

Sunday Laws and Laundromat Patrons; Privileged Disclosures to a Clergyman; Supervision of Deportable Aliens; Regulation of Contingent Fees of Attorneys

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RECENT DECISIONS AND DEVELOPMENTS

Sunday Laws and Laundromat Patrons

The Sunday laws of New York State,¹ a recurring and controversial topic, were given a further exception recently in the case of *People v. Aliprantis*.² The Appellate Division in this case reversed a conviction of the defendant for violation of section 2143³ of the Penal Law and held that a laundromat patron does not violate the over-all intent of the Sabbath Law,⁴ since the washing of one's personal laundry on Sunday is not proscribed labor because it is a work of necessity.

Sabbath laws are basically an evolution from the Old Testament, wherein it was commanded to keep holy the Sabbath.⁵ Typical examples of the development of such laws are: an edict of Constantine the Great in 321 A.D., commanding all inhabitants of cities to rest on a certain day; a statute of Edward III in 1354 by which the sale of wool on Sunday as a staple was forbidden in England.⁶ Carried over to the American colonies, such legislation had for most jurisdictions a twofold objective: 1) to protect the security of religious observ-

ance, and 2) to provide a day of rest for the worker.⁷ Although essentially religious in origin, such legislation is upheld today as a valid exercise of the police power, the public health making necessary a mandatory day of rest.⁸ It has also been held that such laws do not infringe upon the theory of separation of Church and State, since it is not legislation "respecting an establishment of religion or prohibiting the free exercise thereof. . . ."⁹

The New York legislation on this subject is found in Article 192 of the Penal Law. The foundation of this article is seen in section 2140 which recognizes Sunday as a day of rest and prohibits "the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community." Subsequent sections of the Article contain specific prohibitions, sections 2143 and 2146 covering respectively the broad areas of "labor" and "trades." There is an exception added to both areas, however, allowing each, if they can be classified as "works of necessity or charity." It is with these sections, constructed with broad and

¹ N. Y. PENAL LAW art. 192.

² 8 App. Div. 2d 276, 187 N.Y.S. 2d 477 (1st Dep't 1959).

³ N. Y. PENAL LAW §2143, prohibiting labor, with the exception of works of charity or necessity.

⁴ N. Y. PENAL LAW §2140, establishing "the first day of the week," Sunday, as a day of rest.

⁵ *Exodus* 16:23-30; *Leviticus* 23:8-21.

⁶ 21 ENCYC. BRITANNICA 565 (1951).

⁷ 2 CATHOLIC LAWYER 260 (July 1956). These objectives can be seen in Section 2140 of the N. Y. PENAL LAW. For the historical background of Sunday legislation see generally Johnson, *Sunday Legislation*, 23 KY. L.J. 131 (1934).

⁸ *Petit v. Minnesota*, 177 U.S. 164 (1900); *People v. Havnor*, 149 N. Y. 195, 43 N.E. 541 (1895).

⁹ U. S. CONST. amend. I. See *People v. Friedman*, 302 N.Y. 75, 79, 96 N.E. 2d 184, 186 (1950).

elastic terminology, that many of the problems arise.

The defendant in the instant case was charged with performing "labor" on Sunday as proscribed by the statute. In reversing his conviction, the Appellate Division first considered the "expenditure of energy" as a test to exclude the defendant's actions from the coverage of the term "labor." Automatic washing machines, it was reasoned, are in fact laborsaving. The Court also recognized the necessity in many instances of doing personal laundry on Sunday and doing it in laundromats, individuals such as *Aliprantis* perhaps having no other opportunity and, very probably, no other facilities.

The somewhat inconsistent application of the statute can be seen, however, by comparing the reasoning of the *Aliprantis* case with a decision of the same court several days earlier. In the case of *People v. Kaplan*,¹⁰ the defendant was the proprietor of a laundromat, convicted of violating section 2146 of the Penal Law which prohibits all trades not deemed works of necessity. Reasoning that "necessity" does not refer only to a necessity on behalf of the proprietor, it would seem logical that if the washing of one's laundry on Sunday in a laundromat be a necessity (as stated in the *Aliprantis* decision), the proprietor should also be excepted from the statute's application.¹¹ Recognizing that there can be no general rule as to what constitutes a work of necessity, the court in the *Kaplan* case met this proposition by considering the

washing in this case as a convenience rather than as a necessity. It was further held that the defendant, Kaplan, was engaged in conducting a trade, although he was not physically on the premises at the time of the violation. The fact that the defendant's store was open, and that he was receiving income, would appear to make this conclusion obvious. Yet a further inconsistency in the statute's application can be seen in the case of *People v. Welt*.¹² In that case, on precisely the same issue, the court held that the proprietor, although his store was open and patrons were using his machines, could not be guilty of conducting a trade because he was not physically present at the time. Returning to the *Kaplan* case, once the defendant's actions were found to be classifiable under section 2146 as a "trade," the court found no need to consider section 2140 as to whether the trade was a serious interruption to the repose of the community.

In the interpretation and application of the statute there seems to be too much room for the use of an individual justice's discretion. It also appears possible that the Sabbath laws are in danger of being used by individuals as an economic weapon.¹³ Such varied and arbitrary enforcement stands as little credit to the State's statutory legislation. The problem was succinctly stated by Governor Thomas E. Dewey in his 1952 annual message to the Legislature where he stated: "There are many incongruities and examples of disparate treatment. Many activities which do not interfere with the religious repose of the community are prohibited by existing law.

¹⁰ 8 App. Div. 2d 163, 188 N.Y.S. 2d 673 (1st Dep't 1959).

¹¹ An example of this reasoning may be seen in the case of a drug store. While the proprietor may not deem it a necessity to remain open, he may do so as it is a necessity to others.

¹² 14 Misc. 2d 275, 178 N.Y.S. 2d 313 (Nassau County Ct. 1958).

¹³ See *City of Elizabeth v. Windsor-Fifth Ave. Inc.*, 31 N.J. 187, 106 A. 2d 9 (App. Div. 1959).

There is need for a careful re-examination of these provisions."¹⁴ The problem, admittedly requiring the most tactful handling, has to this date not been met. Amendments to the Sabbath laws are perennial subjects before the New York Legislature,¹⁵ but with few exceptions proposals in this area appear to die in committee, perhaps because of possible religious ramifications and the antiquity of our Sabbath laws.¹⁶

One of the foremost proponents of a change is Senator Rosenblatt, Democrat from Kings County. Among the Senator's 1959 proposals was an amendment to section 2144 of the Penal Law making it a defense to a prosecution for conducting business on the first day of the week that the defendant keeps another day as holy time and does not conduct business on that day, providing such business does not interrupt or disturb another person in holy time observance.¹⁷

A second proposal of the Senator would be an amendment allowing the New York City Council to regulate the conduct of business by inhabitants of the city who observe another day of rest as holy time.¹⁸

A third and widely proposed plan would be a "one-day-in-seven" law,¹⁹ in place of

Article 192 of the Penal Law, making one day of rest mandatory for the workers, but leaving the selection of that day to individual discretion.

This last suggestion would apparently achieve the same end as both of the Senator's proposals but gives no consideration to the extant religious aspect of the problem.

As to the Senator's proposals, the qualifications attached to the broadening of the alternate holy day defense appear to be an equitable solution and in accord with the intentions of section 2140. It is suggested, however, that an interruption to another's religious observance and repose need not come only in the concrete form of a physical interruption. In an area of keen competition, a businessman may find his repose greatly disturbed and therefore fail in his religious observance through knowledge that a competitor is open for business because he observes another day of rest. Economic pressure can be as much a disturbance to one's repose as would be a loud and raucous undertaking. To answer that such a businessman would be free by law to change his day of rest would again ignore the religious aspect of the problem.

Perhaps the sounder approach lies in the Senator's second proposal. The first day of the week has been protected by legislation not in deference to any particular religious sect, but to conform to the day respected as the Sabbath by the majority of citizens. The day could therefore be varied according to the majority's religious sentiment in a particular trade or locale, and if such variation did not substantially affect the repose of the community, Sabbath laws could be delegated to the realm of municipal government. Regulations instituted on this level could still achieve the ends sought by sec-

¹⁴ Annual Message of the Governor, N. Y. Sess. Laws 1952, 1300.

¹⁵ See, e.g., N. Y. LEG. INDEXES 1958-59. Reference to these and to Indexes of other years will reveal a number of proposals on the subject of Sunday Laws.

¹⁶ This is obvious from the number of proposals made on the subject of Sunday Laws each year, note 15 *supra*, and the absence of actual changes. See, e.g., N. Y. Sess. Laws 1953, 2177, where a Sunday Law amendment was vetoed because of the extreme divergency of existing views.

¹⁷ Sen. Intro. 2277, N. Y. LEG. INDEX 1959.

¹⁸ Sen. Intro. 1836, N. Y. LEG. INDEX 1958.

¹⁹ Note, *Sunday Blue Laws: An Analysis of their Position in Our Society*, 12 RUTGERS L. REV. 505, 520 (1958).

tion 2140 of the Penal Law.

The *Aliprantis*²⁰ decision involves an open question as to whether the defendant performed "labor" in the use of the washing machine. Courts have said that a proprietor performed labor by turning on the lights of a store and starting his machines.²¹ Whether such actions are a necessity on Sunday for anyone is a matter of individual conscience which cannot be touched by the most stringent or lenient of man-made laws.

Since proper Sabbath observance is a matter of conscience, it is not suggested that Christianity will suffer by the abolition of such legislation. Such laws, however, while carrying out a valid exercise of the police power and protecting the security of the majority's religious observance, also stand as a reinforcement of this country's Christian foundation. With valid reasons for upholding them, and with the possibility of a just and practical enforcement of them on a local basis, the problem is not met honestly by their complete abolition.²²

Privileged Disclosures to a Clergyman

Communications between clergyman and penitent pose the problem of weighing two mutually exclusive but desirable objectives. The court is forced to evaluate the importance of the evidence to the judicial process against possible detriments to the religious

community, and specifically, detriment to the secrecy of the confessional. In a recent case before the District of Columbia Court of Appeals,¹ the defendant was convicted of abusing and wilfully misusing her children. During the course of the trial a Lutheran minister who had been called as a character witness testified that the defendant had come to his office in an effort to receive communion. The minister told her that he could not give her communion unless she confessed. He then stated that she did confess to chaining her children, and the minister advised her that this was sinful.

The conviction was reversed on other grounds, but two of the three judges expressed the thought that the minister's testimony was inadmissible. While there was no statute specifically governing this point of admissibility the judges relied on Rule 26 of the Federal Rules of Criminal Procedure, which provides that

the admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an Act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.²

There has been considerable debate as to whether or not information revealed during confession was privileged at common law. It is highly probable that, considering the close relationship between the Church and the State in pre-Reformation England, the sacredness of the confessional seal was never doubted.³ Perhaps this is the reason why there are no cases reported from that

²⁰ 8 App. Div. 2d 276, 187 N.Y.S. 2d 477 (1st Dep't 1959).

²¹ *People v. Rubenstein*, 182 N. Y. S. 2d 548 (Ct. Spec. Sess. 1959).

²² "Justice and reason forbid a state to be atheistic or to be what comes to the same thing as being atheistic, to have the same attitude towards various so-called 'religions' and indifferently to grant the same rights to all of them." Leonis XIII Pontificis Maxima Acta, V, 123; quoted in BAIERL, *THE CATHOLIC CHURCH AND THE MODERN STATE* 223 (1955).

¹ *Mullen v. United States*, 263 F. 2d 275 (D. C. Cir. 1958).

² FED. R. CRIM. P. 26. See *Lutwak v. United States*, 344 U. S. 604, 614 (1953).

³ See NOLAN, *The Law of the Seal of Confession*, 13 CATHOLIC ENCYC. 649, 652 (special ed. 1912).

period dealing with this problem.⁴

Since the Restoration, however, it appears that the English courts have not recognized this privilege.⁵ It has been pointed out that there have been few instances in which a priest was actually compelled to disclose a statement made to him in confession,⁶ and in fact when the English cases were considered in New York by Mayor De Witt Clinton in 1813, in the case of *People v. Phillips*,⁷ he distinguished those cases which seem to deny the privilege and found no express adjudication in the English Courts.⁸ Many cases in dicta, however, have argued against any such privilege.⁹

In the United States, thirty-seven states have enacted statutes establishing such a privilege.¹⁰ Where there is no statute, how-

ever, despite the *Phillips* case, the courts have generally accepted the post-Restoration English view.¹¹

Dean Wigmore states four fundamental conditions as being essential to the establishment of a privileged communication:¹²

(1) The communications must originate in a *confidence* that they will not be disclosed;

(2) This element of *confidentiality* must be *essential* to the full and satisfactory maintenance of the relation between the parties;

(3) The *relationship* must be one which in the opinion of the community ought to be sedulously fostered; and

(4) The *harm* that would inure to the relationship by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

The judges in the present case restated these principles and found no difficulty in applying them to the facts involved.¹³ Dean Wigmore suggests that it was the third condition which was not satisfied at common law and that "[I]n a state where toleration of religions exists by law, and where a substantial part of the community professes a religion practicing a confessional sys-

⁴ *Ibid.* See also 8 WIGMORE, EVIDENCE §2394 (3d ed. 1940).

⁵ 8 WIGMORE, *op. cit. supra* note 4.

⁶ MODEL CODE OF EVIDENCE rule 219, comment (1942).

⁷ This case was never officially reported. For an excerpt of the opinion see 1 CATHOLIC LAWYER 199 (1955).

⁸ 1 CATHOLIC LAWYER 199, 204 (1955).

⁹ See, e.g., *Wheeler v. Le Marchant*, [1881] 17 Ch. D. 675 (dictum); *Greenlaw v. King*, 1 Beav. 137, 48 Eng. Rep. 891 (Q. B. 1838) (dictum); *Anonymous*, *Skinner* 404, 90 Eng. Rep. 179 (K. B. 1693) (dictum).

¹⁰ ALASKA COMP. LAWS ANN. §58-6-5 (1949); ARIZ. REV. STAT. ANN. §12-2233 (1956); ARK. STAT. ANN. §28-606 (1947); CAL. CIV. PROC. CODE ANN. §1881 (3) (West 1958); COLO. REV. STAT. ANN. §153-1-7 (3) (1953); FLA. LAWS 1959, ch. 144; GA. CODE ANN. §38-419.1 (1954); HAWAII REV. LAWS §222-20 (1955); IDAHO CODE ANN. §9-203 (1948); IND. ANN. STAT. §2-1714 (1946); IOWA CODE ANN. §622.10 (1950); KAN. GEN. STAT. ANN. §60-2805 (1949); KY. REV. STAT. ANN. §421.210 (4) (1955); LA. REV. STAT. §15: 477, 478 (1950); MD. ANN. CODE art. 35, §13 (1957); MICH. COMP. LAWS §617.61 (1948); MINN. STAT. ANN. §595.02 (3) (1947); MO. ANN. STAT. §491.060 (1952); MONT. REV. CODES ANN. §93-701-4 (3) (1947); NEB. REV. STAT. §25-1201, 1206 (1956); NEV. REV. STAT. §48.070 (1957);

N. J. REV. STAT. §2A: 81-9 (1951); N. M. STAT. ANN. §20-1-12 (c) (1953); N. Y. CIV. PRAC. ACT §351; N. D. REV. CODE §31-0106 (1943); OHIO REV. CODE ANN. §2317.02 (Baldwin 1958); OKLA. STAT. ANN. tit. 12 §385(5) (Supp. 1958); ORE. REV. STAT. §44.040 (1957); S. C. CODE §56-861 (Supp. 1959); S. D. CODE §36.0101 (1939); TENN. CODE ANN. §24-109-11 (Supp. 1959); UTAH CODE ANN. §78-24-8 (3) (1953); VT. STAT. ANN. tit. 12 §1607 (1959); WASH. REV. CODE §5.60.060 (3) (1958); W. VA. CODE ANN. §4992 (d) (1955); WIS. STAT. ANN. §325.20 (1958); WYO. STAT. ANN. §1-139 (2) (1957).

¹¹ *State v. Morehous*, 95 N. J. L. 285, 117 Atl. 296 (1922). See *Commonwealth v. Drake*, 15 Mass. 163 (1818); *Barnes v. State*, 199 Miss. 86, 23 So. 2d 405 (1945) (dictum).

¹² 8 WIGMORE, EVIDENCE §2285 (3d ed. 1940).

¹³ See *Mullen v. United States*, 263 F. 2d 275, 279-80 (D. C. Cir. 1958) (concurring opinion).

tem . . ."¹⁴ this condition is fulfilled. However, it is proposed that if a fundamental freedom is involved it is immaterial whether that part of the community practicing a confessional system is "substantial" or numerically insignificant.

It has been suggested that the view of the English common law was the product of intolerance towards the religion which enforced a confessional system,¹⁵ rather than a proper application of principles of law.¹⁶ This very aptly points out in an historic perspective the relation of the privilege to our tradition of religious freedom.

The types of communication protected by the privilege vary with statutory language and with judicial interpretation. Not all communications to clergymen are entitled to this protection.

The New York statute which reads:

[A] clergyman, or other minister of religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs . . .¹⁷

is similar to that of many jurisdictions.¹⁸ No New York cases have been found adequately construing it,¹⁹ but many of the

other states have construed such laws strictly.²⁰ It has been held that the statute does not apply unless the confession is made pursuant to a duty enjoined by the rules of practice of the particular church.²¹ Other courts have not been as strict, but the element of penitential confession has been required in almost all cases.²² In the *Swenson*²³ case, the Supreme Court of Minnesota had to deal with a similarly strict statute. That court indicated that not all religions have confessions and that it is very uncommon outside the Catholic religion for there to be any similar duty or obligation involved. The court reasoned that the legislature did not intend to benefit only Catholics, and so promulgated a liberal definition of the required relationship. It was necessary only that the defendant, seeking spiritual advice, aid or comfort, speak to the witness in his professional character as a clergyman, with confidence that the conversation would be secret and that the disclosures were penitential in nature.²⁴

An interesting and broad interpretation of the privilege was applied in an Irish case, which like the present one, was not

minister for his signature, with intent to defraud the church. See also *People v. Shapiro*, 308 N. Y. 453, 458, 126 N.E. 2d 559, 561-62 (1955), which suggests by way of dictum that such statutes are construed liberally. In that case the court was discussing the attorney-client privilege. See also *N. Y. City Council v. Goldwater*, 284 N. Y. 296, 31 N.E. 2d 31 (1940) (dictum).

²⁰ See, e.g., *Sherman v. State*, 170 Ark. 148, 279 S.W. 353 (1926); *Alford v. Johnson*, 103 Ark. 236, 146 S.W. 516 (1912); *Estate of Toomes*, 54 Cal. 509 (1880); *State v. Morgan*, 196 Mo. 177, 95 S.W. 402 (1906).

²¹ *Sherman v. State*, *supra* note 20, *State v. Morgan*, *supra* note 20.

²² See, e.g., *In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931).

²³ *Ibid.*

²⁴ *Supra* note 22 at —, 237 N.W. at 591.

¹⁴ 8 WIGMORE, EVIDENCE 849-50 (3d ed. 1940).

¹⁵ See *Cook v. Carroll*, [1945] Ir. R. 515, 521 (dictum).

¹⁶ See the *Phillips* case as reported in 1 CATHOLIC LAWYER 199 (1955).

¹⁷ N. Y. Civ. Prac. Act §351.

¹⁸ See, e.g., IDAHO CODE ANN. §9-203 (1948); IOWA CODE ANN. §622.10 (1950); N. D. REV. CODE §31-0106 (1943); OHIO REV. CODE ANN. §2317.02 (Baldwin 1958); OKLA. STAT. ANN. tit. 12 §385 (5) (Supp. 1958).

¹⁹ In *People v. Gates*, 13 Wend. 311 (N. Y. 1836), the court merely recited the predecessor statute, [2 R. S. 406, Sec. 72 (1829)] and stated that the admissions are not in the course of discipline. Defendant had falsely submitted a bond to the

based on statute.²⁵ In that case a priest unsuccessfully attempted to mediate in an impending paternity suit. When he was called as a witness he refused to testify. The court refused to follow the common law, stating that it was founded on a sectarian principle to which it did not adhere.²⁶ The conversation was held to be privileged and the priest was found innocent of contempt. As corollary dictum it was stated that the privilege could not be waived without the consent of all the parties.²⁷ Wigmore's four conditions were cited favorably and found to apply. The court said that the communications were made with the understanding that they would be kept secret and that secrecy was essential to the confidence. The court thought that

[T]he community thoroughly appreciates the value of the relation and wishes it to be preserved and fostered for the common weal.²⁸ As to the fourth condition . . . we should lose far more in the parish . . . than we could hope to gain in litigation by informing our parish priests that an Irish Court cannot recognise the sanctity of the hallowed confidences exchanged in such a colloquy. . . .²⁹

Not all statutes are as strict as the type exemplified by New York law. For instance, after the lower court discussion in the *Swenson* case, but before the appeal, the heretofore strict Minnesota statute was

²⁵ *Cook v. Carroll* [1945], Ir. R. 515.

²⁶ *Id.* at 519.

²⁷ *Id.* at 523-24. Compare N. Y. CIV. PRAC. ACT §354, "The last four sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial examination by the person confessing. . . ."

²⁸ *Cook v. Carroll* [1945], Ir. R. 515, 521.

²⁹ *Id.* at 522. It would appear that Wigmore would disagree with this interpretation of his conditions. See the comment on Minnesota's statute in 8 WIGMORE, EVIDENCE §2395 n. 1 (3d ed. 1940).

amended by adding, ". . . nor shall a clergyman or other minister of any religion be examined as to any communication made to him by any person seeking religious or spiritual advice, aid, or comfort or his advice given thereon in the course of his professional character, without the consent of such person."³⁰ Such a statute would seem to eliminate the problems involved in defining the phrase "in the course of discipline enjoined by the rules or practice of the religious body." A statute passed in Florida this May has similarly broad wording,³¹ and might, considering the present case, indicate a trend.³²

While the recognition of the privilege rests firmly on the principles, if not on the clear authorities, of the common law, an interesting argument may be proposed on constitutional grounds.³³ By admitting such evidence an essential religious function is endangered. It may be strongly argued that this is an interference with the penitent's freedom of religion,³⁴ and further it may be questioned whether a priest may be compelled to violate his conscience and sacred duty.

Whether founded on policy or on constitutional grounds, it is proposed that communications to a clergyman in his professional character are deserving of privilege. It is essential that the courts accord a proper respect to such sacred and essentially secret personal disclosures when made in the religious forum.

³⁰ MINN. STAT. ANN. §595.02 (3) (1947).

³¹ FLA. LAWS 1959, ch. 144.

³² For other similarly broad statutes see, *e.g.*, GA. CODE ANN. §38-419.1 (1953); MD. ANN. CODE art. 35, §13 (1957); NEB. REV. STAT. §25-1206 (1956); N. M. STAT. ANN. §20-1-12 (c) (1953).

³³ See U. S. CONST. amend. I.

³⁴ 1 CATHOLIC LAWYER 199 (1955).

Supervision of Deportable Aliens

In *Siminoff v. Esperdy*,¹ the petitioners, deportable aliens, challenged the validity of an order of supervision issued by the Immigration and Naturalization Service. Petitioners sought to enjoin the immigration officials from requiring compliance with the order, hereinafter referred to as Provision (3). This provision, issued pursuant to the authority granted in 8 U.S.C. §1252 (d) (4),² required:

That said alien shall not travel outside New York District,³ without furnishing written notice to the Asst. District Director for Deportation of the Immigration and Naturalization Service . . . of the places to which he intends to travel and the dates of such travel, at least 48 hours prior to beginning the travel unless that Immigration Officer grants him written permission to begin the travel before the expiration of the 48-hour notice period.⁴

In reversing the holding of *Siminoff v. Murff*,⁵ the Court held that Provision (3) exceeded the authority conferred by section

1252 (d) (4)⁶ because it was unreasonable.

Before the District Court attempted a determination of the reasonableness of Provision (3), it explored the purpose for which the authorizing statute was framed. The Court ascertained that section 1252 (d) was designed only to guarantee availability for deportation of deportable aliens.⁷ It has been intimated that in limiting the statute to this singular purpose grave constitutional issues were avoided.⁸ This primary consideration is a very important factor in distinguishing the lower court and the appellate court opinions, because it appears that the Second Circuit ignored that objective purpose of the statute in favor of the subjective feelings of the petitioners.

The Second Circuit relied on *United States v. Witkovich*⁹ and *Barton v. Sentner*¹⁰ in its justification of a narrow application of section 1252(d) (4).¹¹ Although the Court held in the former case that the statute was to have a limited application as to clause (3) of subsection (d),¹² this had no direct bearing on the *Siminoff* case which was testing clause (4) of the statute. In the *Sentner* case the limitations are placed in

¹ 267 F. 2d 705 (2d Cir. 1959).

² Immigration and Nationality Act §242 (d), 66 Stat. 208, 211 (1952) (amended by 68 Stat. 1232 (1954), as amended, 8 U.S.C. §1252 (d) (4) (1958). This section provides in part: "Any alien, against whom a final order of deportation . . . has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision . . . (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case."

³ The New York District includes New York City and only those suburban counties adjacent thereto which are within the State of New York. *Siminoff v. Esperdy*, 267 F. 2d 705, 707 (2d Cir. 1959).

⁴ *Id.* at 707.

⁵ 164 F. Supp. 34 (S. D. N. Y. 1958), *rev'd sub nom.* *Siminoff v. Esperdy*, 267 F. 2d 705 (2d Cir. 1959).

⁶ See note 2 *supra*.

⁷ *Siminoff v. Murff*, 164 F. Supp. 34, 37 (S. D. N. Y. 1958).

⁸ *United States v. Witkovich*, 353 U. S. 194, 199 (1957). See also 70 HARV. L. REV. 718, 719 (1957).

⁹ *Supra* note 8.

¹⁰ 353 U. S. 963 (1957) (per curiam).

¹¹ *Siminoff v. Esperdy*, 267 F. 2d 705, 707 (2d Cir. 1959).

¹² 66 Stat. 208, 211 (1952) (as amended by 68 Stat. 1232 (1954), as amended, 8 U. S. C. §1252 (d) (3) (1958)). This section requires deportable aliens subject to supervision "(3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." *Ibid.*

relation to clause (4). There the District Court was concerned with an order of supervision, composed of ten restrictions, issued by the Immigration and Naturalization Service pursuant to clause (4).¹³ One restriction, that was held valid, required a 48-hour notice prior to change of residence and an application for permission for all trips outside the State of Missouri.¹⁴ Though the latter provision seems wider in geographic scope than the New York provision, it is significant that they are nevertheless so similar that the final determinations seem somewhat inconsistent.

The concurring opinion in the *Siminoff* case implies two defects of omission in the Second Circuit's determination of the reasonableness of Provision (3). Circuit Judge Waterman alludes first to the special travel privileges which had been granted to one of the petitioners by the Service.¹⁵ This stresses the flexibility that is inherent in Provision (3) and which the Court seems to disregard. Secondly, the concurring opinion reveals the administrative difficulties that will result from a decision declaring Provision (3) unreasonable. The difficulties would stem from the necessary broadening of geographic limitations which would disturb the authority and the facility of working within established district lines.¹⁶

Judge Dawson, in the District Court opinion, made a probing, analytical study of the problem before him and in so doing, arrived at a precise determination of the issue. He approached the question of reasonableness from its specific and general aspects and considered these points:

1. Is Provision (3) adapted to the purpose of the authorizing statute? The answer was in the affirmative because it satisfied the necessary supervision purpose of the statute.¹⁷
2. Is Provision (3) flexible? Again the answer was yes, as clearly evidenced by the freedom of travel granted to petitioner, Young, and the proposed leniency towards the other petitioners.¹⁸
3. Is the status of the persons a necessary factor? This answer is affirmative insofar as it relates to the purpose and the validity of the authorizing statute.¹⁹ Congress has the power to order the deportation of aliens it considers hurtful²⁰ and, *a fortiori*, it must have legislative power to supervise aliens so ordered.²¹
4. Should the hardship suffered by the petitioners be determinative of the reasonableness of Provision (3)? Here the District Court was careful to consider the difficulties encountered by a rule involving time and geographic elements, but implied that this notion of hardship, alone, could not be the controlling factor in determining the reasonableness of a rule.²²

Yet the Second Circuit seized upon this

¹³ *Sentner v. Colarelli*, 145 F. Supp. 569 (E.D. Mo. 1956), *aff'd sub nom. Barton v. Sentner*, 353 U. S. 963 (1957) (per curiam).

¹⁴ *Sentner v. Colarelli*, *supra* note 13, at 573. The court in interpreting "permission," in effect, equated it with "notice" because such "permission" could not be withheld by the Immigration and Naturalization Service without (1) questioning the justiciability of the restriction itself and (2) raising serious constitutional doubts concerning the restriction. *Ibid.*

¹⁵ *Siminoff v. Esperdy*, 267 F. 2d 705, 708 (2d Cir. 1959).

¹⁶ *Ibid.*

¹⁷ *Siminoff v. Murff*, 164 F. Supp. 34, 40 (S. D. N. Y. 1958), *rev'd sub nom. Siminoff v. Esperdy*, 267 F. 2d 705 (2d Cir. 1959).

¹⁸ *Id.* at 39, n. 3.

¹⁹ *Id.* at 40.

²⁰ See *Carlson v. Landon*, 342 U. S. 524, 536 (1952); *Ng Fung Ho v. White*, 259 U. S. 276, 280 (1922); *Bugajewitz v. Adams*, 228 U. S. 585, 591 (1913).

²¹ *Supra* note 17.

²² *Siminoff v. Murff*, 164 F. Supp. 34, 39 (S. D. N. Y. 1958), *rev'd sub nom. Siminoff v. Esperdy*, 267 F. 2d 705 (2d Cir. 1959).

notion of hardship and harassment and the following perplexing query was raised: Would not any supervisory order which was directed at keeping a party available for deportation be a grave hardship to that person? The shadow of deportation constantly hovering over a person must, of necessity, be burdensome, discouraging and harassing.

Leaving aside the reasonableness of Provision (3), a model provision might be suggested. The Second Circuit, outside of its judicial function, suggested that a notice mailed immediately prior to a trip and applicable only to trips of some considerable distance and time would be satisfactory.²³ This suggestion would leave little control over the movements of deportable aliens. Perhaps Provision (3) would be more acceptable with an amendment to the final section which now reads, ". . . unless the Immigration Officer grants him written permission to begin the travel before the expiration of the 48-hour notice period."²⁴ That section might better read, ". . . except that the Immigration Officer *must* grant him permission to begin the travel before the expiration of the 48-hour period, where the petitioner's motive for travel is consistent with the purpose of the statute." This amendment should satisfy the courts because it retains the flexibility of Provision (3) while eliminating the harassment and difficulty of economic and social travel restrictions.

There is an incidental note raised in the District Court concerning the right to travel as qualified by Provision (3). The importance of this note is the relative quality of the right to travel. In the natural law, the

²³ *Siminoff v. Esperdy*, 267 F. 2d 705, 707 (2d Cir. 1959).

²⁴ *Ibid.*

right is referred to as "locomotion" and it is subject to the limitation of "forfeiture of exercise as the equal rights of others and the demands of the *common good* . . . reasonably indicate."²⁵ *Kent v. Dulles*,²⁶ a recent Supreme Court decision, reiterated the basic liberty and freedom of travel as protected by the Constitution. In that case the Court discusses curtailment of the right to travel especially in the area of national emergencies, but does not decide or even suggest to what extent this curtailment may be exercised.²⁷ Thus it appears that the restriction of the petitioner's right to travel is, at least on its face, valid in both the natural law and the civil law areas.

Taken as a whole, the record of the *Siminoff* case dramatically points out the difficulty and arbitrariness of a test of reasonableness. The significance of this difficulty is further impressed upon us by the Second Circuit's attempt to narrow that test to a specific consideration, i.e., harassment and hardship. The test of reasonableness is a Joseph's coat with many individual facets contributing to the final product.²⁸ It is submitted that the District Court, recognizing this principle, applied it and reached the correct determination of the reasonableness of Provision (3).

Regulation of Contingent Fees of Attorneys

In the recent case of *Gair v. Peck*,¹ the New York Court of Appeals upheld the

²⁵ Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 263-64 (Oct. 1955).

²⁶ 357 U. S. 116 (1958), 4 CATHOLIC LAWYER 363 (Autumn 1958).

²⁷ *Kent v. Dulles*, 357 U. S. 116, 124, 127 (1958).

²⁸ FORKOSCH, ADMINISTRATIVE LAW 643 (1956). 16 N.Y. 2d 97, 160 N.E. 2d 43, 188 N.Y.S. 2d 491 (1959).

validity of Rule 4,² promulgated by the Appellate Division, First Department, regulating contingent fees which attorneys may charge in personal injury claims and wrongful death actions. This Rule, adopted in 1956, is the first attempt by a New York court to regulate such matters.

² 1ST DEP'T SPECIAL RULE 4. The relevant portions of this rule are as follows:

"Rule 4. Contingent Fees in Claims and Actions for Personal Injury and Wrongful Death.

(a) In any claim or action for personal injury or wrongful death, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorneys is contingent, that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorneys, pursuant to agreement or otherwise, of compensation which is equal to or less than the fees scheduled below is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such scheduled fees shall constitute the exaction of unreasonable and unconscionable compensation in violation of Canons 12 and 13 of the Canons of Professional Ethics of the New York State Bar Association, unless authorized by a written order of the court as hereinafter provided.

(b) The following is the schedule of reasonable fees referred to above: either,

[Part] (1)

(A) Fifty per cent. on the first one thousand dollars of the sum recovered,

(B) Forty per cent. on the next two thousand dollars of the sum recovered,

(C) Thirty-five per cent. on the next twenty-two thousand dollars of the sum recovered,

(D) Twenty-five per cent. on any amount over twenty-five thousand dollars of the sum recovered; or

[Part] (2)

A percentage not exceeding thirty-three and a third per cent. of the sum recovered, if the initial contractual arrangement between the client and the attorneys so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

(c) Such percentages shall be computed on the net sum recovered after deducting taxable costs and disbursements, and expenses for legal, medi-

cal, investigative, or other services properly chargeable to the claim or action. But for the following or similar items there shall be no deduction in computing such percentages: Liens, assignments or claims in favor of hospitals, treating doctors, nurses, self-insurers or insurance carriers.

(d) In the event that claimant's or plaintiff's attorneys believe in good faith that the foregoing schedule (1), because of extraordinary circumstances, will not give them adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the Trial Term Calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the Trial Term Calendar part of the Supreme Court for the county in the First Judicial Department in which the attorneys filing the statement of retainer, pursuant to Rule 4-A, have an office. Upon such application, the justice in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the foregoing schedule (1), provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorneys. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application."

³ 3 N.Y. STATE BAR ASS'N REP. 134-43 (1879). In an essay read to the Bar the author pointed out that contingent fee contracts were bringing the practice of law "more closely akin to a trade, rather than the noble, high-minded, honorable and elevating profession it was once considered to be." *Id.* at 135.

⁴ 31 N.Y. STATE BAR ASS'N REP. 119-24 (1908).

report was entitled "Exorbitant Charges," and stated:

For the first two or three decades after the legalization of the contingent fee, percentages were moderate, fifteen per cent. or twenty per cent. of the recovery was considered reasonable. These have grown until forty per cent. is common, fifty per cent. is not unusual, and sixty per cent. has been known to have been charged.⁵

Today in the First Department 60 per cent of the 150,000 contingent fee retainers filed yearly provide that the attorney receive 50 per cent of the recovery.⁶ Thus, as "a means of investigating and checking what it deems to be an improper professional practice in the great majority of instances where it occurs,"⁷ Rule 4 was enacted by the First Department.

The Rule permits an attorney to make either one of two contingent fee contracts with his client in personal injury and wrongful death cases. Part (1) of the schedule provides that he may charge his client according to the scale of percentages provided by the court, and thus at the end of litigation he may apply for additional compensation if extraordinary circumstances give rise to the justification of a higher fee. Part (2) provides that the attorney may charge his client a straight 33 $\frac{1}{3}$ per cent, and in such case he has *no opportunity to apply for additional compensation* at the end of litigation should a higher fee be required. Failure to comply with these provisions constitutes the exaction of unreasonable and unconscionable compensation in violation of Canons 12 and 13 of the Canons of Pro-

fessional Ethics of the New York State Bar Association.

Following the promulgation of Rule 4 a group of attorneys within the jurisdiction of the First Department brought an action for a declaratory judgment, alleging that the First Department lacked the power to adopt the Rule. Judgment was rendered in favor of the attorneys in the New York County Special Term.⁸ The Rule was declared invalid on the grounds that it was inconsistent with section 474 of the Judiciary Law, and that the Appellate Division lacked the power of discipline over attorneys regarding excessive fees except in the individual case and *after* the misconduct has occurred. This judgment was affirmed by the Appellate Division, Third Department.⁹ However, on May 28, 1959, the New York Court of Appeals reversed the lower court's holding by sustaining Rule 4.¹⁰

The specific issue presented in the case was whether or not the Rule is within the rule-making power of the Appellate Division. The majority opinion indicated that court control over attorneys was well established at early common law,¹¹ expressly recognized by the first New York State Constitution,¹² and presently provided for by section 90 of the New York Judiciary Law.¹³ This court control is approved by

⁸ Gair v. Peck, 6 Misc. 2d 739, 165 N.Y.S. 2d 247 (Sup. Ct. 1957).

⁹ Gair v. Peck, 5 A.D. 2d 303, 171 N.Y.S. 2d 594 (3d Dep't 1958).

¹⁰ Gair v. Peck, 6 N.Y. 2d 97, 160 N.E. 2d 43, 188 N.Y.S. 2d 491 (1959).

¹¹ See *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487 (1928), for a discussion of the early English origins of this concept.

¹² N.Y. CONST. §27 (1777) provided: ". . . all attorneys, solicitors, and counsellors at law . . . [shall] be regulated by the rules and orders of the said courts."

¹³ N.Y. JUDICIARY LAW §90 provides: ". . . The

⁵ *Id.* at 121.

⁶ Gair v. Peck, 6 N.Y. 2d 97, 102, 160 N.E. 2d 43, 52, 188 N.Y.S. 2d 491, 502 (1959).

⁷ *Id.* at 112, 160 N.E. 2d at 52, 188 N.Y.S. 2d at 502.

Canon 13 of the American Bar Association's Canons of Professional Ethics which specifically provides for supervision by the courts over contingent fees.¹⁴ New York courts have on occasion exercised such supervision in passing upon the reasonableness of contingent fees.¹⁵

Section 83 of the Judiciary Law gives the Appellate Division the power to make special rules "not inconsistent with any statute or rule of civil practice."¹⁶ Rule 4 was passed as a result of this power of the Appellate Division, in an attempt to extend the already indicated disciplinary authority of the courts over attorneys. The only question remaining is whether Rule 4 is "inconsistent with any statute,"¹⁷ namely section 474 of the Judiciary Law providing that "the compensation of an attorney or counsellor for his services is governed by agreement, express or implied."¹⁸ In an action under section 474, a contingent fee con-

tract as high as 50 per cent has been enforced by the New York courts since it was considered reasonable under the circumstances.¹⁹

The majority opinion of the Court of Appeals reasoned that, even though Rule 4 does not allow attorneys to contract for a straight 50 per cent fee, the Rule does not violate section 474 since it allows an attorney to apply for additional compensation above the set percentages if extraordinary services are rendered by him. Thus, although an arbitrary fee of 50 per cent is considered unreasonable under the Rule, upon a proper showing that the circumstances require greater compensation, fees as high as 50 per cent will nevertheless be sustained. As a result the Court stated that Rule 4 is not inconsistent with section 474 of the Judiciary Law since those prior cases, where 50 per cent fees have been sustained under section 474, would receive indirectly the same result. The only change under Rule 4 is that now the attorney has the burden of proving to the court that a higher fee is justified. This procedure attempts to reduce the charging of unreasonable fees through an orderly administration of the court's admitted supervisory power over attorneys.

The dissenting opinions of the Court of Appeals took the position that the arbitrary setting of percentage fees and the presumption of unconscionable conduct on the part of the attorney for failure to comply with these percentages as established by Rule 4 impairs the attorney's freedom of contract as is provided under section 474. The power to make such change in the law, it is contended, rests only with the Legisla-

appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice. . . ."

¹⁴ Canon 13 provides: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness."

¹⁵ *Ward v. Orsini*, 243 N.Y. 123, 152 N.E. 696 (1926); See, e.g., *Morehouse v. Brooklyn Heights R.R.*, 185 N.Y. 520, 78 N.E. 179 (1906); *Matter of Fitzsimons*, 174 N.Y. 15, 66 N.E. 554 (1903); *Matter of Friedman*, 136 App. Div. 750, 121 N.Y.S. 426 (2d Dep't), *aff'd*, 199 N.Y. 537, 92 N.E. 1085 (1910).

¹⁶ N.Y. JUDICIARY LAW §83.

¹⁷ *Ibid.*

¹⁸ N.Y. JUDICIARY LAW §474.

¹⁹ *Ward v. Orsini*, *supra* note 15. *Accord*, *Morehouse v. Brooklyn Heights R.R.* *supra* note 15; *Matter of Fitzsimons*, *supra* note 15.

ture, and such legislation cannot come from any judicial source.

Both the majority and dissent in *Gair v. Peck*²⁰ have considered the First Department's power to adopt Rule 4 in its entirety. The majority purports to sustain the whole rule, while the dissent completely rejects it. However, upon a reading of Rule 4 it appears that the reasoning of the majority only justifies part (1) of the schedule, while the dissent presents a strong argument in opposition to part (2).

The majority held that contingent fees as high as those justly enforced under section 474 will still be sustained under Rule 4, since the attorney has the right to apply for additional compensation if at the end of litigation it is due him. However, it should be noted that this right to additional compensation is only granted by Rule 4 when the attorney contracts according to part (1) of the schedule (the scale of percentages based on the amount of recovery). If the attorney should contract according to part (2), for a *straight* contingent fee not exceeding 33 $\frac{1}{3}$ per cent, he will not be allowed to apply for additional compensation should it be due him at the end of litigation. Part (2) states: "the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances *shall not* apply."²¹ Thus, part (2) of the schedule makes contingent fee contracts above 33 $\frac{1}{3}$ per cent unreasonable as a matter of law. This apparently violates section 474 of the Judiciary Law since, as the dissenting opinions point out, contingent fees as high as 50 per cent have been enforced under this section.²² The

First Department's rule-making power does not extend to rules which are "inconsistent with any statute,"²³ and thus it would seem that part (2) of the schedule of Rule 4 is invalid.²⁴

It appears that the Court of Appeals' construction of Rule 4 either fails to take into account or is in conflict with that clause of part (2) of the schedule which prohibits the attorney from seeking additional compensation. Despite this apparent conflict, as the Rule stands now after this judicial construction, "the way is left open in *any* case"²⁵ for an attorney to come before the First Department, and upon a full showing of all the facts and circumstances he may establish that the percentages stipulated by the First Department do not apply to his particular case. In such a case, the *Gair* decision holds that the court will permit the attorney to charge a fee above the stipulated percentages.

The Court's failure to give specific treatment to part (2) of the schedule is quite perplexing. However, it appears evident from the Court's reasoning that where contingent fees are regulated by a court to prevent excessive charges, there must also be provision made for the attorney who ren-

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²³ N.Y. JUDICIARY LAW §83.

²⁴ It is also interesting to note that part (2) is in conflict with an opinion expressed by the First Department itself. In 1950, the First Department in *Buckley v. Surface Transp. Corp.*, 277 App. Div. 224, 98 N.Y.S. 2d 576 (1st Dep't 1950) (per curiam), stated that the fixing of fees should take into consideration "the nature and amount of the services rendered and the amount of the recovery." *Id.* at 226, 98 N.Y.S. 2d at 578. These factors can only be known at the end of litigation for which part (2) of the schedule makes no provision.

²⁵ *Gair v. Peck*, 6 N.Y. 2d 97, 113, 160 N.E. 2d 43, 52, 188 N.Y.S. 2d 491, 503 (1959). (Emphasis added.)

²⁰ 6 N.Y. 2d 97, 160 N.E. 2d 43, 188 N.Y.S. 2d 491 (1959).

²¹ 1ST DEP'T SPECIAL RULE 4. (Emphasis added.)

²² See note 19 *supra*.

RECENT DECISIONS AND DEVELOPMENTS

(continued)

ders extraordinary services to obtain additional compensation. The fact that "attorneys owe a duty to uphold the honor of their profession and to aid any effort under the direction of the court to root out corruption and fraud,"²⁶ does not give a court the right to unduly burden the attorney's income.²⁷ Cases may be tried, retried and ap-

²⁶ In the Matter of Becker, 229 App. Div. 62, 73, 241 N.Y. Supp. 369, 381 (1st Dep't 1930).

²⁷ It is to be noted that "the American Bar Association . . . has published studies indicating that compensation for attorneys has not increased correspondingly over these inflationary years as has

pealed, in addition to other unexpected and time-consuming obligations prior to obtaining a judgment. The attorney assumes all these obligations under the contingent fee contract at the risk of obtaining no recovery at all. The fact that it may be a rare case where a fee as high as 50 per cent is warranted is no reason why an attorney in such a case should not be protected. It is apparent from the Court of Appeals' interpretation of Rule 4 that the fairness as well as the effectiveness of the Rule will depend upon the liberality of the First Department in granting the additional amount of compensation to attorneys who justly deserve it.

the remuneration of other professions as medicine and dentistry." Gair v. Peck, 6 N.Y. 2d 97, 117, 160 N.E. 2d 43, 55, 188 N.Y.S. 2d 491, 507 (1959).