotional prejudice against the defendants.

At variance with the Nuremberg trials, where the vote of an unqualified majority of the members of the tribunal was sufficient for any judgment, including convictions and any kind of sentence, a majority of at least two-thirds of the members of the tribunal was required for a conviction or sentence in a Dachau trial. This, however, was sufficient

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55 Letter of Headquarters U. S. Forces, European Theater, dated 16 July 1945, subject: Trial of War Crimes and Related Cases, printed infra, as Annex II, provided in part of its paragraph 3, “At least one officer with legal training will be detailed as a member of such courts”. There was, however, no corresponding provision in letter of same Headquarters, dated 25 August 1945, subject: Military Commissions, printed infra, as Annex I. It should be noted that no such requirement exists under customary international law defining due process in war crimes trials of captured enemy nationals. Under American court-martial practice, a “law member” is required only in a “general” court-martial. Articles of War 8-10. Only the nominal designation, but not the actual presence of a properly qualified law member has been held a jurisdictional requirement. Wallstein, The Revision of the Army Court-Martial System, 48 Col. L. Rev. 219, 225 (1948).
even for a death sentence, contrary to the regular courts-martial system which requires a unanimous vote for capital punishment.\textsuperscript{57}

In accordance with the applicable provision,\textsuperscript{58} the Nuremberg judgments included reasonings justifying the tribunal’s findings. By the thoroughness with which the judges discharged this part of their functions, they rendered an invaluable service to the clarification of certain legal issues involved and to those who in the present or at future times may benefit from this rich well of information. A corresponding feature is absent from the Dachau judgments. They consisted of the laconic verdict of “guilty” or “not guilty” and, in the case of a conviction, also of the sentence, but were not accompanied by any kind of reasoning.

Announcing in each case, by way of a standing clause, that the judgment had been reached with concurrence of at least two-thirds of the members present, the Dachau tribunals did not disclose whether the decision had been actually arrived at by a unanimous vote or was only carried by a vote of the qualified majority, required as a minimum. This was considerably different from Nuremberg, where not only the judgment of the tribunal was made public but also any concurring and dissenting opinion. The Dachau practice was in this respect like the continental one that abides by the principle of secrecy in polling the judges. The Nuremberg practice, in accordance with Anglo-American tradition but not indispensable to the realization of the Anglo-American ideal of justice, might better have been avoided as a matter of occupation policy since it impaired the prestige of the Nuremberg judgments in the eyes of the German public.\textsuperscript{59}

Both in Nuremberg and in Dachau the defendant was given adequate opportunity for assistance by learned counsel.\textsuperscript{60} The routine was not,

\textsuperscript{57} Articles of War 43.
\textsuperscript{58} Art. XV of Ordinance No. 7, supra note 56.
\textsuperscript{59} Opponents of the war crimes trials in general or of particular convictions utilize the dissenting opinions in their respective crusades. For instance, the critics of Weiszaecker’s conviction in one of the subsequent Nuremberg trials (The Ministries Case, U. S. v. von Weiszaecker et al., Trials of War Criminals, case No. 11, vols. XII-XIV) exploit, for this purpose, Judge Powers’ forceful dissent in that case.
\textsuperscript{60} Article IV(c) of Ordinance No. 7, supra note 56. Ordinance No. 2, issued by General Eisenhower as Supreme Commander of the Allied Forces in Europe, establishing Rules of Procedure of Military Government Courts, quoted in Hearings, supra note 44, at 1205, 1206, contained the following provision (par. 3, (2)) applicable also in war crimes trials:

“Any lawyer not debarred from appearing by the Military Government or by the court, or any other person with the consent of the court, may appear as defending counsel. The court may appoint an officer of the Allied Forces, or with the consent of the accused
however, the same in the two systems. In Nuremberg the defense was mainly entrusted to German attorneys who were only in a few instances assisted by unofficial American counsel, retained by the defendant subject to special admission by the tribunal.61 The defense in the Dachau trials was chiefly in charge of officially assigned American counsel, but a great number of German attorneys, either retained by the respective defendant or officially assigned to him, were also engaged in this task.62 German counsel in Dachau would either act alone for a particular defendant or with liaison-assistance of officially assigned American counsel. Both in Nuremberg and in Dachau, former Nazi affiliation would not bar a German attorney from the function as defense counsel in a war crimes trial. No American defense counsel was officially assigned in any of the Nuremberg trials. Officially assigned American defense counsel in Dachau would be taken from a panel of legally trained officers and Department civilians, jointly available for prosecution and defense purposes. The same American official would have the opportunity of acting as a prosecutor in one Dachau trial and as a defense counsel in another one, held to the best possible performance of his respective duties in each of the two functions. No superior order or official or semi-official pressure impaired the American defense counsel’s freedom of action in accordance with his conscience and the dictates of professional ethics. Nor was there any discrimination to the disadvantage of defense with regard to the distribution of available legal talent.63

According to a famous dictum of the Supreme Court of the United States: "...charges of violations of the law of war triable before a mili-

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61 In the Krupp trial, the required special authorization by the Tribunal was for particular reasons denied to a member of the California Bar. However, American counsel was subsequently approved by the same tribunal for another defendant. Ferencz, Nurnberg Trial Procedure and the Rights of the Accused, 39 J. CRIM. L. & CRIMINOLOGY 145, 146-147.

62 See letter of Frederick K. Baer in Hearings, supra note 44, at 1238, stating "...the German attorneys who participated in these trials were most competent".

63 The American defense team in the Malmedy Case included among others a Colonel as Chief Defense Counsel, and a Lieutenant Colonel and two Department civilians who were members of various American Bars, as Assistant Defense Counsel. Hearings, supra note 44, at 1196. There were German attorneys in addition.
ticary tribunal need not be stated with the precision of a common law indictment.” In neither Nuremberg nor in Dachau was there any remarkable ambition to make the written act of accusation more specific than was required under that announcement. Nevertheless, the respective practice was not the same in the Nuremberg and the Dachau trials. The indictment in the Nuremberg trials, patterned after the form used in the case against Hermann Goering and others, did not fully conform with the “dossier” or “Anklageschrift” (brief of accusation), traditional in the criminal procedure of civil law countries. Nor did it have the highly technical and most uncommunicative contents of a common law indictment. It was however a workable compromise between the two and showed the result of skilful and rather sophisticated draftsmanship.

Turning from the form to the substance of the accusation, it should be mentioned that, again different from the Nuremberg practice, no charge in a Dachau trial was in terms based on the conception of a crime against humanity. Nor was there any charge of participation in a crime against peace. The accusations in Dachau were phrased in terms of the traditional war crimes. Finally, the charges in the Dachau trials did not include the accusation of membership in an organization declared as criminal by the International Military Tribunal in Nurem-

64 In re Yamashita, 327 U. S. 1, 17 (1946).
65 Text of indictment in Trial of War Criminals, Dep’t State Publication 2420, at 23 (1945).
66 Usually containing a narrative description of the charge involved with a statement of the particular facts supporting the accusation and a discussion of actual or prospective defense pleas, coupled with a listing of the evidence to be introduced by the prosecution. It should be noted that in the criminal procedure of civil law countries, the prosecuting authority has a quasi-judicial rather than purely party-character not only in theory but also in practice. Ferrari, The Procedure in the Cour d’Assises of Paris, 18 Col. L. Rev. 43, 49 (1918).
67 Among numerous discussions of this novel conception, pro: Goodhart, supra note 4, at 15-17, Brand, Crimes against Humanity and the Nuremberg Trials, 28 Ore. L. Rev. 93 (1949); contra: Morgan, The Great Assize 19 et seq. (1948), and Donnedieu de Vabres, Le Procès de Nuremberg devant les Principes Modernes Du Droit Pénal International, 70 Recueil des Cours, Académie de Droit International 505 (France 1948). See also the overall bibliographical note in Wright, supra note 2, at 42-43.
berg. There was only a single deviation from this generally followed principle.

Article X of Ordinance No. 7, governing the procedure in the later Nuremberg trials, contained the following provision:

The determinations of the International Military Tribunal in the judgment in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of facts stated, in the absence of substantial new evidence to the contrary.

A similar deviation from the normal limitations of the effect of res judicata was contained in a provision applicable to certain Dachau trials subsequent to June 26, 1946. In substance, it made findings of fact

69 Those organizations were: the Leadership Corps, the Gestapo, the SD and the SS. 1 Trial of the Major War Criminals Before the International Military Tribunal 261-273 (1947). See also: Wright, International Law and Guilt by Association, 43 Am. J. Int'l L. 746 (1949); Biddle, supra note 37, at 691; note, 17 U. of Chi. L. Rev. 148, 161 (1949).

70 In the so-called Superior Order Case of U. S. v Jurgen Stroop et al. (Dachau Trials) there was, among ten separate charges, one (charge 2) reading in part:

"That the accused, . . . were members of organizations declared criminal by the International Military Tribunal in Case No. 1, i.e., the Leadership Corps, . . . the Gestapo . . ., the SD . . . the SS . . ., after 1 September 1939, with knowledge that the said organizations were being used in the commission of acts declared criminal by Article 6 of the Charter of the International Military Tribunal, annexed to the agreement establishing the Tribunal, dated 8 August 1945, . . ."

71 See note 22 supra.

72 Directive of Headquarters, United States Forces European Theater, dated June 26, 1946, contained in its paragraph 11 the following lengthy provision:

"Mass Atrocity Subsequent Proceedings.

a. Certain mass atrocity cases have heretofore been tried, i.e., Hadamar, Dachau and Mauthausen cases wherein the principal participants in the respective mass atrocities were charged with violating the laws and usages of war under particulars alleging that they acted in pursuance of a common design to subject persons to killings, beatings, tortures, starvation, abuses and indignities, or particulars substantially to the same effect. The courts pronounced sentences in those cases, involving imprisonment and death and of necessity, in view of the issues involved therein, found that the mass atrocity operation involved in each was criminal in nature and that those involved in the mass atrocities acting in pursuance of a common design did subject persons to killings, beatings, tortures, etc.

b. With regard to subsequent proceedings against accused other than those involved in the initial or 'parent' mass atrocity cases heretofore or hereafter tried involving charges
in a parent case concerning a particular concentration camp, to a specified extent binding upon the tribunals in subsequent trials related to the same concentration camp. It was probably inspired by the special findings in the *Mauthausen Concentration Camp Case* and was obviously motivated by important considerations of practical convenience. It would have been a waste of time, efforts and costs to repeat the evidence concerning certain general features of a particular concentration camp, introduced in the parent case, in each of the numerous affiliated proceedings. It was not, it is submitted, inconsistent with international law requirements of due process of law, nor a handicap in the achieve-

and particulars substantially similar to those described in paragraph a, above, it is prescribed as follows:

“(1) After final action by the reviewing and confirming authority, if any, in connection with a parent mass atrocity case, this headquarters will appoint one or more Intermediate Military Government Courts to try such additional individuals as may be charged with participating in the mass atrocity.

“(2) In such trial of additional participants in the mass atrocity, the prosecuting officer will furnish the court certified copies of the charge and particulars of the findings and the sentences pronounced in the parent case. Thereupon, such Intermediate Military Government Courts will take judicial notice of the decision rendered in the parent case, including the finding of the court (in the parent case) that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, did subject persons to killings, beatings, tortures, etc., and no examination of the record in such parent case need be made for this purpose. In such trials of additional participants in the mass atrocity the court will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof.

“(3) The Intermediate Military Government Courts will examine the evidence presented to them bearing upon the nature and extent of the participation of the additional participants in the mass atrocity operations and pronounce such sentences, if any, as may be appropriate. ...”

73 Quoted in 11 Law Reports, op. cit. supra note 6, at 15.

74 There were about 7 “parent” cases involving six different concentration camps (Dachau, Mauthhausen, Flossenburg, Nordhausen, Buchenwald, Muehldorf). There were in addition about 170 subsequent proceedings related to one or the other of the above camps. Information by Col. Young, Chief, War Crimes Division, Office of the Judge Advocate General, in his letter of February 7, 1950, cited supra note 43. For a not exhaustive list of concentration camp trials see: *History of the United Nations War Crimes Commission*, op. cit. supra note 18, at 540-542.

75 See: Hyde, *Japanese Executions of American Aviators*, 37 Am. J. Int’l L. 480 (1943); Freeman, *War Crimes by Enemy Nationals Administering Justice in Occupied Territory*, 41 Am. J. Int’l L. 579 (1947); comments on The Criminal Aspects of the Denial of a Fair Trial in 5 Law Reports, op. cit. supra note 6, at 70; moreover quite a few pertinent war crimes trials including the *Justice* case, one of the subsequent Nuremberg trials, 6 Law
ment of substantial justice. The reversal of the normal distribution of the burden of proof, with regard to the accused's knowledge of the criminal nature of the concentration camp, was not consistent with the corresponding ruling of the International Military Tribunal regarding prospective proceedings for membership in criminal organizations, and was also otherwise objectionable from a technical angle. It was nevertheless not improper, it is believed, in the light of the particular mass atrocities involved.

An appeal technically was not provided for either in the Nuremberg or the Dachau trials. There was nevertheless a substantial difference between the two systems insofar as the final effect of the judgment was involved. In both systems it needed an executive confirmation. However, the military governor, passing upon a Nuremberg judgment, could only change a sentence in favor of the affected defendant, but he could not reform it *in pejus* nor set aside or alter any finding of the court regarding guilt or innocence respectively. In the Dachau trials, the judgments were subject to review and approval through channels.

Reports, *id.* at 1; the French trial of Robert Wagner and others, 3 Law Reports, *id.* at 23, 27.

76 Art. XV of Ordinance No. 7, *supra* note 56:
"The judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review. The sentences imposed may be subject to review as provided in Article XVII, *infra.*"

Art. XVII(a), reading in part:
"... the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof".

The judgment in the Krupp trial was confirmed but with a certain alteration of the sentence of confiscation in the case of the principal defendant. Contrary to doubts expressed in certain newspaper comments on this part of General Clay's action, it is believed that he thereby did not overstep the boundaries of his power of review under the above-quoted Art. XVII.

77 Before the war crimes trials had become a matter exclusively within the purview of the Theater Commander, as the sole "appointing" authority, two levels of review and confirmation existed with regard to certain judgments. All judgments had to be reviewed by the Army Commander as the then appointing officer whose action was final if it amounted to an acquittal or to the approval of a conviction with imposition of a sentence other than death sentence. Death sentences, however, needed in addition confirmation by the Theater Commander who would then review the case of the affected defendant both concerning guilt and sentence. After the Theater Commander had become the sole appointing officer, each judgment was directly subject to his review and confirmation, but with regard to judgments not involving death sentences or sentences to imprisonment for life, he would generally delegate the exercise of his power to the Theater Judge Advocate.

1 Law Reports, *op. cit.* *supra* note 6, at 121, 124.
The appropriate military commander could not only alter a sentence but had the power of setting aside a finding of guilt. However, he had no power of setting aside an acquittal no matter how unjustified he may have found it. In any of these actions he was guided, though not bound, by an opinion of his Judge Advocate, commonly referred to as the "review" or "post-trial review". It was normally an elaborate write-up examining the trial record with regard to sufficiency of the evidence as well as legal problems involved. It served, however, only inter-office purposes and was not open for inspection by a defendant or his counsel.

The question may well be raised whether there was any need for two different systems of war crimes trials in the American occupation zone of Germany. Why have both the Dachau and Nuremberg trials? The reason for this duplication was indeed not one of logic but of history. The Dachau proceedings revived the tradition of military commissions trying captured enemy nationals for violations of the laws of war. The subsequent specially appointed military government courts were not part of the normal system of occupation courts established under this name. They were only by their designation different from the military commissions which had been their predecessors in carrying out the American war crimes trial program in Germany. The numerous so-called "flier cases", that is, trials against Germans who had participated in the lynching of bailed out American or British fliers, were of course much closer to the traditional activities of military commissions trying war criminals than the trials involving mass atrocities against civilians of Allied, but not American, nationality. In the last mentioned

78 Under rules applicable to proceedings before military government courts, the reviewing authority could not only reduce a sentence but also increase it in any case in which a petition for review has been filed which is considered to be frivolous. 1 Law Reports, op. cit. supra note 6, at 124. However, no use was ever made of this provision in a war crimes case. For all practical purposes, the review was considered a matter exclusively in the interest of the defendant, regarding both guilt and sentence.

79 See Ex parte Quirin, 317 U. S. 1 (1942); In re Yamashita, 327 U. S. 1 (1946); Colby, War Crimes, 23 Mich. L. Rev. 482 (1923); Kaplan, Constitutional Limitations on Trials by Military Commissions, 92 U. or Pa. L. Rev. 119, 120 (1943); Jackson, Report to the President, op. cit. supra note 17, at 1071.


81 See for instance the cases in 1 Law Reports, op. cit. supra note 6, at 46 (Hadamar trial).

82 No United States national was among those exterminated at Hadamar, it is pointed
group of cases, American jurisdiction was nevertheless asserted on the basis of the alleged principle of universality of war crimes jurisdiction. The idea was apparently to have a series of trials against major war criminals in continuation of the International Military Tribunal Case but without Soviet participation. It was in line with this consideration that cases of major importance should be tried in Nuremberg and in close approximation to the pattern established there in the case against Hermann Goering. This automatically ruled out the military commissions and the sober arrangement of trials before them with practically no publicity at all. Rather it seemed preferable to retain and adjust the spectacular Nuremberg scene with the forms, technical paraphernalia and procedures developed there during the International Military Tribunal trial. In other words, the grand judicial show in Nuremberg should be continued in all its external aspects but as an American rather than an international performance.

A rather flexible European Theater directive defined the internal relationship between the two systems of war crimes trials. The theoretical line of demarcation thus drawn was rather vague. The actual practice after the establishment of the later Nuremberg tribunals was that the Chief of Counsel for War Crimes in Nuremberg selected

out by Cowles, Trials of War Criminals (Non-Nuremberg), 42 AM. J. INT'L L. 299, 312 (1948).


84 CLAY, op. cit. supra note 39, at 251. Intimated also by Jackson, Final Report to the President, 15 DEPT STATE BULL. 771, 773 (1946).

85 The judicial recognition of an international rather than American character of the subsequent Nuremberg trials is of course not quite in line with this rationale.

86 Letter of Headquarters, U. S. Forces, European Theater, dated 26 October 1946, subject: Coordination of War Crimes Activities. According to its paragraph 2 the Theater Judge Advocate remained in charge of the prosecution of:

a. war crimes involving American nationals as victims;

b. mass atrocities committed in the American zone of occupation;

c. such other war crimes as shall be, from time to time, assigned to the Theater Judge Advocate for action by the Theater Commander."

Under its paragraph 3, the Chief of Counsel for War Crimes was mainly responsible for the prosecution of:

"a. leaders of the European Axis powers and their principal agents and accessories, and

b. such of the members of groups and organizations declared criminal by the International Military Tribunal as the Chief of Counsel for War Crimes may determine to prosecute"
for his organization cases of top exponents of certain professional lines of cooperation with criminal policies of the Third Reich. The remaining bulk of the cases was handled as before, by the Theater Judge Advocate, more specifically by his Deputy for War Crimes. His was the general jurisdiction as it were; the Chief of Counsel for War Crimes had a special one.

It would be a mistake, however, to believe that only small fry were taken to account in the Dachau trials and that all the "big shots" were tried in Nuremberg. For instance, three army generals, one of them an army and one a corps commander, were among the defendants in the Malmedy trial. A police general was the main accused in another important Dachau case. A "Gauleiter and Reichsstatthalter" figured among those indicted in the Mauthausen Concentration Camp trial. A Luftwaffe colonel who had startled the whole world by the sensational way in which he had rescued Mussolini from his confinement in Italy, was charged, in one of the Dachau trials, with war crimes allegedly committed in connection with the Malmedy offensive but obtained an acquittal. Several members of the medical profession were among the defendants in the Hadamar trial and in various concentration camp cases. Commanders of concentration camps were also tried in Dachau. A prince was among those accused in the Buchenwald concentration camp trial.

**Jurisdictional Basis of the Dachau Trials**

Even within the domestic criminal laws of the various nations, the so-called principle of territoriality has long ago ceased to be the exclusive or almost exclusive criterion for the assumption of jurisdiction. Roughly defined, this principle postulates that a crime be brought to justice by the judiciary of the country where it has been committed, the country of the *locus delicti comissi*. In a recent study on the problem of international criminal justice, it is well pointed out that various principles other than that of territoriality have become firmly embodied in the law of today as factors determining criminal jurisdiction. They are: the principle of active personality by virtue of which the criminal law of a state extends to its subjects committing offenses abroad; the principle of passive personality under which a state undertakes to punish offenses committed abroad if the victims are its sub-

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87 Glueck, War Criminals, *op. cit. supra* note 5, at 81.
jects; the principle of paramount national interests according to which the state applies its own law for the protection of certain of its interests, whatever the place of the offense or the nationality of the offender may be;99 finally, and most important in the present connection, some systems of law admit the principle of universality of criminal jurisdiction with regard to certain offenses considered as dangerous to all civilized nations. Assumption of jurisdiction on this cosmopolitan ground, as it were, may either be provided for only in case the state in the territory of which the crime has been committed does not take care of the necessary punitive action,90 or as a claim of jurisdiction concurrent with that of the state which would be called upon by the principle of territoriality. It was claimed by the prosecution and accepted by the tribunals in the Dachau trials that the principle of universality of jurisdiction in its last mentioned extreme sense, was applicable as a criterion for the jurisdiction of American military commissions or American military government courts in Germany to try persons accused of having violated the laws of war. This principle of "Universality of Jurisdiction over War Crimes", ably expounded in an article by Professor Cowles,91 was adopted also by other than American war crimes tribunals.92 The above mentioned article concludes with the following proposition:

In the light of practice, and the basic principle and tests enunciated by the Permanent Court of International Justice in the Lotus case, it is clear that, under international law, every independent State has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offense was committed.93

In previous parts of the same paper, the learned writer points out:

Actual practice shows that the jurisdiction assumed by military courts, trying

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99 Professor Pella calls it "the principle of real protection". Ibid.
90 For instance, the Criminal Code prevailing in Austria before the "Anschluss", contained in its paragraphs 39, 40, the principle that a foreigner who had committed a crime abroad should as a rule be extradited to the country which was the scene of its perpetuation, but that he was to be prosecuted and punished in Austria if that foreign country should decline to accept his extradition.
91 Cowles, supra note 83, at 218.
92 For instance, in the trial of Tomono Shimio, of the Japanese Army, by a British military court at Singapore, the accused was charged, found guilty and sentenced to death for having unlawfully killed American prisoners of war in French Indo-China. 1 Law Reports, op. cit. supra note 6, at 106.
93 Cowles, supra note 83, at 218.
offenses against the law of war, has been personal, or universal, not territorial. The jurisdiction, exercised over war crimes, has been of the same nature as that exercised in the case of the pirate, and this broad jurisdiction has been assumed for the same fundamental reason.

It is not being suggested in this paper that there is an international obligation to try and punish such offenses, or that a custodian government should punish a war criminal if another government has a primary interest in punishing him. . . . The doctrine of *forum non conveniens* should, of course, be applied by States in these cases. But, while the State whose nationals were directly affected has a primary interest, all civilized States have a very real interest in the punishment of war crimes. . . . And an offense against the laws of war, as a violation of the law of nations, is a matter of general interest and concern.94

This view was taken over into the theory and practice of the Dachau trials as appears for instance from that portion of the review of the Deputy Judge Advocate for War Crimes in the *Buchenwald Concentration Camp Case* which is entitled "Universality of Jurisdiction over War Crimes". It is there said, among other things:

A validly constituted court of an independent state derives its powers from the state. A state is independent of all other states in the exercise of its judicial power, except where restricted by the law of nations (S. S. *Lotus, France v. Turkey*, 2 Hudson World Court Reports 23). Concerning punishment for a crime of the type involved in the instant case, it has been stated that the sovereign power of a state extends "to the punishment of piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed" (Wheaton's "International Law", Sixth Edition, Volume I, page 269). . . . Any violation of the law of nations encroaches upon and injures the interests of all sovereign states. Whether the power to punish for such crimes will be exercised in a particular case is a matter resting within the discretion of a state. However, it is axiomatic that a state, adhering to the law of war which forms a part of the law of nations, is interested in the preservation and the enforcement thereof. This is true, irrespective of when or where the crime was committed, the belligerency status of the punishing power, or the nationality of the victims. . . .95

In adherence to this principle, crimes not committed in American territory were tried by American military commissions or military government courts in Germany not only where the victims were American nationals but also where no American victim was involved, as for

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94 *Id.* at 217.
95 *Conduct of Ilse Koch War Crimes Trial. Hearings before Investigations Sub-committee of the Committee on Expenditures In the Executive Departments on S. Res. 189*, United States Senate, 80th Cong., 2d Sess., at 1212 (1949).
instance in the Hadamar Trial, or those incidents charged in the Malmedy Case where the victims were Belgian civilians. Moreover, in the Buchenwald Concentration Camp Case, American war crimes jurisdiction was assumed over crimes which had been committed in a part of Germany belonging to the Russian zone of occupation, and in the Malmedy Case American war crimes jurisdiction was asserted with regard to crimes that had been committed on Belgian territory. It should be noted, however, that as a matter of international courtesy, it was only decided to try the Buchenwald Concentration Camp Case in Dachau after the Russians had declined to have it tried in their own zone and at the same time had declared they had no objection to an American trial of the case. Similarly, in the Malmedy Case, consent of the Belgian Government to the trial of the offenses committed on Belgian territory against Belgian civilians was obtained.

The principle of universality of war crimes jurisdiction and its application in cases where no American victim was involved and where the offense was committed not only outside American territory, but also outside of Germany, was attacked by defense counsel on numerous occasions. It was, for instance, claimed that it was contrary to the Moscow Declaration. It should be mentioned in this connection that the determination of the Allies to punish war criminals of the European Axis found its first important expression at the Moscow Conference, especially in the “Declaration on German Atrocities”, dated October 30, 1943. Therein, the Governments of the United Kingdom, the United States and the Soviet Union jointly declared that “German officers and men and members of the Nazi Party, who have been responsible for, or have taken a consenting part in atrocities, massacres and executions” in the countries overrun by German forces, “will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries and of the free governments which will be created therein”. They further stated that this declaration was “without prejudice to the

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96 United States v. Alfons Klein et al., 1 LAW REPORTS, op. cit. supra note 6, at 46 et seq., and KINTNER, THE HADAMAR TRIAL (1949).
97 United States v. Valentin Bersin et al., commonly referred to as the Malmedy Case.
98 United States v. Josias Prince zu Waldeck et al., commonly referred to as the Buchenwald Concentration Camp Case.
99 Argument in the petition for habeas corpus on behalf of the defendants in the Malmedy Case. Hearings, supra note 44, at 1181, 1185-1186.
case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies".100 However, this declaration or any other interallied announcement following it, had certainly not the purpose of depriving any of the Allied Governments of a war crimes jurisdiction theretofore possessed under generally applicable international law. It should be mentioned in this connection that the London Agreement for the establishment of the International Military Tribunal in Nuremberg, in its Article 6 expressly provided:

Nothing in this agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.101

Moreover, the Moscow Declaration was not the source of inspiration for the establishment of the American military commissions and military government courts for the trial of war criminals in Germany. Rather they represent a revival of the traditional "military commission"102 which was recognized by the Supreme Court of the United States in two leading World War II cases.103

In ex parte Quirin, the Supreme Court stated among other things:

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and

100 See The Charter and Judgment of the Nurnberg Tribunal, Memorandum submitted by the Secretary-General, United Nations, 3, 87-88 (1949).
101 Quoted in, Trial of War Criminals, DEP'T STATE PUBLICATION 2420 at 14 (1945).
102 On the importance of General Scott's famous Order No. 20, issued during the Mexican War, for the development of the "military commission", see Colby, War Crimes, 23 Mich. L. Rev. 482, 485 et seq. (1925). Cowles, supra note 83, at 204, states:
"The jurisdiction exercised by United States military courts has always been personal, not territorial, even as to members of the United States forces. The same is true of United States military commissions, which are the United States tribunals which try war crimes".
punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.104

In this connection, it should be mentioned that the above-cited Article of War No. 15, before the 1948 amendment of the Articles of War provided and still provides as follows:

The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals.108

In the *Yamashita* case, the majority opinion of the Supreme Court among other things, stated:

(a) The congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war . . . sanctioned their creation by military command in conformity to long-established American precedents. Such a commission may be appointed by any field commander, or by any commander competent to appoint a general court martial . . . 106

(b) We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.107

The historical development of the "military commission" as a special kind of military tribunal has been one of practice rather than of theory and it is, therefore, and in view of the very flexible nature of this in-

104 *Ex parte Quirin*, 317 U. S. 1, 27 et seq. (1942).


106 *In re Yamashita*, 327 U. S. 1, 10 (1946).

107 Id. at 12.
stitution, difficult to give a precise definition thereof. According to a recognized authority on American military law, "... in our military law, the distinctive name of military commission has been adopted for the exclusively war-court, which ... is essentially a distinct tribunal from the court-martial of the Articles of War".108 According to one of the introductory statements in the official Manual for Courts—Martial U. S. Army, 1949 the characteristic of military commissions as well as of provost courts would seem to be that these tribunals are summary in nature. It is perhaps safe to say that two elements are essential for the military commission as distinguished from a regular court martial:

(a) A military commission is a type of military tribunal applied only during a war, from the beginning of hostilities until the conclusion of a peace treaty, mostly in the theater of war or in occupied territory, but also in the zone of the interior,109 for the purpose of allowing a more summary procedure than the one subject to all the rules applicable before a court martial;

(b) The trial before a military commission is not subject to the technical rules of procedure which are applicable in a court martial case. Rather, the commander appointing a military commission may prescribe special rules of procedure applicable before it.110 Articles of War 25 and 38 contain very important qualifications of the just mentioned principle, especially concerning rules of evidence.111 However,

108 Winthrop, Military Law and Precedents 831 (2d ed. 1920).
109 For instance, the Commission convened July 8, 1942, to try the saboteurs, Ernest Peter Burger and 7 other defendants including Herbert Hans Haupt and Richard Quirin. Fed. Reg. 5103 (1942). It was sitting in Washington, D.C. This was the case subsequently reviewed by the Supreme Court of the United States in Ex parte Quirin, supra note 104.
110 President Franklin D. Roosevelt's decree appointing the Military Commission, supra note 109, provided:

"The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of the military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence."

111 Article 25 prescribes conditions for the admissibility of depositions. More important is Article 38, reading:

"The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall,
according to the majority opinion of the Supreme Court in the *Yamashita* case, 112 forcefully challenged in the dissent of Mr. Justice Rutledge, 113 these exceptions do not apply to military commissions trying enemy aliens, but only to military commissions trying persons subject to military law under Article of War No. 2 that is, generally speaking, members of American armed forces. 114

While the post-armistice power of the American occupation army in Germany to establish military commissions for the trial of war crimes cases appears to be well established by the above-quoted opinion of the Supreme Court in the *Yamashita* case, it seems doubtful whether it was good policy to try German defendants for alleged violations of the laws of war before tribunals and under rules of procedure which are not considered a sufficient guarantee for the attainment of justice in a corresponding trial against an American soldier. An extremely contrary approach underlies the following statement of a distinguished member of the Judge Advocate’s Division of the Department of the Army:

> The spotlight which has played on the international military trials at Nuremberg and elsewhere has left in relative darkness and obscurity the trials by the military commission of the American fighting and occupation forces. The military commission might have been used to try the major war criminals and, had it been used, the trials of such criminals might have been more expeditious and conducted more in accord with established military and legal procedure. 115

At any rate, the first war crimes trials sponsored by the United States Army in Germany were conducted before military commissions which were such tribunals not only in fact but also by official designation. 116

112 *In re Yamashita*, 327 U. S. 1, 20 (1946).

113 Id. at 73.


115 Green, *supra* note 103.

116 Information received from Colonel Edward H. Young, in a letter dated February 7, 1950, *supra* note 43.
From some time in the winter of 1945 onward, the trials were conducted before so-called specially appointed military government courts which, it is submitted, were nevertheless military commissions for all practical purposes.\(^{117}\) In between there was a period of transition where certain war crimes trials were held before military commissions so designated, and others before specially appointed military government courts.\(^{118}\)

In the first instances of trials before commissions, they were conducted under \textit{ad hoc} rules. A general announcement of rules applicable to war crimes trials before military commissions was only made on August 25, 1945, in the form of a letter of USFET (United States Forces European Theater).\(^{119}\) It was under this so-called European directive that for instance the \textit{Hadamar Case} was tried. Meanwhile, the Military Government in Germany had provided for the creation of general, intermediate and summary military government courts, prescribing in Article II, among other things, that they should have jurisdiction over "... all offenses against the laws and usages of war".\(^{120}\) \textit{A Technical Manual for Legal and Prison Officers, Military Government, Germany}, contained along with \textit{Ordinance No. 2}, elaborate "Rules of Procedure in Military Government Courts"\(^{121}\) and a "Guide to Procedure in Military Government Courts". From the last mentioned "Guide" it appears that contrary to the above-mentioned wording of \textit{Ordinance No. 2}, it was not intended to turn over the jurisdiction over war crimes trials to the regular occupation courts termed "military government courts" which were created by \textit{Ordinance No. 2}.\(^{122}\) As a matter of fact, General Eisen-

\(^{117}\) No definite explanation of the changeover from trials before military commissions to trials before military government courts is contained in the pertinent testimony of Colonel Mickelwaite, \textit{Hearings, supra} note 44, at 915.

\(^{118}\) For instance, the "fler" case against Karl Bloch and Karl Neunobel was on October 12, 13 and 15, 1945, tried before a military commission of the Seventh Army at Heidelberg while the "fler" case against Clemens Wiegand was on October 15 and 16, 1945, tried before a general military government court in Heidelberg, also appointed by the Seventh Army.

\(^{119}\) The full text of this directive appears in Annex I to this study.

\(^{120}\) \textit{Ordinance No. 2}, Military Government, Germany. Supreme Commander's Area of Control (1945).

\(^{121}\) \textit{Hearings, supra} note 44, 1205 et seq.

\(^{122}\) The \textit{Guide} provides in par. 5(b):

"The jurisdiction of Military Government Courts only arises in respect of offenses committed subsequent to occupation. Offenses committed prior to occupation must be left to be dealt with by German courts unless they come under the category of War Crimes. The manner in which war criminals in general are to be dealt with will form
hower, in his capacity as Commander, United States Forces, European Theater, issued a directive dated July 16, 1945, subject "Trial War Crimes and Related Cases" paragraph one of which reads:

1. General.

a. As a matter of policy, cases involving offenses against the laws and usages of war or laws of occupied territory or any part thereof commonly known as war crimes, together with such other related cases within the jurisdiction of Military Government courts as may from time to time be determined by the Theater Judge Advocate, committed prior to 9 May 1945, shall be tried before the specially appointed courts provided for in this directive. Such trials in the United States Army zone of occupation will hereafter be conducted before Military Government courts, except where otherwise directed by the Theater Commander.

b. Charges against persons accused of offenses of the character described above will originate in the Office of the Theater Judge Advocate, will be processed through Army Judge Advocates to trial by specially appointed Military Government courts, and will be reviewed by Army Judge Advocates prior to approval of sentences in accordance with procedures herein provided. 123

In the further paragraphs of this directive, those procedural matters were set forth in which for the trial of war crimes cases by the specially appointed military government courts different rules should prevail from those applicable before the regular military government courts. This directive became the charter, as it were, of the war crimes trials conducted by specially appointed military government courts, gradually replacing those held before "military commissions". As a matter of fact there was no important difference between a war crimes trial before a "military commission" so designated and a specially appointed military government court. Also these military government courts were appointed ad hoc, that is, separately and specifically for each case. They had in common with the military commissions so designated that they were American military tribunals proceeding under rules different from those applicable before a court martial. In other words, they were, as suggested hereinbefore, nothing else than the same military commissions under a different name.

The above quoted directive of July 16, 1945, underwent several amendments the most important of which was the one contained in a

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123 The full text of this directive appears in Annex II to this study.
letter dated July 11, 1946. While in the beginning of the program both the Third and the Seventh Army had functioned as commission or court appointing commands, the directive of July 11, 1946, made the theater command the only appointing authority. Among other interesting innovations, this directive contained also a particular provision on proceedings subsequent to mass atrocity cases. Among changes of the procedure introduced subsequent to the directive of July 11, 1946, there was the option given to the defendant to testify in the trial either under oath or unsworn.

It is obvious that the position of a defendant in a war crimes trial before an American military commission or an American military government court in Germany was less favorable than the position of a defendant before a United States court martial. For instance, according to Article of War 43, a unanimous vote of the members of a general court martial is required for death sentences and a three-fourths vote for sentences to life imprisonment or to confinement for more than 10 years, whereas both military commissions and military government courts could reach a finding of guilt and impose any sentence, including death, with the concurrence of two-thirds of the commission or court. Moreover, and perhaps more important, in a court martial the defendant is given the great advantage of the so-called exclusionary rules of the Anglo-American law of evidence. Under these rules, a great part of the evidence admitted in the American war crimes trials in Germany would not have been admissible in a court martial proceeding, either because it constituted improper hearsay evidence or improper opinion evidence or because the prescribed foundation was not properly laid, or on other technical grounds.

This striking difference between the position of a defendant in one

125 This change was made subsequent to the trial of the Malmedy Case. Testimony of Colonel Dwinell, Hearings, supra note 44, at 419. The practice prevailing before, is thus stated in the Rules of Procedure in Military Government Courts, par. 10 (5):
   "... If the accused chooses to testify... he may do so, but he may not be required to do so and shall not be sworn." Id. at 1208.
127 See: par. 1 (d) of the directive dated August 25, 1945, (Military Commissions) and par. 4 of the directive dated July 16, 1945, (Military Government Courts), in Annexes I and II to this study.
of the war crimes trials in question and the one of a defendant in an American court martial, gave defense counsel of those accused who had been members of the German Army, the opportunity of raising a special jurisdictional issue, related to the Geneva (Prisoners of War) Convention of July 27, 1929. It provides in its Article 63 as follows:

Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.129

Defense Counsel claimed that the accused former members of the German armed forces were to be considered as prisoners of war, therefore entitled to the privilege under the above quoted Article 63 and consequently triable only before a U. S. court martial and under the rules applicable thereto. The same jurisdictional objection had been raised before the American commission trying the German General Anton Dostler at Rome in the period October 8-12, 1945. The commission held Article 63 inapplicable without announcing its reasons for this conclusion.130 A full discussion of the problem of interpretation involved, is however presented in the majority opinion and in one of the dissenting opinions in the Yamashita case. Dealing with a similar jurisdictional objection on behalf of the Japanese General, the majority opinion of the Supreme Court of the United States reached the result that Article 63 of the Geneva Convention was applicable only to a proceeding for an offence committed by the defendant in question while he was a prisoner of war but not to a proceeding for an offence committed while he was still a combatant.131 This conclusion and a corresponding one simultaneously reached regarding Article 60 of the same Convention, was derived from the setting in which the articles in question are placed in the Geneva Convention. In a very forceful dissenting opinion, Mr. Justice Rutledge wrote on this point among other things:

Neither Article 60 nor Article 63 contains such a restriction of meaning as the Court reads into them. In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before capture or later. Policy supports this view. For such a construction is required for the security of our own soldiers, taken prisoner, as much as for that of prisoners we take. And the oppo-

130 1 Law Reports, op. cit. supra note 6, at 22, 29 et seq.
131 In re Yamashita, 327 U. S. 1, 21 (1946).
site one leaves prisoners of war open to any form of trial and punishment for offenses against the law of war their captors may wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offense. This, in many instances, would be to make the treaty strain at a gnat and swallow the camel.\textsuperscript{132}

It should also be mentioned that in its protest against the Japanese trial and execution of American aviators, the United States Department of State took a contrary position to that subsequently approved by the Supreme Court in the \textit{Yamashita} case since it invoked several articles of the Geneva Convention, including Article 60, which in the light of the majority opinion in the \textit{Yamashita} case would not be applicable to a proceeding for an alleged crime committed before captivity.\textsuperscript{133}

In the latest of the so-called subsequent Nuremberg judgments, concluding the \textit{High Command case},\textsuperscript{134} the problem was again discussed. While mainly relying on the majority opinion in the \textit{Yamashita} case, the Court added a supporting argument of a highly technical and hardly persuasive nature.\textsuperscript{136}

At any rate, the law laid down by the majority opinion in the \textit{Yamashita} case was sufficient for the refutation of the above-mentioned specific jurisdictional issue raised in several American war crimes trials in Germany. Prosecution claimed also a second ground for the alleged inapplicability of Article 63 of the Convention, namely that a war crimes suspect was as such not entitled to the treatment as prisoner of war. The correctness of this proposition would seem to be highly doubtful in spite of a certain support in vague statements from authoritative sides.\textsuperscript{136} A mere suspicion cannot be held sufficient for the withholding of a privilege which is admittedly only forfeited in case the crime suspected has actually been committed.\textsuperscript{137}

\textsuperscript{132} \textit{Id.} at 76.

\textsuperscript{133} Press release of April 21, 1943, 8 \textit{Dep't State Bull.} 337 \textit{et seq.} (1943).

\textsuperscript{134} Officially designated as: United States v. Wilhelm von Leeb et al. Reported in 12 \textit{Law Reports, op. cit. supra} note 6, at 1.

\textsuperscript{135} \textit{Id.} at 63.

\textsuperscript{136} \textit{E.g.,} 2 \textit{Wheaton's International Law} (7th English ed., Keith, 1944); \textit{Flory, Prisoners of War} 37 (1942); \textit{Cowles, Trials of War Criminals (Non-Nuremberg)}, 42 \textit{Am. J. Int'l L.} 299, 305 (1948); \textit{Jackson, Report to the President}, 12 \textit{Dep't State Bull.} 1071, 1072 (1945).

\textsuperscript{137} The following lines of approach were not touched by the opinions of courts dealing with the applicability of Art. 63 of the \textit{Geneva Convention} to crimes committed by a prisoner of war before his capture:

(a) Whether the fact that in principle also a member of the American Army may be
In conclusion, it would seem that the jurisdiction of the military commissions in question, partly named so, partly baptized as military government courts, could be technically justified by the principle of universality of war crimes jurisdiction and by reference to the majority opinion of the Supreme Court of the United States in the Yamashita case. The question remains nevertheless whether it was politically sound to make such a vast application of an extraordinary type of military tribunal, operating under special rather than generally prevailing rules of procedure and especially of evidence, in a country under post-armistice occupation which should be impressed with profound respect for democratic ways of justice. It may be noted in this connection that the Germans consider extraordinary courts or "Sondergerichte", as they call them, as one of the instruments used by dictatorial regimes. The so-called Bonn Constitution or Basic Law for the Federal Republic of Germany provides in part of its Article 101:

Extraordinary courts shall be inadmissible. No one may be prevented from appearing before his lawful judge.\textsuperscript{138}

Similar provisions were contained in pre-existing democratic constitutions of several "Laender".\textsuperscript{139}

\textsuperscript{138} From the agreed Anglo-American translation at p. 27.

\textsuperscript{139} For instance, Art. 86 of the Constitution of the Free State of Bavaria adopted December 1, 1946 provided:

"Extraordinary courts are forbidden. No one may be deprived of his lawful judge." CONSTITUTIONS OF THE GERMAN LAENDER, Civil Administration Division, Office of Military Government (U. S.), at 60 (1947).
PROCEDURE AND PRINCIPLES OF EVIDENCE IN THE DACHAU TRIALS

a. Requirement of a Fair Trial.

In his classical exposition of the *Pure Theory of Law*, Professor Kelsen emphasized the rudimentary stage of development of international law. Writing in 1934, he stated in substance that the law of nations was still a primitive system of law since the injured nation itself had to be the judge as to whether an incident complained of constituted an offense for which another nation could be held responsible. In the same connection he pointed out that the sanctions of reprisal and war represented that method of self-help which had marked the beginning of the development of domestic systems of law.\(^{140}\)

This observation would seem to be particularly true with regard to the punitive reaction against war crimes or violations of the laws of war. The ideal situation would, of course, be that such offenses could be prosecuted and brought to justice before a permanent tribunal rather than one created *ad hoc*; that the selection of the judges and the conduct of the procedure would be subject to permanent rules rather than a matter for the discretion of one or more of the nations opposed in a belligerent conflict; that such tribunal could be invoked even after the termination of a war by a peace treaty; and that it would have the jurisdiction to try members of victorious nations as well as members of defeated nations for alleged war crimes, rather than to be merely "victors' justice". The problem involved is not limited to the field of war crimes, but the general one of the need for an international criminal court. Most valuable studies and proposals have been made in this direction by distinguished bodies and scholars.\(^{141}\) However, in 1949 an outstanding American authority made a rather pessimistic forecast of the probability of materialization of such projects in a near future,\(^{142}\) and no realistic view of the development thereupon in the scene of world affairs, can fail to admit that the trend has been retrogressive rather than progressive. An interesting suggestion of a more moderate nature,

\(^{140}\) Kelsen, *Reine Rechtslehre* 131-132 (1934).


\(^{142}\) Hudson, *International Tribunals: Past and Future* 186 (1944), stating:

"Whatever course of development may be imminent with reference to political organization, the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts of either of States or of individuals."
amounting to the proposal of an international agreement on uniform domestic rules on the trial of war criminals, is contained in the report of the subcommittee of the United States Senate concluding its investigation of the Malmedy Case.143

Whatever the law of the future may be, the present law on the trial of war crimes certainly shows strong resemblance to the method of self-help characteristic, according to Professor Kelsen, of a primitive system of law while it is limited to the contingency of legitimate self-defense in the modern domestic laws. It is self-help subject to the requirement of the determination of guilt and sentence in a judicial procedure conducted with observance of the minimum elements of a fair trial. It is justice which is a belligerent action invoked only until the conclusion of a peace treaty, though also after the termination of the actual fighting by an armistice.144 It is well established that a belligerent nation may punish captured enemy nationals for alleged violations of the laws of war. While this right is only in isolated instances resorted to during the actual fighting, due to the reciprocal fear of counter-measures colored as reprisals, its most frequent application occurs in the post-armistice period where it is obviously limited to the prosecution of members of defeated nations. Nothing in the present international law limits the discretion of a belligerent State in its decision as to whether the war crimes trials of captured enemy nationals should take place before its ordinary civil or military courts or before tribunals established ad hoc, including especially military commissions, and nothing in the present international law prevents a belligerent State from exercising its own judgment as to whether or not special rules of procedure, announced ad hoc, should prevail in those trials.

There is, however, a most important qualification of the foregoing proposition. Nobody must be convicted and sentenced for an alleged

143 Sen. Rep. supra note 47, at 34, containing among other recommendations the following one, that:

"1. The Secretary of Defense, through proper channels, request the United Nations to thoroughly study the problem of war crimes; that uniform rules of procedure be agreed upon for the trial of war criminals, as distinct from prisoners of war, and, as rapidly as possible, that such rules be made a part of the codes of justice of the various nations. It is believed that such rules should provide more civilian participation in war-crimes cases than present procedures allow. Pending decision on this matter by the international agencies, necessary legislation should be introduced to remove any legal obstacles in the way of remedial procedural action by the United States."

144 In re Yamashita, 327 U. S. 1, 12 et seq. (1946).
War crime without being given the benefit of those minimum guarantees of justice which are implied in the conception of a fair trial in the most general and elementary sense of this phrase. There are occasional statements from distinguished authorities that the major war criminals could have been punished by administrative fiat\textsuperscript{145} and that therefore any kind of trial was more than they were entitled to. However, from other distinguished sources it has been emphasized that, to do so, would have been a war crime in itself,\textsuperscript{146} and certain adjudications in World War II war crimes trials would seem to bear out this proposition.\textsuperscript{147} A fair trial, in the above mentioned sense, may require more or less than is inherent in the national standard of due process of law prescribed by the domestic system of the nation sponsoring the procedure involved.\textsuperscript{148} The situation would be different to a certain extent if the Supreme Court of the United States, in its majority opinion in the Yamashita case, would not have limited the applicability of Article 63 of the Geneva Convention on the treatment of prisoners of war to the trial for offenses committed by the prisoner during his captivity.\textsuperscript{149} This ruling has become the generally accepted law even though it is very doubtful whether its highly technical reasoning, challenged in Justice Rutledge's forceful dissent,\textsuperscript{150} is consistent with the spirit and the purpose of said Article 63. A prisoner of war needs even more protection in a procedure instituted for a crime allegedly committed before his capture than in a procedure involving a crime allegedly committed subsequent to his falling into enemy hands. However this may be, a recognition of the requirement of a fair trial in the general and elementary sense of this conception seems to be inherent in the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948. It provides in part:

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

\textsuperscript{145} For instance, Glueck, The Nuremberg Trial \textit{op. cit. supra} note 5, at 8-9.

\textsuperscript{146} Goodhart, \textit{supra} note 4, at 18-19; dissenting opinion in the Tokyo Trial by Justice Pal (India), at 178.

\textsuperscript{147} See for instance the Trial of General Tanaka Hisakasu et al., \textit{5 Law Reports, op. cit. supra} note 6, at 66 \textit{et seq.}, and editorial comments at 70; also \textit{15 Law Reports, id.} at 60-61.

\textsuperscript{148} Wright, \textit{supra} note 137, at 402, 405.

\textsuperscript{149} \textit{In re Yamashita}, 327 U. S. 1, 20 \textit{et seq.} (1946).

\textsuperscript{150} \textit{Id.} at 41 \textit{et seq.}
Article 11. (1) Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.\(^{151}\)

b. General Character of the Procedure.

Those responsible for the war crimes trials by American military commissions or military government courts in Germany were inspired by the honest desire to give the defendants the full benefit of a fair trial. The sentence: "hang them after a fair trial", if understood in a malicious sense, is certainly a gross misrepresentation of the leading idea of the program, as appears from the fact of numerous acquittals by the courts and numerous instances of convictions set aside by the reviewing authority. The officially announced and never intentionally abandoned principle was that no defendant in any of those war crimes trials should be convicted but upon proof beyond any reasonable doubt. At the same time those in charge of the master plan of the trials did not feel that it was necessary to give the defendants certain technical advantages which they would have in a purely Anglo-American procedure while they would not have them before a court of a democratic European country, operating under the different rules prevailing in the civil law system. This was especially felt with regard to the Anglo-American rules of evidence excluding certain kinds of evidence, as for instance hearsay and opinion evidence, which are generally admissible in a continental procedure, subject to the weighing of their probative value by the court. It should be noted in this connection that the exclusionary rules of the Anglo-American law of evidence are by consensus not considered anything inherent in the conception of a fair trial; that there is a strong movement in the United States for their elimination or at least substantial limitation;\(^{152}\) and that they are historically related to the system of trial before a jury that is different from the system of the trial before judges qualified by their positions as officers of the American Army, prevailing in the war crimes cases. It is well understandable that in the period subsequent to the armistice it was felt a duty to humanity that the

\(^{151}\) 19 Dep't State Bull. 752, 753 (1948).

\(^{152}\) See Frank, Courts on Trial 143 et seq. (1949).
perpetrators of most atrocious deeds should be brought to justice rather than be given the chance of escaping justice with the help of technical rules of historical derivation, handicapping the possibilities of proving a crime, though not inherent in the conception of a fair trial. One of the "Rules of Procedure in Military Government Courts", applicable also in war crimes trials, reads:

26. Effect of Irregularities. The proceedings shall not be invalidated, nor any findings or sentence disapproved, for any error or omission, technical or otherwise, occurring in such proceedings, unless in the opinion of the Reviewing Authority, after an examination of the entire record, it shall appear that the error or omission has resulted in injustice to the accused.153

Nor was it felt necessary to give the defendant in a war crimes trial certain advantages of a defendant before a United States court martial, for instance that requiring a unanimous vote of the members of the court for a death sentence, such unanimous vote not being required even under the most advanced civil law systems.

The result of this philosophy, mainly emphasizing on the one hand, the need for a fair trial; on the other hand, the need for the elimination of technicalities of Anglo-American law handicapping the possibilities of proof of guilt, was a procedure similar to that prevailing in the Nuremberg Trials. It represented there a compromise between the Anglo-American and the civil law systems of procedure, necessary in view of the fact that the International Military Tribunal was composed of representatives of both systems. It would not have been necessary for this reason in the war crimes trials before purely American military commissions or military government courts. However, the above mentioned guiding principles led in the same direction. The outcome was a procedure which, in all external aspects, represented an American trial, but was conducted under rules which were neither purely American, nor purely European ones but a kind in themselves. We turn to a description of the main features of this procedure.

c. Constitution of the Tribunals.

Starting with the constitution of the courts, it should be pointed out that in the military commissions era as well as in the military government courts period, the war crimes tribunals were individually established for each specific case. There was an order of the so-called ap-

153 These rules are printed in the Appendix to: Hearings, supra note 44, at 1205 et seq. Rule 26 appears at 1212.
pointing authority, separately issued for each case, organizing the tribunal by appointing the officers to sit as members of the court and also those to conduct prosecution and defense respectively. While this involved the danger of “packing” the court, it should be emphatically stated that this never became a reality. No instructions or directives whatsoever were, officially or unofficially, given to those appointed as members of the tribunal as to how they should live up to their judicial responsibilities. They were bound only by general regulations on the form of the procedure and on the prevailing principles of evidence, but they were not given any kind of lead or hint with regard to the decision of the individual case entrusted to them. This was left completely to their own discretion, to be solely controlled by their own judicial conscience. At variance from members of a jury, they were triers both of law and fact. But also at variance from members of a jury, their qualification for the judicial office was not a matter of chance. They were qualified by the fact that all of them were American officers. Under the regulation for the appointment of military government courts, though not under those for the appointment of military commissions, at least one officer with legal training had to be detailed as member of the tribunal, comparable to the law member of the court-martial. However, at variance with the law prevailing in the courts-martial system, it would seem that in the war crimes trials this was not considered a jurisdictional requirement. When sufficient legally-trained personal was not available, a military government court conducting a war crimes trial would not have a legally trained officer on the bench. There was only one type of military commission, but there were two types of military government courts appointed for the trial of war crimes. One type was the general military government court, the other one the intermediate military government

154 The order appointing the court in the Malmedy Case is printed in Hearings, supra note 44, at 1195-1196.
156 The limited scope of the jurisdictional nature of the requirement of a “law member” in a court-martial proceeding, appears from the following comment by Wallstein, The Revision of the Army Court-Martial System, 48 Col. L. Rev. 219, 225 (1948):
“... the designation of a member of the court as law member (regardless of his qualifications) was a jurisdictional requirement and ... the omission of such designation made the proceeding void. But once the bare designation was made in the order appointing the court, it was held to be immaterial that the law member was absent from trial"
court. A general military government court could impose any lawful sentence including death. An intermediate military government court could not impose a death sentence or imprisonment in excess of 10 years. Intermediate courts were therefore appointed only in such cases where it was obvious from the nature of the offenses charged, that the ceiling of the tribunal's sentencing power would nevertheless leave a sufficient scope for the meting out of an adequate sentence. The officers sitting as judges in the war crimes trials justified the trust placed in them by those who assigned them this high responsibility. The trials were conducted in an atmosphere of dignity and judicial detachment which gave cause to spontaneous expressions of admiration by members of the German Bar participating as defense counsel or otherwise witnessing the trials. That part of them, with the growing revival of the nationalistic trend in Germany, who quickly forgot this first thought and joined those attempting to vilify the trials, does not disprove the correctness of their first impression. In general the tribunals showed no prejudice toward the defendants and were ready to be impressed by defense evidence at least as much as by the evidence of the prosecution. This writer knows of only one court with regard to which it has been claimed from a distinguished American source, that it was prejudiced against the defendants, namely the court in the Malmedy Case. Even in this case it would seem that there is no sufficient basis for such an allegation, though it must be admitted that the interlocutory rulings made in that trial were not always correct, as pointed out in the report of the Senate Subcommittee investigating the case, and even though it must also be admitted that this tribunal obviously made very grave errors in its weighing of the evidence of prosecution and defense respectively, especially in not giving sufficient consideration to the possible impact of certain questionable investigation methods. The most able and most honest judge is nevertheless not safe against the possibility of passing a decision which competent critics may consider a miscarriage of justice. There was, however, a very efficient safety valve in the war crimes trials in the existence of the system of review, and in the extremely conscientious way this reviewing was generally done. The same case in

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157 Art. III of Ordinance No. 2, supra note 120.
158 Testimony of Colonel Dwinell, Assistant Defense Counsel in the Malmedy Case, Hearings, supra note 44, at 434.
159 This would seem to appear from the testimony of the law member of the court, Hearings, supra note 44, at 1369 et seq.
which the tribunal might have gone too far in disfavor of the defendants, is also the one in which the reviewing authority might have gone to the extreme of leaning backward in favor of the defendants.160

The appointment of commissions and military government courts was first done by the two Armies in the Theater, the Third and the Seventh Army respectively. In connection with the gradual dissolution of the Armies, the Theater Commander became finally the only court appointing authority.161 The number of appointed members of a commission or military government court was flexible, subject only to a required minimum. A military commission and an intermediate military government court had to be composed of at least three, a general military government court of at least five officers.162 In important cases, however, the number of the members of the commission or court would exceed this minimum. The practice of drawing mainly upon high ranking officers, part of whom had a long courts-martial experience, was an additional salutary feature in the appointment of members of the war crimes tribunals.

As pointed out above, both in the military commissions and in the military government courts adjudicating war crimes cases, the rule prevailed that the concurrence of at least two-thirds of the members of the tribunal was necessary for any conviction and for any sentence.163 The voting was done in chambers and the announcement of the judgment did not reveal whether it had been arrived at unanimously or by a majority vote and in the last case whether only by a concurrent vote of two-thirds or by a stronger majority. No reasoned opinion accompanied the finding of guilty or not guilty. This practice was extremely unfortunate in the case of defendants charged with more than one offense since it did not allow one to establish from the record whether a convicted defendant had been found guilty by the court of all the offenses charged against him, or only of part of them, and if so, of which part.

160 See the tabulation of the results reached by the court and by the reviewing authority respectively in: Hearings, supra note 44, at 588-589.
161 This was announced in the directive dated July 11, 1946, supra note 124.
d. The Indictment.

The written act of accusation in a war crimes trial before a military commission or a military government court was called "charge sheet" and roughly resembled the institution in the court-martial system from which this designation was derived. It was certainly not drawn with the exactness of a common law indictment. Nor did it fully live up to the requirements of a charge sheet in a court-martial proceeding. It was radically different, in content and form, from the written accusations in the civil law systems.\textsuperscript{164} It was a very vaguely drafted document, only most generally indicating the facts underlying the accusation and the offense or offenses charged.\textsuperscript{165} This was an unfortunate oversimplification of the responsibility of a prosecutor to set forth the exact scope of his accusation, an indication which is necessary both to properly apprise the defendant of what he is being charged with and to give a precise meaning to the subsequent finding of guilty or not guilty by the court. As a matter of fact, however, no defendant was at a loss to find out in due time what the prosecutor intended to prove against him. He became aware of it by his pre-trial examination, and his defense counsel had not the least difficulty in getting the necessary information from the prosecutor. At least for a considerable period of time, the practice prevailed that the prosecutor's dossier was open for inspection by the defense counsel which is contrary to the practice in American criminal courts other than courts-martial. It seems that at a later stage of the Dachau trials, this liberal practice was abandoned.

e. Prosecutor and Defense Counsel.

Whatever technical deficiencies the charge sheets in the Dachau trials may have had, it is certain that one element of a fair trial with neglect of legal technicalities\textsuperscript{166} was accomplished thereby: to give the

\textsuperscript{164} For the general nature of the difference between the common law indictment and the act of accusation in the civil law systems, see: Hazard, Drafting the Nuremberg Indictment, 8 Am. Rev. of the Soviet Union 16, 19-20 (1947).

\textsuperscript{165} The charge sheet in the Malmedy Case is printed in: Hearings, supra note 44, at 1191-1192.

\textsuperscript{166} It is rightly stated in an editorial comment in 15 Law Reports, op. cit. supra note 6 at 190:

"The rules relating to evidence and procedure which are applied in trials by courts of the various countries, and by the International Military Tribunals in Nuremberg and Tokyo, when viewed as a whole, are seen to represent an attempt to secure to the accused his right to a fair trial while ensuring that the guilty shall not escape punishment because of legal technicalities."
accused notice of the substance of the charge against him. It is not so certain whether assistance by learned counsel also belongs to the elementary features of a fair trial in a general or international sense of the phrase, in other words, whether denial of the opportunity for such assistance would amount to denial of due process of law in an international sense. The rules developed in the American constitutional law on the analogous problem presented there, are not necessarily applicable. However this may be, both in the war crimes trials before American military commissions and American military government courts in Germany, the accused was given ample opportunity for assistance by learned counsel. Each order appointing a commission or a court contained also the assignment of American personal for the antagonistic functions of prosecutor and defense counsel respectively. The prosecutor had on the whole a similar function to that of the “judge advocate” in United States court-martial procedure and was therefore also called “judge advocate” in certain orders appointing war crimes tribunals. Both prosecutor and defense counsel would be taken from a panel of legally trained officers and Department employees (“attorneys”) who were members of the so-called Prosecution Section of the War Crimes Group of the Judge Advocate Department. This section was not in charge of the pre-trial investigation which was in the hands of another section of the War Crimes Group, the so-called Investigation Section.167 It was exceptional that in the Malmedy Case the Chief of the Investigation Section who as such had supervised the pre-trial investigation, was subsequently appointed Chief Prosecutor of the case. There was no discrimination to the disadvantage of the defense with regard to the distribution of available high ranking officers and of legal talent for the functions of prosecutor and defense counsel respectively.168 No official

167 The pre-trial investigation was not a judicial one corresponding to the procedure before an investigating magistrate (“juge d'instruction” or “Untersuchungsrichter”) in continental countries. Ploscowe, supra note 52; Ferrari, supra note 66, at 53. Rather it was similar to the preliminary police investigation preceding in the continental countries, or that by the investigating magistrate or the police investigation in our country. Only part of the investigators were lawyers.

168 For instance, Colonel Dwinell was Assistant Defense Counsel in the Malmedy Case, Chief Prosecutor in the so-called Superior Order Case and Law Member of the Court in the Buchenwald Concentration Camp Case. The present writer acted as officially appointed defense counsel in several flier cases, but was also entrusted with the drafting of posttrial reviews in several other cases. And incidentally, later acted as member of the prosecution in two of the subsequent Nuremberg Trials.
direction or unofficial lead or hint impaired the freedom of the officially appointed American defense counsel to act in accordance with his conscience and the dictates of professional ethics. Efficient performance as defense counsel was considered as meritorious for a member of the Prosecution Section of the War Crimes Group and as worthy of his ambition as efficient performance as a prosecution counsel. Even in cases where the court found a defendant guilty whose innocence had been most vigorously pleaded for by his defense counsel, the court would occasionally commend defense counsel at the end of the public session for his zeal in complying with his duty toward his client. Article V of Ordinance No. 2, applicable also in war crimes trials, provided among other things for the right of a defendant “to consult a lawyer before trial and to conduct his own defense or to be represented at the trial by a lawyer of his own choice, subject to the right of the court to debar any person, from appearing before the court”.\(^{169}\) This provision was the basis for a very liberal routine of providing the accused, who so desired, with German defense counsel of his choice in addition to officially assigned American counsel. In all the important cases there was a team of defense counsel consisting both of American members and of German attorneys.\(^{170}\) It appears that the general professional prohibition to act as common defense counsel for clients with conflicting interests was not always strictly adhered to in the assignment of defense counsel in the war crimes trials. It would seem, however, that even in the Malmedy Case where this shortcoming may have been particularly serious, insofar as there was one Chief Defense Counsel having the top lead of the defense of numerous accused with in part strongly conflicting interests, no substantial harm was thereby done to the accused who could nevertheless through the several assistant American defense counsel and German attorneys safeguard their separate interests. Contrary to the general European understanding of professional ethics on the point in question, but in accordance with the American practice, distinguishing between the interviewing and the coaching of a witness by counsel and

\(^{169}\) Ordinance No. 2, supra note 120.

\(^{170}\) For instance, in the Hadamar Trial, three American officers (two lieutenant colonels and one captain) and seven members of the German Bar carried the burden of the defense. The Chief Defense Counsel, then Lieutenant Colonel Sedillo, is at the present time a member of the U. S. High Commissioner’s Court of Appeals at Nuremberg, Germany. In the Borkum Island Case, the defense was conducted by an American lieutenant colonel, two American captains and one American first lieutenant jointly with ten German attorneys.
considering interviewing not only a right but even a duty of counsel, the
defense in the Dachau trials had the right of interviewing witnesses
and ample exercise was made thereof both by officially assigned American
counsel and by the German attorneys for whom this was a novel ex-
perience. It might be mentioned again that in the Dachau trials, as
well as at Nuremberg, former Nazi affiliation would not bar a German
attorney from functioning as defense counsel in a war crimes trial. The
idea was not to deprive the accused of counsel whom he might feel best
qualified to understand his particular situation and who might have
the greatest sympathy with him.


The trial itself was not conducted in the so-called inquisitorial form
of a continental procedure171 but in the Anglo-American form which
continental lawyers like to compare to a duel between two parties,
prosecutor and defense counsel, with the judge acting as umpire. The
main difference between the two types of procedure, each of which allows
a fair trial, may be summarized as follows. Under the continental pro-
cedure the president of the court is the first one to examine each accused
and any witness while both parties, prosecutor and defense counsel, have
an equal right of supplementary examination of defendants and wit-
tnesses, to be exercised with regard to each individual examinee, im-
mEDIATELY upon the termination of the examination by the president of
the court and any additional examination by another member of the
court. There is no distinction between a party's own witness and hostile
witnesses and therefore no limitation of the scope of ex parte examina-
tion of an accused or a witness based on such distinction. The substantial
part of the trial begins with the reading of the indictment and immedi-
ately thereupon an elaborate examination of the defendant, mainly
conducted by the president of the court. The defendant is not com-
pelled to answer, but as a matter of practice would always make use
of the opportunity to give his version of the case. He is, however, not
considered a witness and not sworn in, not with the idea of depriving
him of the privilege of taking the oath on his own behalf but with the
idea of protecting him against the conflict of conscience between either
telling the truth and thereby harming his own cause or perjuring him-

171 The word "inquisitorial", as used in the present connection has of course nothing
to do with the ill-famed Spanish Inquisition, but means a procedure which places the
emphasis on ex officio rather than ex parte action.
Examinations of defendant and witnesses do not strictly follow the question and answer pattern. Defendant and witnesses would as a rule first be asked to give a coherent statement of the pertinent facts and in this phase be interrupted by questions only where clarification was necessary. Examination in question and answer form is usually the supplementary rather than the main feature of the examination. Contrariwise, it is in the Anglo-American procedure for the parties and not for the court to conduct the main, or direct examination of the witnesses, who are divided according to the party calling them. The prosecutor conducts the direct examination of the prosecution’s witnesses, followed by their cross-examination by defense counsel, re-direct examination by the prosecutor, and so on. Similarly, the defense counsel conducts the direct examination of a defense witness, followed by cross-examination of the prosecutor, re-direct examination by the defense counsel, and so on. There are highly technical rules limiting the scope of each party’s examination regarding its own witnesses and those of the adverse party. Subject to certain exceptions, no party is allowed to impeach its own witness. There is a certain relation between the permissible scope of the cross-examination and the direct examination, though the rules on this point are far from being uniform. The defendant himself is considered a witness and supposed to testify under oath, however not in the first phase of the trial which is devoted to the “prosecution’s case” but only when prosecution has “rested” and the defense’s case begins. Defendants in the Dachau trials, not familiar with this kind of procedure, would sometime be worried by the fact that all the prosecution’s witnesses were heard before they themselves could be called as witnesses and give their own versions of the incidents involved. The examination of witnesses in Anglo-American procedure is strictly subject to the question and answer form and frequently interrupted by objections on

172 This is mostly unknown to American writers discussing this particular feature of the continental law. For instance, Stimson, The Nuremberg Trial: Landmark in Law, 25 Foreign Affairs 179, 186 (1947), stating:

“In their insistence on fairness to the defendants, the Charter and the Tribunal leaned over backwards. Each defendant was allowed to testify for himself, a right denied by Continental law.”

However, Ploscowe, supra note 52, 1023, correctly states:

“Since most men will lie to save their skins, there is no use in making them perjurers by compelling them to take an oath. It is difficult for Europeans to understand how liberal England and America can require an accused to take an oath as an ordinary witness if he takes the stand.”
technical grounds for which there is much less opportunity in the continental procedure. It is nevertheless wrong to see the distinguishing feature of the Anglo-American procedure as compared with the continental one in the so-called accusatorial character of the first one. Also the so-called inquisitorial procedure of modern continental laws is not an old-time procedure merging the functions of prosecutor, defense counsel and judge into one person, characteristic of the original inquisitorial method of trial, but is accusatorial in that it places upon the prosecution, represented by a functionary different from the court, the burden of proof of guilt beyond a reasonable doubt. Similarly with the American military justice system, but different from the system of American civilian justice, in a continental procedure prosecutor and judge would be officials taken from the same civil service roster. Again similarly with the courts-martial system and the peculiar position there of the judge advocate, the public prosecutor in a continental procedure would take more seriously his official character as a quasi-judicial officer\textsuperscript{173} rather than be anxious only to get a conviction.

g. American Aspect of the Procedure—Deviations.

In its external appearance, a procedure in a war crimes trial before an American military commission or an American military government court in Germany looked like a trial in the United States before a court consisting of a body of several judges without a jury, in other words like a trial before a United States court-martial. Closer examination reveals, however, important differences. One of them is related to the right of the defendant to take the stand under oath. Under the military commission system the practice was rather flexible. While in the beginning the view seems to have prevailed that also an accused testifying in his own behalf is supposed to take the oath,\textsuperscript{174} the military commis-

\textsuperscript{173} Ferrari, supra note 66, at 49, stating:

"The avocat general, just as our district attorney, is, in theory, a quasi-judicial officer. But whereas our district attorney is, in practice, usually nothing more than a prosecuting officer and seldom retains this quasi-judicial character even during the investigation of the case prior to trial, the French district attorney does retain that character throughout the case."

In People v. Fielding, 158 N. Y. 542, 547, 53 N. E. 497, 498 the New York Court of Appeals wrote:

"Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the people of the state, and presumed to act impartially in the interest only of justice."

\textsuperscript{174} Such a ruling was initially made, though subsequently rectified, in the Russelsheim
sion in the Hadamar trial advised the defendants that they had the option of either testifying or not testifying, and in the first case of testifying under oath or unsworn. The directive of August 25, 1945, only stated that "All witnesses will be sworn," but left the question open whether this applied also to defendants as witnesses. Under the "Rules of Procedure in Military Government Courts," the Court had the right to interrogate the defendant at the time of his pleading guilty or not guilty, that is at the beginning of the trial. The exercise of this right would have been an important continental invasion in the otherwise American procedure. However, the tribunals in the war crimes trials never made use of this right. The interrogation of the defendant by the court at the time of his pleading established only his identity and whether he pleaded guilty or not guilty. In other words, it was a mere formality. An interrogation of the defendant on the merits of the case was only conducted at the later stage of the trial where the defense introduced its evidence and only if the defendant took the stand which was optional for him. However, if he took the stand, he was not allowed to take the oath, a provision which the official "Guide" expressly explained as "... a concession to continental practice where the accused is not sworn." This rule which prevailed for quite some time, for instance still at the time of the Malmedy Case, was later changed to the effect that a defendant taking the stand had the option of doing it under oath or unsworn. The previous practice had on several occasions been attacked by defense counsel as causing the following hardship. Sworn pre-trial affidavits of defendants or other persons were admissible as prosecution's evidence as will be seen hereinafter. Defense counsel felt it an undue disadvantage to a defendant if he could not


176 The Commission trying the Hadamar Case seems not to have understood the provision as applicable to testimonies of defendants.

177 Section 10(5) of the Rules of Procedure in Military Government Courts, provided: "The Court may interrogate the accused at the time of pleading or at the trial, but shall not apply any compulsion to require him to answer. Any statements then made may be received as evidence. If the accused chooses to testify at a later stage of the trial, he may do so, but he may not be required to do so and shall not be sworn." Hearings, supra note 47, at 1208.

178 Id. at 1213 (Guide to Procedure in Military Government Courts, par. 12).

179 Testimony of Colonel Dwinell, Id. at 419.
impeach these pre-trial statements, which were sworn, by his own sworn testimony at the trial. The question seems never to have been raised whether it was proper for the pre-trial investigation to obtain sworn statements from the accused if the rule for the trial procedure prohibited the swearing in of a defendant taking the stand.

Another difference between American court-martial procedure and the procedure in the American war crimes trials in Germany was that the technical rules prevailing in the former were not considered as binding per se. This was generally stated in paragraph 2 of the directive dated August 25, 1945.\(^{180}\) A similarly general statement was not contained in the corresponding rules for the procedure before military government courts, but the general understanding there seems to have been the same though in the Malmedy Case certain questionable interlocutory rulings were made on highly technical grounds.\(^{181}\)

The most outstanding difference between an American war crimes trial in Germany and a regular American trial was the absence of any binding effect of the Anglo-American exclusionary rules of evidence. In the present connection it should be said that the above mentioned negative principle prevailed with one exception made by the “Rules of Procedure in Military Government Courts”. Rule 12(3) incorporated the so-called character evidence rule\(^{182}\) which is not known in continental procedure. It is there not considered as creating unfair prejudice to the defendant, rather considered consistent with a fair trial that the prosecutor introduces evidence of the bad character of the defendant as one of the means which the court may use in arriving at its final conclusion concerning guilt or innocence of the accused.

\(h.\) Records: Translations.

Symptomatic of the fairness of the trials in which there was nothing to be concealed was the fact that they were kept open to the public and that qualified court reporters made a contemporaneous transcription of the whole proceedings. These trial records have been preserved and a copy of each of them is available for inspection by the public in the

\(^{180}\) See Par. 2, Annex I.


\(^{182}\) Rule 12 (3) reads:

“Evidence of bad character of an accused shall be admissible before finding only when the accused person has introduced evidence as to his own good character or as to the bad character of any witness for the prosecution.”

Hearings, supra note 44, at 1209.
Department of the Army at Washington, D. C. The fact that the official
court language was English while the defendants, most of the witnesses
and the German defense counsel were using their native tongue, was
taken care of by ample use of qualified interpreters who would trans-
late the German statements into English for the benefit of the court
and the other American personnel and would translate the English
statements into German for the benefit of the defendants, their German
counsel and the Germans in the audience. While this bilingual charac-
ter of the trial was bound to cause certain shortcomings, inherent in the
difficulty of court interpretation, every reasonable effort was made to
guarantee the fairness of the trial also in this respect. The spectacular
Nuremberg facilities of an earphone and a sound taping system were
not available in the Dachau trials. More important is perhaps the fact
that due to the employment of only American court reporters, the trial
transcript was kept only in one language, English. Not the original
wording spoken in German, but only its translation by the court inter-
preter was therefore preserved in the record.

i. Review Procedure.

No conviction and no sentence had final effect before the approval of
the judgment by the court-appointing commander who would make his
decision only on the basis of an elaborate written review of his judge
advocate, not binding upon him but of an advisory character. As long
as the army commander was the appointing authority, he would also be
the approving authority and therefore have the final say concerning
convictions and sentences save death sentences which in addition needed
confirmation by the theater commander. Also the theater commander
would only act on the basis of an elaborate written review of his judge
advocate, of an equally advisory character. Thus, cases involving
defendants sentenced to death were finally passed on by the army com-
mander only if he decided to set aside the conviction or to commute the
death sentence. Otherwise, his decision in such cases was practically a
mere recommendation and it was the theater commander who had the
final say. This system of a double review of death sentences was dis-
continued when the theater commander became the only appointing
and therefore also the only approving authority. There was then only
one approval or confirmation necessary for death sentences as well as
any other sentences. However, a system of multiple review of the case
nevertheless developed. The first review would be made by the deputy
The theater judge advocate who was in charge of the War Crimes Group. His recommendations would be the basis for a second review and for independent recommendations by the theater judge advocate. At the time when the last mentioned office was held by Colonel, now Brigadier General Harbaugh, he introduced an important innovation by creating a War Crimes Board of Review. At this stage, the review by the deputy judge advocate was followed by a review of the War Crimes Board of Review and thereupon only by a review by the theater judge advocate, so that the same case went through three different kinds of review before the theater commander made his final decision. While the "Rules of Procedure in Military Government Courts" provided a very remote possibility of a reformatio in pejus,\(^{183}\) this provision was considered inapplicable by those in charge of the war crimes trials and was never made use of, as a matter of fact. The review was considered as something which could change the effect of the judgment of the court only in favor of the defendant. It is submitted that nothing could have prevented the approving authority from setting aside a conviction with simultaneous remand of the case for a new trial. As a matter of fact, however, this was considered as inconvenient, rather the policy established that the setting aside of a conviction amounted to a definite termination of the case of the defendant thus acquitted by the reviewing authority after his conviction by the court. Acquittals by the court were not subject to review but immediately final. The review of convictions and sentences was automatic, that is independent from a petition for review filed by the affected defendant or his counsel. Petitions for review were not subject to technical requirements and they were given thorough consideration by the reviewers. They accomplished to a great extent the practical purpose of an appeal. According to the prevailing and, in the view of this writer, correct opinion, sponsored by the Deputy Judge Advocate for War Crimes and the theater judge advocate, it was among other things the duty of the reviewer to examine whether the evidence on record was sufficient to justify the conclusion that the guilt of the defendant had been proved beyond any reasonable doubt.\(^{184}\) This practice, while not giving sufficient attention

\(^{183}\) According to Rule 25 (1)d, the reviewing authority had the power to increase any sentence where a petition for review was considered frivolous and the evidence in the case warranted such increase. \textit{Hearings, supra} note 44, at 1212.

\(^{184}\) To be sure, this amounted to substituting the reviewing authority's belief on credibility of witnesses for that of the court and was therefore different from the general prac-
to the so-called demeanor evidence, was nevertheless, it is submitted, a necessary safeguard of substantial justice in a procedure which was extremely liberal regarding admissibility of evidence and therefore made the proper weighing of the evidence the center of gravity of the administration of justice. Properly composed, a review was supposed to be an elaborate document giving a detailed summary of the evidence appearing on record coupled with a discussion of the issues of fact, law and procedure and with the reviewer’s recommendations concerning guilt and sentences. It must be admitted that not all the reviews lived up to this standard. On the whole, however, the thoroughness of the review procedure made up for a certain summary character of the trial procedure.

j. The Dachau Law of Evidence.

We turn now to the principles of evidence which were governing the introduction of evidence in the war crimes trials under consideration. They amounted to an elimination of most, if not all, of the exclusionary and other technical rules of the law of evidence generally applicable in trials before regular American courts. They enlarged the power of the tribunal concerning the weighing of the probative force of admitted evidence and they gave the tribunal practically unlimited discretion in deciding whether or not evidence of a questionable type should be excluded right away or admitted for what it was worth, that is subject to the court’s weighing of its probative force. The directive on military commissions, dated August 25, 1945, stated in part of paragraph 2 that military commissions, while supposed to see to it that the accused got “a full and fair trial”, were not bound by the rules of evidence prescribed for general courts-martial. In the paragraph 3, this directive provided:

3. Evidence Admissible. Such evidence shall be admitted before a military commission as, in the opinion of the president of the commission, has probative value to a reasonable man.185

The same general principle was in effect in the trials before the specially appointed military government courts even though it was there formulated in a different way and subject to one important exception,

185 Par. 3, Annex I.
the so-called character evidence rule. Rule 12 of the "Rules of Procedure in Military Government Courts", applicable also in war crimes trials, provided under the heading "Evidence":

(1) A Military Government Court shall in general admit oral, written and physical evidence having a hearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof. If security is at stake, evidence may be taken in camera or in exceptional cases where security demands it may be excluded altogether.

(2) The court shall in general require the production of the best evidence available.

(3) Evidence of bad character of an accused shall be admissible before finding only when the accused person has introduced evidence as to his own good character or as to the bad character of any witness for the prosecution. 188

This was supplemented by the following official comment in the "Guide to Procedure in Military Government Courts", paragraph 9:

Rule 12 does not incorporate the rules of evidence of British or American courts or of courts-martial.... Hearsay evidence, including the statement of a witness not produced, is thus admissible, but if the matter is important and controverted every effort should be made to obtain the presence of the witness, and an adjournment may be ordered for that purpose. The guiding principle is to admit only evidence that will aid in determining the truth. 187

It should be mentioned in this connection that the technical rules of the Anglo-American law of evidence do not exist even in the most progressive continental systems of criminal procedure and that their absence there certainly does not prevent the possibility of a fair trial. Nor did their absence from the rules governing the Nuremberg trials deprive the latter of their character as fair trials, according to the opinion of those distinguished British and American lawyers who participated in the establishment of the "Nuremberg Law" and also in the view of others. 188

188 Hearings, supra note 44, at 1209.
187 Id. at 1213.
Under continental procedure, hearsay evidence is admissible though looked upon with great distrust and not given the credit of full probative value. Under the Anglo-American law, hearsay evidence is in theory not admitted since it is considered improper to admit in evidence an assertion which the party against whom it is offered has no opportunity to test by cross-examination. The Manual for Courts-Martial U. S. Army, thus states this so-called hearsay rule:

Hearsay is not evidence. This means simply that a fact can not be proved by showing that somebody stated it was a fact. Thus, either an oral or a written statement not made by a witness in court in the trial of a particular case but later offered in court as evidence of the truth of the matter stated is hearsay and not evidence. Such a statement does not become evidence because received by the court without objection. Underlying the hearsay rule is the principle that the testimony of witnesses, to be of value, must be taken in court so that the witnesses may be sworn, cross-examined, confronted by the accused, and observed by the court.

The fact that a given statement was or was not made may itself be relevant. In such a case a witness may testify that the statement was made—not for the purpose of proving the truth of what was stated but for the purpose of proving the fact that it was stated.\textsuperscript{189}

In the course of the Anglo-American legal development, the hearsay rule has been strongly undermined by numerous exceptions to it, though it may be an overstatement that the “... exceptions to the hearsay rule almost swallow it up”.\textsuperscript{190} Among the most important exceptions to the hearsay rule are the admissibility of confessions and of admissions against interest. According to the Manual for Courts-Martial U. S. Army, “A confession is an acknowledgment of guilt”, while “An admission is an incriminatory statement falling short of an acknowledgment of guilt”.\textsuperscript{191} While a confession is thus admissible even under circumstances which would otherwise justify the application of the exclusionary hearsay rule, this is generally qualified by the requirement that proof of the voluntariness of the confession must be made as a foundation for its admissibility. “A confession or admission may not be received in evidence if it was not voluntarily made”.\textsuperscript{192} An admission against the interest of the party making the admission is also admissible in evidence as an exception to the hearsay rule, but under this excep-

\textsuperscript{189} Op. cit. supra note 126, at 155.
\textsuperscript{190} McCormick, EVIDENCE, S ENCYC. SOC. SCI. 642 (N. Y. 1931).
\textsuperscript{192} Id. at 157.
tion the statement of another person than the defendant himself, especially the statement of a co-defendant, is only admissible if they were parties to a conspiracy in the technical sense of Anglo-American law and if the statement in question was made in pursuance of the common design.\(^{193}\)

All these limitations for the admissibility of hearsay evidence were considered inapplicable in the war crimes trials under consideration. Hearsay evidence was admitted irrespective of the existence of any of the exceptions recognized in the pertinent Anglo-American law. Statements containing confessions or admissions, obtained from defendants during the pre-trial investigation, were admitted without any requirement that a foundation must be laid for their voluntary character. Rather it was considered to be the law that even confessions or admissions which may have been obtained under duress were admissible for what they were worth, that is subject to the court's judgment of their probative value under the particular circumstances of the case. This was definitely a departure from settled Anglo-American law\(^{194}\) which is not so clear concerning the admissibility of confessions or

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193 Id. at 159-160. The term "conspiracy" was often loosely used in war crimes trials when not this common law concept but complicity in a general sense of criminal law or "common plan and design" was meant. See for a comparative analysis of those different conceptions: 15 Law Reports op. cit. supra note 6, at 90, 94. Neumann, The War Crimes Trials, 2 World Politics, 135, 139 (1949), comments as follows:

"Continental liberal legal thinking rejects the very conception of conspiracy as incompatible with the individualistic basis of criminal law. The decisive break on the European continent occurred in the Soviet purge trials where Mr. Vyshinsky first developed the modern and quite dangerous concept of criminal conspiracy. It is restated in Trainin's book. . . The conspiracy concept developed in the war crimes . . . is neither the Anglo-American conception of conspiracy nor Mr. Vyshinsky's which is equivalent to guilt by association."


194 This is expressly acknowledged in the testimony of Colonel Harbaugh, one-time Theater Judge Advocate in: Conduct of Ilse Koch War Crimes Trial, Hearings, supra note 95, at 1154. The Manual for Courts-Martial U. S. Army 157-158 (1949 ed.), states:

"A confession is not admissible in evidence unless it is affirmatively shown that it was voluntary. An admission of the accused, however, may be introduced without such preliminary proof except when it is indicated that the admission was involuntary."

admissions obtained by ruses or tricks and is probably more favorably disposed to evidence obtained in the last mentioned way than at least certain continental laws. Also in departure from settled Anglo-American law, pre-trial statements made by a co-defendant or a third person were admitted in evidence irrespective of the existence of the specific conditions under which the statement of a conspirator would be admissible in evidence against another party to the same conspiracy under the so-called conspiracy conception of the Anglo-American law. Claiming the inadmissibility under the orthodox rules of such kind of evidence, the defense in almost all the important cases made, immediately upon prosecution’s resting its case, a motion to discharge the defendants for failure of proof. However, such motions were always denied in accordance with the standing practice that those orthodox rules had no validity in the war crimes trials.

In addition to the disregard of the so-called exclusionary rules of

195 There seems to be a difference of opinion as to whether tricks amounting to fraud vitiate the confession. In 20 Am. Jur. § 519 (1939), it is stated:

“The general rule is that the use of artifice, trickery, or fraud in inducing a confession will not alone render the confession inadmissible as evidence, although the courts admitting such testimony have often condemned the practice of obtaining confessions in this manner.” (Italics supplied.)

However, Wharton op. cit. supra note 194, § 623, contains the following summary of the pertinent American law:

“In many instances, the prosecution or police authorities, in seeking to establish the commission of the crime charged will resort to deception or falsehood to extract a true confession from the accused. While many courts have stated their censure of such tactics, the confessions obtained by deception, artifice, or falsehood are not vitiating as evidence merely because of the employment of such methods, if they are not otherwise conducive to the making of a false statement. But there are cases holding that where the deception amounts to an actual fraud the confession is to be deemed involuntary.” (Italics supplied.)

196 The Austrian (pre-Anschluss) Code of Criminal Procedure contained the following provisions (writer’s translation): “Section 202: It is prohibited to use promises or mis-representations or threats or measures of compulsion to induce the accused to confessions or other statements. Nor is it allowed to protract the investigation in an effort toward obtaining a confession.

“Section 205: It is most strictly prohibited to police authorities and other public officials to endeavor toward creating suspicion or proof of guilt of an individual by inducing him to the perpetration, continuation or completion of a criminal offense or to apply informers to obtain confessions to be forwarded to the courts.”

It seems that the French practice is different, that is, inclined to generously tolerating the use of tricks. Ploscowe, supra note 52, at 1025. This is, however, not the general European approach, as appears from Vargha, Die Verteidigung in Strafsachen 545, 547 (Vienna 1879).
the Anglo-American law of evidence, there was a brushing aside of other technical rules prevailing therein. For instance, under the so-called corpus delicti rule, the confession of an accused is not sufficient for his conviction if the fact that the crime confessed to has actually been committed is not corroborated by independent evidence. In this connection, the Manual for Courts-Martial U. S. Army states:

An accused cannot be legally convicted upon his uncorroborated confession. A court may not consider the confession of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be substantial evidence of the corpus delicti other than the confession. Other confessions or admissions of the accused are not such corroborative evidence.197

Several convictions by American military commissions and military government courts in Germany were made in disregard of this corpus delicti rule,198 since the confession of the respective defendant was only corroborated by confessions or admissions of co-defendants or not corroborated at all. Not all such convictions were set aside by the reviewing authorities, e.g., the Malmedy Case.

There cannot be any doubt that in some instances the evidence on which convictions were based in the war crimes trials under consideration would not have been sufficient even for a prima facie case in a regular American procedure since upon elimination of the evidence inadmissible under the orthodox Anglo-American rules, there would not have remained enough to justify a judge to have the case go to the jury. This does not, however, mean that a procedure in which such evidence was admitted did not amount to a fair trial, nor does it mean that a conviction based upon such evidence necessarily amounted to a miscarriage of justice. There is, however, a sound philosophy behind the Anglo-American exclusionary rules, namely that those types of evidence which are inadmissible under it are second class evidence which involves the danger of miscarriage of justice if the greatest caution in critically appraising its probative value is not applied by the triers of fact. A legal system which nevertheless considers such evidence as admissible is thereby alone not a bad system nor a system sponsoring a procedure different from a fair trial. However, a tribunal which accepts evidence so admitted at its face value rather than to be aware of its inherent weakness and need for corroboration, may act in good faith but does not

198 No such rule exists in the continental laws.
live up to its high responsibility toward the accomplishment of substantial justice. A few comments may serve to clarify this proposition.

It is a natural tendency of any human being to blame his own fault upon somebody else. Experience teaches that this desire of shifting responsibility frequently induces co-accused to reciprocally charge one another, regardless of the truthful distribution of the criminal responsibilities involved. It is therefore not a mere technicality, but a principle based upon reason and experience that the charge against an accused, contained in the statement of a co-accused, must be accepted with a certain degree of mistrust. In many American jurisdictions there can be no conviction of crime based exclusively upon the uncorroborated testimony of an accomplice.\textsuperscript{199} American military law, while not going so far, strongly cautions against the reliability of such evidence.\textsuperscript{200} A classical American treatise cites a long array of judicial authorities for the following statement:

As a general proposition, and as a matter of common knowledge, the testimony of an accomplice is apt to be highly colored and biased. Moreover, it is to be expected, and is but a manifestation of human nature, that an accomplice may, or has good reason to, place his own welfare and freedom above that of the defendant. Hence, it is stated that the testimony of an accomplice is to be received with suspicion and acted upon with great caution.\textsuperscript{201}

The foregoing general proposition gains momentum in a case where the accused charged by a co-defendant is the latter’s military superior. Whatever the final effect of the plea of superior order may be, no accused is likely to abandon the hope that such plea may serve to improve his judicial fortune.

A similar reasoning applies to confessions obtained by duress or ruses or tricks. Irrespective of the question of their admissibility, they are evidence of a very doubtful character. To be sure, even an involuntary confession and certainly one obtained by ruses or tricks, may nevertheless be true. It is, however, not necessary to refer to such a remote period of history as the time of the witch trials to show how often false

\textsuperscript{199} Wharton \textit{op. cit. supra} note 201, § 728; Miller, \textit{Handbook of Criminal Law} 246, n. 21 (1934).

\textsuperscript{200} Winthrop, \textit{op. cit. supra} note 194, at 357. Also, Manual for Courts-Martial U. S. Army 184 (1949), stating:

“\textit{A conviction may be based upon the uncorroborated testimony of an accomplice, but such testimony, even though apparently credible, is of doubtful integrity and is to be considered with great caution.”}

\textsuperscript{201} Wharton, \textit{op. cit. supra} note 194, § 730.
confessions were obtained by compulsion. There are enough illustrations of the same phenomenon in more recent times, and the same applies to confessions obtained by deceit. It is therefore not only an ethical postulate but also in the eminent interest of justice that its administration should be anxious to keep its hands clean irrespective of the danger that by doing so it may allow the perpetrator of a serious crime to escape deserved retribution. Resistance should be shown to post-war hysteria and other psychological reasons for occasional departures from a strictly ethical approach to the problems involved in convicting the guilty rather than the innocent. In obtaining confessions by means of deceit or duress, one builds on quicksand, one erects constructions which are bound to collapse before the eyes of honest and intelligent judges. Certain continental legislatures were extremely anxious to endorse this approach.  

Finally, the philosophy behind the corpus delicti rule is thus explained in an important digest of American law:  

The grounds on which the rule requiring independent proof of the corpus delicti rests are the hasty and unguarded character which confessions often have, the temptation which for one reason or another a person may have to say that which he thinks it most for his interest to say, whether true or false, the liability which there is to misconstrue or report inaccurately what has been said, the danger of a conviction when no crime may have been committed, the difficulty of disproving what may be said, and the feeling that the rule best accords with the humanity of the criminal law and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases.  

k. Summation.

In evaluating the foregoing summary of the principles of procedure and evidence in the war crimes trials under consideration, the writer firmly believes that the defendants were given the full benefit of a fair trial, as required under the applicable international law, by the American military commissions and American military government courts involved. No exception from this general trend has been noted. By saying this, the writer means the trials as such and the review procedure, but does not wish to include the pre-trial investigation of the Malmedy Case which has been sharply criticized by him in his testimony before the Baldwin Committee.  

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202 Supra note 196.
204 Hearings, supra note 44, at 1353, 1355, 1367.
missibility of types of evidence which are inadmissible under the Anglo-American exclusionary rules was inconsistent with due process of law in an international sense though it may be a matter for difference of opinion whether it was good policy to deny enemy aliens tried as war criminals before American courts those additional guarantees against possible miscarriage of justice which defendants in a United States courts-martial normally enjoy. Quite a few intelligent and honest people may, however, revolt at the idea of giving defendants accused of most atrocious deeds more than their due under the minimum requirements for a fair trial. Others, and they are becoming more and more numerous, may feel that it is better to have 99% of the guilty war criminals acquitted than to have one innocent person convicted as a war criminal. It is the latter group which completely overlooks the atrocities of the war crimes involved and sees only the alleged atrocity of the trials. Some of them even deny the honest intention of those who had sponsored the trials. In an attempt to maintain a detached approach, this writer believes that the fairness of the trials cannot be justly denied, but that in certain of the cases involved the tribunals may have given more credit to questionable types of evidence than appears warranted in the light of the most cautious approach which should be applied in the weighing of evidence which would be inadmissible under the Anglo-American exclusionary rules. At the same time, it is believed that most, if perhaps not all such deficiencies have been eliminated by action of the reviewing authorities.

Dachau Version of the Substantive Law of War Crimes

a. Conception of War Crimes.

The official philosophy underlying both the Nuremberg and the Dachau trials was that they did not represent retroactive application of new criminal law but were applying pre-existing law to partly novel situations. This theory was, however, less vulnerable with regard to the Dachau trials than in the case of the Nuremberg trials. There was no charge in the American war crimes trials before military commissions or military government courts in Germany, based on the much disputed crimes of aggressive war or crimes against humanity or, with a single exception, membership in a criminal organization. At least on their face, the charges in the Dachau trials were based on the established and traditional doctrine of war crimes which, however, was handled in such a flexible way as to make it fit situations in which it
had hardly been employed before World War II. War crimes are by definition violations of the rules of international law on legitimate warfare, even though the question has been raised whether each offense against those rules amounts to a war crime or whether a certain serious character of the offense is inherent in the conception of a war crime. As a matter of fact, however, the original practice was to prosecute and punish as war crimes unlawful acts which were committed in the course of military operations. Originally members of the enemy armed forces, captured during the fighting phase of the hostilities were those who might be tried for war crimes. Declaratory of this customary international law, was Article 59 of the famous General Orders Number 100, dated April 24, 1863, also known as Lieber’s Instructions for the Government of Armies of the United States in the Field, reading in part:

A prisoner of war remains answerable for his crimes committed against the captor’s army or people, committed before he was captured and for which he has not been punished by his own authorities.

While the old-time war crimes trials had to do with combatants rather than non-combatants, it is not due to the trend of total war to expose non-combatants to a greater extent than ever before to hardships similar to those of combatants but was black letter law even before World War I that violations of international law, triable as war crimes, could be committed also by civilians. The British Manual of Military Law of 1914, dealing with the laws and usages of war, written by Colonel J. E. Edmonds and the famous international law scholar, Professor Oppenheim, expressly included in its definition of war crimes acts of enemy soldiers as well as acts of enemy civilians. Similarly, an American

205 According to Cowles, supra note 83, at 181, the term “war criminal” is of recent origin, but all the offenses of any importance which the term properly denotes, are old and well-known in the law of war. The question whether espionage is a war crime technically appears doubtful even though a spy caught red-handed may be sentenced to death and executed under international law. Wright, War Criminals, 39 AM. J. INT’L L. 257, 274 (1945), considers espionage as a war crime in a narrow sense, but believes that the punishment of persons committing it represents an act of war rather than of justice. Kelsen, Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals, 31 CALIF. L. REV. 530, 547 (1943), defines war crimes as “... acts by which rules of international law regulating the conduct of war are violated.”

206 As quoted by Colby, War Crimes, 23 MICH. L. REV. 482, 488 (1925).


208 1916 Ed. ch. XIV, especially at 302; Colby, supra note 206, at 491.
commentator on the Articles of War wrote in 1944 that the jurisdiction of military commissions concerning violations of the laws of war extended both to military persons and civilians.209 It was therefore certainly no retroactive departure from pre-existing law when in the numerous "flier cases" before American military commissions and military government courts in Germany, civilians were tried for the war crime of killing surrendered and unarmed prisoners of war. The fact that their offenses were not committed in the battlefield but in the German zone of interior, and that they were not carried out in the course of military operations, did not deprive them of their character of active hostilities against enemy soldiers during the war and related to the war. Moreover, those lynchings had the intended belligerent purpose of discouraging the enemy from continuing the air attack upon Germany. It may, however, be that the old-established conception of war crimes was stretched, as in a Procrustean bed, when, for instance, in the Hadamar Sanatorium Case210 German civilians were tried by an American military commission for the alleged war crime of having been parties to a common design of exterminating foreign civilians unrelated to any of the belligerent armies. It would not be unreasonable to believe that in this instance the defendants, under color of being prosecuted for a war crime, were actually tried for the novel crime against humanity, forming one of those parts of the so-called Nuremberg law which according to certain writers represent ex post facto criminal law.211

In the foregoing comment, the emphasis lies on the fact that civilians were under a war crimes charge tried for offenses against persons other than enemy belligerents, but not on the fact that the victims were civilians. Even from the above quoted Lieber provision it appears as old-established law that belligerents may commit war crimes against civilians as victims. It would therefore seem that in this respect the Hadamar trial and, for that matter also the Concentration Camp trials in Dachau, are not subject to justified challenge as retroactive criminal law. However, the conception of a war crime requires that the offense against a civilian in question be committed as an incident of belligerent operations. This is undoubtedly the case when inhabitants of an occupied belligerent country are exposed to treatment contrary to the ap-

210 1 Law Reports, op. cit. supra note 6, at 46.
211 Goodhart, supra note 4, at 15.
plicable criminal law. It would not seem that it makes a relevant difference whether the scene of this unlawful treatment is the occupied country itself or the country of the occupier to which they were forcibly deported, as slave laborers, to add to the manpower element of the war potential. It is obvious that this was part of the theory applied in the Hadamar and the Concentration Camp Cases. It was a technical defect rather than going to substantial justice that the requirement of proof of this particular status of the civilian victims involved was not sufficiently complied with in those trials.

From the foregoing it appears that the Hadamar trial and the Concentration Camp trials were very close to the borderline between the traditional conception of war crimes and a departure from it. Certainly in line with the traditional conception, however, were the “flier cases” and other trials of war crimes allegedly committed during actual military operations such as the Malmedy, the Skorzeny, and the Hagendorf Cases. At least in one Dachau trial, the defendant was charged and found guilty of mutilating the body of a dead enemy soldier. While this was a case of first impression, a learned comment on it by the United Nations War Crimes Commission in London would seem to be persuasive to the effect that it was a correct application of the conception of war crimes. b. Responsibility of Individuals.

In line with pre-established international law, though contrary to the view of a minority of writers, the war crimes trials in question vindi-

212 Articles 42 et seq. of the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV of October 18, 1907. 213 Kintner, The Hadamar Trial, Introduction p. xxiii (1948), believes that the court could as a matter of judicial knowledge make the finding that the victims had belonged to the category of slave laborers in Germany. 214 Trial of Max Schmid, convicted and sentenced to 10 years imprisonment by a military government court in Dachau on May 19, 1947, for having, as medical officer in charge of a German dispensary in France, severed the head from the body of a dead U. S. airman, removed the skin and flesh and bleached the skull which he kept on his desk for several months, allegedly for instructional purposes. 13 Law Reports, op. cit. supra note 6, at 151. 215 Ibid. 216 The Geneva Convention of July 27, 1929, For The Amelioration Of The Condition Of The Wounded And The Sick Of Armies In The Field, provides in Art. 4 among other things that the belligerents shall see that the dead “are honorably buried and that the graves are treated with respect and may always be found again.” 47 Stat. 2074, 2084, U. S. Treaty Ser. 847 (Dep’t State 1929).
cated the theory that for a violation of the international law of war, committed by an enemy soldier or civilian, he himself is criminally responsible irrespective of any overall responsibility of his government.\textsuperscript{217} Neither the absence of any express provision to this effect in the \textit{Hague Regulations} annexed to the \textit{Hague Convention on Laws and Customs of War on Land}\textsuperscript{218} nor Article 3 of the latter\textsuperscript{219} can reasonably be understood as an intended or implied repeal of that pre-existing rule.\textsuperscript{220} It is true that international law did not yet proceed very far in the recognition of individuals as direct bearers of rights.\textsuperscript{221} The established doctrine that normally only a government and not an individual has a \textit{locus standi} before an international tribunal, applicable also to the International Court of Justice,\textsuperscript{222} is the rationale for the institution of diplomatic protection.\textsuperscript{223} It is also true that in a developed system of law, the


\textsuperscript{218} \textit{Supra} note 212.

\textsuperscript{219} Art. 3 reads:

“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

\textsuperscript{220} The judgment of the International Military Tribunal in Nuremberg, in its section entitled “The Law of the Charter”, among other things states:

“But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention.” \textit{1 Trial of the Major War Criminals Before the International Military Tribunal} 220-221 (1947).

\textsuperscript{221} \textit{Jessup, A Modern Law of Nations} 15 (1948), stating among other things:

“States are said to be the subjects of international law and individuals only its ‘objects’ . . .

“But there has welled up through the years a growing opposition to this traditional concept.”

\textsuperscript{222} Art. 34 of the \textit{Statute of the International Court of Justice} provides in part:

“Only States may be parties in cases before the Court”

\textsuperscript{223} Koessler, \textit{Government Espousal Of Private Claims Before International Tribunals},
capacity of having duties is correlated to the capacity of having rights and that, therefore, in such a system the conception of a person in the legal meaning of the term is defined as that of a unit bearing rights and duties. However, in a more backward phase of the development of law, we find the slave who was a subject of duties but, at least in legal theory, not of rights. International law is unfortunately still in a similar primitive phase. There is therefore nothing inconsistent in the fact that its lack of recognition of individuals as direct subjects of international law rights is coupled with the old-established principle that individuals may under international law be held criminally responsible.

c. Forms of Criminal Participation.

Concerning forms of participation in a crime, charges in the Dachau trials were at least on their face based upon the general principles regarding kinds of complicity recognized among all civilized nations rather than on anything which is particular to the Anglo-American systems of law, as for instance, charges based merely on an agreement to commit a crime, without any materialization thereof, at least in the form of an attempt (conspiracy). No exception from this general approach were the so-called common design charges which must not be confused with a conspiracy charge even though they were often loosely referred to by the last mentioned term. The theory of the common design charges was that whoever joins in a plan to commit an unlawful act, is responsible for the natural and probable consequences of the execution of that plan even though he was not one of those actually participating in its execution. This, it would seem, remains within the ambit of forms of criminal complicity generally recognized in all developed systems of law. It may be that the Supreme Court of the United States went further than the traditional law by recognizing the extreme theory on command responsibility on which the charge against General Yamashita was based. In substance according to this theory which is sometimes referred to as the Yamashita doctrine, a military superior who

13 U. of Chi. L. Rev. 180, 181 (1946): “A streamlined law of nations, granting to private persons a standing before international courts and arbitration commissions, could do away with the roundabout relief through diplomatic protection, just as the emancipation of the serfs eliminated the need for feudal representation”.

224 Kelsen, Reine Rechtslehre (Pure Theory of Law), 131 (1934).

225 Conspiracy represents preparation rather than attempt.

226 See comment, 15 Law Reports, op. cit. supra note 6, at 90, as compared with 94.

227 In re Yamashita, 327 U. S. 1, 14 et seq. (1946).
fails to control the operations of his subordinates and thereby "permits" them to commit atrocities, may jointly with the perpetrators themselves be held criminally responsible for those atrocities even though he did not order, encourage, aid, abet or approve them and had not even knowledge of their planned or actual perpetration. Mr. Justice Murphy expressed strong disagreement with this point of the majority opinion which, in this writer's belief, is a correct statement of disciplinary rather than criminal responsibility. At any rate, no case has been found where a conviction by a military commission or military government court in Germany, in the light of the facts claimed by the prosecution and possibly accepted by the Court, could be based legally only on this extreme doctrine. The case coming nearest to it was that of the defendant Krolikowski in the Borkum Island trial. There was, however, in the facts proven with regard to this defendant much more than would be sufficient under the Yamashita doctrine.

d. Plea of Superior Order.

With regard to the plea of superior order which was raised not only by defendants who claimed to have acted upon orders of military superiors but also by defendants who as Nazi party officials or party members had allegedly been under an equally stringent duty to obey superior directions given to them, the American army authorities responsible for the administration of war crimes justice in Germany were in a rather embarrassing situation. The defendants invoked alleged American military law, the correctness of which was challenged by the American prosecutors referring, among other things, to the different principle announced in German military law.

Until November 15, 1944, the Basic Field Manual, Rules of Land Warfare provided in part of Article 347 under the heading "Offenses by Armed Forces":

... Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.

Only by order of the Secretary of War, on November 15, 1944, was

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228 Id. at 34 et seq.
230 War Dep't Basic Field Manual, FM 27-10 (1940).
the above quoted part of Article 347 eliminated and the rule therein replaced by the following Article 345.1, to be added to Article 345 under the heading "Liability of Offending Individuals":

Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.231

It appears that under the prior rule (Article 347) superior order was in the American army considered an absolute defense for a military subordinate who had acted pursuant to it, but that under the later rule (Article 345.1) it should be taken into consideration to determine whether in the given circumstances it may lead to an acquittal or merely to a mitigation of punishment. It would seem, however, that even in the light of the later rule superior order, if proven, should have at least the effect of an extenuating circumstance.

The German legislation, even before 1944, expressed a more severe view. Section IV, paragraph 47, of the German Military Penal Code as reenacted in October 1940, reads in English translation as follows:

(1) If in the execution of an order relating to Service matters a penal law is violated, the commanding officer is solely responsible. Nevertheless, the subordinate obeying the order is subject to penalty as accomplice: 1. If he transgressed the order given, or 2, if he knew that the order of the commanding officer concerned an action the purpose of which was to commit a general or military crime or misdemeanor.

(2) If the guilt of the subordinate is minor, his punishment may be suspended.232

The actual practice in the Dachau trials was that the plea of superior order was never considered as an absolute defense of an atrocity perpetrated pursuant to it and that there was not too much liberality in giving it the credit of a mitigating circumstance. The official view, constantly taken by the Deputy Judge Advocate for War Crimes in his reviews of judgments involving this problem, is thus expressed in part of his review of the Buchenwald Concentration Camp Case (United States v. Josias Prince zu Waldeck et al.):

231 Change No. 1, to FM 27-10.
232 Contained in: 3 Law Reports, op. cit. supra note 6, at 58.
Compliance with superior orders does not constitute a defense to the charge of having committed a war crime. . .

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior directing that he commit the wrongful act; (b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct; and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. . .

The official theory in rejecting any reference of defense counsel to the rule in the above quoted Article 347, before the amendment, was in substance that the Basic Field Manual was not a legislative enactment but an administrative attempt to state a rule of law with merely declaratory effect and that the particular statement in question was mistaken since not corresponding to international law as generally understood. In the last mentioned respect reference would be made to paragraph 47 of the German military code even though any provision of the German law as such was irrelevant in a trial where the court was supposed to act under international law. The charge of defense counsel that the court in fact applied Article 345.1, announced only on November 15, 1944, with regard to crimes committed before that date, thus acting against the ex post facto prohibition, would be countered by the proposition that also Article 345.1 was not an enactment of law but a declaration of pre-existing law, correcting a previous declaration which had been erroneous.

An unbiased appraisal of the law on the effect of the plea of superior order in a war crimes trial should lead to the result that this question was not yet definitely settled before or at the beginning of World War II. Much support for the theory that the plea cannot have the effect of an absolute defense, may be found in various pre-World War II sources. For instance, the trial of Henry Wirz who during the Civil

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233 Conduct of Ilse Koch War Crimes Trial, Hearings, supra note 95, at 1214 et seq.
234 This appears clearly from the presentation in Glueck, War Criminals, op. cit. supra note 5, at 140 et seq.; especially the summary and analysis there, of various American and British decisions. See also: Lauterpacht, The Law of Nations and the Punishment of War Crimes, 21 Brit. Y. B. Int'l L. 59, 69 (1944); Sack, War Criminals and the Defense of Superior Order in International Law, 5 Law. Guild Rev. 11 (1945).
War had commanded a prisoner of war camp at Anderville, Georgia, the judge advocate made the following statement:

A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result, both the superior and the subordinate must answer for it.\(^{235}\)

In the same sense, reference is frequently made to the decision of the German Reichsgericht in the *Llandovery Castle Case*,\(^{236}\) though the ruling in that case is strongly qualified.\(^{237}\) However, in the first five editions of the leading British text on the law of nations, Oppenheim, *International Law*, it was in substance maintained that a soldier should be held immune if upon order of his military superior he had perpetrated what otherwise would be a crime.\(^{238}\) This view was adopted in an official British text published in 1913, authored by Oppenheim himself and the British Colonel Edmonds, entitled *British Land Warfare, An Exposition of Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army*, from where it entered into the 1914 edition of the United States Army's *Rules of Land Warfare* (Article 347) to remain there until the above-mentioned amendment of November 15, 1944. However, Lauterpacht's sixth edition of Oppenheim, *International Law*, contained the following statement reversing the position taken in the preceding five editions:

The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted in military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle. Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in them-


\(^{236}\) 16 Am. J. Int'l L. 708 (1922).

\(^{237}\) See the analysis by Glueck, *War Criminals*, *op. cit.* *supra* note 5, at 153.

\(^{238}\) 2 Oppenheim, *International Law* 264 et seq. (1st ed. 1906).
selves sufficient to divest the act of the stigma of a war crime. Also, the political authorities of the belligerent will frequently incline to take into consideration the danger of reprisals against their own nationals which are likely to follow as a measure of retaliation for punishing a war crime *durante bello*. However, subject to these qualifications, the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.\textsuperscript{209}

Those denying any absolute effect of the plea of superior order do not mind taking a leaf from Goebbels’ propaganda article against the Allied fliers, containing this passage:

The law of war does nowhere provide that a soldier committing an ignominious crime gains immunity by pleading superior order, especially if such order is flagrantly inconsistent with morality and international custom. . . \textsuperscript{240}

On the other hand, an outstanding American expert in the field of international law, writing in 1943, recommended to uphold “the principle *respondeat superior*” in the matter of punishment of war criminals\textsuperscript{241} and in a discussion at a meeting of the American Society of International Law, another well-known scholar, as late as 1949, made this statement:

You have the idea that a man can be tried for the crime of obeying his officers. Whoever heard of such a fantastic thing? If a man is faced with a choice between obeying the orders of his commander and observing some fantastic law about occupation and requisition, why, he is going to obey the orders of his officer, and that is that. We might as well face the thing.\textsuperscript{242}

The problem is, therefore, such a difficult one because it is intimately interwoven with other than purely legal considerations. The efficiency of an army, our army as well as that of the enemy, depends largely on the maintenance of discipline. While it is a characteristic of the totalitarian systems of government to override individuality altogether in a kind of collective ecstasy, military discipline, even in a democratic system, cannot be a great respecter of individual criticism.


\textsuperscript{240} Published in the party newspaper *Volksischer Beobachter* of May 27, 1944. Complete German text in 26 Trial of Major War Criminals, op. cit. supra note 220, 436 et seq. Partial translation into English, 4 id. at 50.

\textsuperscript{241} Eagleton, Punishment of War Criminals by the United Nations, 37 Am. J. Int’l L. 495, 497 (1943).

The disregard of the plea of superior order in judging the guilt of a military man who acted pursuant to it, makes the military subordinate the keeper of his military superior, a paradoxical thing to the military mind. In addition, those who believe that superior order should be an absolute defense, point out that it is unfair to the soldier to force him into the dilemma of either be punished for disobedience of orders, which under certain circumstances means risk of his life, or be taken to account as a criminal. It is on the other hand not desirable that soldiers should be robots ready to execute any given order of a superior irrespective of its obviously criminal and atrocious character.

A compromise solution should be found by an agreement among the civilized nations, as a supplement to the Hague Regulations annexed to the Hague Convention IV of October 18, 1907. In the World War II war crimes trials, beginning with the Japanese trials against American fliers, the most extreme position was generally taken regarding any effect of the plea of superior order in the question of guilt. This applies to American as well as other war crimes trials, international ones and those conducted several by various nations. There were a few exceptions, as for instance the acquittal of the defendant Luger by a French Military Tribunal at Strasbourg in the war crimes trial against Robert Wagner, former Gauleiter of Alsace, and six other defendants. Mr. Justice Jackson, in his report to the President, released June 7, 1945, did not completely exclude the possibility that in certain cases acquittals on the ground of superior order, obeyed by the defendant, might be justified. Said he:

With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society, as modernly organized, cannot tolerate so broad an area of official irresponsibility. There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. But the case may be greatly altered where one has

243 Jessup, The Crime of Aggression and the Future of International Law, 62 Pol. Sci. Q. 1, 6, ingeniously writes:

"Whereas the traditional international system put the burden on the state to restrain the individual, the precedent of the trial of the war criminals suggests that pressure in the form of fear of punishment should be put upon individuals to restrain the state."

Lofty as this idea certainly is, it would nevertheless seem questionable whether the individual is able to bear such a burden, even with regard to executives in a democratic state.

244 3 Law Reports, op. cit. supra note 6, at 23, especially learned comment at 54 et seq.
discretion because of rank or the latitude of his orders. And of course, the
defense of superior orders cannot apply in the case of voluntary participation
in a criminal or conspiratorial organization, such as the Gestapo or the S.S.
An accused should be allowed to show the facts about superior orders. The
Tribunal can then determine whether they constitute a defense or merely
extenuating circumstances, or perhaps carry no weight at all.\textsuperscript{245}

It was not necessarily in deviation from this counsel of moderation,
when the \textit{London Charter} for the International Military Tribunal in
Nuremberg, in its Article 8 provided:

The fact that the defendant acted pursuant to order of his government or
of a superior shall not free him from responsibility, but may be considered in
mitigation of punishment if the Tribunal determines that justice so requires.\textsuperscript{246}

This provision, as well as the similarly phrased Article 6 of the Char-
ter of the International Military Tribunal for the Far East and Article
II-4 of Control Council Law No. 10,\textsuperscript{247} the basic law for the 12 subse-
quent Nuremberg trials, was supposed to be applied in trials against
\textit{major} war criminals with regard to whom it was obvious that in view
of their high positions, involving wide ranges of discretion and even top
policy making, no reasonable judgment could result in the acknowledg-
ment of superior order as an absolute defense for any of them. This
specific applicability of the rule arrived at in the London Agreement,
was overlooked when it was without any further qualification considered
as a guiding principle also for the trials of defendants who had held
much lower positions in the military or party hierarchy. Without any
express provision, save perhaps Article VI of \textit{Ordinance No. 1},\textsuperscript{248} the

\textsuperscript{245} 12 \textit{Dep't State Bull.} 1071, 1073 \textit{et seq.} (1945).
\textsuperscript{246} \textit{TRIAL of War Criminals}, \textit{Dep't State Publication} 2420, at 17 (1945).
\textsuperscript{247} Reading:
\hspace{1em} "4. a) The official position of any person, whether as Head of State or as a responsi-
\hspace{1em} ble official in a Government Department, does not free him from responsibility for a crime
\hspace{1em} or entitle him to mitigation of punishment.
\hspace{1em} b) The fact that any person acted pursuant to the order of his Government or of a
\hspace{1em} superior does not free him from responsibility for a crime, but may be considered in
\hspace{1em} mitigation."

Quoted in Taylor, \textit{op. cit. supra} note 40, at 360.
\textsuperscript{248} Issued by Military Government, Germany, Supreme Commander's Area of Control
(1945), reading:
\hspace{1em} "1. It shall be a good defense to any charge hereunder that the offense charged was
\hspace{1em} an act of legitimate warfare by a person entitled to the status of a combatant.
\hspace{1em} "2. It shall not be a defense to any charge hereunder that the offense charged was com-
\hspace{1em} mitted under orders of any civil or military superior or of any person purporting to act
\hspace{1em} as an official or member of the NSDAP or that the offense was committed under duress"
applicability of which in war crimes trials appears highly doubtful, it was generally understood in the Dachau trials that Article 6 of the London Charter, though technically not applicable, should be applied as a rule declaratory of customary international law. In other words, it was believed that under no circumstances and irrespective of the low rank of the defendant in question and the extraordinarily high rank of the superior upon whose order he acted, and irrespective of existing battle conditions, with capital sanction for offenses against the military discipline, the plea of superior order should never be the basis of an acquittal, but at best be considered in mitigation of the sentence. This was the theory. This was the actual practice.\textsuperscript{249}

It may nevertheless have been sound insofar as the defendants were voluntary members of such criminal organizations as the Gestapo or the S.S. In this connection, it was brilliantly stated in the Nuremberg trial of General Erhard Milch:

The humblest citizens of Germany knew that the iniquitous doctrines of the Party were being implemented by ruthless acts of persecution and terrorism which occurred in public view. Thousands of obscure German citizens were only too well aware that they were living under the scrutiny of an army of spies and saw their friends and relatives summarily dispatched to concentration camps for the slightest suspicion of disdissience. The defendant did not live in a vacuum. He was not blind or deaf. Long before 1939; long before his military loyalty was called into play; long before the door to withdrawal was closed, he could have seen the bloody handwriting on the wall, for murder and enslavement of his own countrymen was there written in blazing symbols. But he had taken on the crimson mantle of the Party, with all its ghastly implications, and he wore it with glory and profit to himself to the end . . .

"In an authoritarian state, the head becomes the supreme authority for woe as well as weal. Those who subscribe to such a state submit to that principle. If they abjectly place all the power in the hands of one man, with no right reserved to check or limit or repudiate, they must accept the bitter with the sweet. This is especially true of those in high places in the state—those who choose to enjoy the honour, the emoluments and the power to such high stations. By accepting such attractive and lucrative posts under a head whose power they knew to be unlimited, they ratify in advance his every act, good or bad. They cannot say at the beginning, 'The Fuehrer's decisions are final; we will have no voice in them; it is not for us to reason why; his will is law', and then, when the Fuehrer decrees aggressive war or barbarous inhumanities or

\textsuperscript{249} For instance, two defendants in the Malmedy Case were convicted for the carrying out of criminal orders, which they had received in the theater of war from their highest superior in the field, Colonel Peiper. Reference is made to the defendants Hans Hillig and Otto Wichmann, both sergeants at that time. The court sentenced both to 10 years imprisonment. These sentences were confirmed upon review.
broken covenants, to attempt to exculpate themselves by saying, 'Oh, we were never in favour of those things'. . ."250

This observation, though made by the tribunal judging a General and top Party man, was applicable to all those who had voluntarily joined organizations priding themselves on a program, the atrocious nature of which should have been obvious to anybody not intellectually blind and deaf, the old Party members as well as those who were anxious to be on the bandwagon when it apparently was on the road to success. In point is the following statement in a well-known book by an outstanding Soviet lawyer who had an important voice in the Allied deliberations at the London Conference:

All the members of the Hitlerite clique were not only participants in an international band of criminals, but also the organizers of a countless number of criminal acts (murders, robberies, destructions, etc.) performed by the Hitlerite invaders.251

A different approach, reasonably possible even in this respect is indicated by the following argument of the ex officio defense counsel in the Kharkov Trial,252 the Russian advocate N. V. Kommodov:

... It is doubtful whether it is possible to place these men who committed these crimes on a par with those who inspired them. They became murderers because their souls were killed. . .253

The plea of superior order, outlawed as an absolute defense, was considered a mitigating factor in the theory underlying the war crimes trials before American military commissions and military government courts in Germany. Hindsight is always easier than foresight. It is therefore admirable that even at the time when emotions were running very high in justified indignation at the Nazi atrocities, an outstanding American scholar was detached enough to write:

250 7 Law Reports, op. cit. supra note 6, at 42.
251 TRAINTIN, HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW 86-87, (Edited by Vishinsky, translated by Rothstein, 1945).
252 This trial, involving three Germans and one Russian as defendants, was conducted by the Russians before the armistice. The accused were charged with atrocities committed during the occupation period against the civilian population of the region of Kharkov. All the four were convicted, sentenced to death and executed. Id. at 15.
253 The trial in the case of the atrocities committed by the German fascist invaders in the city of Kharkov and in the Kharkov region (December 15 to 18, 1943, translated from the report published in Pravda, December 16 to 20, 1943, by the Foreign Languages Publishing House, Moscow, 1944), at 77.
We should not twist the law or make *ad hoc* innovations to meet our present desires for retribution. We should take into account the emotional strain of bombed civilians who have lost their homes and loved ones through what they erroneously believed were acts in violation of the laws of war.\textsuperscript{254}

As the war crimes trial program in Germany advanced, sentences became more and more lenient. Unbiased appraisal of the first *Dachau* trial should not deny the fact, however, that in the beginning of the program the theoretically acknowledged mitigating effect of the plea of superior order was in some instances paid lip service only, as is particularly illustrated by the numerous death sentences, meted out at that early period, to underlings. Also some of the sentences of imprisonment may have been too severe in the terms meted out. It is possible that in those early days war crimes justice in Germany was emphasizing the sword rather than that other symbol of justice, the scales. To take care of such shortcomings, wherever this is still possible, the Commander-in-Chief, European Command, has recently established a War Crimes Modification Board.\textsuperscript{255}

Proper consideration of the plea of superior order should pay attention to the particular circumstances of each individual case rather than to deal with this defense in a stereotyped manner. It is of course a different thing whether a military man, a Party official, a government official or a private civilian claims that he could not avoid obeying a given order, and with regard to military men a distinction should also be made whether the order was given in the battlefield or in the zone of the interior, and whether the superior involved was just one rank higher up or towering in rank as against the subordinate concerned. An important factor is also the military status of the respective defendant, especially whether he was an officer or an enlisted man, in the first case whether he was a company or a field grade officer, in the second case whether he was a non-commissioned officer or a private. Insofar as the criminal act itself is concerned, a proper appraisal of the plea in question should examine whether the criminal character of the order was obvious to anybody or at least to the person receiving it and carrying it out; whether the order required the commission of a merely technical crime or was at the same time a disregard of elementary principles of


\textsuperscript{255} According to information contained in letter from the Department of the Army, Office of the Judge Advocate General, dated March 6, 1950.
humanity; whether the superior giving the order acted on his own initiative or whether it was known to the subordinate that the superior gave him the order pursuant to directions received from higher authority. Attention should also be paid to the intellectual level and the station in military and civilian life and to similar circumstances in the person of the defendant determining his ability to understand the criminal character of the order and his moral capacity to offer resistance. Relevant in this connection is also the rigidity of the discipline in the organization concerned, especially whether it required "blind obedience" under the sanction of death penalty. Another important circumstance would seem to be whether the man obeying the order was in inner agreement with it or whether he acted reluctantly, perhaps even with a certain demonstration against it and an attempt to have it revoked or changed.

e. Plea of Necessity.

The plea of superior order is strongly related to, but technically not identical with, the plea of necessity for the preservation of one's own life, often vaguely termed the defense of compulsion, by German defense counsel mostly referred to as "Notstand", literally translated "Emergency", but as a term of art corresponding to what is called necessity in Anglo-American law. The emphasis in the plea of superior order is the duty to obey; the emphasis in the plea of necessity is the emergency situation in which one evil, serious harm for the person in question, can only be avoided by another evil, inflicting serious harm upon an innocent person. Of course, the plea of necessity must not be confused with the plea of legitimate self-defense, a recognized justification for any action which otherwise would be a crime. Self-defense exists only where the perpetrator acts under the reasonable belief that he must defend himself against an impending unlawful attack. The situation in which the plea of necessity is invoked does not consist in an actual or reasonably assumed unlawful attack, but supposes an attack undertaken against an innocent victim.256

Classical Anglo-American law is not settled on the general problem

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256 The distinction between self-defense and necessity is thus pointed out by the judgment in the Krupp trial in Nuremberg:

"The defense of necessity is not identical with that of self-defense. The principal distinction lies in the legal principle involved. Self-defense excuses the repulse of a wrong whereas the rule of necessity justifies the invasion of a right."

10 Law Reports, op. cit. supra note 6, at 148.
as to whether necessity may ever be a justification for otherwise criminal homicide. The question came up in two leading cases concerning self-preservation in shipwreck.\textsuperscript{257} In one of them, an English case, the special verdict of the jury finding the accused guilty of murder, subject to the opinion of the Court, was sustained by the latter and the prisoners were sentenced to death. However, the opinion of the judges does not seem to outlaw the plea of necessity in a homicide case, but to rest the decision on specific circumstances in the particular case.\textsuperscript{258} Similarly failing to settle the law, is the corresponding American case wherein the defendant was found guilty but sentenced to an imprisonment of short duration. Also there the conviction was not based on an absolute outlawing of the plea of necessity as an excuse for the killing of a human being, but on reasons derived from the individual case under consideration.\textsuperscript{259}

In spite of the above-shown uncertainty of the classical authorities, the following rule has been stated in reliance on modern cases:

Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil. Homicide through necessity—\textit{i.e.}, when the life of one person can be saved only by the sacrifice of another—\ldots The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defense to a prosecution for illegally seizing such relief. To the same general effect speak high English and American authorities. Life, however, can usually only be taken, under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree.\textsuperscript{260}

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\textsuperscript{258} Reg. v. Dudley, \textit{supra} note 257, involving Dudley and Stephens as defendants, often referred to as the \textit{Dudley} case. In announcing the opinion of the Court, Lord Coleridge stated among other things:

"It is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity; but the temptation to the act which existed here was not what the law has ever called necessity."

However, the Crown commuted the punishment to imprisonment for 6 months.

\textsuperscript{259} U. S. v. Holmes, \textit{supra} note 257.

\textsuperscript{260} 1 \textit{Wharton},\textit{ Criminal Law} 177 (12th ed. 1932). See also: 10 \textit{Law Reports, op. cit. supra} note 6, at 147.
According to Section 52 of the German Criminal Code, headed "Notigung" (duress),

An offense is not punishable if the offender was compelled to do it by irresistibly force or under threat to himself or a relative, coupled with imminent danger to life or limb which could not otherwise be averted.261

In one of the subsequent Nuremberg trials, the Flick Case,262 the Court expressly distinguished the plea of necessity from the plea of superior order, considered the first one not affected by the provision in Article II-4 of Control Council Law No. 10 and acquitted several defendants from the charge of slave labor in acknowledging their incriminating actions in question as justified by necessity.263 A very elaborate opinion on the applicability of the plea of necessity in a Nuremberg trial, is contained in the judgment in the Krupp Case.264 Finally, in one of the subsequent Nuremberg trials involving not industrialists, but officers as defendants, the so-called Hostages trial265 the judgment of the tribunal expressed the following view under the heading Duress Needed for Plea of Superior Orders:

But it is stated that in military law even if the subordinate realizes that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.

Nor need the peril be that imminent in order to escape punishment.266

262 9 Law Reports, op. cit. supra note 6, at 18 et seq.
263 After referring to Article II-4 of Control Council Law No. 10, the Tribunal stated:
"In our opinion, it is not intended that these provisions are to be employed to deprive a defendant of the defense of necessity under such circumstances as obtained in this case with respect to defendants Steinbrinck, Burkart, Kaletsch and Terberger. This Tribunal might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity here urged in their behalf. This principle has had wide acceptance in American and English courts and is recognized elsewhere."

9 Law Reports, op. cit. supra note 6, at 19.
264 10 Law Reports, op. cit. supra note 6, at 146 et seq.
265 Trial of Wilhelm List et al., 8 Law Reports, op. cit. supra note 6, at 34.
266 Id. at 91.
It appears from the foregoing, that the judges in the subsequent Nuremberg trials made a clear distinction between the plea of superior order technically and the plea of necessity and that in their view a plea of necessity could under certain circumstances lead to an acquittal in spite of the provision of Article II-4 of Control Council Law. No. 10. The practice in the Dachau trials was less developed in this respect. The plea of necessity was practically merged with the plea of superior order, therefore not considered as a potential absolute defense but only a matter of mitigation. This was, insofar as military defendants were concerned, in line with the following argument by Professor Glueck:

It is clear that if and when coercion is a justification the reason lies in the recognition of the strength of the instinct of self-preservation; i.e., a recognition of human frailty; but a soldier’s entire work involves the suppression of the instinct of self-preservation.267

Alluring as this argument sounds, it would seem to have a logical weakness if applied to a soldier acting upon superior order. The soldier is supposed to be a hero in the fight against the enemy, but not in the fight against his superiors. He counts the possibility of losing his life by enemy action but not the danger of losing it as a result of an argument with his superior based on difference of opinion concerning the lawfulness of a given order. It appears therefore that any disregard of the situation of necessity with respect to crimes committed by a soldier pursuant to superior order cannot persuasively be based on a special professional duty to suppress the instinct of self-preservation, but on a general ethical prohibition to use the extermination of another’s life as a means for the preservation of one’s own. The problem is, whether law adds a criminal sanction to such a dictate of humanity, and if so, how extensive the sanction is.

f. Military Necessity and Sundry Other Pleas.

Different from the plea of necessity for the preservation of one’s own life is the plea of “military necessity”268 For instance, in the Malmedy Case there was much evidence to the effect that the defendant Peiper had issued an order in substance allowing the killing of prisoners of war should military necessity require it. Was such an order lawful?

267 Glueck, War Criminals, op. cit. supra note 5, at 242.
268 15 Law Reports, op. cit. supra note 6, at 175 et seq. Glueck, War Criminals, op. cit. supra note 5, at 63, 195, 218 et seq.
Certainly not. Military necessity can never be a valid excuse for what is expressly forbidden by the rules of warfare; to reach a contrary result would mean to replace the law of war by an anarchy of war. It is rightly stated in the Basic Field Manual, Rules of Land Warfare, Article 23:

_Military necessity._—Military necessity justifies a resort to all the measures which are indispensable for securing this object and which are not forbidden by the modern laws and customs of war.

A leading textbook on international law contains the following interesting discussion of the plea of military necessity:

As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects. In accordance with the German proverb, _Kriegsraeson Geht vor Kriegsmanier_ (necessity in war overrules the manner of warfare), many German authors before the World War were already maintaining that the laws of war lose their binding force in case of extreme necessity.

The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war, _i.e._, generally binding customs and international treaties, but only by usages (Manier, _i.e._, Brauch), and it says that necessity in war overrules usages of warfare. In our days, however, warfare is no longer regulated by usages only, but to a greater extent by laws—firm rules recognized either by international treaties or by general custom. These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self-preservation. . . . Article 22 of the Hague Regulations stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity. . . .

In accordance with the above quoted view, any plea of military necessity in alleged justification of the killing of prisoners of war was doomed to failure before the courts in Dachau. Nor were they inclined to go

260 Art. 23 of the Hague Regulations, annexed to the Hague Convention IV of October 18, 1907, provides, among other things, that it is especially forbidden.

"(b.) To kill or wound treacherously individuals belonging to the hostile nation or army;"

"(c.) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;"

"(d.) To declare that no quarter will be given;"


into the question whether or not the bombings of German cities by the Allied air forces were lawful under international law, since even a negative answer to this question could not have justified any retaliation by killing prisoners of war. In this respect, the Dachau practice considered applicable Article 2 of the Geneva Convention of July 27, 1929 relative to the treatment of prisoners of war providing in its last paragraph that measures of reprisal against prisoners of war are prohibited. Insofar as alleged unlawful treatment of German prisoners of war by members of the Allied forces was claimed in defense, this plea was considered as irrelevant in the Dachau Trials, mostly by referring to the fact that two wrongs do not make one right. The so-called *tu quoque* argument was thus nipped in the bud.

**g. Observations.**

It was not the purpose of the foregoing discussion to go into any details but rather to show the main features of the substantive law of war crimes as applied in the Dachau trials. It appears from what has been submitted that the approach there was not a revolutionary one but an honest attempt at keeping in line with established legal tradition. The old-time principles were, however, handled in a flexible way to adjust them to situations unknown to previous generations. It is true that with regard to the pleas of superior order and necessity the most severe among the conflicting views expressed on this point before World War II, was adopted in the Dachau trials as well as in most of the other World War II war crimes trials. This was not inconsistent with the maxim: *in dubio pro reo* which is a rule of evidence rather than of substantive law. The question remains nevertheless arguable whether a more benevolent approach to the plea of superior order would not have been a more realistic appraisal of the particular psychological situation which hung like a sword of Damocles over everybody in the Third Reich.\(^{272}\) Be this as it may, it is certainly not true of the Dachau war crimes law, as alleged by a critic of the Nuremberg law, that "some pretty astute somersaults" had been made by the victors in World War II "... to live up, in appearance, to the particular rule that no man can be tried under an *ex post facto* law. ..."\(^{273}\) On the whole it may well be said that the Dachau

\(^{272}\) ROTHFELS, *THE GERMAN OPPOSITION TO HITLER* 27 (1948), quotes the following boasting statement of Ley:

"There is not such a thing as a private individual in National Socialist Germany."

\(^{273}\) LUNAU, *THE GERMANS ON TRIAL* 5 (1948).
version of the war crimes law was far less sophisticated than the so-called Nuremberg law and therefore less open to criticism on the basis of alleged retroactivity of the law applied.

DACHAU TRIALS AND HABEAS CORPUS REVIEW BY THE SUPREME COURT OF THE UNITED STATES

Until the recent decision of the Supreme Court of the United States in the so-called Eisentrager case,\(^\text{274}\) the question was debatable whether a Dachau trial could upon a habeas corpus petition, properly filed,\(^\text{276}\) be a matter for review by the federal courts of the United States.\(^\text{276}\) This issue has been definitely settled in the negative by unavoidable implications from the above mentioned opinion in a war crimes case which was not a Dachau trial but a trial before United States Military Commission in Nanking, China.\(^\text{277}\)

Petitioners for a habeas corpus review with regard to a Dachau trial were not faced with the handicap that the federal courts of the United States have no jurisdiction to interfere by any kind of post trial review with a judgment passed by an international tribunal.

No petition for habeas corpus has ever been brought, insofar as this writer is informed, on behalf of any of those who have been convicted by the International Military Tribunal in Nuremberg, in the case against Herman Goering \textit{et al.}. The international or at least multi-national character of this tribunal was obvious from its establishment by the London Agreement of August 8, 1945, concluded between four powers (United States, Britain, France, Russia).\(^\text{278}\) Under this quadripartite arrangement, the Tribunal consisted of four members, each with an al-

\(^{274}\) Johnson v. Eisentrager, 70 S. Ct. 936 (1950).

\(^{276}\) Colonel Everett's petition in the \textit{Malmedy Case}, improperly filed directly with the Supreme Court of the United States, was not denied on the merits, but on jurisdictional grounds. Everett v. Truman, 334 U. S. 824 (1946).


\(^{278}\) The alleged war crime for which Eisentrager and his codefendants, all German nationals, had been convicted, was that after Germany had surrendered they had given certain information to Japanese military forces, Japan then still being at war with the United States. Mr. Justice Black, in a dissenting opinion, doubts whether their incriminated action really constituted a war crime. Johnson v. Eisentrager, 70 S. Ct. 936, 951 (1950).

\(^{278}\) Charter and Indictment in: \textit{Trial of War Criminals}, \textit{op. cit. supra} note 246, at 13 et seq.
ternate, severally appointed by the four signatories. In the same way, the four chief prosecutors were appointed, to act in coordination, subject to specified circumstances where they had to act as a Committee with a majority rule. There was a single indictment naming the four powers as the prosecuting party.

Essentially alike, though with certain differences, was the organizational setup of the International Military Tribunal for the Far East which passed the judgment in the so-called Tokyo trial.\footnote{Charter in: \textit{Trial of Japanese War Criminals}, Dep't State Publication 2613, \textit{Far Eastern Series} 12, at 39 (1946).} An international agreement was the source of its authority, though only indirectly. At the Moscow Conference of December 26, 1945, between the United States, Britain and Russia, with China concurring in the resolutions, a wide range of implementation authority had been given to the Supreme Commander of the Allied Forces in the Far East. Based on this authority, General MacArthur, as the above mentioned Supreme Commander, established the International Military Tribunal for the Far East in a special proclamation, dated January 19, 1946. In his same multi-national capacity, he issued the charter of the Tribunal and appointed the original nine judges, each of them, however, nominated by one of the signatories of the Japanese surrender document. His additional appointment of judges respectively nominated by India and the Philippines, raised the number of the members of the Tribunal from 9 to 11. A policy decision of the Far Eastern Commission, itself a multi-national body, ratified those appointments made by General MacArthur. Similar to the structure of the Tribunal was the organizational layout of the prosecution. Eleven powers were represented; however, only the United States by a Chief Counsel, the ten other governments by Associate Counsel. Again there was only one indictment naming eleven governments as the prosecuting party.

Motions for leave to file petitions for writs of habeas corpus, submitted on behalf of several of the defendants convicted in the Tokyo trial, were denied by the majority of the Supreme Court of the United States on the ground that the Military Tribunal for the Far East had not acted as an American court and that therefore courts of the United States could not interfere with its judgment.\footnote{Hirota v. MacArthur, 338 U. S. 197 (1949).} A provocative concurring opinion was filed by Mr. Justice Douglas.\footnote{Id. at 199, 204, 207.}
The question whether the "Military Tribunals" in the twelve subsequent Nuremberg trials had acted under international or under American authority, was a borderline problem. The origin of those tribunals was "Law No. 10" of December 20, 1946, enacted by the quadripartite Control Council of the Interallied Administration of Germany. "To give effect to the Moscow Declaration of 30 October, 1946, and the London Agreement of 8 August, 1945, and the Charter issued pursuant thereto", was its self-stated purpose. In the American zone it was implemented by Ordinance No. 7 of the American Military Government in Berlin, dated October 18, 1946. This American decree, in its article II, established the special courts to try the subsequent Nuremberg cases. They were "Military Tribunals" in name only, but not in fact, since all the judges were civilians. Their appointment was not an interallied matter but took the form of action by the American Military Government. Eligible as judges were American lawyers of a certain standard specified in the Ordinance. The indictments mentioned only "the United States of America" as the prosecuting party. Also certain external paraphernalia gave the trials the appearance of purely American proceedings. For instance, the beginning of each session of the court was solemnly announced by the marshal in the following words: "God save the United States of America and This Honorable Tribunal". While all this was apparently symptomatic of an American rather than international character of the subsequent Nuremberg trials, a contrary view was the official American position, elaborately expressed in an opinion of the Legal Division of the American Military Government in Berlin, and supported by a dictum of the tribunal that decided the so-called Justice trial.

There was no need to settle this problem as long as petitions for writ of habeas corpus were, on behalf of certain defendants in subsequent Nuremberg trials, improperly filed directly with the Supreme Court of the United States. They were denied by memorandum decisions, obviously on the ground that the Supreme Court of the United States would only have appellate jurisdiction in such matters, if any, but no original jurisdiction. Flick's lawyer avoided this technical mistake by filing

283 United States v. Altstoetter, 6 Law Reports, op. cit. supra note 6, at 49.
the petition with the United States District Court for the District of Columbia. It was there denied on a different jurisdictional ground, namely because petitioner was confined in Landsberg prison in Germany, which is outside the territorial limits of the District of Columbia.\textsuperscript{285} However, the United States Court of Appeals for the District of Columbia Circuit did not agree with this reasoning expressing the opinion that the petition, if otherwise proper, would lie in the District Court for the District of Columbia.\textsuperscript{286} It nevertheless confirmed the denial of Flick's petition but on a ground completely different from the venue issue. It found that the military tribunal in Nuremberg, which had passed the judgment against Flick, was "in all essential respects, an international court" whose "power and jurisdiction arose out of the joint sovereignty of the Four victorious Powers" and out of the "exercise of their supreme authority . . . vested in the Control Council".\textsuperscript{287} Certiorari was denied by the Supreme Court of the United States.\textsuperscript{288}

While in the \textit{Flick Case}, the opinion of the Court of Appeals concerning the venue problem amounted to a \textit{dictum}, a ruling to the same effect had before been made by the same court in the above mentioned \textit{Eisentrager} case. There the Court of Appeals, reversing a decision of the United States District Court for the District of Columbia,\textsuperscript{289} which was adverse to the petitioner on the ground of lacking territorial jurisdiction of the court, in view of the petitioner's detention abroad, said:

\begin{quote}
We think, upon the basis of the foregoing conclusions, that when a person is deprived of his liberty by the act of an official of the United States outside the territorial jurisdiction of any District Court of the United States, that person's petition for a writ of habeas corpus will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailor.\textsuperscript{290}
\end{quote}

This holding of the Court of Appeals in the \textit{Eisentrager} case encouraged those interested in a habeas corpus review of certain Dachau trials to the hope that a petition not improperly filed directly with the Supreme Court of the United States (as had been the technical defect

\begin{footnotes}
\item[285] \textit{Ex parte} Flick, 76 F. Supp. 979 (D. C. D. C. 1948).
\item[287] Flick v. Johnson, \textit{supra} note 286, at 985.
\item[288] Flick v. Johnson, 70 S. Ct. 158 (1949).
\item[289] The District Court opinion is not reported but is summarized in the opinion of the Court of Appeals. Eisentrager v. Forrestal, \textit{supra} note 286.
\item[290] \textit{Id.} at 967.
\end{footnotes}
of Colonel Everett’s petition on behalf of defendants in the *Malmedy Case*), but properly filed with the District Court for the District of Columbia, might result in a habeas corpus review of the detentions complained of. Nobody had ever claimed or could reasonably have claimed that the military commissions or military government courts, set up by the War Crimes Group of the United States Army in Germany, were international tribunals. It has always been understood that they were purely American tribunals.291 Thus the ground on which the Flick petition was finally denied did not apply to similar petitions on behalf of defendants convicted in a Dachau trial. And any venue hurdle appeared to be removed by the Court of Appeals’ decision in the *Eisentrager* case. Such hope was however frustrated by the decision which, upon certiorari, the Supreme Court of the United States passed in the *Eisentrager* case. In a majority opinion, written by Mr. Justice Jackson, the question was not answered but expressly left open whether the Court of Appeals had been right in its opinion that a federal court in the United States had authority to issue a writ of habeas corpus in favor of an otherwise eligible prisoner, detained outside the territorial jurisdiction of the federal court concerned, but by an American jailor whose highest superior was within the territorial limits of the jurisdiction of that federal court.292 Rather, the decision of the Court of Appeals in the *Eisentrager* case was reversed on the ground that the constitutional protection by writ of habeas corpus was not available to an enemy alien detained in an American prison outside the territorial limits of the United States.293 The *Quirin* and *Yamashita* cases, in which the Supreme Court had denied the petitions on their merits, but not on jurisdictional grounds,294 were distinguished by an interpretation of the facts in the light of which the detention of those prisoners had been within territory of the United States.295 It is obvious that this ruling in the *Eisentrager* case constitutes a definite jurisdictional bar to any attempt at a habeas corpus review in a Dachau trial. The Supreme Court was aware of this far reaching effect of its ruling in the *Eisentrager* case, as appears from a note in Mr. Justice Jackson’s opinion, referring to numerous similar petitions filed on behalf of persons convicted in

291 Perlman, *supra* note 276.
292 *Supra* note 274, at 950.
293 *Id.* at 938, 943, 945, 947.
294 *Ex parte* Quirin, 317 U. S. 1 (1942); *In re* Yamashita, 327 U. S. 1 (1946).
295 *Supra* note 274, at 945.
Dachau trials, to be affected by the Court’s ruling in the *Eisentrager* case.\(^{296}\) Thus the final judicial seal was set on the judgments in the Dachau trials. It was definitely established that any further review thereof could only take place in the form of administrative, especially clemency, procedure.

**Conclusion**

Whether or not, under international law as it existed before World War II, there was a crime of aggressive war, may be seriously debated. There cannot be any doubt, however, that for the present and the future, the Nuremberg and the Tokyo trials and the United Nations’ endorsement of the “Nuremberg Law” have definitely established aggressive war as a category of international criminal delinquency. But this does not mean that we have reached the stage where there will never be any more war and therefore no need for a law of war crimes. Writing with a rather optimistic vision regarding the future of international law, an outstanding expert nevertheless anticipated the possibility of armed conflict between an aggressor and international forces opposing him, suggesting, in this connection, the need for a streamlining of the rules of warfare.\(^{297}\) In a study prepared by the Secretary-General of the United Nations, it is said:

> War crimes are . . . defined as violations of the laws or customs of war. This implies that these laws and customs are applicable also to aggressive war.\(^{298}\)

The conception of war crimes thus survives the outlawry of aggressive war. In a realistic approach it cannot be denied that it is necessary to adequately prepare for future war crimes trials. Any study of the historical truth concerning past war crimes trials should not neglect the purpose of learning from the past how to make it better in the future.

A good deal of the objections which have been raised in forum discussions significantly labeled as “the trials on trial”;\(^{299}\) are based on certain legal fineries of the “Nuremberg Law” which are absent from the traditional law of war crimes applied in the Dachau trials. However,

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\(^{296}\) *Id.* at 938, note 1.


\(^{299}\) See for instance, the various articles in 3 *Common Cause* 284 et seq., including a reprint of Szilard’s most amusing fictional feature *My Trial as a War Criminal*, 17 U. of Chi. L. Rev. 79 (1949).
the catch phrase of "victors' justice", referring to the fact that the tribunals were exclusively composed of the victor nations as judges, would seem to hit also the Dachau trials. The answer to this objection appears to be that "victors' justice", while certainly not an ideal state of things, does nevertheless not exclude the possibility of a fair trial and an honest judgment. Moreover, at the time of the armistice the world was not yet ripe, as it is not even today, for the existence of permanent tribunals for the administration of international criminal justice. In the case of a victory of the Axis powers, they would not have hesitated to arraign alleged Allied war criminals before tribunals exclusively composed of Axis nationals. It was not taking a lesson from their expected attitude, but following the traditional line that tribunals established by the Allied nations were sitting in judgment over Axis nationals accused of war crimes.

Awareness of this fact should not, however, discourage our present generation of lawyers from making every reasonable effort toward the achievement of an international agreement establishing a permanent Court of International Criminal Justice, with jurisdiction to try alleged war criminals upon complaint from any affected side, that is not only to try nationals of defeated countries. Pending such progress in the development of international law, it may be a wise policy for our Government to give to enemy nationals as defendants in war crimes trials substantially the same safeguards against possible miscarriage of justice which are given to American defendants tried before an American Court of the same kind (court-martial or military commission). We should not feel that such a policy would be unreasonable in view of the possibility that the enemy defendant in question may thereby have a more favorable position before an American war crimes tribunal than he would have had as a defendant before a criminal court in his own country. Nor should we be influenced by the fact that the requirements of a fair trial in the American tradition are higher than the requirements of a fair trial in a more general (international) understanding of this conception. It is the old established role of our country to march in the frontline of the champions of freedom and justice. Of the two possible mistakes, let us rather do too much than too little in this direction.
Annex I


Subject: Military Commissions.

1. General.

a. Authority to Appoint. You are hereby authorized to appoint military commissions for the trial of persons subject to the jurisdiction of such commissions who are charged with violations of the laws or customs of war, of the law of nations, or of the laws of occupied territory or any part thereof. You are not authorized to redelegate such appointing powers.

b. Cases to be Tried. As a matter of policy no case shall be referred to trial before a military commission except when directed by this headquarters. Applications for authority to proceed with such trials will be forwarded to the Deputy Theater Judge Advocate, War Crimes Branch, this headquarters, APO 757.

c. Composition. Military commissions shall be composed of not less than three commissioned officers of the United States Army. There shall also be appointed a trial judge advocate and defense counsel.

d. Conviction or Sentence. The concurrence of at least two-thirds of the members of the commission present at the time of voting shall be necessary for the conviction and for the sentence.

e. Approval of Sentence. No sentence of a military commission appointed under the authority cited in sub-paragraph a, above, shall be carried into execution until the same shall have been approved by the officer appointing the commission or by the officer commanding for the time being.

f. Confirmation of Death Sentence. No sentence of death shall be carried into execution until it shall have been confirmed by the Theater Commander or his designee.

2. Rules of Procedure. Military Commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings, consistent with the powers of such commissions, and with the rules of procedure herein set forth, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure, and evidence prescribed for general courts-
martial. The provisions of Section VII, paragraph 38-47, War Department FM 27-5, subject: "Military Government and Civil Affairs," dated 22 December 1943 are designed as a general guide in this field and will be followed except as amended by this letter or other instructions of this headquarters.

3. Evidence Admissible. Such evidence shall be admitted before a military commission as, in the opinion of the president of the commission, has probative value to a reasonable man.

4. Charges and Specifications. Formal charge and investigation as contemplated in Article of War 70 are not necessary in proceedings before military commissions, although War Department, Adjutant General's Office Form Number 115, may be used as a charge sheet. The charge should designate the offense by its legal name or describe it in terms of international law, preferably without reference to an Article of War. The specification should set forth the details of the act charged with sufficient definiteness to show the jurisdiction of the commission and the status of the accused. The accused shall be furnished with a copy of the charges and specifications. Although no oath is necessary, the charge should be signed by a person subject to military law. At some stage prior to the trial, the charge should be investigated sufficiently to enable the appointing authority to determine that the offense merits trial by military commission. Before directing the trial of any charge, the appointing authority will refer the case to his staff judge advocate for consideration and advice.

5. Challenges. Members of the military commission may be challenged by the accused or the trial judge advocate for cause stated to the court. Peremptory challenges shall not be allowed.

6. Oaths. Making such changes as are necessary, the appropriate oaths contained in Article of War 19 shall be administered to members of the commission as well as to the prosecution and to others connected with the trial. All witnesses will be sworn.

7. Pleas. General and special pleas of the accused should be heard and passed upon by the commission in order to insure a fair and impartial trial.

8. Fees and Allowances. Fees and allowances for witnesses, court reporters and interpreters will be set as provided in Army Regulations 35-4120, dated 30 July 1943, as changed, or as may be published in future instructions from this headquarters.

9. Interpreter for Accused. The accused shall have the right to have
the proceedings of the commission interpreted into his own language if he so desires.

10. **Records of Trial.**

   a. **Preparation.** Commissions shall keep a record of their proceedings, conforming as nearly as practicable to that prescribed for general courts-martial. Court reporters may be detailed for this purpose. If for any cogent reason it is inexpedient to make a verbatim record of the proceedings by stenographer or in longhand, the record shall be prepared in form prescribed for special courts-martial, preparing in such case a sufficiently complete summary of the testimony of the witnesses that the reviewing authority may properly evaluate the evidence received by the commission.

   b. **Disposition.** The record of trial will be prepared and authenticated in duplicate and forwarded, together with pertinent accompanying papers, including an original and signed copy of the review of the staff judge advocate, to the Deputy Theater Judge Advocate, War Crimes Branch, this headquarters, APO 757.

11. **Sentence.**

   a. **General.** Subject to limitations imposed by this headquarters, military commissions may adjudge any type of punishment referred to in paragraph 45, War Department FM 27-5, subject: “Military Government and Civil Affairs,” dated 22 December 1943. Commissions may be guided by, but are not limited to, the penalties authorized by the Manual for Courts-Martial, the laws of the United States, and of the territory in which the offense was committed or the trial is held.

   b. **Places of Confinement.** Places of confinement will be designated by the appointing authority as in the case of prisoners sentenced to imprisonment by military government courts.

12. **Review.**

   a. Every record of trial by military commission will be referred by the appointing authority to his staff judge advocate for review before he acts thereon.

   b. Every record of trial in which a death sentence is adjudged, if such sentence is approved and not commuted by the appointing authority, will be forwarded to the Deputy Theater Judge Advocate, War Crimes Branch, this headquarters, APO 757, for review by the Theater Judge Advocate or his deputy and presentation with appropriate recommendations to the confirming authority for action.

13. **Action Upon Sentences After Confirmation.** The action taken by the confirming authority upon sentences requiring confirmation will
be notified to the appointing authority, who will issue appropriate orders promulgating the sentence as confirmed and carry the same into execution. In confirmation cases the record of trial will be retained in the office of the Deputy Theater Judge Advocate.

14. *Publicity.* Trials will be held in open court, except when security, protection of witnesses, or other considerations make this inadvisable. Full publicity may be given to trial proceedings and execution of death sentences. Press material will be submitted to press censorship in the normal way and will be subject only to normal press censorship restriction to protect counter-intelligence organizations and method.

15. *Mitigation, Remission, etc.* The power to order the execution of a sentence, or to confirm a death sentence, of a military commission includes the power to disapprove or vacate in whole, or in part, any finding of guilty, and to mitigate, remit, approve and commute, suspend or to remand for further proceedings or for rehearing before a new military commission.


a. The appointing authority will advise the Deputy Theater Judge Advocate, War Crimes Branch, this headquarters, APO 757, by TWX of the result of each trial by military commission immediately upon announcement of findings and sentence.

b. Reports of execution of all death sentences imposed by military commissions will be made to the Deputy Theater Judge Advocate.

17. *Distribution of Orders Promulgating Sentences.* The distribution listed below will be included for all orders promulgating sentences of military commissions:

a. Three copies to The Adjutant General, Washington 25, D. C.

b. Two copies to The Judge Advocate General, Washington 25, D. C.

c. One copy to the Adjutant General, US Forces, European Theater, APO 757.

d. Three copies to the Theater Judge Advocate, APO 757.

e. Two copies to the Assistant Judge Advocate General with the US Forces, European Theater, APO 887.

f. Three copies to the Deputy Theater Judge Advocate, War Crimes Branch, APO 757.

18. All directives and instructions of this and subordinate headquarters relating to military commissions are hereby superseded to the extent inconsistent with this letter.
Regulation on Military Government Courts, issued by Letter of Headquarters, U. S. Forces, European Theater, Dated July 16, 1945, AG 000.5-2 CAP.

Subject: Trial of War Crimes and Related Cases.

1. General.

a. As a matter of policy, cases involving offenses against the laws and usages of war or laws of occupied territory or any part thereof commonly known as war crimes, together with such other related cases within the jurisdiction of Military Government courts as may from time to time be determined by the Theater Judge Advocate, committed prior to 9 May 1945, shall be tried before the specially appointed courts provided for in this directive. Such trials in the United States Army zone of occupation will hereafter be conducted before Military Government courts, except where otherwise directed by the Theater Commander.

b. Charges against persons accused of offenses of the character described above will originate in the Office of the Theater Judge Advocate, will be processed through Army Judge Advocates to trial by specially appointed Military Government courts, and will be reviewed by Army Judge Advocates prior to approval of sentences in accordance with procedures herein provided.

2. Procedural Matters before Trial.

a. Charges. Charges in the cases contemplated will be prepared under the direction of the Theater Judge Advocate in the form prescribed for Military Government courts.

b. Reference for Trial. The Theater Judge Advocate, or the authority designated by him, will forward charges to the appropriate Army Military District Commander for reference to trial before Military Government courts. Such charges when forwarded will be addressed “Attention: Staff Judge Advocate”. The charges will be referred to the court for trial by the Army Military District Commander, or in his discretion by his Staff Judge Advocate.

c. At the time of forwarding such charges to the Army Military District Commander the Theater Judge Advocate will in each case designate those United Nations, if any, which in his judgment should be invited by such commander to send observers to the trial.

3. Appointment of Courts. Military Government courts will be ap-
pointed by Army Military District Commanders for the special purpose of the trial of cases herein contemplated, the personnel for the courts to be selected from the officer personnel of military organizations under the command of the appointing authority. General Military Courts and Intermediate Military Courts appointed under the authority hereof shall consist of not less than five members and not less than three members respectively. The orders appointing such courts will designate one or more prosecutors and defense counsel. The senior member present at each trial will be the president and presiding officer of the court. At least one officer with legal training will be detailed as a member of such courts.

4. **Trial.** The trial will be conducted according to pertinent Military Government directives and instructions, except that no person shall be convicted or sentenced by the courts provided for herein except by the concurrence of two-thirds of all the members present at the time vote is taken.

5. **Post-Trial Action.**

   a. Irrespective of the result of the trial, the accused will be returned to custody pending final disposition.

   b. The prosecuting officer will be responsible for the preparation of the record of trial which, after being properly authenticated, will be forwarded to the Staff Judge Advocate of the appointing authority who will prepare a written review of the case for submission to the approving authority. No administrative examination by any other legal officer on the staff of the appointing authority will be required.

   c. In taking the action prescribed in sub-paragraph b, above, the Staff Judge Advocate will take into consideration and include in the discussion and recommendations made in such written review any Petition for Review filed by or on behalf of the accused. Final action on each case will be deferred for the ten-day period described under Military Government court procedure for filing of such petition.

   d. No sentence of Military Government Court appointed under the authority hereof shall be carried into execution until the case record shall have been examined by the Army Military District Judge Advocate and the sentence approved by the officer appointing the court or by the officer commanding for the time being, except that such approving authority may designate an officer for such action on sentences of Intermediate Military Courts appointed hereunder. The action taken will be entered on the case record in the space provided on Legal Form No. 8.
over the signature of the approving authority or, in the case of Intermediate Military Courts, of his designee.

e. No sentence of death shall be carried into execution until confirmed as prescribed for Military Government courts.

f. Approving authorities will in each case where a death sentence is adjudged advise the Theater Judge Advocate (Attention: Chief, War Crimes Branch) of the approval of any such sentence, and will withhold execution after confirmation pending receipt of clearance from the Theater Judge Advocate in connection with each person so sentenced.

6. The execution of death sentences, designation of places of confinement, and the effective date of prison sentences will be as provided for other Military Government Courts.

7. All directives and instructions of this and subordinate headquarters relating to the conduct of trials by Military Government Courts are modified to the extent necessary to give effect to the provisions of this letter. Except as so modified herein, all existing directives and instructions shall be applicable to the special category of courts hereby authorized.
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NOTES

PICKETING—IS IT STILL FREE SPEECH?

INTRODUCTION

It was just ten years ago that picketing, after a hectic half century of struggle against the hostility of the common law, was blessed with the cloak of constitutional immunity in the now famous cases of Thornhill v. Alabama and Carlson v. California. Though it had been suggested by Mr. Justice Brandeis in Senn v. Tile Layers Protective Union that picketing might be within the constitutionally protected area of free speech, no case before Thornhill had so held, and it was a universal proposition that picketing could be dealt with by each state as it saw fit.

When the Supreme Court decided in the Thornhill case that a state statute outlawing all picketing was an unconstitutional restraint on freedom of speech, it appeared that the status of picketing had finally become definite, and that the right to picket could only be proscribed when warranted by the clear and present danger test applied to First Amendment liberties. Succeeding years and the Supreme Court, however, have shown the fallacy of any such assumption. By 1948 the picketing situation

1 For cases indicative of the prevailing attitude of courts on picketing during the first part of this century, see Atchison, T. & S. F. Ry. v. Gee, 139 Fed. 582, 584 (C. C. S. D. Iowa, 1905): “There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching”; American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921); Thomas v. City of Indianapolis, 195 Ind. 440, 145 N. E. 550 (1924). By 1940, however, peaceful picketing in connection with a lawful strike had generally achieved a status of respectability, though some courts still held that it was illegal per se. See Teller, LABOR DISPUTES AND COLLECTIVE BARGAINING 332-344 (1940); Gregory, LABOR AND THE LAW 338 (Rev. Ed. 1949).
2 310 U. S. 88 (1940).
3 310 U. S. 106 (1940).
4 “Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.” 301 U. S. 468, 478 (1937). For a contrary view as to the intention of Mr. Justice Brandeis to apply these words to picketing, see Gregory, op. cit supra note 1, at 338-340. Nevertheless, the great majority of writers and courts have based the origin of the picketing as free speech doctrine on the above-quoted statement.
5 See note 2 supra.
6 For cases dealing with the clear and present danger test, in addition to the Thornhill case, see Thomas v. Collins, 323 U. S. 516 (1945); West Virginia Board of Education v. Barnette, 319 U. S. 624 (1943); Bridges v. California, 314 U. S. 252 (1941); Schenck v.
was more confused than ever. Its present status can only be described as chaotic.

During its last term, the Supreme Court handed down three cases on picketing which materially affect existing law. Although, as suggested above, they do little to explain what constitutional grounds, if any, the protection of picketing should be based on, they do indicate the extent to which states will henceforth be permitted to evolve their own picketing law.

Whether or not picketing should be protected as free speech is an exceedingly difficult problem. Powerful arguments may be made on both sides of the question, and both sides have been strenuously urged. It is true that picketing is a method of communicating information. It is at times the only effective means a union may have of informing the public that a labor dispute is in progress, or that a particular person or corporation is indulging in what the union thinks are unfair practices. On the other hand, it constitutes a powerful form of coercion. In many instances the effect gained from picketing is produced, not by the information imparted on the picketers' placards, but merely from the fact of a picket line, which all union members will observe, with the possible resultant destruction of the picketed party's business. It is one of an arsenal of weapons developed by labor to offset the disproportionate power of


9 For the argument that picketing is not free speech, but a form of economic pressure, see Gregory, op. cit. supra note 1, at 346-347; Teller, Picketing and Free Speech, 56 Harv. L. Rev. 180 (1942); Teller, Picketing and Free Speech, a Reply, 56 Harv. L. Rev. 532 (1943). That picketing should be protected as free speech, see Dodd, Picketing and Free Speech: a Dissent, 56 Harv. L. Rev. 513 (1943); Sherwood, The Picketing Cases and How They Grew, 10 Geo. Wash. L. Rev. 763 (1942); Armstrong, supra note 7, at 30-34, to the effect that at least the speech aspect of picketing should be so protected.
management over the individual worker. To place picketing, because of its communication aspect, on the constitutional level of free speech obviously creates difficult problems in the regulation of economic disputes. As stated by Mr. Justice Douglas, one of the strongest supporters of the doctrine that picketing should be protected as free speech, concurring in Bakery Drivers Local v. Wohl:

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.10

It is not within the scope of this note to attempt to weigh the relative merits of these contentions. It will be attempted, however, to determine whether, in the light of the Supreme Court's last three decisions, picketing is in fact still considered by the Court as free speech.

**Background of Picketing in the Supreme Court**

In order properly to approach this question, a brief review of previous Supreme Court decisions on the status of picketing is necessary. There can be no doubt that the Thornhill and Carlson cases established the broad proposition that picketing is and will be protected as free speech with all of its constitutional guarantees. The language of Mr. Justice Murphy in opinions dissented to in each case by Mr. Justice McReynolds only, leaves no room for equivocation:

The carrying of signs and banners . . . is a natural and appropriate means of conveying information on matters of public concern. . . . For the reasons set forth in our opinion in Thornhill v. Alabama, supra, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a State.11

In addition, it was made clear that the right to infringe picketing could only be justified where:

... clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in [the Alabama statute].12

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10 315 U. S. 769, 776 (1942).
Such words can only mean that the clear and present danger test will be applied to each infringement on the right to picket, in the same manner as it is to restrictions on our other fundamental liberties. That this danger must be extremely serious, substantial, and imminent is basic in constitutional law.\footnote{Thomas v. Collins, 323 U. S. 516 (1945); West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943); Bridges v. California, 314 U. S. 252 (1941). See note 6 supra.}

Subsequent picketing cases handed down by the Court reaffirmed the free speech doctrine. In \textit{Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.},\footnote{312 U. S. 287 (1941).} the first of Mr. Justice Frankfurter’s opinions on picketing,\footnote{Of the eleven picketing decisions involving the constitutional question of free speech handed down by the Supreme Court since 1940, Mr. Justice Frankfurter has written the majority opinion in six.} the Court upheld an injunction by an Illinois court restraining all union picketing of stores handling products of a dairy, with which the union had a labor dispute. The injunction was justified by the finding of the state court that the picketing was “... set in a background of violence.”\footnote{Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 294 (1941).} It was held that “... the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence.”\footnote{Id. at 295.} But the opinion carefully noted that peaceful picketing is protected by the Constitution,\footnote{Id. at 293.} and expressly reaffirmed the \textit{Thornhill} and \textit{Carlson} cases.\footnote{Id. at 297.} Although the decision may be questioned on its interpretation of the facts,\footnote{See the dissenting opinions of Mr. Justice Black,\textit{id.} at 299, and Mr. Justice Reed,\textit{id.} at 317.} it certainly does not deny or even question the proposition that picketing comes within the constitutional protection of free speech.

On the same day that it announced the \textit{Meadowmoor} case, the Court again affirmed the guaranties accorded peaceful picketing in another opinion by Mr. Justice Frankfurter, in \textit{American Federation of Labor v. Swing}.\footnote{312 U. S. 321 (1941).} In this case the Illinois court had enjoined organizational picketing of a beauty shop by a union, on the basis of its common law policy forbidding picketing where there was no dispute between the employer and his employees. It was in other words a plain case of peaceful
stranger picketing, prohibited by the state of Illinois on the basis of that state's common law precedents. The Supreme Court, in an opinion warmly embracing the constitutional right to picket peacefully, and applying the clear and present danger test, held that such a ban on free communication violated the Constitution. In the words of Mr. Justice Frankfurter:

A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.23

Up to this point, the doctrine of the Thornhill case apparently had the complete approval of the Court, and there seemed to be little doubt that the identification of picketing as free speech was here to stay. In its next term, the Court decided three cases involving restraint on picketing. In one, no constitutional issue of free speech was raised.24 In Bakery Drivers Local v. Wohl25 the New York courts had restrained the picketing, by a bakery drivers union, of manufacturing bakers who sold to independent peddlers with whom the union had a dispute. It was a clear case of secondary picketing, and in addition the dispute was primarily between the union and a group of self-employed workers, on whom it was attempting to force the observance of a six day work week. The Supreme Court reversed the New York decision, holding that a state has no right to define the limits of the Fourteenth Amendment according to its own conception of the meaning of the term "labor dispute", and that no substantive evil could be perceived "... of such magnitude as to mark a limit to the right of free speech."27 Although there were implications in the opinion28 that, had the picketing been for an unlawful objective, or had New York correctly determined that no labor dispute existed, the decision might have been otherwise, the Wohl case again affirmed the doctrine that picketing was free speech.29

22 Id. at 326.
23 Ibid.
26 Id. at 774.
27 Id. at 775.
28 Id. at 774-775. See Mr. Justice Douglas' concurring opinion, id. at 775-777.
29 An explanation of the Wohl case in the Ritter case seems to base the decision on the theory that a union has a right to follow the subject matter of a legitimate labor dispute. Carpenters & Joiners Union v. Ritter's Cafe, 315 U. S. 722, 727 (1942). For the rationale
Despite this relatively consistent attitude, however, the Court on the same day, in *Carpenters & Joiners Union v. Ritter's Cafe*,\(^{30}\) handed down a decision written by Mr. Justice Frankfurter which not only seemed at odds with its previous policy on picketing cases, but cast doubt on the identification of picketing with free speech under the Constitution. In sustaining a Texas injunction against the picketing of a cafe owned by Ritter, who had contracted with a non-union builder for the construction of a house in another part of town, the Supreme Court apparently abandoned the clear and present danger test in respect to picketing cases, and based its holding instead on the right of a state to prohibit the conscription of neutrals—in this case the "neutral" was cafe-owner Ritter—in a struggle between industrial combatants. The clash of conflicting interests could be regulated in the public interest, regardless of the fact that such regulation infringed upon what had been supposed a basic right.

In addition to rather dubious reasoning on the factual question of an absence of interdependence of economic interest between Ritter, the cafe owner-house builder, and the non-union contractor,\(^ {31}\) the opinion seems wholly inconsistent with the line of cases developed by the Supreme Court during the previous three years. Indeed, the conception of picketing by the majority in the *Ritter* case seems much closer to the economic pressure, or coercion theory\(^ {32}\) than to that of free speech. At best it emerges as an inferior brand of free speech, not entitled to the protection accorded other modes of communication.\(^ {33}\)

In *Cafeteria Employees Union v. Angelos*,\(^ {34}\) decided a year and a half after the *Ritter* case, the Court, again speaking through Mr. Justice Frankfurter, answered in the negative the question of whether it contemplated complete abandonment of the concept of picketing as free speech. In this case, the right of a union to picket cafeterias where the owners employed no help was upheld, despite certain reprehensible conduct towards customers of the cafeterias, and untruthful allegations made on

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\(^{30}\) 315 U. S. 722 (1942).

\(^{31}\) Id. at 727. See also Mr. Justice Black, dissenting, at 730, and Mr. Justice Reed, dissenting, at 739.

\(^{32}\) See note 9 supra.

\(^{33}\) "Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication." (emphasis supplied) *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722, 727-728 (1942).

\(^{34}\) 320 U. S. 293 (1943).
the picketers' placards. The language of the Court read as though the
Ritter case had never been written, and, in fact, no mention was made
of that case.

After the Angelos case, despite numerous opportunities, the Supreme
Court refused to grant certiorari on any more cases involving picketing
and free speech for five years. With the exception of the Ritter case, all
of the cases had paid more than mere lip service to the Thornhill doctrine.
It seemed, indeed, that the marriage of picketing and free speech was a
valid one,35 and if the Ritter case left the precise area of constitutional
protection cloudy, it could at least be hoped that such area would become
more clearly defined with the decision of more cases on the question.

In the meantime, state courts had to meet the problem of regulating
labor disputes in the public interest. Although there was great contrariety
of opinion in regard to other valid limitations on picketing, all state courts
were agreed that picketing for an unlawful purpose was not a valid
exercise of the right of free speech, and could be enjoined.36 When the
Supreme Court finally took another picketing case, it concerned the
validity of such state decisions. In Giboney v. Empire Storage & Ice Co.,37
it was held, in a unanimous opinion, that where picketing was
carried on to effectuate the purpose of an unlawful combination in vi-
olation of a Missouri restraint of trade statute, and where, if successful,
the picketing would have resulted in forcing an employer to commit a
criminal act, such picketing could be enjoined.

It is true that the opinion was based on a situation where the picketing
was in defiance of a valid criminal statute. In the words of Mr. Justice
Black:

35 In varying degrees the same conclusion has been reached by the great majority of state
courts. See, for example, Smith v. State, 207 Ark. 104, 179 S. W. 2d 185 (1944); In re Blaney,
30 Cal. 2d 643, 184 P. 2d 892 (1947); American Federation of Labor v. Reilly, 113 Colo.
90, 155 P. 2d 145 (1945); Naprawa v. Chicago Flat Janitors' Union, 315 Ill. App. 328, 43
N. E. 2d 198 (1942); Gruet Motor Co. v. Briner, 229 S. W. 2d 259 (Mo. 1950); Hotel
v. Ellis, 321 Mass. 495, 74 N. E. 2d 1 (1947) for an example of dubious respect for the con-
istitutional protection of picketing. See also Gazzam v. Building Service Employees Union,
29 Wash. 2d 488, 188 P. 2d 97 (1948), overruling on the basis of the Ritter case, O'Neil v.
Building Service Employees Union, 9 Wash. 2d 507, 115 P. 2d 662 (1941), a case decided on
the basis of the Swing case.

Root, 356 Mo. 976, 204 S. W. 2d 733 (1947); State v. Casselman, 69 Idaho 237, 205 P. 2d
1131 (1949); Dinofria v. International Brotherhood of Teamsters & Chauffeurs Union, 331

37 336 U. S. 490 (1949).
In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.\textsuperscript{38}

Again:

Placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control.\textsuperscript{39}

Furthermore, the injunction was justified on the basis of "... clear danger, imminent and immediate"\textsuperscript{40} to the public interest. Nevertheless, the \textit{Giboney} case gave the green light to state injunctions of picketing conducted for an illegal purpose. It remained for future litigation to determine whether the approval of the illegal purpose doctrine would open the floodgate to injunctions of picketing, with only nominal respect paid to the free speech doctrine, or whether the Supreme Court would confine such restraints to situations like that of the \textit{Giboney} case involving violations of valid criminal statutes, importing clear and present danger to important public interests.

\textbf{Present Status of Picketing}

The answer was not long in coming. In its last term, the Court decided three cases, the net effect of which is to practically extinguish the \textit{Thornhill} doctrine.

In \textit{Building Service Employees Union v. Gazzam},\textsuperscript{41} the union had been restrained by the state of Washington from picketing to compel an employer to coerce his employees to join the union. The policy of the state as defined by statute\textsuperscript{42} provides that employees shall be free to join or not to join a union, without coercion or interference from their employer. It is interesting to note that the Supreme Court of Washington in a 5-4 decision held that, since there was no picketing of an employer by his employees, this was not a labor dispute.\textsuperscript{43} That this is directly contrary to the holding of the \textit{Swing} case\textsuperscript{44} is obvious. The Washington Court also held, however, that it was unlawful for a union to attempt to coerce an employer to coerce his employees to join a union.\textsuperscript{45}

\textsuperscript{38} \textit{Id.} at 498.
\textsuperscript{39} \textit{Id.} at 502.
\textsuperscript{40} \textit{Id.} at 503-504.
\textsuperscript{41} 339 U. S. 532, 70 Sup. Ct. 784 (1950).
\textsuperscript{43} Gazzam v. Building Service Employees Union, 29 Wash. 2d 488, 188 P. 2d 97 (1948). See note 35 \textit{supra}.
\textsuperscript{44} American Federation of Labor v. Swing, \textit{supra} note 21.
The Supreme Court held that the *Giboney* case was controlling, much as the picketing, though conducted in a lawful manner, was for a purpose declared unlawful by the state of Washington.\(^\text{46}\) It distinguished the *Swing* case, in that the state of Washington in the *Gazzam* case had not *relied* on the absence of an employer-employee relationship.\(^\text{47}\) Resting on this distinction, the case extends the *Giboney* ruling only insofar as it did not require the violation of a *criminal* statute.\(^\text{48}\) The closest approach to any language requiring an application of the clear and present danger test, however, was that "The injunction granted was tailored to prevent a specific violation of an important state law."\(^\text{49}\) Though not a complete abandonment of the picketing as free speech doctrine, the decision, in forsaking the clear and present danger test, and in extending the rule of the *Giboney* case one more notch, definitely further weakens the ties of picketing to the Constitution.

In *Hughes v. Superior Court of California*\(^\text{50}\) these ties were weakened still further. In this case petitioners had picketed a store, of whose customers approximately fifty per cent were Negroes, to induce the store to hire Negro help according to the proportion of Negro to white customers. California enjoined such picketing, and held petitioners in contempt for wilfully violating the injunction. The California Supreme Court, in furtherance of the state’s common law policy *against* racial discrimination, held the injunction valid.\(^\text{51}\) It held that the picketing was in furtherance of racial discrimination, in that it would subject the opportunity of getting a job to the quota system, and was thus for an unlawful objective at common law.\(^\text{52}\) It assumed, moreover, that picketing to pro-

\(^{46}\) Building Service Employees Union v. Gazzam, *supra* note 41, 70 Sup. Ct. 784, 788. For an interesting case in which it was held that, while picketing by a union to coerce an employer to force his employees to join a union is not protected by the Constitution from injunction, picketing to induce employees to join the union is so protected, and where the picketing was for both purposes, only the unlawful part could be enjoined, see *Park & Tilford Corporation v. International Brotherhood of Teamsters*, 27 Cal. 2d 599, 165 P. 2d 891 (1946).

\(^{47}\) Building Service Employees Union v. Gazzam, *supra* note 41, 70 Sup. Ct. 784, 788. However, the Washington court took pains to hold that this was not a labor dispute, and thus not within the state anti-injunction law, because of the absence of an employer-employee relationship. Building Service Employees Union v. Gazzam, *supra* note 43.


\(^{49}\) *Id.* at 789.

\(^{50}\) 339 U. S. 460, 70 Sup. Ct. 718 (1950).

\(^{51}\) Hughes v. Superior Court, 32 Cal. 2d 850, 198 P. 2d 885 (1948).

\(^{52}\) *Id.* at 856.
test racial discrimination would not be for an unlawful objective. On the basis of this reasoning the Supreme Court affirmed.

At first blush this interpretation of the facts appears to be in direct contravention of the truth, which undoubtedly was that petitioners were seeking to protest racial discrimination. On the other hand, as pointed out by Mr. Justice Frankfurter, an attempt to subordinate employers to the rules of proportionate employment according to ancestral background might produce mischief, and could indeed amount to racial discrimination of a sort.

In affirming California’s right to prohibit picketing for the illegal purpose of promoting such racial discrimination, the Supreme Court again extended the doctrine of the Giboney case by making it plain that it is not necessary that the purpose of picketing violate a valid criminal statute, or any statute. Common law illegality is sufficient. So long as a state can find, or declare illegal, any purpose for which the picketing is conducted, it need not fear a reversal from the Supreme Court. It should be noted that once again the opinion failed to mention anything about the clear and present danger test. In addition, the language of the Court still further debilitated what may have been left of the free speech theory:

And we have found that because of its element of communication picketing under some circumstances finds sanction in the Fourteenth Amendment. . . . It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. (emphasis supplied).

This was the first time that the Court had expressly relegated picketing to an inferior position under the First and Fourteenth Amendments.

It was in International Brotherhood of Teamsters v. Hanke, however, that the Thornhill doctrine received its rudest treatment. In this case unions had picketed two used car dealers who conducted their businesses

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53 Id. at 855.
54 Hughes v. Superior Court of California, see note 50 supra.
55 For a similar but distinguishable factual situation see New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 (1938), in which the free speech question was not an issue.
56 Hughes v. Superior Court of California, supra note 50, 70 Sup. Ct. 718, 721.
57 Id., 70 Sup. Ct. 718, 723.
58 Id., 70 Sup. Ct. 718, 721.
59 Of the eight justices sitting on the Court, five joined in the opinion. Justices Black, Minton, and Reed concurred in the result on the basis of the Giboney case, but apparently could not subscribe to all that was said in the majority opinion.
without the help of any employees, in order to induce them to conform to certain standards of hours of business operation. The Washington courts, in two separate cases, enjoined the unions from in any manner picketing the dealers' places of business, on the ground that the picketing, though peaceful, constituted coercion and was therefore unlawful. 61 All picketing is to a certain extent coercive. It logically follows, therefore, that the Washington courts would have the power to prohibit any picketing on these grounds, lacking state statutes on the subject to the contrary. In other words, the net effect of such holding is that complete control over picketing would be returned to state hands.

The Supreme Court affirmed the Washington decisions, which had been consolidated on appeal. As phrased by Mr. Justice Frankfurter, the issue was:

Does the Fourteenth Amendment of the Constitution bar a State from use of the injunction to prohibit the picketing of a business conducted by the owner himself without employees in order to secure compliance by him with a demand to become a union shop? 62

How the issue became thus reduced is difficult to understand. Further on, the opinion explains that in the Supreme Court's eyes:

. . . the injunctions are directed solely against picketing for the ends defined by the parties before the Washington court and this Court. 63

Yet the Washington Supreme Court in the Hanke case expressly found that the purpose of the picketing was only indirectly to compel the plaintiffs to join the union, but was directly to coerce them to enter into an agreement regarding hours of business operation. 64 In addition, the injunction forbade any picketing of the dealers' places of business. To interpret these facts as meaning that the unions were only forbidden from picketing to secure compliance by the owners of the business with a demand to become a union shop is certainly judicial legerdemain. That such was not the intent of the Washington courts seems obvious.

Nevertheless, assuming the correctness of such an interpretation of the issue, the rest of the opinion warrants further comment. Mr. Justice

62 International Brotherhood of Teamsters v. Hanke, supra note 60, 70 Sup. Ct. 773, 774.
63 Id., 70 Sup. Ct. 773, 778.
64 Hanke v. International Brotherhood of Teamsters, cited supra note 61, at 655.
Frankfurter starts by paraphrasing the rule expressed in the *Hughes* case, with the statement that picketing “...cannot dogmatically be equated with the constitutionally protected freedom of speech.”

The opinion then explains that this case represents an instance of the interplay of competing social-economic interests and viewpoints, the regulation of which is best left to the state's discretion, and that such regulation will not be disturbed by the Supreme Court unless it is so inconsistent “...with rooted traditions of a free people that it must be found an unconstitutional choice.” What this means is difficult to determine, but it certainly leaves no question about the divorce of picketing from free speech and the protection of the clear and present danger test.

Mr. Justice Frankfurter, in justifying the right of the state of Washington to impose such restraints, relies on some interesting logic. He argues that the *Senn* case in holding that a state is not constitutionally prohibited from permitting picketing which infringes another man’s right to earn a living with his own hands, thereby necessarily implies that the state must similarly have the right to withdraw such permission. But, as pointed out by Mr. Justice Minton in his dissent, such conclusion does not follow:

But because Wisconsin could permit picketing, and not thereby encroach upon freedom of speech, it does not follow that it could forbid like picketing; for that might involve conflict with the Fourteenth Amendment.

Another yet more cogent argument against such logic is that, even if this might have been the meaning of Mr. Justice Brandeis’ words in the *Senn* case, such words would have been no more than dictum, and would have been completely overridden by the holdings of the line of cases following the *Thornhill* case. To say that picketing in the *Hanke* case is not constitutionally protected as free speech on the basis of the *Senn* case is to beg the question. When the *Senn* case was decided, picketing had not been identified as free speech, and was not then accorded the protection it later acquired in the *Thornhill* case. Mr. Justice Frankfurter’s reasoning carried to the extreme could be used to justify the conclusion that because in 1870 the protection of the Due Process Clause of the

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67 *Id.*, 70 Sup. Ct. 773, 778.
68 See note 4 *supra*.
Fourteenth Amendment did not then extend to the liberties of the First Amendment, such protection does not exist today. It completely disregards the holdings of subsequent cases which establish the contrary.

Furthermore, it is difficult to distinguish the Hanke case on the facts from the Angelos case.\(^\text{70}\) There, too, the union picketed a business carried on without the aid of employees, in seeking to unionize the business. There, too, the state court held that no labor dispute existed,\(^\text{71}\) and enjoined the picketing on the basis of the state’s common law. The only difference lies in the fact that the New York court found in the Angelos case that the picketing was not for an unlawful purpose, but was conducted in an unlawful manner.\(^\text{72}\) Yet the Supreme Court reversed on the ground that the area of immunity as defined by state policy could not infringe the union’s constitutional right to picket peacefully. Thus New York was prohibited from outlawing what it considered was picketing carried out in an unlawful manner, while Washington was permitted to outlaw similar picketing when conducted for an unlawful purpose. The right of a state to regulate in the public interest the manner of picketing would seem to be subject to no more stringent rules than the right of a sister state to regulate picketing affecting the interplay of conflicting economic interests. The ruling of the Hanke case must therefore be considered as discrediting the Angelos decision.

A further analysis of the Giboney, Gazzam, Hughes, and Hanke cases may illustrate more clearly the extent to which the holdings of the Court in the latter two cases would have varied, if picketing had been accorded the protection traditionally given free speech.

It has been our prized heritage that a person may say what he thinks in this country, regardless of how radically he differs from what most of us believe to be right. The basic freedoms have never been conditioned on the right of a person only to reiterate the majority viewpoint. And the right to speak freely includes the right to persuade others to adopt one’s belief and to act in accordance with it, unless such persuasion falls within certain categories, such as incitement to violence, to commission of crime, or to interference with the valid functions of government.

\(^\text{70}\) See note 33 supra.

\(^\text{71}\) In the Cline case, a specific finding to this effect was made by the Washington court. 33 Wash. 2d 666, 673, 207 P. 2d 216, 220 (1949). In the Hanke case such a finding was not specifically made, but the Washington courts hold that there is no labor dispute when the picketing is not carried on by employees of the employer picketed. See note 46 supra. In addition, both the Cline and Hanke cases were affirmed in a consolidated appeal before the Supreme Court.

Reviewing the above cases it would seem that, considering picketing
to be pure free speech, it would not be unconstitutional to enjoin that
speech if, as in the Giboney case, it was aimed at persuading another to
commit a crime. If, as in the Gazzam case, the purpose was to induce
another to violate an important state policy, such speech probably could
also be enjoined, depending on a factual interpretation of whether the
speech, if unrestrained, would create imminent, serious danger to im-
portant public interests. The right of workers freely to choose whether
or not to join a union, and which union to join, without coercion from
their employers, should constitute a public interest worthy of such
protection.

Where, as in the Hughes case, the speech was intended to induce a
person to do an act in derogation of the state's common law policy only;
where the act itself would in no way be illegal or enjoinable; and where
the danger to public interests created by the speech if unrestrained would
be as remote and as speculative as was the danger to California in the
Hughes case, an injunction of such speech should, in the light of past
precedents, be held an unconstitutional restraint. There are important
differences between the Hughes and Gazzam cases. In the first place,
the commission of the act which the union sought to induce—coercion
of his employees by an employer—could have been enjoined in the
Gazzam case; but the state certainly would have had no right to enjoin the
store in the Hughes case from hiring Negroes in the proportion to which
it catered to Negro customers. Secondly, in the Gazzam case the union
was seeking to exert pressure on third parties—the employees of the
employer who was picketed—while in Hughes, the inducement was di-
rected against the employer only. No third party rights were involved.
Lastly, the state policy had been declared in a statute by the legislature
in Gazzam, while in the Hughes case the policy had not been adopted by
the people of the state or their chosen representatives.

If it is probable that the Hughes case was inconsistent with the consti-
tutional protection of free speech, it is indisputable that the Hanke case
was. Pure speech intended to induce a person to act in a manner in no
way unlawful or inimical to any interest except possibly his own, can
certainly not be restrained consistently with the First and Fourteenth
Amendments. Indeed, Mr. Justice Frankfurter makes no claim that it
can. He merely argues that picketing, not free speech, can be so re-
strained by a state, within its valid power to regulate labor disputes.

It must be concluded, therefore, that on the facts alone, regardless of
the language of the opinions, probably the Hughes case, and certainly the
**Hanke** case, cannot be reconciled with the doctrine that picketing is free speech. Reduced to a sentence, the **Hanke** case holds that peaceful picketing can be enjoined whenever a state, in its regulation of conflicting economic interests, decides that such restraint is in the public interest, provided it does not violate certain nebulous principles of freedom guaranteed by the Constitution. It apparently substitutes a new test, which seems to be that the state is free to prohibit picketing, not only when there is a clear and present danger to a substantial public interest, but may do so whenever the restraint does not contravene the rooted traditions of a free people. It may be that Mr. Justice Frankfurter had in mind the idea of traditional fair play which is required under due process of law, for example when applied to criminal trials. Or he might have meant only that a state's action cannot be arbitrary or capricious, as in the economic regulation test.

On the other hand, it is quite possible that such an interpretation of the decision may be reading a meaning into the words of Mr. Justice Frankfurter which was never intended. But if a new test is not contemplated by which to gauge the constitutional validity of state regulation of picketing, the decision in effect returns to states practically *carte blanche* power over picketing, while at the same time it reserves to the Supreme Court the right to strike down state regulation, in accordance with no discernible standards whatever but the predilection of the Court. Although the purpose of this note, as stated before, is not to express opinion as to what, if any special protection should be granted to picketing under the Constitution, it is submitted that labor, employers, and the law-making agencies of the states have a right to know just what status picketing does occupy, whether it be the full constitutional protection of a First Amendment liberty, no constitutional protection, or somewhere in between.

One more interesting aspect of the **Hanke** case merits discussion. That is the alignment of the Court in the decision. The opinion of Mr. Justice Frankfurter was concurred in by the Chief Justice, and Justices Jackson and Burton. Mr. Justice Clark concurred in the result, without stating his grounds. It may be that he was unwilling to join in the language of Mr. Justice Frankfurter to the extent of repudiating picketing as free

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73 See note 67 *supra*.
speech, but favored affirmance under the rule of the Giboney case on the ground that the state of Washington had found the unions' picketing to be for an unlawful purpose. Justices Black, Minton and Reed voted for a reversal of the Washington decisions. Mr. Justice Douglas did not participate in the decision, but it is highly probable that he too would have dissented.

It is possible, therefore, that the Court might, by an alignment of the three dissenting justices, joined by Mr. Justice Douglas and Mr. Justice Clark, shift its policy again to a restatement of the right of picketing to constitutional protection as free speech. In view of the nationwide trend toward restriction of labor's rights in industrial disputes, however, such a shift is unlikely. Until the Court can enunciate a clear policy on where picketing does stand, it will be up to labor, management, and the state governments to work toward a realistic adjustment of the interests of each, by formulating a law of picketing which can abide by the commands of Congress, and does not violate a general sense of fair play. But they should no longer strive to fit the law of picketing into the law of free speech.

RICHARD L. BRAUN

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76 See note 37 supra.

77 Justices Black and Douglas have consistently been aligned on the same side in all of the picketing cases in which they have both participated.

78 It will be noted that mention of the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. § 141 et seq. (Supp. 1947), is conspicuous by its absence. Section 8 (b) (4) (A) makes it an unfair labor practice for a union to engage in a strike where an object thereof is to force or require any employer or self-employed person to join any labor or employer organization, or to carry out a secondary boycott. Under the Giboney case picketing in furtherance of any purpose thus made illegal could be enjoined without violating the Constitution. In addition, Section 10 (1) provides for injunctive relief against such practices. Section 8 (c) provides exemption for the expression of views, arguments, or opinion from the category of an unfair labor practice if such expression contains no threat of reprisal or force, or promise of benefit. A detailed discussion of the impact of this Act on picketing law and the constitutional problems involved is not within the scope of this note.
MERCHANT PROVISIONS IN THE UNIFORM COMMERCIAL CODE-SALES

The herculean task of drafting a Uniform Commercial Code is now completed. The Code will soon be ready for presentation to the state legislatures. Comprehensive in scope, as now proposed it includes provisions governing sales, commercial paper, bank deposits and collections, letters of credit, miscellaneous banking transactions, documents of title, investment securities, secured transactions, and bulk transfers. The Code is not merely a compilation of existing commercial law but instead introduces many changes of form and substance. The codifiers have attempted to gear the law to modern commercial practice. As one writer has expressed it, "Horse law and haystack law are uneasily tolerated in the complex business of mass production and national distribution." Today an ordinary layman who participates in a business transaction is at a serious disadvantage when dealing, as he generally is, with parties skilled in the highly specialized, modern methods of manufacturing, financing and merchandising. The Code recognizes and seeks to remedy the situation. Illustrative of this is the distinction drawn between merchant and non-merchant or more broadly speaking between the skilled and unskilled. The purpose of this note is to examine some of those provisions in Article 2 (Sales) of the Code which impose additional obligations on the merchant in his dealings with the non-merchant.

THE TERM MERCHANT

The drafters of the Uniform Sales Act did not find it necessary to include therein a definition of the term merchant. Under the Code, since so many additional legal consequences arise out of those transactions involving merchants, it was necessary to define the term. Section 2-104(1) provides:

"Merchant" means a person who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or in any particular phase of it or to whom such knowledge or skill may be attrib-

1 Proposed Final Draft, Spring 1950. Hereinafter referred to as the Code. The September 1950 Revisions to Article 2 were not received by the authors sufficiently in advance of the printing time to enable them to make the necessary changes. The revision of section 2-104(1) attempts to clarify the definition of merchant, but it is believed that most of the ambiguity alluded to in this note remains. The comment in footnote 12 is no longer applicable by virtue of the revision of section 2-205.

uted by his employment of an agent or broker or other intermediary having such knowledge or skill. With respect to transactions of financing, payment, collection, and the like, a financing agency is a "merchant".

It is apparent from the foregoing that the term merchant is very comprehensive, yet it is readily perceived that its application will pose difficult problems of construction. Who, for example, "holds himself out as having knowledge"? Who has the "skill peculiar to the . . . goods involved"? Clearly the young man who buys an engagement ring from Tiffany is dealing with those who have knowledge or skill peculiar to the goods. On the other hand, consider Dr. Collier Shotz. As an avocation Dr. Shotz is fond of trapshooting. He owns a large collection of shotguns which he repairs and conditions himself. Regularly he attends the meetings and trapshoots of the local gun club, the members of which are familiar with Dr. Shotz's ability in caring for and using guns. A club member particularly admires one of the doctor's guns and subsequently buys it. Has he been dealing with a merchant? By profession a doctor, Shotz nonetheless has had considerable experience handling guns. Of course, he is not a dealer in guns, but he does have certain knowledge or skill peculiar to guns. Obviously the application of the definition of merchant will present a perplexing problem in many situations.3

Good Faith

The first substantial distinction drawn between the merchant and non-merchant by the Code appears in its treatment of good faith.4 Prior to the adoption of the Uniform Negotiable Instruments Law in this country there was considerable conflict as to what constituted good faith and what constituted bad faith. Generally speaking two lines of cases developed;5 one line followed the suspicious circumstances or constructive notice rule of Gill v. Cubit;6 the other line followed the holding in Goodman v. Harvey7 that nothing short of actual bad faith would deprive the

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4 Although the definition of good faith appears in the General Provisions (Article 1) rather than in the Sales Article (Article 2), it is made applicable to sales transactions by section 1-203.
6 3 B. & C. 466, 107 Eng. Rep. 806 (1824). If the circumstances are such that a prudent and careful man would entertain suspicion and no inquiry is made, he loses the legal position of a bona fide holder.
purchaser of a negotiable instrument of his position as a bona fide purchaser for value and that even gross negligence would have no effect, except as evidence tending to establish bad faith. The enactment of the Uniform Negotiable Instruments Law settled the conflict in favor of the latter rule. It is now the established rule under the Uniform Sales Act as well that negligence or even gross negligence do not constitute bad faith per se.

The Code imposes the obligation of good faith in the performance of every contract governed by its provisions. What is the prescribed standard of good faith? Section 1-201(18) provides:

“Good faith” means honesty in fact in the conduct or transaction concerned. Good faith includes observance by a person of the reasonable commercial standards of any business or trade in which he is engaged.

Section 1-201(18) thus sets up two standards, that is, one for the professional and one for the non-professional. Holding the non-professional to the single standard of honesty in fact appears to be equivalent to the present rule which merely demands an absence of bad faith. The professional or merchant, on the other hand, must in addition to being honest in fact, conform to reasonable standards. It would appear to follow that a negligent failure to observe these standards would deprive the merchant of his good faith status and of the correlative legal advantages to be gained thereby. This onus on the professional is one way in which the Code attempts to compensate for the many disadvantages the non-merchant experiences in his dealings with the merchant.

It is noted that the definition of good faith presents another problem in statutory construction. After first determining whether either or both parties involved in a transaction are engaged in a business or trade, the courts will then be faced with the problem of deciding what commercial standards are reasonable for the business or trade concerned.

8 Britton, On Bills and Notes § 100 (1943 ed.).
10 Section 1-203.
11 Official Comments Contained in Uniform Commercial Code (Proposed Final Draft, Spring, 1950), hereinafter referred to as Comments, § 1-201(18). Section 1-102(2) provides: “The Official Comments of the National Conference of Commissioners on Uniform State Laws and The American Law Institute may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act and may be used as a guide in its construction and application.”
An interesting innovation is proposed by the Code in its treatment of offers by merchants to buy or sell goods. It is axiomatic in existing law that an offer given without consideration is revocable until accepted. The Code provides:

An offer by a merchant to buy or sell goods expressed in a signed writing to be "firm" or otherwise irrevocable for a period not exceeding three months needs no consideration to be irrevocable during that period; but such an expression on a form supplied by the offeree must be separately signed by the offerer.12

In proposing this section the codifiers have recognized the moral argument that a promise is sufficient in itself to obligate performance. This is a definite change in substantive contract law. The reason for restricting this provision to merchants is not entirely clear, but it is submitted that this distinction is consistent with the basic theory of the Code that professionals should be held to a stricter legal standard than non-professionals.

**Warranty of Merchantability**

While it is true that the common law, unlike the civil law, has in general made no distinction between merchants and non-merchants in commercial transactions, an exception has existed in the law of warranty, namely, the implied warranty of merchantability.13 The Uniform Sales Act incorporated this concept in section 15(2) which provides:

Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of a merchantable quality.14

There has been considerable difficulty in defining the term merchantable. It has been said that it means "medium quality", "fair average quality", or "fairly saleable".15 Professor Prosser has concluded that when a seller undertakes to deliver goods he is obliged to deliver goods that are: (1) genuine according to name, kind and description; (2) saleable in the market under the name or description by which they are sold;

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12 Section 2-205. From a reading of this section it would appear that the offer must expressly provide for a period of three months or less during which it is binding. The Comments, § 2-205(4), however, indicate that even though the promise is expressed to be for a longer period, it is still within the provision and binding for three months.


14 See also, Uniform Sales Act § 16(c).

15 Williston, Sales § 243 (rev. ed. 1948); Vold, Sales § 146 (1931 ed.).
(3) fit for the ordinary uses and purposes of such goods; (4) free from defects interfering with sale or ordinary use; and (5) possibly of a grade not entirely and hopelessly out of line with what the buyer has paid.\textsuperscript{16}

In completely rewriting section 15(2) of the Uniform Sales Act, the drafters of the Code have incorporated much of the case law that has developed on the subject of merchantability. Section 2-314(2) lists certain minimum requirements included within the term merchantable. They specify that the goods—

\ldots must at least be such as (a) pass without objection in the trade under the contract description; and (b) are of fair average quality in the trade and within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any.

The Comments under this subsection indicate that the foregoing list does not exhaust the meaning of "merchantable" and it is not intended that other possible attributes of merchantability should be excluded.

These requirements, though not new to the law, serve one important purpose. The concept of the term merchantable in most jurisdictions today embodies many of the requirements listed in section 2-314; however, as has been mentioned, the definition of the term has not been settled. If enacted, the Code should serve to bring the more conservative jurisdictions into line with those jurisdictions which have more readily granted increased protection to the consumer and non-merchant. This is also especially true of section 2-314(1) which provides in part that—

\ldots the serving for value of food or drink to be consumed either on the premises or elsewhere imposes all warranties of safe use or consumption of the goods included under merchantability.

The trend for several years has been to imply warranties in favor of those who are served food in a restaurant.\textsuperscript{17} Still, many courts have persistently clung to the idea that food eaten in a restaurant is not the sub-

\textsuperscript{16} Prosser, \textit{The Implied Warranty of Merchantable Quality}, 27 Minn. L. Rev. 117, 125-139 (1943).

ject of a sale, but merely of “service”. Failing to denominate the transaction a sale, they have refused to imply the usual warranties. This concept may have been satisfactory and productive of no particular injustice in the days of the free lunch and the nickel beer, but it is entirely unsatisfactory today when the serving of food is for the most part not merely incidental to some other transaction. Although there are still a large number of small and independently owned restaurants, an increasingly larger proportion of the business is being done by the chain restaurants, which should without question assume the duty of serving wholesome food or accept liability on a warranty theory. Further, it cannot be said that the owners of either the large or small restaurant organizations regard their operations as anything but the sale of food.

Without becoming involved in the question of whether food served in a restaurant is the subject of a sale, the Code has solved the problem directly by simply attaching the warranties in favor of the consumer whenever there is service of food for value. This direct solution seems to be beyond criticism.

Previously examples have been given of the problem of determining who is a merchant under the definition given by the Code. Inasmuch as section 2-314 is made applicable to merchant sellers, the difficulties generated by section 2-104(1) will be encountered when dealing with section 2-314.

**Risk of Loss**

Another instance in which the Code differentiates between the obligations of a merchant and a non-merchant occurs in its treatment of risk of loss. Under existing law unless there is a clear agreement to the contrary, the risk of loss is with the seller, until the moment when the property is transferred, even though the goods are identified. The foregoing statement assumes that the loss is not due to negligence or default of either party.

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20 The application of a warranty theory to retail sales of packaged goods is a departure from the idea that a warranty is a representation reasonably inferable from the circumstances. Where the “warranty theory” has been applied to sales of packaged goods, it has in fact amounted to the arbitrary imposition of liability on the seller because of his status, without fault or assumption on his part. *Waite, The Law of Sales* 224 (2d ed. 1938).
22 *Williston, Sales* § 301 (rev. ed. 1948).
The general rule under the Code is that risk of loss shifts at the time of physical delivery of the goods. To understand why risk of loss is determined in this manner a few words regarding the treatment of title and property interest under the Code are necessary. Perhaps the most important step in the analysis of a sales transaction today is the determination of when, if at all, title and the property interest have passed. The Code seeks to minimize the importance of title and property.

...The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.23

The preamble to section 2-401 repudiates the concept that title determines the rights and obligations of the parties. Elsewhere in the Code a conscious effort has been made to avoid the term title. Instead the issues between seller and buyer are determined by reference to steps in the performance or non-performance of the contract for sale. Risk of loss is one illustration of this approach.

The Code provides that (1) where a contract does not require or authorize the seller to ship the goods, and (2) the goods are not held by a bailee to be delivered without being moved, the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.24

An example might serve to clarify the application of section 2-509(2). A contracts to buy a specified automobile from B. A pays the stipulated purchase price and is authorized to take possession of the car at his convenience. Before A goes after the car, it is destroyed. Under the Uniform Sales Act A has the risk of loss. By the provisions of the Code A has the risk of loss, if B is not a merchant. But, if B is a merchant, B has the risk of loss.

The basic theory of this rule, according to the Comments is—

...that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.25

In spite of this salutary purpose, section 2-509(2) has received severe

23 Comments, § 2-101.
24 Section 2-509.
25 Comments, § 2-509(3).
criticism, principally because of the difficulty involved in its application to complex situations which require reference to other sections of the Code, particularly sections 2-401 and 2-104.26

SALES ON APPROVAL AND RIGHTFUL REJECTION

Sections 2-327(c) and 2-603 impose additional duties on the merchant buyer. If the merchant buyer in a sale on approval elects to return the goods, he must follow "any reasonable instructions". Absent any question of honesty, the implication is that a non-merchant buyer may be unreasonable, that is, he may disregard reasonable instructions. The reason for this distinction may be that it is desired to require merchants to conform to known business customs, but not to hold the non-merchant beyond compliance with the terms of his contract.

If a buyer rightfully rejects goods that he already has in his physical possession and seasonably notifies the seller, he has no obligations with respect to the goods except that he is under a duty "... to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. . . ."27 The buyer has these same obligations under the Uniform Sales Act.28 Section 2-603 of the Code, however, provides that—

... when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instruction to sell them for the buyer's account if they are perishable or threaten to decline in value speedily. . . .

This provision is desirable in that it tends to reduce the damages and the merchant is generally able to do so without undue commercial burden. On the other hand, the non-merchant buyer is not generally in a position to comply with the seller's instructions or resell and since the seller has committed the breach, it is understandable29 that he should not be allowed to further inconvenience the non-merchant in these situations.

Sections 2-602 and 2-603, however, must be read in conjunction with

27 Section 2-602(2b).
29 In contrast with the "reasonable instructions" provision of section 2-327 where neither party has breached.
section 2-604 which is "not a 'merchant's' section". It states in part that—

... if the seller gives no instructions within a reasonable time after notification of rejection, the buyer may as appears reasonable in the circumstances store the rejected goods for the seller's account....

Inasmuch as this is not a merchant's section, the words "if the seller gives no instructions" would seem to imply that the non-merchant buyer must follow instructions, if given by the seller; moreover the receipt of instructions deprives him of his salvage option. This is not consistent with section 2-602 which merely requires the buyer to hold the goods with reasonable care.

The Comments state that section 2-604 is conditioned upon the "absence of any instructions from the seller which the merchant-buyer has a duty to follow under the preceding section [2-603]". (emphasis supplied). Does this mean that the codifiers intended the words "if the seller gives no instructions" to apply to merchant-buyers only?

The point may be illustrated by considering an example. Jackson, a fruit grower in Florida, sends a shipment of oranges to Pender in New York. The oranges do not conform to the agreed standards. Pender, therefore, rejects the oranges. Under the provisions of the Uniform Sales Act, it makes no difference whether Pender is a merchant or a non-merchant, his only duty is to give notice and hold the oranges with reasonable care at the disposition of the seller. Under the Code, if Pender is a merchant dealing in oranges, section 2-603 obliges him to follow reasonable instructions and in the absence of such instructions, he must make reasonable efforts to resell them for Jackson's account. But if Pender is not a merchant and has only ordered a few crates of his favorite oranges, what must he do? Section 2-602 says that he need only give notice and hold them with reasonable care at the seller's disposition. The implication of section 2-604, however, is that if Jackson sends instructions to Pender, he must follow them. Furthermore the receipt of such instructions will deprive him of his choice of storing, reshipping, or reselling. Reference to the Comments on Section 2-604 only confuses the issue, for they merely imply and do not unequivocally state that the non-merchant need not follow instructions.

Other provisions of the Code deal with transactions "between merchants". Inasmuch as a sufficient number of merchant provisions have

30 Comments, § 2-604.
31 Sections 2-201, 2-209, 2-326.
been discussed to illustrate the distinction drawn between the merchant and the non-merchant, “between merchants” provisions will not be treated.

CONCLUSION

Fundamentally it is believed that the recognition given by the Code to modern commercial practices is sound. There is an ever widening gulf between the positions of the manufacturer and the consumer, the merchant and the non-merchant. It is too much to expect that a just result will be obtained under rules which fail to recognize these different positions.

It has been suggested that recognition of the requirements of modern commerce could be effected by revising the Uniform Sales Act. Such a revision could retain many of the familiar phrases of the present Act and thereby avoid much of the litigation which will be required in construing the Code. Insofar as the merchant provisions here are concerned, the problem of statutory interpretation should be apparent and it is certain that these provisions will provoke a substantial amount of litigation. In spite of this and even though it may be assumed that similar difficulties will be encountered with other provisions of the Sales Article of the Code, it is considered that these disadvantages are outweighed by the benefits to be derived from a flexible sales law tuned to modern commercial practices.

R. B. HERRINGTON AND, H. M. DURHAM
RECENT DECISIONS

ADMINISTRATIVE LAW—Conviction of Evasion of Liquor Tax is Not a Crime Involving Moral Turpitude Within the Statute Authorizing Deportation of an Alien.

Petitioner, an alien, was convicted in 1938, and again in 1941, of conspiracy to defraud the government of its taxes on liquor. Proceedings were instituted to deport him pursuant to the provisions of the Immigration Act of 1917, which authorizes the deportation of any alien who is sentenced more than once to imprisonment for one year or more because of a crime “involving moral turpitude” committed at any time after entry. Petitioner, by writ of habeas corpus, seeks to defeat the deportation on the ground that his crime did not involve moral turpitude. Held, that the words “involving moral turpitude” were intended to include only crimes of violence, or crimes which are commonly thought of as involving baseness, vileness or depravity, and neither evasion of a tax on liquor nor conspiracy to do so is included within that classification. United States ex rel. De George v. Jordan, 183 F. 2d 768 (7th Cir. 1950).

The holding of the seventh circuit in the instant case is squarely in conflict with the ruling adopted by the second circuit in United States ex rel. Berlandi v. Reimer, 113 F. 2d 429 (2nd Cir. 1940), which held that evasion of the tax on liquor, with intent to defraud the government, was disreputable and involved moral turpitude in the generally accepted sense. The only question involved in both cases was the interpretation of the phrase “involving moral turpitude” contained in the statute authorizing the deportation of aliens. 39 Stat. 889 (1917), 8 U. S. C. § 155(a) (1946).

Although moral turpitude has been used in the law for centuries, its definitions are as varied as the courts which have attempted to interpret it. As said in United States ex rel. Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E. D. Pa. 1947):

This is undoubtedly because it refers, not to legal standards, but rather to those changing moral standards of conduct which society has set up for itself through the centuries.

The reported cases defining the term break down into four basic categories:

(1) It is an act of baseness, vileness, or depravity. United States ex rel. Manzella v. Zimmerman, supra; Coykendall v. Skrmet, 22 F. 2d 120 (5th Cir. 1927); Bartos v. District Court, 19 F. 2d 722 (8th Cir. 1927). (2) It relates to those crimes which are shamefully immoral or malum in se. Maita v. Haff, 116 F. 2d 337 (9th Cir. 1940); United States ex rel. Iorio v. Day, 34 F. 2d 920 (2nd Cir. 1929). (3) It is anything contrary to justice, honesty, modesty or good morals, encompassing all crimes which are disreputable. United States
ex rel. Berlandi v. Reimer, supra; United States ex rel. Medich v. Burmaster, 24 F. 2d 57 (8th Cir. 1928). (4) The classification advocated by Judge Learned Hand in his dissenting opinion in the Berlandi case, supra at 431. "...we must try to appraise the moral repugnance of the ordinary man towards the conduct in question; not what an ideal citizen would feel."

It is impossible to reconcile these interpretations because of the wide range of the views expressed. Anything done contrary to justice, honesty, modesty or good morals might include a willful traffic violation. Other courts restrict moral turpitude to the gravest possible offences. It is clear that Congress did not intend that every alien twice convicted of a crime involving a sentence of a year or more was to be deported. The only plausible purpose for the qualifying insert, "involving moral turpitude", is that a limitation of the crimes which would support a deportation was intended. Because of this limitation then, we can assume that an alien could be imprisoned for a crime without being held guilty of moral turpitude.

The courts almost uniformly have indicated that a violation of the prohibition laws under the Eighteenth Amendment is not a crime involving moral turpitude, reasoning that an act which was not immoral prior to the passage of a statute could not be made the subject of moral turpitude thereby. Bartos v. District Court, supra; Coykendall v. Skremeta, supra.

Is the evasion of a tax, with intent to defraud the government, a crime involving moral turpitude? There are four decisions which have tried to answer this question.

(1) United States v. Carrollo, 30 F. Supp. 3, 7 (W. D. Mo. 1939), although not directly in point, stated:

We are not prepared to rule that an attempt to evade the payment of a tax due the nation, ... wrong as it is, unlawful as it is, immoral as it is, is an act evidencing baseness, vileness, or depravity of moral character. The number of men who have at some time sought to evade the payment of a tax or some part of a tax ... is legion. Any man who does that should be punished ... but to say that he is base or vile or depraved is to misuse words.

(2) In Maita v. Hafl, supra at 337, in reviewing a case of tax evasion, with intent to defraud, the court without discussion said, "This crime involves moral turpitude."

(3) Guarneri v. Kessler, 98 Fed. 2d 580, 581 (5th Cir. 1938). This case involved the deportation of an alien convicted of evading taxes with intent to defraud the government. The court said: "We have no hesitancy in holding that to clandestinely introduce goods into the United States with intent to defraud the revenue is dishonest and fraudulent and involves moral turpitude."

The second circuit in United States ex rel. Berlandi v. Reimer, supra, felt that before the repeal of the Eighteenth Amendment prosecutions under the Volstead Act, 41 Stat. 305 (1919), and the Internal Revenue statutes, were in the alternative, and, so far as the question of moral turpitude was con-
cerned, were treated alike. Since violations of the liquor prohibition laws were not held to involve moral turpitude, neither were violations of the revenue laws. But, since the repeal, the business could be carried on merely by paying the tax. Hence before repeal, there existed only a general intent to supply the demand for liquor, in violation of the statute; but now, that intent is replaced by a specific intent to enhance one’s own profits by evading the taxes.

The court in the instant case belittled this type of reasoning, declaring that it was untenable that the moral turpitude in a certain crime should depend upon the purpose in the perpetrator’s mind. But is the reasoning so untenable? Before repeal, the manufacture of liquor, except in certain rare cases, was illegal. Therefore, there were no taxes being levied on its manufacture, and there could not have been any intent to evade those taxes. Since the repeal, however, the only possible inducement for engaging in such a business illegally would be to ply a trade without paying its taxes, in an effort to line one’s own pockets by defrauding the government.

Fraud between individuals has universally been held to involve moral turpitude. Why make an exception in cases of fraud on the government? This reasoning was expressed in United States ex rel. Popoff v. Reimer, 79 F. 2d 513 (2nd Cir. 1935).

The seventh circuit, in adopting the dissent of Judge Learned Hand in the Berlandi case, takes the view that even if a specific intent to defraud the government could be shown it would not involve moral turpitude. Judge Learned Hand argues in his Berlandi dissent, supra at 431,

... and surely it is quite beyond measure to compare its disrepute with defrauding an individual. There is always the danger in construing this statute that we shall substitute logic for fact and deport a man for what people ought consistently to think of him, rather than for what they do. . . .

Therein we find the irreconcilable difference in the two decisions; one, that a party guilty of a fraud has indicated by his actions that he is of such a character as might be termed vile, base or depraved, and hence logically his crime is one involving moral turpitude; the other, that because the ordinary man does not see anything more than a venial immorality in his actions, takes a “catch as catch can” attitude about the violation, that it does not involve moral turpitude.

Perhaps the instant case is indicative of a trend. Judge Learned Hand’s characteristic adeptness at forecasting the law may again be demonstrated. Certainly Congress intended to draw the line as to what offenses would be considered serious enough for deportation. The definition of moral turpitude seems to involve vileness, baseness, and depravity, which are moral terms, not legal ones. What standards are to be used to determine what is vile? What is depraved? Only time will determine whether Hand’s dissent, as here adopted, will outrun the logic expressed by the majority in the Berlandi decision.

JOHN P. ARNESS
CIVIL PROCEDURE—THE FEDERAL VENUE PRIVILEGE IS NOT WAIVED BY A DEFENDANT IN APPOINTING AN AGENT FOR SERVICE OF PROCESS WITHIN A STATE WHERE SUCH APPOINTMENT IS MADE WHOLLY BY OPERATION OF LAW.

Plaintiff, a citizen of Connecticut, brought this action in the United States District Court for the District of Massachusetts against the defendant, an Ohio corporation, to recover damages for injuries resulting from an automobile collision on a Massachusetts highway. Plaintiff caused service of process to be made upon the registrar of motor vehicles for the Commonwealth of Massachusetts pursuant to the Massachusetts nonresident motorist statute. Jurisdiction of the federal court was based solely on diversity of citizenship. In addition to the fact that the defendant was incorporated in Ohio, it appeared that it was not licensed to do business in Massachusetts, and it was not alleged that it was doing business in that state. Defendant appeared specially and moved to dismiss the complaint on the ground that venue was improperly laid in the District of Massachusetts. The court below granted the motion and dismissed the complaint. Held, defendant by operating its motor vehicle in Massachusetts did not thereby voluntarily consent to be sued in that state and, therefore, did not waive its federal venue privilege. Martin v. Fischbach Trucking Co., 183 F. 2d 53 (1st Cir. 1950).

Being a case of diverse citizenship, the venue is provided by 28 U. S. C. § 1391(a) (Supp. 1950) which limits such suits to the district where the plaintiff or the defendant resides. Since defendant was not incorporated or licensed to do business or doing business in Massachusetts, suit against it there by virtue of such acts was impossible. 28 U. S. C. § 1391(c) (Supp. 1950). According to Massachusetts law, however, a nonresident who operates a motor vehicle upon the highways of the commonwealth is deemed to have appointed the registrar of motor vehicles as his agent for service of process in actions arising out of such operation. Gen. Laws Mass. c. 90, §§ 3A, 3B (Ter. Ed. 1932). Appellant argued that by operating its motor vehicle in Massachusetts, defendant had appointed an agent in that state for service of process in suits brought against it there; that the appointment by a foreign corporation of an agent to receive service of process against it in a state amounts to a waiver of the federal venue privilege. Neirbo Co. v. Bethlehem Corp., 308 U. S. 165 (1939). Therefore, appellant concludes, defendant has waived the venue and is properly subject to suit in the federal courts of Massachusetts.

It is well settled that venue is a personal privilege which may be waived by a defendant. Panama R.R. Co. v. Johnson, 264 U. S. 375 (1924); Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U. S. 177 (1929). The appointment of an agent upon whom service of process can be made constitutes a waiver of the federal venue provision. Neirbo Co. v. Bethlehem Corp., supra. It is said by the court in the instant case, however, that the act of appointment must be conscious or voluntary. Thus the court held an agency imposed without
conscious volition, as under the Massachusetts nonresident motorist statute, cannot realistically provide a basis for holding the defendant to have waived the venue privilege. The problem is to determine whether this reasoning represents a correct expression of the doctrine of the *Neirbo* case, *supra*, which, if applicable, controls the decision in the instant case.

A proper construction of the *Neirbo* case, *supra*, is of paramount importance. Not only has it served as the basis for a great number of decisions since the Supreme Court passed upon its issues in 1939, but lower federal courts have already built a line of cases, professedly based on it, which are diametrically opposed to the result reached in the instant case. *William v. James*, 34 F. Supp. 61 (W. D. La. 1940); *Andrews v. Joseph Cohen & Sons*, 45 F. Supp. 732 (S. D. Tex. 1941); *Krueger v. Hider*, 48 F. Supp. 708 (E. D. S. C. 1943); *Steele v. Dennis*, 62 F. Supp. 73 (D. Md. 1945); *Blunda v. Craig*, 74 F. Supp. 9 (E. D. Mo. 1947). The *Krueger* and *Steel* cases, *supra*, are cited at length and with approval in *Knott Corp. v. Furman*, 163 F. 2d 199 (4th Cir.), *cert. denied*, 332 U. S. 809 (1947). The court in the *Knott* case reaches the conclusion, on facts analogous to those in the *Neirbo* case, *supra*, that implied consent is a sufficient basis for holding a nonresident corporation to have waived the federal venue provision. There appears, therefore, an intimation that had the fourth circuit been called upon to pass on the issues raised in the instant case an opposite result would have been obtained. Thus a potential split in federal appellate authority is in the making.

In the instant case appellant's argument is based chiefly on the *Neirbo* doctrine. The court holds that case inapplicable and seeks to distinguish it. In the *Neirbo* case, it is said, the corporation voluntarily consented to suit in the state courts. There, the court points out, the corporation by written appointment designated an individual and gave to him express authority to receive service of process on its behalf. This is contrasted with the agency in the principal case which is construed as one imposed wholly by "command" of law.

It must be conceded that the court in the principal case was justified, in logic and on the facts, in reaching its conclusion. But logic has its limitations. To hold that the appointment must be express in order to amount to a waiver of venue is to limit the doctrine of the *Neirbo* case too close to the bounds of logic and not near enough to the realm of justice and common sense. The better rule, one more in keeping with such considerations, it is submitted, is that expressed in *Knott Corp. v. Furman, supra*. There the appointment of the agent for service of process for the corporation doing business within the state was by operation of law, arising out of the failure of the defendant to designate an agent of its own choice. Though the appointment of the agent was implied, not express, the court held that federal venue had been waived. The court reasoned that where a corporation has given such consent as subjects it to suit in the courts of the state, the same consent subjects it to suit in the federal courts there sitting if the elements of federal jurisdiction are present. In a well
reasoned opinion, the court reaches the conclusion, substantiated by many sound arguments, that no purpose of justice is served by permitting a defendant to be sued in the state courts but not in the federal courts, and refuses to make a distinction between a formal and an implied appointment. *Knott Corp. v. Furman*, supra, at 204.

The *Neirbo* case was based on the "exclusion theory". Cf. *Lafayette Insurance Co. v. French et al.*, 18 How. 404 (U. S. 1855). Applying that theory the court did not find it necessary to emphasize the fact that the appointment of the agent had been express. It would appear that service upon an agent whom a state legislature requires a corporation to appoint in conformity to state law is that which constitutes consent to suit in federal courts and a waiver of venue. *Neirbo Co. v. Bethlehem Corp.*, supra, at 170. Moreover, the Supreme Court in cases explaining and commenting upon the *Neirbo* doctrine passes lightly over the fact of express designation. *Oklahoma Packing Co. v. Gas Co.*, 309 U. S. 4 (1939); *Mississippi Publishing Corp. v. Murphree*, 326 U. S. 438 (1946). This would seem to indicate that the distinction between express and implied appointment of an agent is not material and that it should not have been so emphasized in the instant case.

Decisions involving the validity and effect of nonresident motorist statutes are reasoned in close analogy to the "exclusion theory". *Hess v. Pawloski*, 274 U. S. 352 (1927); *Kane v. New Jersey*, 242 U. S. 160 (1916). From these cases it is clear that the defendant is subject to suit in the courts of the state, and that the appointment of the agent need not be formal. The decisions in such cases taken in conjunction with the *Neirbo* and *Knott* cases, supra, form a reasonable basis upon which the court in the instant case could have held venue waived.

It is submitted that the better rule is expressed in the *Knott* case, supra. That decision reflects the trend in recent years. This trend has been to enlarge the basis of jurisdiction: Goodrich, *Conflict of Laws* 166-225 (3rd ed. 1949), and to relax federal venue requirements, Bunn, *Jurisdiction and Practice of the Courts of the United States* 115-117, 120-123 (5th ed. 1949). The decision in the instant case is at cross purposes with the established trend. It is suggested that the more liberal view should be adopted.

JOHN B. LETTERMAN

CONSTITUTIONAL LAW—REFUSAL BY A STATE TO ADMIT A NEGRO TO A STATE-SUPPORTED SCHOOL FOR PROFESSIONAL OR GRADUATE EDUCATION WHEN THE DUAL SYSTEM IS UNEQUAL IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Petitioner Heman Marion Sweatt was denied admission to the University of Texas Law School because he is a Negro and state law forbids the admission of Negroes to that school. Petitioner refused to enroll in a separate state law school newly established for Negroes. The University of Texas Law School has 16
The separate law school for Negroes has five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association and one alumnus admitted to the Texas Bar. Petitioner was denied mandamus on the trial court's finding that the legal training to be received at the law school for Negroes was "substantially equivalent" to that afforded white students at the University of Texas Law School. The Texas Court of Civil Appeals affirmed and the Supreme Court denied writ of error. The Supreme Court of the United States granted certiorari. Held, the legal education afforded petitioner is not substantially equal to that which he would receive if admitted to the University of Texas Law School; the Equal Protection Clause of the Fourteenth Amendment requires that he be admitted to the University of Texas Law School, Sweatt v. Painter, 339 U. S. 629 (1950).

The "separate but equal" doctrine can be traced to the landmark case of Plessy v. Ferguson, 163 U. S. 537 (1896), wherein the Court held that a statute requiring railway companies carrying passengers within the state to provide "separate but equal" accommodations for white and colored passengers was not in conflict with the Equal Protection Clause of the Fourteenth Amendment. Further, there was dictum to the effect that several jurisdictions had sustained segregation in education, and that such was not "unreasonable."

In Gong Lum v. Rice, 275 U. S. 78 (1927), the Court treated segregation in education as valid under the Fourteenth Amendment, holding that the power of separating the races in public schools is within the discretion of the state. This decision was rested on two cases: principally Plessy v. Ferguson, supra, and Cumming v. Board of Education, 175 U. S. 528 (1899), wherein the Court refused to consider the legality of segregation per se and held that the equal protection clause is not violated where a state provides a high school for white children without making similar provisions for colored children. Thus, the Court is said to have "tacitly assumed" the constitutional validity of segregation in education, for the problem was neither involved in the Plessy case, nor decided in the Cumming case. Notes, 23 Notre Dame Lawyer 220 (1948), 46 Mich. L. Rev. 639 (1948).

In the instant case, the Court elected not to rule on the Plessy case, despite the fact that respondents relied upon it for affirmation of the courts below and petitioner had urged its re-examination to test its constitutional validity "in the light of contemporary knowledge." The Court, citing Rescue Army v. Municipal Court, 331 U. S. 549 (1947), reiterated its policy of deciding constitutional questions only when necessary to decide the particular case at hand.

The most distinguishing feature of the Sweatt case, supra, is the fact that the Court disregarded the facts as found by the state courts. In doing this, the Court invoked an exception to the general rule that the Court will not review questions of fact decided on writs of error to state courts, Thomas v. State of
Texas, 212 U. S. 278 (1908). Exceptions to this rule will be applied when constitutional rights are involved, Powell v. Alabama, 287 U. S. 45 (1932). In Pierre v. Louisiana, 306 U. S. 345 (1939), Mr. Justice Black said that the conclusions reached by the state's supreme court are afforded great respect. However, when a proper claim has been asserted that one has been denied equal protection of the laws because of his race, the Court has the serious duty of making an independent inquiry in order to determine the disputed facts. Similarly, the Court in the Sweatt case, supra, ascertained for itself whether the "separate" legal education provided for Negroes was in fact equal to that of the University of Texas Law School.

Two other cases have been decided by the Court involving legal education. One of these raised the question of whether a state might satisfy the constitutional requirement of the equal protection clause by giving out-of-state scholarships to Negroes desirous of legal education. The Court held that the state was bound to furnish a Negro legal education within its borders "substantially equal" to that afforded white students; provisions made outside the state do not meet the requirements of the Fourteenth Amendment. Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938).

In the other case a state court had attempted to qualify the Gaines case in holding that the Fourteenth Amendment is not violated by denying a Negro admission to the state law school where no separate facilities exist for colored students, unless the student has made known his wants or desires to the proper authorities. The Supreme Court of the United States reversed, declaring that the state must provide equal facilities for a Negro "as soon as it does" for applicants of any other group. Sipuel v. Board of Regents, 332 U. S. 631 (1948).

The Gaines and Sipuel cases are similar to the Sweatt case in that all three arose from segregation in legal education and neither of the three have traversed the tacit assumption of segregation in education as established in Gong Lum v. Rice, supra. However, in contradistinction, the Sweatt case squarely presented the question whether the education made available was in its separate nature equal in fact.

In the light of the Court's decision in the Sweatt case, the "separate but equal" doctrine has not been overruled. Nevertheless, the Court has construed the doctrine to mean "equality in fact." In McLaurin v. Oklahoma State Regents, 339 U. S. 631 (1950), decided practically in the same breath as the Sweatt case, the Court buttressed this new construction by holding that the imposition of statutory segregation on a Negro already admitted to the state university, by compelling him to sit, eat and study in designated places of the classroom, cafeteria and library respectively, was violative of equal protection of the laws as guaranteed by the Fourteenth Amendment.

Rice v. Arnold, 19 U. S. L. Week (U. S. Oct. 17, 1950), is the most recent case before the Court concerning segregation of the races. There—where Negroes were allowed to use the city's publicly owned golf course but one day a week,
and the state courts had sustained the allocation as "substantially equal"—Chief Justice Vinson, per curiam, vacated the judgment and remanded the case to be reconsidered in the light of the Sweatt and McLaurin cases, supra. Thus, the Court in its decision in the Rice case, supra, asserts that the doctrine of the Sweatt case, supra, will not be confined to education.

The significance of the Sweatt case is two-fold. Clearly the Court has followed a previous pattern of leaving undecided the question of the constitutional validity of segregation in education per se, thereby electing to use the cautious approach as has been frequently employed in matters concerning segregation. Secondly, the Sweatt case is of landmark nature since it abroges the "separate but equal" doctrine of its fictional aspect and imparts thereto the literal meaning of the word equal. This construction, in effect, decreases the potency of Plessy v. Ferguson, supra, for its importance lies not so much in the actual words of the Court in Sweatt v. Painter, supra, as in the implications to be drawn therefrom. Hence, just as Plessy v. Ferguson is recognized as the precedent of the "separate but equal" doctrine, so it seems that Sweatt v. Painter, which has rendered it less potent, will effect marked changes among the various phases of segregation which the Plessy case governs. Further, the effects of the Sweatt doctrine—equality in fact—will necessarily abolish some of these phases, which would seem to give weight to Sweatt v. Painter as groundwork for reversal of Plessy v. Ferguson.

HARRY T. ALEXANDER

CONSTITUTIONAL LAW—THE FIRST AMENDMENT AS MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT DOES NOT INTERDICT NEW YORK CITY'S "RELEASED TIME" PROGRAM.

Petitioners were parents of children attending a public elementary school in New York City which allowed pupils, whose parents so desired, to leave the school an hour earlier than the regular dismissal time, one day a week, to attend church schools for religious instruction. The petitioners sought to have this "released time" program, which was authorized by section 3210 of the New York Education Law, discontinued. Held, the New York City "released time" program does not violate the separation of Church and State required by the First and Fourteenth Amendments. In re Zorach, 99 N. Y. S. 2d 339 (N. Y. 1950).

The question of a "released time" program is not new to the courts of the State of New York. In 1925, the issue arose in the City of Mt. Vernon. The cards with which the pupils made application for release were paid for by a private organization, but they were printed by students in a Mt. Vernon public school. In declaring the program invalid, the court held that it was "... contrary to the intent and meaning of section 621 of the Education Law... requiring every child to attend upon instruction for the entire time during which the schools are in session." Stein v. Brown, 125 Misc. Rep. 692, 697, 211 N.
Y. S. 822, 827 (1925). A similar suit involved the "released time" program of White Plains, New York, which was a duplicate of Mt. Vernon's system except that the cards used by the pupils for application were not only paid for but also printed by a private organization. In upholding the validity of the program, a unanimous Court of Appeals regarded discretion in the school authorities as being essential to the practical administration of the public schools. "... it is impossible to say, as a matter of law, that the slightest infringement of constitutional right... has been shown in this case." People ex rel. Lewis v. Graves, 245 N. Y. 195, 198, 156 N. E. 663, 664 (1927).

At the time when the Mt. Vernon and White Plains cases were decided, there was no statutory authority for the "released time" program in New York State. The program was established in the several communities with the permission of the State Commissioner of Education. In 1940, the New York Legislature provided: "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish." L. 1940, c. 305, § 1. On November 13, 1940, the Board of Education of the City of New York, with the approval of the State Commissioner of Education, adopted a set of rules regarding the "released time" program in that city. The rules provide a scheme whereby the "released time" program may be initiated by the parents and religious organizations without any interference by the public schools.

In 1925, the Supreme Court of the United States declared unconstitutional an Oregon statute which would have resulted in the disappearance of parochial and private schools. Speaking for the unanimous Court in Pierce v. Society of Sisters, 268 U. S. 510, 535 (1925), Mr. Justice McReynolds said:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

In succeeding cases, the Court upheld the constitutionality of state statutes which rendered aid, incidentally, to students attending private or parochial schools. Cochran v. Board of Education, 281 U. S. 370 (1930); Everson v. Board of Education, 330 U. S. 1 (1947).

Thus, although the Supreme Court of the United States had decided on related issues, it was not until 1948 that "released time" as such was considered. At that time, the program as practiced in Champaign, Illinois, was declared unconstitutional. McColllum v. Board of Education, 333 U. S. 203 (1948). Under this program public school children whose parents so desired were released from regular instruction so that they might attend religious classes during school hours in the public school building. The program was declared unconstitutional on the grounds that the use of public property for sectarian purposes and the use of the public school system in coercing pupils to attend upon re-
State. However, in the McCollum case, supra at 225, a majority of the Court recognized that

... "released time" as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects.

As a result of the Supreme Court decision, a petition was submitted to the courts of New York State. The Supreme Court of New York, after considering the McCollum case, declared the New York enabling statute constitutional. Lewis v. Spaulding, 193 Misc. 66, 85 N. Y. S. 2d 682 (1948), appeal withdrawn, 299 N. Y. 564, 85 N. E. 2d 791 (1949).

In denying the petition in the case here reported, In re Zorach, supra, the Supreme Court of New York accepted the inferred opinion in the McCollum case that "released time" was not per se unconstitutional and then considered the "differentiating particularities." The main differences between the plans are twofold. The religious instruction in Champaign took place in public school buildings, whereas in New York City the church is the scene of training. Secondly, pupils for the religious training were solicited in the Champaign public schools, while in New York City the same is not done.

The importance of this decision can be properly realized when we consider that more than 2,000,000 American children in our public schools are now participating in the "released time" programs. The Public and Education, Vol. 3, No. 3, May 25, 1948. The program as set up in New York City may serve as a model for similar programs since it seems to obviate the defects of the Champaign system in that no public property is involved nor is New York's compulsory education law used to assist in the enrollment of pupils for religious instruction. The New York courts have made a sensible application of the McCollum case.

RICHARD J. ZANARD

EVIDENCE—EVIDENCE OF UNCOMMUNICATED THREATS OF THE DECEASED AGAINST THE DEFENDANT WHEN THE DEFENDANT CLAIMS SELF-DEFENSE AND THERE IS SUBSTANTIAL EVIDENCE, THOUGH IT BE ONLY HIS OWN TESTIMONY, THAT THE DECEASED ATTACKED HIM, IS ADMISSIBLE ALTHOUGH THERE WERE EYE-WITNESSES.

Defendant, claiming self-defense, was convicted in the District of Columbia of murder in the first degree. On a motion for a new trial on the ground of newly discovered evidence, defendant relied on evidence that at the time of the killing the victim had an open penknife in the same trousers pocket in which his hand was, and that the prosecution knew at the time of the trial that such testimony was available but neither produced it in court nor disclosed it to the defense. The trial court denied the motion on the ground that, since defendant
did not know that the deceased was carrying a knife, the evidence was inadmissible. An appeal was dismissed by the Court of Appeals without opinion. The Supreme Court of the United States granted certiorari and remanded the case to the Court of Appeals with instructions to decide what rule of evidence should prevail in the District of Columbia with respect to the admissibility of "uncommunicated threats" of the deceased against the defendant and, further, to apply the rule to this case. Held, when a defendant claims self-defense and there is substantial evidence, though it be only his own testimony, that the deceased attacked him, evidence of uncommunicated threats of the deceased against the defendant is admissible, although there were eye-witnesses. Griffin v. United States, 183 F. 2d 990 (D. C. Cir. 1950).

Generally, when a defendant claims self-defense, uncommunicated threats by the deceased are admissible to prove which party was the aggressor, subject to the limitations that (1) the evidence of threat is inadmissible where there is clear evidence that the defendant was the aggressor, and, (2) the threat is only admissible where there is some other evidence of an aggression by the deceased. 1 Wigmore, Evidence § 111 (3) (a) (b) (3d ed. 1940). The rule is well stated in Trapp v. Territory of New Mexico, 225 Fed. 968, 971 (8th Cir. 1915) in which it was said:

It is the general rule that on the trial for a homicide uncommunicated threats are not admissible in evidence, because such threats cannot have had any influence upon the mind or intent of the defendant. But there is an exception to this rule as well established as the rule itself. It is that where the alleged crime was committed in a sudden affray, and there is a conflict in the evidence upon the question, and there is doubt which party fired the first shot, made the first assault, or was the aggressor, uncommunicated threats of death or great bodily harm to the defendant, his father, or other near relative he claims to be trying to defend, are admissible in evidence, not on account of their influence on the mind or intent of the defendant, but because they tend to prove the probability that he who made the threats, rather than his opponent, fired the first shot, made the first assault or was the aggressor.

The instant case, a two to one decision, which sets forth the rule of evidence for the District of Columbia for the first time, expands the doctrine of uncommunicated threats in a manner not previously contemplated. There is, in the doctrine of uncommunicated threats an existing peculiarity in that the court, in effect, weighs the evidence that the defendant was the aggressor. While this ruling purports to adhere to this "weight of evidence" consideration, no decision has been found in which the unsupported testimony of the defendant, contradicted by five witnesses, has been accorded the weight which this decision gives it. On the contrary, in State v. Barber, 13 Idaho 65, 84, 88 Pac. 418, 424 (1907), in which the defendant claimed self-defense and gave supporting testimony in his own behalf, the court stated: "There were a number of eye-witnesses . . . they do not differ materially as to any of the facts, hence no uncommunicated threats would aid the jury to determine who was the aggressor." Again, in State v. DePass, 45 La. Ann. 1151, 14 So. 77 (1893),
in which two of the three defendants and two eye-witnesses testified that the deceased was the aggressor, and several disinterested eye-witnesses contradicted this testimony, evidence of uncommunicated threats was held to be properly excluded, the court saying: "Taking the testimony as a whole, and so considering it, we do not think it can be said there was testimony legally tending to show a case of self-defense." In other words, by the instant decision, to negative the clear evidence limitation all the defendant has to do is take the stand and swear that the deceased was the aggressor.

While this case considerably expands the doctrine of uncommunicated threats, it would seem that the court is on safe ground when the theory of relevancy is considered, i.e., the relevancy of the testimony to any issue involved in the plea of self-defense. The question of who was the aggressor is such an issue and the testimony on the uncommunicated threat is evidentiary of the deceased's state of mind, which in the final analysis may be probative of the fact that he was the aggressor. If, as it would seem heretofore, it was intended that the clear evidence limitation should cover those cases in which the defendant desires to testify in his own behalf that the deceased was the aggressor and the only evidence he has to offer is the uncommunicated threat, then it would seem that the evidence of the uncommunicated threat has not been assigned its rightful probative value on the theory of relevancy.

Wigmore states that the limitation that there must be some other evidence of an aggression by the deceased before the uncommunicated threat is admissible is usually expressed by saying that there must have been some "demonstration of hostility," or some "overt act" by the deceased. 1 Wigmore, Evidence § 111 (3)(b) (3d ed. 1940); Babcock v. People, 13 Colo. 515, 22 Pac. 817 (1889); State v. Alexander, 66 Mo. 148 (1877). In the Babcock case "some evidence of a hostile act by the deceased" was necessary, while the instant decision asserts that defendant's own unsupported testimony is sufficient "other evidence" of an aggression by the deceased. However, again, the court would seem to be on safe ground, as the requirement of other evidence of aggression by the deceased before the uncommunicated threat is admissible violates the theory of relevancy.

While the limitations of the doctrine of uncommunicated threats are founded in a distrust of the jury's ability to evaluate this evidence and a fear of a flood of fabricated evidence of this kind, it is submitted, that in a murder trial, it is much the lesser of two evils, if an evil it be, that there be an adherence to the theory of relevancy which accords the accused the full protection to which he is entitled. However, in the instant case, which goes beyond previous bounds, it seems that a more logical reason for the admissibility of the evidence of the open penknife would have been on the basis of the unknown arming of the deceased tending to corroborate the testimony of the defendant, rather than a resort to the doctrine of uncommunicated threats which appears to be inapplicable to the factual situation, having, in the past, been confined to cases where the threat had been disclosed to some third party although not to the defendant.

WILLIAM C. KELLER
HUSBAND AND WIFE—WIFE HAS CAUSE OF ACTION FOR LOSS OF CONSORTIUM IN NEGLIGENCE CASES IN THE DISTRICT OF COLUMBIA

Plaintiff wife sued defendant company for the loss of her right to the consortium of her husband resulting from an injury brought about through the negligence of defendant. The husband sustained severe and permanent injuries to his body, and as a consequence plaintiff is deprived of his consortium, in particular of sexual relations. The district court granted defendant's motion for summary judgment on the grounds that the complaint failed to state a cause of action, and entered judgment for defendant. Plaintiff appealed. Held, in the District of Columbia a wife may bring an action to recover damages for loss of consortium because of injuries to her husband caused by defendant's negligence. Hatafer v. Argonne Company, Inc., 183 F. 2d 811 (D. C. Cir. 1950), cert. denied, 19 U. S. L. Week 3103 (U. S. Oct. 17, 1950).

Thus has the District of Columbia become the only American jurisdiction to allow such an action. At long last a judicial blow has been struck at the inconsistency in the logic of the case law which has been developed on this point. Specific legislation has for the most part been lacking, and the interpretation of the courts has indicated an amazing departure from logic.

By way of preface to a review of the opinion proper, a few remarks on what the term "consortium" is generally considered to mean would seem pertinent. During the era of early English common law the action of trespass per quod consortium amisit was maintainable only by the husband, where it was shown that he was deprived of one or more of the elements of consortium. These elements in general terms included the love, affection, society, companionship and services of his consort—the wife. See 26 Am. Jur. 635; 42 C. J. S. § 665; 8 Words and Phrases 709; 3 Vernier, American Family Law § 158 (1935). The latter element, "services", is commonly considered the practical factor, whereas the other elements are looked on as comprising the sentimental factor.

There were various occasions when an injury to this right in the husband might give rise to a cause of action. Prominent among these were the actions for criminal conversation, for alienation of affections and for wrongful or negligent torts resulting in physical or mental injury to the wife. Obviously in the case of alienation of affections, the factor of consortium most seriously injured is the sentimental one; whereas, in an action for loss resulting from physical injuries, it might be said that the practical factor generally suffers most. However, the loss in either instance is of the consortium as a legal entity, whether or not one factor appears to be more seriously concerned than the other. None the less, somewhere in the line of decisions in negligence cases, the courts began to refer to the loss as a "loss of services", and this came to form a theoretical basis of the action. Serious reflection on the problem makes it readily apparent that many times this will not be true. The instant case forms a perfect example of a negligent injury resulting in a loss more of the so-called sentimental factor than of the practical. Yet the persistent refusal of the courts to recognize
this fact has brought about the anomaly which Judge Clark's decision attempts to disintegrate. As indicated in the opinion of the court in the case under consideration, every other jurisdiction denies the wife a right of action in negligence cases.

The particular problem is encountered in this jurisdiction for the first time in the instant case. However, an early District of Columbia case set the precedent for allowing the husband recovery in the same type case. The Washington & Georgetown R.R. v. Hickey, 12 App. D. C. 269 (1898). There the plaintiff husband was allowed recovery for loss of "society" of his wife where no loss of "services" was proved. Although he had claimed both, his own evidence at trial indicated that his wife's state of health did not seriously impair her ability to perform her household services. Chief Justice Alvey stated the principle upon which the District of Columbia courts will permit recovery, as follows:

The general principle, doubtless, is that the husband may, in a suit by him to recover damages for injuries inflicted upon his wife, recover for the loss of the services and of the society of his wife... The Washington & Georgetown R.R. v. Hickey, supra, at 275. (italics supplied).

Thus was the fiction that loss of material services is a necessary element of recovery refuted in this jurisdiction from the very beginning.

The opinion in the Hitaffer case, supra, points out that in the majority of courts disallowing this action, the theory of necessity of material services is the peg upon which the wheel of justice revolves in a somewhat wobbly fashion. But the court very convincingly shows that services is not the nucleus of the action. The consortium includes equally as much the sentimental factor. On the other hand, the minority of courts which admit the dispensability of material services are forced to discover even more circuitous deviations from logic in order to deny the wife her action. To those courts which allude to the injuries to the wife as too indirect, remote, and incapable of measurement, a further objection might be added to those of the present court. How can the injury be considered too remote and indirect when resulting from negligence, and yet blithely referred to as direct when intentionally caused, as in the alienation suits? In either instance the injury is a direct one to the consortium itself, distinct from any injury to the person.

The bothersome dilemma to all the courts following the majority view is why the wife is permitted to sue in intentional cases and not in negligence cases. The stand of most of the courts on the Married Women's Acts is quite inconsistent. True, there is nothing in the Acts specifically giving the wife a right to sue in negligence cases. However, there is likewise nothing referring to a right of action in the cases of intentional invasions of the consortium (alienation of affections, criminal conversation, etc.), and yet the same courts have no trouble in considering the Acts as enabling in those cases. Tingle v. Maddox, 186 Ga. 757, 198 S. E. 722 (1938). Many of the courts seems to prefer to
remain on the horns of the dilemma for another reason. They indicate that in almost every case of the wife suing, there will be danger of a double recovery as to the material services element. Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P. 2d 1100 (1937). But is not the same true today when the husband sues? Under the Acts emancipating the wedded wife, she is entitled to the products of her own service. In either case, it is manifest that damages recovered by the other spouse as to any element of the consortium can be deducted from the total amount recovered by the one whose right to the consortium was injured.

As demonstrated in the opinion of the case under review, a considerable number of legal writers have criticized the prevailing rule. Of these, the learned judge has cited a few who advocate adopting the rule which the instant case upholds. It was briefly noted also that the North Carolina court in the case of Hipp v. E. I. DuPont de Nemours & Co., 182 N. C. 9, 108 S. E. 318 (1921), allowed the action to the wife. However, shortly thereafter the same court reversed itself, apparently feeling insecure in its singular position. Hinnant v. Tide Water Power Co., 189 N. C. 120, 126 S. E. 307 (1925). In December of 1949 the Georgia Court of Appeals was evenly divided on the question. McDade v. West, 80 Ga. App. 481, 56 S. E. 2d 299 (1949). The three judges opposed to allowing such an action based their reasoning on a mixture of some of the diverse inconsistencies mentioned above, contenting themselves to rely on past authority. The three judges who favored permitting the suit gave the question a thorough and original examination and used logic similar to that of the present court in refuting the old rule. In summary the court said:

The wrong is a direct wrong to the valuable interests of the wife, whether intentional or not, the damages for which the husband cannot sue, and in these days of increased enlightenment her rights should be recognized and enforced. McDade v. West, supra, at 486, 56 S. E. 2d at 302.

It is also worth noting that Vernier, one of the outstanding authorities on the law of Marriage and Divorce, has indicated his dislike for the majority view. He advocates a unified change in one direction or the other, either by completely eliminating all actions based on loss of consortium, brought by either spouse, or granting the wife equality in all respects, the latter being logically preferable. He suggests that as marital relations have been altered greatly since the time of Blackstone, the law governing them should be made to conform to these changes. See 3 Vernier, American Family Laws § 158 (1935).

We have adverted, for the sake of brevity, only to the more salient arguments of the opinion in the instant case. We adopt in toto, however, the logical analysis of the court. It represents the first thorough juridical examination of a problem which has long been begging an answer. How far the opinion will go towards effectuating the desired change in other jurisdictions is at present a matter of speculation. Certainly it will provide substantiating force for the arguments of the legal critics in favor of this minority rule. Perhaps it will also
persuade some of the jurisdictions, which have as yet to be confronted with the question, to evade the maze of legal inconsistencies and look for a more logical answer. Of its present effect, however, we have no doubt. It at last provides a well-constructed bridge to span the gap created by the change in concept of the position of the wife in the marital union.

DONALD W. O'BRIEN

LABOR LAW—FAIR LABOR STANDARDS ACT GENERALLY DOES NOT APPLY TO EMPLOYEES ENGAGED IN ORIGINAL CONSTRUCTION PROJECTS.

Cooper and other plaintiffs were employees of a contractor constructing a new defense plant to be used for the manufacture of munitions. Electrical wiring, lumber and plumbing supplies were received at the construction site from outside the state and defective or damaged materials were returned to the shipper. Plaintiffs, employed as clerks, stenographers and telephone operators, performed duties in connection with the receipt of these supplies from other States. Action was brought under the Fair Labor Standards Act of 1938, as amended, 52 STAT. 1060 (1938), 29 U.S.C. §§ 201-219 (1946), for overtime pay. Held, plaintiffs did not come within the coverage of the Act. Cooper v. Rust Engineering Co., 84 F. Supp. 149 (W. D. Ky. 1949). The trial court in the instant case fully approved of the opinion in Wells v. Ford, Bacon & Davis, Inc., 6 F. R. D. 606, 608 (W. D. Ky. 1943) that "Both the Administrative Construction of the Fair Labor Standards Act and the judicial decisions thereunder hold that employees of local construction contractors generally are not engaged in interstate commerce or in the production of goods for commerce." The Sixth Circuit affirmed, 181 F. 2d 107 (6th Cir. 1950) and petition for certiorari is presently pending before the Supreme Court.

The Fair Labor Standards Act of 1938 was enacted to provide a floor for wages and a ceiling for hours without overtime compensation. It brought within its coverage all employees engaged in "commerce", § 3(b), or the "production of goods for commerce", § 3(j). Section 3(b) defines commerce as "...trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof," and section 3(i) defines goods as "... goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof. ..."

The trial court in the principal case, at 153, was of the opinion that,

... had Congress intended to make construction work on buildings and plants which were to manufacture goods to be shipped in interstate commerce within the scope of the Act it would have said so. No reasoning can interpret the language of the Act to include materials used in such construction as the "commerce" intended by the Congress or that those so locally engaged were employees of one "engaged in commerce or in the production of goods for commerce."
It is well settled that employees who are engaged in the original construction of industrial facilities are not brought within the coverage of the Act merely because goods will subsequently be produced in those facilities for interstate commerce. *McDaniel v. Brown & Root*, 172 F. 2d 466 (10th Cir. 1949); *Parham v. Austin Co.*, 158 F. 2d 566 (5th Cir. 1946); *Noonan v. Fruco Construction Co.*, 140 F. 2d 633 (8th Cir. 1948), since "...such work does not have such a close and immediate tie to the production of goods for commerce as to bring such worker within the coverage of the Fair Labor Standards Act of 1938." *McDaniel v. Brown & Root*, *supra*, at 471.

The trial court in the instant case relied upon an interpretative bulletin issued by the Administrator of the Wage and Hour Division (who is charged with the duty and responsibility of administering and enforcing the Act) holding that employees engaged in original construction are not generally within the scope of the Act. The court noted the qualification contained in this bulletin that: "There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the Act." § 12 of Interpretative Bulletin No. 5, U.S. Department of Labor, Wage and Hour Division, Office of General Counsel, Release No. R-113, December 2, 1938, Revised November 1939. Apparently, however, only lip service was given to this important qualifying language, for the court in its opinion ignored it.

The fact that the employees in the instant case were working at the site of original construction should not, by that fact alone, exclude them from coverage. Inasmuch as the duties of the clerks, stenographers and telephone operators directly related to the receipt of materials at the site from outside the State, they appear to be directly engaged in "commerce" within the meaning of the Act, and it has been so held. *Clyde v. Broderick*, 144 F. 2d 348 (10th Cir. 1944); *Laudadio v. White Construction Co.*, 163 F. 2d 383 (2d Cir. 1947). In the *Broderick* case, *supra*, at 351, the court succinctly stated the grounds for coverage as follows: "Our concern then is with the actual transportation of goods, not the use to which they will be put after arrival at their intended destination . . . if a substantial part of an employee's services have to do with the movement of these goods, . . . such employee is 'engaged in commerce' within the meaning of the Act."

A most significant aspect of the Supreme Court's opinion in *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950) is its reaffirmance of the principle that the validity of an employee's claim is to be determined on the basis of his individual duties despite the administrative and judicial advantages of disposing of all claims on some general ground. Mr. Justice Burton, speaking for the Court, at 516, emphasized that "Breadth of coverage was vital to its [the Acts's] mission. . . . Where exceptions were made, they were narrow and specific." It was further noted at 517 that "Such specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act."
Application of the Act turns upon the work of the particular employees and not on the business of the employer. *Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942); *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943); *Roland Electric Co. v. Walling*, 326 U.S. 657 (1946). As the Court of Appeals noted in *Clyde v. Broderick*, *supra*, the controlling fact is that the employee's duties relate to the movement of equipment and material across State boundaries rather than the fact that the employer's business involves the construction of a new plant. To ignore the employee relationship to this interstate movement is in effect to provide by implication a sweeping exemption for all employees engaged in any kind of work solely because of its relation to new construction. The trial court in the principal case rejected *Clyde v. Broderick*, *supra*, however, on the basis of rather general language of the Supreme Court in *Murphey v. Reed*, 335 U.S. 865 (1948), dismissing therein those causes of action involving solely construction work. But the Supreme Court's instruction in the *Reed* case to dismiss the suits involving construction employees was apparently based on the conclusion of the Fifth Circuit below, *Murphey v. Reed*, 168 F. 2d 257, 261 (5th Cir. 1948) that there was a total failure to discharge the burden of proof. It is highly questionable that the dismissal was the result of any new rule of law which the Supreme Court has adopted with respect to coverage of these types of employees. If the Court had intended to announce any new doctrine of law—for example, that no employees working at a new construction site, *including those whose duties directly relate to the flow of interstate goods*, are engaged in interstate commerce—it would have spelled out such a doctrine. Its casual handling of the matter belies such an intent. The need for clarification by the Supreme Court of the application of the Act in this field has become particularly pressing by reason of the misinterpretation of the Court's action in *Murphey v. Reed*, *supra*.

Already the Eighth Circuit in *Spencer v. Porter*, 183 F. 2d 245 (8th Cir. 1950), has adopted a course similar to that of the Sixth Circuit in the principal case summarily dismissing, without any consideration of the duties of particular employees, all claims "based on services rendered . . . in connection with the construction of the Pine Bluff Arsenal." An early determination by the Supreme Court of the issue can be expected to clarify the application of the Act to the numerous employees performing interstate functions in connection with construction projects.

PHILIP A. YAHNER

LABOR LAW—TRADITIONAL DISTINCTION BETWEEN A PRIMARY AND SECONDARY BOYCOTT IS NOT RECOGNIZED AS CONTROLLING UNDER LABOR MANAGEMENT RELATIONS ACT.

Petitioner operated rice mills. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 210, was engaged in
an organizational campaign, and to further this campaign called a strike of petitioner's employees. Enough employees remained at work to permit the plant to continue in operation. Members of the picket line prevented a truck of the Sales House, a neutral employer, from entering the struck premises by stoning the vehicle. The petitioner filed charges with the NLRB charging the union with violation of section 8(b)(4)(A)(B) of the Labor Management Relations Act of 1947. The Board dismissed the complaint ruling that the section was not aimed at primary picketing, and violence did not convert primary picketing into secondary action. The question of violence as a violation of section 8(b)(1)(A) was not raised in the pleadings and the Board did not consider the issue. The petitioner then appealed this decision to the Court of Appeals. Held, union's use of violence on the picket line to induce truck driver employed by Sales House not to make deliveries to struck employer violates secondary boycott ban of section 8(b)(4)(A) of Labor Management Relations Act even though union's activities were restricted to vicinity of struck plant. *International Rice Milling Co. v. NLRB*, 183 F. 2d 23 (5th Cir. 1950).

The court arrived at this conclusion by pointing out that although section 8(b)(4) of the Labor Management Relations Act of 1947, 61 Stat. 140, 29 U.S.C. § 158 (Supp. 1948), is known as the secondary boycott section, the term is not used in the language of the section. Using this as a premise the court concludes that if the union's activity comes within the language of the section it is an unfair labor practice regardless of what was a true "secondary boycott" at common law, or under any modern theories of labor law.

The language of section 8(b)(4) is so broad that it is not inconceivable that such an interpretation be given to this section. The result of the stoning of the Sales House truck encouraged and induced an employee of a neutral employer to refuse to handle the product of the struck employer. The section provides that the inducement must result in a strike or a concerted refusal to handle the goods. Clearly one employee's refusal does not constitute a strike, and whether it is a concerted refusal is doubtful. The question is not considered by the court in its construction of the statute and must be left unanswered.

The ruling of the case appears rather extreme, however, in light of the history of this legislation. Courts after investigation of the legislative history have said that the purpose of section 8(b)(4) was to stop secondary boycotts. The court in *Douds v. Metropolitan Federation of Architects, Engineers, Chemists & Technicians*, 75 F. Supp. 672 (S. D. N. Y. 1948) after considering the legislative history says at 676:

Examination of these expositions of Congressional purposes indicates that the provision was understood to outlaw what was theretofore known as a secondary boycott. (emphasis supplied.)

The court in *United Brotherhood of Carpenters v. Sperry*, 170 F. 2d 863 (10th Cir. 1948) uses similar language.

In *Oil Workers International Union, Local 346 (CIO)*, 84 N. L. R. B. 315 (1949) at 318 the NLRB ruled:
It is clear from the legislative history of the Act that section 8(b)(4)(A)(B) was aimed at secondary and not primary action. Thus Senator Taft said of the section: “This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and his employees. . . .” [Under] the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott. . . . All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.”

Historically an employer’s remedy for harm to his business as a result of violence on the picket line has been an injunction to cease and desist in the use of violence which was obtained on established principles of equity. See *Sailors Union of the Pacific v. Hammond Lumber Co.*, 156 Fed. 450 (9th Cir. 1907). This procedure was followed after the passage of legislation restricting the court’s powers to grant injunctions in labor disputes, 38 Stat. 738 (1914), 29 U. S. C. § 52 (1946); 47 Stat. 70 (1932), 29 U. S. C. §§ 101-115 (1946) (Norris-La Guardia Act). *Knapp-Monarch Co. v. Anderson*, 7 F. Supp. 332 (E.D. Ill. 1934); *Hotel & Restaurant Employees International Alliance v. Greenwood*, 249 Ala. 265, 30 So. 2d 696 (1947), cert. denied, 332 U. S. 847 (1948).

It does not seem warranted to interpret the statute to reach the result that the use of violence on a picket line is within the purview of section 8(b)(4)(A). The consensus of the courts and the NLRB, considered with the legislative history, leads to the conclusion that the abuses of secondary boycotts were to be corrected. Congress intended to give a remedy where there was none before. There is a remedy for violent picketing. It seems unlikely that Congress would intend to virtually obliterate the distinction between primary and secondary labor activity without expressly stating such an intention.

The decision as it stands greatly increases the advantage of an employer engaged in a labor dispute. No longer does he need to file a bill and establish his case in accordance with accepted rules of equity, but he may now, if this decision is followed, avail himself of all the advantages of procedure and proof available under the National Labor Relations Act, *supra*.

WILLIAM L. DIEDRICH, JR.

REAL PROPERTY—NO ACTION FOR DAMAGES SUSTAINED FROM INVASIONS OF LAND BY TREES WHICH ARE NOT POISONOUS OR INHERENTLY DANGEROUS.

Plaintiff and Defendant are adjoining landowners. There are two large trees on the Defendant’s property which overhang the Plaintiff’s premises. On several occasions, leaves and buds from the branches have stopped up gutters on the Plaintiff’s building; water has flooded over the wall. Considerable amounts of money were expended in having the debris cleared from the drain, and having
the walls water-proofed. In addition, the trees leaned over the building and were in such a state of neglect that they constituted a threat to his security. Action was brought for damages and abatement of the nuisance. Held, when one's land is invaded by branches and roots of trees which are not poisonous or inherently dangerous, he has no action against the owner of such trees, but may protect himself therefrom, by cutting them off to the extent that they invade his property. Sterling v. Weinstein, 75 A. 2d 144 (D. C. 1950).

The instant case stands for the principle that innoxious and non-poisonous trees which extend over another's land are not nuisances; and restricts the injured party to the remedy of self help in protecting himself. As a basis for this holding they adopt the rule enunciated in Michelson v. Nutting, 275 Mass. 232, 175 N. E. 490 (1931), which held that an invasion which clogged sewer pipes and threatened to ruin a foundation was damnum absque injuria. That court said that it would be intolerable to give an action against the owner of an innoxious tree whenever its branches encroached, and that the common sense of the law recognized that it is wiser to leave the individual to protect himself than to subject him, and the public, to actions at law which would be innumerable and for the most part purely vexatious.

The application of this rule, which is disapproved by the great majority of the courts in the United States, develops a principle which, if not properly curbed, could lead to the anomalous result of forcing a party to take the law into his own hands and denying him a cause of action even though his case has real merit.

According to the weight of authority, when an invasion has caused some actual and sensible damage, the plaintiff may maintain an action for abatement and damages, even despite a former permissive acquiescence. Smith v. Holt, 174 Va. 213, 5 S. E. 2d 492 (1939); Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188 (1884).

Authorities consistently maintain that trees are technical nuisances to the extent that their branches overhang. They recognize that a landowner has the right to reasonable enjoyment and use of his property in the manner of his choice, and that he has the right to grow trees upon every inch of his land. This use in the course of natural events will involve protrusion of roots and branches. Nevertheless in the exercise of his rights the owner must restrict himself to that use which will neither invade nor prejudicially affect the rights of others. Wood, Law of Nuisance § 108 (2nd ed. 1883).

The remedy of self help, i.e., the right to clip the branches or roots at the boundary, has long been established in cases of invasions. The courts, however, have not made this remedy exclusive and nearly unanimously have given damages and abatement when actual injury has been inflicted. Stevens v. Moon, 54 Cal. App. 737, 202 Pac. 961 (1921). In Forbus v. Knight, 24 Wash. 2d 297, 163 Pac. 2d 822, 829 (1945), the court said that the owner is not "...to be charged with negligence if he fails to take steps to make his property secure against invasion..." and stated that the duty lay in the owner of the offending agency to restrain its encroachment.
As a means of justifying their deviation from the reasoning and the consequent remedies employed by the majority, the court in the principal case seizes upon, by way of criticism, three apparent inconsistencies or impracticalities in the decisions of the jurisdictions following the majority view. (1) The difficulty in determining what is and what is not a sensible or substantial damage; (2) the distinction which allows recovery for an invasion by a noxious tree but not for a tree which is innnoxious; and (3) the distinction between a natural condition and that which results from human activity, which is employed by the Restatement, Torts § 840 (1934), as a basis for liability vel non. Griefield v. Gibraltar Fire and Marine Insurance Co., 199 Miss. 175, 24 So. 2d 356 (1946).

A brief analysis of these criticisms reveals that they are not so inconsistent or impractical and that in some instances the true inference to be drawn escaped the court. (1) What is a substantial damage? There seems to be little difficulty in determining when a real injury has been inflicted. At any rate, it is the province of the jury to ascertain whether or not there has been a sensible injury. (2) The cases which base recovery on whether the tree is noxious or innnoxious are not inconsistent with the majority view, which allows recovery if the injury is real. Noxious generally denotes something inherently dangerous or offensive. However, the courts have consistently interpreted it to apply wherever actual injury occurs. Granberry v. Jones, — Tenn. —, 216 S. W. 2d 721 (1949). (3) The criterion which relieves the owner of liability for natural conditions on his land has not always been considered well advised when applied to urban areas. In Prosser, Torts § 76 (1941) it was said:

The rule of non-liability for natural conditions was obviously a practical necessity in the early cases, when land was very largely in a primitive state. . . . But it is scarcely a rule suited to cities, to say that a landowner may escape all liability for serious damage to his neighbor arising out of his property, merely by allowing nature to take its course. . . .

The conclusion to be drawn from the consideration of this lack of reason for the rule is not that no liability should exist for either, but that liability should fall indiscriminately since, especially in urban areas, owners have equal opportunity to observe and maintain both natural conditions and the fruits of their own hands. Upon this opportunity rests the duty to protect their neighbors.

The decision in question expresses a desire to simplify the application of the law, by rejecting the principles upon which relief has been granted, and restricting the remedy to self help; thereby protecting the courts and the public from the possibility of "innumerable and vexatious" actions. Both aims are commendable, but the decision might well be restricted to cases where the invasion is from non-poisonous and innnoxious trees, and where there is no sensible injury. For, to deny a cause of action and a recovery to a complainant whose case has real merit, would seem to be neither just nor conscionable.

JOHN P. ARNESS
TORTS—Mother Has No Cause of Action for Physical Consequences of Mental Disturbance Resulting From Injury Inflicted on Her Minor Child by Negligent Operation of Defendant's Automobile.

Defendant, while driving his automobile, negligently injured plaintiff's minor child. He carried the child up three flights of stairs to her apartment and handed her to her mother, the plaintiff, who then learned of the accident for the first time. As a result of shock and fright from this incident, plaintiff suffered serious physical injuries which are the basis for this action. Held, defendant had no duty to so conduct himself regarding the injured child so as to protect the mother from unreasonable risk of shock upon her learning of injury inflicted on her child. Cote v. Litawa, 71 A. 2d 792 (N. H. 1950).

The case introduces a novel question, the court's opinion stating: "We know of no case in New Hampshire, or in any other jurisdiction... which has passed on the precise issue to be decided in this case." Cote v. Litawa, supra, at 794. Further, there is considerable conflict in that portion of the law of torts which must govern a factual situation of this character. It has been said, regarding physical injuries resulting from mental disturbance, that "the authorities are in a state of dissension probably unequalled in the law of torts." 52 Am. Jur. § 55, 399. This lack of uniformity is particularly evident in actions where the mental disturbance and/or its consequences are the result of injury or danger of injury to another person. The leading industrial states would deny recovery in such a factual situation since they require an "impact" (any battery, Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N. E. 737 (1902), or jarring, Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931)), on the ground that such requirement limits the possibilities of feigned mental injuries. However, even certain courts, not requiring an "impact", deny recovery, the most common rationale being, directly in line with the majority opinion in Palsgraf v. Long Island R.R., 248 N. Y. 339, 162 N. E. 99 (1928), that negligence is a relative term and that it is not enough that the defendant was negligent toward someone else, but his conduct must have been negligent toward legally protected interests of the plaintiff. Waube v. Warrington, 216 Wisc. 603, 258 N. W. 497 (1935).

A clear majority of jurisdictions are in accord with this Wisconsin court.

In the instant case, the court would concede that the defendant's action, in carrying the child up three flights of stairs and presenting her to her mother, was the proximate cause of the mother's fright and the physical consequences thereof. The precise issue is: did the mother, in this case, have a legally protected right to be free from shock with resulting physical injury. The court's consideration of this question was limited by the stipulations of the pleadings in which both parties agreed that if defendant was to be held liable, his liability must arise out of the negligent operation of his automobile. Acting within the limits of this approach, the court answered the question negatively, the thought behind the opinion being that such consequences are unusual and, in balancing the social interests involved, to recognize such a right and impose such a duty.
would place an unreasonable burden on the users of the highways. Conceding the apparent validity of this concept in a case where the shock is the result of plaintiff's witnessing a third person being injured, it would appear to have no application in a case where the shock is caused by defendant's actions after, and independent of, the accident. The element of foreseeability distinguishes the latter case, for in the time intervening between the injury and the presenting of the child to her mother, the defendant had opportunity to foresee and know, or, as a reasonable and prudent man should have known, that his action might well result in mental injury, of which the physical consequences are an incident, to the mother. This, then, was conduct "... which falls below the standard established by law for the protection of others against unreasonably great risk of harm." Restatement, Torts § 282 (1934).

The opinion in the instant case is in accord with Waube v. Warrington, supra, and represents what is undoubtedly the weight of authority. Note, Torts—Fright as an Element in Civil Actions, 23 Georgetown L. J. 515, 518 (1935). However, a factual element clearly distinguishes the instant case from Waube v. Warrington, supra. In the Waube case and those in accord therewith, denial of liability is predicated upon the entirely unforeseeable consequence that plaintiff will suffer a mental injury from the physical injury inflicted on a third person. This might have been the case if the mother had witnessed the accident and suffered shock without any act of the defendant's intervening, but, upon the facts here, we are not concerned with such a case. Here, defendant's act intervened and was the proximate cause of the plaintiff's injury.

If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability. Restatement, Torts § 436, (1) (1934).

True, the first illustration under this subsection is closely analogous to Janvier v. Sweeney, [1919] 2 K. B. 316, in which the defendant had knowledge that his conduct would result in fright. However, the comment on this subsection removes all doubt as to a possible requisite of intent or knowledge by stating conduct which "... is intended or obviously likely ..." to cause fright or other emotional disturbance. The instant case invites comparison with opinions which would hold telegraph companies liable when they must have had

... either from the character of the telegraph itself, or from extrinsic information, knowledge that the mental anguish suffered by the plaintiff is such as the company ought reasonably to have anticipated.

Haffey v. Western Union Telegraph Co., 194 Ky. 709, 712, 240 S. W. 374, 376 (1922); Western Union Telegraph Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930). The suggestion that recognizing such a right would place an unreason
able burden on the users of highways becomes less tenable since the burden is
not on the use of the highway, or, at most, only remotely or indirectly so, but
on acts independent of the use of the highway and affecting defendant's lia-
ability only in a situation where the risk is foreseeable and the danger such as
would be or should be known by a reasonable and prudent man.

It would appear, clearly, that a mother might, and in most cases would,
suffer shock or mental injury with physical consequences on learning of a seri-
ously threatened or real injury to her child. The danger of fabricated claims is
evident, but as long as mental injuries are rarely compensated unless accom-
panied by physical injuries and since such may be substantiated by medical
evidence, the problem is lessened to one of adequate proof, accounting for the
recent tendency to find a cause of action in a proper case. Notably, some
jurisdictions have gone to the extent of holding, in effect, that if the defendant
is to be held liable to a mother who happens to see her child injured and suffers
a mental injury with physical consequences, whether in personal danger herself
or not, as a minority hold, then there is no apparent reason why recovery
should be denied to a mother who hasn’t seen the infliction of the injury but
suffers a similar shock when the injured body of her child is brought home. 

“The simple question is, whether a loss, that must be borne somewhere, is
to be visited on the head of the innocent or guilty.” Fent v. Toledo, P. & W.
Ry., 59 Ill. 349, 361 (1871). When the unforeseeable aspect and the concept
of placing an unreasonable burden on the users of public highways are removed
from consideration by the fact of defendant’s intervening act, there appears
no valid foundation for failure to recognize plaintiff’s cause of action for physical
damages resulting from mental injury.

THOMAS J. O’CONNOR, JR.
BOOK REVIEWS


The courts exist for the purpose of administering justice. In each case decided by them the objective to be reached is substantial justice. The law is the instrument that the courts use to attain this purpose. The law is not an end in itself, but is merely the means by which justice is sought to be achieved. While law may be called a science, the administration of justice consists of far more than the application of scientific principles to facts. It is a practical effort to effectuate substantial justice with the but actions are concerned with particulars."

Judge Frank's book on "Courts on Trial" deals with some aspects of the administration of justice by the courts. His approach is novel in many respects. Much of the book is devoted to a demonstration of the fact that the outcome of litigation is unpredictable. It is not likely that anyone would take issue with this thesis. In fact, it would be deplorable if the outcome of litigation could be foreseen in advance. A controversy cannot be determined until the testimony on both sides has been heard and arguments have been presented. No one can foretell what evidence will be forthcoming in behalf of any party. Moreover, triers of the facts, be they judges or jurors, are not automatons or robots and determine the issues presented to them in the light of their own sense of justice, experience, background, and practical common sense. What may be termed the human equation necessarily enters into the disposition and determination of any controversy. It is in the nature of things that this be so. It would be lamentable if it were otherwise. The human equation is always involved in the application of general principles of law to specific situations. As Aristotle says, "Enactments must be universal, but actions are concerned with particulars."

The larger part of Judge Frank's book is devoted to an interesting analysis of what this reviewer has just termed the "human equation." The author makes a very able and analytical presentation of his point of view. Whether his point of view will be shared by others is, however, another matter. In the earlier part of his book the author creates the impression, whether intentionally or unintentionally, that the factors, to which reference has just been briefly made, result in rendering the administration of justice very unsatisfactory. The author seems to be pessimistic about the quality of justice meted out in the courts. On the
other hand, in the latter part of the book he seems, in part at least, to mollify some of the aspersions cast earlier.

The administration of justice would indeed be in a sad state if it were of as poor a quality as Judge Frank seems to intimate. Fortunately, his pessimism is not generally shared and should not be. Naturally, like all human institutions, the courts are far from perfect. Substantive law must advance with changes in social conditions. Procedure must be simplified and technicalities minimized in order that justice should be rendered both expeditious and inexpensive. During the past century far-reaching advances have been made. For instance, in the field of substantive law Married Women’s Acts have emancipated married women and accorded to them a status more in accord with reality than that possessed by them at common law. Workmen’s Compensation Acts have revolutionized the rights of employees to compensation for injuries incurred in the course of employment. Countless similar examples might be adduced in the field of substantive law. Particularly striking developments have also taken place in the realm of adjective law. In all but a few jurisdictions common law pleading has become but a memory. As a result of conferring the rule-making power on the judiciary, the federal courts have developed the simplest form of civil and criminal procedure that has yet been devised in Anglo-American jurisprudence. Those interested in law reform cannot, of course, rest on their laurels. Much still remains to be done. Law must not stand still. It must constantly progress.

Judge Frank, however, seems either to ignore or wave aside as insignificant the reforms that have been achieved, and to create the impression that there is something basically and fundamentally wrong with the administration of justice. Yet the remedies that he suggests are not of a major character and seem hardly commensurate with what he seems to think are fundamental faults in the manner in which the courts operate.

There is one defect in the administration of justice, however, that at one time was quite serious, but to which Judge Frank does not refer. That is the frequent tendency of appellate courts (Judge Frank prefers to call them “upper courts”) to reverse decisions of trial courts on matters that have no bearing on the merits of the controversy. Fortunately, this tendency is much less prevalent now than it was at one time, and perhaps Judge Frank saw fit not to refer to it, because the tribunal of which he is a member does not ordinarily display it. The Court of Appeals for the Second Circuit, under the enlightened leadership of Judge Learned
Hand, has time and time again declined to reverse convictions on legal technicalities if the evidence of guilt were overwhelming. Unfortunately, however, there are still some courts, both Federal and State, that have not progressed that far.

Among the proposals advanced by the author is the rather intriguing suggestion that special education be provided for future trial judges. One naturally wonders why it does not include appellate judges.

The author makes an exceedingly constructive and desirable proposal in respect to legal education. While many would not agree with the author’s attack on Langdell and his system of legal teaching, there is no reason why the recommendation that legal education be made more practical, should not meet with favor. Specifically, the author urges that law students be encouraged to visit courtrooms and to watch trials; and also that they do what might be called clinical work in assisting in legal aid societies and in other similar ways. A few law schools have already adopted these ideas, and it is hoped that more will.

Judge Frank severely attacks trial by jury. On the surface his arguments appear cogent and logical, but as Justice Holmes remarked, the life of the law has not been logic, it has been experience. For example, around 1890 an outstanding scientist wrote a book in which he demonstrated mathematically that flight in heavier-than-air aircraft was physically impossible. Yet a few years later the Wright Brothers made their epoch-making flight at Kittyhawk, which was followed by the marvelous expansion of aviation. Although the idea that twelve laymen should decide controversies between man and man, and pass upon the guilt or innocence of defendants in criminal cases, may seem illogical to some minds, nevertheless, experience has shown that trial by jury is the most efficacious and just method for deciding controversies that has yet been devised by the mind of man. Trial judges and trial lawyers, who try cases with juries day in and day out, are practically unanimous in having a mounting feeling of confidence in the ability of juries to mete out justice. It has been the reviewer’s observation, based on daily experience with juries, that the impact of mind upon mind in the jury room produces a composite product that is far superior to the average product of the twelve individual jurors. Jury trials are at their best in the Federal courts, which still require unanimity of action on the part of jurors, thereby leading to greater and more thorough discussion in the jury room. The Federal system also provides an aid to the jury by permitting the trial judge to summarize and comment on the evidence.
True, sometimes juries make mistakes, but so do judges and so do all other human beings. The percentage of injustice in the outcome of jury trials is, however, very small. The author refers to a few cases of unjust convictions reported by Professor Borchard. The percentage of such instances is so minute, that these few unfortunate cases stand out and all of them are included in a single volume. On the other hand, a prison official is said to have remarked that he knew only one innocent person in the prison of which he was a warden and that this person was not in a position to establish his innocence because he was committing a much more serious crime at the time when it was alleged that he committed the offense for which he was imprisoned. It is true that occasionally the guilty escape punishment due to the protection that the law hedges around the defendant in a criminal case. Neither Judge Frank nor any one else would, however, want any part of these safeguards weakened.

ALEXANDER HOLTZOFF*


Judge Yankwich has assayed to write “not a digest-like textbook for lawyers, but a book for all persons interested in the problem of libel and contempt.” The book has two main parts: the first deals with the law of libel as such with particular emphasis on newspapers; the second deals more particularly with freedom of the press.

In Part I, the author’s purpose is to be informative. To this end he has collected in an illustrative casebook in Chapter II, various situations to demonstrate what the courts have considered libelous. This part of the book is probably of the greatest value to the non-specialist. The multiplicity of examples should give insight into the anatomy of defamation to one who has neither the time nor training to probe deeply into the origin and operation of principles governing this branch of the law.

The specialist, however, will find confusion in the introduction of a series of slander cases at the end of the “casebook” without an adequate distinction between libel and slander. Of course, the vital distinction is that according to the general law, libel is actionable without proof of

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1 Yankwich, IT'S LIBEL OR CONTEMPT IF YOU PRINT IT viii (1950).
special damages, whereas slander requires such proof except in special cases not material here. Most lawyers carry this distinction in their heads. Hence it is perplexing to find it virtually obliterated when the author comes to discuss publications actionable upon proof of special damages. He cites the California Civil Code, Sec. 45(a) which, in effect, provides that a publication not libelous on its face is not actionable unless the plaintiff alleges and proves special damages. This is the distinction between written matter defamatory on its face (libel per se), and defamatory because of extrinsic circumstances (libel per quod), the latter being actionable only if special damages are proved. The author states: "This principle has been recognized for many years in the law of libel", and cites Pollard v. Lyon as authority. But the case cited involved spoken defamation or slander and is no authority at all for the distinction in a libel case. Indeed that case indicates the general rule that all written defamation is actionable without proof of special damages. Most jurisdictions so hold and do not import a requirement that special damages must be proved from the fact that extrinsic circumstances are necessary to show a defamatory content where the matter is written.

Of course, one cannot quarrel with the California Civil Code but the departure by California from the general law should be pointed out inasmuch as the author has stated: "In truth, except in the matter of privilege, the law of libel of California does not differ from the law of other states." The matter discussed above is different in an important way. Witness the quarrels in other jurisdictions as to whether defamation by radio is libel or slander. Moreover the general rule would apply to a libel originating in California but published in another state. And it should be remembered that the author aims to tell the newspaper writer "what he can do." It is apparent that he can do more in California than elsewhere. This reviewer found it regrettable that in a book intended for general consumption such important differences were not pointed out.

The doctrine of privilege comes in for treatment in two separate chap-

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2 Id. at 270.  
3 Ibid.  
4 91 U. S. 225 (1875).  
5 PROSSER, TORTS 794 (1941); BOHLEN, CASES ON TORTS 871-872 (4th ed. 1941).  
6 YANKWICH, op. cit. supra note 1, at 17.  
7 Hartmann v. Winchell, 296 N. Y. 296, 73 N. E. 2d 30 (1947); YANKWICH, op. cit. supra note 1, at 176.  
8 YANKWICH, op. cit. supra note 1, at ix.
ters. Some of the matter is unduly repetitious and part is repeated verbatim. However the author has succeeded in being informative and Part I fairly covers the field.

Part II deals more concretely with the role of a newspaper in modern society. There can be little disagreement on the matter concerning contempt. The author is vigorous throughout in sounding the praises of freedom of speech in relation to the judicial process. He reviews the major controversies from John Peter Zenger to Harry Bridges. Being a judge his animadversions on contempt by publication are certainly worthy of note and should afford support to those who claim that the law should go far in allowing newspapers to comment on judicial proceedings. And here he has a majority of the Supreme Court and Voltaire's old chestnuts (trite by this time) to support him.

When the author comes to discuss the delicate subject of obscenity statutes, he is more receptive of what has been decided than critical. Perhaps it is due to space limitations that his treatment is so cursory. However he does seem to accept a theory of relativism in morals. Social pressure should determine where the line is to be drawn between obscenity and non-obscenity. The crux is to find some test to determine what is obscene. The author accepts without criticism the tendency "not to consider anything obscene unless its direct tendency is not to merely corrupt the young but to have a corrupting effect upon the morals of all whom it may reach." 9

Surely the unformed minds of the young should be the particular object of judicial and legislative protection. We have rape statutes to protect their bodies. Are their minds less important? No one has yet demonstrated that knowledge of whatever sort cannot be communicated if the test for obscenity is broadened so as to afford the required protection. The difficulty of attributing definite content to the word "obscenity" is greatly overemphasized. The law has succeeded in other areas. The proper policy would lend content. Such a test as Judge Yankwich uncritically accepts is really nothing but freedom of expression worshipped for its own sake. In discussing the contempt cases, however, he recognized that freedom of speech should be allowed up to the point where there was undue interference with judicial administration. An end was kept in view. Here the test is so broad that the end is pushed out to infinity and becomes unrecognizable (if a court so desires), and it would be possible to drop the word "obscene" out of our legal vocabu-

9 Id. at 541.
lary. This of course is traceable to the absence of a policy behind the test which in turn is due to relativism in morals.

No one can disagree with the conclusion to Part II that "the greatest danger to free expression lies in the abuse of the power of the press." Logically, individual responsibility would take care of the obscenity problem or any other social problem for that matter. But until that receding ideal is reached certain restrictions on the irresponsible are necessary.

PHILIP A. RYAN*


To those of us who believe the corporate form of business needs reforming, this book is a welcome and necessary addition to the available material on the subject; to those who have no firm conviction on the matter, or who have not thought about it at all, this book is "must" reading.

Beginning with a foreword by Senator Joseph C. O'Mahoney, an undaunted corporate reform crusader for many years, Professor Reuschlein then "By Way of Diagnosis" puts the "monster" under examination. Unerringly he has catalogued the major ills, carefully separating symptom from disease so that by the end of Part I the reader understands the more important malignancies present in the corporate form today. The enumeration of ills, although very brief, is extremely thorough.

"By Way of Curatives", the book in Part II considers the various theories of corporate reform. It is clear the author thinks that most of the proposals are merely palliatives, nonetheless his analysis is remarkably complete and objective. He does not discount present federal legislation, rather he points out its inadequacies. Dean Pound's proposal that the visitatorial powers of the courts of equity be resorted to by the prosecuting powers of the state, and Professor Berle's theory of trusteeship are not summarily dismissed; they are regarded as treatments for only portions of the diseased corporate form and therefore inadequate if the entire anatomy is to be reconditioned.

It is with Part III that some readers may disagree. It is here that

10 Id. at 545.
* Member of the Pennsylvania Bar; Professor of Law, Georgetown University, School of Law.
Professor Reuschlein lays aside the robes of the diagnostician and seizes the scalpel of the surgeon and the art of the physician who would restore the patient to health. His prescription reflects neither the idealism of Pound nor the patience of Berle. Part III is entitled "Uniformity—the Solvent" and in this portion of the book, the author considers the Uniform Business Corporation Act, Interstate Compacts, Interstate Compacts and Uniform Legislation, Federal Incorporation and Federal Licensing. Uniformity being the suggested solvent, Professor Reuschlein quickly comes to the conclusion that the only feasible method of achieving it is through Federalization. After an excellent historical account of the efforts of Senators Borah and O'Mahoney to obtain Federal regulation in the past, the author then casts his vote for Federal Licensing. He then considers Senator O'Mahoney's current effort, S. 10, 81st Cong., 1st Sess. (1949), so carefully and critically that it is to be hoped this volume finds its way into the hands of the legislators now considering S. 10. The criticism indicates the author's thinking is not of the White Tower variety since he points to political obstacles which may be encountered in the passage of S. 10, and practical obstacles to its application as presently constituted.

The main objection to the book is that there is not enough of it. There are but 67 pages of text. The 38 pages of notes contain an excellent bibliography of the plenitude of valuable material on the subject. The book is not heavy reading as the facile pen of Professor Reuschlein makes the subject colorful and easily-digestible. In the foreword, Senator O'Mahoney recommends the book to leaders in business and leaders in government. This reviewer recommends the book to any student of corporate reform.

PAUL R. DEAN*


The author of these three massive volumes starts with the premise that religion is necessary for democracy and that "religious freedom is necessary both for the creation and the maintenance of civil and political freedom."1 Canon Stokes is convinced furthermore that the 160 years of

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1 3 Stokes, Church and State in the United States 714-715 (1950).
Church-State separation in the United States has provided more protection for that religious liberty than any other Church-State arrangement in the history of mankind.

The basic ideals of Christianity are at the heart of American law, Canon Stokes feels, and these ideals, detached from any sectarian dogma or institution, have a recognized place in America’s national life. These ideals must be preserved if American democracy is to perdure. As to the question of preserving these ideals Canon Stokes stands midway between America’s extreme religionists and her extreme separatists. The former group would favor the view that the state has a positive obligation to promote religion since, as many courts have said, Christianity is a part of the Anglo-American legal tradition. The latter group, now increasing in number and strength, would refrain from all cooperation with religion or anti-religion because only by this means can the religious conscience of all citizens be kept inviolate. Canon Stokes stands with the religionists in that he feels that the state can and must cooperate to some extent with all religions on an impartial basis, maintaining, however, a “friendly” separation of Church and State. Stokes thus favors tax-exemption for religious institutions, the presence of chaplains in the armed services and most of the other traditional forms of cooperation between Church and State. But the Canon is with the separatists in that he approves of the *McCollum*\(^2\) decision, opposes any aid to denominational schools and is not quite sure that the incidental aid allowed to the pupils in these schools in the *Everson*\(^3\) decision is in the American tradition.

Before we analyze Canon Stokes’ conclusions, let us briefly review the topics which he has treated in this comprehensive treatise. The author divides his vast field into two major sections; book one is an historical narration of Church-State relations in the United States from 1630 to the end of the Civil War. Book two consists of an analytical treatment of modern and contemporary problems involving Church-State relations. Current tension points are not omitted; there is considerable material on the Reverend Melish-Holy Trinity dispute, the New Mexico religious garb case still being litigated and the Barden Bill.

Some of the major topics in these three volumes are: a description in some detail of the status of religious liberty in the original American colonies, the legislative history of the First Amendment to the Federal Constitution, the position on Church-State relations taken by the major

\(^2\) 333 U. S. 203 (1948).

\(^3\) 330 U. S. 1 (1947).
sects during the nineteenth and twentieth centuries, the relation of the churches to the movement for the abolition of slavery and the movements for social reform. The various Church-State conflicts in the field of education are discussed at some length; for example, the practice of reading the Bible in the public school, the flag salute controversy which ended in the Barnette decision and the origin and rise of denominational schools. The "blue laws," the status of conscientious objectors to war, the Jehovah's Witnesses and the Supreme Court—all these and countless other topics are given copious treatment in this exhaustive work. Added to this vast compilation of Church-State material is a bibliography of some 300 books with a brief synopsis and evaluation of the contents of each.

What general conclusions does Canon Stokes advance after his comprehensive survey of Church-State relations? He believes that there has been and should be a "wall of separation" between Church and State but this wall has not been and should not be an iron curtain. The American tradition has been one of "friendly" separation of Church and State; the European separation which was based on contempt for religion has never been employed in this country. The Canon specifically rejects what he calls the novel doctrine enunciated in the Everson decision that the state cannot "aid all religions". States Canon Stokes: "There is nothing unconstitutional about a law merely because it aids all religions." The privileges and encouragements of religion which all religious groups share differentiate the American government from a secularist state. The United States, though providing complete religious freedom, "is committed in general to a Christian ideal." Stokes feels that even the judicial approach supports the view that the American nation has a special sense of obligation to the basic ideals of Christianity. This assertion is supported by reference to the volume of Justice Cardozo, The Nature of the Judicial Process, where Cardozo sets out four methods of approach open to a judge in determining his action in any doubtful case. The judge may follow the method of logic, historic development, the customs of the community or the norm of social welfare. No matter which of these norms is employed, Canon Stokes thinks, the result will be dictated by the general ethical ideals of Christianity. He would not go so far as to say, however, that Christianity is a part of the law of the land.

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5 2 Stokes, Church and State in the United States 705 (1950).
6 3 Stokes, Church and State in the United States 579 (1950).
7 Ibid.
In view of these convictions about the place of religion in our national life, what does Canon Stokes hold on the two recent cases in the Supreme Court which have construed the "establishment" clause of the First Amendment for the first time in American history—the *Everson* and *McCollum* decisions? On the *Everson* decision Stokes is not very clear. He actually avoids a judgment by saying that to a layman the majority and minority opinions seem equally conclusive. He does not point out that the arguments from history used by all the justices were not opposite. He suggests that if to the experts the decision seems to be a dangerous opening wedge to bring about direct aid to sectarian schools then an Amendment to the Constitution forbidding such aid may now be advisable. This treatment of the *Everson* decision is not too satisfactory; one would expect Stokes to at least acknowledge the force of the arguments which the parents and the school board urged in their brief. One hesitates to suggest that Canon Stokes is influenced by the many Protestant protests to the *Everson* decision which he quotes at some length but in the absence of any other explanation of his position such a suggestion may not be without foundation.

Canon Stokes' attitude on the *McCollum* decision is not too satisfactory either. He presumes that the system of dismissed-time religious education will be upheld by the Supreme Court in a later decision; he does not point out that the Court has forbidden any assistance whatsoever to be given by the public school to religion. He states gratuitously that many constitutional lawyers expected the *McCollum* decision but he gives no indication of their identity. He seems unaware that the decision has been opposed by the American Bar Association and that at least a dozen constitutional law experts have expressed grave misgivings about the validity of the *McCollum* decision. The Canon does not see that the *McCollum* decision, unless substantially overruled, will lead to secularism in American education and American life. And the Canon is aware of the rapid secularization of modern society; he says that this trend is much more serious than most people realize. In fact the most serious defect in America's traditional Church-State separation is "its failure up to the present to work out any satisfactory constitutional plan for providing a broad basis for religious education for pupils of our public schools."8 Canon Stokes does not appreciate the fact that the *McCollum* decision has made the integration of religion with education which he feels is desirable almost impossible; the State and the Church must stay within their own

8 *Id.* at 722.
sphere in all matters of education, the Supreme Court has ruled. The Court has thus deepened the dilemma of the religiously minded parent who desires that religion be integrated with the education of his children. Since the McCollum decision these parents may not look to the public school for such an education and are barred from setting up their own schools unless they do it entirely from their own funds. What does the right to religious liberty possessed by these parents amount to in this instance? Canon Stokes has accepted the view that it is a sheer immunity and not a full-bodied right worthy of implementation.

It would indeed be miraculous if such a vast work as this contained no errors of fact or judgment. There are many such errors; a few of the mistakes of interest to lawyers include the complete omission of any mention of the Girouard decision which gave citizenship to conscientious objectors to war; the misstatement of the scope of the Barden Bill; the statement that those who obtain an annulment of a marriage from the Catholic Church are frequently persons of important position who are able to exert much influence in Rome—the truth being that the Roman Rota is more exacting about the validity of the evidence in an annulment case than the most scrupulous American court. Besides such errors as these there is sometimes an inadequate treatment of a topic because the author relies on a single secondary source. The Christian Century magazine, the Churchman or the Federal Council of Churches Bulletin are quite frequently given as the only source of an incident related by Canon Stokes; this habit of absolute reliance on these sources alone lessens the value of Stokes' work considerably because these periodicals write from a particular point of view on Church-State relations.

The author of these volumes is not, as we have indicated before, a secularist. He concedes to the churches the right to enter the temporal order when moral issues are at stake. He is not, therefore, another Paul Blanshard, the author of American Freedom and Catholic Power, who would deny to the churches—or at least to the Catholic Church—the power to speak and act when what is conceived to be a moral issue arises in the temporal order. Canon Stokes, however, seems to concede this right to the Catholic Church with some reluctance. The religious groups who were responsible for Prohibition, the ban against obscene literature in the mails and many other laws are praised for their conviction and

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10 2 Stokes, Church and State in the United States 733 (1950).
11 Id. at 65.
zeal, even if sometimes misdirected. But the attempts by Catholics to influence legislation are implied to be the imposition of the doctrine of an authoritarian or totalitarian institution whose headquarters exists outside the United States. In a few other points Canon Stokes is somewhat less than fair to the Catholic Church as, for example, when he writes that the Catholic Church favors, immigration and opposes birth control not only on principle but because the Church desires that Catholics should increase "so that in time they may be the dominant religious element in the American scene."\(^\text{12}\) Or again, when Stokes avers that American Catholics have adjusted themselves rather well to America despite their "inherited totalitarian tradition."\(^\text{13}\)

It is possibly a truism to say that the appearance of these encyclopedic volumes confirms the fact that we have reached the end of an epoch in Church-State relations in the United States; what has been taken for granted for well over a century has been challenged by new social forces and it has thus become timely for a compilation or case-book like Canon Stokes' *Church and State*. It is well for those who believe in God, the natural law and religious freedom that a man, as religious and tolerant as Canon Stokes, has written this treatise which will without doubt be referred to as the definitive work in this field. It is fortunate for the American nation that Canon Stokes has accepted as his principal postulate the truth that "freedom of conscience or religious liberty is the basic freedom without which other civil and political freedoms and rights cannot survive."\(^\text{14}\) The forces of true religion and true freedom run parallel, Canon Stokes reminds us. His volumes offer vital proof of the truth of his assertion that religious liberty is the matrix of all other freedoms; they should be read therefore by everyone who desires to protect and perpetuate traditional American freedoms.

ROBERT F. DRINAN, S.J.*

\(^{12}\) *Id.* at 71.

\(^{13}\) *Id.* at 412.

\(^{14}\) 3 Stokes, *Church and State in the United States* 718 (1950).

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BOOKS RECEIVED


