

4-1-1975

## The Law and Legal Impact of Contraceptive Use by Minors in North Carolina

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### Recommended Citation

Wright, Donald M. (1975) "The Law and Legal Impact of Contraceptive Use by Minors in North Carolina," *North Carolina Central Law Review*: Vol. 6 : No. 2 , Article 14.

Available at: <https://archives.law.nccu.edu/ncclr/vol6/iss2/14>

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the central idea of parole that it is a rehabilitative process and not one of retribution and enforcement. It appears likely that the courts will move slowly in this area until another significant case on parolee rights reaches the Supreme Court.

As an indication of how the Supreme Court might rule in such a case attention should be given to *Gagnon v. Scarpelli*.<sup>83</sup> In this case the Supreme Court extended the right of counsel to probationers and parolees in revocation hearings.<sup>84</sup>

### CONCLUSION

It is most likely that the North Carolina Parole Commission will not change its present procedures unless prompted to do so by court decision. The first area that is likely to see change is that of warrantless search and seizure. This practice is taboo in North Carolina and is rarely if ever employed.

North Carolina, by Commission policy, always uses an arrest warrant and it has been adamant on this point. However, it appears that no attempt will be made to direct parole officers to give parolees their *Miranda* rights. Furthermore, it is not likely an exclusionary rule will be instituted to keep any evidence gained by an in-custody interrogation, where the parolee is not advised of his rights, out of the revocation hearing.

The Commission shows no willingness to extend the privilege of bail to parolees unless directed to do so by a court decision. Furthermore, the Commission has decided that in view of the *Morrissey* decision, the use of a parole hold for disciplinary reasons is unconstitutional.

Finally, the North Carolina Parole Commission is in total compliance with present Supreme Court and State court rulings and the commission seems content with its present procedure.

ROBERT J. ROBBINS, JR.

### The Law and Legal Impact of Contraceptive Use by Minors In North Carolina

Present North Carolina law, G.S. 90-21.1, makes unlawful the medical treatment of a minor without parental consent, by a physician,

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83. 411 U.S. 778 (1973).

84. *Id.* at 787.

except in cases of emergency. Such medical treatment as defined in G.S. 90-21.1 would apply to all contraceptives prescribed and supervised by a physician. G.S. 90-21.1, by its wording, would not apply to non-prescriptive contraceptives such as condoms and foam, but there is still some questions as to their legality of disposition to minors. In a May 14, 1974 letter to a family planning coordinator for several health departments<sup>1</sup>, the North Carolina Attorney General gave his opinion of G.S. 90-21.1 through G.S. 90-21.5:

. . . [N]either restricts nor authorizes the distribution of non-prescriptive methods of birth control to minors without parental consent as a part of a family planning program conducted by a local health department.<sup>2</sup>

There have been no civil or criminal cases in North Carolina concerning the legality of either prescriptive or non-prescriptive contraceptives, but as the law stands today, it is very possible that a suit for damages could be instituted by a parent, guardian, or person standing *in loco parentis*, absent consent, against one who provides a minor with contraceptives. There are three possible civil causes of action in North Carolina in this situation. One would be an action for aiding and abetting seduction by providing contraceptives which may tend to accelerate seduction by reducing the risk of pregnancy. Another would be an action based upon an interference with the parental right of child control, and the last action would be a charge of battery.

Since one may deduce that one using contraceptives will usually have sexual intercourse, a cause of action instituted on grounds of seduction might aid the parent suing. The contraceptive source could not be a party to the action as a seducer, but rather as one promoting or aiding seduction. This is based upon the assumption that the contraceptive would be used in sexual intercourse reducing the risk, thereby encouraging the act.

It is important to determine the necessary elements upon which a case of abetting seduction might be based. The older cases regarding seduction actions were based upon a legal fiction of loss of services from the child to the parent. This was abandoned by the North Carolina Supreme Court in 1903.<sup>3</sup> In one of the cases that served as basis for dropping the old theory, the Court stated: ". . . [H]e (the parent) is entitled to recover for his wounded feelings and sense of disorder, loss of society of the daughter, and in short all that a father can feel from the nature of the loss."<sup>4</sup> Following this line of

1. 43 N.C. Attorney General Report 380 (1974).

2. *Id.* at 381.

3. *Willeford v. Bailey*, 132 N.C. 402, 43 S.E. 928 (1903) and *Snider v. Newell*, 132 N.C. 432, 43 S.E. 951 (1903).

4. *Id.* (concurring opinion in *Snider v. Newell*).

thought, it is possible that a parent showing "wounded feelings and disorder" as a result of seduction indirectly aided by the defendant in providing contraception could have sufficient damages for a valid suit.

But the measure of damages would hinder such a suit. It is a well known rule of law that damages, whenever possible, should be reasonably determined and supported. Damages to feelings and dishonor would be a perplexing issue to the court, especially in light of recent North Carolina decisions. In *Alttop v. J.C. Penny Co.*,<sup>5</sup> the ruling held mere hurt or embarrassment is not compensable.

As to parental right of control, the North Carolina Supreme Court has stated: "The law protects the parents in the right to custody, control, and services of their children until they reach legal age."<sup>6</sup> Providing contraception to a minor, with all the potential ramifications, would no doubt conflict with the parent's right to control. Another problem of damages would also arise in the interference suit. A recent case, *Clary v. Alexander County Board of Education*,<sup>7</sup> limited the parent's right of action in damages to his child unless he had sustained some direct pecuniary injury from the wrong done the child. Such damages for interference with parental control would have to be linked with a direct and measurable injury. Otherwise the parent would only have a right to nominal damages.

A civil action for battery would be the strongest cause of action in cases of minors receiving prescriptive contraceptives without parental consent. This action would encompass the unlawful physical contact between the physician and minor as described in G.S. 90-21.1. Battery would not be involved in non-prescriptive contraceptive aid given minors since there is usually no body contact as a result of the nature of these contraceptives.

The action of battery would consist of an unlawful touching and the lack of valid parental consent would make it as such. Improperly authorized medical treatment has been held to create criminal assault and battery<sup>8</sup>, but there have been no civil cases on such grounds. It seems however, if unauthorized medical treatment could constitute criminal assault and battery, it would be sufficient to satisfy the elements of civil assault.

The matter of damages in a battery action of this sort would be difficult to determine. To recover damages, the burden would be upon

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5. 10 N.C. App. 692, 179 S.E.2d 885 (1971).

6. *Little v. Holmes*, 181 N.C. 413, 107 S.E. 577 (1921).

7. 285 N.C. 188, 203 S.E.2d 820 (1974). Here the suit asked for damages resulting from a young boy being forced to take physical education with the other boys and causing him emotional damage. The parents were denied damages.

8. *State v. Monroe*, 121 N.C. 677, 28 S.E. 547 (1897). Here a druggist added oil to a drug for trick purposes.

the parent, acting for the child, to show by a clear preponderance of evidence that the procedure was undertaken without the parent's necessary consent.<sup>9</sup> Once the action of battery is established, the parent could recover nominal damages.<sup>10</sup> But for real damages, the parent must show actual physical injury from the treatment,<sup>11</sup> and from the nature of the medical procedure there is very rarely physical harm; just a touching. This is supported by the fact that there hasn't been a case in any jurisdiction holding a physician liable for treatment of a minor without parental consent when the minor was over fifteen years of age and the procedure was simple, beneficial, and performed with the minor's consent.<sup>12</sup>

The Attorney General's opinion<sup>13</sup> points out the possibility of civil action: "From the very nature of the type of information, services, and supplies involved, it would seem absent consent, a very sound and valid basis for a damage suit by the parent, guardian, or individual standing in loco parentis would be created."<sup>14</sup> But because of the uncertainty of damages, there can be no sound basis for determining damages, other than nominal. Often such nominal damages would be so disproportionate to the plaintiff's cost in time, effort, and legal fees, that it would be wiser for the plaintiff not to sue. There is an absence of civil law and cases on point concerning prescriptive contraceptives and non-prescriptive contraceptives given to minors without parental consent, and therefore one should hesitate before declaring a sound and valid basis for a damage suit when there has been no judicial determination on these facts.

Possible criminal charges may come about against the prescriptive contraceptive source as a result of G.S. 14-316.1(b) which covers encouraging delinquency in minors. The statute reads:

. . . [w]ho encourages, aids, causes, or connives at, or knowingly or willfully does any act to produce, promote, or contribute to, any condition of delinquency . . . shall be guilty of a misdemeanor.

It is very possible that an able prosecutor could convince a judge or jury that prescribing contraceptives to minors without parental consent would indeed contribute to their delinquency. A criminal charge of assault and battery in a case of prescriptive contraception would be of doubtful validity because of the lack of criminal intent and malice.<sup>15</sup>

9. Trogun v. Fruchtmann, 58 Wis. 2d 596, 207 N.W.2d 297 (1973).

10. Walker v. L.B. Price Mercantile Co., 203 N.C. 511, 166 S.E. 391 (1932).

11. Lane v. Southern Ry. Co., 192 N.C. 287, 134 S.E. 808 (1926). Here the court said pecuniary awards are allowed only for actual damages.

12. Pilpel and Wechsler, *Birth Control, Teenagers, and the Law . . . A New Look*, 3 *Family Planning Perspectives* 37, 43 (1971).

13. 43 N.C. Attorney General Report 380 (1974).

14. *Id.* at 381.

15. State v. Ingram, 237 N.C. 197, 74 S.E.2d 532 (1952).

The use of non-prescriptive contraceptives by anyone, adult or minor, is not prohibited by any law in North Carolina, however the Attorney General's opinion<sup>16</sup> would carry over the illegality of prescriptive birth control to be implied to non-prescriptive contraception in cases concerning minors. The opinion implied that statutory authorization, not statutory abstention, would be required before an individual could distribute non-prescriptive birth control methods, such as condoms and contraceptive foam, to minors. This implied illegality has a weak foundation absent any case or statutory law. The absence of clear illegality would hamper any civil suits by a parent in cases of non-prescriptive birth control being given to their child without their consent.

The above is the present North Carolina legal view, however there was an unsuccessful attempt in the 1973 North Carolina General Assembly to pass a bill that would allow minors, upon the judgment of a physician, to have access to all contraceptives.<sup>17</sup> The recent trend in other states has been to allow all minors full contraceptive freedom by statute and thus remove criminal and civil liability.<sup>18</sup>

#### CONSTITUTIONALITY OF MINORS' RIGHTS TO CONTRACEPTIVES

The United States Supreme Court has ruled in the two main cases of great import concerning contraceptives, that a married couple has a right to birth control without the interference of any government,<sup>19</sup> and where a state allows contraception to married persons, the same contraception must be allowed to single adults.<sup>20</sup> As to married persons, *Griswold v. Connecticut*,<sup>21</sup> established a right of marital privacy in the penumbra of the Bill of Rights and excluded state interference

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16. 43 N.C. Attorney General Report 380 (1974).

17. S.343, N.C. State Senate, 1973 Session (1973).

18. ILL. ANN. STAT. ch. 91, § 18.7 (1969); MISS. CODE ANN. ch. 41-41-3 (1966); ORE. REV. STAT. § 109-640 (1971); S.C. CODE § 32-565 (1972); WYO. STAT. § 35-508 (Cum. Supp. 1969); COL. REV. STAT. ch. 66-32-2 (Supp. 1971); NEV. STAT. § 422.235 (1965); MD REV STAT. ANN. art. 43, § 135 (1971); PA. STAT. ANN. ch. 35, § 10104 (Supp. 1970); ME. REV. STAT. ANN. ch. 22, § 1908 (Supp. 1973); W. VA. STAT. § 16-2B-2 (Supp. 1972); GA. CODE ANN. tit. 99, § 3103 (1968); FLA. STAT. ANN. § 381.382(5) (1972); CODE OF ALA. tit. 22, § 104(15) (Supp. 1972); TENN. STAT. § 53-4607 (Supp. 1971); LA. REV. STAT. ch. 5, § 40-1095 (Supp. 1972); ALAS. STAT. tit. 18, ch. .05, § .035 (1966); ARK. STAT. § 82-3104 (Supp. 1973); N.M. STAT. ch. 12-30-3 (Supp. 1973); OKLA. STAT. tit. 63, ch. 43, § 2071-75 (1967); VA. CODE ANN. § 32-137 (Supp. 1973); OHIO STAT. § 5207-.10 (1967); IOWA CODE ANN. § 234.21 (Supp. 1973); CAL. WEL. AND INST. CODE § 10053.2 (West Supp. 1971). Ohio, Iowa, and California restrict birth control to only minors which are upon the welfare rolls of those states.

19. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

20. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

21. 381 U.S. 479.

in the couple's contraceptive life as unconstitutional. In *Eisenstadt v. Baird*,<sup>22</sup> Baird, in giving a lecture on birth control, distributed contraceptive foam to a young woman contrary to Massachusetts law at that time.<sup>23</sup> The law prohibited the exhibition, distribution, and sale of contraceptives by a non-physician and prohibited contraceptive distribution to any unmarried person no matter who was the source, physician or not.

Justice Brennan, writing the majority opinion in *Baird*, saw the issue as an Equal Protection Clause argument and stated:

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under *Mass. General Laws Ann.*, chapter 272, sections 21 and 21A.<sup>24</sup>

Brennan, in a footnote,<sup>25</sup> rejected the compelling state interest test for *Baird*, for the Court had decided not to determine if birth control was a fundamental right under a reading of *Griswold*. A fundamental right, a right expressed in or implied from the Constitution, must be in issue for the stricter compelling state interest test to be applied under an Equal Protection Clause test. That is, forcing the burden of proof upon the state to show why the statute does not violate an expressed or implied Constitutional right. In not accepting the compelling state interest test, the proper test was the rational interest test in which the individual has the burden of proof to show the actions or procedure of the state to be so unreasonable as to violate a constitutional right.

Under this test of rational interest, Massachusetts set out interests which they declared were reasonably connected to the disputed statute. One such interest was to discourage illicit sex and the other was that of protecting the health of its citizens. These interests were brushed aside by the Court because they saw no reason to protect the health of the unmarried by denying them birth control while the married were allowed to face this health "danger". The Court found that there would be unequal treatment of the single for the state to try to stop illicit sex among their class while not being concerned with illicit sex among the married. An unequal treatment of persons in the same class, sexually active adults, not based on a rational ground leads to the violation of the Equal Protection Clause. Following up *Griswold*, the Court in *Baird* left open the door to possible future decisions to determine if contraceptive rights are fundamental in stating:

If the right of privacy (established in *Griswold*) means anything, it is the right of the individual, married or single, to be free from unwar-

22. 405 U.S. 438.

23. MASS. ANN. LAWS ch. 272, §§ 21, 21A (2970).

24. 405 U.S. at 447.

25. *Id.* at 447 n.7.

ranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>26</sup>

Although a rational interest test was used in *Baird*, the application of the test seemed to be on stricter grounds than other such tests in other cases involving different circumstances. Usually any conceivable reason a state can present will uphold a statute under the rational interest test,<sup>27</sup> but in *Baird* the state interests were not accepted as containing such conceivable interest even where it was possible to deduce some reasonable basis to the interest. Chief Justice Burger in his dissent in *Baird*, plainly stated his displeasure at the intensive study given to the purposes of the statute which he argued met the rational interest test and showed some conceivable reason on its face.

Because of this "strict" rational interest test in *Baird*, the strong dicta, and recent decisions<sup>28</sup> which has given abortion an aura of a fundamental right, it may be in the near future that the Court will award contraception such fundamental right status.

Under a reading of *Baird*, would minors be able to claim the same harm done their constitutional rights as did the single? The Equal Protection Clause argument would apply also to minors since the Court has held the fourteenth amendment to include minors as well as adults.<sup>29</sup> And because of the similarity of the subject matter, and the fact the harm suffered by the minors would be as great as that suffered in *Baird*, it would seem the Court would apply the "strict" rational interest test. That again as in *Baird*, they would not accept the state interest against minor birth control on its face, but subject the interest to such rigid scrutiny.

To protect a statute prohibiting birth control to minors, the interest of stopping illicit sex would be offered by the state, and it is very possible that the Court may find sex among minors potentially more harmful than sex among adults and thus warrant the state interest. But a statement by the Federal Court of Appeals in *Baird* could apply to this problem:

To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support.<sup>30</sup>

Here the court is saying the statute would not prevent sex among minors; just punish it. Also if the state had other statutes, as North

26. *Id.* at 453.

27. *McDonald v. Board of Education*, 394 U.S. 802 (1968).

28. *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973).

29. 387 U.S. 1 (1967).

30. *Baird v. Eisenstadt*, 429 L.2d 1398, 1402 (1st Cir. 1970).

Carolina does,<sup>31</sup> that allowed emancipated minors contraceptive freedom, then the state would have difficulty in explaining their interest in stopping sex among some minors while allowing no interference in the case of others.

The health of minors would also be presented as a state interest. However this argument would be tenuous and void of logic. If the state feels secure about the health of adults using birth control, for what reason should the minor have any additional health problems related to contraception that would warrant a state interest? Can not a physician offer both the minor and adult the same degree of care?

The strongest state interest that could be offered would be the right of a state to protect parental control. Such control by the parent has long been noted by the Court<sup>32</sup>, but restricted where the health or safety of the child is in danger or where there are possible social burdens arising.<sup>33</sup>

Already in many states, including North Carolina,<sup>34</sup> the state has deprived the parent of control over his child's right to V.D. treatment based on the interest of the child's health. The risk of pregnancy would qualify as a health hazard against which a sexually active minor should be protected with or without parental consent. The result of restricted birth control and the illegitimate births resulting would create social burdens upon both the minor and the state,<sup>35</sup> would be additional reason to erode parental control in this area. With past state action reducing parental control, it would be a frivolous campaign for the state to argue that preserving parental control is an exceptionally important state interest that should prevent minors from receiving the benefits of birth control. The state interest of upholding parental control would be the deciding factor in the rational interest test of the Equal Protection Clause. With all the possible harm that could befall a minor due to denial of contraceptives, the social burden arising to the state in most minor illegitimate births, and the Court's respect for a mature minor's decision in areas directly affecting a minor's life,<sup>36</sup> it would seem the Court would dismiss the interest of parental control as not controlling

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31. N.C. GEN. STAT. § 90-21.5(a) (1965).

32. *Stanley v. Illinois*, 405 U.S. 645 (1972).

33. *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

34. N.C. GEN. STAT. § 90 21.5(b) (1965).

35. As of May 1974, one may estimate there were 2,428 children of unwed minor mothers on Aid to Family with Dependent Children (AFDC) rolls in N.C. using figures found in a booklet written by the Dept. of Human Resources. Dept. of Human Resources, *The AFDC Family in N.C.*, Special Report 22 (1974). Also in determining the welfare burden of such illegitimate children, one should note food stamp and health care costs the state must bear in many cases.

36. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

in the case. There is uncertainty as to this point, but from past decisions, it would seem the Court would give minors the contraceptive freedom which a state allowed adults.

This uncertainty was reaffirmed by the Court's refusing certiorari to a Utah case concerning minor's rights to birth control.<sup>37</sup> The case arising in a Utah district court resulted in an injunction forcing a federally funded planned parenthood program to serve minors with or without parental consent. The trial judge interpreted the federal contract as requiring service to all minors and also based his opinion on the ninth and fourteenth amendment requirements of privacy and equal protection in giving minors the same rights to contraceptives as others. The Utah Supreme Court overturned the lower court decision by determining the interest of the state in discouraging sex and delinquency among minors was a sufficient basis for the refusal to serve minors without parental consent. The constitutional issue was ignored by the Utah Supreme Court and neither *Baird* nor *Griswold* were mentioned in the decision. Despite the apparent disregard of the constitutional issue, the Court denied certiorari with only Justice Douglas dissenting. This could be an indication that the Court hopes the problem of minors' rights to birth control might be "defused" by increasing state statutory action allowing such contraception. However, responsive judicial action would tremendously aid the state in determining what position to take concerning these vague and uncertain issues now existing.

### CONCLUSION

Both the minor and North Carolina would benefit if all minors of sexual maturity were given contraceptive freedom. The minor would be able to reduce the chances of his life being handicapped by parenthood at a too early age,<sup>38</sup> or a forced marriage. And the child born may be unwanted and unloved; a heavy burden for any child. The reduced social burden the State would realize in reduced welfare and educational costs coupled with the State interest in the personal welfare of the child and the minor mother are certainly valid state interests which could be achieved by a change in present North Carolina law. Also increased contraceptives among minors should decrease the number of minor abortions in North Carolina.<sup>39</sup>

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37. 29 Utah 2d 356, 510 P.2d 75 (1973).

38. Pregnancy is the single largest cause of school dropouts among minors in the lower socio-economic classes. Hearings on SB 2108 and SB 3219 Before A Subcomm. of the Senate Comm. on Labor and Welfare, 91 Congress, 1st and 2nd Sess. (1969).

39. An estimate of 982 abortions given to minor unwed females in N.C. during 1972 can be made based upon the general abortion illegitimacy rate of sixty-one percent and the 1,609 abortions given minor females in 1972. From the circumstances of such females it would seem, however, that the illegitimacy rate of such minors would be higher

Although prescribed contraceptives to minors without parental consent are illegal in North Carolina, as a parental matter, there is widespread use of all contraception by minors in North Carolina. The efforts of the State to keep birth control from minors would be very costly, futile, and inefficient.

For all the above reasons, a change in present North Carolina law would be a good step. Three bills prepared by the Institute of Government at Chapel Hill concerning minors' rights to medical treatment (including birth control) without parental consent will be presented to the 1975 North Carolina General Assembly for study.<sup>40</sup> Passage of one of these bills would serve the interest of North Carolina and minors.

DONALD M. WRIGHT

### A Right to Reasons When Denied Parole

Throughout the twentieth century, Americans have supported a penal system founded on the principle of rehabilitation rather than retribution.<sup>1</sup> It follows that the administration of parole, an integral part of the criminal justice system, has as its object the rehabilitation of persons convicted of crime and the protection of the community.<sup>2</sup> But recently a federal prisoner, when denied parole, was heard to complain:

One cannot improve or correct the reasons for denial if he is not aware of that reason. What sureness is there, that one year or one month from this time he will be any different. Why was he denied; there is all the cause in the world for him to become bitter when one is being denied justice.<sup>3</sup>

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and thus make the number above a low estimate. The data above was compiled by the author from records of the N.C. State Board of Health in October of 1974 with the Aid of Mr. Paul Johnson of the N.C. State Board of Health in Raleigh.

40. One bill pertains only to birth control for minors, the other two bills refer to the allowance of all medical treatment without parental consent to be given to minors. These proposed bills were written by Mr. David Warren who was the head of health affairs at the Institute of Government at the time these proposed bills were written in 1974.

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1. See D. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 75 (1969).

2. See 67 C.J.S. *Pardons*, § 17 (Cum. Ann. Pocket Part 1974). The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. *Morrisey v. Brewer*, 408 U.S. 471, 477 (1971).

3. *King v. United States*, 492 F.2d 1337 (7th Cir. 1974). Charles King, Jr. in his *pro se* complaint at 1338.