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Recent Cases

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RECENT CASES

Antitrnst—Treble Damage Actions—Private Litigant Wbose Injury Was Reasonably Foreseeable Has Standing To Sue

Plaintiff, a seller of motion pictures, brought a treble damage action under section 4 of the Clayton Act,[1] charging his purchaser-distributor with violation of section 1 of the Sherman Act.[2] Defendant had contracted to distribute plaintiff's films in exchange for a purchase price to be determined by the profits generated by the distributed films.[3] Plaintiff contended that defendant's "block booking" distribution technique[4] diminished the value of his contract rights in the films. Defendant, although conceding the illegality of his method of distribution, argued that there was no causal connection between the violation and the alleged injury, and that, in any event, plaintiff had no standing to sue under the Clayton Act because he was not within the "target area" of the economy "aimed at" by the block booking.[5] The district court granted summary judgment for the defendant. On appeal to the Unitcd States Court of Appeals for the Ninth Circuit, *held*, reversed. A private litigant whose injury was a reasonably foreseeable result of an antitrust violation has standing to sue under section 4 of the Clayton Act. *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970).

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1. 15 U.S.C. § 15 (1964) (granting a private cause of action to all persons injured "by reason of" an antitrust violation).

2. 15 U.S.C. § 1 (1964) (declaring illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . .").

3. Samuel Goldwyn Productions, Inc., predecessor of defendant, was to pay $1.5 million to plaintiff for the film, "Pride of the Yankees." Plaintiff was to receive 82½% of the gross receipts generated in distribution until a specified date. The outstanding balance, to the extent that it failed to satisfy the purchase price, was forfeited at that time.

4. Under the arrangement challenged in the instant case, the defendant distributed a large group of motion pictures as a block on a "take it or leave it" basis. The effect of this method of distribution was to enlarge the overall receipts for the distributor but to diminish the portion allocable to the more valuable films within the block. Block booking is a form of tying arrangement that under certain conditions is prohibited by the Sherman Act. For a discussion of tying arrangements see P. AREEDA, ANTITRUST ANALYSIS 438-87 (1967).

5. Previous Ninth Circuit case law limited standing under § 4 of the Clayton Act to plaintiffs within the "target area" of defendant's violation. This judicially constructed test for standing required more than a showing of damage physically caused by an antitrust violation. *See* Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1016-17 (1952).

Section 4 of the Clayton Act grants the right to sue for treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[6] The courts, however, traditionally have restricted the availability of this remedy by narrowly interpreting the requirements for standing. Initially, the courts equated standing with the requirement that the illegal antitrust activity be the "proximate" or "direct" cause of the plaintiff's injury.[7] Because of the restrictive interpretation placed on this test by the courts, the number of private antitrust actions was severely limited.[8] More recently, the Ninth Circuit relaxed the standing requirement by adopting a "target area" concept.[9] Under this theory, an injured plaintiff needs only to show that he was within the area of the economy endangered by the antitrust violation.[10] Many courts now apply both tests in determining a plaintiff's standing and, as a result, a considerable degree of uniformity has been achieved. The courts, for example, have held that a competitor of the antitrust violator has standing, reasoning that the prohibited activity is usually "aimed at" him.[12] Similarly, there is general agreement that an individual who is economically dependent on the injured competitor lacks standing.[13] A clear split, however, has

6. 15 U.S.C. § 15 (1964).

7. *E.g.*, Jack v. Armour & Co., 291 F. 741, 745 (8th Cir. 1923) (conspiracy of livestock purchasers not "proximate" cause of injury to sellers); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) (stockholder has no standing to sue for antitrust injury to bankrupt corporation).

8. "[A]ll indications suggest that prior to the end of World War II private action was relatively unimportant." Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181 (1961). "The private antitrust suit, despite its tender of treble damages, was dormant for years. As of 1940, a half century of private action had produced a mere 175 reported cases with judgment for plaintiff in only 13." Note, *supra* note 5, at 1010.

9. The "target area" doctrine was first announced in Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) (no standing for labor union against employers who conspired to hire only nonunion employees).

10. *E.g.*, Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967), *noted in* 1967 DUKE L.J. 686; *see* Comment, 19 CASE W. RES. L. REV. 132 (1967).

11. *E.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (retailer given standing against another retailer who conspired with supplier to deny merchandise to plaintiff); *cf.* Rayco Mfg. Co. v. Dunn, 234 F. Supp. 593, 597 (N.D. Ill. 1964) (standing denied because plaintiff and defendant not competitors).

12. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955).

13. *E.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir.), *cert. denied*, 372 U.S. 907 (1963) (supplier may not recover for injury to customer); Bookout v. Schine Chain Theaters, Inc., 253 F.2d 292 (2d Cir. 1958) (shareholder may not recover for corporate injury); Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956) (patent licensor may not recover for injuries to licensee), *noted in* 69 HARV. L. REV. 575, 576 (1956). Two cases seem to have made inroads on this otherwise generally accepted principle. Sanitary Milk Producers v. Bergjan Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966)

developed among the circuits when the plaintiff is economically dependent on the antitrust violator, but not in competition with him. The Ninth Circuit is at the forefront of the liberal trend on this issue.[14] In *Steiner v. Twentieth Century-Fox Film Corp.*,[15] for example, the plaintiff's lessee and a noncompetitor had combined in a restraint of trade that resulted in a decrease in the rent payable to the plaintiff. Standing was upheld on the ground that the antitrust violation was the "direct" cause of the injury.[16] Similarly, in *Twentieth Century-Fox Film Corp. v. Goldwyn*,[17] a film lessor, whose rent was diminished by an illegal allocation of first-run movies by lessees to exhibitors, had standing because he was within the area that could reasonably be foreseen would be affected by the violation. The opposite result has been reached in the Second and Third Circuits. In *Harrison v. Paramount Pictures, Inc.*,[18] for example, a landlord was denied standing to recover treble damages for loss of rent. The court reasoned that the plaintiff was not directly injured by the tenant's antitrust violation. In a similar case, *Field's Productions, Inc. v. United Artists Corp.*,[19] the court denied standing to a film producer-lessor, concluding that it was not within the "target area" of the lessee's block booking operation, even though the receipts from the distributed films determined the rent payable. The target area was found to comprise only the lessee's competitors and those forced to accept his films. The Supreme Court has indicated in dicta that the only requisite for standing should be proof that the plaintiff was injured by an antitrust violation.[20] The Court, however, has

(supplier of raw milk may recover for injury to distributor); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) (manufacturer of car wax given standing to sue for injury to distributor). In these cases, however, the courts did not repudiate the principle, but held that the distributors were an inadequate force for carrying out the policy behind private enforcement of the antitrust laws. The distributors were held to be merely formal entities whose existence would not bar recovery by the party actually bearing the heaviest burden of loss. *But see* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970) (the existence of a distributor was a bar to standing for a soft drink franchisor against a competing soft drink manufacturer).

14. The Fourth and Seventh Circuits have followed the liberal policy of the Ninth Circuit. *E.g.*, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957).

15. 232 F.2d 190 (9th Cir. 1956).

16. A similar case is Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957) (lessor granted standing against violating lessee).

17. 328 F.2d 190 (9th Cir. 1964).

18. 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

19. 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd per curiam*, 432 F.2d 1010 (2d Cir. 1970).

20. The Court, in granting standing under established precedent, indicated that present lower court standing tests may be unduly restrictive. Radiant Burners, Inc. v. People's Gas, Light, & Coke Co., 364 U.S. 656, 660 (1961) (manufacturer of gas appliances may maintain action against

never overturned the restrictive decisions denying standing to those suffering injury as a result of their economic dependence on violators.[21]

The instant court dismissed at the outset the defendant's contention that his breach of contract and not the antitrust violation was the legal cause of the plaintiff's injury. The court found it immaterial whether the block booking was a breach of contract, observing that successful maintenance of an antitrust suit does not depend on the availability of a common law remedy for the wrong. Turning to the defendant's standing argument, the court concluded that the plaintiff's claim met the requirements of the "target area" test currently utilized in that circuit. The court reasoned that the defendant's activities did not have to be "aimed at" the plaintiff in order for the target area test to be met. The test is satisfied if it was reasonably foreseeable that the plaintiff would be affected by the illegal activity, and if in fact he was "squarely hit." Since it was entirely foreseeable that defendant's block booking could impair the revenue producing potential of plaintiff's films, the court held that the plaintiff had standing under section 4 of the Clayton Act.

At first glance, the instant decision appears to do no more than extend the Ninth Circuit's interpretation of "target area" to include the vendor-vendee relationship.[22] Thus, this liberal approach to standing questions apparently is still confined to plaintiffs who are economically dependent on the antitrust violator and is not applicable to situations in which the plaintiff is dependent on a victim of the violation. Although logical in the light of precedent, the decision is undesirable both for its reasoning and its possible long-range impact. In applying the "target area" test, the court gave this judicial metaphor a new and curious reading. In earlier Ninth Circuit cases, the inquiry had been whether the plaintiff had been "aimed at."[23] If so, he was in the "target area" and, therefore, was granted standing. The lower court in the instant case, relying on these decisions, had denied standing because it found that the

supplier who refused to deal with plaintiff); Radovich v. National Football League, 352 U.S. 445, 454 (1957) (blacklisted football player may sue organization of football teams).

21. *See, e.g.*, Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956) (lessor does not have standing against violating lessee). *But see* South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966) (Supreme Court refused to overturn a liberal standing decision).

22. The extension of standing to the lessor-lessee relationship preceded the instant decision in the Ninth Circuit. *See, e.g.*, Steiner v. Twentieth Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956).

23. *E.g.*, Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir. 1964); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955). For a discussion of the "aimed at" test for standing see Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Action*, 57 NW. U.L. REV. 691, 704 (1963).

plaintiff was not "aimed at" by defendant's violation. The instant court, however, concluded that it was immaterial that the plaintiff had not been "aimed at" since he was "squarely hit," not "sideswiped nor struck by a carom shot."[24] It is submitted that this reasoning further clouds an already confused area and that the court has announced a standard that will be exceedingly difficult to apply uniformly and with fairness. Even more troublesome, however, is the court's conclusion that the plaintiff was in the "target area" because it was reasonably foreseeable that he would be injured by defendant's violation. This approach, if followed, can only lead to further conflicts among the circuits. Moreover, it will contravene the policy underlying the treble damage remedy. If this reasoning is carried to its logical extent, standing will be granted to plaintiffs who are dependent on victims of antitrust violations. It is reasonably foreseeable, for example, that a shareholder's investment will suffer if the corporation's profits are diminished by a restraint of trade. Similarly, a creditor will likely sustain economic injury if his debtor is forced into bankruptcy by an antitrust violation. A "reasonably foreseeable" test would grant standing and, consequently, treble damages to shareholders and creditors in these cases. It is submitted that this result is clearly undesirable. The congressional purpose in enacting section 4 of the Clayton Act was to supplement the efforts of the Department of Justice to ensure competitive conditions in the economy.[25] Suits by plaintiffs whose causes of action are only derivative are unnecessary to effectuate this policy.[26] The individual who is directly injured by the antitrust violation is not only the proper party to bring the action, but his recovery also will benefit those indirectly affected by the violation. Moreover, it would be unjust to permit all derivative plaintiffs to recover a treble damage windfall. For these reasons, the instant decision must be viewed as an undesirable and unwarranted relaxation of standing requirements in treble damage actions. On the other hand, this additional dimension to the conflict among the circuits could have a desirable effect. Since the Second Circuit, in *Fields Productions, Inc.*,[27]

24. 433 F.2d at 1076.

25. The courts have repeatedly emphasized that § 4 was intended not merely to redress a personal injury, but to aid in achieving the broader purposes of the antitrust laws. *See, e.g.*, Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955); Maltz v. Sax, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943); *see* Note, *Standing To Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 571 (1964).

26. For an extended discussion of this point see Note, *The Franchisor As Plaintiff in Treble Damage Actions: An Antitrust Anomaly*, 49 B.U.L. REV. 322, 339-44 (1969).

27. Note 19 *supra* and accompanying text.

reached the opposite result on almost identical facts, the conflict is now more sharply focused than ever. It would seem, therefore, that a Supreme Court clarification, avoided in the past,[28] is now almost mandatory.

Constitutional Law—Free Exercise of Religion—First Ameudmeut Violated by Compulsory Education Statute tbat Prevents a Pareut from Raising His Children Accordiug to His Religious Beliefs

Defendant,[1] a member of the Old Order Amish religion,[2] was convicted of violating Wisconsin's Compulsory School Attendance Act,[3] which requires parents to insure regular school attendance of all children under their control from ages seven to sixteen. At his trial, defendant contended that by refusing to enroll his child in a public high school,[4] he was following the fundamental tenets of the Amish religion, which consider a child's attendance in a public or private high school a deterrent to salvation.[5] Defendant maintained, therefore, that the statute

28. Cases cited note 21 *supra*.

1. Three prosecutions were joined for hearing: State v. Yoder, No. 92 (member of Old Order Amish religion); State v. Yutzy, No. 93 (member of Old Order Amish religion); and State v. Miller, No. 94 (member of Conservative Amish Mennonite Church).

2. The Amish religion was formed in 1693 when Jakob Ammann separated from the Swiss Anabaptists because of disagreements over what he believed to be unwarranted departures from the traditional practices. In the 18th century the Amish migrated to America and settled in Pennsylvania. Today, the Amish are found in most states, and there are large Amish communities in Indiana, Iowa, Ohio, Pennsylvania, and Wisconsin. The Old Order Amish is the most conservative sect and numbers about 50,000. *See generally* J. HOSTETLER, AMISH SOCIETY (1963); W. SCHREIBER, OUR AMISH NEIGHBORS (1962); E. SMITH, THE AMISH PEOPLE (1958); Note, *The Right Not To Be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925 (1967).

3. The statute under which the defendants were convicted is substantially the same as the present one. WIS. STAT. ANN. § 118.15(1)(a) (Spec. Pamphlet 1970) provides: "Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

4. The children had attended public schools until they had finished the eighth grade.

5. Strictly adhering to the agrarian traditions of their forefathers, the Amish place no value in education beyond the eighth grade. The Amish teach their children to read and write in both German and English and to learn basic mathematics. Education past the eighth grade is directed toward farming, homemaking, or religious instruction. The high school years of Amish youth are particularly critical, because they must decide at age 18, whether they will remain in the Amish

violated his first amendment right to free exercise of his religion by denying him the ability to raise his children in the Amish tradition.[6] The State contended that the statute's infringement of religious liberty was justified by the State's interest in educating its youth.[7] Persuaded by the State's contention, the circuit court affirmed the defendant's conviction. On appeal to the Supreme Court of Wisconsin,[8] *held*, reversed. A compulsory education statute that prevents a parent from raising his children according to his religious beliefs violates the free exercise clause of the first amendment. *State v. Yoder*, 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *appeal docketed*, 39 U.S.L.W. 3446 (U.S. April 1, 1971) (No. 1536).

The religious liberty protected by the free exercise clause of the first amendment has traditionally been limited.[9] In the early case of *Reynolds v. United States*,[10] for example, the Supreme Court significantly restricted the protection of the free exercise clause by distinguishing

Order and accept adult baptism. When Amish youth are between ages 14 and 18, they are imparted with the cultural values of the Amish, and influences of a public high school severely hamper this process. *See* Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423, 425-26 (1968); Note, *supra* note 2.

6. The Amish fathers also contended that a high school education was irrelevant to the Amish society. The cultural values of personal achievement and individual competition are inimical to those values taught by the Amish. Casad, *supra* note 5, at 426-27; Note, *supra* note 2. The Amish interpret the Bible literally and believe the scriptures, like the following, require that they remain separated from the rest of the world: "Be not conformed to this world, but be ye transformed by the renewing of your mind that ye may prove what is that good, and acceptable, and perfect, will of God," *Romans* 12:2; and "[b]e ye not unequally yoked together with unbelievers: for what fellowship hath righteous with unrighteous? and what communion hath light with darkness?" 2 *Corinthians* 6:14. These scriptures form the basic tenets of the Amish religion.

7. The State advanced 4 theories upon which the statute could be applied to the Amish. First, the State contended that the first amendment protects only religious rituals, not a practice or way of life. Secondly, the State, as *parens patriae*, could oversee the welfare of the defendant's children and apply regulations to the children that would be unreasonable if applied to adults. Thirdly, an exemption of the Amish would deny the purpose of the statute, which is to homogenize the State's citizens. Lastly, an exemption of the Amish would violate the establishment clause of the first amendment.

8. As complete pacifists, the Amish do not defend themselves in litigation. The appeal for the defendants was initiated by the National Committee for Amish Religious Freedom. N.Y. Times, Feb. 16, 1971, at 37, col. 3.

9. For a discussion of the various freedoms contained in and restraints applied to the religion clauses of the first amendment see Galanter, *Religious Freedoms in the United States: A Turning Point*, 1966 WIS. L. REV. 217, and Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967).

10. 98 U.S. 145 (1878) (statute proscribing Mormon polygamy does not violate the free exercise clause of the first amendment); *accord*, Cleveland v. United States, 329 U.S. 14 (1946) (Mormon religious beliefs are not valid defenses against prosecutions under the Mann Act); Davis v. Beason, 133 U.S. 333 (1890) (statute imposing civil disabilities upon polygamists does not violate the first amendment). *But see* Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 824-26 (1958).

between the right of an individual to hold a religious belief and the right to practice that belief.[11] The Court recognized that the right to hold a religious belief was absolute[12] but held that the practice of a belief could be controlled through the police powers of the state to protect the health,[13] safety,[14] and morals[15] of its citizens. The Supreme Court subsequently recognized the inadequacy of this belief-practice dichotomy as a test for determining the constitutionality of state limitations on the free exercise clause.[16] In *Sherbert v. Verner*,[17] the Court announced a new test whereby the burden imposed on an individual because of a restriction on the free exercise of his religion is balanced against the state's interest in controlling the individual's practice of his religion.[18] In applying this weighing process, courts have insisted that a compelling state interest be demonstrated before a state may constitutionally limit the free exercise of religion.[19] In this regard, a

11. 98 U.S. at 163; *see* Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969) (advertisement of religious literature may be regulated); Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969) (prison authorities need not permit dangerous inmates to attend Sunday worship); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (obtaining and transfering marijuana and LSD is not permissible as an exercise of religious beliefs).

12. 98 U.S. at 164; *accord*, United States v. Ballard, 322 U.S. 78 (1944) (courts may not consider the truth of religious beliefs); Supple v. Hallinan, 247 Cal. App. 2d 410, 55 Cal. Rptr. 542, *cert. denied*, 389 U.S. 820 (1966) (statements of church representative may not be challenged on their basis of truth); *see* Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593 (1964).

13. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding constitutionality of compulsory vaccination requirements); People v. Handzik, 410 Ill. 295, 102 N.E.2d 340 (1951), *cert. denied*, 343 U.S. 927 (1952) (criminal prosecution of faith healers upheld); McCartney v. Austin, 57 Misc. 2d 525, 293 N.Y.S.2d 188 (Sup. Ct. 1968) (state can compel polio shots); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) (denying college student's claims of religious liberty in possession marijuana and peyote).

14. Prince v. Massachusetts, 321 U.S. 158 (1944) (state's interest in regulating child labor is paramount to religious beliefs); People v. Woodruff, 26 App. Div. 2d 236, 272 N.Y.S.2d 786 (1966) (affirming contempt conviction for refusing to testify before a grand jury because of religious beliefs); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub. nom.* Bunn v. North Carolina, 336 U.S. 942 (1949) (handling of reptiles in religious ceremonies prohibited).

15. State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) (affirming college student's conviction for possessing marijuana and peyote); *see* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (permitting use of peyote during ceremonies of Indian religion).

16. Galanter, *supra* note 9, at 236-37 (discussing Cantwell v. Connecticut, 310 U.S. 296 (1940), which reversed a breach of peace conviction that violated free exercise clause of first amendment).

17. 374 U.S. 398 (1963) (upholding a right to receive unemployment compensation even though the applicant refused employment requiring Saturday work because it was contrary to her religious beliefs).

18. 374 U.S. at 403; *cf.* NAACP v. Button, 371 U.S. 415 (1963) (the interest of union members in receiving adequate legal representation outweighed the state's interest in proscribing the conflict of interest when a union-paid attorney represents the union members).

19. *E.g.*, Shelden v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963) (children cannot be compelled

number of decisions have recognized the states' deep interest in providing for minimum educational requirements as a means of nurturing political awareness, economic productivity, and homogeneous cultural values.[20] On the other hand, a parent has an absolute right to raise his children within his religion and to educate them in parochial schools.[21] This right, however, is a limited one since the state may regulate the standard of education afforded children at parochial schools.[22] Upholding this regulatory power, the Supreme Court of Kansas, in *State v. Garber*,[23] held that an Amish school must meet the minimum standards of the state. Although this decision was later effectively overruled by the Kansas legislature,[24] all cases in which Amish have refused to comply with compulsory education statutes have been similarly decided by appellate courts.[25] In the absence of statutory exemptions, therefore, courts have uniformly upheld state compulsory education statutes notwithstanding their possible infringement of religious liberty.

In the instant case, the court applied the *Sherbert* test and balanced

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to stand during singing of the National Anthem when contrary to their religious beliefs); *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963) (exception from jury duty for religious beliefs).

20. *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Commonwealth v. Beiler, 168 Pa. Super. 462, 465, 79 A.2d 134, 137 (1951); Commonwealth v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950). For a discussion of the state's interests in educating its youth see Scalise, *The Amish in Iowa and Teacher Certification*, 31 ALBANY L. REV. 1 (1967). Most states have compulsory education statutes. *See, e.g.*, ILL. ANN. STAT. ch. 122, §§ 26-1 to -11 (Smith-Hurd 1961); IND. ANN. STAT. §§ 28-505 to -517 (1948), *as amended*, (Supp. 1968); IOWA CODE ANN. §§ 299.1-23 (1946), *as amended*, (Supp. 1971); KAN. STAT. ANN. § 72-1111 (Supp. 1970); MICH. STAT. ANN. §§ 15.3733-.3743 (1968); OHIO REV. CODE ANN. §§ 3321.01-.13 (Baldwin 1964), *as amended*, (Supp. 1970); PA. STAT. ANN. tit. 24, §§ 13-1326 to -1334 (1962), *as amended*, (Supp. 1970).

21. Pierce v. Society of Sisters, 268 U.S. 510 (1925). This proposition has been well established today and most of the present litigation concerns the standard of education which the child is receiving and whether that standard meets the various exemption requirements. *See* notes 22 & 30 *infra*.

22. States may prescribe the number of class hours, the subjects taught, and the training given to the teachers. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Morton v. Board of Educ., 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966); State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct., L. Div. 1967). *See* note 31 *infra* and accompanying text.

23. 197 Kan. 567, 419 P.2d 896 (1966).

24. The Kansas legislation created a religious exemption. KAN. STAT. ANN. § 72-1111 (Supp. 1970); *see* Casad, *supra* note 5, at 423. Other states also have created religious exemptions. *E.g.*, IOWA CODE ANN. § 299.24 (Supp. 1971). In Indiana, an administrative exemption was granted to the Amish. 28 OPS. IND. ATT'Y GEN. 140 (1959).

25. *E.g.*, State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951). Only one court has held in favor of the Amish, Commonwealth v. Petersheim, 70 Pa. D.&C. 432 (Somerset County Ct. 1949), but this decision was effectively overruled by Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951). *See* Note, *supra* note 2, at 945-48.

the burden placed on the defendant's free exercise of his religion against the State's interest in compulsory education. Reasoning that the statute subjected Amish children to an anguish of living in two cultures and forced their parents to choose between damnation and criminal sanction, the court found that a severe burden was placed on the defendant in the exercise of his religion.[26] Turning to the State's interest, the court found that the welfare of the Amish children was not enhanced by the compulsory education statute and that the purpose of the statute would not be materially compromised by exempting the Amish.[27] The court concluded that the statute was not grounded upon a sufficiently compelling interest and, therefore, violated the first amendment right of the Amish to the free exercise of their religion.[28] A dissenting judge reasoned that education is a compelling interest of the state that conflicts with the constitutional rights of the Amish[29] and suggested that the antangonistic interests be reconciled by requiring the Amish to establish their own vocational schools.[30]

By expanding the scope of first amendment protection of religious liberty, the Supreme Court of Wisconsin has become the first appellate tribunal to exempt the Amish from a compulsory school attendance statute. In predicating its exemption upon the first amendment, the court has implicitly accepted two propositions: first, that securing for Amish

26. The court found that the statute required the defendants "to perform affirmative acts which are repugnant to their religion." State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539, 542 (1971).

27. The court also rejected each of the theories upon which the state was defending the statute. *See* note 9 *supra*. In particular, the court stated that its decision would not violate the establishment clause of the first amendment because a special exemption for the Amish would do nothing more than relieve the direct burdens placed on the Amish by the government regulation. Thus the court is remaining "neutral" by accommodating religious variations. 182 N.W.2d at 545; *accord*, Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding constitutionality of tax exemption for religious property); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (striking down prayer in public schools).

28. In distinguishing earlier decisions limiting religious liberty, the court found that either a different state interest was involved or the burden upon the individual's exercise of his religion was not as severe as in the instant case. 182 N.W.2d at 544-45. A concurring opinion advocated limiting the constitutional exemption from the statute to those children living as members of an Old Order Amish religion or Conservative Amish Mennonite Church community.

29. 182 N.W.2d at 547 (Hefferman, J., dissenting). The dissent also argued that Amish children should be compelled to attend high school in order to protect those who may choose to leave the Order.

30. The establishment of Amish vocational schools would not resolve the conflict, but would place it on a different level. The conflict would no longer be one of attendance, but would become one of teacher certification and the quality of the education taught in the Amish schools. Where Amish communities have established their own schools, they have generally failed to meet minimum state requirements. For a discussion of the problems with Amish schools in a state where the Amish have been vigorously prosecuted see Scalise, *supra* note 20.

parents the right to prevent their children from attending high school does not abridge any paramount rights of the children, and secondly, that a minority culture has the right to resist ingestion by a majority culture. These two propositions warrant independent discussion and analysis.

In considering the first proposition, the majority observed that there was no conflict of interests in the instant case between the parent and his child since they shared a mutual disdain for public high school.[31] A conflict could exist, however, if a child's religious interests were restricted by the parent.[32] To treat this conflict, one must first determine the extent to which a parent can influence the religious choice of his children. In this regard, it is not uncommon for parents to raise children with the belief and expectation that they will continue to adhere to the religious tenets taught them in childhood. Moreover, the exclusiveness and intensity of a child's religious instruction has long been an incident of parental discretion. The first amendment should not be construed therefore, to afford every child a right to be introduced to a maximum number of faiths from which to choose. The Constitution guarantees only that *once a choice has been made*, the individual shall have the free exercise of his chosen religion protected.[33] A significant aspect of the Amish parent's free exercise of his chosen religion is his ability to raise his children within that religion. Thus, the control of parents over the religious instruction of their children is their constitutionally protected right[34] and does not violate their children's religious liberty. Difficulty arises, however, when the exercise of the parent's religion affects more than the mere religious interest of the child. In these instances, the religious liberty of the parent must be balanced against the potential nonreligious harm to the child. When the religious belief of the parent threatens the health or safety of the child, for example, the state may

31. *See* 182 N.W.2d at 542.

32. Since the Amish children have the right to choose and practice a religion upon reaching the age of majority, this conflict would be restricted to the parent and his minor children. 182 N.W.2d at 543. In regard to the ultimate choice of the child, the majority felt that a state should not be permitted to "directly influence or destroy that choice." 182 N.W.2d at 543.

33. In asserting the interest of Amish youth, the argument could have been made that the first amendment, by protecting both free speech and the free exercise of religion, suggests a purpose to insure the free flow of ideas, and, therefore, the free exercise clause was not meant to protect a religion, such as the Amish, designed to eliminate a child's exposure to a free flow of ideas. In this regard, the effect of the state's argument in the instant case would be to manipulate the choices open to a child and not to secure the total free flow of ideas. While new possible choices would be created by exposure to cultural values of the majority in public high school, the choice of entering the Amish Order would be eliminated as a possibility. *See* notes 6 & 27 *supra* and accompanying text.

34. *See* note 21 *supra* and accompanying text.

prescribe actions repugnant to the parent's religion.[35] The only children who are threatened with potential nonreligious harm under the ruling of the instant case are those who, upon reaching majority, may seek their livelihood outside of the Amish Order.[36] It is submitted, however, that a mere postponement of high school education would not sufficiently harm those children who will leave the Order to warrant restricting the parents' religious liberty, and jeopardizing the religious instruction of those children who will remain within the Order.

In reference to the second proposition assumed by the instant decision—that a minority culture may resist ingestion by a majority culture—the court apparently recognized that the perpetuation of the Amish culture depends upon the ability of parents to instill their cultural values into their children. By requiring a high school education, the state could effectively disrupt the parents' instruction of their children, cause the Amish children to reject the Amish values,[37] and threaten the Order with extinction.[38] These possible consequences cast particular significance upon the determination of whether the state could impose on the child values that are repugnant to the religious values of the parent. In resolving this issue the court relied upon a value that overrides the educational values advanced by the state—the first amendment guarantee of free exercise of one's religion.[39] By upholding the religious liberty of the Amish parents, the court insured the preservation of the Amish religion on the basis of a state and not an Amish value. In effect, the court concluded that a minority may resist ingestion by a majority

35. *See* notes 13-15 *supra* and accompanying text. The majority opinion in the instant case also points out that these remedial measures to protect the child are far less harmful to other religions than compulsory education is to the Amish religion. 182 N.W.2d at 544-45. This reasoning would suggest that even if the rights of the parent were in direct conflict with those of the child concerning education, the balance of the rights rests with the parent.

36. The youth choosing to remain within the Amish Order do not need a high school education, and to compel them to attend high school would be detrimental to their exercise of the Amish religion.

37. Both the majority and dissenting opinions expressed the view that a central purpose of education was to "awaken" the children to the cultural values of the state. 182 N.W.2d at 543, 548. Both cited Brown v. Board of Educ., 347 U.S. 483 (1954), as support for the proposition. The defendants in the instant case were objecting to this "awakening" process. Furthermore, *Brown* was inapposite to the instant case, because in *Brown* a minority culture was seeking entry into the majority culture, not rejecting it.

38. 182 N.W.2d at 542. If a high school education influences youth to reject the Amish religion, and if the Amish are unable to reside in an area where they are granted relief from these prosecutions, then the religion would lose its members, or prospective members, until none remained.

39. "No liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment." 182 N.W.2d at 540. *See also* Galanter, *supra* note 9; Giannella, *supra* note 9.

culture[40] if it can demonstrate that imposition of majority values will impair its religious liberty. It is submitted that this result is a proper one, since the free exercise clause of the first amendment should be construed as guaranteeing every individual the maximum opportunity to adhere to the dictates of his conscience.[41]

Constitutional Law—Immunity Statutes—Section 201 of Organized Crime Control Act of 1970, Which Provides Only Use and Fruits Immunity, Violates Fifth Amendment

The United States Government applied to federal district court for an order compelling a witness[1] to testify under a grant of immunity afforded by section 201 of the Organized Crime Control Act of 1970.[2]

40. One author aptly describes the problem in these words: "As government exercises control over more aspects of the environment, it becomes more difficult for a minority to opt out of the system or to form an enclave beyond its reach." Galanter, *supra* note 9, at 268. A California court suggests one viewpoint: "In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty." People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964).

41. *Cf.* Welsh v. United States, 398 U.S. 333 (1970) (conscientious objection exemption applies to sincerely held personal philosophies); *In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964) (self-styled peyote preacher permitted to use peyote for religious purposes). *But cf.* Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955) (Buddhist parents may not keep child at home to protect him from Christian religion); People *ex rel.* Shapiro v. Dorin, 199 Misc. 643, 99 N.Y.S.2d 830 (Dom. Rel. Ct. 1950), *aff'd mem. sub nom.*, People v. Donner, 302 N.Y. 857, 100 N.E.2d 48, *appeal dismissed*, 342 U.S. 884 (1951) (state interest paramount to unique interpretation of Jewish law); Commonwealth *ex rel.* School Dist. v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950) (Moslem parent cannot keep child from school on their Friday sabbath).

1. Joanne Kinoy refused to testify before a federal grand jury despite a grant of immunity providing that "no testimony or other information compelled under the order, or any information, may be used against Joanne Kinoy in any criminal case. . . ." *In re* Kinoy's Testimony, No. M-11-28 (S.D.N.Y. Jan. 29, 1971), *substantially reported in* 8 CRIM. L. REP. 2327.

2. 18 U.S.C.A. § 6002 (1971) provides: "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—(1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two Houses or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; *but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness* in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (emphasis added).

The witness had refused to testify, asserting[3] that because section 201 did not offer transactional immunity,[4] it was not coextensive with her fifth amendment right against self-incrimination[5] and was therefore unconstitutional. The witness predicated this argument on the early Supreme Court decision of *Counselman v. Hitchcock*.[6] The United States District Attorney contended that section 201's insulation solely from the use and fruits of testimony was sufficient to satisfy fifth amendment requirements. In support of this contention, the Government argued, on the one hand, that the portions of the *Counselman* decision relied on by the witness were dicta and, alternatively, that *Counselman* had been implicitly overruled by a more recent Supreme Court decision.[7] Rejecting the Government's position, the United States District Court for the Southern District of New York, *held*, order denied. An immunity statute that does not grant transactional immunity from prosecution is unconstitutional under the fifth amendment. *In re Kinoy's Testimony*, No. M-11-28 (S.D.N.Y. Jan. 29, 1971).

Constitutional requirements for statutes that compel self-incriminating testimony were first articulated by the Supreme Court in 1892 in *Counselman v. Hitchcock*.[8] In that case, the Court stated that in order to deprive a witness of his fifth amendment right against self-incrimination, a statute must grant "absolute immunity against future prosecution for the offense to which the [compelled testimony] relates."[9]

3. In addition to the witness's main contention, she also profferred the following defenses: (1) that she must be under grand jury subpoena outlining the scope and subject matter of the investigation or be asked a definite question before being coerced to testify under immunity; otherwise the court would be required to grant her indefinite prospective immunity for any crime to which her testimony might relate; (2) that the abstruse generality and failure of the order to specify the exact questions she would be required to answer violated the notice requirement of the due process clause; and (3) that the testimony sought did not further a legitimate grand jury investigation.

4. Transactional immunity may be defined as absolute or complete immunity from future prosecution for the crime to which the question relates. Immunity from prosecution obviously encompasses the lesser degrees of immunity from (1) the *use* of the immunized testimony and (2) the *fruits* or indirect consequences that flow from the testimony. *See* notes 9 & 10 *infra* and accompanying text.

5. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

6. 142 U.S. 547 (1892) (a witness must receive full transactional immunity to replace the fifth amendment right against self-incrimination).

7. Murphy v. Waterfront Comm'n of New York Habor, 378 U.S. 52 (1964).

8. 142 U.S. 547 (1892).

9. *Id.* at 586. In *Counselman*, the Court held that an immunity statute that leaves the party or witness subject to prosecution after he answers an incriminating question cannot have the effect of supplanting the fifth amendment privilege. The statute is valid only if it supplies complete protection from all perils against which the constitutional prohibition was designed to guard.

This requirement, which has come to be known as the "transactional immunity" standard, demands that an immunity statute accord a witness protection coextensive with his fifth amendment privilege usurped by the compulsion of testimony. The standard enunciated in *Counselman*[10] was followed unwaveringly by the judiciary for more than 70 years.[11] As recently as 1956, the Supreme Court explicitly reaffirmed the pre-eminence of this standard and commanded strict adherence by federal immunity statutes.[12] Congress, moreover, accepted the standard as law, and until 1964 virtually all federal immunity legislation rigidly complied with the *Counselman* mandate of transactional protection.[13] In the 1964 case of *Murphy v. Waterfront Commission of New York Harbor*,[14] however, the Supreme Court seemed to depart from the *Counselman* rule in sustaining a state immunity statute that afforded transactional immunity within the state augmented by constitutionally-founded federal use and fruits immunity without requiring immunity from future federal prosecution. The Court's foremost concern in *Murphy* was not with the specific statute in issue,[15] but rather with abolishing the archaic "two sovereignties rule," which required only that the immunizing state or federal statute afford immunity within its respective sphere of operation. The *Murphy* decision immediately generated prodigious

10. The standard promulgated in *Counselman* was reiterated 4 years later by the Supreme Court in Brown v. Walker, 161 U.S. 591 (1896). The *Brown* decision, in upholding a statute obviously patterned after the holding in *Counselman*, solidified the *Counselman* standard as settled judicial doctrine. The immunity statute challenged in *Brown* provided: "[N]o person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena . . . ." 161 U.S. at 594.

11. Until Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964), the Court rigidly adhered to the *Counselman* ruling. *See* Hines v. Davidowitz, 312 U.S. 52 (1941); Heike v. United States, 227 U.S. 131 (1913); Hale v. Henkel, 201 U.S. 43 (1906).

12. *See* Ullmann v. United States, 350 U.S. 422 (1956). "[I]n *Counselman* . . . a unanimous Court had found constitutionally inadequate the predecessor to the 1893 statute because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony." *Id.* at 436-37.

13. *See* note 20 *infra* and accompanying text.

14. 378 U.S. 52 (1964). "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.* at 79.

15. On the same day that the *Murphy* decision was handed down, the Court decided Malloy v. Hogan, 378 U.S. 1 (1964), which held that the fifth amendment's protection against compulsory self-incrimination is binding on the states through the fourteenth amendment. Although the statute involved in *Murphy* technically complied with the "two sovereignties rule," the Court used this statute as a vehicle to vitiate the anomalous effects of the rule and to further extend the constitutional strictures enunciated in *Malloy*.

judicial and legislative speculation about whether it has overruled *Counselman* sub silentio and established a new standard for gauging the validity of immunity statutes.[16] One year later in *Albertson v. Subversive Activities Control Board*,[17] the Court attempted to quell the uncertainty by reiterating the *Counselman* precept that "no immunity statute which leaves the party or witness subject to prosecution after he answers the criminating question" will withstand the censorship of the fifth amendment.[18] Unfortunately, however, the confusion was far from clarified. In 1968, the Supreme Court resurrected the dormant dispute when it indicated in five cases that statutory use and fruits immunity might be sufficient to placate fifth amendment strictures.[19] Perhaps in an attempt to resolve the quandary, and to centralize disparate federal statutory provisions, Congress hurriedly enacted section 201 of the Organized Crime Control Act of 1970, comprehensively repealing the existing 57 federal immunity statutes.[20] In deference to a burgeoning wave of public concern over the disruptive force of organized crime, section 201 was patterned strictly after the holding in *Murphy* and made no provision for transactional immunity as required in *Counselman*.[21]

After summarily disposing of several peripheral issues,[22] the instant

16. *See* H.R. REP. No. 1549, 91st Cong., 2d Sess. (1970); H.R. REP. No. 1188, 91st Cong., 2d Sess. 39-45 (1970); S. REP. No. 617, 91st Cong., 1st Sess. (1969); H.R. DOC. No. 105, 91st Cong., 1st Sess. 5 (1969); *Hearings on H.R. 11157 and 12041 Before Subcomm. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 83-84 (1970); Wendel, *Compulsory Immunity Legislation and Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U.L.J. 327 (1966); 116 CONG. REC. S481 (daily ed. Jan. 23, 1970) (remarks of Senator Williams); 116 CONG. REC. S422-26 (daily ed. Jan. 22, 1970) (letter from the American Civil Liberties Union to each member of the Senate).

17. 382 U.S. 70 (1965).

18. *Id.* at 80. The Court subsequently reaffirmed its stance taken in *Albertson* in Stevens v. Marks, 383 U.S. 234 (1966). The Court stated that although the issue had not been raised anew in the *Stevens* case, *Counselman* irrefutably remained the standard. The Court then cited *Albertson* as the most recent echo of the standard. *Id.* at 244-45.

19. Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968). The Court was not forced to reach the question of transactional immunity in these cases, however, since all the statutes failed to provide the more fundamental requirement of protection from the use and fruits of the testimony.

20. For a catalogue of the 57 federal immunity statutes repealed by § 201 see the listing following Organized Crime Control Act of 1970, § 201, 18 U.S.C.A. § 6002 (Supp. 1971).

21. *See* H.R. REP. No. 1549, 91st Cong., 2d Sess. (1970). The Ninth Circuit has recently upheld the constitutionality of § 201 in a decision reflecting almost exclusive reliance on the standard interpretation of *Murphy*. Stewart v. United States, 9 CRIM. L. RPTR. 2021 (9th Cir., Mar. 29, 1971). *See also* note 33 *infra*.

22. *See* note 3 *supra*.

court considered the salient question whether the protection afforded by section 201 was coextensive with the fifth amendment right against self-incrimination. Addressing the Government's contention that the transactional immunity requirement of *Counselman* was mere dictum,[23] the court observed that even if this were originally the case, supervening Supreme Court decisions[24] had elevated the requirement to binding judicial doctrine. Turning to the Government's second argument, that *Counselman* had been overruled sub silentio by the *Murphy* decision, the court intimated that there was clearly a basis upon which the two decisions were distinguishable. Specifically, the court pointed out that, unlike *Counselman, Murphy* had focused on a state statute that provided immunity from future state prosecution coupled with constitutionally-based federal use and fruits immunity, but did not shield against future federal prosecution.[25] The court further noted that the *Murphy* Court, in dissolving the inveterate "two sovereignties rule,"[26] had not directly confronted the question whether federal immunity statutes must afford transactional insulation. Thus the court held that the *Counselman* standard is still vital,[27] and that since section 201—which closely resembled the enactment invalidated in *Counselman*—failed to extend transactional immunity it violated the fifth amendment.

It seems clear from the instant decision that the *Murphy* Court wisely declined to overrule *Counselman.* If *Murphy* were to represent a relaxed constitutional standard under which immunity from prosecution is no longer required fifth amendment rights would be emasculated. As a consequence a witness would inevitably be forced to make the impossible choice between a contempt citation and self-inculpation.[28] Moreover, had the Supreme Court intended to overrule *Counselman,* it would not

23. The court further stated that those who argued prior to 1956 that the Supreme Court's language in *Counselman* was mere dictum were abruptly silenced by the Court's decision, directly in point, in Ullmann v. United States, 350 U.S. 422 (1956). In *Ullmann* the Court ruled 7 to 2 in favor of the *Counselman* standard. *See also* note 11 *supra.*

24. *See* notes 10 & 11 *supra.*

25. 378 U.S. at 79.

26. *See* note 15 *supra* and accompanying text.

27. The court further demonstrated that in 2 cases subsequent to *Murphy,* the Supreme Court had reiterated the *Counselman* requirements, so that *Murphy* could not have enunciated a new test, or it would have been followed in all subsequent litigation. *See* Stevens v. Marks, 383 U.S. 234 (1966); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

28. The usual criminal sanction for refusal to testify is a judicial contempt citation. A witness who has been granted immunity only from the use and fruits of his testimony would still be subject to prosecution for the related offense. Thus, he would be forced to elect either to remain silent and be sentenced to jail for as much as 18 months for contempt, or to testify and risk the possibility of prosecution.

have unequivocally restated the transactional immunity mandate only a year after the *Murphy* decision was rendered.[29] Assuming that the *Counselman* rule has always been the correct standard, there are two possible bases upon which *Murphy* can be explained logically. The first explanation, which has been suggested by several scholars,[30] is that Mr. Justice Goldberg's majority opinion in *Murphy*, in a zealous attempt to abolish the "two sovereignties rule," inadvertently failed to require that a state witness be afforded immunity from federal prosecution. This view,[31] however, is fatally discredited by Justices White and Stewart's extended concurring opinion which reveals the majority's overt intention to omit the requirement of federal transactional immunity when the state is the immunizing body. A second explanation for the *Murphy* decision was offered in the instant case—that *Murphy* is in fact distinguishable from *Counselman*. As the instant court correctly intimates, *Murphy* was directed primarily toward the dissolution of the "two sovereignties rule" and did not specifically consider whether federal immunity statutes must offer transactional protection.[32] The proponents of section 201, however, apparently attempted to extend the *Murphy* rationale to authorize the enactment of a federal statute affording only use and fruits protection.[33] Since this extension was obviously unwarranted, the instant court was clearly justified in invalidating section 201[34] solely on the basis of the *Counselman* standard.

Even if the transactional immunity standard had been met in section 201, there remains some question whether immunity statutes in

29. Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79-80 (1965).

30. *See* materials cited note 16 *supra.*

31. *See, e.g.*, H.R. REP. No. 1188, 91st Cong., 2d Sess. 41 (1970).

32. The *Murphy* Court was concerned because the state government would be able to immunize a witness from federal prosecution. The Court, therefore, carved an exception in that specific instance. The proponents of § 201, however, have interpreted *Murphy* to mean that the federal government is not required to extend a witness immunity from state prosecution. Since the *Murphy* exception applies only unilaterally, § 201 is unconstitutional. *See* text accompanying note 15 *supra.*

33. A recent case has held to the contrary. Stewart v. United States, 9 CRIM. L. REP. 2021 (9th Cir., Mar. 29, 1971). The court relied exclusively upon the interpretation of *Murphy* promulgated by proponents of § 201 without considering the fundamental distinction that the statute involved in *Murphy* was a state statute, thereby restricting the *Murphy* Court's holding because of sensitivity to federalism: "It appears that *Murphy* has decided the issue here both with respect to the scope of *Counselman* and also with respect to the extent of the requirements of the Fifth Amendment . . . ." 9 CRIM. L. REP. at 2021.

34. Prior to the instant decision, various federal administrative agencies had voiced strong opposition to § 201 for failing to provide transactional immunity and, therefore, interfering with their investigative functions. Objection had also been raised that personalized immunity statutes serve their purposes better than a single uniform one. *See, e.g., Hearings on H.R. 11157 & 12041 Before Subcomm. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969).

general are desirable. Under the *Counselman* standard, for example, a state interrogating officer could injudiciously foreclose all future federal prosecution of a witness for the specific offense to which his compelled testimony relates. Moreover, once the witness has taken the stand under a grant of immunity, the immunizing body must cautiously frame its questions to avoid eliciting unexpected testimony to extraneous crimes which might entitle the witness to a blanket "gift" of immunity. The most inequitable effects of immunity statutes, however, may fall upon the witness. Although a witness cannot be judicially prosecuted after testifying under a grant of immunity, he may be "convicted" in public opinion, losing employment and other vital benefits incidental to societal favor. While a certain degree of guilt would be attached by public suspicion even if the witness pleaded the fifth amendment, perhaps the guilt from forced confession results in harsher tangential consequences. If so, it appears that the witness should be permitted to elect to testify under immunity or to reject the grant and remain vulnerable, since he would otherwise be "convicted" in the public mind without due process and since the Constitution extends him the privilege against self-incrimination.

Constitutional Law—Search and Seizure—AFDC Caseworker's Visit to Home of Nonconseuting Welfare Recipieut Not Prohihited by Fourth Amendmeut

The New York City Department of Social Services initiated proceedings to terminate plaintiff's Aid for Families with Dependent Children (AFDC) benefits because she refused to allow a caseworker to visit her home.[1] Plaintiff thereupon instituted a class action[2] seeking

1. Plaintiff had submitted to a home visit as a prerequisite to determining AFDC eligibility and had permitted numerous follow-up visits. Although plaintiff refused to allow further visits, she offered to meet with the caseworker at any other place and provide whatever information was required. The Department of Social Services thereupon advised plaintiff that a quarterly home visit was mandatory if aid was to continue. Subsequently, a hearing was held and the reviewing officer determined that plaintiff's refusal to allow the visit was sufficient cause to terminate assistance. Wyman v. James, 400 U.S. 309, 322 n.9 (1971).

The AFDC program is financed largely by the federal government on a matching fund basis. Congress, the Department of Health, Education and Welfare, the New York State Legislature, and the New York City Department of Social Services all promulgate regulations affecting New York City AFDC recipients. For discussions of pertinent AFDC regulations see 23 VAND. L. REV. 1390, 1391-92 (1970), and 79 YALE L.J. 746 (1970).

2. Plaintiff brought suit under the Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1964),

declaratory and injunctive relief, contending that the Department's policy[3] of mandatory home visits violates both the federal constitution and HEW regulations.[4] Plaintiff argued that the fourth amendment bans all administrative searches of an individual's home unless the occupant's consent or a search warrant is first obtained. Defendants, the New York State and City Departments of Social Services, urged that since the caseworker's visit is primarily rehabilitative in purpose, it is not a search. In the alternative, defendant claimed that because of the essential role of the home visit in the proper administration of the AFDC program, it is not the kind of unreasonable intrusion proscribed by the fourth amendment, even if it is characterized as a search. The three-judge district court upheld plaintiff's constitutional claim.[5] On appeal to the United States Supreme Court, *held*, reversed. Caseworker visits to homes of nonconsenting welfare recipients that are conducted in a reasonable manner and are not for the purpose of criminal investigation, and that, if refused, result only in denial of AFDC assistance, are not prohibited by the fourth amendment. *Wyman v. James*, 400 U.S. 309 (1971).

In recent years, the Supreme Court has shown increasing willingness to recognize in varying contexts a constitutional right of privacy. In the landmark case of *Griswold v. Connecticut*,[6] the Court held that the marital relationship is safeguarded by the right to privacy. Although not specifically guaranteed by the Constitution, the Court found that the right emanates from the penumbra of the first, third, fourth, fifth, and ninth amendments. The Court also has held that the privacy of an individual's home is entitled to protection against

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in behalf of her son and all other AFDC recipients similarly situated. She also sought an injunction prohibiting the Department from terminating AFDC payments.

3. N.Y. SOC. WELFARE LAW § 134 (McKinney 1966) requires that "[t]he public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department or required by the circumstances of the case . . . ." 18 STATE OF NEW YORK, CODES, RULES, & REGULATIONS §§ 351.10, .21 (1962) requires that the caseworker visit the home of AFDC recipients. DEPARTMENT OF SOCIAL SERVICES, POLICIES GOVERNING THE ADMINISTRATION OF PUBLIC ASSISTANCE § 175 (1963) implements the statute and code by requiring "[m]andatory visits . . . at least once every three months . . . ."

4. Plaintiff argued that HEW regulations prohibiting home visits without consent are binding upon the states. *See* note 30 *infra*.

5. James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969). The majority, finding that the Department's scheme violated the fourth amendment's prohibition of unreasonable search and seizures, declared the statute unconstitutional, and enjoined the Department from terminating plaintiff's AFDC payments. The dissenting opinion argued that there was no search within the meaning of the fourth amendment. *Id.* at 946 (McLean, J., dissenting).

6. 381 U.S. 479 (1965).

unwanted mail,[7] door-to-door salesmen,[8] and electronic surveillance.[9] The Court often has recognized that the fourth amendment's prohibition of unreasonable searches and seizures is of central importance to the right of privacy.[10] Although this constitutional safeguard traditionally has been invoked to protect criminal defendants from overzealous law enforcement officers,[11] it is debatable whether the amendment had its origin in criminal or civil law.[12] In any event, the amendment's applicability to searches by administrative officials was not tested for almost a century after its enactment.[13] Moreover, for many years the Supreme Court seemed content to avoid the question.[14] The Court

7. Rowan v. United States Post Office Dep't, 397 U.S. 728, 735-36 (1970) (recipient's first amendment right of privacy outweighs sender's freedom of speech and press).

8. Breard v. Alexandria, 341 U.S. 622, 626-27, 632 (1951); *cf.* Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (dictum that homeowner has right to prevent distribution of unwanted handbills, despite unconstitutionality of statute in question).

9. *E.g.*, Silverman v. United States, 365 U.S. 505, 512 (1961).

10. *E.g.*, Silverman v. United States, 365 U.S. 505, 511-12 (1961) (eavesdropping violates fourth amendment right of privacy); Olmstead v. United States, 277 U.S. 438, 473-74 (1928) (Brandeis, J., dissenting) (wiretapping as invasion of right of privacy); Boyd v. United States, 116 U.S. 616, 626-30 (1886) (search and seizure violates fourth amendment right of privacy); Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253, 260-65 (1966).

11. *E.g.*, Chambers v. Maroney, 399 U.S. 42 (1970), *noted in* 23 VAND. L. REV. 1370 (1970); Gouled v. United States, 255 U.S. 298 (1921); Boyd v. United States, 116 U.S. 616 (1886). *See generally* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 49-61, 118-43 (1966); Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, in 55 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 106-43 (1937).

12. This ambiguity stems from conflicting interpretations of the prerevolutionary "writs of assistance," frequently utilized by the Crown. It is unclear whether these writs are civil or criminal in origin. There is no doubt that the fourth amendment's authors were primarily concerned with the writ. A. CORNELIUS, THE LAW OF SEARCH AND SEIZURE § 3 (2d ed. 1930); J. LANDYNSKI, *supra* note 11, at 30-48; Lasson, *supra* note 11, at 51-78. The writ of assistance was used to combat the colonists' penchant for smuggling to avoid unpopular duties. The writ conferred general authority to search for violations of the law, and resulted in a fine and the forfeiture of any smuggled goods unearthed. Although during that period forfeiture was considered a civil remedy, it would probably be considered penal today. Comment, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 ALBANY L. REV. 155, 156-57 (1967). From this uncertainty flow strikingly diverse opinions regarding the purpose of the amendment. *Compare In re* Strouse, 23 F. Cas. 261 (No. 13,548) (D. Nev. 1871) ("the fourth amendment . . . is applicable to criminal cases only"), *with* District of Columbia v. Little, 178 F.2d 13, 19 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950) ("in none of [the opinions interpreting the fourth amendment] is there the slightest intimation that the right to privacy protected by the Fourth Amendment is limited to persons or things involved in suspected crime").

13. The applicability of the amendment to administrative proceedings was first tested in 2 IRS cases. *In re* Meador, 16 F. Cas. 1294, 1298-99 (No. 9375) (N.D. Ga. 1869) (summons issued by supervisor of IRS for production of business records not governed by fourth amendment); *In re* Strouse, 23 F. Cas. 261, 262 (No. 13,548) (D. Nev. 1871) (IRS examination of business records not prohibited by the fourth amendment).

14. The issue was first raised in the Supreme Court in District of Columbia v. Little, 339 U.S.

eventually addressed the issue in *Frank v. Maryland*[15] and upheld a conviction for refusing to grant a health department inspector access to a home. The Court held that the fourth amendment's protection extends only to searches for evidence to be used in a criminal prosecution.[16] Less than ten years later, however, the Court, in *Camara v. Municipal Court*,[17] reversed a conviction for refusing to submit to a routine home inspection by the city health department. The Court, explaining that a search without a warrant is unreasonable in all but a few carefully circumscribed situations,[18] held that a search of a private dwelling by an administrative official falls within the fourth amendment's prohibition, unless consented to or supported by a warrant based on probable cause.[19] In a companion case, *See v. City of Seattle*,[20] the Court extended its newly formulated administrative search doctrine to business establishments by overturning a defendant's conviction for refusing to grant a fire inspector access to his warehouse. The *See* Court interpreted *Camara* as holding that any warrantless search of a private dwelling is presumptively unreasonable.[21] Notwithstanding these precedents, many

1 (1950). It has been said that the Court sidestepped the constitutional question with tortured statutory interpretation. J. LANDYNSKI, *supra* note 11, at 247-48.

15. 359 U.S. 360 (1959).

16. The reasoning of the majority was bitterly attacked by the 4 dissenters in an opinion by Mr. Justice Douglas. 359 U.S. at 374. Less than one month after the decision, the Court noted probable jurisdiction in the similar case of Ohio *ex rel* Eaton v. Price, 360 U.S. 246 (1959). Several factors attending the Court's decision to take such a similar case so soon after *Frank* caused one observer to speculate that the 4 justices who voted to consider the case did so to embarrass the majority. *See* J. LANDYNSKI, *supra* note 11, at 253-54. The justices noting jurisdiction were the dissenters in *Frank*, and they knew that Mr. Justice Stewart, a member of the majority, would recuse himself from consideration of the Ohio case since his father was on the court that decided the case below. The 4 justices voting against noting jurisdiction wrote strong dissenting opinions, a highly irregular practice. Since Mr. Justice Stewart recused himself, the defendant's conviction was later sustained in a one sentence per curiam opinion by an evenly divided Court. Ohio *ex rel* Eaton v. Price, 364 U.S. 263 (1960).

17. 387 U.S. 523 (1967). The 4 dissenters in *Frank*, Justices Douglas, Black, and Brennan and Chief Justice Warren, were joined by Justices White and Fortas to become the majority in *Camara*.

18. A warrantless search is reasonable only if incident to a valid arrest (Weeks v. United States, 232 U.S. 383 (1914)) or if there is probable cause to suspect that an automobile containing contraband might be removed (Carrol v. United States, 267 U.S. 132 (1925)). *See* J. LANDYNSKI, *supra* note 11, at 87-117.

19. 387 U.S. at 531. The Court indicated that "[t]he basic purpose of [the fourth amendment] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Id.* at 528. In addition, the Court stated "[i]t is surely anomalous to say that the invididual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Id.* at 530.

20. 387 U.S. 541 (1967).

21. *Id.* at 543. The *Camara* and *See* decisions were the subject of much discussion. *See, e.g.*, Comment, *supra* note 12; 3 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 209 (1967); 52 MINN. L. REV.

states have continued to require visitation by caseworkers to homes of welfare recipients as a condition to AFDC assistance even though the visits are neither consented to nor supported by a valid search warrant.[22] In some states, moreover, the caseworker is under a statutory duty to report criminal violations detected during the visit.[23] Although compulsory home visits to welfare recipients have been challenged on other grounds,[24] no court has squarely faced the underlying constitutional question.

The instant Court first acknowledged that, with few exceptions, searches are prohibited by the fourth amendment unless consented to or authorized by a valid warrant. The Court refused, however, to characterize the caseworker's home visit as a "search" within the meaning of that amendment. Although entering a welfare recipient's home has an admittedly investigative as well as rehabilitative purpose, the Court found the rehabilitative purpose to be of paramount significance.[25] The conclusive factor in the Court's reluctance to term the caseworker's visit a search was the finding that no criminal sanction threatened the welfare recipient who refused a home visit.[26] The Court further reasoned that even if the caseworker's intrusion were described as a search, the procedure does not possess the character of unreasonableness proscribed by the fourth amendment. The Court found instead that the visits were not only conducted in a reasonable manner, but also furthered legitimate state interests.[27] Concluding that the challenged visitation program threatened the plaintiff with neither an

761 (1968); 79 YALE L.J. 746 (1970). Much of the commentary assumed the fourth amendment was applicable to administrative searches and concentrated on the lower probable cause standard for issuing administrative warrants promulgated in *Camara*. 387 U.S. at 533-40.

22. *See, e.g.*, ARK. STAT. ANN. § 83-131 (1960); COLO. REV. STAT. ANN § 110-9-7 (Supp. 1969); ILL. ANN. STAT. ch. 23, § 4-7 (Smith-Hurd Supp. 1970); IND. ANN. STAT. § 52-1243 (1964); MISS. CODE ANN. § 7177 (1952); N.M. STAT. ANN. § 13-1-13 (1968); S.D. COMPILED LAWS ANN. § 28-7-7 (1967); TENN. CODE ANN. § 14-309 (1956); WIS. STAT. ANN. § 49.19(2) (1957).

23. *See* note 36 *infra*; *cf.* MISS. CODE ANN. § 7174(i) (Supp. 1970).

24. *E.g.*, Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (state cannot condition receipt of benefits on submitting to midnight raids).

25. The majority bolstered its finding that the purpose of the visit was primarily rehabilitative by quoting extensively from the Social Security Act, subch. IV, pt. A, 42 U.S.C. §§ 601-09 (1964), *as amended* 42 U.S.C. §§ 601-10 (Supp. V, 1970) (authorizing the AFDC program). 400 U.S. at 315-16. The statute emphasizes that the focus of recipient-contact should be on rehabilitation rather than investigation.

26. The Court indicated that "[i]f consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." 400 U.S. at 317-18.

27. The Court found the visits were helpful in protecting children from abuse, preventing fraud, and rehabilitating the recipient.

unwarranted invasion of personal privacy nor the infringement of any right protected by the fourth amendment, the Court upheld the termination of plaintiff's AFDC benefits based on her refusal to permit the caseworker to enter her home.[28] Mr. Justice Douglas, in his dissenting opinion,[29] argued that the fourth amendment affords protection against all governmental intrusions, and, by forcing welfare recipients to choose between consenting to the search and forfeiting benefits, the state was conditioning receipt of its largess upon the surrender of a constitutional right. Mr. Justice Marshall, dissenting, concluded that since the federal statutory provisions were dispositive of the issue, it was unnecessary to decide the case on constitutional grounds.[30] He argued, moreover, that the majority had not only ignored *Camara's* prohibition of warrantless administrative searches, but also had created a special exception to fourth amendment protection that will be felt most severely by the poor.[31]

The instant decision severely curtails fourth amendment protection against administrative searches and seizures. The Court's refusal to characterize the caseworker's visit as a search in effect limits the amendment's proscription to intrusions that are incident to criminal proceedings.[32] The frequently proferred view that *Camara* brought warrantless administrative searches within the amendment's scope[33] has proved erroneous. Although the Court did not satisfactorily define the class of permissible intrusions, both the reasoning and language of the majority opinion indicate that this newly created exception to fourth amendment protection may be broad. The Court concluded, for example, that *Camara* was inapplicable to the instant case because no criminal penalty attaches to a welfare recipient's refusal to permit a

28. Mr. Justice White, the author of the majority opinions in *Camara* and *See*, concurred in the result but disagreed with the Court's conclusion that the home visit is not a search. 400 U.S. at 326. Mr. Justice White evidently would have reversed on the basis that the caseworker's visit constitutes a reasonable search.

29. 400 U.S. at 326.

30. "The Federal Handbook of Public Assistance Administration provides: 'The [state welfare] agency especially guards against violations of legal rights and common decencies in such areas as entering a home by force, *or without permission*, or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours. . . .'" *Id.* at 346.

31. Mr. Justice Brennan joined in Mr. Justice Marshall's dissent.

32. Probably the most significant factor in the instant decision is the change in Court personnel since *Camara*. The 6-man majority in *Camara* was diminished by the retirement of Chief Justice Warren and the resignation of Mr. Justice Fortas. They were replaced by Chief Justice Burger and Mr. Justice Blackmun, both members of the new majority. Mr. Justice White switched sides. *See* note 28 *supra*.

33. *See, e.g.*, materials cited note 21 *supra*.

home visit. From this reasoning, it would seem to follow that any governmental intrusion not enforced by criminal sanctions falls outside fourth amendment protection.[34] It also is arguable that *Camara* has been overruled and *Frank* reinstated,[35] since the Court expressly recognized that a caseworker is under a statutory duty to report criminal violations detected during the home visit.[36] If this interpretation is correct, few, if any, administrative searches will be barred by the fourth amendment. The Court's alternative rationale also poses troublesome questions. Apparently, the Court concludes that an investigative entry by an administrative official, at least to homes of welfare recipients, is a reasonable search, and, therefore, does not require a warrant.[37] The

34. The validity of the Court's rationale becomes questionable when applied to criminal law. The Court holds the search is outside the fourth amendment's scope since refusing the warrantless search results in no criminal penalty. This *ratio decidendi* is inapplicable to the amendment's protection in the criminal field since the very purpose of the fourth amendment is to insure an individual's right to refuse to submit to a warrantless search for criminal evidence without suffering any consequences. *See generally* Lasson, *supra* note 11, at 107-24. Moreover, the Court's formulation provides a simple means of reinstating administrative searches. Since *Camara* is distinguished as applying only when a criminal penalty attaches to an individual's refusal to allow a search, a statute with no criminal sanctions would avoid *Camara*. An ordinance of a housing authority for example could provide that if the occupant of a dwelling refuses entry to an inspector, the building would be assessed with the costs of obtaining a court order granting the inspector power to enter, as well as all expenses for remedying any defects. Compelled rehabilitation of a dwelling is easier to justify than the "rehabilitation" proposed for plaintiff because a building code violation could threaten the lives of many people in the area. Under the rationale of the instant decision, the fourth amendment offers no protection against the hypothetical housing authority ordinance since it is not enforced by a criminal sanction.

35. The Court distinguishes *Camara* by noting that no criminal penalty attaches to a welfare recipient's refusal to submit to a home visit. It is obvious, however, that if the visit is conducted, and the caseworker observes and reports a violation of the law, this information could be the basis of a subsequent criminal prosecution. Apparently the instant Court would uphold the conviction of a welfare recipient on the basis of evidence found in a caseworker's home visit against a fourth amendment challenge. Since *Frank* upheld a defendant's conviction in connection with an administrative search, it would appear that the reasoning of that case has been resurrected.

36. N.Y. SOC. WELFARE LAW § 145 (McKinney 1966) provides in part: "Whenever a public welfare official has reason to believe that any person has violated any provision of this section, he shall refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official." This section makes obtaining AFDC by fraud, or failing to report the receipt of funds from any other source, a misdemeanor unless governed under other sections of the penal code. The N.Y. PENAL LAW § 175.35 (McKinney 1967) classifies as a felony the filing of a statement, known to be false, to mislead a public official. An AFDC recipient, who made false statements in an application for assistance, could probably be convicted of a felony under this law. *Cf.* People v. Licausi, 23 Misc. 2d 75, 200 N.Y.S.2d 582 (Suffolk County Ct. 1961) (conviction of a felony under § 175.35 for fraud in obtaining workmen's compensation upheld despite another law providing that obtaining workmen's compensation by fraud is a misdemeanor).

37. Mr. Justice White would apparently support this view. *See* note 28 *supra*. The Court considered its statement in *Camara* that a warrantless search is unreasonable except in carefully defined areas, but only in deciding whether or not the visit was a search. 400 U.S. at 317. The Court, however, failed to consider this statement when it discussed whether the search was reasonable, and failed to presume the warrantless search unreasonable as required by *See*.

majority found the instant search reasonable in light of the balance struck between the individual's interest in preserving the privacy of her home and the state's supposedly paramount interests in preventing child abuse, rehabilitating the recipient, and determining eligibility. It is submitted that this kind of ad hoc evaluation of the circumstances surrounding each governmental search, in order to measure the reasonableness required by the fourth amendment, eviscerates the absolute protection against administrative intrusions that many thought *Camara* guaranteed.[38] Moreover, the governmental interests relied on by the Court in characterizing compulsory home visits as reasonable intrusions suggest that states will find little difficulty in justifying warrantless searches. The Court, for example, places its imprimatur on the state's need to investigate the possibility of child abuse. If based on the premise that welfare recipients are more likely than affluent parents to mistreat children, the Court's approach indicates a class concept inconsistent with the tenets of American democracy.[39] If, on the other hand, the state has a broad-based right to inspect for child abuse, no home is safe from governmental intrusion. Clearly, the power to invade any family's privacy without a search warrant or the occupant's consent has great potential for abuse and oppression. It is also difficult to accept the majority's conclusion that the home visits are reasonable because of the state's need to rehabilitate the welfare recipient. To hold that the state has a right to foist rehabilitation upon an impoverished person despite his objection to ministrations in his home is blatantly paternalistic.[40] Additionally, the Court gave little consideration to the right of privacy that exists apart from the fourth amendment.[41] In light of the Court's recent decisions imparting broad constitutional dimensions to this right,[42] the instant holding appears extremely

38. *See* materials cited note 21 *supra*.

39. For example the Declaration of Independence states: "We hold these truths to be self-evident, that all men are created equal . . . ." *See also* 400 U.S. at 342 (Marshall & Brennan, JJ., dissenting).

40. *Id.* at 343. The Court's emphasis on the state's interest in preventing fraud is equally indefensible. In other forms of governmental subsidy, farmers and airlines, for example, the possible penal consequences of fraud are considered a sufficient preventive device. With AFDC, however, $500 million is expended annually for policing, and the need to monitor welfare funds is considered sufficient to justify ignoring an individual's right to be free from governmental intrusion. *Id.* at 326-35 (Douglas, J., dissenting); Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425, 437-38.

41. It is possible to view the section of the Court's opinion concerning the reasonableness of the search as a discussion of the non-fourth amendment aspects of the right of privacy. It is not clear, however, whether this was the Court's purpose.

42. *See* notes 7-10 *supra*.

regressive. Equally objectionable is the Court's approval of the state's practice of conditioning welfare assistance upon the recipient's surrender of the right to be free from governmental intrusion.[43] Allowing the state to impose unconstitutional conditions upon the receipt of its largess contravenes all established precedent.[44] It is unfortunate that the Court has embarked upon an interpretation of the fourth amendment that will allow states to fashion a variety of administrative invasions of individual privacy outside the amendment's proscription. It is submitted that this construction of the fourth amendment finds justification neither in logic nor history, and more importantly, leaves every private residence vulnerable to unwanted and unwarranted bureaucratic intrusions.

Consumer Protection Law—Standing—United States Has Standing To Seek Injuuction Against Practice of Ohtaiuing Default Judgments Through False Affidavits Certifying Service of Process

The United States sought to enjoin[1] defendant, an "easy credit"

43. The instant case also is indicative of an unfortunate trend in the Court's treatment of public welfare. In a series of decisions under Chief Justice Warren, the Supreme Court sharply curtailed the freedom of states to regulate welfare. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (requiring hearing prior to termination of benefits); Shapiro v. Thompson, 394 U.S. 618 (1969) (prohibiting durational residency requirements for receipt of welfare); King v. Smith, 392 U.S. 309 (1968) (invalidating "substitute father" regulation). The Court under Chief Justice Burger apparently is reversing this trend. In Dandridge v. Williams, 397 U.S. 471 (1970), for example, the Court upheld the right of states to impose maximum grants for AFDC despite contrary holdings by 4 district courts. *See* 23 VAND. L. REV. 1390, 1394 & n.30 (1970). Coupled with *Dandridge*, the instant decision may indicate a permanent departure in the Supreme Court's attitude toward public welfare. *See id.* at 1397.

44. 400 U.S. at 326-28 (Douglas, J., dissenting); *id.* at 344-46 (Marshall & Brennan, JJ., dissenting). *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Verner, 374 U.S. 398, 404, 406 (1963); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1599-602 (1960). An innuendo in the majority's opinion suggests that plaintiff's constitutional claim is tenuous because she voluntarily receives welfare. This implication has ominous overtones since it generally has been conceded in recent years that a state cannot rely on the right-privilege distinction to mistreat welfare recipients. *See* Goldberg v. Kelly, *supra*; Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965); Reich, *The New Property*, 73 YALE L.J. 733, 739-40 (1964).

1. Plaintiff also prayed for invalidation of the prior default judgments unlawfully obtained by defendant, an accounting for sums realized upon these judgments, written notice of the judgment in the instant case to each alleged victim of an unlawful judgment, and restitution and compensatory or punitive damages, or both. Further, plaintiff sought costs and attorney's fees to any judgment debtor who establishes a right to relief within 120 days after receiving the written notice. United

direct sales retailer,[2] from continuing an allegedly longstanding and systematic practice[3] of obtaining default judgments through false affidavits certifying service of process. "Sewer service,"[4] as the practice is called, consists of the deliberate non-service of summonses and complaints on consumer debtors[5] by creditors, coupled with the falsification of affidavits of service.[6] These false affidavits are then used to obtain default judgments against the debtors when they fail to appear or file timely answers to the undelivered summonses or complaints. The default judgments are later enforced by garnishment of the debtors' wages or other methods.[7] The United States contended that the defendant's sewer service practices created substantial burdens on interstate commerce and resulted in widespread deprivation of property through state action without due process of law.[8] Defendant moved to

States v. Brand Jewelers, 70 Civ. No. 179, at 6 (S.D.N.Y. Oct. 8, 1970). For a discussion of *Brand Jewelers* see 39 U.S.L.W. 2219.

2. In addition to Brand Jewelers, Inc., its president, and its attorney, other defendants were the "process serving defendants:" two corporate process serving agencies, notaries public who certified the affidavits of service, and individuals employed in the physical business of serving process.

3. Brand Jewelers, Inc. obtained default judgments against more than 90% of the defendants named in the thousands of summonses and complaints it filed each year claiming damages for failure to meet installment payments. 70 Civ. No. 179, at 4.

4. A 1965 study conducted by the Congress of Racial Equality revealed that more than 97% of "collection" actions brought by several Harlem merchants ended in default judgments, whereas only 73.5% of cases brought by Macy's department store in the same time period ended in default judgments. *Installment Sales: Plight of the Low-Income Buyer*, 2 COLUM. J. L. & SOC. PROBS. 1, 11 (1966). The same CORE investigation found that 12 corporate plaintiffs in New York County Civil Court brought approximately 30,000 cases in one year; of the 28,000 that went to judgment, only 500 did *not* end in default judgment. *Abuse of Process: Sewer Service*, 3 COLUM. J.L. & SOC. PROBS. 17, 18 (1967) [hereinafter cited as *Sewer Service*]. The fact that sewer service is responsible for the extraordinary frequency of default judgments has been shown by several independent studies in which workers attempted to call on all the addresses at which typical process servers purported to have made service on a given day. They found the task physically impossible. Other studies have shown that a large percentage of the addresses at which process servers claim to have located and served defendants do not exist or have not been the residences of the defendants for a considerable time before the process was allegedly served. *See id.* at 18-19.

5. Brand Jewelers sells its merchandise primarily on a door-to-door basis in slum and ghetto areas. The purchasers are almost invariably "poor and are members of economically and culturally deprived minority groups." 70 Civ. No. 179, at 3.

6. The affidavits, alleged to be fraudulent certifications that legal process has been served, are notarized by New York officials before being introduced into court.

7. 70 Civ. No. 179, at 4. For a discussion of enforcement methods see Note, *Enforcement of Judgments*, 61 L. SOC. GAZ. 663 (1964).

8. Plaintiff's complete allegations were that the practice of sewer service by defendant "[v]iolate[s] the Constitution and laws of the United States, impede[s] and burden[s] the United States in the exercise of its powers and the discharge of its responsibilities, and create[s] a public nuisance of direct concern to the United States, in that (a) many victims of default judgments are deprived of property without due process of law; (b) affidavits deny that defendants are in military

dismiss for lack of standing,[9] alleging that its actions were not direct physical burdens on interstate commerce and that to grant the government standing would provide it with an overwhelming and awesome power.[10] The United States District Court for the Southern District of New York, *held*, motion denied. The United States has standing to seek an injunction against the practice of obtaining default judgments through false affidavits certifying service of process. *United States v. Brand Jewelers*, 70 Civ. No. 179 (S.D.N.Y., Oct. 8, 1970).

Although the question whether a litigant has proper standing to maintain a lawsuit has long plagued the courts,[11] it was not until recently that the Supreme Court, in *Baker v. Carr*,[12] enunciated the essence of the question of standing. The majority held that the determinative factor was whether the litigant had "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[13] Subsequently, in *Flast v. Cohen*,[14] the Court refined this general definition to insure that the question of standing would be answered with emphasis on the real interest of the party making the assertion rather than with reference to the justiciability of the issues presented.[15] Although no case law has developed concerning the standing of the

service without knowledge of the facts, violating the Soldiers' and Sailors' Relief Act, 50 U.S.C. App. § 520; (c) garnishments of wages and other practices of defendants impose a substantial burden on interstate commerce and hinder the proper operation of federal bankruptcy law; (d) federal revenue collections are jeopardize[d] because false default judgments are used to support improper bad debt deductions; (e) the default judgments are entitled to full faith and credit in states other than New York; (f) notices of default are sent through the United States mails; (g) defendants' practices undermine public confidence in the courts and in the rule of law . . . ; (h) these practices arise from and in turn exacerbate urgent contemporary problems of poverty, urban disorder and race relations—problems that the United States is actively seeking to alleviate and resolve through programs involving the expenditure of federal funds and by other means; and (i) defendants' practices jeopardize the purposes for which the Constitution of the United States was ordained and established . . . as set forth in the preamble . . . ." 70 Civ. No. 179, at 5-6.

9. Defendant moved to dismiss under Fed. R. Civ. P. 12(b).

10. Defendant also argued that plaintiff's allegations should not be presumed to be true for the purpose of ruling on the motion to dismiss for lack of standing.

11. Some of the classic cases deciding standing issues are Tileston v. Ullman, 318 U.S. 44 (1943) (standing may not be gained by asserting the rights of another); Frothingham v. Mellon, 262 U.S. 447 (1923) (taxpayer has no standing to challenge utilization of tax revenues); Truax v. Raich, 239 U.S. 33 (1915) (employee permitted to assert the rights of his employer).

12. 369 U.S. 186 (1962).

13. *Id.* at 204.

14. 392 U.S. 83 (1968).

15. *Id.* at 99-100.

United States to enjoin the practice of sewer service,[16] there is ample precedent upholding the standing of the government to utilize the courts in attempts to remove substantial burdens on interstate commerce.[17] *In re Debs*[18] is the fountainhead of judicial authority on this point. In *Debs*, the Supreme Court upheld an injunction against the continuation of a railroad strike and boycott on the theory that the United States had standing to seek injunctive relief when interstate commerce and the carriage of the mails were forcibly obstructed.[19] The majority reasoned that since the Constitution expressly grants the national government control of interstate commerce,[20] the government can exercise its power to prevent unlawful interference with interstate commerce by "appeal in an orderly way to the courts for a judicial determination,"[21] just as it can proscribe criminal activity in the same area. The broad mandate of the *Debs* doctrine was expanded in an entirely different context in *United States v. City of Jackson*,[22] in which the court held that the Attorney General of the United States had standing to sue, without statutory authorization, to remove the burdens on commerce that result from racial segregation of interstate travel facilities.[23] In rejecting the idea that some forcible obstruction of commerce was necessary, the court implied that the principles of *Debs* did not rest on the existence of a physical obstruction, but emanated from the fundamental power of the federal government to protect the public in areas of national concern.[24] This same principle has led a number of courts to recognize that there is no justifiable reason for distinguishing between the Government's authority

16. The instant case was predicted, however, by an article advocating federal action as a means of rectifying the evils of sewer service. Baer, *The Magnitude of Consumer Fraud and a Summary of Some Counter Weapons*, 4 N. ENG. L. REV. 97, 100-04 (1969).

17. *E.g.*, United States v. City of Jackson, 318 F.2d 1, *rehearing denied*, 320 F.2d 870 (5th Cir. 1963); United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962); United States v. United States Klans, Knights of Ku Klux Klan, Inc., 194 F. Supp. 897 (M.D. Ala. 1961).

18. 158 U.S. 564 (1895).

19. *Id.* at 577.

20. U.S. CONST. art. 1, § 8.

21. 158 U.S. at 582.

22. 318 F.2d 1, *rehearing denied*, 320 F.2d 870 (5th Cir. 1963), *noted in* 32 GEO. WASH. L. REV. 375 (1964), *and* 77 HARV. L. REV. 1157 (1964).

23. Other decisions that have applied the commerce theory to racial segregation are United States v. City of Shreveport, 210 F. Supp. 36 (W.D. La. 1962), and United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962). For a thorough treatment of civil rights in transportation and the standing of the Government to sue see Dixon, *Civil Rights in Transportation and the ICC*, 31 GEO. WASH. L. REV. 198 (1963); Pollack, *The Supreme Court and the States: Reflections on Boynton v. Virginia*, 49 CALIF. L. REV. 15 (1961).

24. 318 F.2d at 15; *see* United States v. American Bell Tel. Co., 128 U.S. 315, 367-68 (1888); United States v. San Jacinto Tin Co., 125 U.S. 273, 285-87 (1888).

to protect against burdens on interstate commerce and its authority to protect against widespread deprivation of property without due process of law.[25] The *Debs* doctrine also has been relied upon to uphold the standing of the United States to seek injunctions against improper changes in union contracts that threaten to obstruct interstate commerce,[26] collection from servicemen of taxes barred by federal law,[27] and obstruction of navigable waters.[28]

For the purpose of deciding the standing issue, the instant court assumed that the plaintiff's allegations were true. Referring to the *Jackson* decision, the court then dismissed the defendant's attempt to distinguish *Debs* on the ground that the alleged wrongs were not physical obstructions of interstate commerce. The court reasoned that the essence of *Debs* was not directness or physical force, "but an obstruction of broad impact, sufficient in its dimensions to be thought 'public' rather than 'private,' causing . . . injury of such moment as to bring fairly into play the National Government's 'powers and duties to be exercised and discharged for the general welfare . . . .'"[29] The court further found that, although the power of the Government is great, its exercise by the Attorney General is subject to judicial and congressional control. The court concluded, therefore, that the United States had standing to sue to remove large-scale burdens upon interstate commerce and denied defendant's motion. For essentially the same reasons, the court alternatively held that the Government had standing to sue to remove widespread deprivation of property resulting from state action without due process of law.

Although the favorable determination of the standing issue in the instant case seems justified, the utilization of the *Debs* doctrine to extend federal power raises potential problems. The theory of standing relied upon by the instant court, for example, would presumably sustain suits by the federal government to enjoin activities of militant political organizations, or even consumer protection groups, insofar as they constitute substantial burdens on interstate commerce. Because of this possibility, it is hoped that future courts will not expand the use of the

25. *E.g.*, United States v. City of Jackson, 318 F.2d 1, *rehearing denied*, 320 F.2d 870 (5th Cir. 1963); United States v. Lassiter, 203 F. Supp. 20 (W.D. La.), *aff'd*, 371 U.S. 10 (1962); United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962); United States v. United States Klans, Knights of Ku Klux Klan, Inc., 194 F. Supp. 897 (M.D. Ala. 1961). *Contra*, United States v. Biloxi Municipal School Dist., 219 F. Supp. 691 (S.D. Miss. 1963).

26. Florida E. Coast Ry. v. United States, 348 F.2d 682, 685 (5th Cir. 1965).

27. United States v. Arlington County, 326 F.2d 929, 936 (4th Cir. 1964).

28. Sanitary Dist. v. United States, 266 U.S. 405, 426 (1925).

29. 70 Civ. No. 179, at 17.

Debs doctrine without looking beyond the immediate determination of the substantive commerce issue and considering possible applications of the doctrine to presently unforeseen areas of concern. In determining the necessity of applying the *Debs* doctrine, courts also should consider the availability of alternative solutions to the problem that the government's suit is designed to correct. The instant court, for example, could have reviewed several possible alternative solutions to the problem of sewer service. The Federal Trade Commission (FTC) is empowered by section 5 of the Federal Trade Commission Act to enjoin "unfair or deceptive acts or practices in commerce"[30] and also has control of federal consumer credit protection.[31] Nevertheless, the language of section 5 referring to unfair acts "in commerce," rather than to acts "affecting commerce," has been construed to create a jurisdictional bar to FTC activity in most localized consumer fraud practices.[32] Furthermore, a majority of the present commissioners have stated that the FTC should not become deeply concerned with "ghetto fraud."[33] State law also fails to provide a viable alternative method of combating sewer service. New York, for example, has no comprehensive consumer protection code but relies on scattered legislative provisions to combat consumer fraud.[34] Under existing New York law, two possible means of attacking the problems of sewer service have been advanced: criminal prosecution of process servers and bar association sanctions against attorneys who are involved with the fraudulent service practices.[35] These methods, however, do not reach the origin of the problem. The process servers and attorneys are merely agents of the merchant plaintiffs, who neither expect nor desire that debtors actually be served.[36] The source of the problem is

30. 15 U.S.C. § 45 (1964).

31. *See* 15 U.S.C. §§ 1601-65 (Supp. V, 1970).

32. FTC v. Bunte Bros., 312 U.S. 349 (1941) (rejecting FTC's claim of jurisdiction over localized fraud on the ground that the local practice affected the competitive success of interstate business rivals); AMERICAN BAR ASS'N, REPORT OF THE COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 51-53 (1969); *see* Note, *Jurisdictional Fetter on the FTC*, 76 YALE L.J. 1688, 1693 (1967).

33. AMERICAN BAR ASS'N, *supra* note 32, at 50-51. Three reasons are given for this position: (1) effective action against ghetto fraud necessitates criminal sanctions beyond the powers of the FTC, and the primary offenders are fly-by-night operations unlikely to be affected by the FTC's injunctive powers; (2) local officials could handle the situation better; and (3) the FTC has no jurisdiction over localized consumer fraud practices. *Id.*

34. *E.g.*, N.Y. GEN. BUS. LAW § 349 (McKinney Supp. 1970) (deceptive practices); N.Y. PERS. PROP. LAW §§ 401-18 (McKinney Supp. 1970) (retail installment sales).

35. *Sewer Service*, *supra* note 4, at 22. Criminal action against city marshals is also suggested.

36. 70 Civ. No. 179, at 4.

similarly unaffected by proposed statutes[37] that would make it easier to challenge default judgments, since these statutes provide only symptomatic relief for those garnishees who learn of their legal rights. The City of New York, on the other hand, does have strong consumer protection legislation,[38] which authorizes the commissioner of consumer affairs to take punitive and remedial action[39] against those who use unconscionable trade practices in the collection of consumer debts and to promulgate rules designating what practices will be deemed unconscionable.[40] This sweeping mandate appears to provide a structure conducive to the creation of adequate local sanctions against the practice of sewer service. In a broader perspective, however, it must be noted that the vast majority of states and municipalities do not have comprehensive consumer protection legislation and, hence, no effective method of alleviating the distress resulting from sewer service is available at these levels. In light of the lack of effective alternatives, therefore, the decision of the instant court appears justified.

Unless the instant court's determination of the standing question is reversed, the critical issue now becomes whether the practice of sewer service constitutes a substantial burden on interstate commerce. It is the ultimate consequences of sewer service, rather than the activity itself, that will be the determinative factor in this inquiry.[41] The immediate result of sewer service is that the victim does not have the opportunity to raise any defenses to the debt that might be available to him, such as partial payment, set-off, repossession value, and especially, unconscionability of the sales contract.[42] In addition to causing

37. Some proposals, for example, have provided for postponing the entering of default judgments until the expiration of at least 7 days after the default has occurred and requiring 72 rather than 24 hours notice to persons being evicted or dispossessed. *See Sewer Service, supra* note 4, at 25.

38. City of New York, N.Y., Local Law No. 83, Dec. 29, 1969.

39. The ordinance provides for civil penalties of $500 for each offense and, in the case of repeated or persistent violations, restitution of all monies received as a result of unconscionable practices. *Id.* §§ 2203d-4.0(b), (c).

40. The ordinance defines unconscionable trade practice, in part, as "[a]ny act or practice . . . in the collection of consumer debts which unfairly takes advantage of the lack of knowledge . . . of a consumer . . . ." *Id.* § 2203d-2.0(b).

41. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949). *See generally* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

42. *See* UNIFORM COMMERCIAL CODE § 2-302 (providing for the defense of unconscionability). *See also* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (absence of meaningful choice in contract may be unconscionable); American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964) (contract held unconscionable on basis of price alone).

individual hardships, sewer service fosters feelings of distrust and persecution in those segments of the population that encounter the practice most frequently. Although some state statutes permit the reopening of default judgments when a failure of service of process and a valid defense on the merits are shown,[43] the typical victim of sewer service is unlikely to exercise this option even if it is available to him. He is generally frightened by authority, unaware of his rights, and distrustful of a system of justice that he encounters only as a defendant. Even in a situation in which the debtor has no defense on the merits, the practice of sewer service deprives him of any opportunity to enter into a pretrial settlement with the creditor and avoid interest charges, statutory costs, marshals' fees, and loss of credit standing. More importantly, however, the effects of sewer service often include garnishment of the debtor's wages, which frequently results in loss of employment.[44] In passing the Consumer Credit Protection Act of 1968, Congress acknowledged that wage garnishment proceedings impose burdens on interstate commerce.[45] For these reasons, it is submitted that the practice of sewer service constitutes a substantial burden on interstate commerce that should be prohibited by the courts. Because of the lack of effective state and local controls, moreover, it is appropriate for the federal government to seek injunctions against the practice.

Criminal Procedure—Plea Bargaining—Trial Judge's Participation in Plea Negotiations Does Not Render Plea Involnntary

Petitioner was charged with armed robbery in a state court prosecution. Following negotiations between his attorney, the

43. N.Y. CIV. PRAC. LAW § 317 (McKinney Supp. 1970). N.Y. CIV. PRAC. LAW § 5015 (McKinney 1963) provides that a judgment may be vacated on the grounds of excusable neglect, fraud, or lack of jurisdiction.

44. The Consumer Credit Protection Act of 1968 restricts the percentage of the debtor's wages that may be taken by garnishment and provides that tbe Act does not interfere with any state laws prohibiting discharge of employees for reasons of garnishment of their wages by creditors. 15 U.S.C. §§ 1673(a), 1677 (Supp. IV, 1970). The Supreme Court recently held that prejudgment garnishment, absent notice and a prior hearing, is unconstitutional. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), *noted in* 22 VAND. L. REV. 1400 (1969).

45. Congress found that "[t]he application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce." Consumer Credit Protection Act of 1968, § 301, 15 U.S.C. § 1671(a)(2) (Supp. V, 1970).

prosecutor, and the trial judge, the petitioner was offered a life sentence in exchange for a guilty plea. By entering a guilty plea,[1] he avoided a jury trial and the possible imposition of the death penalty.[2] Subsequently, petitioner sought habeas corpus relief in federal district court, alleging that his guilty plea had not been made voluntarily and, therefore, that he had been denied due process of law. Petitioner contended that his plea was coerced as a matter of law because the trial judge had participated in the plea negotiation process prior to the time when the plea was entered. The district court denied relief. On appeal to the United States Court of Appeals for the Fourth Circuit, *held*, affirmed. The participation of the trial judge in the plea bargaining process does not, as a matter of law, render a guilty plea involuntary. *Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970).

Contrary to the practice at common law,[3] the use of plea bargaining has become increasingly important to the administration of criminal justice in the United States.[4] In the typical case, the bargaining between the prosecutor and the accused results in an agreement under which reduced charges or a lighter sentence are given in return for a guilty plea.[5] Since the guilty plea represents both a confession and a

1. Petitioner entered his guilty plea and was convicted in 1957. He subsequently petitioned several times for habeas corpus relief, once alleging that his plea had been coerced by the court-appointed counsel. The Fourth Circuit dismissed the petition for failure to substantiate the general allegations of coercion. Brown v. Smyth, 271 F.2d 227 (4th Cir. 1959).

2. In Virginia the jury fixes punishment if trial is by jury. VA. CODE ANN. § 19.1-291 (1960). If the defendant is tried without a jury, the court fixes the penalty. VA. CODE ANN. § 19.1-192 (1960).

3. Guilty pleas were not permitted at common law on the theory that the adversary trial was the most trustworthy method of determining guilt or innocence. *See* 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 179 (1926) ("no one ought to be convicted of a capital crime by mere testimony"); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 650 (2d ed. 1923).

4. About 90% of all criminal cases are disposed of by guilty pleas. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 n.1 (1966). A recent survey revealed that approximately 11% of all criminal cases commenced in the federal courts go to trial. *See* PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 128, 134 (1969).

5. For an excellent description of the bargaining process see D. NEWMAN, *supra* note 4. *See also* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964). Early commentators condemned plea bargaining, expressing concern over its ethics, possible coercion of innocent defendants, and the weakening of the deterrent theory of punishment. *See* Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951); Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927). *See generally* Weintraub & Tough, *Lesser Pleas Considered*, 32 J. CRIM. L.C. & P.S. 506 (1941). More recent commentators have questioned the constitutionality of the practice on the ground that it induces defendants to waive their fifth and sixth amendment rights. *See, e.g.*, Note, *The Unconstitutionality of Plea Bargaining*,

conviction,[6] it results in a waiver of the accused's constitutional rights to protection against self-incrimination, confrontation of his accusers, and trial by jury.[7] Accordingly, when a defendant contends that his guilty plea was made involuntarily, he is entitled to every reasonable presumption against waiver.[8] In addition, his guilty plea is subject to the constitutional requirement that it be made intelligently and voluntarily.[9] In view of the well recognized possibilities for abuse,[10] the voluntariness of a defendant's waiver frequently has presented difficulties for the courts. In a line of decisions generally related to plea bargaining, the Supreme Court has consistently found that a guilty plea was made involuntarily when it was exacted by means of physical coercion, violent threats, or misleading promises.[11] These decisions, however, have provided little guidance in cases raising the more specific problem of judicial participation in the plea bargaining process. In considering this problem, several lower courts have ruled that the determination that a guilty plea was coerced is a fact question requiring an analysis of all the circumstances surrounding the plea.[12] Within this analytical framework,

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83 HARV. L. REV. 1387 (1970). Criticism also has developed because the practice results in differential sentencing. *Id.* at 1397. *But see* D. NEWMAN, *supra* note 4, at 112-31; Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 183-86 (1947).

6. Boykin v. Alabama, 395 U.S. 238, 242 (1969); Kercheval v. United States, 274 U.S. 220, 223 (1927).

7. *See* Boykin v. Alabama, 395 U.S. 238 (1969).

8. *See, e.g.*, Brookhart v. Janis, 384 U.S. 1 (1966) (right to jury trial may not be waived by the defendant's counsel when the defendant expresses a contrary intention); Carnley v. Cochran, 369 U.S. 506, 516 (1962) ("[p]resuming waiver from a silent record is impermissible"); Glasser v. United States, 315 U.S. 60, 70-71 (1942) (waiver of right to counsel must be affirmative); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waiver is "an intentional relinquishment of a known right or privilege").

9. The federal requirement as stated in FED. R. CRIM. P. 11 provides: "The court may refuse to accept a plea of guilty, and shall not accept such plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." Failure to observe this rule was held prejudicial in McCarthy v. United States, 394 U.S. 459 (1969), and was made a constitutional requirement in Boykin v. Alabama, 395 U.S. 238 (1969). Despite the *Boykin* decision, only 6 states have adopted the federal standard: CAL. PENAL CODE § 1192.5 (West Supp. 1971); MONT. REV. CODES ANN. § 95-1606(e) (1969); DEL. SUPER. CT. (CRIM.) R. 11; FLA. R. CRIM. P. 1.170; KY. R. CRIM. P. 8.08; MO. R. CRIM. P. 25.04.

10. *See* Dash, *supra* note 5.

11. *See* Machibroda v. United States, 368 U.S. 487 (1962) (promises of prosecutor gave rise to issue of coercion); Waley v. Johnston, 316 U.S. 101 (1942) (agent's threat to throw accused out window raised issue of coercion); Walker v. Johnston, 312 U.S. 275 (1941) (district attorney's threat to impose higher sentence if defendant did not plead guilty gave rise to issue of coercion).

12. *See, e.g.*, Shipe v. Sigler, 230 F. Supp. 601, 605 (D. Neb. 1964); United States v. Tateo, 214 F. Supp. 560, 565 (S.D.N.Y. 1963). The majority of courts have approved the prosecutor's participation in plea bargaining. *See, e.g.*, Brown v. Beto, 377 F.2d 950 (5th Cir. 1967) (permissible

judicial participation in plea bargaining[13] has been held coercive on at least three theories: First, the judge's powerful position creates the impression that his offer of a lighter sentence is a threat of harsher punishment if it is not accepted;[14] secondly, the judge's participation compromises his role as impartial arbiter in the criminal process;[15] thirdly, the certainty of the judge's offer of a lighter sentence may induce the defendant, whether guilty or not, to plead guilty instead of facing the hazards of a jury trial and the possibility of a more severe penalty.[16] Regardless of the confusion engendered by the established case-by-case approach to plea bargaining, few courts have been willing to abandon it and hold that judicial participation is coercive as a matter of law.[17] Although the Supreme Court has never directly considered the issue, two

for prosecutor to bargain); State v. Olbekson, 7 Ariz. App. 474, 441 P.2d 71 (1968) ("mere fact" of bargain, standing alone, does not mean plea was coerced); People v. Blevins, 222 Cal. App. 2d 801, 35 Cal. Rptr. 438 (1963), *cert. denied*, 377 U.S. 913 (1964) (prosecutor's threat to seek death penalty, when statute provides for death penalty, does not constitute coercion).

13. For a discussion of the different appellate approaches to the plea bargaining problem see United States *ex rel.* McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963). Judge Kaufman thought the petitioner should be given a hearing, even though the record contained no supporting evidence of judicial coercion of the plea. *Id.* at 309-15 (majority opinion). Judge Friendly, concurring and dissenting, agreed with Judge Kaufman that judicial participation was not coercive per se, but argued that since the voluntariness determination was a question of fact already decided by the trial judge it should receive the benefit of the "unless clearly erroneous rule" of FED. R. CIV. P. 52(a). 319 F.2d at 315-19. Judge Marshall, dissenting, seemed to take the position that participation by the trial judge is coercive per se. *Id.* at 319-24.

14. State v. Benfield, 264 N.C. 75, 140 S.E.2d 706 (1965) (judge's comment that he thought jury would convict held to be coercive).

15. United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254-55 (S.D.N.Y. 1966) ("A judge's prime responsibility is to maintain the integrity of the judicial system . . . . [N]one can seriously question that if this central figure . . . promises an accused that upon a plea of guilty a fixed sentence will follow, his commitment has an all-pervasive and compelling influence. . . ."); Rogers v. State, 136 So. 2d 331, 335 (Miss. 1962) (words or acts of a judge, whose duty it is to see that plea is voluntary, "have a much greater significance than acts or words of others"). *See also* Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082, 1089 (1967).

16. *See* Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) (judge advising defendant to confess after conviction or higher sentence would be given); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963) (during trial, judge informed defendant that if he did not plead guilty and if the jury then found him guilty, judge would impose "life-on-life" sentences); Letters v. Commonwealth, 346 Mass. 403, 193 N.E.2d 578 (1963) (judge threatened to impose consecutive life sentences unless guilty plea was entered).

17. *But see* Mesmer v. Raines, 351 P.2d 1018 (Okla. Crim. App. 1960) (court may not properly bargain with prisoner to induce guilty plea) (dictum); Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969) (holding it is never proper for judge to participate in plea bargaining process). Judicial plea bargaining has been held noncoercive, as a matter of fact, when the judge did not meaningfully participate in the bargaining or did not initiate the plea discussions. *See* United States *ex rel.* Rosa v. Follette, 395 F.2d 721 (2d Cir. 1968) (judge did not meaningfully participate: no coercion); People v. Darrah, 33 Ill. 2d 175, 210 N.E.2d 478 (1965) (judge did not initiate plea discussions: no coercion).

recent decisions have indicated that the Court will continue to analyze all the circumstances of any case in which the voluntariness of a guilty plea is questioned. In *United States v. Jackson*,[19] the Court examined the constitutionality of a federal statute authorizing a maximum penalty of death upon conviction by a jury but only life imprisonment if a guilty plea was entered. It held that the death sentence provision was unconstitutonal and the defendant's guilty plea was involuntary because the statute penalized the defendant's exercise of his right to a jury trial. Considering a similar statute in *Brady v. United States*,[20] the Court found that the defendant, having assessed all the factors against him, pleaded guilty intelligently and voluntarily. Even though the *Brady* decision contained language suggesting approval of plea bargaining,[21] the Court expressly reserved any judgment on the constitutionality of judicial participation in the process.[22] In its most recent decision dealing with the voluntariness of a guilty plea, the Court, in *North Carolina v. Alford*,[23] reaffirmed the standard traditionally applied to the plea bargaining process—whether the plea represented a voluntary and intelligent choice among the alternatives open to the defendant.[24] The American Bar Association's response to judicial plea bargaining is fundamentally different from that of the courts. Rejecting the case-by-case approach with its tendency toward conflicting decisions, the ABA standards set forth an objective test to govern the judge's relation to the plea bargaining process.[25] They permit bargaining between the prosecutor and defendant's counsel, but restrict the judge's involvement until after a tentative agreement has been reached.[26] Even then, the judge

19. 390 U.S. 570 (1968).

20. 397 U.S. 742 (1970).

21. The Court considered 4 examples of plea bargaining in the text of the opinion: "(1) The defendant, in a jurisdiction where the judge and the jury have the same range of sentencing power, . . . pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) *the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged*; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped." *Id.* at 751 (emphasis added).

22. *Id.* at 751 n.8.

23. 400 U.S. 25 (1970).

24. *Id.* at 31.

25. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.1(a) (App'd Draft 1968).

26. *Id.* §§ 3.3(a), (b). The ABA lists 6 considerations in plea bargaining. Two are administrative. The others include: (1) A guilty plea represents a willingness to accept responsibility for one's actions and therefore justifies leniency; (2) the plea will make possible alternative

is not an active participant; his function is merely to approve or disapprove the plea agreement. Only one jurisdiction, however, has approved the ABA standards.[27]

In the instant case, the court, finding that the *Brady* decision sanctioned judicial plea bargaining, concluded that the constitutional standard to be applied was whether the judge's involvement rendered the petitioner's plea involuntary. After analyzing the circumstances surrounding the plea, the court found that the petitioner's decision was made freely and intelligently. Shifting to a consideration of the ABA standards, the majority held that they do not state constitutional limitations on judicial participation in plea bargaining.[28] Moreover, the court maintained that since these standards divide plea bargaining into two steps with the judge having only a veto power over the plea agreement, their adoption would add an unnecessary circuitousness to plea bargaining and might terminate a process beneficial to the administration of criminal justice. Noting the benefit of plea bargaining to criminal defendants, the court reasoned that its prohibition or curtailment would deprive defendants of their already minimal bargaining power. The court, therefore, held that judicial participation in plea bargaining does not, as a matter of law, render the plea involuntary. The dissent argued that the court was not compelled to hold judicial intervention in plea bargaining coercive as a matter of law in order to reach the conclusion that petitioner's guilty plea was involuntary. It contended instead that the petitioner's plea was involuntary because of the fact that it was "generated by the trial judge."[29]

Although the instant court followed established authority by approving the factual analysis approach to plea bargaining, its rationale warrants criticism in two respects. First, the court erroneously relied on the *Brady* case to sanction judicial participation in plea bargaining. It is clear from the *Brady* opinion that the Supreme Court did not intend to approve judicial plea bargaining and in fact expressly reserved judgment on this question.[30] Secondly, the court appears to have erred in its statement that a prohibition of judicial involvement in plea bargaining

correctional measures; (3) the defendant has made public trial unnecessary when there are good reasons for not having a public trial; and (4) the defendant has given cooperation that will or may result in prosecution of other criminals. *Id.* §§ 1.8(a)(i)-(vi).

27. Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969).

28. Brown v. Peyton, 435 F.2d 1352, 1357 (4th Cir. 1970).

29. *Id.* at 1358. The dissent concluded that the majority was unwarranted in its reliance on *Brady* to validate judicial involvement in plea bargaining. *Id.* at 1360.

30. *See* note 22 *supra*.

would end all plea bargaining. As the majority noted, the backlog of criminal cases in the courts remains severe[31] even though 75 percent of all cases are disposed of with guilty pleas. Since the guilty plea is the administrative device that aids most in the rapid disposition of cases, the incentive to continue bargaining for guilty pleas will remain, regardless of whether the judge participates in the process. Defendants also have an interest in the perpetuation of plea bargaining since they will always want to obtain the lightest possible penalty. In this vein, the majority argued that the exclusion of the judge from plea bargaining would damage the petitioner's interest by requiring him to bargain without accurate knowledge of the judge's response to the agreement.[32] Studies have shown, however, that most judges readily accept the recommendations of the prosecutor.[33] If this is true, it should make little difference whether a defendant has full knowledge of the judge's response to the pleading agreement; in either instance the sentence imposed should be about the same. Even if the majority's argument is valid, it does not follow that judicial participation in plea bargaining must be approved. Under the ABA standards, for example, a defendant would be required to reach a plea decision without consultation with the judge. If the judge indicated that he would not accept the prosecutor's sentence recommendation, the defendant's interest in making a voluntary plea would be protected by permitting him either to alter his plea or bargain further with the prosecutor.

The instant decision also failed to recognize that judicial plea bargaining poses a serious problem for the judge himself. Permitting the judge to bargain for pleas forces him into a dual role. If a guilty plea is entered, the court is required to consider its voluntariness. When the judge has participated in the plea bargaining, he must make a factual finding on the effect of his own actions. Not only is it difficult for the trial judge to make this determination, but his decision is virtually

31. Other authorities have estimated that as many as 90% of criminal cases are disposed of by guilty pleas. *See* note 4 *supra*. As of July 1, 1969, there were 14,763 criminal cases pending in federal district courts, a 9% increase from the previous year. The backlog has increased steadily since 1961. *See* PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 128 (1969). One commentator who suggested banning plea bargaining, recommended offsetting the resulting increase in court congestion by procuring more resources for the criminal courts or dropping "victimless" crimes from the statutes. Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1411 (1970). It is doubtful that these suggestions would supply enough relief to permit abolishing the plea bargaining process.

32. 435 F.2d at 1356.

33. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967).

unreviewable, particularly when lower court records do not include an account of plea bargaining. Since the ABA standards remove the judge from the bargaining altogether, it is submitted that their adoption would effectively eliminate this problem by making the judge's position consistent with his traditional role as impartial arbiter. In sum, both on the practical and the constitutional levels, the ABA standards represent an adequate and feasible response to the controversy over the judge's role in plea bargaining. The ABA proposal strikes a balance between protection of the defendant's right to make a voluntary pleading decision and the need to preserve judicial detachment in assessing the bargaining process. It also promotes the court's administrative interest in the rapid disposition of criminal cases. It is hoped, therefore, that the courts will give further consideration to the merits of adopting these standards.

Evidence—Statements Obtained in Violation of *Miranda* Gnidelines May Be Used To Impeach Testifying Defendant's Credihility

Defendant, arrested on a charge of selling narcotics, voluntarily[1] made incriminating statements during police interrogation before being advised of his right to appointed counsel as required by *Miranda v. Arizona*.[2] Although the prosecution conceded that the statements were inadmissible as part of its case in chief, the trial court permitted their use, over objection, to contradict testimony given by the defendant on an essential element of the crime charged.[3] The jury was instructed to consider the statements in question only in passing on the defendant's credibility and not as evidence of guilt.[4] The defendant was found guilty and his conviction was subsequently affirmed by the New York Supreme

1. Defendant made no claim that his statements to the police were coerced or involuntary.

2. 384 U.S. 436 (1966).

3. The State's case depended upon the testimony of an undercover police agent that the defendant had sold heroin to him on 2 occasions. Defendant testified on direct examination that he had not sold anything to the officer on the first occasion and that on the second occasion he had sold 2 bags of baking powder, which the officer had mistaken for heroin. This contradicted defendant's prior statement to the police that he had acted as a middleman to purchase heroin from a third person for the officer on both occasions and that he had received not only $12 but also a part of the heroin as consideration for the second purchase. The content of this statement was used in the impeaching process. Harris v. New York, 91 S. Ct. 643, 644 (1971).

4. Both counsel argued the substance of the impeaching statements in their closing summations.

Court, Appellate Division and the New York Court of Appeals.[5] On certiorari to the United States Supreme Court, *held*, affirmed. When normal evidentiary standards of reliability are satisfied, voluntary statements that are inadmissible as substantive evidence because of failure to comply with *Miranda* guidelines may be used to impeach a testifying defendant's credibility. *Harris v. New York*, 91 S. Ct. 643 (1971).

Although evidence obtained in violation of a defendant's constitutional rights ordinarily may not be used to secure his conviction in a criminal proceeding,[6] a narrow exception to this general rule has become well established. In the 1954 decision of *Walder v. United States*,[7] the Supreme Court announced that evidence obtained by illegal search and seizure may be used for the purpose of impeaching a defendant's testimony on an issue unrelated to the charge pending against him.[8] The Court carefully circumscribed its holding, however, by stating that a defendant may not be deprived of his constitutional right "to deny all of the elements of the case against him" by allowing the prosecution to rebut his testimony with illegally obtained evidence.[9] Prior to the High Court's 1966 decision in *Miranda v. Arizona*[10] lower federal courts expanded the *Walder* exception to the general exclusionary

5. People v. Harris, 31 App. Div. 2d 828, 298 N.Y.S.2d 245, *aff'd*, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969).

6. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment privilege against self-incrimination); Escobedo v. Illinois, 378 U.S. 478 (1964) (sixth amendment right to counsel); Weeks v. United States, 232 U.S. 383 (1914) (fourth amendment right against unreasonable search and seizure—principle extended to states in Mapp v. Ohio, 367 U.S. 643 (1961)). The purpose of barring the use of evidence obtained in contravention of the fourth amendment, which makes no mention of the exclusion of evidence, is deterrence of unconstitutional conduct by the police. Statements violating *Miranda* standards are excluded directly by the terms of the fifth amendment. Kent, *Miranda v. Arizona—The Use of Inadmissible Evidence for Impeachment Purposes*, 18 W. RES. L. REV. 1177, 1182 n.22 (1967); *see Developments in the Law—Confessions*, 79 HARV. L. REV. 938, 1030 (1966).

7. 347 U.S. 62 (1954).

8. The defendant, indicted for a narcotics violation, testified on direct examination that he had never possessed narcotics. The prosecution then introduced the testimony of an officer who had participated in an illegal raid on the defendant's home 2 years earlier that had resulted in a seizure of narcotics. The Court emphasized the fact that the defendant's sweeping claim "went beyond a mere denial of complicity in the crimes of which he was charged. . . ." *Id.* at 65. Since impeachment of the defendant's direct testimony was at issue, the Court reasoned that Agnello v. United States, 269 U.S. 20 (1925), which held that the prosecution could not introduce evidence to discredit a defendant's response on cross-examination, was distinguishable.

9. The Court reasoned that there was no justification for "letting the defendant affirmatively resort to perjurious testimony" by providing him with a fourth amendment shield against contradiction. 347 U.S. at 65.

10. 384 U.S. 436 (1966).

rule in two respects.[11] First, a number of tribunals found no distinction between phsycial evidence obtained by illegal search and seizure and statements that were inadmissible because of failure to comply with required procedural safeguards.[12] Secondly, many courts equated *Walder's* limiting phrase "elements of the case" with "elements of the crime" and held that inadmissible evidence that is germane to a given case could be used for impeachment purposes if it were neither per se inculpatory[13] nor directly related to an essential element of the crime charged.[14] These decisions became increasingly significant as the *Walder* exception was impliedly extended, along with federal constitutional safeguards,[15] to state criminal trials. The landmark *Miranda* decision, however, cast considerable doubt upon the applicability of the *Walder* exception to pretrial statements that were inadmissible as substantive evidence.[16] In *Miranda*, the Supreme Court completed a task begun in *Escobedo v. Illinois*[17] by abandoning "voluntariness"[18] as the principal

11. For discussions of these developments see Kent, *supra* note 6; Comment, *The Collateral Use Doctrine: From Walder to Miranda*, 62 NW. U.L. REV. 912 (1968); Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939 (1967).

12. *E.g.*, United States v. Curry, 358 F.2d 904 (2d Cir. 1966) (confession obtained in violation of defendant's sixth amendment right to counsel); Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960) (confession obtained in violation of FED. R. CRIM. P. 5(a)). One possible distinguishing factor, related to the reliability of the evidence rather than the manner in which it is obtained, was mentioned in *Curry*, in which the court indicated in dictum that the *Walder* exception might not be applied to a coerced confession. 358 F.2d at 904.

13. *Compare* Tate v. United States, 283 F.2d 377, 380-81 (D.C. Cir. 1960) (statements concerning defendant's acquaintance with alleged accomplice and his arrival at scene of crime, which the court characterized as "lawful proper acts," held properly used for impeachment), *with* Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964) (confession held improperly used for impeachment since it raised a clear likelihood of prejudice to defendant).

14. *Compare* United States v. Curry, 358 F.2d 904, 911 (2d Cir. 1966) (statements that were inconsistent with defendant's alibi on "collateral items," such as implication of additional parties and wearing of moustache on prior occasion, held properly used for impeachment), *with* Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966) (inadmissible statement held improperly used for impeachment since it was inconsistent with defendant's testimony on the issue of self-defense), *and* White v. United States, 349 F.2d 965 (D.C. Cir. 1965) (court held that if statements were found to be inadmissible on remand they could not be used to contradict defendant's claim of self-defense). The reason for disallowing the use of this type of evidence for impeachment is to avoid prejudice to the defendant on the ultimate issue of guilt.

15. A number of recent Supreme Court decisions have made federal exclusionary rules applicable to the states. *E.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination extended to states); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel extended to states); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment guarantee against unreasonable search and seizure extended to states). This development has forced state courts to rely upon federal interpretations of these rules. Kent, *supra* note 6.

16. *See* notes 22-25 *infra* and accompanying text.

17. 378 U.S. 478 (1964) (voluntary confession held inadmissible because police continued interrogation after defendant requested the presence of an attorney).

18. Prior to *Escobedo*, the admissibility of a confession was based upon a determination of

criterion for determining admissibility of pretrial statements in favor of an objective standard of prescribed police conduct which would better enable a defendant to exercise his fifth amendment privilege against self-incrimination.[19] In a five-to-four decision,[20] the Court held that no statement obtained from a defendant during custodial interrogation, absent a voluntary and intelligent waiver of rights, can be used against him in a criminal trial unless he has previously been warned "that he has a right to remain silent, that any statement he . . . make[s] may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[21] Although unnecessary to its holding in *Miranda*[22] the Court's recognition that even exculpatory statements can be incriminating when used for impeachment purposes, coupled with its unequivocal pronouncement that these statements may not be used unless preceded by the required warning,[23] seemed to preclude the admission of improperly obtained pretrial statements as either substantive or impeachment evidence.[24] The majority of courts

whether, judging all the circumstances, it could be characterized as a product of the defendant's free and rational choice. *E.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (confession obtained after defendant had been held incommunicado for 16 hours held inadmissible because procured in violation of defendant's fourteenth amendment right to due process); Brown v. Mississippi, 297 U.S. 278 (1936) (confession extorted by physical torture held inadmissible because obtained in violation of defendant's fourteenth amendment right to due process). *See generally Developments, supra* note 7.

19. In *Miranda*, the Court decided that a case-by-case determination of admissibility based on the "voluntariness" test was unsatisfactory because of the practical impossibility of ascertaining all of the subtle factors of coercion present in a police interrogation room. It chose to avoid this problem by laying down comprehensive guidelines for police interrogation that would provide the best guarantee against infringement of a defendant's constitutional rights even though the imposition of these requirements might deprive the police of a useful investigative tool. Exclusion of confessions obtained in violation of these guidelines was deemed necessary to protect the accused's rights even though the evidence so acquired was completely reliable. *See* F. GRAHAM, THE SELF-INFLICTED WOUND 153-193 (1970). In Johnston v. New Jersey, 384 U.S. 719, 730 (1966), the Court provided support for the view that neither *Escobedo* nor *Miranda* was based upon a reliability rationale, when it stated that neither decision added to the reliability of the fact-finding process. Some commentators, however, have suggested that the importance of the reliability factor in these opinions should not be underestimated. Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 62 (1966); Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939, 948 (1967).

20. Chief Justice Warren who delivered the Court's opinion was joined by Justices Black, Brennan, Douglas, and Fortas. Justices Clark, Harlan, Stewart, and White dissented.

21. 384 U.S. at 444.

22. The 4 convictions under consideration in *Miranda* were reversed because the prosecution had introduced as part of its case in chief pretrial statements that were obtained without the required warning.

23. 384 U.S. at 476-77.

24. Most commentators have concluded that the *Walder* exception would be inapplicable to a pretrial statement obtained in violation of the guidelines prescribed in *Miranda*. *See* Kent, *supra*

that have since considered whether statements inadmissible under *Miranda* may be used for impeachment purposes have concluded that this use is constitutionally impermissible.[25] These courts have reasoned that illegally obtained evidence is equally incriminating whether introduced under the guise of impeachment or as a part of the prosecution's case in chief.[26] Moreover, some courts have concluded that to permit constitutionally tainted evidence to enter a trial for the purpose of contradicting a defendant's testimony not only would infringe his right to testify in his own behalf but also would encourage unlawful police conduct.[27] A few state courts, however, have continued to rely tenaciously upon *Walder* and have thus allowed voluntary statements taken in circumvention of *Miranda* to be used to impeach a testifying defendant's credibility.[28]

In the instant case, the Supreme Court initially distinguished as dictum language in the *Miranda* opinion that could be interpreted as barring any use of uncounseled statements.[29] The Court reasoned that the *Walder* exception, allowing illegally obtained evidence on collateral issues to be used for impeachment purposes,[30] is also applicable to statements that bear directly upon the crime charged[31] and are otherwise inadmissible under *Miranda*. Observing that this limitation on the *Miranda* exclusionary rule would not undermine its deterrent effect upon

note 6, at 1186; Note, *Limited Use of Unlawfully Obtained Statements to Impeach Defendant's Credibility: The New York Rule in Light of Escobedo and Miranda*, 13 N.Y.L.F. 146, 160 (1967); Comment, *The Collateral Use Doctrine: From Walder to Miranda*, 62 Nw. U.L. Rev. 912, 932-33 (1968); Comment, *supra* note 19, at 947.

25. *E.g.*, United States v. Fox, 403 F.2d 97 (2d Cir. 1968); Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967); State v. Brewton, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967); Cardwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968); *cf.* Breedlove v. Beto, 404 F.2d 1019 (5th Cir. 1968); United States v. Pinto, 394 F.2d 470 (3d Cir. 1968).

26. *See* cases cited note 25 *supra*.

27. *E.g.*, Groshart v. United States, 392 F.2d 172, 180 (9th Cir. 1968); State v. Brewton, 247 Ore. 241, 245, 422 P.2d 581, 583, *cert. denied*, 387 U.S. 943 (1967).

28. State v. Kimbrough, 109 N.J. Super. 57, 262 A.2d 232 (App. Div. 1970); State v. Butler, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969); *cf.* People v. Kulis, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966), *noted in* Note, *supra* note 24; State v. Grant, 459 P.2d 639 (Wash. 1969).

29. *See* notes 22-24 *supra* and accompanying text.

30. *See* notes 8-9 *supra* and accompanying text.

31. The statement involved in the instant case was directly related to the central issue of whether the defendant actually sold heroin to the officer. Since the statement was an admission by the defendant that he had procured heroin for the officer, it was also per se inculpatory. The statement, therefore, would seem to fall outside the scope of the more liberal rule developed by lower federal courts in applying the *Walder* exception to inadmissible pretrial statements. *See* notes 13-14 *supra* and accompanying text.

proscribed police conduct,[32] the Court concluded that a defendant testifying in his own behalf should not be permitted to commit perjury free from the risk of confrontation with prior inconsistent utterances.[33] Thus, the Court held, in a five-to-four decision,[34] that voluntary statements excluded by *Miranda* from use in a prosecutor's case in chief may be properly admitted for impeachment purposes, provided that the trustworthiness of the evidence satisfies normal legal standards. In a vigorous dissent challenging the majority's interpretation of *Walder* and *Miranda*, Justice Brennan argued that the defendant's constitutional right against self-incrimination had been violated[35] and that the majority decision went far toward undoing previous progress in the constitutional regulation of police conduct.[36]

Although the Court's reluctance to strengthen the controversial *Miranda* rule is not surprising,[37] the instant decision will severely limit the effectiveness of *Miranda* as a guarantee against unwitting forfeiture

32. The Court dismissed the speculative argument that allowing inadmissible statements to be used for impeachment would encourage impermissible police conduct as an insufficient justification for depriving the jury of the valuable aid provided by impeachment evidence. It concluded that making improperly obtained evidence unavailable to the prosecution for its case in chief would sufficiently deter proscribed police conduct.

33. The Court stated that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense . . . ." 91 S. Ct. at 646.

34. Chief Justice Burger delivered the opinion of the Court, in which Justices Harlan, Stewart, White, and Blackmun joined. Justice Black dissented. Justice Brennan filed a dissenting opinion, in which Justices Douglas and Marshall joined.

35. After distinguishing the facts in the instant case from those in *Walder*, Justice Brennan argued that *Miranda* identified the fifth amendment privilege against self-incrimination as the constitutional specific guaranteeing a defendant the freedom "to deny all of the elements of [the] case against him," which *Walder* described as a constitutional right. *See* text accompanying note 9 *supra*. Relying upon Griffin v. California, 380 U.S. 609 (1965), in which the Court held that comments by the prosecution on the accused's failure to take the stand violated the fifth amendment, Justice Brennan reasoned that a defendant's privilege against self-incrimination also is denied if his choice of whether to deny complicity in the crime is burdened with the risk that illegally obtained statements might be used to impeach his testimony. Justice Brennan concluded that since *Miranda* had disposed of the artificial distinction between direct and impeachment evidence, the exclusionary rule was applicable to either use of an unwarned statement. *See* notes 23-24 *supra* and accompanying text.

36. "[I]t is monstrous that courts should aid or abet the law-breaking police officer. . . . [T]o the extent that *Miranda* was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* can't be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution." 91 S. Ct. at 649.

37. None of the Justices supporting the instant decision were among the majority in *Miranda*. Compare note 35 *supra*, with note 21 *supra*.

of the privilege against self-incrimination. A defendant who makes incriminating statements during interrogation when the *Miranda* warning has not been given will hereafter pay a high price to exercise either his right to testify in his own behalf or his fifth amendment privilege against self-incrimination.[38] Assuming that he testifies, he will be unable to rely upon the ability of a jury to disregard impeachment evidence in determining the ultimate issue of guilt,[39] on the other hand, his failure to take the stand may give rise to an equally detrimental inference of guilt.[40] The Court justifies this compromise of constitutional privileges with a determination that the desirability of maintaining the integrity of a criminal trial as a truth-finding process outweighs the importance of absolute adherence to the procedural safeguards created by *Miranda*. This marks an abrupt departure from the philosophy of the Warren Court[41] and may well indicate that the present Court will narrowly construe other controversial procedural guarantees when societal interests predominate.

The Court's adoption of the seemingly discredited "voluntariness" standard as a test for determining the admissibility of impeachment evidence[42] has one immediate and several potential ramifications. The immediate consequence is the creation of separate standards for determining the admissibility of impeachment as opposed to direct evidence. Although confessions introduced as direct evidence will continue to be judged by *Miranda* criteria, impeaching statements will

38. In an empirical study of implementation of the *Miranda* rule in the District of Columbia, researchers found a high degree of correlation between failure to give the warnings required by *Miranda* and the failure of defendants to request counsel. A similar correlation was found with respect to the percentage of defendants giving statements to the police. Medalie, Zeitz, & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt To Implement Miranda*, 66 MICH. L. REV. 1347, 1372 (1968).

39. It is generally recognized that a limiting instruction is ineffective to prevent a jury from using highly probative evidence in its determination of the substantive issue. *See, e.g.*, Shepard v. United States, 290 U.S. 96, 104 (1933); C. MCCORMICK, EVIDENCE § 39, at 77 (1954); Comment, *The Collateral Use Doctrine: From Walder to Miranda*, 62 NW. U.L. REV. 912, 919-20 (1968).

40. Although Griffin v. California, 380 U.S. 609 (1965), prohibits adverse comments by either the court or the prosecution on the accused's failure to take the stand, the prosecution frequently will be allowed to make general comments that its case is "unrebutted" or that "no one has denied" the testimony of its witnesses. 2 A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 389 (1967). Moreover, an instruction on the impermissibility of adverse inferences is obviously ineffective since a jury is apt to construe the defendant's failure to testify as an indication that he has something to hide. *Id.* §§ 389-90.

41. *See* note 20 *supra* and accompanying text.

42. Since the Court emphasized the fact that defendant made no claim that the statements used for impeachment were coerced or involuntary, the pre-*Escobedo* decisions would seem to control the admissibility of pretrial statements for purposes of impeachment. *See* notes 18-19 *supra* and accompanying text.

be subjected to the more lenient "voluntariness" standard, which the Warren Court expressly rejected in *Miranda*. Beyond this, the present Court's apparent preference for the "voluntariness" standard may indicate that it would uphold the section of the 1968 Omnibus Crime Control and Safe Streets Act in which Congress partially overruled *Miranda* by providing that the "voluntariness" test will govern the admissibility of confessions in federal courts.[43] If this should occur, the states could safely enact similar legislation.[44] Another possible consequence of the Court's adoption of relaxed standards for the introduction of impeachment evidence may be, as Justice Brennan has warned,[45] the precipitation of widespread disregard of *Miranda's* procedural safeguards by state police officers.[46]

Until the instant decision, the limitations expressed in *Walder* to safeguard a defendant's right to testify generally had been interpreted to preclude the use of illegally secured evidence for impeachment purposes whenever the evidence had a direct bearing on the issue of guilt.[47] The Court's rejection of this qualification of the *Walder* exception raises the possibility that the instant decision will be used as precedent for permitting evidence obtained by illegal search and seizure to be used for impeachment regardless of its incriminating character. It is apparent that the Court could not have intended this result because it would encourage a disrespect for law by government officials more blatant than that which the Court sought to prevent by refusing to allow individual defendants to use *Miranda* as a shield for perjury. It is submitted, therefore, that the instant decision should be viewed as a qualification of the *Miranda* rule rather than a general expansion of the *Walder* exception.

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43. 18 U.S.C. § 3501a-b (Supp V, 1970) (a confession shall be admissible if it is voluntarily given and that failure to advise a defendant of his rights to remain silent and to assistance of counsel "need not be conclusive on the issue of voluntariness of the confession"). The Court could avoid this provision's inconsistency with *Miranda* by construing the Act as an acceptance of the Court's invitation in *Miranda* encouraging Congress and the states to "exercise their effective rulemaking capacities" to develop "effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." Miranda v. Arizona, 384 U.S. 436, 467 (1966). *But see* Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 264 & n.81 (1968).

44. *See* note 43 *supra*.

45. *See* note 36 *supra*.

46. Although *Miranda* has caused an increase in the number of specific warnings given by the police, empirical research indicates that police conduct still falls short of the standards set by the Court. Medalie, Zeitz, & Alexander, *supra* note 38, at 1362-63. The instant decision cannot be expected to improve an already poor record of compliance.

47. *See* notes 13-14 *supra* and accompanying text.

Taxation—Depreciation—Pnrchaser of Leased Property May Not Take Deductions for Depreciation of Lessee's Improvements

Taxpayer-corporation purchased for 925 thousand dollars certain land subject to a twenty-year lease.[1] The lessee had built on the land a commercial garage that had a shorter useful life than the unexpired term of the lease.[2] Taxpayer allocated 625 thousand dollars of the purchase price to the building and 300 thousand dollars to the land;[3] for the next three years, he deducted under section 167[4] an annual amount for the depreciation of his interest in the building.[5] The Commissioner disallowed the deductions, and the taxpayer paid the assessed deficiency[6] and brought a refund suit, contending that it was entitled to the deductions since it acquired an interest in depreciable property by purchasing legal title to the building. The Commissioner responded that the taxpayer acquired no greater rights than the lessor, who admittedly had no depreciable interest in the building. After trial before a jury, the federal district court dismissed the complaint.[7] On appeal to the First

1. At the time of the sale in 1959, the lease was not set at a fixed number of years. It was to last 20 years after the death of the survivor of 6 named individuals, but in any event no longer than 1990. At the time of the district court trial in 1969, one of the survivors was still living, so the lease would have lasted from 20 to 21 years longer.

2. The government's contention that the useful life was shorter than the remaining term of the lease was supported by the taxpayer's own assertion that the useful life of his interest in the building was less than the term of the lease. *See* M. DeMatteo Constr. Co. v. United States, 310 F. Supp. 1313, 1314 (D. Mass. 1970).

3. Taxpayer's expert appraisers based these values on the *unleased* fair market value of the land and the building. "[The taxpayer's] expert was not aware, at the time he made his appraisal of the premises and his allocation of the purchase price as between land and building, that the building was subject to the long term ground rent lease." *Id.* at 1316.

4. INT. REV. CODE OF 1954, § 167(a) provides:

"There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income."

5. Taxpayer could only take a deduction for its interest in the building because land is a nondepreciable asset. Treas. Reg. § 1.167(a)-2 (1970). The taxpayer took deductions of $39,899.71 in 1962, $36,907.23 in 1963, and $34,139.19 in 1964. Taxpayer used the double declining balance sheet method approved by § 167(b), taking a useful life of 20 years. This method can be used only when tangible assets are involved. INT. REV. CODE OF 1954, § 167(c); Treas. Reg. § 1.167(a)-2 (1970).

6. The deficiency amounted to $57,009.21.

7. The district court found that the taxpayer purchased: (1) the fee simple title to the land; (2) the right to reversion in the land; (3) a bare possibility of reverter in the case of the early death of all the measuring lives or a material default by the lessee; (4) the right to receive ground rentals totaling $2,711,000 if the lease ran until 1990. The district court further found that the taxpayer received no

Circuit Court of Appeals, *held,* affirmed. The purchaser of leased property on which the lessee has constructed a building may not take annual depreciation deductions on the portion of the purchase price allocated to the building. *M. DeMatteo Construction Co. v. United States,* 433 F.2d 1263 (1st Cir. 1970).

Section 167(a) of the Internal Revenue Code[8] allows a taxpayer to recoup his capital investment[9] in a depreciable asset over its useful life by taking an annual "depreciation" deduction against income.[10] To qualify for a deduction under this section,[11] an asset must have a basis,[12] be held for the production of income or used in taxpayer's trade or business,[13] and be subject to economic exhaustion.[14] Although land is not a depreciable asset since it fails to meet this latter requirement, improvements on land are exhaustible and therefore depreciable.[15] An owner can depreciate the improvements even if he later leases the land and the improvements.[16] Likewise, a lessee may depreciate any improvements that he constructs on the land.[17] Neither the lessor nor the lessee, however, is entitled to a deduction for the depreciation of the other's improvements,[18] even though the lessor holds the legal title to the

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interest in the building. *See* M. DeMatteo Constr. Co. v. United States, 310 F. Supp. 1313, 1314-15 (D. Mass. 1970).

8. *See* note 4 *supra.*

9. Whether the taxpayer has a capital investment will usually determine if he has a depreciable interest entitled to the deduction. Goelet v. United States, 161 F. Supp. 305, 308 (S.D.N.Y. 1958), *aff'd,* 266 F.2d 881 (2d Cir. 1959); Frieda Bernstein, 22 T.C. 1146, 1150 (1954), *aff'd,* 230 F.2d 603 (2d Cir. 1956). *But see* notes 24 & 46 *infra.* Generally, the taxpayer owns directly any capital investments. A taxpayer, however, is allowed a depreciation deduction when he has only an equitable interest in the property. Thus, when a lessee constructs improvements on a piece of property, he is entitled to a deduction even though legal title to the improvement is in the lessor. Duffy v. Central R.R., 268 U.S. 55 (1925). *See generally* 4 J. MERTENS, FEDERAL INCOME TAXATION § 23.06 (1966).

10. This deduction, like all other deductions, is a matter of legislative grace. *See, e.g.,* Detroit Edison Co. v. Commissioner, 319 U.S. 98 (1943); Jefferson & Clearfield Coal & Iron Co. v. United States, 14 F. Supp. 918, 920 (Ct. Cl.), *cert. denied,* 299 U.S. 581 (1936); 4 J. MERTENS, *supra* note 9, § 23.01.

11. If the asset does not qualify for the depreciation deduction, then the taxpayer can recover his basis upon ultimate disposition of the asset. Comment, *Depreciation of Property Acquired Subject to a Long Term Lease,* 42 TEXAS L. REV. 72, 76 (1963).

12. INT. REV. CODE OF 1954, § 167(9).

13. *Id.* § 167(a). This requirement has caused little problem when the lessor transfers property, since the property will usually be held for rent in the hands of the transferee.

14. *Id.*

15. Treas. Reg. § 1.167(a)-2 (1970).

16. *E.g.,* Gulf, M. & N. R.R. v. Commissioner, 83 F.2d 788 (5th Cir.), *cert. denied,* 299 U.S. 574 (1936); Terminal Realty Corp., 32 B.T.A. 623 (1935); Treas. Reg. § 167(a)-4 (1970).

17. *E.g.,* Duffy v. Central R.R., 268 U.S. 55 (1925); Nelson v. Commissioner, 184 F.2d 649 (8th. Cir. 1950); Treas. Reg. § 167(a)-4 (1970).

18. Commissioner v. Moore, 207 F.2d 265 (9th Cir. 1953), *cert. denied,* 347 U.S. 942 (1954);

lessee's improvements. When either the lessor or lessee transfers his depreciable interest, whether by gift, inheritance, or purchase, his transferees are entitled to any depreciation deduction that he could have taken.[19] The propriety of a deduction is unclear, however, when a lessor who has no interest in the lessee's improvements transfers his property and the transferee attempts to take depreciation deductions on the lessee's improvements.[20] Section 167 provides no answer to this issue and conflicting judicial determinations have only added to the confusion. Several early Tax Court decisions involving transfers by inheritance allowed a lessor's devisee to depreciate the lessee's improvements, but these decisions were overruled because the appellate courts[22] were reluctant to allow the devisee to take a deduction that had not been available to the devisor.[23] This position was reinforced by the fact that the devisee expended no capital to obtain his depreciable basis in the property.[24] Since a purchaser invests capital in the property, many of these same courts have suggested, in dictum, that a purchaser should be

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First Nat'l Bank v. Nee, 190 F.2d 61 (8th Cir. 1951). The basis on which depreciation is allowed is generally the cost of the property. Since the cost to the lessor of an improvement built or paid for by the lessee is zero, the basis for the lessor's depreciation is zero. Reisinger v. Commissioner, 144 F.2d 475 (2d Cir. 1944). The burden of proving a tax basis upon which depreciation deductions can be taken is on the taxpayer. Clinton Cotton Mills, Inc. v. Commissioner, 78 F.2d 292 (4th Cir. 1935); Kaufman v. Commissioner, 44 F.2d 144 (3d Cir. 1930).

19. *See, e.g.*, First Nat'l Bank v. Nee, 190 F.2d 61, 67 (8th Cir. 1951) (lessor's successor); Cogar v. Commissioner, 44 F.2d 554 (6th Cir. 1930) (lessee's assignee); 42 ORE. L. REV. 176 (1963). The basis that the transferee will get in the wasting asset will depend upon the mode of transfer. If the transfer is by sale, the basis is the cost to the transferee. INT. REV. CODE OF 1954, § 1012. If the transfer is by inheritance, the basis will generally be the fair market value at the time of death of the transferor. *Id.* § 1014. If the transfer is by gift, the basis will be the donor's basis. *Id.* § 1015. If both land and its improvements are transferred, then the basis must be allocated between the two. Treas. Reg. § 1.167(a)-5 (1970).

20. The problem is whether the transferee can take a deduction that the transferor was disqualified from taking because the transferor had no basis in the property.

21. 3 J. RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 45.09A, at 4580 (1971); Lurie, *Depreciating Structures Bought Under Long Leases: An Adventure in Blunderland*, N.Y.U. 18TH INST. ON FED. TAX. 43-44 (1960).

22. Mary Young Moore, 15 T.C. 906 (1950), *rev'd*, 207 F.2d 265 (9th Cir. 1953), *cert. denied*, 347 U.S. 942 (1954); J. Charles Pearson, Jr., 13 T.C. 851 (1949), *rev'd*, 188 F.2d 72 (5th Cir.), *cert. denied*, 342 U.S. 861 (1951).

23. *See, e.g.*, Schubert v. Commissioner, 286 F.2d 573 (4th Cir.), *cert. denied*, 366 U.S. 960 (1961); Goelet v. United States, 266 F.2d 881 (2d Cir. 1959); First Nat'l Bank v. Nee, 190 F.2d 61 (8th Cir. 1951).

24. *See* First Nat'l Bank v. Nee, 190 F.2d 61 (8th Cir. 1951); Martha R. Peters, 4 T.C. 1236 (1945). It is arguable, however, that there is no ground for the distinction because all the Code requires is a basis for depreciation. The Code does not require that this basis arise from a capital investment by the transferee. Comment, *supra* note 11, at 75 n.22. Some courts have argued that there is a capital investment in the form of estate taxes. *See* J. Charles Pearson, Jr., 13 T.C. 851, 857 (1949); Charles B. Currier, 7 T.C. 980 (1946). *But see* note 46 *infra*.

allowed a deduction for depreciation of the lessee's improvements.[25] In a 1962 case of first impression,[26] the Eighth Circuit Court of Appeals, in *World Publishing Co. v. Commissioner,*[27] allowed a purchaser to take the deduction. The taxpayer in *World Publishing Co.* sought a deduction based on 300 thousand dollars of the purchase price that it had allocated to the lessee's building.[28] Although the building's useful life was shorter than the unexpired term of the lease,[29] the court held that this 300 thousand dollars was a separate depreciable investment in the building that the purchaser could recoup over its remaining useful life by depreciation deductions.[30] The *World Publishing Co.* decision has been followed by other circuit courts of appeals.[31] Some commentators, although agreeing that a deduction should have been granted under the facts of *World Publishing Co.*, have criticized the grounds on which the decision was based.[32] Specifically, they have stated that the Eighth

25. *See* Schubert v. Commissioner, 286 F.2d 573, 580 (4th Cir.), *cert. denied,* 366 U.S. 960 (1961); Goelet v. United States, 161 F. Supp. 305, 310 (S.D.N.Y. 1958), *aff'd,* 266 F.2d 881 (2d Cir. 1959).

26. In 2 other cases, a similar, but not identical, issue was raised. In Bernstein v. Commissioner, 230 F.2d 603 (2d Cir. 1956), a deduction was disallowed to a purchaser, but the purchase price was below the land value so "the cost of the building was already eliminated from the price." *Id.* at 604. The issue was raised but bypassed in Annex Corp., 2 CCH Tax Ct. Mem. 167, 173 (1953).

27. 299 F.2d 614 (8th Cir. 1962) (Blackmun, J.).

28. The court accepted the opinion of the taxpayer's appraisers that "at the time of the purchase the fair and reasonable value of the building alone was around $300,000." 299 F.2d at 617. Although the court did not make clear whether this was the present value of the properties as leased or as unleased, it appeared to be the leased values.

29. In all the cases discussed in this Comment, the useful life of the improvement is shorter than the unexpired term of the lease. When the economic life of the building outlasts the lease, several problems arise, such as who can take a depreciation deduction, when can the deduction be taken, and at what rate can the property be depreciated. *See* Rubin, *Depreciation of Property Purchased Subject to a Lease,* 65 HARV. L. REV. 1134, 1149-51 (1952); Comment, *supra* note 11, at 73 n.8.

30. "[T]he taxpayer is entitled to a deduction under § 167(a) . . . for depreciation of the $300,000 portion of its 1950 purchase price allocable to the improvements on the real estate in question." 299 F.2d at 617 (footnotes omitted). The court relied heavily on Millinery Center Bldg. Corp. v. Commissioner, 221 F.2d 322 (2d Cir. 1955), *aff'd,* 350 U.S. 456 (1956), in which the *lessee* purchased the lessor's reversionary interest and sought a depreciation deduction on that portion of the purchase price in excess of the value of the unimproved land. Dictum in that case clearly suggests that any purchaser should be able to depreciate that part of the purchase price allocated to the building. *Id.* at 324. *Millinery Center,* however, is distinguishable from the instant case because there the purchaser had the immediate right to the possession of a building that apparently had not been economically wasted, even though its estimated useful life was over. Comment, *supra* note 11, at 84.

31. 1220 Realty Co. v. Commissioner, 322 F.2d 495 (6th Cir. 1963); Wilshire Medical Properties, Inc. v. United States, 314 F.2d 333 (9th Cir. 1963).

32. *See, e.g.*, Comment, *supra* note 11; 76 HARV. L. REV. 1303 (1963); 23 MD. L. REV. 353 (1963). *But see* 3 J. RABKIN & M. JOHNSON, *supra* note 21, § 45.09A(2); 42 ORE. L. REV. 176, 179 (1963).

Circuit's finding that the purchaser acquired an interest in the building[33] ignores economic realities because he will receive no rental income from the building[34] and will be able to use it only after the termination of its estimated useful life.[35] These authorities have suggested that the deduction should have been justified on the ground that the taxpayer had a depreciable investment in the right to receive favorable rentals from the lease.[36] This suggestion, commonly referred to as the "lease premium"[37] theory, is premised on the idea that since the lessor could not depreciate the unleased value of the land, a purchaser from him should not be allowed to depreciate it. If the purchase price is greater than the unleased value of the land, however, the purchaser must be paying an extra amount for something other than the land. Since it is economically unrealistic to say that the purchaser obtains an interest in the lessee's improvements, the only other asset of value that he might obtain is the right to receive rentals at a favorable rate. This right will be exhausted as the lease expires and should therefore be classified as an intangible asset,

33. One criticism of this analysis is that if the lessor has no interest in the building and cares only about the ground rentals, why did he include a provision in the lease requiring the lessee to construct the building? 42 ORE. L. REV. 176, 179 (1963). One explanation could be that this is a common provision in long-term leases. *See* S. MCMICHAEL, LEASES: PERCENTAGE, SHORT AND LONG TERM 123-65 (4th ed. 1947). Another explanation could be that the lessor just wanted to specify the type of structure that would be on the land in the event of a default by the lessee.

34. Since the lessor would receive no extra rental income as a result of the improvements by the lessee, it would be unrealistic to say that any part of the same rent, if received by a purchaser from the lessor, was attributable to the building. Nor should the fact that the purchaser receives the legal title to the building indicate that he is purchasing a depreciable interest in it, because he is not the beneficial owner. *But see* note 33 *supra*. Indeed, it is common to include in most leases provisions to the effect that the lessor shall hold legal title to the lessee's improvements. S. MCMICHAEL, *supra* note 33, at 123-65. Even in the absence of this provision, the lessee's permanent fixtures become part of the land owned by the lessor as a matter of law in most jurisdictions. *See, e.g.*, Frost v. Schinkel, 121 Neb. 784, 792-99, 238 N.W. 659, 664-66 (1931).

35. For a suggestion that the estimated useful life of a structure does not always necessarily equal that structure's real economic life see note 74 *infra* and accompanying text.

36. This was an alternate contention in *World Publishing Co.* *See* 299 F.2d at 620. In fact, taxpayers in both the devise and purchase situations have generally alleged in the alternative that they were entitled to depreciate the building or amortize the lease premium. *See, e.g.*, Frieda Bernstein, 22 T.C. 1146 (1954); Mary Young Moore, 15 T.C. 906 (1950). One reason why the court in *World Publishing Co.* ignored the taxpayer's lease premium contention was that it appeared to think that under either theory the same amount could be recovered. The taxpayer was responsible for this assumption in urging recovery of the same amount by either depreciating the building or amortizing the lease premium. The same approach has been used in other cases when both theories have been relied on. *See, e.g.*, Schubert v. Commissioner, 286 F.2d 573 (4th Cir. 1961); First Nat'l Bank v. Nee, 190 F.2d 61 (8th Cir. 1951). This approach is erroneous. In *World Publishing Co.* the portion of the purchase price allocated to the building was its fair market value as leased with the remainder assigned to the fair market value of the land as leased. *See* note 28 *supra*. The lease premium, however, is the difference between the purchase price and the unleased value of the land.

37. *See* Comment, *supra* note 11, at 80. For other suggested interests that the purchaser receives see notes 73 & 74 *infra* and accompanying text.

which qualifies for an amortization (depreciation) deduction.[38] The amount of this lease premium is the difference between the purchase price and the unleased value of the land at the time it is acquired. The Ninth Circuit, in an inheritance case,[39] is the only court that has allowed a deduction based on the amortization of the lease premium,[40] noting that under this theory the incongruous result of having two taxpayers depreciate the same building is avoided.[41] All other courts that have considered the question, however, have denied taxpayers amortization deductions on the ground that the lease premium and the land are not separate interests for the purposes of depreciation.[42] This inseparable interest rationale is based on the incident-to-fee doctrine enunciated by the Tax Court in *William R. Farmer*.[43] The lessor in *Farmer* sought a deduetion for the depreciation of the lease. The court found that the lease was merely an incident to the fee and was therefore no more depreciable than any other ownership right to land. The courts that have refused a deduction for the amortization of the lease premium have regarded it as a part of the basis, which as an incident to the fee is not depreciable.[44]

In the instant case, the court initially noted that since the lessor had made no cost investment in the building, he had no depreciable interest in it at the time of the sale. Since the taxpayer could not have received any depreciable interest from the lessor, the court concluded that he would have to show his own cost investment in something other than the land. The court reasoned that since the useful life of the building was

38. Comment, *supra* note 11, at 77; 41 N.C.L. REV. 135 n.4 (1962). *See generally* 4 J. MERTENS, *supra* note 9, § 23.10. The lease premium in theory is similar to the amortizable bond premium described in § 171 of the Code.

39. Commissioner v. Moore, 207 F.2d 265 (9th Cir. 1953), *cert. denied*, 347 U.S. 942 (1954). The Supreme Court also has denied certiorari on 2 cases with opposite holdings on the issue. *See* Schubert v. Commissioner, 366 U.S. 960, *denying cert. to* 286 F.2d 573 (4th Cir. 1961); Friend v. Commissioner, 314 U.S. 673, *denying cert. to* 119 F.2d 959 (7th Cir. 1941).

40. This allowance was criticized in Lurie, *supra* note 21, at 54.

41. The lessee will take deductions for the depreciation of the building, and the purchaser will take them for the amortization of the lease premium.

42. Some courts have accepted the lease premium explanation in theory, but have found it unsupported by the evidence before them and have doubted its general utility. *See* World Publishing Co. v. Commissioner, 299 F.2d 614, 620 (1962); Schubert v. Commissioner, 286 F.2d 573, 580-83 (4th Cir. 1961); First Nat'l Bank v. Nee, 190 F.2d 61, 66 n.3 (8th Cir. 1951). Other courts have rejected it entirely. *See* Mary Young Moore, 15 T.C. 906 (1950), *rev'd*, 207 F.2d 265 (9th Cir. 1953), *cert. denied*, 347 U.S. 942 (1954); Martha R. Peters, 4 T.C. 1236, 1240 (1945).

43. 1 B.T.A. 711 (1925). In *Farmer*, the taxpayer argued that since part of the purchase price was allocable to the right to use the land, a basis for the depreciation of the lease was established when that right was exchanged for the lease. The Board of Tax Appeals held that a depreciable basis was not established because no separate value could be assigned to the right to use the land since it is only an incident to the fee simple. *Id.* at 713-14.

44. For a discussion of the incident-to-fee doctrine see p. 861 *infra*.

shorter than the unexpired term of the lease, the taxpayer purchased only the bare legal title to the building.[45] The court held that no part of the purchase price was properly allocable to the building and therefore no deduction could be taken by the taxpayer for its depreciation. Although recognizing that the Eighth Circuit in *World Publishing Co.* had allowed a deduction on identical facts, the instant court declined to follow the decision,[46] citing the criticism it has received.[47] The court concluded that the part of the purchase price not allocable to the land should have been assigned to the lease.[48] Although indicating that the taxpayer may have had an amortizable basis in the lease, the court refused to consider this point because it was not argued at the trial level and was not in issue on the appeal.[49]

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45. *See* note 34 *supra.*

46. The court also criticized *World Publishing Co.* for creating a rule that allowed the transferee by purchase to take a depreciation deduction when a transferee by gift or devise was not permitted to take the same deduction. 433 F.2d at 1265 n.5. As the court noted, the Internal Revenue Code makes no distinction between transferees who acquire a depreciable basis by devise, gift, or purchase. The Code requires only that the person seeking a deduction have a basis. *See* note 24 *supra.* The *World Publishing Co.* case recognized this and showed consistency in suggesting that the transferee by gift or devise should also be allowed a depreciation deduction on the lessee's improvements. 299 F.2d at 621. The court, however, proceeded to distinguish the devise and gift cases on the ground that no cost investment was made by the transferee. This seems to be an extra-judicial requirement. Some courts have suggested that this cost investment might have been made in the form of an estate and gift tax. *See* J. Charles Pearson, 13 T.C. 851, 857 (1949); Charles Bertram Currier, 7 T.C. 980 (1946). This, however, is a cost investment by the donor or devisor and not the transferee. In any event, it is not a cost investment in the property because the estate and gift taxes are excise taxes on the privilege of transferring property, not on owning property. *See, e.g.*, Commissioner v. Moore, 207 F.2d 265 (9th Cir. 1953); Friend v. Commissioner, 119 F.2d 959, 960 (7th Cir. 1941).

47. The court noted criticism in 76 HARV. L. REV. 1303 (1963); 23 MD. L. REV. 353 (1963); and 1963 WIS. L. REV. 484. Each of these student writings suggested that the purchaser should have been allowed to amortize the lease premium.

48. The court also rejected the taxpayer's argument that he had a depreciable security interest in the building. *See* note 73 *infra.* The court found that this was a highly speculative interest, if there was one at all, and that the taxpayer had failed to prove its worth. The court indicated that its worth, in any event, was "considerably less than the full value of the building." 433 F.2d at 1265. *But see* 63 YALE L.J. 872, 875-76 (1954).

49. The court's decision on this point is questionable as a matter of law. As heretofore stated, this case arose on appeal from the trial court's decision granting a motion to dismiss for failure to present facts sufficient to state a cause of action. The circuit court in the instant case affirmed the decision on 2 grounds. First, it found that the plaintiff did not sufficiently state that it was seeking relief under the lease premium theory. The court itself, however, stated in a footnote that: "Although taxpayer points out that in the claims for refund, and in its complaint, it made reference to a lease premium amortization theory, it made no such claim at the trial. Three memoranda were filed in the trial court by the taxpayer. Only the second makes more than brief mention of lease amortization, and then solely for the purpose of deprecating it as a concept put forward by the government and rejected by the taxpayer." 433 F.2d at 1264 n.3. This appears to be a sufficient statement of the lease premium theory, and the instant court's finding that it was not appears to be controverted by the fact that the trial judge himself regarded it as an alternate contention. *See*

The instant decision is the first case since *World Publishing Co.* to hold that a purchaser does not have a depreciable interest in the lessee's improvements. Since two other circuits have adopted the *World Publishing Co.* rule,[50] it is likely that the Supreme Court will now grant certiorari to resolve this split in the circuits. Until that time, however, the Commissioner can be expected to challenge any deductions based on allocations of the purchase price to leased buildings on which a lessee is also taking depreciation deductions. Since the instant decision did not foreclose the possibility that a taxpayer might be able to prove that he has an amortizable investment in the lease premium, he should argue that he is entitled to a "lease premium" deduction and should offer at the trial sufficient proof to establish the fair market value of the unleased land.[51] Moreover, since the weight of authority still supports the *World Publishing Co.* rule, the taxpayer should place primary emphasis on the contention that he is entitled to depreciate the building.[52] It is probable that he would receive greater annual deductions under this theory, because the building is likely to have a shorter useful life than the lease and accelerated depreciation methods[53] are only available for the depreciation of tangible assets.[54] Future courts, however, are likely to find persuasive the instant court's determination that a purchaser acquires no depreciable interest in a lessee's improvements. The purchaser has not invested in the right to use the building after the

M.DeMatteo Constr. Co. v. United States, 310 F. Supp. 1313, 1316 (D. Mass. 1970). The trial judge dismissed the suit for failure to carry the burden of proof on the value of the lease premium, not for failure to state a cause of action. Specifically, the trial judge found that the taxpayer's appraiser failed to value the lease, and indeed did not even know a lease existed. Under the lease premium theory, however, the value of the lease is not needed to determine the value of the lease premium; only the unleased value of the land is necessary for this determination. This is exactly what the appraiser unwittingly valued. The instant court also suggested that the taxpayer had failed to establish the useful life of the lease at trial. 433 F.2d at 1264 n.2. At the trial, however, it was proved that the lease would have definitely lasted for 20 years and could have run for 21 years at most. Since the former estimated life presumably would be more advantageous to the taxpayer because he would get a faster recoupment of his investment, the court could have penalized the taxpayer for failing to show a shorter useful life by taking the longer of the 2 possible useful lives. It is submitted that the instant court should have held, as a matter of law, that the taxpayer stated in the trial court a cause of action and carried the burden of proof. The instant court should therefore have either determined, or remanded to allow the trial court to determine, the validity of the lease premium theory.

50. *See* note 31 *supra*.

51. This may be difficult when commercial downtown land is involved because there may be no comparable unleased land that does not have a building on it.

52. If the taxpayer proceeds with these alternative contentions, he will have to offer 2 valuations. Under *World Publishing Co.* he must prove the leased value of the building, and under the "lease premium" theory he must prove the unleased value of the land.

53. *See* INT. REV. CODE OF 1954, § 167(b).

54. *See id.* § 167(c).

termination of the lease, since the building would be economically wasted by that time; and the building contributes no rental income, because only the land is leased.[55] When a lessee constructs improvements that have a useful life shorter than the unexpired lease,[56] these improvements do not, in economic reality, affect the depreciable interest acquired by a purchaser from the lessor.[57] This reasoning avoids the incongruous result of finding that two taxpayers have made full cost investments in the same property for which both are entitled to depreciation deductions.[58] The instant court, therefore, reached an economically realistic decision in declining to follow the *World Publishing Co.* rule that part of the purchase price was properly allocable to the purchaser's interest in the building. It is submitted, however, that *World Publishing Co.* correctly recognized that the purchaser had made an investment in something other than land and that this interest would not exist at the expiration of the lease. It is the failure of the courts to precisely define the nature of this interest that has created such confusion in this field.[59] It is unfortunate that the instant court did not undertake to define the nature of the purchaser's interest, especially since the facts of this case offer an excellent illustration of it. The purchaser certainly received an interest in a tract of land that appraisers estimated had an unleased value of 300 thousand dollars.[60] Presumably, the land had that value because a purchaser would think that a 300 thousand dollar investment in it would produce a return equal to or greater than other available investments. After the property was leased, it apparently was worth 925 thousand dollars to the taxpayer because it offered a rate of return obtainable elsewhere only with an investment of a like sum. In fact, the taxpayer made a good bargain because it would have received 3,711,000 dollars in ground rentals over the remaining life of the lease,[61] which is approximately a fifteen percent yearly return on its 925 thousand dollar investment. The value of the

55. *See* notes 33 & 34 *supra*.

56. When the improvements have a longer life, difficult problems arise concerning who is entitled to depreciate the portion of the useful life that extends beyond the lease. *See* note 29 *supra*.

57. *See* Comment, *supra* note 11, at 79.

58. *Cf.* 76 HARV. L. REV. 1303, 1305 (1963).

59. 3 J. RABKIN & M. JOHNSON, *supra* note 21, § 45.09 (1962); Comment, *supra* note 11, at 73.

60. Since the taxpayer's appraisers did not know that the property was subject to a long-term lease when they made the appraisal, this $300,000 figure had to be the unleased value of the land. *See* note 3 *supra*. If the court was not satisfied that this was the unleased value of the land without the building, the proper procedure should have been to seek a clarification on remand. *See* 76 HARV. L. REV. 1303, 1306 (1963).

61. M. DeMatteo Constr. Co. v. United States, 310 F. Supp. 1313, 1315 (D. Mass. 1970).

land, therefore, had been increased from 300 thousand dollars to 925 thousand dollars by subjecting it to the lease, and no part of this increase accrued by virtue of the improvements later constructed by the lessee. Since the purchaser would have property worth only 300 thousand dollars at the end of the lease, it follows that he must have invested 625 thousand dollars in the right to the favorable rate of return.[62] This right to favorable rentals, the lease premium, is an intangible asset that the taxpayer should be able to amortize over the life of the lease because its benefits will be exhausted as the lease expires.[63] Otherwise, at the expiration of the lease, the taxpayer would own land with a basis of 925 thousand dollars and a fair market value of 300 thousand dollars. Thus, the taxpayer would be taxed on a return of capital[64] and on disposing of the property he would realize a loss of 625 thousand dollars, which he could deduct.[65] A loss deduction, however, is not the equivalent of a recoupment of a capital investment.

If the instant court had pursued the issue of whether the taxpayer was entitled to a deduction under the lease premium theory,[66] it would have been confronted with several objections that the overwhelming majority of courts have recognized as valid.[67] Closer analysis of these objections, however, reveals that they are unfounded. It has been argued, for example, that it is adminstratively unfeasible to estimate the value of a lease. Since the formula for determining the lease premium is simply the purchase price less the unleased value of the land, however, this objection would be meritorious only if the unleased value of the land could not be determined.[68] It is submitted that this appraisal is generally less difficult to make than a determination of the value of the leased building, which the *World Publishing Co.* rule requires.[69] Courts also have objected to the lease premium theory because it calls for a speculative valuation of the unleased land at the expiration of the lease. These courts have simply misunderstood the theory.[70] Only the present value of the unleased land is needed to determine the lease premium. The

62. For a discussion of the treatment of an unfavorable lease see Comment, *supra* note 11, at 79.

63. *See* note 38 *supra.*

64. Taxing as income what is really a return of capital would violate taxpayer's rights under art. 1, § 2, of the Constitution. *See* Doyle v. Mitchell Bros. Co., 247 U.S. 179 (1918).

65. *See* INT. REV. CODE of 1954, § 165.

66. For an argument that the court should have considered the theory see note 49 *supra.*

67. *See* note 42 *supra.*

68. For a discussion of the difficulties inherent in valuing the unleased value of downtown commercial land see note 51 *supra.*

69. *See* note 28 *supra.*

70. *See* 3 J. RABKIN & M. JOHNSON, *supra* note 21, § 45.09A(3).

main objection that courts have raised to the lease premium theory is that the land itself would be depreciated if the taxpayer were permitted to amortize the lease premium since the lease premium is only an incident to the fee. The incident-to-fee doctrine was formulated in *William H. Farmer*,[71] a case in which a taxpayer who purchased land and subsequently leased it was denied a deduction for depreciation of the lease. It is submitted that although the court rightly disallowed the deduction, it obscured the underlying reason by using technical property concepts. The underlying rationale of the decision was that the taxpayer, if allowed a deduction, would have in effect depreciated a nondepreciable asset, and at the expiration of the lease he would have held the unleased land with a greatly reduced basis.[72] Since the above reasoning was the real basis of the *Farmer* decision, it is submitted that the *Farmer* incident-to-fee doctrine should not be applied to disallow a deduction for the amortization of the lease premium when a taxpayer purchases property already subject to a favorable lease. In this situation, only the lease premium is amortized, and the taxpayer will never reduce his basis below the unleased value of the land. A final objection to the lease premium theory has been that the lease premium does not represent all of that portion of the purchase price above the unleased value of the land. Some authorities have suggested that the purchaser receives a valuable security interest in the building because he has a right to immediate possession upon a material breach by the lessee.[73] Others have noted that the purchaser may actually be buying a future interest in the building, if the lessee underestimates the real economic life of the building.[74] Since these two interests are both depreciable, however, it would be to the taxpayer's advantage to prove that part of the purchase price was allocable to them only if their value greatly exceeded the lease premium. In the absence of this proof, it is hoped that future courts will recognize that the amount by which the purchase price exceeds the unleased value of the land should be allocated to the lease premium, for which an amortization deduction is allowable.

71. 1 B.T.A. 711 (1925). For a discussion on the parties' contentions see note 43 *supra*.

72. *Id.*

73. 3 J. RABKIN & M. JOHNSON, *supra* note 1; Lurie, *supra* note 21; Rubin, *supra* note 29; 63 YALE L.J. 872 (1954). The building also has security value as a deterrent to nonperformance. 63 YALE L.J. 872, 875 (1954). When part of the purchase price is allocated to the security interest, problems arise when the taxpayer seeks to use an accelerated depreciation method or when the taxpayer has rental insurance. *See* Comment, *supra* note 11, at 80-81. The court in the instant case considered this contention but rejected it because the security value, if any, was too speculative. *See* note 48 *supra*. Other courts have reached the same conclusion. *See, e.g.*, Frieda Bernstein, 22 T.C. 1146 (1954); Annex Corp., 2 CCH Tax Ct. Mem. 167 (1943).

74. The fact that the building has a longer useful life than the lease, however, should not affect the purchaser's deductible interest for the duration of the lease.

Torts—Strict Liability—Automobile Manufacturer Liable for Defective Design that Eubauced Injury After Initial Accident

Plaintiff was a passenger in an automobile that was struck in the rear by another vehicle. Although the plaintiff sustained only minor injuries as a result of the impact, she received severe burns when flaming gasoline from the ruptured gas tank escaped into the passenger compartment. Plaintiff sued the automobile manufacturer on the theory of strict liability, contending that the automobile's defective design[1] unreasonably increased the risk of harm to the occupants after the collision. Defendant contended that the negligent driver of the other vehicle,[2] rather than the defective design, caused the accident. Defendant further claimed that it was not liable for the plaintiff's injuries since accidents are not within the intended use of an automobile.[3] The trial court held the manufacturer strictly liable. On appeal to the California Court of Appeals, *held*, affirmed. An automobile manufacturer is strictly liable for injuries that are enhanced by the automobile's unreasonably dangerous design even though the design did not cause the accident. *Badorek v. General Motors Corp.*, 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1970).

Liability for defective design[4] in automobiles has been based either on the theory of negligence or strict liability.[5] These theories and their requirements recently have been delineated in the *Restatement (Second)*

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1. The design defect was the placement of an inadequately supported gas tank a small distance behind the passenger compartment. The tank was vulnerable to rupture and displacement with the occurrence of a relatively minor impact to the rear portion of the automobile.

2. The plaintiff also sued the driver of the other vehicle for his negligence. The jury found him liable.

3. Defendant articulated several other contentions: (1) safety standards should be legislatively formulated; (2) present statutes have pre-empted the field; (3) juries are unable to comprehend design complexities; and (4) a finding of liability would flood the courts with litigation.

4. Courts traditionally have imposed liability for negligent construction that causes an accident. Negligent construction defects most frequently occur during the manufacture or assembly of the product and often are confined to a component part. A defect in design, on the other hand, raises a more difficult problem since it results from improper planning of the product's form or structural quality and is therefore generally common to all vehicles of a given model. *See* Norton Co. v. Harrelson, 278 Ala. 85, 176 So. 2d 18 (1965); Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645, 653 (1967); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

5. *E.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (negligence); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969) (strict liability and negligence considered).

of Torts. Section 398 states that a manufacturer is liable in negligence for any lack of due care in adopting an unsafe or dangerous design.[6] Section 395 further requires that the product be put to an "expected purpose" in order for liability to be imposed. Similarly, section 402A, by virtue of its explanatory comments[7] concerning the "consumer," limits a manufacturer's strict liability to injuries caused by an unreasonably dangerous[8] product that the consumer puts to its "intended use."[9] The cases considering liability of automobile manufacturers for defective design have attempted to draw a clear distinction between actions for negligence and actions based on strict liability.[10] It has been suggested, however, that this traditional distinction is not viable in the area of defective design since liability may be based on either ground with equal effectiveness.[11] Although most jurisdictions have applied the negligence theory,[12] a few courts have

6. RESTATEMENT (SECOND) OF TORTS § 398 (1965) states: "A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design."

7. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment *l* at 354 (1965).

8. Elements considered in determining whether a product is unreasonably dangerous include the following: "(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger . . . , (5) common knowledge and normal public expectation of the danger, (6) the avoidability of injury by care in use of the product . . . , and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive." Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965).

9. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

10. *See* Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966) (denied recovery on negligence theory); Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969) (plaintiff sought recovery under negligence theory and court discussed and denied liability on theory of strict liability).

11. Dean John W. Wade has observed: "In the design cases there is essentially no difference between a negligence action and an action for strict liability. If the design of a product makes it unreasonably dangerous, strict liability will lie. But the same proof would normally be sufficient to permit a jury to find negligence on the part of the manufacturer in using such a design." Wade, *The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233, 243 (1968); *see* notes 34-38 *infra* and accompanying text.

12. *E.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).

imposed strict liability.[13] There has been a strong judicial tendency to limit a manufacturer's liability to situations in which the defective design was a cause of the accident.[14] If the design defect only enhanced the injury, courts have been reluctant to impose liability unless the defect also was a causative factor of the accident itself.[15] Courts have described enhanced injuries as "second accident" injuries—those injuries that occur after the initial accident. *Evans v. General Motors Corp.*[16] is the leading case holding that an automobile manufacturer is not liable for a negligent design[17] that results only in enhanced injuries. The *Evans* court based its holding on two propositions: (1) collisions are not within the "intended purpose" of an automobile despite their foreseeability, and (2) a manufacturer is under no legal duty to produce a crash-proof car.[18] The *Evans* rationale has been utilized by several courts to deny liability in both negligence[19] and strict liability actions.[20] These courts, moreover, have introduced additional arguments against imposing liability for enhanced injuries. Some judges have reasoned, for example, that because of the complexities of automotive design, juries are incapable of apportioning damages between the first and second accidents.[21] Further, it has been urged that legislatures rather than the courts should determine the standard for manufacturers.[22] Other arguments frequently advanced are that an imposition of liability would result in a flood of litigation[23] and that the alleged defective design should not be actionable

13. *E.g.*, Dyson v. General Motors Corp., 298 F. Supp 1064 (E.D. Pa. 1969) (considered both negligence and strict liability).

14. *See* Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966); Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967). An early case suggesting the possibility of automobile design liability is Foster v. Ford Motor Co., 139 Wash. 341, 246 P. 945 (1926).

15. *See* Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); Willis v. Chrysler Corp., 264 F. Supp. 1010 (S.D. Tex. 1967).

16. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

17. The plaintiff alleged that negligence in the design of the automobile, which had an "X" frame without perimeter frame rails, caused the death of the operator after a collision. 359 F.2d at 823-24.

18. "A manufacturer is not under a duty to make his automobile accident proof or foolproof; nor must he render the vehicle 'more' safe where the danger to be avoided is obvious to all." *Id.* at 824.

19. *E.g.*, Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967).

20. *E.g.*, Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969) (court recognized split of authority but accepted *Evans* rationale).

21. *E.g.*, Schemel v. General Motors Corp., 384 F.2d 802, 810 (7th Cir. 1967) (Kiley, J., dissenting), *cert. denied*, 390 U.S. 945 (1968); *see* 118 U. PA. L. REV. 299, 304 (1969).

22. *See* Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967); Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969).

23. *See* Nader & Page, *supra* note 4, at 663; 1969 U. ILL. L.F. 396, 397-98; 118 U. PA. L. REV. 299, 305 (1969).

if it conforms with the "state of the art" in the automobile industry.[24] Despite these propositions, several courts have imposed liability on manufacturers for design defects that caused enhanced injuries.[25] In *Larsen v. General Motors Corp.*,[26] for example, the Eighth Circuit held that a manufacturer is under a duty to use reasonable care in its automotive design to avoid an unreasonable risk that an injury will be enhanced in the event of a foreseeable collision. The court rejected the *Evans* court's narrow construction of the "intended or expected use" and reasoned that accidents are not unforeseeable in the normal and expected use of automobiles.[27] *Larsen* also held that there is no rational difference between a design defect that causes the initial accident and one that enhances the possibility of further injury because both result from negligence and cause injury.[28] Following this decision, a distinct split of authority has developed[29] concerning a manufacturer's liability for injuries enhanced by design defects, with some courts following *Evans*[30] and others adopting the *Larsen* rationale.[31]

In the instant case, the court initially noted that section 402A of the *Restatement (Second)* applied to automobile manufacturers and that strict liability could be imposed if the requirements of the section were satisfied. The court then rejected the reasoning that a duty to produce a crash-proof car would result if collisions were found to be within the intended use of automobiles. Instead, the court found that accidents are foreseeable consequences incident to an automobile's normal use and held that although a manufacturer is not required to produce a crash-proof car, it is under a duty to design an automobile that will not increase the risk of injury to occupants in the event of an accident.[32] The

24. *See* Schemel v. General Motors Corp., 384 F.2d 802, 808, 810 (7th Cir. 1967) (Kiley, J., dissenting), *cert. denied*, 390 U.S. 945 (1968); 118 U. PA. L. REV. 299, 311 (1969).

25. Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).

26. 391 F.2d 495 (8th Cir. 1968) (negligently designed steering column was forced back into the driver upon the impact of a head-on collision).

27. *Id.* at 502.

28. *Id.*

29. While recent cases indicate no trend toward uniformity, several commentators have predicted a judicial trend toward adopting the rationale of *Larsen*. *E.g.*, 1969 U. ILL. L.F. 396; 118 U. PA. L. REV. 299, 312 (1969).

30. *E.g.*, Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969).

31. *E.g.*, Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); *see* Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970).

32. The court also rejected several policy arguments advanced by the defendant. These arguments included: (1) establishing standards of design is solely a legislative function; (2) juries are incompetent to decide cases of automotive design liability; (3) a finding of liability "would create a

court, therefore, agreeing with the reasoning in *Larsen*, held that automobile manufacturers are strictly liable under section 402A for enhanced injuries caused by an unreasonably dangerous defective design of their products.[33]

Many courts that have considered an automobile manufacturer's liability for design defects that enhance injury during an accident have been preoccupied with the choice between the theories of negligence and strict liability.[34] The instant decision allowed recovery for enhanced injuries on the basis of strict liability, whereas *Larsen* allowed recovery on the basis of negligence. In both these cases, however, the courts have made the basic policy decision to allow recovery when the plaintiff's injuries were enhanced by defective design. It is submitted that recovery should not depend on which theory is adopted by a court since an examination of the respective requirements of the two theories[35] reveals that there is no practical difference[36] in their application to questions of liability for defects in design.[37] A court considering the question of

volume of highway crash litigation that would imperil the American judicial system." 11 Cal. App. 3d at 923, 90 Cal. Rptr. at 319. The instant court summarily dismissed this last argument by quoting W. PROSSER, TORTS § 11, at 43 (3d ed. 1964): "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."

33. 11 Cal. App. 3d at 925, 90 Cal. Rptr. at 320.

34. *E.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969).

35. *See* material cited notes 6 & 9 *supra*. RESTATEMENT (SECOND) OF TORTS § 402A (1965) requires that a product be unreasonably dangerous for its intended use in order to subject a manufacturer to strict liability, and § 398 requires that a product be dangerous for its expected use in order to subject a manufacturer to liability for his lack of due care in not adopting a safe design.

36. The type and amount of proof required to show that a design is unreasonably dangerous, and therefore qualifies for strict liability, is normally sufficient for a jury to find negligence on the part of the manufacturer in using the design. Wade, *supra* note 11, at 243. Courts considering both strict liability and negligence as theories for liability should concentrate on whether the design is unreasonably dangerous rather than on which theory of liability will be imposed.

37. A defective design that makes a product unreasonably dangerous, and is actionable under the strict liability of § 402A, must have resulted from the manufacturer's negligence in not adopting a safe design. Similarly, if the manufacturer exercises reasonable care in the adoption of its design, the design necessarily will not be unreasonably dangerous. The basis for this proposition is the distinction between *unavoidably unsafe* and *unreasonably dangerous* products. An unavoidably unsafe design is one that is incapable of being made safe for its intended use in the present state of design achievement even if all possible due care has been exercised. Thus by definition, an unavoidably unsafe design cannot be unreasonably dangerous. Consequently, if a manufacturer employed a design only after totally fulfilling his duty of due care, and the design still proved to be dangerous, the manufacturer would not be liable for negligence. Likewise, the manufacturer would not be subject to strict liability if the design, although dangerous, was *unavoidably unsafe* and thus was not deemed to be *unreasonably dangerous*.

liability for design, therefore, should reach the same result using either theory.[38]

Although the instant decision is a mere addition to the line of cases that have adopted the *Larsen* rationale, it is important for its perceptive analysis of the misconceptions underlying the *Evans* rule. Automobile manufacturers have relied on *Evans* to support their arguments against imposing liability for design defects that enhance injury during the second accident. Defendant manufacturers have urged, and courts considering the issue have agreed, that a duty to produce a crash-proof car should not be imposed.[39] The existence of this duty, however, is not the controlling issue.[40] The ultimate question is whether a manufacturer should have a legal duty to design an automobile that will not expose its occupants to an unreasonable risk of enhanced injuries following an accident.[41] Although a manufacturer may be incapable of producing a crash-proof car given the existing level of technology, it should be under a duty to minimize the injuries to the passengers once an accident has occurred. Another argument frequently advanced by the manufacturer is that collisions are not within the "intended or expected use" language of section 398 and the comments under section 402A of the *Restatement (Second)*.[42] This unrealistic contention ignores the statistical evidence that more than one-fourth of all automobiles at some time are involved in accidents producing injury or death.[43] Since a manufacturer is required to anticipate the environment in which its product is to be used,[44] recent decisions have correctly concluded that automobile manufacturers should foresee that automobiles may be involved in accidents.[45] It is clear, therefore, that the "intended use" argument should not be an obstacle to the imposition of liability.[46] Manufacturers

38. There may be a slight theoretical difference in design cases between "intended use" in strict liability and "expected use" in negligence, with the former being slightly narrower in scope. *See generally* Wade, *supra* note 11. Courts, however, have not recognized this distinction.

39. *E.g.*, Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); Schumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967); Willis v. Chrysler Corp., 264 F. Supp. 1010 (S.D. Tex. 1967).

40. *See generally* Nader & Page, *supra* note 4, at 656; 118 U. PA. L. REV. 299, 300 (1969).

41. *See* Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); 33 ALBANY L. REV. 238, 240 (1968); 1969 U. ILL. L.F. 396, 397-98. *But see* Pawlak, *Manufacturer's Design Liability: The Expanding Frontiers of the Law*, 19 DEFENSE L.J. 143, 157-71 (1970).

42. *See* cases cited note 39 *supra*.

43. Of the 102 million registered vehicles in the United States, 26 million were involved in accidents in 1968 alone. 1969 U. ILL. L.F. 396, 398 n.22.

44. Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83 (4th Cir. 1962).

45. *E.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969).

46. The argument also has been made that the "intended use" test, limiting a manufacturer's

also have contended that liability should not be imposed for design defects if it is shown that other producers employ a similar design. Although the "state of the art" may be useful in determining the standards to which the manufacturer will be held, it should be an objective standard of safety and reasonableness based upon design capabilities and economic practicalities and not a comparative standard based on prevailing practices within the automobile industry.[47] If a particular design is found to be unreasonably dangerous after weighing the economic burden on the manufacturer against the possibility and gravity of harm to the consumer, then the manufacturer should not be able to avoid liability merely because the design is widely used throughout the industry. An additional assertion made by manufacturers is that juries are unable to comprehend the intricacies of automotive design or to apportion damages between injuries received in the first accident and those enhanced by the defective design.[48] Although automotive designs are undoubtedly determined by experts, this is not an effective argument because juries often are required to determine applicable standards of care for experts.[49] This same reasoning applies to the apportionment of damages, which is frequently undertaken by juries.[50] Furthermore, mere difficulties with the jury system should not be allowed to absolve the manufacturer of all liability for breach of its duty and leave the injured party without legal redress.[51] Finally, manufacturers maintain that the determination of standards for automotive design is a legislative function that should not be usurped by the courts.[52] Although legislative standards have definite advantages, such as uniformity, section 108(c) of the National Traffic and Motor

liability, applies only to the conscious utilization of the product by its operator. A distinction can be drawn between ordinary driving and intended misuse of an automobile. Consequently, a person would not violate the intended use test of an automobile if he had an accident while driving normally. Nader & Page, *supra* note 4, at 662.

47. *See* Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969). Learned Hand, speaking of the necessity that tugs be equipped with radio receivers, said: "Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

48. *E.g.*, Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968); *see* Nader & Page, *supra* note 4, at 663.

49. *See* Bayshore Dev. Co. v. Bondfoey, 75 Fla. 455, 78 So. 507 (1918) (architect); Tremblay v. Kimball, 107 Me. 53, 77 A. 405 (1910) (pharmacist); Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931) (accountant); *A Symposium on Professional Negligence*, 12 VAND. L. REV. 535 (1959).

50. *E.g.*, Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968).

51. The manufacturer should be liable only for injuries over and above those that probably would have resulted from the initial collision. *Id.; see* 118 U. PA. L. REV. 299, 303-04 (1969).

52. *See* cases cited note 22 *supra*.

Vehicle Safety Act of 1966 is an explicit example of congressional intent to enact legislation that is not all-inclusive or pre-emptive of common law.[53] The judicial branch, therefore, has adequate power to determine reasonable standards of automotive design[54] and to impose liability for injuries enhanced by defects. This imposition of liability for design defects should produce greater emphasis on safety in automobile design and should shift the cost of these injuries to the manufacturer, whose insurance expense can then be distributed among the public as a cost of doing business.[55] The manufacturer will have an increased economic burden, but the automotive industry is in a much better position than the individual consumer to accept this burden.

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53. 15 U.S.C. § 1397(c) (Supp. V, 1970) provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1391(1) (Supp. V, 1970) states that the intent of the statute is to protect the public against "risk of death or injury to persons in the event accidents do occur . . . ." For extensive treatment of the 1966 Act see Nader & Page, *supra* note 4, at 669-73; 1969 U. ILL. L.F. 396; and 118 U. PA. L. REV. 229, 305-07 (1969).

54. "[T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. REP. No. 1301, 89th Cong., 2d Sess. 12 (1966).

55. Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 923, 90 Cal. Rptr. 305, 319 (1970).