Buffalo Law Review

Volume 22 | Number 2 Article 19

1-1-1973

Criminal Law—Faculty Member Entering School Building During Teachers Strike Found Guilty of Criminal Trespass and Resisting Arrest.

Vincent L. Morgan

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Criminal Law Commons, Education Law Commons, and the Labor and Employment Law Commons

Recommended Citation

Vincent L. Morgan, *Criminal Law—Faculty Member Entering School Building During Teachers Strike Found Guilty of Criminal Trespass and Resisting Arrest.*, 22 Buff. L. Rev. 644 (1973).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol22/iss2/19

This Recent Case is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

to the students, the students may perceive these rules as oppressive. Therefore, the rules implement social preferences, not social absolutes, and should not be under the control of the boards. Furthermore, the restrictions on extracurricular activities, by definition, apply to students already married and still in school. The *Davis* and *Holt* courts recognized this paradox of punishing students after the fact of marriage but questioned the means, not the ends, of the rules. Therefore, an alternative view of the function of schools in the socialization of students is that the boards of education should implement only those social values that directly affect the welfare of society and will prepare the student to function in society.

Lastly, it is submitted that a more humane and useful approach to the problem of teenage marriage may be for the schools to create programs that will educate all students on the responsibilities of marriage. This approach will not only attack the problem more directly and efficiently but will also provide future guidance to the students when they finally leave school.

CARL R. REYNOLDS

CRIMINAL LAW—FACULTY MEMBER ENTERING SCHOOL BUILDING DURING TEACHERS STRIKE FOUND GUILTY OF CRIMINAL TRESPASS AND RESISTING ARREST.

During the middle of October, 1968, New York City was in the grips of its third teachers' strike in a month. Staged by the United Federation of Teachers (UFT), this strike, which was later declared illegal,[1] kept more than a million children out of public schools for over a month. Like the two preceding walkouts, it was basically a result of the city's attempt to decentralize its schools. The city had made several moves to set up experimental "demonstration" districts in which a decentralization plan could be tested under set guidelines. During this period deep and angry splits began developing among whites, blacks, and Puerto Ricans over such issues as hiring, firing, transferring, teacher accountability, minority principals, and expulsion of students. Frustrated by the state legislature's failing to back

1. *See* Rankin v. Shanker, 25 N.Y.2d 780, 250 N.E.2d 584, 303 N.Y.S.2d 527 (1969). For two versions of the events in New York City during this time, see B. CARTER, PICKETS, PARENTS AND POWER (1971); M. MAYER, THE TEACHERS STRIKE (1969).

decentralization, the city proposed an "interim" plan which allowed local boards to transfer teachers. In response, the UFT, which wanted to gain control over teacher transfers, struck for two days. The union walked out again when the "demonstration board" at the Ocean Hill-Brownsville district defied an order of the New York City Board of Education and refused to take back teachers it had relieved from duty. A scant few days after the settlement of this second strike, the teachers were again relieved. The city responded by removing the "demonstration board," three "demonstration principals," and the district superintendent, in effect closing down Ocean Hill. When the board of education attempted to return the three principals and reopen the school district, the UFT struck for the third time.

As the strike progressed, it gained sympathy from many of the city's principals and custodians, several of whom began closing and locking their own schools. However, not all of the city's public school teachers joined the UFT action. In an attempt to avoid the strike's paralyzing effect and to reassert its own authority, the board of education publicly announced on October 16, that the schools would remain open as long as there were teachers willing to teach. It was hoped that public announcement of this policy would cause recalcitrant principals and custodians to acquiesce and open their schools to those teachers responding to the board's invitation. Failing in this, the board was preparing an alternate procedure for opening and operating the schools under designated teachers-in-charge, many of whom had already been chosen.

On October 17, in apparent response to the board's announcement, appellant Horelick reported to Washington Irving High School, which had been closed by its principal. Accompanying Horelick were some fellow teachers, one of whom was the designated teacher-in-charge, and who carried a letter of authority from his district superintendent. Outside the school's front doors the group was confronted by members of the custodial staff, while other custodians inside began nailing windows shut. Although precisely what followed was clouded by conflicting recollections, it is agreed that after being thwarted in his first effort to enter the school, Horelick ultimately gained entry through an unsecured window. As the appellant proceeded through a hallway toward some side doors, he was intercepted by a custodian who attempted to stop him. Continuing toward the doors, Horelick was halted by a policeman responding to the warning cries of the custodian and was

arrested for trespass. It was also alleged that Horelick resisted arrest by attempting to kick and squirm away from the arresting officer. On the night of October 19 Horelick was again arrested for trespass when he refused to leave the school following the performance of a public concert. Horelick's conviction on two counts of criminal trespass in the second degree[2] and one count of resisting arrest[3] was affirmed by the appellate division. Upon appeal, the New York Court of Appeals *held:* Horelick did not have the right to use self-help to enter the school and additional force to prevent his arrest. Whether the school was properly closed or not, Horelick's available remedy was to seek the assistance of his superiors. *People v. Horelick,* 30 N.Y.2d 453, 285 N.E.2d 864, 334 N.Y.S.2d 623 (1972).

To resolve this case, the majority placed emphasis on the notions of forcible entry and detainer, and of breaking and entering. Criminal liability for forcible entry or detainer has typically been imposed by the courts only where it could be shown that there was actual threatened violence tending towards a breach of the peace or an abuse of authority.[4] *Fults v. Munro,*[5] the leading New York case in this area, held that forcible entry implies a different kind of force from that which is involved in a mere trespass. This force must be

> unusual and tend to bring about a breach of the peace, such as entry with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life and limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession.[6]

The law relating to "breaking," on the other hand, holds generally that the sort of force just described is not required to be shown. Thus, for example, the mere effort necessary to effect an entry through an unlocked, or even slightly ajar, door or window would be enough to constitute "breaking."[7] The concept of "breaking" also includes entry by a threat or ploy used for that purpose or by connivance with some-

2. N.Y. PENAL LAW § 140.10 (McKinney 1967).
3. *Id.* § 205.30.
4. Brandt v. Kosenko, 57 Misc. 2d 574, 293 N.Y.S.2d 489 (Sup. Ct. 1968); Pollack v. Macombs Inwood Corp., 52 Misc. 2d 563, 276 N.Y.S.2d 455 (Civ. Ct. 1966); Pisano v. Nassau County, 41 Misc. 2d 844, 246 N.Y.S.2d 733 (Sup. Ct. 1963), *aff'd,* 21 App. Div. 2d 754, 252 N.Y.S.2d 22 (2d Dep't 1964).
5. 202 N.Y. 34, 95 N.E. 23 (1911).
6. *Id.* at 42, 95 N.E. at 26.
7. *See* People v. Viola, 264 App. Div. 38, 34 N.Y.S.2d 1018 (3d Dep't 1942).

one inside, or any other violation of an occupant's security against intrusion.[8] Simple trespass, then, could not per se give rise to an action for damages under forcible entry and detainer.

> A mere trespass unaccompanied by any circumstances of actual violence or terror is not such a forcible entry as will authorize the maintenance of a forcible entry and detainer proceeding. . . . So, too, merely breaking or wrenching off a lock prior to entry will not in and of itself constitute a forcible entry, unless such acts are accompanied by violence or a riotous entry.[9]

With the adoption in 1967 of section 140.10—criminal trespass in the second degree[10]—the traditionally confusing concept of "breaking" was dropped from the Penal Law. This statute provides that "[a] person is guilty of criminal trespass . . . when he knowingly enters or remains unlawfully in a building . . . ."[11] Although the mens rea requirement is narrowed to a specific unlawful intent,[12] the presence of actual criminal intent is not essential to a conviction under section 140.10.[13] The prosecution must prove beyond a reasonable doubt that an accused actually knew of the illegality of his conduct. Honest belief that one is licensed or privileged to enter or remain is a defense to an action brought under this section. The absence of such license or privilege must be proved by the people, for this is not an offense of strict liability.[14] Naturally a person gaining entry "through intimidation or by deception, trick or artifice, does not enter with 'license or privilege.' "[15] Where a person enters or remains in a *public* building, he cannot knowingly violate the statute until directly informed of the illegality of his presence. Since Washington Irving High School is not a public building in the sense that the public may enter or remain at will, an order to leave the school is not a critical element in Horelick's case.[16]

The second issue in this case was Horelick's right to resist arrest.

---

8. *See* Denzer & McQuillan, *Practice Commentary* to N.Y. PENAL LAW § 140.00 (McKinney 1967).

9. 14 CARMODY-WAIT 2d, *What is forcible entry and detainer* § 90:126 (1967).

10. N.Y. PENAL LAW § 140.10 (McKinney 1967).

11. *Id.*

12. *In re* C., 66 Misc. 2d 907, 323 N.Y.S.2d 267 (Fam. Ct. 1971).

13. *See In re* D., 58 Misc. 2d 1093, 296 N.Y.S.2d 825 (Fam. Ct. 1968), *rev'd on other grounds,* 33 App. Div. 2d 1028, 308 N.Y.S.2d 262 (2d Dep't 1970); N.Y. PENAL LAW § 140.00(5) (McKinney 1967); Denzer & McQuillan, *Practice Commentary* to *id.* at 340.

14. Denzer & McQuillan, *Practice Commentary* to N.Y. PENAL LAW § 140.05 at 347 (McKinney 1967).

15. Denzer & McQuillan, *supra* note 13, at 341.

16. *See In re* C., 66 Misc. 2d 907, 323 N.Y.S.2d 267 (Fam. Ct. 1971).

The long-standing notion that, under proper circumstances, one may lawfully resist an arrest has been severely restricted in New York during the past decade. Prior to July 1, 1963, a police officer could not make an authorized warrantless arrest unless it involved a felony or a crime committed or attempted in his presence.[17] Resisting arrest was permissible when the above conditions were not met. A defendant actually could use reasonable force to resist arrest, and if found not guilty of the crime for which he was arrested could not be convicted of resisting arrest.

This practice met its demise shortly after *People v. Dreares*,[18] a case in which a defendant who had injured a policeman was nevertheless acquitted of resisting arrest. The New York Legislature amended section 177 (1) of the former Code of Criminal Procedure to allow a policeman to make an authorized arrest without a warrant when it was reasonable to believe that a crime was being committed in his presence.[19] In addition, section 35.27, recently added to the New York Penal Law, forbids the use of "physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a peace officer when it would reasonably appear that the latter is a police officer."[20] And under section 205.30,[21] entitled "Resisting arrest," it is no longer necessary that a defendant use violence or force in obstructing the arresting officer. All that is needed is proof that an accused engaged in some kind of conduct, including most forms of passive resistance, with the intent to prevent the officer from effecting an *authorized* arrest.[22] In view of this recent legislation, at present, the fact that a defendant is subsequently acquitted of the underlying charge does not prevent him from being convicted of resisting his arrest on that charge. The true import of these provisions may be found in section 140.10 of the Criminal Procedure Law[23] (which replaced section 177 of the Code of Criminal Procedure). This statute eliminates the vague, general use of the term "peace officer" by distinguishing between police officers and non-police peace officers; it permits arrests for misdemeanors and felonies to be made on the same basis by expanding the jurisdiction of the officers; and it provides that the crime need no longer

17. N.Y. Sess. Laws 1881, ch. 504, § 177.
18. 11 N.Y.2d 906, 182 N.E.2d 812, 228 N.Y.S.2d 467 (1962).
19. N.Y. Sess. Laws 1963, ch. 580 (repealed 1971).
20. N.Y. PENAL LAW § 35.27 (McKinney Supp. 1972).
21. N.Y. PENAL LAW § 205.30 (McKinney 1967).
22. *Id.*
23. N.Y. CRIM. PRO. LAW § 140.10 (McKinney 1971).

be committed in the officer's presence.[24] The combined effect of these statutes is that the chances of lawfully resisting arrest are practically nonexistent in New York.[25] The underlying philosophy of what is termed "no-sock" is that altercation and injury tend to be promoted if the validity of an arrest is permitted to be disputed on the spot. The preferred procedure, then, is for the suspect to offer an immediate and orderly submission to the arresting officer, and later seek remedial action in the courts if he feels he has been wronged. The "no-sock" principle, however, is not designed to prevent someone from lawfully resisting an unjustified beating or an excessive use of force by police.[26]

New York's predilection for peaceful solutions wherever possible has rendered the concept of "self-help" obsolete. Apparently, the thinking is that: (1) "self-help" is unnecessary since legal remedies are available and adequate for most situations; (2) "self-help," or a forceful assertion of one's rights, tends toward violence, breaches of the peace, and general danger to the urbanized society; and (3) "self-help" interferes with the orderly functions of the legal system and of law enforcement officers.

The court in the instant case rejected a consideration of whether the school was lawfully closed on several grounds. First, the decision of the principal and the complicity of the custodians in closing the school were said to be "reviewable elsewhere."[27] Second, it was said that whether or not the board directed the schools to remain open, the principal, by virtue of being in direct charge of his school, has the "power . . . to direct the school to be open or closed. Safety of students and teachers requires no less authority."[28] Third, the court stated that there existed a procedure for opening schools that had been closed improperly, which the appellant failed to follow.

Manipulating its analysis in the above ways, the court was able to state the issue as follows:

> [It] is not the lawfulness of the closing of the school . . . but the use of self-help to enter the school and then additional force to pre-

24. *See* Denzer, *Practice Commentary* to *id.* at 463-64.

25. For an eloquent argument against the New York position, see Chevigny, *The Right to Resist an Unlawful Arrest,* 78 YALE L.J. 1128 (1969).

26. People v. Sanza, 37 App. Div. 2d 632, 323 N.Y.S.2d 632 (2d Dep't 1971).

27. People v. Horelick, 30 N.Y.2d 453, 457, 285 N.E. 2d 864, 866, 334 N.Y.S.2d 623, 625 (1972) [Hereinafter cited as instant case].

28. *Id.* at 456, 285 N.E.2d at 865, 334 N.Y.S.2d at 624-25. The majority supports this conclusion on the school by-laws, parts of which may be found in Brief for Respondent at Addendum 4, instant case.

> vent arrest . . . . [T]he issue is whether the resort to self-help by "breaking and entering" in the classic sense, is permitted, an issue laid to rest long ago by successive and ancient statutes relating to forcible entry and detainer. . . .[29]

Because the school was closed, the court reasoned that Horelick's conduct was to be judged not by whether he had a right or duty to be in the school, but by whether he was licensed or privileged to enter the school furtively and with force in order to open it. The court concluded that with the police and custodians at the doors of a closed school, the only way that Horelick could secure entry was by the use of force or some other illegal means. Even Horelick's superiors would not have been permitted to do this, for it would ultimately prompt counterforce, and "it is not tolerable that the controversies be resolved in the streets or the school corridors, instead of under law, and in the courts, if necessary."[30]

On the charge of resisting arrest, the majority accepted the lower court's finding that Horelick resisted his arrest by trying to kick a policeman.

The dissent regarded the lawfulness of the school principal's action as a vital issue in this case.[31] It felt that despite the exigency of the general situation, the board's published directive overruled the principal's authority to respond speedily to any safety threat. The board exercised its superior custody and control by virtue of its ultimate legal authority over all the school property,[32] as opposed to that authority of the principal which is derived from the school by-laws. It was this directive which reaffirmed Horelick's right and duty to be in the school, regardless of the illegal strike. That Horelick entered as he did was "not remarkable in the light of the hostility of custodians who were wrongfully closing the school."[33] Hence, it was "not established beyond a reasonable doubt that the defendant was 'wrongfully' in the school,"[34] on either occasion for which he was charged. The mens rea necessary under section 140.10 was not proved in this case since Hore-

29. Instant case at 456, 285 N.E.2d at 865, 334 N.Y.S.2d at 624.
30. *Id.* at 458, 285 N.E.2d at 866, 334 N.Y.S.2d at 626.
31. *Id.* at 459, 285 N.E.2d at 867, 334 N.Y.S.2d at 627 (dissenting opinion).
32. *See* N.Y. EDUC. LAW §§ 2550, 2552, 2554(2), (4) (McKinney 1969). Section 2554(4) empowers the board to directly oversee the care, custody, control and safekeeping of all school property *not specifically placed by law* under control of some other body or officer and to prescribe rules and regulations for preservation of such property.
33. Instant case at 460, 285 N.E.2d at 867, 334 N.Y.S.2d at 627 (dissenting opinion).
34. *Id.*

lick's colorable claim of right, even if mistaken, is a valid defense,[35] which the prosecution failed to overcome.

The dissent dismisses the charge of resisting arrest by asserting that Horelick's movements did "not actually establish the defendant's guilt for attempting to 'prevent' the officer from 'effecting' "[36] his arrest, let alone serve as "a fair basis for a separate prosecution on a distinct crime."[37]

The most unsettling feature of the majority opinion is its failure to analyze this case within the bounds of the crimes for which Horelick was charged. If the Penal Law is to be our guide, the question is not whether the defendant "broke in," or "entered forcibly," but whether he *knowingly* entered the school unlawfully. This is a difficult question—one which deserves more attention than the majority allowed.

An analysis of the majority's technique of avoiding this question shows that the court's conclusion—that "it is not tolerable that the controversies be resolved in the streets or the school corridors, instead of under law, and in the courts, if necessary"[38]—was actually the premise for its interpretation of the facts. The majority clearly was unable to use criminal trespass as the vehicle for its reasoning since the essence of criminal trespass is not whether Horelick's acts were proper, but rather, what he believed (or knew) while he was acting. Thus, in its recital of the facts the majority was constrained to depict a scene resembling that of forcible entry[39] in order to rationalize its distaste for self-help. The confrontation was determined by the court to be "emotional and incipiently riotous,"[40] facts helpful toward proving forcible entry, but not even alleged by the prosecution.[41] The issue was not deemed to be whether the school was lawfully closed, but whether Horelick was permitted to use "*self-help* to enter the school and then additional force to prevent arrest."[42] Phrasing the issue this way implies that Horelick used "force" to effect his entry; the court seemed to treat the "force" used in Horelick's subsequent physical struggles with his captors as indications of the "force" he *must have used* to

35. *Id. See* Denzer & McQuillan, *Practice Commentary* to N.Y. PENAL LAW § 140.05 at 347 (McKinney 1967) and text at notes 12-15, *supra*.

36. Instant case at 461, 285 N.E.2d at 868, 334 N.Y.S.2d at 628 (dissenting opinion).

37. *Id.*

38. *Id.* at 458, 285 N.E.2d at 866, 334 N.Y.S.2d at 626.

39. *See* text at note 7 *supra*.

40. Instant case at 455, 285 N.E.2d at 865, 334 N.Y.S.2d at 624.

41. Brief for Respondent at 2, 16-19, instant case.

42. Instant case at 456, 285 N.E.2d at 865, 334 N.Y.S.2d at 624.

enter the building. Again, even the prosecution did not allege this, but handled the entry and the resisting arrest as two totally separate occurrences.[43] This "force" that the court attributed to Horelick's entry was, of course, another factor helpful in building a showing of forcible entry. Ironically, the mere act of opening a window normally would fit into the classical concept of "breaking" or "mere trespass," not forcible entry. The court's conclusion again indicates a tendency to overstate the situation: "Since only force or some other illegal method could be used to *effect* an entry which would inevitably provoke counter-force (in this case, even riot), the remedy to open the school . . ."[44] lay elsewhere. There is no indication, in this case, of any counter-force—certainly not that which was "inevitable" or which would be of "riot" proportions. In the passage quoted above there also seems to be the assumption that force is illegal. It is apparent that the majority presupposes the facts necessary to arrive at the desired result—that Horelick gained entry by the use of force.

The majority's opinion incorrectly excluded the question of whether the school had been lawfully closed. This question has direct bearing on whether Horelick had license or privilege to be in the school under section 140.10. As stated in the dissenting opinion, to the extent that confusion reigned concerning the proper exercise of authority, it is evident that Horelick could not have possessed the necessary mens rea or subjective factor for the offense of criminal trespass. Even granting the majority's dismissal of the lawfulness of the school's closing, Horelick could not have knowingly entered unlawfully, since the law leaves it unclear whether entry under such conflicting mandates of authority is prohibited. Here it would seem that the school, although declared closed by the principal, was actually open to the appellant by the board's consent, or even by its express invitation. It follows, therefore, that the hostile and frustrating opposition of the custodians, in denying Horelick a right he thought he had, would be ample reason for him to resort to an unusual means of entry.

Even if Horelick had known that his entry would have constituted an unlawful act under ordinary circumstances, and therefore had an intent or motive to commit the trespass, the *mobile*[45]—the profound

43. Brief for Respondent, *supra* note 41.

44. Instant case at 458, 285 N.E.2d at 866, 334 N.Y.S.2d at 626 (emphasis added).

45. The idea generated in this sentence, and the two that follow, is based on

intentionality or social cause of his transgression—is to be found in the contradictory actions of the higher school authorities and in Horelick's awareness of the need to educate children in spite of an unjustified walkout on the part of some teachers. The *mobile* concept has been the unarticulated basis for decisions in some entrapment cases.[46] In these cases, the defendant is generally found not guilty even for intentional acts when the profound cause of his act lies with the government itself. Further, *Raley v. Ohio*[47] and *Cox v. Louisiana*[48] presented "unusual" situations in which the United States Supreme Court was able to predicate its application of due process concepts on the state's assurances of legality to the defendant. In *Raley,* the appellants were brought before a state commission which was investigating activities it thought were subversive to the government. The appellants were informed that they had right to rely on the privilege against self-incrimination as afforded by the Ohio Constitution. The Ohio Supreme Court subsequently held, however, that an Ohio immunity statute deprived the appellants of the privilege against self-incrimination, and therefore they actually committed an offense by not answering the questions to which they had asserted the privilege. The United States Supreme Court held that this ruling violated the due process clause of the fourteenth amendment. It concluded that to allow such a conviction would be to sanction an indefensible sort of entrapment by the state, even when the state had no intent to deceive the appellants.[49]

In *Cox,* appellant, a leader of a civil rights demonstration, was told by the police chief of Baton Rouge that he could hold a meeting of the group of protesters as long as it was confined to a particular side of the street. After later deciding that the meeting was becoming inflammatory, the Sheriff ordered the group to disperse. When the order was refused, tear gas was used and the appellant was eventually arrested and convicted of disturbing the peace, obstructing public passage and courthouse picketing. The United States Supreme Court concluded that the appellant was in effect advised by the city's highest

an interview with Mitchell M. Franklin, Professor of Law, State University of New York at Buffalo, School of Law, in Buffalo, New York, Nov. 28, 1972. For an article which helps to lay the foundation for this concept, see Franklin, *A Precis of the American Law of Contract for Foreign Civilians,* 39 TUL. L. REV. 635, 679-86 (1965).

46. *See* S. KADISH & M. PAULSEN, THE CRIMINAL LAW AND ITS PROCESSES 991-1004 (2d ed. 1969).

47. 360 U.S. 423 (1959).

48. 379 U.S. 559 (1965).

49. 360 U.S. at 437-38.

police officials that a demonstration at the place where it was held was not "near" the courthouse; thus, to permit him to be convicted for exercising a privilege they had told him was available would be to allow a type of entrapment violative of the due process clause.[50]

The general due process standard regarding entrapment is limited to the court's scrutiny of a state's behavior as it regulates conduct and enforces its authority. It could easily have been applied in *Horelick,* since the board of education derives its power from state law. New York has not definitively spoken on whether one may be protected from entrapment by state officers,[51] and *Horelick* might have been an appropriate situation in which to do so. The due process approach to entrapment would help to prevent the innocent from being convicted. It could also objectively examine the propriety of police and state behavior in light of accepted standards.

Many teachers felt disdain toward the petty jealousies of the UFT and identified strongly with what was being attempted by the city and the board during this period. During the seesaw events of autumn, 1968, those teachers saw the children as the only real victims of the UFT's strike and the actions of those in support of it. Though in the midst of a power struggle and a racial dispute, these teachers merely desired to teach—a desire fueled by the board's public announcement.

The majority opinion may have sensed Horelick's predicament after all: "[I]t is even sadly regrettable, that a school teacher should suffer a penal sanction for conduct motivated by an ideology . . . ."[52] In these terms, it would seem imperative that the majority should have dealt with the facts as they stood according to section 140.10. Since the court was not willing to follow the statute, it might at least have viewed the appellant's actions in a light most favorable to him. Reaching back into discarded law should not be an accepted method by which the court enforces its preference for peaceful solutions. This sort of formalistic approach, which avoids the essence of the conflict under consideration, disregards both law and justice. It is unlikely that an approach which is so arbitrary can ever be justified.

VINCENT L. MORGAN

50. 379 U.S. at 571.

51. *Cf.* People v. Donovan, 53 Misc. 2d 687, 279 N.Y.S.2d 404 (Ct. Spec. Sess. 1967), a case in which the public authorities were *estopped* to prosecute the defendant for driving a car while her ability was restricted by her consumption of alcohol *after* the police had instructed her to leave private property upon which she had parked.

52. Instant case at 458, 285 N.E.2d at 866, 334 N.Y.S.2d at 626.