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Recent Cases

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RECENT CASES

Antitrust—Burden of Proof—"Clear Proof" Standard Applied to Union Liability Under Sherman Act

Plaintiffs, alleging that the United Mine Workers of America (UMW) entered into a conspiracy with large coal producers to create a monopoly, to suppress competition, and to drive the plaintiffs out of business,[1] brought a joint action[2] against the UMW for violations of sections 1 and 2 of the Sherman Act.[3] Defendant contended their

1. In the late 1940's the UMW faced a Taft-Hartley injunction, contempt, and unfair labor practice charges by the federal government and coal operators. In this context the Bituminous Coal Operators Association (BCOA), an organization of large coal operators, entered into negotiations with the UMW and in 1950 signed the National Bituminous Coal Wage Agreement. For background information and the changes after the 1950 Bituminous Coal Wage Agreement, see Adam, *Technology and Productivity in Bituminous Coal, 1949-59*, 84 MONTHLY LAB. REV. 1081 (1961). In 1958 BCOA and UMW agreed upon a supplemental Protective Wage Clause which the plaintiffs contended included an agreement by the UMW to impose the wage scale on all bargaining units in the mining industry. The Protective Wage Clause provides: "During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract." Ramsey v. UMW, 265 F. Supp. 388, 411 (E.D. Tenn. 1967).

Subsequent to this agreement UMW loaned Cyrus Eaton $25 million to buy controlling stock in the Western Kentucky Coal Company. Western Kentucky immediately signed the National Bituminous Coal Wage Agreement which was the first time they had ever signed a contract with the UMW. Plaintiffs contended that Western Kentucky engaged in price cutting which drove their coal out of the TVA market.

After 1958 southeastern Tennessee was subjected to picketing and violence which plaintiffs allege was instigated by the UMW. Plaintiffs' theory was that the UMW drove prices down with predatory pricing, while forcing labor costs up by causing general violence and intimidation. The net result was to harass the plaintiffs from both directions until they were forced to leave the market.

2. Tennessee Products and Chemical Corporation and Tennessee Consolidated Coal Company control the major portion of coal mining in southeastern Tennessee. Lessees from these companies operate small trunk mines and constitute the majority of plaintiffs. Plaintiff Ramsey, however, owns his own land and operates as Ramsey Coal Company. The original action was brought by 26 parties against numerous defendants. At the trial 16 parties remained as plaintiffs, while the UMW was the only defendant.

3. 15 U.S.C. § 1 (1964): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

15 U.S.C. § 2 (1964): "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

For an analysis of whether labor unions should be subject to the Sherman Act, see C.

actions furthered the long-established policy of seeking national uniformity of wages and were exempt from antitrust prosecution under the Clayton Act.[4] The United States District Court for the Eastern District of Tennessee denied relief[5] and held that even though plaintiffs had established the UMW's antitrust violation by a preponderance of evidence, a labor union cannot be convicted except by the "clear proof" required in section 6 of the Norris-LaGuardia Act.[6] A three judge panel of the Court of Appeals for the Sixth Circuit reversed[7] and ruled that the preponderance of evidence test governed. The Sixth Circuit granted defendant's petition to rehear en banc,[8] and in a four-four decision which reinstated the district court's opinion,[9] *held*, the

GREGORY, LABOR AND THE LAW 200-22 (2d rev. ed. 1961); Daykin, *The Status Of Unions Under Our Antitrust Laws*, 11 LAB. L.J. 216 (1960); Note, *Union-Employer Agreements And The Antitrust Laws: The Pennington And Jewel Tea Cases*, 114 U. PA. L. REV. 901 (1966).

4. 15 U.S.C. §§ 12-27 (1964). Section 6 of the Clayton Act provides: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17 (1964). It has been suggested that the commands of the Clayton Act have been diluted. *E.g.*, Cox, *Labor And The Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Note, *Collective Bargaining Under the Antitrust Laws*, 61 NW. U.L. REV. 156 (1966).

5. Ramsey v. UMW, 265 F. Supp. 388 (E.D. Tenn. 1967).

6. 29 U.S.C. §§ 101-15. Section 6 of the Norris-LaGuardia Act provides: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U.S.C. § 106 (1964). The necessity for enacting the Norris-LaGuardia Act is analyzed in Note, *Labor Injunctions And Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 73-74 (1961).

7. Ramsey v. UMW, ANTITRUST & TRADE REG. REP., No. 405, April 15, 1969, at X-2 (6th Cir. April 8, 1969).

8. Plaintiffs alleged that they should have been allowed to file a reply to the defendant's petition to rehear despite Rule 40(a) of the Federal Rules of Appellate Procedure which provides: "No answer to a petition for rehearing will be received unless requested by the Court but a petition for rehearing will ordinarily not be granted in the absence of such a request." In the absence of the plaintiffs' reply brief, the five judges who had not heard oral argument on the "clear proof" rule were forced to render a decision solely on the basis of the defendant's petition to rehear. Plaintiffs contended such practice is inequitable because Rule 40(a) was intended to apply only when the same judges who heard the original case render a decision on the petition to rehear. Plaintiffs' Petition to Rehear at 2,3.

9. Plaintiffs contended that the four-four split leaves the three judge panel's reversal of the district court standing, rather than reinstating the district court's opinion, and cite as authority Carmichael v. Eberle, 177 U.S. 63 (1900); Pitton v. Atlantic Coast Line R.R., 144 Fla. 462, 198 So. 503 (1940). Plaintiffs' Petition to Rehear at 2,3.

"clear proof" requirement of section 6 of the Norris-LaGuardia Act controls the standard of proof on all issues in an antitrust action against a labor union. *Ramsey v. UMW*, 416 F.2d 655 (6th Cir. 1969).

Although union exemption from antitrust suits has been a fully litigated issue both before and after passage of the Norris-LaGuardia Act in 1932,[10] none of the litigation provided significant discussion of the "clear proof" doctrine in section 6 until *United Brotherhood of Carpenters v. United States*.[11] After determining that section 6 prescribes limitations which courts must apply in all matters arising out of labor disputes covered by the Norris-LaGuardia Act,[12] that Court held that the purpose of the "clear proof" test was to relieve unions of liability for the lawless acts committed by union officers or members in labor disputes in the absence of "clear proof" that the union participated in, authorized, or ratified such acts.[13] This holding limits section 6 to a determination of a union's liability for the illegal acts of its agent. The only other non-antitrust case to discuss "clear proof" was *UMW v. Gibbs*[14] which involved recovery under section 303 of the Labor Management Relations Act[15] for violence committed by union members. The majority defined "clear proof" as "clear, unequivocal, and convincing proof"[16] and suggested that "clear proof" dictates a standard of proof greater than preponderance of the evidence, but less than the proof beyond a reasonable doubt required in criminal cases.[17] Other than this proposed definition of "clear proof," the Court confined its examination of "clear proof" to a determination of whether the union ratified the violence[18] and offered

10. The cases which have addressed themselves to the question of the scope of the union's antitrust exemption include: Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945) (union activity with a combination of businessmen to prevent all other competition not exempt); United States v. Hutcheson, 312 U.S. 219 (1941) (strike and economic boycott expressly exempt from Sherman Act); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) (Sherman Act only covers activities having substantial effect on commercial competition); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (secondary boycott held a violation of antitrust laws). For a suggestion as to what the extent of a union's exemption should be, see Note, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684, 698-99 (1967).

11. 330 U.S. 395 (1947). This was a criminal case in which manufacturers and dealers in millwork and lumber allegedly conspired with an unincorporated union.

12. *Id.* at 401. The two elements of this idea which must be present are: first, the presence of a labor dispute; and secondly, this dispute must be covered by the Norris-LaGuardia Act. If either of these elements is absent, the Court's suggestion that § 6 applies to all matters arising out of labor disputes is inapplicable.

13. *Id.* at 403.

14. 383 U.S. 715 (1966).

15. 29 U.S.C. §§ 141-68, 171-87 (1964).

16. 383 U.S. at 737.

17. *Id.*

18. *Id.* at 735-42.

no comment on how far the scope of section 6 could be extended. Issues similar to those in *Ramsey* were first litigated by the Sixth Circuit in *Pennington v. UMW (Pennington I)*.[19] The Sixth Circuit approved the district court's jury charge, which was couched in terms of preponderance of evidence, and affirmed its finding of an antitrust violation; however, it failed to analyze the "clear proof" rule in depth.[20] On writ of certiorari, the Supreme Court reversed on other grounds in *Pennington v. UMW (Pennington II)*,[21] but affirmed the holding that the union's exemption from the antitrust laws did not apply.[22] The majority opinion used the phrase "clearly shown" when defining the scope of a union's antitrust exemption,[23] but this was done without specific reference to section 6.[24] On retrial of the case in *Lewis v. Pennington (Pennington III)*,[25] the district court ruled in favor of the UMW because the plaintiffs failed to meet either the preponderance of evidence or "clear proof" test. Relying solely upon *Gibbs*, the court in *Pennington III* provided the first implication that a union's antitrust violation must be demonstrated by "clear proof."[26] On appeal, the Sixth Circuit affirmed the district court's dismissal of the action against the UMW in *Lewis v. Pennington (Pennington IV)*[27] and interpreted *Pennington II* to hold that "such an anti-competitive conspiracy must be established by 'clear proof.' "[28] Before the Sixth Circuit rendered judgment in *Pennington IV*, the district court in the

19. 325 F.2d 804 (6th Cir. 1963). In *Pennington I* the UMW sued a coal producer for welfare fund payments. Pennington counterclaimed on the theory that the union had conspired with large coal producers to drive him out of business.

20. Although the UMW asserted that § 6 should have been applied, the court found that § 6 was not the controlling standard. Ramsey v. UMW, ANTITRUST & TRADE REG. REP., No. 405, April 15, 1969, at X-4 (6th Cir. April 8, 1969) (Sixth Circuit's interpretation of its decision in *Pennington I*).

21. 381 U.S. 657, 670-72 (1965). Many comments have been written on *Pennington II*. *E.g.*, 51 CORNELL L.Q. 576 (1966); 44 N.C.L. REV. 474 (1966); 43 TEXAS L. REV. 1122 (1965).

22. 381 U.S. at 661.

23. "But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 665.

24. It has been suggested that after *Pennington II* the scope of labor's antitrust exemption was defined by the Labor Management Relations Act rather than the Norris-LaGuardia Act. Comment, *Labor's Antitrust Exemption*, 55 CALIF. L. REV. 254, 260 (1967).

25. 257 F. Supp. 815 (E.D. Tenn. 1966).

26. The court suggests that "[i]n the ordinary case, proof would be simply by a preponderance of the evidence and in the criminal case guilt would have to be established beyond a reasonable doubt. Under Section 6 of the Norris-LaGuardia Act, as interpreted by the Supreme Court in the *Gibbs* case, a middle ground is reached with respect to the quantum of proof necessary for civil liability." *Id.* at 829.

27. 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968).

28. *Id.* at 814.

Ramsey chain of cases dismissed the plaintiffs' case in *Ramsey v. UMW (Ramsey I).*[29] This court admitted that if the preponderance of evidence rule were applied, the UMW would be guilty. On the basis of *Gibbs* and *United Brotherhood of Carpenters*, however, the court ruled that the "clear proof" test under section 6 must be applied and that the plaintiffs had not clearly proved a Sherman Act violation.[30] In the same district court at almost the same time, facts identical to those in *Ramsey I* were presented to a jury under both "clear proof" and preponderance of the evidence instructions in *Tennessee Consolidated Coal Co. v. UMW.*[31] The jury rendered a verdict in favor of the plaintiffs' contention that the UMW had violated the Sherman Act. Before *Tennessee Consolidated* could be decided on appeal, a three judge panel of the Sixth Circuit reversed *Ramsey I's* decision and held in *Ramsey v. UMW (Ramsey II)*[32] that the "clear proof" standard was inapplicable to proving a union's antitrust conspiracy and that such a conspiracy need be proved only by a preponderance of the evidence.[33] One week before the Sixth Circuit sat en banc to rehear the appeal from *Ramsey I*, it affirmed the district court's conspiracy finding in *Tennessee Consolidated Coal Co. v. UMW.*[34] The court introduced a new interpretation of section 6 and asserted that section

29. 265 F. Supp. 388 (E.D. Tenn. 1967).

30. Judge Wilson's opinion analyzed collective bargaining before and after the 1950 National Bituminous Coal Wage Agreement, the Wage Protection Clause itself, the alleged predatory pricing of coal, and other factors such as geological conditions which contributed to the plaintiffs' inability to operate competitively. Judge Wilson concluded that the inferences of the existence or non-existence of a conspiracy were equal on both sides, so that the plaintiffs failed to meet the "clear proof" test.

31. The only significant difference between this case and *Ramsey I* is that Judge Wilson presided over a jury trial. His charge stated: "Thus, labor unions may not be held liable for the acts of officers or members or agents or third parties, without clear proof that the labor union actually participated, gave prior authorization or ratified such act after full knowledge of their commission. . . . Now, upon each and every other issue in the case, the plaintiffs are merely required to establish their claims by a preponderance of the evidence, and needs [*sic*] not carry the burden of proof upon such issues by clear proof as I have defined those terms." Tennessee Consol. Coal Co. v. UMW, 416 F.2d 1192, 1201-02 (6th Cir. 1969), *citing* Trial Record at 1703a-1705a.

32. ANTITRUST & TRADE REG. REP., No. 405, April 15, 1969, at X-2 (6th Cir. April 8, 1969).

33. The three judge panel argued that because Mr. Justice White's use of the words "clearly shown" in *Pennington II* was dictum, the "clear proof" rule which the district court relied upon lacked sufficient precedent. The majority opinion also pointed out that in *Pennington I* the same Sixth Circuit had already rejected UMW's contention that § 6 should have been applied. *See* note 20 *supra.*

34. 416 F.2d 1192 (6th Cir. 1969), *cert. denied,* 38 U.S.L.W. 3335, 3342 (U.S. Mar. 3, 1970). This judgment was for $1,432,500 and $67,500, which is possibly the largest ever affirmed against a labor union at the appellate level. Defendant's Petition to Rehear En Banc at 2-3.

6 must be applied only to proving the union's authorization, participation, or ratification by "clear proof" because section 6 was not intended to test the unlawfulness of an act.[35]

In the instant case, the court faced the same issues presented in *Tennessee Consolidated* and determined that in the absence of a per se antitrust violation[36] it was still possible for the Wage Protection Clause of 1958 to give evidence of an illegal conspiracy by the BCOA and UMW to impose a wage scale on the mining industry. The court first recognized that a union is exempt from antitrust prosecution so long as it "acts in its own self-interest and does not combine with non-labor groups."[37] In order to determine whether the UMW conspired with a non-labor group, it is essential to apply a specific standard of proof, either the "clear proof" test in section 6 or the preponderance of evidence standard. The majority[38] attempted to choose between these standards and examined the question whether all elements of an antitrust suit have to be established by "clear proof." In the instant case, the court began its development of the "clear proof" test by referring to portions of the district court opinions in *Pennington III* and *Ramsey I* in which both judges concluded that it was necessary for the plaintiffs to present "clear proof" of the conspiracy.[39] Quoting with approval Mr. Justice White's reasoning in *Pennington II*[40] and the Sixth Circuit's language in *Pennington IV*, which asserted that *Pennington II* meant "such anti-competitive conspiracy must be established by 'clear proof,' "[41] the majority then turned to the history of section 6 and interpreted it to have been passed by Congress to apply to situations identical to the instant case in which a conspiracy is involved. The court further argued that the Supreme Court in *United Brotherhood of Carpenters* had examined section 6 and determined that it governed all matters arising in labor disputes,[42] and concluded that

35. "Section 6 does provide that participation, authorization or ratification must be shown by clear proof. Section 6 does not state that the unlawful acts must be shown by clear proof." 416 F.2d at 1201.

36. The 4 judges for affirmance dismissed one issue when they found that the Protective Wage Clause of 1958 between the BCOA and UMW was expressly limited to the signatories and did not constitute a per se violation of the antitrust laws.

37. 416 F.2d at 659, *citing* United States v. Hutcheson, 312 U.S. 219, 232 (1941).

38. Because the Sixth Circuit reached a split decision, there was no true majority or dissenting opinion. Instead, there were 4 judges for affirmance and 4 for reversal. The opinion for affirmance will be referred to as the majority, while the opinion for reversal will be termed the dissent.

39. 416 F.2d at 659-60. Text accompanying notes 26 & 30 *supra.*

40. *See* note 23 *supra.*

41. 416 F.2d at 661, *citing* Lewis v. Pennington, 400 F.2d 806, 814 (6th Cir. 1968).

42. Text accompanying note 12 *supra.*

the line of authority developed through *United Brotherhood of Carpenters, Gibbs, Pennington II, Pennington IV,* and *Ramsey I* required that the "clear proof" standard in section 6 be applied to all issues in a union antitrust suit.[43]

The dissent's[44] thesis was that the "clear proof" standard is limited to proof of an alleged agent's authority and that the development of the "clear proof" test through *Ramsey I* lacked a sufficient basis because the cases that the majority relied upon could either be distinguished or had erroneously interpreted *Pennington II.* First, the dissent noted that the majority misinterpreted *Pennington II,* which did not argue that the "clear proof" standard controls all issues in a union antitrust suit because none of the three justices who filed opinions mentioned section 6. Secondly, *Pennington III* failed to cite *Pennington II* as authority, but relied upon *Gibbs* to hold that the "clear proof" test controlled. Consequently, the dissent asserted that *Pennington II* cannot be the genesis of the "clear proof" test. Instead, it was not until *Pennington IV* and *Ramsey I* that a court suggested the holding in *Pennington II* included a requirement for proving a union's conspiracy by "clear proof." The Sixth Circuit in *Pennington IV,* however, gave no explanation for its interpretation of *Pennington II,*[45] but merely cited the one instance when Justice White used the phrase "clearly shown" in reference to the union's antitrust exemption.[46] In *Ramsey I,* the dissent argued that the district court's

43. In an attempt to supplement its conclusion, the court weighed policy considerations and claimed that in order to reconcile the national labor policy of collective bargaining with antitrust statutes, the "clear proof" test must be applied. Implicitly the majority concluded that if the preponderance test were utilized, it would be easier for plaintiffs to prove a union conspiracy which in turn would tip the balance in favor of antitrust prosecution and against collective bargaining. For a general analysis of labor unions, collective bargaining, and the Sherman Act, see E. BERMAN, LABOR AND THE SHERMAN ACT (1930); M. FORKOSCH, A TREATISE ON LABOR LAW (2d ed. 1965); R. POUND, LEGAL IMMUNITIES OF LABOR UNIONS (1957). There are opposing views in regard to whether antitrust policy conflicts with collective bargaining. *Compare* Winter, *Collective Bargaining and Competition: The Application Of Antitrust Standards To Union Activities,* 73 YALE L.J. 14 (1963), *with* Frank, *The Myth Of The Conflict Between Antitrust Law And Labor Law In the Application Of Antitrust Law To Union Activity,* 69 DICK. L. REV. 1 (1964). A few authors advocate elimination of the union exemption from antitrust prosecution. *E.g.,* Lewis, *The Labor Monopoly Problem: A Positive Program,* 59 J. POL. ECON. 277, 278 (1951); Miller, *Unions and the Antitrust Laws,* 7 LAB. L.J. 186 (1956). This difference of opinion over unions and antitrust policy has also been expressed by the Supreme Court. *Compare* Mr. Justice Douglas' dissent in UMW v. Pennington, 381 U.S. 657, 673 (1965), *with* Mr. Justice Goldberg's concurring opinion in Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676, 698 (1965).

44. 416 F.2d at 667.

45. 400 F.2d 806, 814 (6th Cir. 1968).

46. *See* note 23 *supra.*

reliance on *Gibbs* and *United Brotherhood of Carpenters* was unfounded. Although *United Brotherhood of Carpenters* stated that section 6 applied to "all matters growing out of labor disputes,"[47] the dissent suggested that the district court failed to note that further in the opinion the Court specifieally stated its holding in terms of limiting a union's liability for illegal acts committed by individual members of the union.[48] *Gibbs*,[49] the dissent continued, questioned the union's liability for violence committed by its members and limited its holding to an application of the "clear proof" standard to cases involving a union's participation in, approval, or ratification of violence.[50] Because the majority's reasoning was based on an erroneous interpretation of the cases that discuss "clear proof," the dissent concluded that section 6 must be limited to an examination of an officer or union member's authority to act for a union, and the preponderance of evidence test governs the question of an alleged conspiracy between BCOA and the UMW.[51]

It is suggested that the instant court's holding in favor of applying the "clear proof" standard to all issues in a union antitrust suit is the culmination of a misinterpretation of section 6 and the consecutive application of that error. There is an inherent fallacy in the court's reasoning because this seetion does not intimate that the "clear proof" test be applied to determine the illegality of an act. Instead, the section is phrased in terms of applying the "clear proof" test to specific acts that are already deemed to be unlawful under a different standard of proof.[52] Clearly, the assumption that illegal acts exist indicates that

47. 330 U.S. at 401; Text accompanying note 12 *supra*.

48. Text accompanying note 13 *supra*. The dissent suggests that this statement does not mean the "clear proof" standard has replaced the preponderance of evidence rule in union antitrust suits.

49. Text accompanying notes 14-15 *supra*.

50. "What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further *acts which were in themselves actionable* under state law or intentionally drew upon the previous violence for their force." 383 U.S. at 739 (emphasis added).

51. The dissent concluded with a policy argument and suggested that the courts must not read anything new into § 6 that would increase the labor union's insulation from antitrust prosecution beyond the confines of the Clayton Act. Such insulation would result if the more stringent "clear proof" test were applied to union antitrust prosecutions. From an equitable standpoint, the union's conduct in the instant case does not merit the protection offered by § 6.

52. "To hold that officers or members of a labor organization, or the organization itself, should be liable for damages for unlawful acts committed while a strike is on, without clear, actual proof of authorization, participation in, or ratification of such unlawful acts, would go far toward the destruction of organized labor." S. REP. No. 163, 72d Cong., 1st Sess. 19 (1932). "This section speaks for itself and is desirable because both individuals and associations have been

Congress intended section 6 to be applied to cases that attempt to attribute the illegal acts of alleged agents to the union. Section 6, however, was not meant to supplant the pre-existing rules of agency, but only to be utilized as a rule of evidence for determining the union's liability for the acts of others.[53] Not only did the Sixth Circuit fail to consider this congressional intent, but they overlooked an excellent analysis of such intent in *United Brotherhood of Carpenters*,[54] in which the Supreme Court assumed that before the "clear proof" rule could be utilized, unlawful acts had to be committed in labor disputes.[55] The instant court also neglected to analyze language in *Gibbs* that assumed the presence of acts otherwise actionable[56] and suggested that "the driving force behind § 6 . . . was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control."[57] If the Sixth Circuit had more thoroughly considered either of these cases, they would not have rendered a decision in derogation of Congress's clear assumptions and intent.

Another possible weakness in the majority opinion is that section 6 may not have been intended by Congress to be applied to the act of conspiracy. Instead, Congress referred to unlawful acts such as instances of property damage or personal injury.[58] *United Brotherhood of Carpenters* perceived this distinction by discussing the purpose of section 6 in terms of "lawless acts done in labor disputes"[59] which assumes there is a labor dispute and intimates that a tortious act or property damage has resulted. *Gibbs* also suggested that the "clear proof" rule applies to acts other than conspiracies by arguing that

held liable for unlawful acts of overzealous members which acts . . . were entirely without the scope of any authority committed by the officer or association of the offending member." H.R. REP. No. 669, 72d Cong., 1st Sess. 9 (1932).

53. "[T]his section is concerned especially with establishing a rule of evidence." S. REP. No. 163, 72d Cong., 1st Sess. 19 (1932). "This provision does not affect the general law of agency, and it is necessary, under the circumstances, that the courts should know that Congress expects them not to hold officers or associations liable for the unlawful acts of a member without clear proof . . . ." H.R. REP. No. 669, 72d Cong., 1st Sess. 9 (1932).

54. 330 U.S. at 401-06.

55. "We hold that its [§ 6] purpose and effect was to relieve organizations . . . from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof . . . ." 330 U.S. at 403.

56. *See* note 50 *supra*.

57. 383 U.S. at 736-37.

58. "In most cases where strikes occur involving a great many employers and employees . . . there are often unlawful acts committed in the way of injury to property or to persons . . . . In case of a strike, where the officers of the labor union are doing everything within their power to prevent acts of violence from being committed by any person, the law should fully protect them . . . ." S. REP. No. 163, 72d Cong., 1st Sess. 19 (1932).

59. *See* note 55 *supra*.

"[p]lainly, § 6 applies to federal court adjudications of state *tort* claims arising out of labor disputes. . . ."[60] If Congress intended section 6 to be applied only to these acts, then the "clear proof" standard cannot be validly utilized to test all elements of a union's liability for a Sherman Act violation.[61]

Assuming antitrust conspiracies were intended to be a type of act within the phrase "unlawful acts," and that based on congressional intent the "clear proof" test is inapplicable to all issues in union antitrust cases,[62] the need for a solution becomes apparent. It is proposed that union antitrust cases should involve a two part analysis. First, was there an unlawful act, a conspiracy, committed by anyone? The preponderance of evidence test must govern this aspect of the case. Secondly, was the unlawful act ratified, participated in, or authorized by the union? Only in this part of the court's decision will the "clear proof" rule be relevant. A two part approach has already been implicitly recognized,[63] but must be implemented by all courts. If the instant court had adopted the suggested procedure, the practical result would have been to find the UMW liable because the district court judge admitted that if the preponderance of evidence test were applied, the union's conspiracy had been established.[64] The union's authorization or ratification would then be tested by "clear proof," and even though it requires more proof than a preponderance of evidence, there is little doubt that the UMW authorized its officials to act in the manner they did.[65] Because the Sixth Circuit realized in

60. 383 U.S. at 737 (emphasis added).

61. A possible response to this argument is that property damage and personal injury are elements of a conspiracy, so the "clear proof" rule should be applied to test the conspiracy (the allegedly illegal acts) as a whole. Congress, however, assumed an unlawful act was present and did not intend § 6 to test the illegality itself.

62. Scholars have recognized that § 6 was not intended to dictate the standard of proof in a union antitrust case. *E.g.*, Comment, *supra* note 24, at 265 n.62.

63. *See* note 35 *supra*; Brief for Plaintiff at 38-39, Ramsey v. UMW, 416 F.2d 655 (6th Cir. 1969). A rebuttal to this two part analysis would be based on the theory that a union acts only through its agents; therefore, when a conspiracy is proved, the agency relation is also proved. Consequently, the "clear proof" test should be applied to finding a conspiracy. The fallacy in this reasoning lies in congressional intent which never suggested that the unlawful act itself be tested by "clear proof." *See* notes 52 & 55 *supra*. A second alternative suggests proving the illegal act or conspiracy by "clear proof" and the union's ratification by a preponderance of evidence. This approach, however, has two weaknesses: (1) congressional intent militates against applying § 6 in proving an illegal act; and (2) § 6 states that the union's authorization of an illegal act must be shown by "clear proof." *See* note 6 *supra*.

64. Text accompanying note 30 *supra*.

65. If sufficient acts are present in any situation to find a conspiracy and the acts were authorized by the union, there must also be proof of an unreasonable restraint of trade or commerce. If the restraint is not unreasonable, there has not been a Sherman Act violation. The test for unreasonableness is based on what other courts have found to be unreasonable under

Tennessee Consolidated the necessity for a two part approach only one week before their decision in *Ramsey*,[66] it is difficult to rationalize why the same court refused to apply a dual analysis in that case. Although the Sixth Circuit engaged in a subversion of legislative intent in *Ramsey*, the Supreme Court has the opportunity to delineate a more viable interpretation of the scope of the "clear proof" standard. In *Pennington II*, the Court could have resolved the issue, but left no precise guidelines because three different judges offered opinions. *Ramsey* presents a medium in which the Court can clarify the confusion which persists over its holding in *Pennington II*[67] and limit the scope of section 6.[68] Regardless of whether the Court rules in favor of the preponderance of evidence or "clear proof" test, the problem will still remain of allowing judges and juries to bring their prejudices into collective bargaining controversies. To avoid giving judges and juries too much leeway in this complex field, the best solution is for Congress to issue a "clear delineation of prohibited employer-union relationships."[69] Even if the Court refuses to explain *Pennington II* and clarify when the "clear proof" standard governs, this denial of certiorari may be a suggestion that Congress take action to eliminate subsequent misinterpretation of section 6. In any case, the

similar restrictive situations. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

66. *See* note 35 *supra*. The UMW's filing of a petition to rehear en banc in *Tennessee Consolidated* suggests they hope to reverse the three judge panel's decision, just as was done in *Ramsey*. This result seems doubtful as long as the Sixth Circuit will again note that the "clear proof" test is not meant to determine the illegality of an act.

67. For an example of the confusion, *compare* the interpretation of the holding of *Pennington II* in Lewis v. Pennington, 400 F.2d 806, 814 (6th Cir. 1968) ("clear proof" stated as part of holding), *with* Ramsey v. UMW, 265 F. Supp. 388, 398 (E.D. Tenn. 1967) (no mention of "clear proof").

68. The Supreme Court could also decide whether predatory intent is necessary to violate the Sherman Act. The opinions in *Pennington II* failed to agree on this question and numerous courts have already attempted to answer the question. *E.g.*, United States v. Columbia Steel Co., 334 U.S. 495, 525 (1948); United States v. Patten, 226 U.S. 525, 543 (1913).

69. 43 TEXAS L. REV. 1122, 1126 (1965). Such legislation might place the NLRB in charge of union antitrust litigation. *Compare* Cox & Dunlop, *Regulation Of Collective Bargaining By The National Labor Relations Board*, 63 HARV. L. REV. 389 (1950), *with* Comment, *Union-Employer Agreements And The Antitrust Laws: The Pennington And Jewel Tea Cases*, 114 U. PA. L. REV. 901, 931-37 (1966).

implementation of the proposed two part approach demands that the courts and Congress recognize the inherent limitations of the "clear proof" rule.[70]

Antitrnst—Robinson-Patman Act—Private Litigants Need Not Show Consequential Damages in Order to Recover Treble Damages for Price Discrimination Violations

Alleging price discriminations[1] in violation of the Robinson-Patman amendment to the Clayton Act,[2] plaintiffs brought a private antitrust suit[3] against a supplier. The trial court found the plaintiffs had suffered a direct business injury as a result of the discriminations, and that the amount thereof could be made the measure of a general damage award.[4] The defendant contended that this was an improper measure of damages and that the plaintiff must prove special or consequential damages[5] before being entitled to recovery. On appeal to the Ninth Cireuit Court of Appeals, *held*, affirmed. Where plaintiff has established that he has been charged illegally discriminatory prices, the unjustified discrimination is a direct business injury, and the amount thereof is the measure of a general damage award. *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969).

70. The necessity for legislation has often been recognized. *E.g.*, Cox, *Labor And The Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Meltzer, *Labor Unions, Collective Bargaining, And The Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Winter, *Collective Bargaining And Competition: The Application Of Antitrust Standards To Union Activities*, 73 YALE L.J. 14 (1963). Congress has already considered specific bills in this area. *E.g.*, Meltzer, *supra* at 660 n.4; Note, *Jewel Tea & Pennington—Collective Bargaining Under the Antitrust Laws*, 61 NW. U.L. REV. 156, 175 n.99 (1966). Other possible statutes have been proposed outside Congress. *E.g.*, Cox, *supra* at 279-84.

1. Defendant Fowler had sold electric water heaters to the three principal business competitors of plaintiff Thrifty at prices below what it had charged Thrifty.

2. 15 U.S.C. § 13(a) (1964). "It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to diseriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . ."

3. 15 U.S.C. § 15 (1964) (allows any person injured in his business or property by an antitrust violation to sue and collect treble damages); *see* note 31 *infra*.

4. The amount of "general damages" is the difference betwcen the price charged a plaintiff and that charged his competitors, multiplied by the volume of goods purchased by a plaintiff at the discriminatory price.

5. Special or consequential damages are those suffered by a plaintiff through loss of business or profits as a result of the discrimination.

The Clayton Act,[6] which was passed in 1914 to supplement[7] the Sherman Act,[8] proscribes certain types of price discrimination. Section two of the Act, however, contained a "good faith to meet competition"[9] proviso which for twenty years made the Act virtually ineffective against price discrimination violations.[10] A Federal Trade Commission report confirmed this finding[11] and recommended that the law be amended.[12] In response to this report, separate bills[13] were introduced in both Houses of Congress. The Senate bill, as originally passed, created a statutory presumption that the measure of damages was the pecuniary amount of the prohibited discrimination.[14] The House bill, however, contained no provision for a measure of damages.[15] The issue was resolved in the conference committee of the two houses, and the statute as finally enacted contained no provisions for measuring damages.[16] The question whether general or consequential damages should be the measure of recovery in a private suit under the Robinson-Patman Act has not been adjudicated by the Supreme Court. The lower federal courts have divided on the issue, and even within the circuits the districts are split. In *Elizabeth Arden Sales Corp. v. Gus Blass Co.*,[17] the Eighth Circuit held that the presence of

6. 15 U.S.C. §§ 12-27 (1964).

7. "[W]e are not amending the Sherman law. We are merely supplementing it by additional legislation . . . [i]n the interest of harmony, and especially when there is no objection to the Sherman law . . . [w]hy have one rule in the original Sherman law as it is written and another rule in the supplemental provisions . . . ." 51 CONG. REC. 9417 (1914) (remarks of Representative Floyd).

8. 15 U.S.C. §§ 1-7 (1964).

9. "[N]othing herein . . . shall prevent discrimination in price between purchasers of commodities . . . or discrimination in price in the same or different communities made in good faith to meet competition." Act of Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730.

10. W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 7 (1963).

11. FEDERAL TRADE COMMISSION, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. DOC. NO. 4, 74th Cong., 1st Sess. 90 (1934).

12. *Id.* at 96-97.

13. S. 3154, 74th Cong., 2d Sess. (1936), *cited in* W. PATMAN, *supra* note 10, app. C, at 283; H.R. 8442, 74th Cong., 2d Sess. (1936), *cited in* W. PATMAN, *supra* note 10, app. C, at 306.

14. "For purposes of suit under section 4 of this Act, the measure of damages from any violation of this section shall, in the absence of proof of greater damage, be presumed to be the unit amount of the prohibited discrimination . . . ." S. 3154, 74th Cong., 2d Sess. § 2(d) (1936). The Senate report accompanying the bill stated that the presumptive rule for the measure of damages would serve as a deterrent to violators and enable victims of the discriminations to avoid the difficulties of proving business loss. S. REP. NO. 1502, 74th Cong., 2d Sess. 8 (1936).

15. H.R. 8442, 74th Cong., 2d Sess. (1936).

16. The conference report deleting § 2(d) of the Senate bill provided: "[T]he Senate bill set up a new measure of damages for violations of the law, whereas the House bill left the damages to be determined in accordance with the provisions of the existing Clayton Act. The Senate receded." H.R. REP. NO. 2951, 74th Cong., 2d Sess. 8 (1936).

17. 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).

an illegal price discrimination constituted the necessary business injury and that the amount of discrimination could properly be made the measure of a general damage award.[18] The court reasoned that a damage statute should be read in relation to the intent and policy of the Act of which it is a part.[19] They interpreted the Robinson-Patman Act as requiring that anything furnished to one customer should be furnished to another on proportionately equal terms. The court found no reason under the language or policy of the statute for not compelling the seller to do what he is required to do by allowing recovery of general damages.[20] Although the majority adopted a general damage standard, they conceded that there are some kinds of discrimination which preclude an award of general damages.[21] The Second Circuit in *Enterprise Industries, Inc. v. Texas Co.*,[22] took a contrary position when it reversed a district court decision[23] allowing general damages. *Enterprise* held that no general damage award is authorized under the Act and that the customer must prove consequential damage to his business in loss of profits and customers.[24] The majority relied in part upon its previous decision in *Sun Cosmetic*[25] and in part upon its interpretation of the legislative history of the Robinson-Patman Act. The court reasoned that since proof of the price discrimination places the burden of showing price justification upon the party charged with the violation,[26] it would unduly prejudice the

18. *But see* American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951).

19. 150 F.2d at 995.

20. *Id.* at 996.

21. Although the court did not point out any characteristic features by which a general damage situation can be distinguished from a consequential damage situation, they provided the following example: "[A] discriminatory allowance of funds to a customer, to be used by him solely in advertising or promoting business in the seller's goods, would perhaps not furnish a basis for general damages, since the injury to a competitor probably would depend upon the results which the advertising funds produced . . . . Again, under subsection (c), 15 U.S.C.A. § 13(c), which prohibits the granting of any commission or brokerage by a seller to any customer or his agent, no general damage right would probably exist . . . ." *Id.* at 996.

22. 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

23. Enterprise Indus., Inc. v. Texas Co., 136 F. Supp. 420 (D. Conn. 1955).

24. In reaching this conclusion the court referred to the reasoning of Justice Cardozo concerning the proper way to measure damages: "If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered . . . price . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more." ICC v. United States *ex rel.* Campbell, 289 U.S. 385, 390-91 (1933).

25. Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1946).

26. 15 U.S.C. § 13(b) (1964) (originally enacted as § 2(b) of the Robinson-Patman Act).

defendant to presume that the amount of the discrimination reflects the amount of business injury. This would require the defendant to prove, from facts at the disposal of the plaintiff, that there was no loss of business or profits as a result of the discrimination.[27] The majority concluded that if Congress had intended to place a defendant at such a drastic procedural disadvantage, the general damage standard would not have been deleted from the original Senate bill. The court, however, indicated that if a buyer has been charged a discriminatory price and there is evidence that he has not passed this expense on to the consumer but has absorbed it himself, then the facts may show the amount of the discrimination to be the proper measure of the buyer's business damage.[28] Although the Supreme Court has not decided the issue, in dictum in *Bruce's Juices, Inc. v. American Can Co.*[29] answering the buyer's complaint that there would be no relief available unless the Court allowed him to disaffirm the sale, the majority suggested that if he showed the prices to be discriminatory, he would be able to recover three times the amount of the discrimination.[30]

In the instant case, the court found that the unjustified price discrimination caused a direct business injury, and that the Robinson-Patman Act did not require a plaintiff to prove his damage through a showing of lost profits or business. Therefore, the court concluded that the Act allowed the illegal price discrimination to be the basis for recovery and that the amount of the discrimination is the measure of a general damage award.

The private enforcement section of the Clayton Act requires that a person be *injured in his business* in order to recover for a violation of the antitrust laws. This court applied a general damage standard which equates the price discrimination with the required business injury. This interpretation seems to violate the congressional intent and the language of the private enforcement section of the Clayton Act, under which suits for violation of the Robinson-Patman Act are instituted. When the Robinson-Patman amendment to Clayton was enacted, Congress left undisturbed the pre-existing section allowing

27. 240 F.2d at 460.

28. *Id.* at 459.

29. 330 U.S. 743 (1947).

30. *Id.* at 757. The question then before the Court was whether discrimination should bar a seller from recovering the contract price. *See* Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951), *petition for cert. dismissed*, 342 U.S. 875 (1951) (in a private enforcement suit the court appeared to apply the general damage standard).

private recovery.[31] This section had been re-enacted with only minor changes from section seven of the Sherman Act.[32] In passing the Clayton Act, Congress apparently meant to limit recovery to the Sherman Act concept of actual business injury.[33] The Robinson-Patman Act was intended to strengthen and close the loopholes in section 2 of the Clayton Act.[34] It did not alter the section allowing private recovery in any way, and Congress rejected the Senate's attempt to set up the general damage standard as a new measure of damages.[35] As the dissent pointed out, the *Arden* decision fails to justify the grant of general damages in the light of the legislative history of the Act.[36] The adoption of a general damage standard fails to correlate legislative intent with economic reality. A buyer who is discriminated against in prices may pass that price increase on to the ultimate consumer, and thereby eliminate any direct business injury. Price variation among competing merchants is an integral part of our economic system and must be considered if the clear language of the Act is to be followed. If in a given case a merchant is charged a higher discriminatory price, and he absorbs this increase rather than passing it on, a direct business injury has occurred. In this situation, the amount of price discrimination reflects actual business injury. This does not justify approval of a general damage award. The amount of discrimination is recoverable only because it happens to be the measure of consequential damages.[37] The cases and authorities advancing the

31. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1964) (originally enacted as Act of Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731).

32. Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890).

33. *See* 51 CONG. REC. 9073 (1914); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922); *cf.* 51 CONG. REC. 9261 (1914). *Contra*, Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 756 (1947) (dictum that Sherman Act case law does not fit Robinson-Patman cases). *See generally* Clark, *The Treble Damage Bonanza: New Doctrines of Damages In Private Antitrust Suits*, 52 MICH. L. REV. 363, 406-11 (1954); 1957 U. ILL. L.F. 329.

34. "Mr. GORE. I desire to ask the Senator whether the general purpose and object of the pending bill are to strengthen the provisions of section 2 of the Clayton Act, and to stop the loopholes and correct the abuses which time and experience have developed and disclosed in that legislation? Mr. LOGAN. I say to the Senator that the bill has no other purpose . . . the bill has three things in view, all aimed at strengthening the Clayton Act." 80 CONG. REC. 3115 (1936).

35. *See* note 19 *supra*.

36. 150 F.2d at 996-97.

37. The opinion in the instant case does not contain enough information to ascertain whether this was the situation upon which the court based its award of general damages.

general damage approach have argued that to require a plaintiff to prove damages through loss of business and profits is an almost insurmountable barrier to success in a suit.[38] This argument has become less persuasive since the lack of precise proof of the amount of damage no longer blocks recovery in a private antitrust action in federal courts.[39] The principle which precludes recovery of uncertain damages only applies to the situation in which the violation is not definitely shown to be the proximate cause of the damage; it does not prohibit recovery when only the amount of the damage is uncertain.[40] Recent Supreme Court decisions have indicated a trend towards encouraging private enforcement suits under the Robinson-Patman Act. The decision in the present case does not detract from this trend since the injured party is not required to specifically prove the amount of his damages.

Although it may be more difficult for a plaintiff to prove special damages, it is not an unreasonable requirment. To require less puts the defendant under the unjustifiable burden of disproving all the specific elements of plaintiff's case; it ignores the fact that the private action is only one means of enforcing the prohibition against price discrimination;[41] and it conflicts with the intent of Congress as reflected by the legislative history of the Robinson-Patman Act.

Antitrnst Remedies—State Given Standing to Sue as *Parens Patriaé*

The State of Hawaii, alleging a combination and conspiracy in restraint of trade[1] and damage to the State in its proprietary capacity,

38. *See* Barber, *Private Enforcement Of The Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181, 210-18 (1961).

39. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946); Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

40. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931); *see* TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS § 20.02, at 289-93 (1965).

41. The primary means of enforcement is a suit by the Federal Trade Commission. After finding that there has been illegal discrimination, the Commission will issue a cease and desist order.

1. Plaintiff's fourth amended complaint alleged that defendant's bid rigging, price fixing, market monopolization, and other acts in restraint of trade were in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964): (1) "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." (2) "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize

filed a treble damages complaint against three oil companies. Plaintiff, acting in its *parens patriae* capacity,[2] alleged injury to the economy and prosperity of the State of Hawaii[3] and sought damages for and injunctive relief against the antitrust violations. As to the *parens patriae* action, defendants moved to dismiss, urging that a state could not recover damages as *parens patriae*[4] and that no injury had been alleged.[5] On motion in the United States District Court for the District of Hawaii, *held*, for the plaintiff. Within the context of the antitrust acts, a state has standing to sue for damages and injunctive relief as *parens patriae* when defendant's acts adversely affect a substantial number of a state's citizenry and the general economy and prosperity of the state. *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii 1969).

In examining the nature of a state's ability to sue as *parens patriae*, the Supreme Court has closely scrutinized petitioner's standing in each case. To qualify for the Court's original jurisdiction,[6] a state

any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

2. The *parens patriae* or quasi-sovereign capacity is one in which a state asserts its position as agent and protector of all its citizens in behalf of their general welfare. Georgia v. Pennsylvania R.R., 324 U.S. 439, 443-44 (1945).

3. The specific injuries alleged are as follows: "(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii; (b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income; (c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed; (d) the full and complete utilization of the natural wealth of the State has been prevented; (e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market; (f) measures taken by the State to promote the general progress and welfare of its people have been frustrated; (g) the Hawaii economy has been held in a state of arrested development." Hawaii v. Standard Oil Co., 301 F. Supp. 982, 983-84 (D. Hawaii 1969). Plaintiff also alleged that the precise extent of the damage has not yet been ascertained and it requests leave to insert such sum when determined. *Id.*

4. Defendant specifically alleged that a *parens patriae* suit is not maintainable under § 4 of the Clayton Act, 15 U.S.C. § 15 (1964): "Any person who shall be injured in his businss or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

5. Other grounds asserted for dismissal were that: (a) there can never be a *parens patriae* suit for damages; (b) there would be created the risk of double recovery for damages recoverable by both the State and individual citizens; (c) damages under the antitrust laws will not lie because an injury to the State's sovereignty is by its very nature too remote or speculative to be measured in money damages. Hawaii v. Standard Oil Co., 301 F. Supp. 982, 984 (D. Hawaii 1969).

6. "In all Cases affecting Ambassadors, other public Ministers and Consults, and those in

must be a true party in interest, and the suit must be free of the eleventh amendment's bar against a state's being sued by the citizens of another state.[7] As a result, the Court has disallowed suits as *parens patriae* when one state sued another in order to collect debts owed to its citizens[8] or when it found a state was suing primarily in behalf of particular creditors and depositors of a state bank.[9] In *Oklahoma v. Atchison, T. & S. F. Ry.*,[10] the state sued to cancel railroad rates set by a federal statute. The use of *parens patriae* was severely restricted by the Court's holding that individual shippers could have brought essentially the same suit and that the state had no direct property interest at stake. Therefore, inadequate grounds existed for granting original jurisdiction.[11] On the other hand, states have been allowed to bring *parens patriae* suits when it was found that the state had a quasi-sovereign interest in the comfort, health, and prosperity of its citizens.[12] A state suing as *parens patriae* must act for the benefit of the public as a whole and not for the benefit of defined individuals.[13] Standing to recover damages for economic injury was allowed first in *Georgia v. Pennsylvania R.R.*[14] The decision brought new breadth to the *parens patriae* doctrine by allowing Georgia to enforce the civil sanctions of the antitrust laws. The Court considered the state to be a "person" within the meaning of section 4 of the Clayton Act,[15] and the asserted claims were deemed to be an injury distinct from any damage suffered

which a State shall be Party, the Supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2.

7. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

8. New Hampshire v. Louisiana, 108 U.S. 76 (1883) (citizen-bondholders of New Hampshire were the real parties in interest, thereby falling within the eleventh amendment prohibition).

9. Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387 (1938) (without a direct interest the state was not a real party).

10. 220 U.S. 277 (1911).

11. "We are of the opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be a party,' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally." *Id.* at 289.

12. *See, e.g.*, North Dakota v. Minnesota, 263 U.S. 365 (1923); Kansas v. Colorado, 206 U.S. 46 (1907); Missouri v. Illinois, 180 U.S. 208 (1901).

13. Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (damages averred by the state do not have to threaten all of the state's inhabitants or all of them in like degree).

14. 324 U.S. 439 (1945).

15. 15 U.S.C. § 15 (1964). The Court found that there was no apparent reason why states should be excluded from the purview of the antitrust laws. 324 U.S. at 452.

by individual citizens.[16] Although Georgia was not allowed to recover its alleged damages,[17] a precedent was set for giving states standing to sue as *parens patriae* in order to redress economic injury inflicted by antitrust violations.

In determining the state's legal standing to sue, the district court held in the instant case that Hawaii's complaint met the two prerequisites of a *parens patriae* suit: (1) the state alleged an interest independent of its citizens rather than seeking to recover for individual citizen-claimants; and (2) a substantial number of the state's inhabitants were adversely affected by the alleged acts of the defendants.[18] As to the propriety of the state's claim for *parens patriae* standing in an antitrust action, the court found *Georgia v. Pennsylvania R.R.*[19] to be determinative of the principle that a state is a "person" within the meaning of the antitrust provisions and can sue to recover damages for injuries to the general economy. Defendants' argument that economic injury was not injury to "business or property" within section 4 of the Clayton Act[20] was met by the court's conclusion that if the economy of a state may be injured, then "economy" is finite and within the broad definition of property. The specific allegations of plaintiff's complant[21] were not so remote and speculative as to render the complaint insufficient or the damages immeasurable. The assertion of possible double recovery was also denied by the court's recognition of a *parens patriae* action as redress for only that injury completely severable from damages recoverable by individual citizens.

The court's denial of defendants' motion to dismiss was appropriate in light of available precedent. The *Georgia* case[22] made it

16. 324 U.S. at 447-48; Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

17. Even if the alleged conspiracy or restraint of trade did exist, under the holding of Keogh v. Chicago & N.W.Ry., 260 U.S. 156 (1922), rates approved by the I.C.C. must be considered legal. 324 U.S. at 453.

18. The court judicially noticed that 300,000 motor vehicles are owned by Hawaii's 800,000 inhabitants. Furthermore, "[i]f more facts were needed, in this State where the grass never ceased to grow, gasoline-powered lawn mowers are as thick as the proverbial fleas on a dog. These two categories, of course, do not cover all of the engines in Hawaii that are powered by petroleum products. The court would judicially notice that there is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other petroleum products referred to in the present complaint, and perforce therefore, the cost thereof." 301 F. Supp. at 987.

19. 324 U.S. 439 (1945).

20. *See* note 4 *supra.*

21. *See* note 3 *supra.*

22. 324 U.S. 439 (1945).

clear that a state has the ability to enforce the civil sanctions of the antitrust laws[23] and directly implied that a suit in *parens patriae* for damages was allowable.[24] There is analytical difficulty in classifying a state's economy as property, but a broad definition of property, which traditionally has included other intangibles such as business goodwill, does not seem unreasonable. Furthermore, the strong countervailing considerations[25] that have often led the Supreme Court to deny standing in certain *parens patriae* suits are not present in this case. Therefore, as a policy matter, no reason exists for refusing the state an opportunity to prove damage to its economy. The conceptual proof, however, demonstrating some reasonable inference of amount of damage, is a formidable obstacle for the state,[26] since the theory of *parens patriae* as delineated by the district court presupposes the need to show injury completely severable from individual damages.[27]

The proof of damages entails the use of economic theory to approximate injury to the economy apart from direct injuries measured by overcharges. The basic premise is that had it not been for defendants' price-fixing activities, the citizens of Hawaii would have had extra dollars[28] to allocate between spending for consumption[29] and holding for savings.[30] These withheld extra dollars would have had an

23. *See* text accompanying note 18 *supra*.

24. "Georgia, suing for her own injuries is a 'person' within the meaning of § 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust laws or *to recover damages* by reason thereof. . . . But Georgia is not confined to suits designed to protect only her proprietary interest." 324 U.S. at 447 (emphasis added).

25. The state is not here seeking either original jurisdiction by the Supreme Court or suit against another state within the eleventh amendment prohibition. *See* notes 6 & 7 *supra* and accompanying text.

26. Practical evidence of this difficulty is shown by: (a) the State of Hawaii did not allege a monetary sum for damages, *see* note 3 *supra*; (b) the brief for the State of Georgia admitted that such damage is perhaps incapable of estimate in money, Brief for Complainant at 7, Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945).

27. "If the State cannot prove injury to the State's economy—an injury completely severable from the injuries to its individual inhabitants, then of course it could recover no money damages." 301 F. Supp. at 988.

28. The amount of these extra dollars could be determined by finding the difference between the cost per unit as actually sold and the cost per unit under competitive prices and multiplying by the number of units sold in Hawaii by the defendants. The only offset would be the Hawaiian stockholders' share of the companies' greater profit.

29. The extra percentage amount that will be spent on consumption if people are given an extra dollar of income is known as the "marginal propensity to consume" (MPC) and can be determined by reference to typical consumption schedules. P. SAMUELSON, ECONOMICS, AN INTRODUCTORY ANALYSIS 265-66 fig. 1 (2nd ed. 1951).

30. The fraction of each extra dollar that goes to savings instead of consumption is known as the "marginal propensity to save" (MPS) and can be determined by a consumption schedule. *Id.* at 265-67.

effect on the economy of the state over and above the direct injury to the overcharged individuals. It is a well established principle of economic theory that an increase in net spending (the extra dollars) will increase overall income by a multiplied amount—by an amount greater than itself.[31] This amplified effect of changes in spending on income is called the "multiplier" doctrine,[32] and depending on what percent of each extra dollar of income is spent for consumption,[33] the economy is affected by a change in income greater than the total amount of the overcharge.[34] Such a multiplied increase in income less the aggregate individual overcharges would, therefore, when multiplied by the ratio of aggregate spending within the state to total spending, be a measure

31. *Id.* at 280.

32. The word "multiplier" is the term used for the numerical coefficient showing how great an increase in income results from each increase in spending. For example, if an increase of $5 billion eauses an increase of income of $15 billion, then the multiplier is 3. *Id.*

33. This percentage is known as the MPC. *See* note 29 *supra.* Technically, the change in income will be equal to: 1 ÷ (1-MPC) multiplied by extra dollars invested. P. SAMUELSON, *supra* note 29, at 282.

34. The practical effect of the multiplier can be better shown by an example. If a person hires unemployed resources to build a $1,000 garage, there will be a secondary expansion of income over and above the primary investment. The building contractor will get an extra $1,000 of income, but that is not the end of the story. If he is assumed to have a marginal propensity to consume of 2/3, he will now spend $666.67 on new consumption goods. The producers of these goods will now have an extra income of $666.67. If their MPC is also 2/3, they in turn will spend $444.44 or 2/3 of $666.67 (or 2/3 of 2/3 of $1,000). So the process goes on, with each new round of spending being 2/3 of the previous round. An endless chain of secondary consumption respending is set up by the primary $1,000 of investment spending; however, it is a dwindling chain which all adds up to a finite amount. By either arithmetic or geometric progression,* we get:

$$\begin{array}{l} \$1{,}000.00 \\ + \\ 666.67 \\ + \\ 444.44 \\ + \\ 295.29 \\ + \\ 197.53 \\ + \\ \cdots \\ \hline 2{,}999.9999 \\ \text{or} \\ \$3{,}000.00 \end{array} = \begin{array}{l} 1 \times \$1{,}000 \\ + \\ 2/3 \times \$1{,}000 \\ + \\ (2/3)^2 \times \$1{,}000 \\ + \\ (2/3)^3 \times \$1{,}000 \\ + \\ (2/3)^4 \times \$1{,}000 \\ + \\ \cdots \\ \hline \frac{1}{1\text{-}2/3} \times \$1{,}000 \text{ or } 3 \times \$1{,}000 \end{array}$$

of the economic injury sustained by the State's economy as a result of the discriminatory rates.[35]

The overall policy considerations of the antitrust laws should also be considered. As evidenced by the treble damages provision of the Clayton Act,[36] the policy of antitrust legislation is to deter illegal combinations and conspiracies by severely punishing the violators. Therefore, the remedy against such wrongdoers should be an effective, strong deterrent. The enticement of multi-million dollar price-fixing arrangements is not likely to be prohibited unless treble damages are recoverable by some injured party. Damages to individual consumers, however, usually involve only small sums, although the aggregate overcharges make for quite lucrative profiteering on the part of the wrongdoers. The individual amounts in controversy are usually not sufficient to make piecemeal litigation economically feasible.[37] A method of aggregating valid overcharge claims would partially solve the effective remedy problem by allowing the employment of qualified counsel at reduced cost to individuals.[38] In view of the nature of a state's *parens patriae* capacity—as guardian of its citizens' welfare—a suit by the state to recover the damages of its consumer citizens would be an appropriate remedy were it not for the instant court's insistence on the state's having an interest independent of its citizens.[39] Another remedial approach would involve a typical class action, wherein the state could sue for damages both as the entity injured in its business and property and as the representative of a class as defined by Rule 23 of the Federal Rules of Civil Procedure.[40] Such a state represented

*The formula for an infinite geometric progression is:

$$1 + r + r^2 + r^3 + r^4 + \ldots + r^n + \ldots = \frac{1}{1-r}$$

as long as r is less than 1 in absolute value. P. SAMUELSON, *supra* note 29, at 281. An analogous discussion of the multiplier is set forth in SAMUELSON, ECONOMICS, AN INTRODUCTORY ANALYSIS 246-69 (1961).

35. This theory of proof should not, however, be considered a substitute for the amassing of any available probative statistics showing the deterrent effect of discriminatory petroleum prices upon the location of new business or industry in Hawaii. Proof of damages of this sort, as alleged, would also be free of any double recovery taint since individual citizens are not given standing to protest such injuries.

36. Clayton Act, § 4, 15 U.S.C. § 15 (1964). *See* note 4 *supra.*

37. Wade & Kamenshine, *Restitution for Defrauded Consumers,* 37 GEO. WASH. L. REV. 1031, 1048 (1969).

38. Unfortunately, courts have rarely allowed such actions. *Id.* at 1049 n.113.

39. As was seen above, the reasons for disallowing a *parens patriae* action in the context of a Supreme Court decision are not present in this situation. *See* note 24 *supra.*

40. It is interesting to note that in the instant case such a state represented class action was dismissed by an oral bench decision of the court. 301 F. Supp. at 984 n.3. The basis for the dismissal probably involved administrative difficulties in defining the class and giving notice as

class action would seemingly be an appropriate conduit[41] for administering the large-scale recovery.[42] Either approach could, however, effectuate antitrust policies by providing both restitution to consumers and punishment to the wrongdoers.[43] Problems of administration of such a suit and determination of the proper legal theory as to the cause of action should not prohibit a state's seeking justice for its injured inhabitants, who are themselves without a practical remedy. Even given the framework of the present allowable cause of action to recover for damages to the state's economy, a state represented consumer class action[44] could be a helpful adjunct. The class action would provide a probative basis for determining the monetary residue[45] deductible from the total economic damage (the "multiplied" increase) in order to prevent a double recovery, yet allow a restitution to the victims and a strong deterrent-punishment to the wrongdoer.

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well as the state's claim of injury not being typical of the class. *See* Joint Memorandum of Defendants in Support of Motion to Dismiss Class Action—Count Three of Third Amended Complaint at 8-20, Hawaii v. Standard Oil Co., 301 F. Supp. 982 (D. Hawaii 1969).

41. The attributes of a class action, making it appropriate for this type of consumer remedy, have been articulated by the Second Circuit in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968): "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."

42. The total sum recovered by the class suit could be returned by the state to the injured individuals on a pro rata basis. For guidelines to administering such a massive recovery, the court could look to the recent consent settlement against several major drug companies. *See* Wade & Kamershine, *supra* note 37, at 1031, 1055 & n.153; Order Directing Escrow of Funds by Defendants.

43. As it appears from the argument, plaintiff was merely seeking consumer restitution under either theory available. "Finally, in Count II and Count III, plaintiff is properly seeking compensation (either as trustee-*parens patriae*, or as representative of a class) for the widespread economic injuries which defendants' illegal pricing practice caused to purchasers of refined petroleum products and asphalt." Plaintiff's Memorandum in Opposition to Defendants' Motions Directed to the Third Amended Complaint at 28, Hawaii v. Standard Oil Co., 301 F. Supp. 982 (D. Hawaii 1969).

44. The class action suit should be brought while the present suit is pending.

45. Presumably the class action recovery would approximate the aggregate individual overcharges.

Civil Rights—State Action Not Required Under Sections 1981, 1982, and 1985(3) of Title 42; Action "Under Color of State Constitutional Right" Satisfies the "Color of Law" Requirement of Section 1983

Plaintiffs, parishioners and officials of St. Louis Cathedral Parish, brought a class action in federal district court against two groups of militant demonstrators, seeking injunctive relief to prohibit the threatened recurrence of previous disruptive activities by defendants.[1] On four of five consecutive Sundays, defendants entered plaintiffs' church in an organized, militant fashion, completely disrupted services, and made threatening demands, copies of which were distributed throughout the congregation.[2] Defendants warned of further "shocking" demonstrations in the church unless their demands were met.[3] Plaintiffs contended that defendants, acting under color of state law, violated certain rights and privileges secured to plaintiffs by the United States Constitution and laws, and that plaintiffs might properly have redress under section 1983 of title 42 of the United States Code.[4] Plaintiffs further alleged violation of 42 U.S.C. sections 1981, 1982, and 1985(3).[5] On motion for preliminary injunction, *held*, granted.

1. Plaintiffs included the pastor of St. Louis Cathedral Parish, the Archbishop of St. Louis, as holder of legal title to the church propertty, and certain parishioners, acting individually and on behalf of all other parishioners of St. Louis Cathedral Parish. The 2 defendants, Action and Black Liberation Front, are voluntary and unincorporated associations.

2. The size of the group ranged from 29 to 12; at least 5 demonstrators entered the church on each occasion; those entering the church retained contact with their cohorts outside (whom the court characterized as a "guerilla force") via walkie-talkie equipment. The material passed out to the congregation read in part as follows: "Action's 'BLACK SUNDAYS' at this church will take place *without further warning*. If you're present, of course, you'll become involved—a very shocking experience!

"'BLACK SUNDAYS,' phase two, will take on various forms of uniqueness, such as spitting in the communion cup during communion service, a symbollic gesture of changing wine back to water and/or taking the holy bread from the Reverend and distributing it to the Black *poor*," Gannon v. Action, 303 F. Supp. 1240, 1242 (E.D. Mo. 1969).

3. Defendants demanded "that all properties . . . be made public;" that the church act as a non-profit bonding agency for blacks; that the church take public disciplinary action against certain policemen who were its members; that the church divest itself of specified investments; that 75% of the church's "monies take" be turned over to Action; and, that certain action be taken with regard to rent strikes.

4. 42 U.S.C. § 1983 (1964): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilegcs, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. 42 U.S.C. § 1981 (1964): "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of

Demonstrators who entered a church for the purpose and with the result of causing disorder and disruption acted under color of state law, within the ambit of 42 U.S.C. section 1983, and are amenable to suit under that section, as well as under sections 1981, 1982, and 1985(3). *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969).

The present sections 1981 and 1982 were initially enacted as section 1 of the Civil Rights Act of 1866.[6] From their inception, these sections have been read to apply only to state action. That limitation is traceable to the *Civil Rights Cases*,[7] which held that the fourteenth amendment's first section was directed only at state action. One justification for applying the state action limitation to the statutes was that Congress proposed the fourteenth amendment shortly after it passed the 1866 Act, thereby incorporating the Act into the amendment. A second theory was that a "re-enactment" of the 1866 Act in 1870, after ratification of the fourteenth amendment, imposed the state action limitation on the 1866 Act.[8] In 1948, the Supreme Court suggested that application of section 1982 was limited to discriminatory state action, in view of the scope and purposes of the fourteenth amendment.[9] This approach came to an abrupt end in *Jones*

persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1982 (1964): "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

42 U.S.C. § 1985(3) (1964): "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of pesons of the equal protection of the laws, or of equal privilges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

6. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. §§ 1981, 1982 (1964)). The original § 1 read as follows: "[C]itizens, of every race and color . . . shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." Compare the above language with that of 42 U.S.C. §§ 1981, 1982, *supra* note 5.

7. 109 U.S. 3 (1883).

8. For discussion of the theories and a general study of the 1866 Act, see Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272 (1969).

9. Hurd v. Hodge, 334 U.S. 24, 31-32 (1948). Although purely dicta, the lower federal courts accepted it as an emphatic pronouncement.

v. Alfred H. Mayer Co.,[10] in which the Court extended the coverage of section 1982 to private, as well as public, discrimination in the sale of property. This expansive interpretation was seen as a valid exercise of congressional power to enforce the thirteenth amendment.[11] Although *Jones* was expressly limited to section 1982,[12] the Court's discussion of the legislative history was in terms of section 1 of the 1866 Act, which included the present section 1981.[13] Three months after *Jones*, in *Dobbins v. Local 212, International Brotherhood of Electrical Workers*,[14] an Ohio district court applied the *Jones* rationale and held that state action was not a necessary factor under section 1981.[15]

The state action requirement as applied to section 1985(3)[16] seems a more permanent fixture; since *Collins v. Hardyman*,[17] the state action concept under section 1985(3) has repeatedly been upheld.[18] In *Collins*, the Court noted that section 2 of the Ku Klux Klan Act of 1871[19] was enacted pursuant to the fourteenth amendment and held that section 1985(3) necessarily embodied the amendment's state action

10. 392 U.S. 409 (1968).

11. Justice Stewart's majority opinion provides a detailed analysis of the legislative history and the socio-political environment behind the 1866 Act. Through this analytical process the Court determined that the fourteenth amendment's state action limitation was inapplicable to § 1982. The Court distinguished *Hurd*, stating that it was not a case of "purely private" discrimination. 392 U.S. at 419. The Court noted that the only federal court to previously confront the "purely private" discrimination question had allowed a suit under § 1982. United States v. Morris, 125 F. 322 (E.D. Ark. 1903).

12. 392 U.S. at 413. "We hold that § 1982 bars *all* racial discrimination . . . ."

13. *Id.* at 422-36. See note 6 *supra* for text of § 1.

14. 292 F. Supp. 413 (S.D. Ohio 1968). Dobbins, a Negro, brought an action against a union for its refusal to allow him membership because of his race. Noting the close relationship between union membership and Dobbins' ability to contract for employment in the industry, the court held that the union's discriminatory action violated the contract rights provision of § 1981.

15. *Id.* at 442. The court pointed out that state action was present in *Dobbins*, so that their extension of the *Jones* doctrine was unnecessary. The *Dobbins* court may well have been unconscious of its "extension" of *Jones*; the court seemed to think that the *Jones* decision itself struck down the state action requirement of § 1981 because § 1 of the 1866 Act, relied upon heavily by the Supreme Court, included both 42 U.S.C. § 1981 and § 1982.

16. Like §§ 1981 and 1982, § 1985(3) does not on its face require state action. Note 5 *supra*.

17. 341 U.S. 651 (1951).

18. *See, e.g.*, Wallach v. Cannon, 357 F.2d 557 (8th Cir. 1966); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959); Van Daele v. Vinci, 294 F. Supp. 71 (N.D. Ill. 1968); Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967); Bryant v. Donnell, 239 F. Supp. 681 (W.D. Tenn. 1965); Swift v. Fourth Nat'l Bank, 205 F. Supp. 563 (M.D. Ga. 1962).

19. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13 (codified at 42 U.S.C. § 1985(3) (1964)), entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." The legislative history of the Ku Klux Klan Act of 1871 is given a detailed analysis in Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967).

requirement.[20] A recent Fifth Circuit decision,[21] citing the thirteenth amendment background of section 1982, held that *Jones* was not authoritative as to the 1871 Act, and therefore would not alter the decisional limits of section 1985(3).[22]

Section 1 of the 1871 Act[23] provided redress for deprivation of rights "under color of any law, statute, ordinance, regulation, custom, or usage of any State";[24] that requirement remains in the present section 1983.[25] The original interpretation of the predecessor of section 1983 was that only action *authorized* under state law fell within the purview of that statute.[26] The Supreme Court first rejected that interpretation in *United States v. Classic*.[27] Although a criminal

20. 341 U.S. 651 (1951). Some argue that, even though it was enacted pursuant to the fourteenth amendment, § 1985(3) should not be held to require state action. This analysis notes that § 1 of the Ku Klux Klan Ac twas expressly limited to state action, and concludes that had Congress intended § 2 of tbat Act to be so limited, it would have included the state action requirement in the language of § 2. *See, e.g.*, Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839, 841 (1964).

21. Griffin v. Breckenridge, 410 F.2d 817 (5th Cir. 1969), *noted in* 23 VAND. L. REV. 158 (1969).

22. The Fifth Circuit also distinguished United States v. Guest, 383 U.S. 745 (1966), involving a criminal prosecution under 18 U.S.C. § 241, which reads as follows:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any rigbt or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on tbe higbway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

While 18 U.S.C. § 241 and 42 U.S.C. § 1985(3) have been called criminal and civil counterparts (Baldwin v. Morgan, 251 F.2d 780, 790 (5th Cir. 1958)), the *precise* criminal companion of § 1985(3) was declared unconstitutional in United States v. Harris, 106 U.S. 629 (1882).

In *Guest*, the majority opinion found state action alleged, and therefore failed to reach the issue of whether a private conspiracy came within the prohibition of § 241. Six Justices, however, in 2 concurring opinions, stated that they believed § 241 did extend to private conspiracies. The *Griffin* court held firmly to the majority opinion's finding of state action, and determined that the concurring opinions in *Guest* were insuffieient to remove the state action requirement.

23. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1964)).

24. The only case to discuss deprivations involving a source of state law other than those quoted was Giles v. Harris, 189 U.S. 475 (1903). The case involved deprivation of voting rights under the Alabama eonstitution. A lower federal court dismissed the suit for lack of jurisdiction. Desirous of showing grounds for dismissal other than a laek of subject-matter jurisdiction (inability to provide adequate relief), tbe Court said: "We assume further, *for the purposes of decision*, that [§ 1983] extends to a deprivation of rights under color of a state constitution . . . ." *Id.* at 485 (emphasis added). The Court went on to acknowledge the dubious validity of such an assumption. *Id.* at 485, 487.

25. The phrases "state action" and "under color of" state law have been interpreted as stating essentially the same requirements. For a discussion of the comparative scopes of the 2 pbrases, see Note, *supra* note 20, at 843-46.

26. *E.g.*, Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); Myers v. Anderson, 238 U.S. 368 (1915).

27. 313 U.S. 299 (1941). Most commentators consider the *Screws* test an expansion of the

prosecution, the decision required interpretation of the phrase "under color of" law.[28] The Court held that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[29] The Court's major step in extending the "color of law" doctrine toward its present status was in *Screws v. United States*,[30] in which it declared that under "color" of law clearly meant under "pretense" of law.[31] In the landmark case of *Monroe v. Pape*,[32] the Court injected the *Screws* and *Classic* interpretations into section 1983,[33] allowing a civil action under that section against police officers who had made the plaintiff the victim of a grossly illegal search and detention.[34]

In the instant case the court held that defendants had entered plaintiffs' church purportedly pursuant to defendants' state constitutional rights to freedom of worship and peaceful assembly; and that once inside, defendants exceeded any constitutional grant under which they purported to act, thereby depriving plaintiffs of their rights to freedom of assembly, speech, and worship, to hold, use, and enjoy property, and to have their property protected. Therefore, in entering the church, defendants acted "under color of state constitutional right."[35] Alternatively, the court reasoned that the "color of law" requirement of section 1983 was satisfied by the fact that defendants entered plaintiffs' church under "color of" the "custom" of the State

Classic doctrine. *See, e.g.*, Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 284-87 (1965).

28. The prosecution was under 18 U.S.C. § 242: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both." 18 U.S.C. § 242 bears the same relation to 42 U.S.C. § 1983 as does 18 U.S.C. § 241 to 42 U.S.C. § 1985(3). *See* note 19 *supra*.

29. 313 U.S. at 326.

30. 325 U.S. at 95.

31. *Id.* at 111.

32. 365 U.S. 167 (1961).

33. The holding was phrased in terms of *Classic*. *See* text accompanying note 29 *supra*. The Court noted with approval the *Screws* decision, apparently accepting the *Screws* and *Classic* tests as equivalents.

34. The *Monroe* decision was also significant in that it laid to rest the question of what rights are protected under § 1983, an issue not presented in the instant case. This facet of *Monroe* is discussed in Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969).

35. 303 F. Supp. at 1245.

of Missouri to assemble and worship peacefully,[36] and concluded that plaintiffs were entitled to relief under section 1983.[37] The court also noted that plaintiffs were entitled to redress under sections 1981, 1982, and 1985(3), and held that, since *Jones* erased the state action requirement under section 1982, an allegation of state action was not essential for relief under section 1981 or section 1985(3).[38] In allowing a cause of action under section 1982, the court adopted a liberal construction of that section and concluded that defendants had infringed upon plaintiffs' right to "hold" property. Although the court used the word "hold" in each reference to a violation of section 1982, it adhered to the theory that section 1982 protects all property rights—not merely those rights enumerated in the statute.[39] The court refused to narrow the scope of section 1981 and held that a white person, as well as a non-white, might properly seek redress under that section.[40] In allowing plaintiffs' claim under section 1985(3), the court indicated that the use of semi-military uniforms, walkie-talkie equipment, and pre-printed material clearly showed the requisite conspiracy.[41]

The court's analysis of the rights protected by sections 1981 and 1982 closely parallels the Supreme Court's attitudes toward liberal construction of civil rights statutes;[42] the *Jones* obliteration of the state action requirement under section 1982, as here extended to actions under section 1981,[43] properly completes the transformation of the 1866 Civil Rights Act. The holding under seetion 1985(3) suffers more from the illegitimacy of its justifications than from the result reached. Although the holding contravenes the great weight of authority,[44] it is defensible in light of the concurrent enactment of sections 1983 and 1985(3).[45] Had the court based its decision on the intent of the Reconstruction Congress to reach private conspiracies under section 1985(3), as evidenced by the inclusion of the "color of law"

36. Note that the language of § 1983 includes action taken "under color of any . . . custom . . . of any State . . . ." *See* no. 4 *supra*.

37. 303 F. Supp. at 1245.

38. *Id.* at 1244.

39. This is the view of some commentators. *Cf.* Ervin, *Jones v. Alfred H. Mayor Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485, 496 (1969).

40. 303 F. Supp. at 1244.

41. *Id.* at 1247.

42. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); United States v. Guest, 383 U.S. 745 (1966); United States v. Price, 383 U.S. 787 (1966); Monroe v. Pape, 365 U.S. 167 (1961).

43. 303 F. Supp. at 1244.

44. *See* cases cited note 18 *supra*.

45. Act of April 20, 1871, ch. 22, §§ 1, 2, 17 Stat. 13 (codified at 42 U.S.C. §§ 1983, 1985(3) (1964)). *See* note 20 *supra*.

requirement in section 1983 and the absence of such language in section 1985(3),[46] the case might have laid groundwork for the eventual demise of the state action requirement under section 1985(3). With regard to the application of the *Jones* analysis to section 1985(3), however, *Griffin v. Breckenridge*,[47] in which the Fifth Circuit rejected that argument, is the better-reasoned case and should survive the instant decision.

The activist attitude adopted by the court in its consideration of the section 1985(3) issue hardly waned as the court decided the question of applicability of section 1983. Authority is unlimited for the proposition that private invasion of civil liberties is without the prohibition of section 1983;[48] yet this decision in effect creates a cause of action under that section for practically any private discrimination or deprivation of rights. The initial fallacy of the ruling on section 1983 lies in the authority cited. *Giles v. Harris*[49] does not support the court's holding that action "under color of state constitutional right" satisfies the "color of law" requirement; that supposition was made in *Giles* solely "for the purposes of decision," to allow the Court to reach the issue upon which plaintiff's claim was finally dismissed.[50] Even if the instant case's interpretation of *Giles* is correct, a strained analysis is necessary to maintain that defendants acted "under color of" the Missouri constitution, which expressly excludes from its protection action such as taken by defendants here;[51] or under "color of" a state "custom."[52] The court seems to have overstepped the bounds of reasonableness in so holding. Defendants entered the church with the notorious design of causing disruption; there was no "pretense" of the exercise of religious freedoms. Had entry been made under the guise of peaceful religious exercise, it could be said that there was "power" to enter, possessed by virtue of the state constitution, and that subsequent "misuse of power" had been made possible only because

46. *See* Note, *supra* note 20, at 841.

47. 410 F.2d 817 (5th Cir. 1969).

48. *E.g.*, Wallach v. Cannon, 357 F.2d 557 (8th Cir. 1966); Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283 (W.D. Pa. 1968); Harrison v. Murphy, 205 F. Supp. 449 (D. Del. 1962).

49. 189 U.S. 475 (1903).

50. *See* note 24 *supra*. In *Giles*, the provisions of the Alabama constitution itself violated plaintiffs' rights. This facet of *Giles*, as well as its antiquity, makes noteworthy the Court's statement that its consideration of the case "strikingly reinforces . . . the suggestion that state constitutions were not left unmentioned in [§ 1983] by accident." 189 U.S. at 487.

51. The section on religious freedom in the Missouri constitution contains the following limitation: "[B]ut this section shall not he construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others." MO. CONST. art. 1, § 5.

52. *See* note 4 *supra*.

the wrongdoers were "clothed with the authority of" the state constitution; but under the facts of the instant case, neither the *Classic* criterion nor the *Screws* test can be reasonably applied so as to bring defendants' activities within the "color of law" requirement.[53]

Conflict of Laws—"Contacts" Approach Rejected—Lex Loci Delicti Applied Until Undeniably Better Rule is Found

Guest passengers brought suit in Michigan courts for wrongful death and personal injuries resulting from an automobile accident in Ontario, Canada.[1] Plaintiffs were domiciliaries of New York where the guest-host relationship was created; defendants, driver and owner, were domiciliaries of Michigan where the car was licensed, leased, and insured.[2] Plaintiffs sought relief under the law of either New York[3] or Michigan,[4] both of which allow recoveries by automobile guests. Defendants moved for summary judgment urging that under the local law of the place of the tort, the plaintiffs were barred from recovery.[5] The Circuit Court of Wayne County granted defendants' motion and the Michigan Court of Appeals affirmed.[6] On appeal to the Michigan Supreme Court, *held*, affirmed. The law of the place of the tort will be applied in conflict of laws cases unless some undeniably better rule is available for its supercession. *Abendschien v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969).

Traditionally, the local law of the place of the tort, lex loci delicti,

53. *See* notes 23-32 *supra* and accompanying text. The preliminary injunction was properly granted in the instant case; §§ 1981, 1982, and 1985(3), each in its own right, provided sufficient basis for the remedy sought. However, the decision should have been restricted to allowance of relief under these sections; the court unnecessarily expanded § 1983 far beyond its intended scope.

1. The accident occurred while the parties were in route from Buffalo, New York, to Detroit, Michigan. Plaintiffs based their cause of action on defendant's gross negligence, charging that defendant drove the car at a high rate of speed while intoxicated.

2. Defendant Robert Farrell was the driver; defendant Dictrich Leasing, Inc., incorporated under Michigan laws, was the owner and lessor of the automobile.

3. N.Y. VEHICLE & TRAFFIC LAW § 388 (McKinney 1960).

4. MICH. STAT. ANN. § 9.2101 (1960).

5. ONTARIO REV. STAT. ch. 172, § 105(2) (1960), denies recovery to gratuitous passengers injured due to the negligence or gross negligence of the host driver. This section was amended effective January 1, 1967, to allow recovery if the host driver is guilty of gross negligence. ONTARIO REV. STAT. ch. 64, § 20(2) (1966).

6. Abendschien v. Farrell, 11 Mich. App. 662, 162 N.W.2d 165 (1968). The court found that the place of the tort rule was no longer an acceptable choice-of-law doctrine; however, the court refused to adopt another rule on the theory that stare decisis required continued application of the outdated rule until the Michigan Supreme Court repudiated it.

has determined the substantive rights of parties in tort actions unless the application of that law violates a strong public policy of the forum.[7] This rule, based on the vested rights doctrine,[8] provides certainty, predictability, and simplicity while discouraging forum shopping; however, its strict application may produce inequitable results. To ease these inequities, courts have sought methods for circumventing the rule. Some courts have labeled as procedural issues normally considered to be substantive.[9] This technique avoids the lex loci delicti rule and allows the court to apply the law of the forum. Other courts have avoided undesirable results by holding the rule inapplicable to the case before the court.[10] Neither of these two methods for circumventing the rule involves a complete repudiation of the rule's validity as a choice-of-law technique. The American Law Institute, however, completely abandoned the rule in the 1963 draft of the *Restatement (Second) of Conflict of Laws* and adopted instead the "significant contacts" approach to choice-of-law problems.[11] This approach requires the application of the law of the state having the most significant rclationship to the issue involved. To determine where the most significant relationship is located, four important contacts are to be weighed and considered: the place of the injury; the place where the conduct occurred; the domicile, nationality, place of incorporation and place of business of the parties; and the place where the relationship is centered.[12] The New York Court of Appeals followed the *Restatement's* lead and abandoned the lex loci delicti rule in *Babcock v. Jackson*.[13] While that court spoke in terms of "dominant contacts," it concluded that the law of the jurisdiction most interested in the problem involved and most intimately concerned with the outcome of

7. RESTATEMENT OF CONFLICT OF LAWS §§ 379, 384, 391, 612 (1934).

8. Under this doctrine, rights and obligations vest in the parties under the laws of the jurisdiction where the tort occurred and follow the parties to any other jurisdiction. *Id.* § 384. This theory has been criticized as failing to recognize equitable considerations in determining rights and liabilities. *See* Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379-85 (1945).

9. *E.g.*, Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

10. *E.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Haumschild v. Continental Gas Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

11. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963).

12. *Id.* § 379(2).

13. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The "dominant contacts" approach had previously been adopted in contracts cases. Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332b (Tent. Draft No. 5, 1959).

the case should control.[14] Since *Babcock*, courts[15] and commentators[16] have repudiated the traditional rule in favor of other approaches, including those proposed by the *Restatement* and the *Babcock* decision. The results of this shift away from the traditional rule have been confusion and inconsistency. Much of this confusion has resulted from the failure of courts to distinguish between the "contacts" approach, which relates to the number and weight of the contacts an event has with the jurisdictions involved, and the "interests" approach, which concerns the effects an event has on the jurisdiction. The inconsistency of application is typified by the New York Court of Appeals' attempt to apply the *Babcock* rationale to subsequent cases. For example, in *Dym v. Gordon*,[17] the court reached a result opposite from that in *Babcock* although the facts were strikingly similar. In the *Dym* case, the court resorted to the mere counting of contacts rather than the interest analysis required by *Babcock*. Thus, even the court which created the "interest" approach has experienced difficulty in maintaining a clear and consistent line of decisions. Despite the trend in choice-of-law selection, Michigan has continued to apply the traditional rule.[18]

The instant court began with the proposition that unless some undeniably better rule was presented to supersede lex loci delicti, stare decisis required its continued application. After observing that there were significant contacts in both New York and Michigan, the court balanced the advantages and disadvantages of the lex loci delicti rule and the "significant contacts" approach. The court found that the former provided the advantages of certainty and predictability of result and ease of application, but sometimes produced unsatisfactory or inequitable results. On the other hand, the latter approach allows the equities of the parties and the policies of the concerned states to be weighed and considered, but demands judicial sophistication and precision in its application. Therefore, it fails to provide certainty. The court next considered cases which exemplify the difficulty and confusion caused by attempted applications of the "dominant

14. 12 N.Y.2d at 481-82, 191 N.E.2d at 283-84, 240 N.Y.S.2d at 748-49.

15. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Wilcox v. Wilcox, 26 Wis. 2d 617, 13 N.W.2d 408 (1965).

16. *E.g.*, Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

17. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *see Conflict of Spirit: Babcock v. Dym*, 22 N.Y.U. INTRA. L. REV. 119 (1967).

18. *E.g.*, Griggs v. Griggs, 374 Mich. 268, 132 N.W.2d 163 (1965); Kaiser v. North, 292 Mich. 49, 289 N.W. 325 (1939).

contacts" rule.[19] After considering these factors, the relative advantages and disadvantages of the two rules and the problems attendant to the application of the contacts approach, the court adopted the conclusion of the dissenting opinion in *Babcock* that "there is no overriding consideration of public policy which justifies or directs this change in the established rule or renders necessary or advisable the confusion which such a change will introduce."[20]

Presented with a three-state conflict of laws problem, the Michigan Supreme Court had several choice-of-law approaches from which to choose. The court could have selected the "contacts" approach of the *Restatement*[21] or the "interests" approach of *Babcock*.[22] Applying either of these rules, it is clear that New York or Michigan law must be applied, since Ontario's interest in the issue of liability is questionable and its only substantial contact was the accident itself.[23] While it is true that a balance could result from the application of either of these approaches, the balance would have been between New York and Michigan. Ontario law would not have been applied. Likewise, the court could have selected a choice-of-law methodology such as that developed by Professors Cheatham and Reese[24] or the condensed version of that methodology advocated by Professor Leflar.[25] Leflar condenses the Cheatham-Reese scheme into five factors: the need for predictability of result; the need to maintain

19. Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966); Casey v. Manson Const. & Eng'r Co., 247 Ore. 274, 428 P.2d 898 (1967).

20. 12 N.Y.2d at 487, 191 N.E.2d at 287, 240 N.Y.S.2d at 754 (dissenting opinion).

21. *See* note 11 *supra* and accompanying text.

22. *See* notes 12 & 13 *supra* and accompanying text. The most satisfactory application of the "interests" approach was made by the California Supreme Court in Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). In that case, the court indicated that all foreign and domestic elements should be considered. Then, the choice-of-law should be made in such a way as to reflect the policies of the jurisdiction with legitimate concerns.

23. *See* Trautman, *A Comment*, 67 COLUM. L. REV. 465 (1967). Professor Trautman found that the probable purposes of the Ontario statute were the prevention of collusive suits and the protection of the host-driver from suits by ungrateful guests. Such purposes do not suggest a significant interest in the issue of liability in a suit between New York and Michigan domiciliaries in Michigan courts. *Id.* at 770-72.

24. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 949 (1952). This article suggests nine factors to be considered in making a choice-of-law. In order of relative weight, these factors are: the need for interstate systems; the application of local law, unless there is a good reason not to do so; the purposes of the local laws; the need for certainty, predictability, and uniformity of result; the dominant interests of the states involved; the ease and convenience of application; the implementation of local policy; the attainment of a just result.

25. Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

interstate and international order; the need for simplicity of application; the advancement of the forum's governmental interests; and the need to apply the better rule of law. This approach has been implemented in at least one case,[26] and a variation on the approach has been employed by Wisconsin courts on numerous occasions.[27] The Wisconsin variation is a useful one in situations where the application of the "interests" or "contacts" approach has resulted in a balance. When this occurs, Wisconsin courts have decided to apply the "better rule" of law in accord with Leflar's fifth factor.[28] Other suggested solutions to the balanced situation are the application of the law of the forum[29] or the law of the place of the tort.[30] The former suggestion is reasonable in the two-state conflict because the forum will have the same interests and contacts as the non-forum state; however, in the three-state conflict, an unsatisfactory result may occur if the balance is of questionable validity. In essence, the court rejects the law of the of the forum is the place of the tort and all other interests and contacts are balanced between the other two states, the application of the law of the forum produces an illogical and unacceptable decision. But the suggestion that lex loci delicti be employed when a balance occurs is implicit in the instant case.[31] The court finds contacts in both Michigan and New York and then applies the law of Ontario. Such an approach is of questionable validity. In essence, the courrt rejects the law of the only two states with a legitimate interest in the issue of liability in favor of the law of a state with little or no interest in the issue and only minimal contacts with the event. Thus, the decision of the Michigan Supreme Court typifies the inequitable, illogical decisions which prompted the repudiation of the traditional rule in other jurisdictions and demonstrates the willingness of a court to maintain an outmoded rule simply because new approaches require precision and sophistication of analysis.

26. Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966).

27. *E.g.*, Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

28. The Wisconsin courts consider Leflar's first four factors and if this results in a balance of interests, the better rule of law is applied. *See* note 27 *supra*.

29. Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-43 (1963).

30. Kennedy v. Dixon, 439 S.W.2d 173, 185 (Mo. 1969).

31. Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137, 139 (1969).

Conflict of Laws—Criminal Procedure—Law of Forum Applies to Search and Seizure in Accused's Out-of-State Residence

Appellant, a resident of Oklahoma, was accused of burglarizing a private home in Texas with the intent to commit rape. While appellant was in legal custody, his wife agreed to allow police officers to conduct a search of their residence without a search warrant.[1] As a result of this search, physical evidence[2] was obtained which subsequently proved instrumental in appellant's conviction before a Dallas County criminal court. In appealing his conviction, appellant contended that the trial court had erred in failing to apply Oklahoma law as to the legality of the search of his home without a warrant or his personal consent.[3] Since the law of Oklahoma provides each spouse with an independent personal right to demand a search warrant prior to a residence search,[4] appellant maintained that the crucial incriminating evidence had been unlawfully seized in his home and improperly admitted at the trial. The State responded that any question regarding an evidentiary matter was of a procedural nature and hence governed by Texas law, under which the critical evidence had been legally obtained pursuant to the wife's consent.[5] The Texas Court of Criminal Appeals, *held*, conviction affirmed. The determination of a wife's authority to consent to a residential search and seizure on behalf of her husband is a procedural issue, governed by the law of the forum, even though the search occurred in another jurisdiction. *Burge v. State*, 443 S.W.2d 720 (Tex. Crim. App. 1969).

1. Both Texas and Oklahoma police officers participated in the search. Burge v. State, 443 S.W.2d 720, 722 (Tex. Crim. App. 1969).

2. The officers procured a sweater belonging to the appellant from which there was a piece of material missing. A laboratory tcchnician determined through microscopic examination that a piece of cloth found at the scene of the crime fitted the hole and matched the material in the sweater. The prosecutrix testified that during the course of her struggle with her assailant, she had been able to "bite him and spit out a piece of the sweater he was wearing." *Id.* at 721-22.

3. Actually the appellant was insisting that the issue should be treated not as a matter of conflict of laws, but rather as a question of constitutional law. The appellant argued that Oklahoma law should apply because the Texas position was constitutionally suspect in light of recent Supreme Court decisions in Katz v. United States, 389 U.S. 347 (1967), and Mancusi v. DeForte, 392 U.S. 364 (1968). The appellant apparently did not challenge the State's contentions as to which law should apply under conflict of laws principles. *Id.* at 723.

4. Simmons v. State, 94 Okla. Crim. 18, 20, 229 P.2d 615, 618 (1951): "[T]he right to demand a search warrant is a personal right given to husband and wife alike under the Constitution which cannot be waived by either in absence of the other." *See also* Carignano v. State, 31 Okla. Crim. 228, 238 P. 507 (1925).

5. It is well established in Texas that a wife may consent to a search and seizure on her husband's premises where the consent is given without coercion. Joslin v. State, 165 Tex. Crim. 161, 305 S.W.2d 351 (1957); Padilla v. State, 160 Tex. Crim. 618, 273 S.W.2d 889 (1954).

The judicial confrontation of conflicting state views of the scope of fourth amendment rights[6] represents a novel situation in the conflict of laws arena. Traditional conflict principles prescribe that issues of a clearly procedural nature are governed by the internal laws of the forum, whereas substantive matters are controlled by the laws of the state in which the event or transaction occurred.[7] For the purposes of this rule, questions relating solely to the admissibility of evidence have generally been treated as procedural.[8] It is well established, however, that arbitrary application of the substance-procedure dichotomy is unwarranted in situations presenting issues not clearly definable as either substantive or procedural.[9] Furthermore, the permissible scope of procedural characterization is limited to matters which genuinely relate to the manner in which judicial business of the forum is conducted.[10] The traditional view was abandoned by the New York Court of Appeals in *Babcock v. Jackson*,[11] which enunciated the so-called "grouping of contacts" choice of law test, providing for application of the substantive law of the state having the most significant interest. The mechanics for applying the *Babcock* test were succinctly articulated in the subsequent case of *Dym v. Gordon*.[12]

6. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The fourth amendment was made applicable to the states by the Supreme Court's decision in Wolf v. Colorado, 338 U.S. 25 (1949).

7. California v. Copus, 158 Tex. 196, 309 S.W.2d 227 (1958); Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919). *See* Cook, *"Substance" and "Procedure" in Conflict of Laws*, 42 YALE L.J. 333 (1933).

8. Forney v. Morrison, 144 W. Va. 722, 110 S.E.2d 840 (1959); Lynde v. Western & S. Life Ins. Co., 293 S.W.2d 147 (St. Louis Ct. App. 1956); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 (P.O. Draft 1967). *See generally* Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467 (1957).

9. *See, e.g.*, Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); H. GOODRICH, CONFLICT OF LAWS § 80, at 143 (4th ed. Scoles 1964): "[T]he distinctions made ought not to be mechanical and fixed for the areas identified by this dichotomy are not at all clear but rather vary and overlap." *See also* R. LEFLAR, AMERICAN CONFLICTS LAW § 108, at 250 (1968): "The procedure-substance dichotomy has real justification, but it ought not to be used as a cover-up 'gimmick' affording technical legal support for results justifiable only by other real reasons."

10. Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROB. 706, 720 (1963). Professor Leflar points out that this limitation on procedural characterization is qualified only by a few special rules such as the statute of limitations, statute of frauds, and measure of damages. *See, e.g.*, Willitt v. Purvis, 276 F.2d 129 (5th Cir. 1960), indicating that, on occasion, a rule phrased in terms of admissibility of evidence may be substantive. *See also* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936), and Home Ins. Co. v. Dick, 281 U.S. 397 (1930), suggesting that procedural characterization can be carried to extremes.

11. 12 N.Y.2d 473, 191 N.E.2d 279, 191 N.Y.S.2d 279 (1963).

12. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

Essentially the application process consists of three steps: first, the isolation of the issue; second, the identification of the policies embraced in the conflicting laws; and finally, the examination of the contacts of the respective states to ascertain which has a superior connection with the occurrence and, thus, a superior interest in having its law applied.[13] Though the initial impact of *Babcock* was most profound in torts-conflicts cases,[14] the "grouping of contacts" test has since received widespread judicial application and substantial scholarly approval,[15] with its principle being broadly extended into various branches of the conflicts field.[16]

In the instant case, the court initially observed that there is a split of authority in the United States as to the power of a wife to consent to a residence search on her husband's behalf. Although Oklahoma, like many other state and federal jurisdictions,[17] had consistently refused to recognize such interspousal authority, the court nevertheless felt disinclined to overturn the long established Texas view to the contrary.[18] In determining whether to apply the Oklahoma or Texas law, the court reasoned that the question of the effect of a spouse's consent was of an evidentiary nature and, hence, a matter of procedure. Therefore, through application of the traditional substance-procedure choice of law rule,[19] the court held that the law of Texas, lex fori, controlled.

The instant decision clearly demonstrates the gross inequity inherent in a mechanical application of the substance-procedure choice of law rule. While the use of the procedural characterization is invariably conducive to judicial convenience, its arbitrary application

13. *Id.* at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

14. *Babcock* repudiated the archaic rule that the law of the place of the injury governs all substantive issues in torts cases. Babcoek v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

15. *See* Cavers, Cheatham, Leflar & Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1219, 1229, 1247, 1251 (1963).

16. The *Babcock* principle has been adopted with respect to contracts cases by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332b (Tent. Draft No. 6, 1960), and tort cases, *id.* § 379(i) (Tent. Draft No. 8, 1963). It has been adopted with respect to commercial transactions by the UNIFORM COMMERCIAL CODE § 1-105. *See* Cheatham, note 15 *supra*, at 1233, indicating immediately after *Babcock* was decided that the Uniform Commercial Code "furnishes strong support for the decision in *Babcock v. Jackson* and for the wide extension of its principle in conflict of laws." *See also* Comment, *The Aftermath of Babcock*, 54 CALIF. L. REV. 1301 (1966).

17. *See* note 34 *infra*.

18. The court was not persuaded by appellant's contention that the Texas view should be declared unconstitutional; thus it treated the issue solely as one of conflicts of laws. 443 S.W.2d at 723.

19. *See* note 17 *supra* and accompanying text.

in the present context altogether ignores the dominant state interests involved and vitiates the appellant's constitutional right of privacy as implemented by his state of residency.[20] In effect, this decision is founded upon an artificial after-the-fact classification, which is a meaningless indicia as to which state's law should logically apply. Under any choice of law approach, the forum's initial task should be to clearly isolate the narrow issue over which the laws are in conflict.[21] The instant court's failure to do so constitutes the fallacy which apparently precipitated its erroneous characterization of the matter as procedural. Implicit in the court's analysis is the fact that it viewed the Texas-Oklahoma conflict as focused primarily upon the issue of admissibility of evidence. If this had actually been the case, then under general conflict principles[22] the question would undoubtedly have been one of procedure. In reality, however, the conflict did not encompass the matter of admissibility, but rather was directed soley toward the more fundamental preliminary issue of whether the evidence had been wrongfully obtained. The independent issues of wrongful seizure and admissibilty should have been distinctly isolated by the court, for the latter could only become relevant after the former had been adjudicated.[23] If the court had correctly identified the conflict as

20. The Supreme Court in the landmark case of Home Ins. Co. v. Dick, 281 U.S. 397 (1930), which was followed by John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936), warned that procedural characterization could go too far. Professor Leflar, in discussing these decisions, explains: "It [procedural characterization] goes too far not because of any technical rule of characterization, but for the same 'fair play and substantial justice' reasons that make it unconstitutional when any court deprives any person of his life, liberty, or property by applying a law which has so little of substantial connection with the issues in his case as to make the application an unreasonable one." R. LEFLAR, *supra* note 9, § 63, at 142-43.

21. This is an absolute prerequisite to an accurate identification and evaluation of the interests involved in any conflict of laws case.

22. According to the general rule, matters relating to the admissibility of evidence are procedural and hence governed by the law of the forum. *See* note 8 *supra* and accompanying text. *But see* Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535 (1956). Mr. Weinstein opens his article with the following statement regarding privileged evidence: "The *Restatement of Conflicts* makes the flat statement—supported by the standard works in the field—that 'the law of the forum determines the admissibility of a particular piece of evidence.' It is submitted that this rule should not be applied mechanically to evidence that may be excluded or admitted because it is or is not privileged." *Id.*

23. That seizure and admissibility represent separate and distinct issues is indicated by the fact that in Texas evidence wrongfully seized is not *automatically* inadmissible. In order for the evidence in the present case to have been inadmissible, the appellant must have made timely objection to the admissibility. 2 TEX. CODE CRIM. PROC. art. 28.01 (Vernon 1966); *see, e.g.*, Gutierrez v. State, 423 S.W.2d 593 (Tex. Crim. 1968) (objections to a search are waived when fruits of the search are introduced into evidence without objection). In addition, the appellant must have framed his objection in such a manner as to give the judge sufficient information to take judicial notice of the Oklahoma law. 1966 TEX. R. CIV. PROC. 184(a) (made applicable to criminal cases by 4 TEX. CODE CRIM. PROC. art. 38.02 (Vernon 1966)).

focused upon the question of wrongful seizure, then surely it could not have justified an automatic application of the procedural label. For it is clear that the wrongful seizure issue, divorced from all considerations of admissibility, bore no substantial relationship to the manner in which the judicial business of the forum was conducted, and hence fell outside the scope of permissible procedural characterization.[24]

Assuming that the court had properly isolated the issue, its second step, consistent with *Babcock* guidelines, should have been to identify the policies embraced in the conflicting state laws.[25] The Texas position of allowing interspousal consent is predicated upon the policy that a wife's rights of joint ownership, control, and possession of her residence should necessarily empower her to authorize a search on her own behalf, irrespective of commensurate rights of her husband.[26] The emphasis is on the parties' relationship to the property rather than to one another.[27] On the other hand, the law of Oklahoma seeks primarily to establish that the constitutional protection against unreasonable searches and seizures will not be "left to depend upon the unfettered discretion" of another.[28] This overriding policy objective is founded upon the premise that the fourth amendment right to privacy is personal and, therefore, may only be personally waived.[29] It is significant to note that this position is consistent with contemporary Supreme Court philosophy as reflected in recent decisions upholding the integrity of personal constitutional rights through recognition of their individualistic nature.[30] A second pervasive policy objective

24. *See* note 10 *supra* and accompanying text.

25. *See* notes 12 & 13 *supra* and accompanying text.

26. May v. State, 129 Tex. Crim. 2, 83 S.W.2d 338 (1935). The fact that Texas is a community property state was material in its adoption of the joint control rationale. Cass v. State, 124 Tex. Crim. 208, 61 S.W.2d 500 (1933); 51 CORNELL L.Q. 795, 797-98 (1966). For incisive criticism of the Texas policy of allowing interspousal consent, see Mascolo, *Inter-spousal Consent to Unreasonable Searches and Seizzures: A Constitutional Approach*, 40 CONN. B.J. 351, 381-90 (1966).

27. Other jurisdictions rely on the parties' relationship to one another in allowing a wife's consent to bind her husband. For instance, California courts reason that the marital relationship should give a wife at least apparent authority to give binding consent to a search. *In re* Lessard, 62 Cal. 2d 497, 399 P.2d 39, 42 Cal. Rptr. 583 (1965); People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957).

28. Mascolo, *supra* note 26, at 374, *citing* Stoner v. California, 376 U.S. 483, 490 (1964).

29. Comment, *The Effect of a Wife's Consent to a Search and Seizure of the Husband's Property*, 69 DICK L. REV. 69, 73 (1964).

30. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Jackson v. Denno, 378 U.S. 368 (1964); Massiah v. United States, 377 U.S. 201 (1964). In addition, the Supreme Court has recently emphasized that the fourth amendment protects a right of privacy of the individual and not of property alone. Mancusi v. DeForte, 392 U.S. 364 (1968); Katz v. United States, 389 U.S. 347 (1967).

underlying the Oklahoma law is the prevention of interspousal incrimination and a corresponding maintenance of public confidence in the marital relationship.[31] An additional policy of somewhat less magnitude which permeates the Oklahoma view is the desire to prevent an unjustifiable dilution of the burden of proof in criminal prosecutions.[32]

Having defined the narrow focus of the conflict and delineated the fundamental policies underlying the competing laws, the court should have finally turned to an examination of the respective state contacts to ascertain which had a superior connection with the occurrence and, hence, a superior interest in having its law applied.[33] In this regard, there are at least four significant factors that seem to indicate that the nexus of interest lay in Oklahoma. First, the fact that the search and seizure was conducted within an Oklahoma residence is obviously of paramount importance. It is only logical that the interest sought to be protected by either state's policy as to the scope of lawful seizures was an interest existing at the time and place the seizure was made. Secondly, the fact that the appellant may reasonably have expected that measure of constitutional protection afforded by the laws of his home state, militates against allowing a minority[34] Texas view to abrogate his anticipated privacy rights.[35] A third factor, closely interrelated with the first two, is the fact that the parties most directly involved with the search and seizure were domiciliaries of Oklahoma. Finally, the interest in uniformity of privacy rights allotted the residents of each state, as well as the need for uniform restrictions on intrastate police investigations, would be better served by application of Oklahoma law.[36] Balanced against these Oklahoma contacts is a substantial Texas

31. For a perceptive discussion of this policy objective, see Mascolo, *supra* note 26, at 374-75.

32. *Id.* at 372-73.

33. *See* notes 12 & 13 *supra* and accompanying text. It is significant to note that the *Babcock* weighing of contracts approach is extremely flexible in the sense that its key phrase, "most significant contacts," lacks a precisely defined content and so leaves room for considerable judicial discretion. The test can easily comprehend a weighing of social policies and governmental interests which are discoverable from the contacts themselves. R. LEFLAR, *supra* note 9, § 96, at 222. Of course, the interests that merit consideration in the balancing process vary according to the peculiar facts of each case. However, a concise and seemingly all-inclusive list of pertinent considerations has been formulated by Professor Leflar. *Id.* § 105, at 245.

34. *See* Mascolo, *supra* note 26, at 369, indicating that the Texas position represents a distinct minority view.

35. The weight that should be accorded this factor in situations where a party did not think in advance about choice of law is forthrightly discussed in Professor Leflar's treatise. R. LEFLAR, *supra* note 9, § 106, at 245-47.

36. Presumably the laws governing interspousal consent are designed in part to furnish directives to law officers in making pretrial investigations. Under the instant decision, the

interest in achieving equally just results in criminal prosecutions of out-of-state and Texas residents. It is not difficult to comprehend the forum's reluctance to adopt a rule in prosecutions of non-residents that might compel the exclusion of vital evidence which would be readily admissible in comparable suits against Texans. This Texas interest, however, should not be the controlling factor in choosing the applicable law since it arose only as an indirect after effect of the allegedly wrongful seizure. Logical analysis urges that the interest sought to be protected at the time and place of the search and seizure should be decisive. Therefore, it appears that not only has the instant court adopted an improper choice of law approach, but in doing so, it has reached the wrong result.

Constitutional Law—Criminal Defendant Has Absolute Right to be Present at Trial

During his trial in state court for armed robbery, the defendant insisted upon representing himself and thereafter engaged in a continuous course of disruptive and disrespectful conduct.[1] The trial judge repeatedly warned the defendant that he would be excluded from the courtroom if he did not behave. After threats from the defendant that "there's not going to be no trial" and that he intended to "keep on talking all through the trial,"[2] the trial judge ordered the defendant removed from the courtroom. Although the defendant was permitted in the courtroom during the presentation of his defense, he was excluded from the trial during the voir dire and did not return until the conclusion of the prosecution's case. In the interim, the defendant was brought into the courtroom on four occasions in order to be identified by witnesses; on each occasion, he was immediately removed after identification. In a consolidated appeal from his conviction and the dismissal of a post-conviction petition, the defendant argued that his forcible exclusion from the proceedings was a violation of his sixth

inhibitions on residence searches would depend upon the law of the place of the crime and would thereby create great uncertainty as to police procedure in searches made in other jurisdictions.

1. During the *voir dire*, the defendant told the trial judge that "[w]hen I go out for lunchtime, you're going to be a corpse here." Following this outburst, the defendant tore his attorney's file and threw the papers on the floor, and was finally removed from the courtroom until the jury was seated. When the defendant resumed his abusive comments during the prosecution's opening statement, the trial judge ordered him removed once again. United States *ex rel.* Allen v. Illinois, 413 F.2d 232, 233-34 (7th Cir. 1969).

2. *Id.* at 234.

amendment rights to be personally present and to confront the witnesses against him. The Supreme Court of Illinois affirmed on the basis that the defendant voluntarily chose to misbehave and thereby elected to waive his sixth amendment rights.[3] On appeal from the district court's dismissal of the defendant's habeas corpus petition, *held*, reversed. A criminal defendant has an absolute right to be personally present at all stages of the proceedings to confront the witnesses against him, and the sixth amendment precludes the relinquishment of that right through an election of choices proposed by the trial judge. *United States ex rel. Allen v. Illinois*, 413 F.2d 232 (7th Cir. 1969), *cert. granted*, 396 U.S. 955 (1969).

The early common law afforded the criminal defendant both the right to be present at his trial[4] and the right to appear free from all shackles and bonds or other forms of restraint.[5] The right to be personally present at all stages of the proceedings has been expressly preserved under the sixth amendment right to confront witnesses and has been said to be as fundamental as the right to an impartial jury.[6] Although the right to appear without physical restraint is less clearly preserved under the United States Constitution, the rule has often been justified on the constitutional grounds of due process and the right to a fair and impartial trial.[7] The common law exceptions to both these important rights of the accused have been followed, however, even where the right is founded upon a constitutional mandate. For instance, the right to appear without physical restraint does not apply when there is danger of escape[8] or when restraint is necessary for a safe and orderly

3. People v. Allen, 37 Ill. 2d 167, 226 N.E.2d 1, *cert. denied*, 389 U.S. 907 (1967).

4. *See* Lewis v. United States, 146 U.S. 370 (1892); Hopt v. Utah, 110 U.S. 574 (1884); Evans v. United States, 284 F.2d 393 (6th Cir. 1960); Echert v. United States, 188 F.2d 336 (8th Cir. 1951); People v. Isby, 30 Cal.2d 879, 186 P.2d 405 (1947); People v. Medcoff, 344 Mich. 108, 73 N.W.2d 537 (1955); State *ex rel.* Shetsky v. Utecht, 228 Minn. 44, 36 N.W.2d 126 (1949).

5. *See* Blaine v. United States, 136 F.2d 284 (D.C. Cir. 1943); Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946); State v. Coursolle, 255 Minn. 384, 97 N.W.2d 472 (1959); Pierpont v. State, 49 Ohio App. 77, 195 N.E. 264 (1934); Commonwealth v. Reid, 123 Pa. Super. 459, 187 A. 263 (1936).

This right has been recognized on the theory that the law requires that the accused have the unrestrained use of his limbs and must not be compelled to suffer any physical bonds which might confuse or embarrass him before the jury. Other courts base the rule on the fourteenth amendment right to due process and a fair and impartial trial. Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951).

6. People v. Medcoff, 344 Mich. 108, 73 N.W.2d 537 (1955); *cf.* Snyder v. Massachusetts, 291 U.S. 97 (1934).

7. Cases cited note 5 *supra*.

8. *See* Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951); State v. Brooks, 44 Hawaii 82, 352 P.2d 611 (1960); People v. Mendola, 2 N.Y.2d 270, 140 N.E.2d 353, 159 N.Y.S.2d 473 (Ct. App. 1957).

proceeding.[9] The decision to restrain the defendant is within the discretion of the trial judge, and one of two tests usually prevails in making the determination. Physical restraint of the criminal defendant has been upheld where the record reflected some immediate necessity for the use of such restraint,[10] or less frequently, where there was a reasonable apprehension of danger under all the circumstances.[11] The right to be present has been less litigated, but it is clear that there are some exceptions to the rule.[12] In *Hopt v. Utah*,[13] the United States Supreme Court held that a criminal defendant in a capital case could not waive his right to be present at trial and described the right as unqualified. The Court has distinguished this case, however, on the ground that it involved a capital offense with the defendant in custody and has subsequently upheld "waivers" in non-capital cases. A criminal defendant who is absent from part of the proceedings may waive his right to be present when he is immediately furnished a transcript of the those proceedings and fails to object to the testimony or request further examination.[14] In *Echert v. United States*,[15] the court held that a federal criminal defendant charged with a felony other than a capital offense may waive his objections to the impaneling of the jury in his absence. There are only two cases, however, which deny the criminal defendant the right to be present as a result of voluntary misconduct on his part. Prior to the *Hopt* decision, the federal court in *United States v. Davis*[16] sustained the trial judge's action in having the defendant removed from the courtroom because of an unseemly disturbance. In reaching its decision, the court stated that the defendant could not "complain of the order which was made necessary by his own misconduct, and which he could at any time have terminated by signifying his willingness to avoid creating a disturbance."[17] While a waiver might be implied in *Davis*, the court was more explicit in *People*

9. *See* Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951); State v. Roberts, 86 N.J. Super. 159, 206 A.2d 200 (1965); State v. Daniels, 347 S.W.2d 874 (Mo. 1961); State v. Temple, 194 Mo. 237, 92 S.W. 869 (1906).

10. State v. Coursolle, 255 Minn. 384, 389, 97 N.W.2d 472, 476-77 (1959).

11. State v. Roberts, 86 N.J. Super. 159, 206 A.2d 200(1965).

12. Salinger v. United States, 272 U.S. 542, 548 (1926): "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions."

13. 110 U.S. 574 (1884).

14. Parker v. United States, 184 F.2d 488 (4th Cir. 1950).

15. 188 F.2d 336 (8th Cir. 1951).

16. 25 F. Cas. 773 (No. 14923) (C.C.S.D.N.Y. 1869).

17. *Id.* at 774.

v. De Simone.[18] In that case, the defendant voluntarily left the courtroom on several occasions and at one point was forcibly excluded following his profane remarks to the witnesses and the trial judge. The state appellate court held that under the Illinois constitution the defendant's misconduct was an effective waiver of his right to be present at the proceedings.

In the instant decision, the court recognized the general rule that a criminal defendant has a right to be personally present and noted that there may be circumstances where a defendant effects a waiver of his right. The court disagreed, however, with the view that the defendant's offensive conduct could constitute such a waiver. Defining waiver, whether express or implied, as a voluntary, intentional relinquishment of a known right, the court concluded that the relinquishment of rights compelled by an election of choices is involuntary and not a waiver at all. The court interpreted the right to be present as "absolute," stating that no conditions could be imposed on the right and that the defendant's insistence upon exercising his right under unreasonable conditions did not amount to a waiver. Thus, exclusion of the defendant from the courtroom, even upon conditions completely within his control, violated his constitutional rights under the sixth amendment. In a dissenting opinion,[19] Senior Circuit Judge Hastings interpreted the constitutional mandate of the sixth amendment in a different light. Rejecting the thesis that "an unconditional unqualified right" in criminal cases flows from the sixth amendment, the dissent determined that the sixth amendment provision that a criminal defendant "shall enjoy the right" does not carry with it an unqualified right to exercise it on his own terms. Consequently, Judge Hastings agreed with the Supreme Court of Illinois in finding a waiver in situations where the defendant by his own action brings about his absence from the trial.

The dissent in the instant case proved to be accurate in forecasting the result of the majority's decision in situations where multiple defendants are determined to disrupt the trial to the point of no return.[20] The now famous conspiracy trial of the "Chicago Eight" brought to life Judge Hasting's vision of "[s]hackles, chains, gags and

18. 9 Ill. 2d 522, 138 N.E.2d 556 (1956). The defendant's rights under the Federal Constitution were not litigated, but speaking of the Illinois constitutional provision, the court stated that "[t]he right to appear and defend is not given to a defendant to prevent his trial either by voluntary absence, or by wrongfully obstructing its progress." *Id.* at 533, 138 N.E.2d at 562.

19. 413 F.2d at 235.

20. *Id.* at 236.

a courtroom full of deputy marshals."[21] Citing the present case as authority, the Federal District Court for the Northern District of Illinois has recently upheld the gagging and handcuffing of "Black Panther" leader Bobby Seale as the proper course of action.[22] In doing so, the court made a sweeping application of the instant decision, stating that "[w]hile a defendant . . . has an absolute right to be present . . . he does not have a right to brazenly make a shambles of the criminal judicial process and attempt to force a mistrial . . . ."[23] If this result is a proper application of *Allen*, then the instant decision is a very dangerous precedent. Taken together, the *Allen* and *Seale* cases seem arbitrarily to enforce a right—almost a duty—of the defendant to be present, regardless of the physical restraints necessary to accomodate his presence and an orderly procceding. In reaching this conclusion, both cases virtually ignore the existing exceptions to the right to be present, the prejudicial effect of the defendant's appearance bound and gagged, and the effect of such action on the defendant's right to appear unrestrained.

Although the defendant may lose his right to appear unrestrained through his own conduct,[24] it should be just as evident that the right to be present may also be waived. If a criminal defendant can waive his right to trial altogether, he should be able to waive his right to be present. The apparent issue is what conduct by the defendant is sufficient to constitute a waiver. Obviously, the word "waiver" is an elastic term with many shades of meaning, and therefore it must be interpreted under the circumstances of each case. For example, the court in the instant decision found no waiver since it requires a voluntary, intentional relinquishment. Nevertheless, had the court chosen to do so, it could have gone a step further and implied a waiver ". . . when one in possession of any right . . . does . . . something the doing of which . . . is inconsistent with the right, or his intention to rely upon it."[25] Interpreted in this light, Allen's abusive conduct could be defined as voluntary, intentional, and inconsistent with his known right. Consequently, the court might have found, just as logically, that Allen had waived his right to be present.

This definitional discussion merely highlights the critical problem which has gone unresolved under existing case law. There are many

21. *Id.*
22. Seale v. Hoffman, 38 U.S.L.W. 2287 (N. D. Ill. Nov. 5, 1969).
23. *Id.*
24. *See* notes 8-9 *supra* & accompanying text.
25. BLACK'S LAW DICTIONARY 1751 (4th rev. ed. 1968).

conflicting interests to be reconciled in the trial of a recalcitrant defendant: the accused's right to hear the evidence and confront the witnesses against him; his right to be free of physical restraint so as not to appear already condemned to the jury; similar rights of co-defendants; the court's and attorneys' duty to insure a solemn, orderly, and fair trial;[26] and, in a larger sense, society's interest in securing such a fair and impartial proceeding for every accused. To respond to such a problem by a narrow definition of "waiver" and strapping the defendant into his chair at the expense of an impartial trial is unrealistic and unprofessional. At some point, the recalcitrant defendant's right to be present becomes unduly prejudicial and inequitable to him, his co-defendants, the court, and society. One can easily imagine the connotation of guilt that would accompany handcuffing the accused into his chair. The prejudice might work to the detriment of the State's interest as well; imagine the effect of strait jacketing a defendant who is relying on the defense of insanity.

In spite of a feeling that no other remedy is available,[27] there are several alternatives to simply forcing the defendant to be present under any and all circumstances.[28] In many cases, a warning or a contempt citation may suffice. Failing this, some form of restraint is possible, perhaps, by posting deputies at the defendant's side. Nevertheless, when the defendant's conduct makes it impossible to proceed unless he is physically tied and gagged, the possibility of exclusion from the courtroom must be made available. Fortunately, modern technology makes it possible to exclude the defendant without completely causing him to forefeit his right to hear the evidence against him. In extreme cases, the accused could be removed to another room, but allowed to see and hear the proceedings by closed circuit television or some other similar facility. In addition, he could be provided with telephone or intercom communication with his attorney in the courtroom if deemed desirable by the trial judge. Such an innovation would preserve the dignity and order of the proceedings, avoid the prejudicial effect of restraining the defendant in the courtroom, and preserve the defendant's right to see and hear the evidence against him. At the same time, society's interest in seeing that the judicial system does justice in

26. ABA CANONS OF JUDICIAL ETHICS No. 36; ABA CANONS OF PROFESSIONAL ETHICS Nos. 5 & 22.

27. Seale v. Hoffman, 38 U.S.L.W. 2287 (N.D. Ill. Nov. 5, 1969).

28. For an excellent discussion of the case law development, see Note, *Violent Misconduct In The Courtroom—Physical Restraint And Eviction Of The Criminal Defendant*, 28 U. PITT. L. REV. 443 (1967).

spite of the defendant's conduct would be vindicated. The only interest compromised would be that of the defendant personally to confront the witnesses, but this is a result necessitated by his own misconduct.

Constitutional Law—Imports and Exports—State and Local Tax—States May Tax Imports Held in Bonded Smelting and Refining Warehouses

Plaintiff instituted a proceeding for a writ of mandate to cancel the assessment and prevent the collection of ad valorem personal property taxes on imported metals.[1] These metals were held by plaintiff in a customs bonded warehouse and were appropriated to processing for domestic consumption. Plaintiff's warehouse is designated a Class 7 Customs Bonded and Refining Warehouse[2] and is operated for the purpose of extracting lead and other metals from ores and concentrates. The customs duties on the imported metals, which are in the custody and under the supervision of the United States Bureau of Customs,[3] are not immediately payable upon receipt of the ore by the plaintiff.[4] Defendant, County of Contra Costa, which had levied the tax on the imported metals, contended that by engaging in the local business of smelting and refining plaintiff had become subject to local taxation. The California Superior Court rejected the defendant's position, granted the writ of mandate, and enjoined collection of the tax. The court held that such taxation was proscribed by preemptive federal regulation, the commerce clause, the supremacy clause, and the import-export clause of the United States Constitution. On appeal to the California Court of Appeal, First Appellate District, *held*, reversed. Imports held in bonded smelting and refining warehouses lose their immunity from local taxation once they are appropriated to processing

1. The property consisted of imported metal-bearing ores and concentrates, refined metals subject to a United States Customs Bond, similar imported materials not subject to bond, and domestic gold.

2. *See* Tariff Act of 1930 § 312, ch. 497, 46 Stat. 692, *as amended*, 19 U.S.C. § 1312 (1964).

3. 19 C.F.R. §§ 19.17-.25 (1969). A customs officer is permanently stationed at the bonded warehouse and is responsible to certify an accurate accounting of the dutiable metals. Plaintiff is also required to file monthly inventory reports with the Bureau of Customs.

4. Plaintiff is relieved of any obligation to pay duty on imported metals until and unless they are shipped from the bonded warehouse to a domestic purchaser or until three years have elapsed from the date of entry of such goods into the United States. 19 U.S.C. § 1312 (1964).

for domestic consumption.[5] *American Smelting & Refining Co. v. County of Contra Costa,* 77 Cal. Rptr. 570 (Ct. App. 1969), *appeal docketed,* 38 U.S.L.W. 3240 (U.S. Dec. 30, 1969) (No. 656).

Invalidation of state and local taxation of imported goods has traditionally been based upon either the import-export clause or the commerce clause of the Constitution. Regarding the former, early fears that the seaboard states would unfairly tax imports to the detriment of the interior states[6] resulted in the constitutional prohibition that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ."[7] This clause grants to the federal government the exclusive power to tax importation into the United States and prohibits state taxation of such goods after their entry and for so long as they remain imports.[8] The fundamental test used to determine whether goods have lost their character as imports for state and local tax purposes is whether "the importer has so acted upon the thing imported, that it has become *incorporated* and *mixed up with the mass of property in the country.* . . ."[9] Attempting to apply this standard, courts have determined that imports for manufacture lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported,[10] when they are sold,[11] when the original packages are broken,[12] or when such goods are committed to the supply of the manufacturer's "current operational needs."[13] Although no court has precisely determined whether the mere presence of goods in bonded warehouses renders the goods immune from state taxation, *Tres Ritos Ranch Co. v. Abbott*[14] indicated by way of dicta

5. The court also concluded that gold, whether of foreign or domestic origin, was not exeempt from local taxation because of preemptive federal regulation.

6. *See* J. MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, at 543 (1966).

7. U.S. CONST. art. I, § 10.

8. *See* Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959); Hooven & Allison Co. v. Evatt, 324 U.S. 652, 657 (1945); Brown v. Maryland, 25 U.S. 419, 441 (1827).

9. Brown v. Maryland, 25 U.S. 419, 441 (1827) (Marshall, C.J.) (emphasis added).

10. *See, e.g.,* Hooven & Allison Co. v. Evatt, 324 U.S. 652, 661 (1945); McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 423 (1940); Gulf Fisheries Co. v. MacInerney, 276 U.S. 124, 126 (1928); F. May & Co. v. New Orleans, 178 U.S. 496, 501 (1900).

11. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 557 (1945).

12. F. May & Co. v. New Orleans, 178 U.S. 496, 509 (1900); Low v. Austin, 80 U.S. 29, 34 (1871).

13. Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 543 (1959) (upholding property taxes on imported materials that were held for use in the manufacturing process).

14. 44 N.M. 556, 105 P.2d 1070 (1940). Upholding a state levy, the court found that cattle imported under bond were not stored in a bonded warehouse when allowed to graze on a 500,000 acre ranch and were not in their original package. *Id.*

that "a state can impose taxes before the United States customs have been paid whenever the imported article has been commingled with the property of the state."[15] According to this view, the placement of commodities in a bonded warehouse is merely evidence indicating that the goods are still imports; however, the evidence is not necessarily conclusive.[16] Similarly, *Orr Felt & Blanket Co. v. Schneider*[17] indicated that although the imported goods remained in original packages in a bonded warehouse, the determinative factor for the conclusion that they were not taxable was that they were in a locked portion of the warehouse, which was accessible only to the customs officer.[18]

State and local taxation of imported goods has also been invalidated under the commerce clause which confers on Congress the power to regulate commerce with foreign nations and among the several states.[19] This power "is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than are prescribed in the constitution. . . ."[20] Congress's exclusive and plenary power may not be limited, qualified, or impeded by state action;[21] and under the supremacy clause of the Constitution,[22] any valid congressional regulation of commerce[23] must prevail over conflicting or

15. *Id.* at 563, 105 P.2d at 1074.

16. *Id.* at 561, 105 P.2d at 1073. The case of *In re* Miller Land & Livestock Co., 56 F. Supp. 34 (D. Mont. 1944), treated the question of immunity from taxation as being completely dependent upon whether the cattle were in a valid "bonded warehouse." Concluding that the legislature had not intended that a ranch of 160,000 acres could be a warehouse, the court found that the cattle could be taxed.

17. 3 Ohio St. 2d 14, 209 N.E.2d 150 (1965) (invalidating a state property tax).

18. In District of Columbia v. International Distrib. Corp., 331 F.2d 817 (D.C. Cir. 1964), the court found that goods stored in bonded warehouses did not become subject to the jurisdiction of the state until withdrawn from the warehouse and removed from the control of the customs official. In Republic Steel Corp. v. Porterfield, 14 Ohio St. 2d 101, 236 N.E.2d 661 (1968), the majority invalidated a state tax upon imports stored in a customs bonded warehouse. The imports remained in their original packages, but had not been appropriated to the purpose for which they were imported. Concurring, Chief Justice Taft stated that "the bond in question is in the nature of a surety bond to guarantee payment of customs duties and in no way limits or prohibits the use of the manganese ore . . . ." Thus "appellant's inventory of imported manganese ore is not immune from the Ohio personal property tax because it is held in bond . . . ." *Id.* at 664-65 (concurring opinion).

19. U.S. CONST. art I, § 8: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes . . . ."

20. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

21. *See* Buttfield v. Stranahan, 192 U.S. 470 (1904); Almy v. California, 65 U.S. (24 How.) 169 (1860); Brown v. Maryland, 25 U.S. (12 Wheat.) 262 (1827); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

22. U.S. CONST. art VI.

23. Congress may validly regulate this area of foreign commerce through its power to control any phase of commerce which has a "substantial economic effect" on interstate or foreign commerce. Wickard v. Filburn, 317 U.S. 111 (1942). (Courts have repeatedly recognized that

inconsistent state action.[24] Pursuant to its power, Congress, as early as 1890,[25] enacted legislation for the creation and maintenance of bonded smelting and refining warehouses and vested in the Secretary of the Treasury the authority "to make such rules and regulations as may be necessary to carry out the provisions of this section."[26] Accordingly, the Secretary enacted the Customs Regulations of 1923.[27] Article 850[28] of these regulations provided that "[i]mported goods in bonded warehouse are exempt from taxation under the general laws of the several states."[29] In *McGoldrick v. Gulf Oil Corp.*,[30] the Court held that since article 850 was in effect when Congress adopted the Tariff

under the commerce clause, Congress has power to prohibit state taxation in areas where the states would be free to tax under the Constitution in the absence of congressional action. International Shoe Co. v. Cochram, 246 La. 244, 164 So. 2d 314, *cert. denied*, 379 U.S. 902 (1964); Smith Kline & French Lab. v. State Tax Comm'n, 241 Ore. 50, 403 P.2d 375 (1965); State *ex rel* Ciba Pharmaceutical Prod., Inc. v. State Tax Comm'n, 382 S.W.2d 645 (Mo. 1964).

24. *See, e.g.*, Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 613 (1926); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 230 (1899). The same principle is applicable to state and local tax laws which are determined to be in conflict with federal legislation. *E.g.*, Carson v. Roane-Anderson Co., 342 U.S. 232 (1952); McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940); Minnesota v. Blasius, 290 U.S. 1 (1933).

25. McKinley Tariff Act of Oct. 1, 1890, ch. 1244, § 24, 26 Stat. 617; Wilson Tariff Act of Aug. 27, 1894, ch. 349, § 21, 28 Stat. 551; Dingley Tariff Act of July 24, 1897, ch. 11, § 29, 30 Stat. 210 (applied only to imported goods intended for export); Payne-Aldrich Tariff Act of Aug. 5, 1909, ch. 6, § 24, 36 Stat. 89 (applied to goods intended for export as well as for domestic consumption); Act of Oct. 3, 1913, ch. 16, § IV, subsection 1, 38 Stat. 198; Act of Sept. 21, 1922, ch. 356, tit. III, § 312, 42 Stat. 940.

26. McKinley Tariff Act of Oct. 1, 1890, ch. 1244, § 24, 26 Stat. 617. The Secretary was granted the same authority by the Tariff Act of 1930, ch. 497, tit. III, § 312, 46 Stat. 692, *as amended*, 19 U.S.C. § 1312 (1964).

27. TREASURY DEPARTMENT, CUSTOMS REGULATIONS 1923.

28. The original regulation appeared in article 731 of the Customs Regulation of 1915. In 1943, the format of the Regulation was changed since the provisions prohibiting state taxation and certain other state acts were consolidated and moved from the body of the text to a footnote. Section 19.6 n.11, Customs Regulations of 1943, 8 Fed. Reg. 8398. The present regulation appears in 19 C.F.R. § 19.6 n.11 (1969) which reads: "Imported goods in bonded warehouse are exempt from taxation or judicial process of any State or subdivision thereof."

29. As a departmental construction of a statute, an administrative regulation is not binding upon the courts and has only ordinary persuasive force. On the other hand, if it has been continually in force for a long period of time and the statute is doubtful and ambiguous, the regulation can be ignored for compelling reasons. *See* National Lead Co. v. United States, 252 U.S. 140 (1920); Komado & Co. v. United States, 215 U.S. 392 (1910); United States v. Healey, 160 U.S. 136 (1895). McCaughn v. Hersey Chocolate Co., 283 U.S. 488, 492 (1931), held that a long standing Treasury Department regulation which had been consistently enforced for a number of years by officials charged with its administration may "not be judicially disturbed except for reasons of weight." *See* Fawcus Machine Co. v. United States, 282 U.S. 375, 378 (1931); Universal Battery Co. v. United States, 281 U.S. 580, 583 (1930); Brester v. Gage, 280 U.S. 327, 336 (1930).

30. 309 U.S. 414 (1940). The Court held that the statutes and regulations taken together amount to regulation of foreigu commerce and prohibit state taxation of imported oil refined in

Act of 1930,[31] it was "incorporated by reference" and, as such, was a regulation of foreign commerce.[32] When no direct conflict exists, the state or local action may be invalidated if it obstructs the accomplishment of the full purposes and objectives of Congress. The state or local action may also be invalidated without a direct conflict if Congress, through full and comprehensive legislation, has intended to preempt the field.[33] Thus, a determination that Congress has preempted an area and removed it from state or local control involves a consideration of the entire scheme of congressional regulation and a balancing of both the local and national interests.[34] *McGoldrick v. Gulf Oil Corp.*[35] considered whether federal regulation had preempted state taxation of the sale of imports which were intended for use in foreign commerce and were refined after entry. The Court concluded that the applicable statutes and regulations[36] indicated a congressional intent to prohibit local taxation for the purpose of enabling American refiners to meet foreign competition.[37]

In the instant case, after disposing of preliminary matters,[38] the

a bonded warehouse and intended for use as ship's stores in foreign commerce. As to the regulation prohibiting taxation of goods stored in bonded warehouses, *supra* note 28, the Court stated: "The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the Congressional regulation of commerce presently involved." 309 U.S. at 429.

31. 19 U.S.C. §§ 1202-1654 (1964), *as amended*, (Supp. IV, 1965-68).

32. 309 U.S. 414, 326 (1940).

33. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

34. *See* Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964) (liquor under federal jurisdiction may not be subjected to state regulation despite the powers reserved to the states under the 21st amendment).

35. 309 U.S. 414 (1940).

36. Many of the same regulations are involved in the instant case.

37. In addition to the Tariff Act of 1930 and article 942 of the Customs Regulations of 1931, the Court considered the legislative history of § 601 of the Revenue Act of 1932, ch. 209, § 601, 47 Stat. 169, and § 630, ch. 289, § 705(a), 52 Stat. 570, which taxed the importation of crude petroleum and exempted fuel placed on vessels engaged in foreign commerce. For other cases indicating a congressional intent to prohibit local taxation see Idlewild Liquor Corp., 377 U.S. 324, 329-34 (1964) (the commerce clause deprives the state of the power to prevent transactions supervised by the Bureau of Customs involving intoxicants for delivery to consumers in foreign markets); National Distillers Prods. Corp. v. City & County, 141 Cal. App. 2d 651, 657-58, 297 P.2d 61, 66 (1956) (liquor in interstate shipment on tax day which was to be shipped in foreigu commerce was immune from local taxation under the commerce clause since the tax would interfere with federal regulation); During v. Valente, 267 App. Div. 383, 46 N.Y.S.2d 385 (1944) (New York's Alcoholic Beverage Control Law was inapplicable to goods in Foreign Trade Zone created under the power of Congress to regulate commerce with the nation).

38. The court held that those goods not subject to customs duties were not immune to state and local taxation under the import-export clause because they were imported to supply the

court examined section 312 of the Tariff Act of 1930 along with the relevant Customs Regulations[39] and concluded that the government's interest in the bonded ore was to insure that a sufficient quantity equal to the amount of the bond was available at all times. Thus, a security interest exists which should not affect the local government's right to tax the bonded ore.[40] The court further stated that congressional regulation of foreign commerce was not intended to create an enclave free from local taxation. Instead, Congress had only intended to free the taxpayer from the obligation of paying the duty until the goods were subsequently sold and consumed in domestic commerce. Squarely facing the incorporation by reference of article 942 of the Customs Regulations of 1931,[41] which prohibited state taxation of bonded imports, the court stated that *McGoldrick* limited this regulation to the facts presented therein; therefore, the regulation is incorporated only in so far as it prohibits the taxation of the sale of goods imported and refined in bonded warehouses which are intended to be used as ship's stores.[42] Moreover, *McGoldrick* involved goods destined for forcign commerce which are immune from taxation under the import-export clause rather than goods intended for domestic consumption as in the instant case. Interpreting *McGoldrick* in this light, the court concluded that the regulation exempted only those imported goods which are constitutionally exempt from state and local taxation while in a bonded warehouse.[43] The court further stated that had Congress intended to

manufacturer's current operational needs. No violation of the commerce clausc was found as the nondutiable goods had left the stream of foreign and interstate commerce and had become subject to the taxing power of the state. Moreover, the tax did not discriminate against interstate or foreign commerce.

39. Tariff Act of 1930, ch. 497, § 312, 46 Stat. 692, *as amended*, 19 U.S.C. § 1312 (1964); 19 C.F.R. §§ 19.1(a)(7), 19.17-.25 (1969).

40. Significant to the court's conclusion were: 19 C.F.R. § 19.18(a) (1969) ("The full dutiable contents of such metal-bearing materials, as ascertained by commercial assay made by the Government chemists, less the wastage allowance . . . must be either cxported, duty-paid, or transferred to another bonded warehouse . . . ."); 19 C.F.R. § 19.1(a)(7) (1969) (the bonded smelter and refinery may treat imported metal bearing materials for domestic consumption as well as for exportation); 19 U.S.C. § 1312 (1964) (metal bearing materials of both foreign and domestic origin may be processed); 19 C.F.R. § 19.17(f) (1969) (bonded metals are required to be kept separate and distinct from nonbonded material until sampled and weighed when they become a part of the mass of material in the bonded warehouse); and 19 C.F.R. § 19.24(a) (1969) (a bond may be transferred from goods at one bonded warehouse to goods in another, even though the goods in the second were of domestic origin).

41. Article 850 of the Customs Regulations of 1923 was continued as article 942 of the Customs Regulations of 1931.

42. The court cited *McGoldrick* for the proposition that article 942 "when applied to the *facts of the present case*, states only what is implicit in the Congressional regulation of commerce *presently involved*." 309 U.S. at 429 (emphasis added).

43. The court examined the authority cited in the Customs Regulation of 1915, article 731, which later became Article 942 in the Customs Regulations of 1931, and noted that all cases cited

give bonded smelters and refiners total immunity from local taxes, such legislation would have been unconstitutional because the power of the states to levy nondiscriminatory taxes on goods which are no longer imports or subjects of interstate commerce may not be infringed upon under the guise of federal regulation. Relying upon *Tres Ritos Ranch Co.*,[44] the court formulated a test to determine when goods lose their character as imports: whether "there is more than mere storage in a manner reasonably consistent with the nature of the property. . . ."[45] Accordingly, the court found that the committing of bonded ores to the smelting and refining process ended their local tax immunity. Distinguishing cases cited by the plaintiff,[46] the court concluded that neither the regulations nor precedent reveals a congressional intent to interfere with the right of the states to tax goods imported for and appropriated to processing for domestic consumption. Furthermore, the right to tax is not foreclosed if the importer has withheld payment of the duty and given a bond to secure such payment.[47]

Considering the constitutional issues involved in the instant case, the court has overlooked a fundamental principle and has exhibited confusion in attempting to distinguish commerce clause and import-export clause considerations. The court concluded that imported goods in bonded warehouses lose their status as imports when appropriated to the smelting process for domestic consumption. Although this determination may be justified, the court failed to consider a fundamental principle: goods retain their status as imports until they are "incorporated and mixed up with the mass of property in the country."[48] By applying the "current operational needs" test of

involved goods in bonded warehouses which were constitutionally immune from state taxation under the import-export clause. Low v. Austin, 80 U.S. 29 (1871); Blount v. Munroe, 60 Ga. 62 (1878). The court also indicated that the scope of the regulation was limited since it was "merely a footnote."

44. 44 N.M. 556, 105 P.2d 1070 (1940). *See* note 14 *supra*.

45. 77 Cal. Rptr. at 601.

46. The court distinguished Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940), and National Distillers Prods. Corp. v. City & County, 141 Cal. App. 2d 651, 297 P.2d 61 (1956), by stating that tax immunity rested upon the constitutional prohibition against taxation of goods involved in the stream of commerce. During v. Valente, 267 App. Div. 383, 46 N.Y.S.2d 385 (1944), was distinguished since the court found that the statute in *During* created a foreign trade zone. The Ohio cases of Republic Steel Corp. v. Porterfield, 14 Ohio St. 2d 101, 236 N.E.2d 661 (1968), and Orr Felt & Blanket Co. v. Schneider, 3 Ohio St. 2d 14, 209 N.E.2d 150 (1965), were found to be not inconsistent with the court's holding because in each case the immunity was derived from the import-export clause's protection of goods whose importation journey has not ended.

47. The court further concluded that the laws and regulations governing traffic in gold did not preempt the right of states to tax or regulate that traffic.

48. Brown v. Maryland, 25 U.S. 419, 441 (1827).

Youngstown Sheet & Tube Co. v. Bowers,[49] the court has ignored the distinction between the processing of duty-free goods in which the government has no interest and the processing of goods upon which the duty has not been paid and a bond is outstanding. The appropriation to and processing of duty-free imports falls clearly within the *Youngstown* guidelines. On the other hand, a governmental interest in the dutiable goods may give them a character which justifies the conclusion that they have not become mingled with the mass of domestic property. Moreover, keeping these goods "separate and distinct from nonbonded material until they have been sampled and weighed"[50] clearly indicates that immunity should extend at least until the sampling and weighing. If sampling and weighing are part of the smelting process, then all ores and concentrates appropriated to the manufacturing process and essential to the current operational needs should be free from local taxation. A proper inquiry should include a consideration of whether the government's control and regulation of the imports has kept them "separate" from the mass of goods in this country.[51]

In construing article 942 of the Customs Regulations of 1931, the court has ignored the plain meaning of the regulation and has given it an interpretation that renders it meaningless. A federal regulation, which has been in effect for 55 years and has been held to have been incorporated into the Tariff Act of 1930 by the Supreme Court of the United States,[52] should not be dismissed by stating that "there was no such regulation, but merely a footnote."[53] The court's statement that any congressional regulation intended to prevent state taxation of such goods would be unconstitutional is clearly without merit. Congressional power over interstate commerce is full and plenary, and under that power "Congress can fix the bounds of state taxation of that commerce."[54] If the Customs Regulations' absolute prohibition against state and local taxation of imports in bonded warehouses is taken as a correct interpretation of congressional intent, the instant court's decision may conceivably result in a specific congressional restraint of such taxation. This will be particularly true if the burden

49. 358 U.S. 534 (1959).

50. 19 C.F.R. § 19.17(f) (1969).

51. The court only considered whether there was "use" of the goods in a manner reasonably consistent with the nature of the property. 77 Cal. Rptr. at 601.

52. McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 426 (1940).

53. 77 Cal. Rptr. at 598.

54. Hartman, *State Taxation of Corporate Income From a Multistate Business*, 13 VAND. L. REV. 21, 122 (1959).

of local taxation adversely affects the competitive advantage of domestic smelters and refiners.[55]

Throughout its discussion of the question of preemption, the court seems to have confused commerce clause considerations with those normally applied to the import-export clause. Such confusion is most evident in the court's attempt to distinguish *McGoldrick v. Gulf Oil Co.* Congressional power over commerce is separate and distinct from the constitutional prohibition against state taxation of imports. Although the oil involved in *McGoldrick* was constitutionally protected under the import-export clause,[56] this in no way limits the Court's finding that the "statutes and regulations taken together"[57] are a regulation of commerce which preempts state taxation. The relevant consideration is that congressional intent to preempt taxation of pretroleum destined for foreign commerce was clearly evident in *McGoldrick*;[58] whereas, in the instant case, such clear intention is not present. Although the court's finding that the government has a security interest in the bonded ore is not unreasonable, it is suggested that an attempt by the county to collect outstanding property taxes would present a situation inconsistent with the congressional purpose. The conclusion that local taxation is not preempted by federal regulation might be justifiable in this close question. It is hoped, however, that a more precise statement of the considerations underlying the decision will result from the forthcoming appeal.

Labor Law—Collective Bargaining—Employer's Widely Publicized Stance of Unbending Firmness Indicates Bad Faith

Following several months of negotiations and a three week strike,[1] which ended in capitulation by the Union and a settlement on the

55. The trial court had found that an attempt to pass the effect of the tax down to the supplying-producers would result in plaintiff's losing its business to foreign smelters. 77 Cal. Rptr. at 587.

56. "The salient distinction is that the provisions governing a manufacturing warehouse, such as that in which the imported crude petroleum was manufactured into fuel oil in the *Gulf Oil* case, limit withdrawal and sale of the product to the export trade . . . whereas, under the provisions governing bonded smelting and refining warehouses, all or any part of the product may be introduced into domestic commerce . . . ." 77 Cal. Rptr. at 595-96.

57. McGoldrick v. Gulf Oil Co., 309 U.S. 414, 427 (1940).

58. Sections 601 and 630 of the Revenue Act of 1932, *as amended*, May 28, 1938, ch. 209, 47 Stat. 169, ch. 289, § 705(a), 52 Stat. 570, exempted such petroleum from local taxation. *See* note 37 *supra*.

1. The strike began on Oct. 2, 1960, and ended 22 days later.

Company's terms, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter IUE)[2] filed unfair labor practice charges against General Electric. Prior to the formal bargaining period, GE had unilaterally offered an insurance program on a no-bargaining basis.[3] During the negotiations, GE refused to compromise,[4] withheld requested information,[5] attempted to deal separately with IUE locals,[6] and utilized a massive publicity campaign criticizing the bargaining conduct of Union representatives and advertising the Company's policy of adherence to its "firm, fair offer."[7] The NLRB, adopting the findings of the Trial Examiner,[8] held that General Electric had committed three specific unfair labor practices,[9] and, by "consciously placing itself in a position where it could not give unfettered consideration" to Union proposals, had failed

2. In 1960, about half of GE's 250,000 employees were unionized. The IUE represented about 70,000 GE workers, grouped into over 100 bargaining units. The Company dealt with the Union through the IUE's General Electric Conference Board, composed of delegates elected from IUE locals and empowered by the locals to negotiate, call strikes, and conclude contracts.

3. Shortly before the opening of formal negotiations, GE notified the Union that it was planning to institute unilaterally a personal accident insurance plan. After the Union objected, GE replied that it would make the plan available to non-union employees only.

4. Although GE did alter its offer during negotiations, the changes were relatively insignificant.

5. GE refused both oral and written requests for data needed to compute the cost of proposals. The instant court concluded that this refusal resulted in the Union being unable to bargain intelligently.

6. The Trial Examiner's findings that GE had attempted to deal separately with several IUE locals were affirmed by the Second Circuit. The court also found that the terms offered to 2 locals were better than those offered to the national negotiators.

7. GE's publicity program was essential to the Company's unique approach to collective bargaining. This approach is commonly referred to as "Boulwareism" and is named after Lemuel R. Boulware, a former GE vice-president. The technique is basically an application of GE's consumer merchandising methods to the employment relations field. GE solicits information on the desires of the work force and attempts to translate this information into specific proposals which are both attractive to the employees and within the Company's means. GE then uses its public relations and advertising skills to sell the proposals to the employees and the public. In 1960, the Company described its proposals as a "firm, fair offer," characteristic of its desire to "do right voluntarily" without the need for Union pressure. GE also declared that although it would be willing to accept Union suggestions based on facts the Company might have overlooked, the offer would not be changed merely to avoid a strike. The Company denounced the traditional give and take of so-called "auction bargaining" as "pointless haggling."

8. The Trial Examiner's findings are appended to the decision of the Board. General Electric Co., 150 N.L.R.B. 192, 203 (1964).

9. The Board found that GE had committed 3 separate violations of the duty to bargain by refusing to provide requested information, by attempting to deal separately with the IUE locals, and by unilaterally presenting the insurance program. 150 N.L.R.B. at 193. Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1964), provides: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . . ."

to bargain in good faith.[10] In its petition for review of the Board's order, GE contended that the Company's intransigence and publicity techniques had statutory approval[11] and could not be used to support a finding of bad faith. Refusing to accept this position, the Court of Appeals for the Second Circuit, *held*, order enforced. During collective bargaining, an employer who assumes a widely publicized stance of unbending firmness, and thereby destroys his own ability to alter a position once taken, refuses to bargain in fact, and demonstrates an absence of subjective good faith. *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 38 U.S.L.W. 3337 (U.S. Mar. 3, 1970) (No. 1064).

The employer's duty to bargain, as originally conceived by Congress, required only that he meet and confer with the representative of his employees.[12] From the outset, however, the NLRB regulated the quality of negotiations by requiring a "sincere desire to reach agreement."[13] In 1947, Congress attempted to define the bargaining duty[14] under the NLRA by enacting section 8(d), which provides that an employer is obligated to "confer in good faith," but not to agree or make concessions.[15] The good faith standard was designed to isolate the employer who, through perfunctory negotiation, attempted to avoid both agreement and a Board finding of refusal to bargain.[16] Since various courts determined that it was easier to define bad faith rather

10. 150 N.L.R.B. 192, 196 (1964).

11. 29 U.S.C. § 158(d) (1964): "[T]o bargain collectively is . . . the mutual obligation . . . to meet . . . and confer in good faith with respect to . . . terms and conditions of employment . . . but *such obligation does not compel either party to agree to a proposal or require the making of a concession* . . . ." (Emphasis added). 29 U.S.C. § 158(c) (1964): "The expressing of any views, argument, or opinion . . . *shall not constitute or be evidence of an unfair labor practice* . . . if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis added).

12. Senator Walsh, Chairman of the Senate Committee on Education and Labor, declared: "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 CONG. REC. 7660 (1935).

13. 1 NLRB ANN. REP. 85-86 (1937). *See also* NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941).

14. The fear was expressed in Congress that the Board had "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." H.R. REP. NO. 245, 80th Cong., 1st Sess. 19 (1947).

15. 29 U.S.C. § 158(d) (1964). *See* note 11 *supra*.

16. For a full discussion of the history of § 8(d), see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

than good faith, the basic test became whether the totality of the employer's conduct demonstrated "a desire not to reach an agreement."[17] Thus bad faith was held to be demonstrated by intentional stalling,[18] insistance upon patently unreasonable terms,[19] or withholding from the negotiator authorization to bind the employer.[20] In certain cases, however, employer acts constituted per se refusals to bargain; therefore, the good faith question was not reached. These per se violations included refusing to discuss a mandatory subject,[21] unilaterally changing employment benefits during negotiations,[22] and refusing to supply relevant information.[23] Although not verbalized, the development of the per se approach may reflect the decreasing pertinence of the traditional test of good faith when the parties have actually reached agreement. In *United Steelworkers v. NLRB*,[24] the D.C. Circuit concluded that although the employer intended to sign a contract with the union, his refusal to compromise on the dues checkoff issue was motivated by a desire to undermine union strength. Therefore, the employer had failed to bargain in good faith in spite of his desire to agree. Even though the Supreme Court has never reviewed such a finding, the Court's decision in *NLRB v. Katz*[25] is relevant. After holding that the employer had committed a per se violation of the duty to bargain, the Court found it unnecessary to consider the good faith issue and declared in dictum that the Board had authority to proscribe any behavior "which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a state of mind against reaching agreement."[26]

17. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). For a discussion of the development of this test, see Cox, *supra* note 16, at 1417-28.

18. *See, e.g.*, NLRB v. Reed & Prinee Mfg. Co., 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

19. *See, e.g.*, Majure v. NLRB, 198 F.2d 735 (5th Cir. 1952).

20. *See, e.g.*, NLRB v. Hibbard, 273 F.2d 565 (7th Cir. 1960).

21. *See* NLRB v. Katz, 369 U.S. 736 (1962). *See also* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

22. *See* NLRB v. Katz, 369 U.S. 736 (1962). *See also* May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945); NLRB v. Shannon, 208 F.2d 545 (9th Cir. 1953).

23. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

24. 390 F.2d 846 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 904 (1968). This decision was rendered over the dissent of Chief Justice (then Judge) Burger who declared it to be a "novel and internally inconsistent proposition that a bargainer can be found to have refused to bargain in good faith even while at the same time it is found to have engaged in bargaining in a good faith effort to reach an agreement and has actually reached a final and binding contract." *Id.* at 853 (dissenting opinion).

25. 369 U.S. 736 (1962).

26. *Id.* at 747. The Court also declared that the duty to bargain "'in good faith with respect to wages, hours, and other terms and conditions of employment . . .' [m]ay be violated without

The 1947 congressional definition of bargaining duty was part of a larger attempt to delineate the permissible scope of NLRB activity. Consequently, section 8(c), which provides that noncoercive expression of opinion "shall not constitute or be evidence of an unfair labor practice,"[27] was also added to the Act. The legislative history of this section reveals only isolated criticism[28] of its broad scope and no consideration of its possible application in the collective bargaining context.[29] Subsequent cases reflected the tension between an employer's obligation to bargain in good faith and his right to communicate with his employees. The NLRB and the courts have uniformly outlawed "employer [attempts] to disregard the bargaining representatives by negotiating with individual employees"[30] on the ground that such communications violated the exclusivity requirement.[31] On the other hand, when bargaining table conduct was satisfactory, employer publicity explaining or justifying bargaining proposals has been permitted.[32] Although employer criticisms of union officials have generally been allowed,[33] *NLRB v. Fitzgerald Mills Corp.*[34] held such a communication to be evidence of bad faith on the ground that it was a "calculated attempt to undermine union prestige."[35] The consensus seems to be that section 8(c) is co-extensive with the first amendment, and that if employer speech tends to undermine the process of collective bargaining, the policy goal of labor peace will outweigh the privilege of section 8(c).[36]

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a general failure of subjective good faith . . . . A refusal to negotiate *in fact* . . . violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." *Id.* at 742-43.

27. 29 U.S.C. § 158(c) (1964). *See* note 11 *supra.*

28. The few criticisms made were related to employer coercion during union organizing campaigns.

29. *See, e.g.*, S. REP. No. 105, 80th Cong., 1st Sess., pt. 1, 23 (1947); H.R. REP. No. 245, 80th Cong., 1st Sess. 33, 84 (1947); H.R. REP. No. 510, 80th Cong., 1st Sess. 45 (1947); 93 CONG. REC. 6446 (1947).

30. Medo Photo Supply Co. v. NLRB, 321 U.S. 678, 684 (1944). *See also* The Stanley Works, 108 N.L.R.B. 734 (1954).

31. Under § 9(a) of the NLRA, a union selected by a majority of the employees is the "exclusive representative" of all the employees in the bargaining unit, including those who voted against the union. 29 U.S.C. § 159(a) (1954).

32. *See* Joseph E. Cote, 101 N.L.R.B. 1486 (1952); United Welding Co., 72 N.L.R.B. 954 (1947).

33. Grand Central Aircraft Co., 103 N.L.R.B. 1114, *enforced*, 216 F.2d 572 (9th Cir. 1954) ("communist"); C. Pappas Co., 82 N.L.R.B. 765 (1949) ("racketeers").

34. 313 F.2d 260 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963) (posted notice charging union officials with delay in making wage increases effective).

35. *Id.* at 268.

36. In a reeent case, the Supreme Court deciared that "§ 8(c) . . . merely implements the

In the instant case, Judge Kaufman, writing for the majority, first affirmed the Board's finding that GE committed three specific violations of its duty to bargain[37] and then confronted the good faith issue. After noting that the proper approach was to consider "the totality of the circumstances," the court found that although the Company desired to reach agreement,[38] its bargaining tactics were designed primarily to subvert the Union by dealing "with the Union through the employees, rather than with the employees through the Union."[39] Recognizing that GE's publicity campaign was essential to this approach, he ruled that such publicity was not immunized by section 8(c) since the purpose of that section was to impose a "rule of relevancy;" a literal reading would "emasculate a statute whose structure depends heavily on evaluation of motive and intent."[40] The majority found that the purpose of the publicity was to convince the employees that the Company's offer was in their best interests and that employee support of a strike would not pressure GE into a change. Since the effect of the publicity was to label any concession a defeat, and thus to discourage compromise, the publicity was evidence of GE's bad faith intent to rely upon its results "to the virtual exclusion of genuine negotiations."[41] Finding support in the broad dictum of *Katz*,[42] the court concluded that GE's conduct was tantamount to negotiating with a mind closed to compromise. In a concurring opinion, Judge Waterman conceded that GE's hard bargaining tactics, standing alone, were not indicative of bad faith; however, the Company's "widely publicized stance of unbending firmness" made them unfair. Therefore, "the Company should not be permitted to advertise to its employees that it believes in the firmness of its offers for the sake of firmness."[43] Judge Friendly, in a dissenting opinion, observed that a finding of a

First Amendment" and used a balancing technique to support its finding that employer speech had coerced the employees. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). For an analysis of § 8(c) in constitutional terms, see *Symposium—Restrictions on Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 NW. U.L. REV. 40 (1968).

37. *See* notes 9 *supra* & 51 *infra*.

38. Judge Kaufman argued, however, that the desire to reach agreement "must mean more than a willingness to sign a piece of paper." Furthermore, he indicated that GE's refusal to budge from its original offer was inconsistent with "a serious effort to resolve differences and reach a common ground." 418 F.2d at 761-62.

39. *Id.* at 759.

40. *Id.* at 761.

41. *Id.* at 759.

42. *See* note 25 *supra* and accompanying text.

43. 418 F.2d at 763-64.

"desire not to reach an agreement with the union"[44] should be a prerequisite to any finding of bad faith, and that without such a finding the "totality of the circumstances" approach became subjective and indefinite. Furthermore, Judge Friendly contended that GE's "firm, fair offer" and firmness publicity were specifically protected by sections 8(d) and 8(c),[45] and that the majority decision constituted a serious intrusion into the realm left to the parties by Congress.

The advocates of the traditional good faith standard[46] contend that if an employer's bargaining proposals are not patently unreasonable, any attitude short of a desire to avoid agreement cannot be construed as bad faith. Thus, by definition, where the parties have conferred and reached agreement, the issue of good faith does not arise. This presents the problem of whether to abandon the good faith requirement as inappropriate to this situation, or to retain it and develop broader implementing standards. The per se refusal to bargain approach[47] espouses the former since the employer's subjective attitude is irrelevant to its operation. The majority in the instant case, however, took a bold step in the latter direction. Their test of good faith is not simply whether the employer desires agreement, but how much he desires this result.[48] The rationale of the decision appears to be that any employer bargaining tactic which has the effect of limiting the union's influence on the results of the bargaining process and which is primarily motivated by a desire to prevent union "moral victories" indicates bad faith.[49] In sum, the decision could be interpreted to stand for the proposition that anti-union animus, to the extent that it influences bargaining tactics, is bad faith. The result of the decision, will be to force the employer to be far more accommodating of union interests. First, it effectively requires that an employer engage in "auction bargaining," since intransigence inevitably raises the question

44. *See* note 17 *supra* and accompanying text.

45. 418 F.2d at 765: "Conformably with the dictates of the First Amendment, Congress, when it enacted § 8(c) determined the dangers that free expression might entail for successful bargaining were a lesser risk than to have the Board police employer or union speech."

46. *See, e.g.*, the dissenting opinion of Chief Justice (then Judge) Burger in United Steelworkers v. NLRB, 390 F.2d 846, 853 (D.C. Cir.), *cert. denied*, 391 U.S. 904 (1968).

47. *See* notes 21-23 *supra* and accompanying text.

48. Judge Kaufman characterized GE's conduct as "inconsistent with a genuine desire to reach a mutually satisfactory accord." 418 F.2d at 757. The implication is that an employer must not only desire to agree, but he must also desire an agreement with which the union will be satisfied.

49. *Id.* at 758: "The Board might reasonably infer that its prime purpose was to avoid recognizing the Union's status as bargaining representative of the striking employees, and not to further any legitimate business aim."

of anti-union motive. Moreover, when the granting of a union demand would not significantly burden the employer, the question of anti-union motive may become a presumption. Secondly, the new "good faith" severely restricts the use of employer propaganda by suggesting that any attempt to secure employee support may be evidence of bad faith. It is submitted that the long term results of this policy will not only encourage antagonism between management and employees, but will also increase union strength and bargaining power. On the other hand, employee communications by the negotiating parties can provide a valuable check on either party's misuse of its bargaining power. Employees in one bargaining unit, for example, may be "used" by union officials to gain a contract which sets a precedent for other employers.[50] The employer who must rely on organized labor is at a distinct disadvantage in this situation and should be allowed to publicize his position to those who benefit from collective bargaining. A concept which does not meet these pragmatic standards should be discarded as unworkable, even if valid in theory. After agreement by the parties, the better solution would be to continue and to extend the doctrine of the "per se refusal to bargain." This approach places proper emphasis on the objective bargaining table conduct of the parties and has already produced a substantial "common law" of bargaining, which is sufficient to have resolved the instant case.[51]

Labor Law—State Anti-Injunction Statute Not Applicable to Disputes Concerning Public Employees

Appellee, a municipal school corporation, sought and obtained a restraining order directing appellant, a public school teachers' union, to refrain from picketing and striking against appellee.[1] At a hearing

50. It is interesting to note that this situation may currently exist. The 1969, GE-IUE negotiations have followed a pattern similar to those of 1960. GE has taken full-page advertisements in leading publications declaring that a "union power coalition" is the real force behind the current strike against GE. The advertisements also state that "the primary goal of the union coalition is to prolong the strike—at the expense of General Electric employees. This is an apparent attempt to force a super-inflationary General Electric settlement, which these unions could then use as the basis for further negotiations in other industries." Wall Street Journal, Dec. 29, 1969, at 9. GE has filed unfair labor practice charges against the IUE for allegedly refusing to bargain.

51. The court sustained the Board's finding that GE had committed 3 specific violations of § 8(a)(5), each of which was characterized, with ample precedent, as a per se refusal to bargain. Therefore, the resolution of Boulwareism with good faith could have been avoided.

1. Appellant had instituted a strike against appellee and established picket lines at various schools after salary negotiations had been unsuccessful. Although only a small percentage of the

to adjudge whether the teachers' union was in contempt of court for the continuation of the picketing without regard to the restraining order, appellant contended that Indiana's "Little Norris-LaGuardia Act"[2] was applicable and, since the trial court did not follow the procedures required by that statute, it had no jurisdiction to issue the order.[3] The trial court found appellant in contempt of court for violation of the restraining order. On appeal to the Supreme Court of Indiana, *held*, affirmed. Since the state's anti-injunction law is not applicable to disputes concerning public employees and strikes by public employees are illegal, the strike and picketing by appellant to compel satisfactory contract negotiations was properly enjoined. *Anderson Federation of Teachers, Local 519 v. School City of Anderson,* 251 N.E.2d 15 (Ind. 1969).

While public sector collective bargaining has been expressly and tacitly recognized in a growing number of states,[4] the right of public employees[5] to strike in furtherance of collective bargaining has been uniformly denied. Strikes by government employees are prohibited by federal[6] and state[7] statutes; the marked judicial inclination has been to

public school teachers participated in the strike and the picketing was at all times peaceful, evidence disclosed that school children were unloaded from buses in public streets because of the presence of the picket lines. It was this action by appellant that precipitated the temporary restraining order.

2. IND. ANN. STAT. § 40-501 to -514 (Burns Repl. 1965). The state anti-injunction statute is an exact copy of the Norris-LaGuardia Act, 29 U.S.C. § 101 (1964).

3. The statute sets out procedures that must be followed by a trial court in order to get jurisdiction to enjoin a strike. "No court of the state of Indiana, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this act . . . ." IND. ANN. STAT. § 40-501 (Burns Repl. 1965). Appellant contended that the issuance of the order without notice or a hearing was violative of § 40-501. Furthermore, the union alleged that it was entitled to a jury trial on the contempt charge, as required by § 40-511.

4. *See, e.g.*, CONN. GEN. STAT. ANN. § 10-153d (Supp. 1967); MICH. COMP. LAWS ANN. § 423.209 (1967).

5. The term "public employee" is usually defined very broadly to include anyone holding a position by employment or appointment in the government of the state or any municipal corporation, county, township, or political subdivision thereof. *See, e.g.*, OHIO REV. CODE ANN. § 4117.01 (Baldwin 1968).

6. 5 U.S.C. § 7311 (Supp. IV, 1965-68).

7. The legislatures of 16 states have passed no-strike statutes: CONN. GEN. STAT. ANN. § 10-153e (Supp. 1967) (school teachers specifically); FLA. STAT. ANN. § 839.221 (1965); GA. CODE ANN. § 89-1301 (1963); HAWAII REV. STAT. § 86-2 (1968); MASS. ANN. LAWS ch. 149, § 178m (Supp. 1968); MICH. STAT. ANN. § 17.455(2) (1968); MINN. STAT. ANN. § 179.51 (1966); NEB. REV. STAT. § 48-821 (1960); N.Y. CIV. SERV. LAW § 210(1) (McKinney Supp. 1969); OHIO REV. CODE ANN. § 4117.02 (Baldwin 1968); ORE. REV. STAT. § 243.760 (Repl. 1967); PA. STAT. ANN. tit. 43, § 215.2 (1964); R.I. GEN. LAWS ANN. § 28-9.3-1 (1968) (school teachers specifically); TEX. REV. CIV. STAT. art. 5154c(3) (1962); VA. CODE ANN. § 40-65 (Repl. 1953); WIS. STAT. ANN. § 111.70(4)(*l*) (Supp. 1969).

designate strikes against governmental employers as illegal per se.[8] One of the reasons for denying the right to strike is that public employee strikes derogate the sovereignty of government.[9] Since issues such as wages, hours, and working conditions are determined through the exercise of the legislative power, strikes by governmental employees impair sovereignty by pressuring the legislature to delegate or bargain away its authority. Another reason for the prohibition is that strikes are thought to be the equivalent of a rebellion against government approaching the level of treason.[10] A third reason is the possible danger to public health and safety that may result.[11] Finally, the rationale that public employees have a higher obligation to refrain from interfering with the operation of government is often utilized to justify the limitation;[12] public employees are assumed to accept a fiduciary relationship by entering public employment. There has been some dissatisfaction with these reasons for finding public employee strikes illegal per se.[13] A few courts have adopted an approach requiring inquiry into the circumstances of the particular strike.[14] Although the issue is brought before the courts in diverse forms, it is most often raised in injunction proceedings brought by the public employer. Such

8. *E.g.*, Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951) (declaratory judgment holding that public workers have no right to strike); Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965) (holding that public employees have no right to interfere with a governmental function); City of Manchester v. Teachers Guild, 100 N.H. 507, 131 A.2d 59 (1957) (denying teachers' strikes because such strikes would be rebellions against government). *But see* Local 266, IBEW v. Salt River Project, 78 Ariz. 30, 275 P.2d 393 (1954) (strike by employees of agricultural improvement district not illegal).

9. *See* Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946); Electric Sys. v. Vick, 43 Tenn. App. 524, 309 S.W.2d 792 (1957); Note, *The Strike And Its Alternatives In Public Employment*, 1966 WIS. L. REV. 549, 554.

10. *See* City of Cleveland v. Division 268 of Amal. Ass'n, 85 Ohio App. 153, 90 N.E.2d 711 (1949); Note, *Union Activity In Public Employment*, 55 COLUM. L. REV. 343, 360 n.111 (1955).

11. This premise is discernible in the courts' rationales in Donevero v. Incinerator Auth., 75 N.J. Super. 217, 222, 182 A.2d 596, 599 (L. Div. 1962), *rev'd on other grounds sub nom.*, McAleer v. Incinerator Auth., 79 N.J. Super. 142, 190 A.2d 891 (App. Div. 1963); Port of Seattle v. International Longshoremen's Union, 52 Wash. 2d 317, 324 P.2d 1099 (1958).

12. *See generally* McAuliffe v. New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892); Note, *supra* note 9, at 555 n.39.

13. *See* Los Angeles v. Building & Constr. Trades Council, 94 Cal. App. 2d 36, 210 P.2d 305 (1949); Local 266, IBEW v. Dam Auth., 292 P.2d 1018 (Okla. 1956); Note, *Labor Relations In The Public Sector*, 75 HARV. L. REV. 391, 408 (1961).

14. The traditional governmental-proprietary distinction has been occasionally utilized to permit public employees engaged in proprietary functions to strike against their governmental employer. *See* Local 266, IBEW v. Salt River Project, 78 Ariz. 30, 275 P.2d 393 (1954). Most courts have held this distinction inapposite since all governmental activities are equally services for the general public. *See, e.g.*, Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 P.2d 741 (1946).

requests for injunctive relief have been sustained in spite of anti-injunction statutes, a result contrary to the prevailing private sector policy of protecting striking employees from judicial interference. In *United States v. United Mine Workers*,[15] the United States Supreme Court held that the restrictions on the issuance of injunctions in labor disputes found in the Norris-LaGuardia Act[16] did not apply to the United States Government as an employer. The Court premised its construction of the term "employer" as used in the Act on the ancient English rule that "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."[17] Since the state courts almost uniformly have reached similar results in determining the application of state anti-injunction statutes,[18] the courts have readily granted injunctive relief against strikes and picketing by public employees. State courts, however, have cited a number of different reasons for reaching decisions so contrary to the prevailing policy in the private sector. Some of the cases[19] follow the rationale of *United States v. United Mine Workers*; implicit in these decisions is a finding that the history and terms of the state act are comparable with the federal act.[20] Ignoring the construction question, a few courts have held that public employee strikes and picketing serve an illegal purpose and are not within the purview of the statutorily protected labor activity.[21] Other

15. 330 U.S. 258 (1947).

16. 29 U.S.C. § 101 (1964). The purpose of the Act was to promote free employee choice by divesting the federal courts of jurisdiction to issue injunctions in designated classes of labor disputes.

17. 330 U.S. at 272. For other applications of this exclusionary rule, see Guarantee Title & Trust Co. v. Title Guar. & Sur. Co., 224 U.S. 152 (1912); United States v. Stevenson, 215 U.S. 190 (1909). The Court in *United Mine Workers* did not rely entirely on the exclusionary rule; it noted the contrast between the "individual unorganized worker" and the "owners of property" contained in the statement of purposes of the Act, which, on its face, does not purport to apply to the Government. 330 U.S. at 274.

18. Twenty-six states have adopted anti-injunction laws; 12 had passed statutes before the enactment of the Norris-LaGuardia Act in 1932. An additional 12 adopted such laws for the first time in the decade following 1932. Most, but not all, of the later state statutes are modeled after the federal statute. *See generally* U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. NO. 250, STATE ANTI-INJUNCTION LAWS (1962).

19. *See, e.g.*, Hansen v. Commonwealth, 334 Mass. 214, 181 N.E.2d 843 (1962) (citing *United States v. United Mine Workers* for the rule of statutory construction that general words will not be construed to include the state); City of Pawtucket v. Teachers' Alliance, Local 930, 87 R.I. 364, 141 A.2d 624 (1958) (statute did not intend to withdraw from the state its existing rights to injunctive relief against its own employees).

20. *See* Delaware River & Bay Auth. v. International Organ. of Masters, Mates & Pilots, 45 N.J. 138, 211 A.2d 789 (1965) (history and terms of Rhode Island statute comparable to federal statute).

21. *See* Fair Share Organ., Inc. v. Mitnick, 134 Ind. App. 675, 188 N.E.2d 840 (1963)

courts have found that anti-injunction statutes do not bar injunctions against striking public employees for reasons of public policy[22] or because of other state legislation.[23] Only one court has followed an anti-injunction policy in strikes involving public employees.[24]

In the instant case the court found no basis for applying the state anti-injunction statute to disputes concerning public employees. Noting that the Supreme Court had rejected the application of the Norris-LaGuardia Act to such disputes,[25] the majority reasoned that the Court's utilization of the exclusionary rule and its interpretation of the purposes of the federal act[26] were propositions equally applicable to the Indiana statute.[27] The court further found that this construction had been followed in most other state jurisdictions in order to grant injunctions. Concluding that strikes by public employees would result in anarchy, the court held that such strikes were illegal;[28] therefore the instant strike was properly enjoined, and the trial court was correct in its judgment of contempt of court.[29] Two dissenting judges disagreed with the conclusion that the anti-injunction statute was inapplicable;[30]

(picketing for an unlawful purpose not immune from injunctive relief); City of Minot v. General Drivers & Helpers Union, Local 74, 142 N.W.2d 612 (N.D. 1966) (peaceful picketing for an illegal purpose enjoinable).

22. *Compare* Turnpike Auth. v. American Fed'n of State, County & Municipal Employees, Local 1511, 83 N.J. Super. 389, 200 A.2d 134 (1964) (statute not intended to protect the interests of public employees), *with* Westchester County v. Federation of Labor, 115 N.Y.S.2d 144 (Sup. Ct. 1952) (matter of public policy for courts to have unrestrained power to act promptly).

23. *E.g.*, Petrucci v. Hogan, 5 Misc. 2d 480, 27 N.Y.S.2d 718 (Sup. Ct. 1941) (anti-injunction statute found to be in pari materia with state labor relations act that specifically excluded public employees). *Compare* Board of Educ. v. Public School Employees' Union, Local 63, 233 Minn. 144, 45 N.W.2d 797 (1951) (anti-injunction statute held applicable through principle that exclusion of one results in inclusion of all others), *with* City of San Diego v. American Fed'n of State, County & Municipal Employees, Local 127, 3 LAB. L. REP. (1969 CCH Lab. Cas.) ¶ 52,177 (Cal. Super. June 9, 1969) (prohibition of certain public employee strikes indicates that the legislature has refused to outlaw all strikes by public employees).

24. School Dist. v. Education Ass'n, 380 Mich. 314, 157 N.W.2d 206 (1968). The Michigan Supreme Court held that it was insufficient merely to show that concerted, prohibited action by public employees had taken place and that ipso facto such a showing justified injunctive relief. "We so hold because it is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace." *Id.* at 326, 157 N.W.2d at 210.

25. The court cited *United States v. United Mine Workers* as enunciating the principle that public employees did not have a right to strike and that injunctive processes might properly be used to prevent such strikes. 251 N.E.2d at 16.

26. *See* note 17 *supra* and accompanying text.

27. 251 N.E.2d at 17.

28. *Id.* at 18.

29. One judge who previously had announced his intention not to participate in the decision concurred. *Id.* at 18. The Indiana Supreme Court is a 5-judge court.

30. *Id.* at 19.

they distinguished the reasoning of *United Mine Workers* because of a state statute extending the term "person" to the sovereign.[31] Furthermore, the minority, noting that the legislature had never declared that all strikes by governmental employees were illegal, refused to accept an illegal per se rule against peaceful strikes regardless of impact.[32] The dissenters preferred an inquiry into the particular facts to determine the actual amount of disruption.

The instant court's decision to deny public employees the right to strike by restricting the application of the state anti-injunction statute is a correct assessment of decisional law[33] and legislative history.[34] The court's rationale, however, appears to be a doubtful basis for limiting the rights of public employees. The court ignores both the question of statutory construction raised by the dissent[35] and other suggestions that the state's general labor legislation applies to public employees.[36] The court also fails to indicate whether its holding is essentially premised on statutory construction or on the illegal nature of the activity. By postulating a specter of anarchy in order to deny public employees the right to strike, the instant decision is completely inadequate in resolving the complexities of public sector unionism and preventing further destructive confrontation.[37] This is especially unfortunate in view of the vigorous criticism of court decisions that deny the right to strike to all public employees.[38] Most commentators contend that the illegal per se

31. IND. ANN. STAT. § 2-4701 (Burns Repl. 1968).

32. The dissenting judges pointed out that the teachers' strike and picketing was completely peaceful and minimally disruptive of public service rendered by the schools. They thought it unwise to enjoin a peaceful strike in the absence of any way to insure that the underlying dispute would be settled amicably. 251 N.E.2d at 22 (dissenting opinion).

33. *See* note 8 *supra* and accompanying text.

34. Since the Indiana statute is a literal adaptation of the Norris-LaGuardia Act, it would have been reasonable for the court to follow the interpretation of the federal act unless additional considerations were present. *See* note 35 *infra* and accompanying text. Moreover, the state statute was passed at a time when the concept of public sector collective bargaining was unrecognized; it is fair to conclude that the statute was not meant to apply. *See* Getman, *Indiana Labor Relations Law: The Case for a State Labor Relations Act*, 42 IND. L.J. 77 (1966).

35. Looking to rules of construction applicable to Indiana statutes, the dissent makes a forceful argument that the exclusionary rule utilized by the Supreme Court is contrary to legislative intent. *See* IND. ANN. STAT. §§ 1.201, .202 (Burns Repl. 1967); *id.* § 2-4701 (Burns Repl. 1968); text accompanying note 31 *supra*.

36. 1966 OPS. ATT'Y GEN. IND. No. 22; 1944 OPS. ATT'Y GEN. IND. 224, No. 55. Both opinions seem to assume that general labor legislation was applicable to governmental employees. *See* Getman, *supra* note 34, at 90 n.74.

37. For a rejection of the anarchial approach, see Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 959 (1969).

38. *See, e.g.*, Rains, *Collective Bargaining in Public Employment*, 8 LAB. L.J. 548 (1957); 59 MICH. L. REV. 1260 (1961).

approach toward public employee strikes deprives governmental workers of a prerequisite to effective bargaining; they advocate a qualified right to strike with procedures for the allowance of injunctive relief after a factual determination of possible injury to public health and safety.[39] The dissent in the instant case represents one of the few judicial expositions of this qualified right to strike approach. Rejecting as untenable the sovereignty concept,[40] the dissenting judges insist that the distinction between public and private employees must have a rational basis in order to avoid violating the equal protection clause of the fourteenth amendment.[41] They repudiate the traditional propositions that public sector employment in all instances can be rationally distinguished from its private sector counterpart and that public employee strikes are per se more disruptive than private strikes.[42] The dissenting opinion concludes that "in the absence of legislation . . . it is a judicial function to determine whether the amount of the disruption of the service is so great that it warrants overriding the legitimate interests of the employees in having effective means to insure good faith bargaining by the employer."[43] This conception of the judicial function has been criticized for the reason that public policy resolution of conflicting interests should be left to the legislature.[44] Other authorities argue that the courts can more accurately determine whether there is danger to the public health and safety when faced with the facts of each particular case.[45] By deferring to the legislature the legitimization of public employee strikes, this court exercised a judicial self-restraint that is unrealistic in view of the increase in strikes by public employees. The decision does little to clarify the legal status of such strikes.

39. *See, e.g.*, Bloedorn, *The Strike and the Public Sector*, 20 LAB. L.J. 151 (1969); Kheel, *supra* note 37, at 941.

40. The minority points out that the teachers in the instant case were seeking to pressure choices within the discretion of the local school boards as authorized by the state government; ergo, they did not seek to destroy the body politic. 251 N.E.2d at 20 (dissenting opinion).

41. The U.S. Supreme Court has prevented states from imposing unreasonable restrictions upon the privilege of public employment. *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967) (policemen, like teachers and lawyers, not relegated to a watered-down version of constitutional rights).

42. For contrary arguments, see Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 957 (1969).

43. 251 N.E.2d at 22 (dissenting opinion).

44. *See, e.g.*, Port of Seattle v. International Longshoremen's & Warehousemen's Union, 52 Wash. 2d 317, 324 P.2d 1099 (1958) (legislature better equipped to investigate such matters).

45. *See* 34 WASH. L. REV. 216, 220 (1959).

Securities Regulation—Punitive Damages Awarded for Violatiou of Rule 10b-5

Plaintiffs[1] brought a shareholder's derivative action against the defendant corporation and its principal executive officer[2] for alleged violations of Rule 10b-5[3] involving material misrepresentations[4] and omissions[5] in proxy solicitations distributed by the defendants to obtain the stockholders' consent to a merger.[6] The stockholders sought exemplary damages from the executive officer for his intimate connection[7] with the alleged fraudulent scheme. This claim was based

1. Plaintiffs, de Haas and Colorado International Corporation, were among public shareholders of Inland Development Corporation and subsequently became shareholders in American Industries, Inc., as the survivor of a merger between American, Mutual Industries, Inc., and Inland Development Corporation.

2. Defendant Stone was president, chairman of the board, and chief executive officer of Empire, which was a Colorado corporation. Defendant Empire Petroleum Company was the sole owner of Mutual Supply Co. and American Industries, Inc. and effectively controlled Inland Development Corporation, owning 43% of its stock with the remaining 57% being dispersed among 1400 public shareholders.

3. Rule 10b-5 was promulgated by the Securities Exchange Commission pursuant to § 10(b) of the Securities Exchange Act of 1934.

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j (b) (1964), provides: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national security exchange—

(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, 17 C.F.R. § 240. 10b-5 (1969), provides: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility or any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in ligbt of the circumstances under which they were made, not misleading, or,

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

4. Plaintiffs alleged that the defendants falsely represented that the merged corporation could "look forward to rapid growth and expansion."

5. American and Mutual, Empire's 2 subsidiaries, were in serious financial trouble. American's primary asset was a 50% interest in an unproductive oil field worth only $34,800, but bought for $1,000,000. Mutual had suffered losses of $259,000 since its inception and allegedly was continuing to lose $10,000 each month. Plaintiffs alleged that the defendants failed to disclose Mutual's losses and that American had contracted to save Empire harmless from Mutual's creditors. In addition, plaintiffs alleged that it was not disclosed that the American stock was arbitrarily priced at $5 per share when it actually had little or no worth as of the date of merger.

6. The consolidation occurred during July of 1962 as Empire sold Mutual to American, and subsequently American merged with Inland Development, witb American as the survivor.

7. In addition to defendant Stone's control position of Empire, he was president, chairman

upon the theory that the violation of Rule 10b-5 was intentional under general tort law[8] and compensable by punitive damages. The defendant officer argued that the damages recoverable for violations of Rule 10b-5 were limited by section 28(a) of the Securities Exchange Act[9] to actual damages. The jury returned a verdict for the shareholders.[10] On a post-trial motion to the district court by the corporate official to vacate the jury's punitive damage award, *held*, motion dismissed. A misrepresentation or omission of material fact, coupled with defendant's aggravated scienter, may result in the awarding of punitive damages in a civil action for violation of Rule 10b-5. *de Haas v. Empire Petroleum Corp.*, 302 F. Supp. 647 (D. Colo. 1969).

Congress, in an effort to provide needed protection for investors in securities, enacted the Securities Act in 1933[11] and the Securities Exchange Act in 1934.[12] In order to facilitate plaintiff's prosecutions of securities violations, courts have held that the anti-fraud provisions of the two Acts,[13] although superimposed on the tort of

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of the board, and chief executive officer of American and was president and a director of Inland Development Corporation. The plaintiffs alleged that Stone failed to disclose that he had exacted a $20,000 salary from American to be paid with Inland's funds after the merger and that he had obtained an option to buy 100,000 shares of American stock for $1 per share.

8. 2 RESTATEMENT (SECOND) OF TORTS § 286 (1965); W. PROSSER, TORTS §§ 2, 35 (3d ed. 1964).

9. 15 U.S.C. § 78bb(a): "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his *actual damages* on account of the act complained of." (emphasis added).

10. de Haas v. Empire Petroleum Co., 300 F. Supp. 834 (D. Colo. 1969). The jury awarded $5,000 exemplary damages against Stone, but found he could recover his salary. The jury also returned a $10,000 verdict to compensate American for losses suffered in the 1962 merger and a $50,000 verdict to compensate for interest paid. Finally, the court dismissed plaintiffs' demand for rescission of an alleged fraudulent 1966 merger of American and Empire Crude Oil Company.

11. 15 U.S.C. § 77a-z (1964).

12. 15 U.S.C. § 78a-ff (1964).

13. In general, there are 5 provisions of the 1933 and 1934 Acts which seek to prohibit fraud in securities dealings. For a discussion of these 5 provisions, see A. BROMBERG, SECURITIES LAW; FRAUD-SEC RULE 10B-5 § 2.2 (1961); 3 L. LOSS, SECURITIES REGULATION 1421-30 (1961). Three antifraud provisions were enacted in the Securities Act of 1933:

(1) Section 11, 15 U.S.C. § 77k (1964), seeks to prevent untrue statements of material facts and material omissions from registration statements and provides civil liability for such fraudulent conduct.

(2) Section 12, 15 U.S.C. § 77l (1964), deals with untrue statements of material facts or material omissions from prospectuses and other communications regarding the offer or sale of securities. Any person engaging in such activity is liable to purchasers.

(3) Section 17(a), 15 U.S.C. § 77q(a) (1964), seeks to prevent fraudulent conduct in the offer or sale of securities in interstate commerce. The section provides:

"(a) It shall be unlawful for any person in the offer or sale of any securities

misrepresentation,[14] are much broader than the common law action.[15] Rule 10b-5 was promulgated by the SEC under the authority of section 10b of the 1934 Act[16] in order to close a loophole[17] in the scheme of securities regulation. The Rule has broader application than other SEC regulations as it applies to any person involved in the purchase or sale of any securities by the use of interstate commerce, the mails, or a national securities exchange.[18] Since the adoption of Rule 10b-5 courts have found an implied[19] right of civil recovery for sellers[20] and buyers[21]

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by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

The two remaining anti-fraud provisions take the form of rules promulgated pursuant to sections of the Securities Exchange Act of 1934:

(1) Rule 15c 1-2, 17 C.F.R. § 240.15c 1-2 (1969), was promulgated under 15e (now 15c(1)), 15 U.S.C. § 78o(c)(1) (1964), in 1937 to prohibit the use of fraudulent devices by brokers-dealers in the over-the-counter market.

(2) Rule 10b-5, 17 C.F.R. § 240.10b-5 (1969), was promulgated under 10(b), 15 U.S.C. § 78j(b) (1964); see note 3 *supra* for the text.

14. For a discussion of common law misrepresentation, see W. PROSSER, *supra* note 8, §§ 100-05; 3 L. Loss, *supra* note 13, at 1430-42.

15. "The fact is that courts have repeatedly said that the fraud provisions in the SEC acts . . . are not limited to circumstances which would give rise to a common law action for deceit." 3 L. Loss, *supra* note 13, at 1435. In the common law action for misrepresentation, the plaintiff must prove that there was a false representation of material fact which he justifiably relied on and suffered damages. He must also prove that the defendant knew or should have known that the statement was false (scienter). W. PROSSER, *supra* note 8, § 100, at 700.

16. *See* note 3 *supra*.

17. "The Securities and Exchange Commission today announces the adoption of a rule prohibiting fraud by any person in connection with the purchase of securities. The previously existing rules against fraud in the purchase of securities applied only to brokers and dealers. The new rule closes a loophole in the protections against fraud administration by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." SEC Exch. Act Release No. 3230 (May 21, 1942).

18. *Compare* SEC Rule 10b-5, *supra*, note 3, *with* Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a) (1964), *supra* note 13. It is easy to see why Rule 10b-5 has had the more expansive development since it extends to sales and purchases and § 17(a) deals only with sales. *See* A. BROMBERG, *supra* note 13, § 2.3.

19. The right of private remedy is not an expressed one under Rule 10b-5. However, such a right is expressed in §§ 11 & 12(2) of the 1933 Act. Section 11, 15 U.S.C. 77k (1964), provides that any person mislead by registration information may sue those responsible for faulty registration. Section 12(2), 15 U.S.C. § 771 (2) (1964), provides that any person who offers or sells securities by means of inaccurate prospectus will be liable to the person purchasing the security, if the purchaser can prove the seller had knowledge of the falsehood.

20. *See, e.g.*, Janigan v. Taylor, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965); Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (the leading case).

21. *See, e.g.*, Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961), *dismissal aff'd*, 328 F.2d 573

in suits for violations of the Rule. In doing so, courts have relied both upon the statutory tort theory[22] and the theory of statutory voidability.[23] By reading the 1933 and 1934 Acts *in pari materia*, some courts have interpreted the underlying legislative intent as one to provide "complete and effective sanctions, public and private, with respect to the duties and obligations imposed . . . ."[24] Since the buyer's right to a private suit has been implied through the 1933 Act, it has been held the scienter requirements of sections 11[25] and 12(2)[26] of the 1933 Act apply to the buyer-plaintiff in a suit under Rule 10b-5.[27] There is a split of authority on the scienter requirement under Rule

(1964); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951); Trussel v. United Underwriters, Ltd., 228 F. Supp. 757 (D. Colo. 1964). *But see* Montague v. Electronics Corp., 76 F. Supp. 933 (S.D.N.Y. 1948); Rosenberg v. Globe Aircraft Corp., 80 F. Supp. 123 (E.D. Pa. 1948).

22. This common law doctrine allows a person to recover damages if he is injured by another's violation of a statute which was passed to protect people in the plaintiff's position. W. PROSSER, *supra* note 8, § 35. For a diseussion of this doctrine with regard to Rule 10b-5 cases, see A. BROMBERG, *supra* note 13, § 2.4(1)(a). That author points out that RESTATEMENT (SECOND) OF TORTS § 286 (1965) modified RESTATEMENT OF TORTS § 286 (1934) and provides the courts with an option in statutory tort cases. But he concludes "that the liability theory is so firmly ensconsed in 10b-5 jurisprudence that the later RESTATEMENT is unlikely to have any effect on it." *Id.*, § 2.4(1)(a) n.57.

23. This theory is based on the language of § 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b) (1964), which provides: "Every contract made in violation of any of the provisions of this [Act] or of any rule or any regulation thereunder, and every contract . . . the performance of which involves the violation of, or the continuance of any relationship or practice in violation of . . . any provision of this [Act] or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract . . . ." The reasoning underlying this theory is that the congressional declaration that certain contracts are void would be of little value unless a party to the contract could apply to the courts for rescission. *See* Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946); A. BROMBERG, *supra* note 13, § 2.4(1)(b).

24. Ellis v. Carter, 291 F.2d 270, 274 (9th Cir. 1961). For an excellent discussion of implied civil recovery for buyers and sellers under Rule 10b-5, see A. BROMBERG, *supra* note 13, § 2.4(1)-(2). *See also* 3 L. Loss, *supra* note 13, at 1763-97; Comment, *Private Remedies Available Under Rule 10b-5*, 20 Sw. L.J. 620-23, (1966); Comment, *Insider Liability Under Securities Exchange Act Rule 10b-5: The Cady, Roberts Doctrine*, 30 U. CHI. L. REV. 121, 158-67 (1962).

25. Securities Act of 1933, § 11(b)(3)(A-D), 15 U.S.C. §§ 77k(b)(3)(A-D) (1964), places the burden ofproof on the purchaser to show that the seller knew or had reasonable grounds to know that part of the registration statement was false.

26. Securities Act of 1933, § 12(2), 15 U.S.C. § 77l(2) (1964), provides that the seller of the security must "sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission . . . ."

27. Parker v. Baltimore Paint & Chem. Corp., 244 F. Supp. 267 (D. Colo. 1965); Weber v. C.M.P. Corp., 242 F. Supp. 321 (S.D.N.Y. 1965); Trussell v. United Underwriters, Ltd., 228 F. Supp. 757 (D. Colo. 1964).

10b-5, but the trend is very much against requiring it.[28] Section 28(a) of the 1934 Act provides that no person can recover more than actual damages in a suit for violation of the Act.[29] On its face this section would seem to preclude recovery of punitive damages in a 10b-5 suit, but this section, like a similar section under the 1933 Act,[30] has been subject to divergent interpretations. In a recent decision,[31] the Second Circuit held that section 28(a) does preclude recovery of punitive damages in a suit brought under Rule 10b-5.[32] On the other hand, it has been argued and held that the section 28(a) limitation applies only to those statutory causes of action specifically enumerated in the Act and that a 10b-5 action arises from common law tort principles independent of the Act.[33]

In the instant case, the court initially addressed itself to the plaintiffs' right to a private claim for damages under section 10b of the Securities Exchange Act. Citing *Kardon v. National Gypsum Co.*,[34] the court reasoned that "the right to pursue a private claim for damages under 10b-5 arises by virtue of the general tort principle that the doing of an act prohibited by statute may give rise to an actionable wrong."[35] Then interpreting section 28(a), the court stated that the

28. *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968); Steven v. Vowell, 343 F.2d 374, 379 (10th Cir. 1965) (by implication); Kohler v. Kohler Co., 319 F.2d 634, 637 (7th Cir. 1963) (dictum); Ellis v. Carter, 291 F.2d 270, 274 (9th Cir. 1961). *But see* Note, *Scienter and Rule 10b-5*, 69 COLUM. L. REV. 1056 (1969).

29. *See* note 9 *supra*.

30. In 1968 a jury awarded punitive damages for a violation of § 17(a) of the 1933 Act, but this decision has recently been reversed. Globus v. Law Research Serv., Inc., 287 F. Supp. 188 (S.D.N.Y. 1968), *rev'd*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied* 38 U.S.L.W. 3316 (U.S. Feb. 24, 1970). The confusion in the area is illustrated in this quote from a recent district court opinion: " 'Punitive damages are not authorized in private actions under § 10(b) and Rule 10b-5, of the 1934 Securities Exchange Act. . . . But it is possible that in the *turbid waters* of the 1933 Securities Act plaintiffs may find additional authority for their private suit for damages under § 17(a). . . . The *Green* case . . . instructs us, 'that punitive damages are permitted under the Securities Act of 1933 . . . .' " Geller v. Bohen, CCH 1969 FED. SEC. L. REP. ¶ 92,429, at 98,033 (E.D.N.Y. June 17, 1969) (emphasis added).

31. Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968).

32. The weight of authority supports this position. *E.g.*, Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967); Pappas v. Moss, 257 F. Supp. 345 (D.N.J. 1966); Meisel v. North Jersey Trust Co., 216 F. Supp. 469 (S.D.N.Y. 1963); Mills v. Sarjem Corp., 133 F. Supp. 753 (D.N.J. 1955) (dictum).

33. Heeht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968); Baumel v. Rosen, 283 F. Supp. 128 (D.C. Md. 1968). "The limiting language of 28(a) is treated in 3 Loss, Securities Regulation (1961 ed.) pp. 1474, 1624, 1793-94, as simply precluding double recovery for common law fraud and violation of federal law." *Id.* at 145.

34. 69 F. Supp. 512 (E.D. Pa. 1946).

35. de Haas v. Empire Petroleum Corp., 302 F. Supp. 647, 649 (D. Colo. 1969).

actual damages limitation applies only to claims for relief which are "expressly or impliedly created by the Act itself."[36] The court reasoned that a private claim for damages under 10b-5 rests on general tort law and does not depend on the 1934 Act for express or implied authority; consequently section 28(a) is inapplicable in such cases. The court followed prior case law[37] that held that some elements of scienter must be shown in order to establish a violation of Rule 10b-5. Thus, the court concluded that violation of 10b-5 necessarily involves an intentional tort from which punitive damages may flow when "aggravated scienter" is clearly shown.[38]

Punitive damage awards for securities violations have been justified as a deterrent against fraud and as an incentive to the private individual to prosecute small suits that ordinarily would not be worthwhile.[39] There is some question, however, whether punitive damages are necessary to effectuate the purposes of the federal securities laws.[40] The threat of liability for actual damages coupled with the possible imposition of criminal penalities under the 1934 Act[41] should act as an adequate deterrent for the corporations and officials dealing in securities. The aggregate of compensatory damages in a class action will usually be burdensome and adequate to punish offenders.[42] With no ceiling on the amount which could be awarded and no guidelines to follow, juries could return astronomical awards which would be out of proportion to the harm done.[43] Congress should address itself to the question of whether punitive damages should be recovered in securities regulation cases. If such awards are deemed to

36. *Id.*

37. Trussell v. United Underwriters, Ltd., 228 F. Supp. 757 (D. Colo. 1964).

38. de Haas v. Empire Petroleum Corp., 302 F. Supp. 647 (D. Colo. 1969).

39. "[Punitive] damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." W. PROSSER, TORTS 9 (3d ed. 1964). *See* Globus v. Law Research Serv., Inc., 418 F.2d 1276 (2d Cir. 1969), *cert. denied* 38 U.S.L.W. 3316 (U.S. Feb. 24, 1970); 54 VA. L. REV. 1560 (1968).

40. *See* Globus v. Law Research Serv. Inc., 418 F.2d 1276 (2d Cir. 1969), *cert. denied* 38 U.S.L.W. 3316 (U.S. Feb. 24, 1970); Green v. Wolf, 406 F.2d 291 (2d Cir. 1968).

41. Criminal sanctions are provided in § 32 of the Securities Exchange Act, 15 U.S.C. § 78ff (1964).

42. By liberal rules applicable to class actions and derivative actions by stockholders, individuals with small claims are encouraged to file suits for securities violations. FED. R. CIV. P. 23 & 23.1. This increases the probability of a substantial aggregate of compensatory damages.

43. There are instances of huge and perhaps capricious punitive damages which some juries have awarded. *See, e.g.*, Butts v. Curtis Publishing Co., 388 U.S. 130 (1967) ($3 million awarded in punitive damages; later reduced to $400,000).

be in the best interest of securities regulation, guidelines should be established to aid juries in the task of making such awards.[44]

Although the trend is away from requiring an element of "intent" in the violation of 10b-5,[45] the present court chose to adopt a "watered-down" version of scienter[46] to establish such a violation. There is merit in such a requirement if punitive damages are to be awarded under 10b-5. If the 1933 Act and the 1934 Act are considered *in pari materia*,[47] the scienter requirements of three private remedies expressly provided for under sections 11 and 12(2) of the 1933 Act and section 18 of the 1934 Act[48] would seemingly apply to 10b-5. Liability under all these sections is based on fault, and the remedies should be as consistent as possible.[49] Requiring proof of scienter for the recovery of punitive damages provides a means of imposing greatest liability on the informed insider who knowingly breaches his fiduciary duty and at the same time bars recovery of punitive damages only when the insider acts in good faith.[50]

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44. It has been suggested that a treble damages provision similar to that of § 4 of the Clayton Act, 15 U.S.C. § 15 (1964), would provide protection for both investor and businessman. 22 VAND. L. REV. 690, 695 (1969). In addition to the award guidelines, Congress should speak to the problem of when such awards are warranted. If Congress does not establish these needed guidelines, courts should consciously attempt to define the elements present which demand an award of punitive damages. In the instance case, the court stated that "aggravated scienter" existed without offering any definition of "aggravated scienter" to guide future courts in their determination in similar cases. A discussion of standards of scienter under Rule 10b-5 is found in Comment, *Negligent Misrepresentations Under Rule* 10B-5, 32 U. CHI. L. REV. 824 (1965) and in Note, *supra* note 28.

45. *See* note 28 *supra*.

46. The term "watered-down" scienter has been used to describe scienter less than open knowledge necessary for a common law deceit action. *See* 3 L. Loss, *supra* note 13, at 1766; Comment, 20 SW. L.J. *supra* note 24, at 621.

47. Globus v. Law Research Serv. Inc., 418 F.2d 1276 (2d Cir. 1969), *cert. denied* 38 U.S.L.W. 3316 (U.S. Feb. 24, 1970); Note, *Proof of Scienter Necessary in a Private Suit Under SEC Anti-Fraud Rule 10b-5*, 63 MICH. L. REV. 1070 (1965).

48. The scienter requirements of §§ 11 & 12(2) are discussed briefly in notes 25 & 26 *supra*. Section 18 of the 1934 Act, 15 U.S.C. § 78r (1964), provides that there is no liability imposed for a misleading statement in any application, report of document filed under this title "[if] the person sued . . . [can] prove that be had no knowledge that such statement was false or misleading."

49. *See* Note, *supra* note 47, at 1078.

50. *Id.* That author states that if no scienter requirement is imposed under 10b-5, plaintiffs will naturally utilize this rule with the easiest elements of proof and render the other 3 sections surplusage.

Taxation—Alimony Trust—Income Beneficiary of Section 71(a) Alimony Trust May Exclude Distributions Attributable to Tax-exempt Interest When Compnting Taxable Income

Plaintiff was the income beneficiary of an alimony trust[1] created by her former husband to provide monthly support payments.[2] Distributions to plaintiff included trust income consisting of tax-exempt interest.[3] Plaintiff reported all distributions from the trust as ordinary income but, subsequently, filed a claim for refund of the increment of income tax paid on distributions attributed to tax-exempt interest. Plaintiff alleged that under section 682 of the Internal Revenue Code[4] she qualified as a trust beneficiary and should have been taxed under the conduit principles[5] of sections 652(b) and 662(b),[6] which exclude from gross income that portion of trust distributions which are attributable to tax-exempt income. Denying plaintiff's claim, the Government asserted that section 71(a)[7] applied and required plaintiff

1. This term denotes a trust established for the purpose of making periodic payments in discharge of a legal obligation imposed on the settlor under a divorce decree or incurred by him in a written agreement incident to the decree. *See* INT. REV. CODE of 1954, § 71(a).

2. The trust established by Mr. Ellis was to pay plaintiff $1,000 per month and additional cost-of-living and emergency allowances until her death or remarriage. The payments were to be made "in the discharge of Mr. Ellis's legal obligation of support and maintenanee and alimony." Brief for Appellant, app. at 29a-30a (Trust Agreement), Ellis v. United States, 416 F.2d 894 (6th Cir. 1969).

3. Subsequent to the creation of the trust, the trustee invested in municipal bonds, the interest from which is exempted from federal income tax by § 103 of the Internal Revenue Code.

4. Section 682 of the Internal Revenue Code of 1954 provides: "(a). . . Therc shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance (or who is separated from her husband under a written separation agreement) the amount of the income of any trust which such wife is entitled to receive and which, except for this section, would be includible in the gross income of her husband, and such amount shall not, despite any other provision of this subtitle, be includible in the gross income of such husband. . . . (b). . . For purposes of computing the taxable income of the estate or trust and the taxable income of a wife to whom subsection (a) of section 71 applies, such wife shall be considered as the beneficiary specified in this part. A periodic payment under section 71 to any portion of which this part applies shall be included in the gross income of the beneficiary in the taxable year in which under this part such portion is required to be included."

5. "[The] trust is treated as a conduit through which the income flows to the beneficiaries without any change in its character. The result is that a beneficiary is entitled to treat special classes of income, such as dividends or tax-exempt interest, received through the . . . trust, in the same manner as if he had received them directly." A. MICHAELSON, INCOME TAXATION OF ESTATES AND TRUSTS 2 (rev. ed. 1966).

6. Section 652(b) governs trusts distributing current income only; § 662(b) governs trusts accumulating income or distributing corpus. INT. REV. CODE of 1954, §§ 652(b), 662(b).

7. Section 71(a)(I) provides that "[i]f a wife is divorced or legally separated from her husband under a decree of divoree or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal

to include the full amount of alimony payments in her gross income. In a suit for the refund brought in federal district court, plaintiff was granted summary judgment.[8] On appeal to the Sixth Circuit Court of Appeals, *held*, affirmed. Under section 682(b) of the Internal Revenue Code of 1954, the beneficiary of a section 71(a) trust qualifies as a trust beneficiary as specified in Part I of Subchapter J of the Code and is entitled under sections 652(b) and 662(b) to exclude from gross income the portion of trust distributions derived from tax-exempt interest from municipal bonds.[9] *Ellis v. United States*, 416 F.2d 894 (6th Cir. 1969).

Prior to 1942, alimony payments, whether made directly by the husband[10] or through a trust,[11] were not deductible by the husband or taxable as income to the wife.[12] Having no statutory indication of congressional policy with respect to the taxation of alimony,[13] the Supreme Court placed the tax burden on the husband. Any other determination under then existing law would have resulted in double taxation of such payments.[14] Seeking an equitable distribution of the tax burden[15] and the elimination of disparities in tax treatment caused

obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation." INT. REV. CODE of 1954, § 71(a)(1).

8. 288 F. Supp. 168 (W.D. Tenn. 1968).

9. The instant court noted with approval the equitable principle of determining questions of serious doubt as to the taxability of certain income in favor of the taxpayer. 416 F.2d at 897 *See* cases cited note 41 *infra*. The court, however, based its determination of the issue upon an analysis and construction of the relevant statutes. 416 F.2d at 896.

10. Gould v. Gould, 245 U.S. 151 (1917); *see* A. MICHAELSON, *supra* note 5, at 85.

11. Douglas v. Willcuts, 296 U.S. 1 (1935). *Douglas* was subsequently modified by Supreme Court decisions which conditioned the income tax liability of a husband for the income of an alimony trust upon whether he had a continuing obligation to support his former wife under local law or the trust agreement. *See* Helvering v. Leonard, 310 U.S. 80 (1940); Helvering v. Fuller, 310 U.S. 69 (1940); Helvering v. Fitch, 309 U.S. 149 (1940); A. MICHAELSON, *supra* note 5.

12. For a detailed discussion of problems arising from the taxation of alimony payments prior to 1942, see Gornick, *Taxation of Alimony Trusts—A Need for Congressional Reform*, 20 TAXES 529 (1942); Paul, *Five Years With Douglas v. Willcuts*, 53 HARV. L. REV. 1 (1939); Tye, *Federal Taxation of Alimony Trusts*, 19 TAXES 19 (1941).

13. *See* Gornick, *infra* note 16, at 28.

14. Since as a personal expense the alimony payments could not be deducted from his income, they would have been taxed first to the husband and again to the wife when she received them. *See* Gornick, *supra* note 12, at 533; Lowndes, *Community Income and Alimony—Taxation under the Revenue Act of 1941*, 20 TAXES 3, 46-47 (1942).

15. The inequities of the pre-1942 law were summarized during the hearings on the Revenue Revision of 1942: "Generally speaking, alimony payments are not subject to tax in the hands of a divorced wife. Even where irrevocable trusts have been established, and the husband has no further interest in the trust property, the income of the alimony trust is nevertheless taxable to him because it is used to pay an alimony obligation. Rising tax rates have in some cases absorbed the entire income of the husband required to pay the tax on his income and that of his divorced wife. At the same time, divorced wives receiving tax-free alimony possess a privileged status under

by differences in state laws,[16] Congress, in 1942, amended the Internal Revenue Code of 1939 by adding section 22(k),[17] the substance of which is now section 71(a) of the Internal Revenue Code of 1954. Section 71(a), like its predecessor, requires the wife[18] to include in her gross income periodic alimony payments, whether such payments are made directly by her husband or from property placed in trust.[19] Legislative history clearly indicates that Congress intended to tax the beneficiary of an alimony trust on trust distributions from corpus;[20] there is no clear indication, however, of its intention with respect to distributions from tax-exempt income.[21] Most analysts have concluded that in computing taxable income the beneficiary of a section 71(a) trust must recognize all payments from the trust, including those derived from interest on tax-exempt securities.[22] The determination of the tax liability of an alimony trust beneficiary is complicated by the provisions of section 682 which on its face appears to be inconsistent with the construction commonly given to section 71(a). Section 682[23]

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our tax laws which relieves them of any share of the tax burden." *Hearings Before the House Comm. on Ways & Means on Revenue Revision of 1942*, 77th Cong., 2d Sess., vol. 1, at 92 (1942) (statement of Randolph E. Paul, Tax Advisor to the Secretary of the Treasury); *see* S. REP. NO. 1631, 77th Cong., 2d Sess. 83 (1942); H.R. REP. NO. 2333, 77th Cong., 2d Sess. 71-72 (1942).

16. *See* S. REP. NO. 1631, *supra* note 15; H.R. REP. NO. 2333, *supra* note 15, at 72; Gornick, *Alimony and the Income Tax*, 29 CORNELL L.Q. 28, 34-35 & n.32 (1943).

17. Int. Rev. Code of 1939, ch. 1, § 22(k), 56 Stat. 816 (Supp. 1942) (now INT. REV. CODE of 1954, § 71).

18. Section 71(a) and the other Code sections discussed herein are directed to the tax treatment of the spouse who receives alimony payments. To facilitate discussion, the recipient of the alimony payments will be assumed to be the wife.

19. INT. REV. CODE of 1954, § 71(a).

20. *See* Treas. Reg. § 1.71-1(c)(2)-(3) (1957); S. REP. NO. 1631, *supra* note 15, at 84; H.R. REP. NO. 2333, *supra* note 15, at 73; note 21 *infra*. The relevance of the legislative history of the 1942 amendment to the Internal Revenue Code of 1939 to a determination of congressional intent in the enactment of section 71(a) in 1954 is demonstrated by the following statement from the House Report on the 1954 Code revision: "Except for subsection (a)(2) (extending the provision to cover written separation agreements not under or incident to a court decree), section 71 corresponds to section 22(k) of the 1939 Code, which has been restated for purposes of clarity. No substantive change is made . . . ." H.R. REP. NO. 1337, 83d Cong., 2d Sess. A20-A21 (1954).

21. *See* Treas. Reg. § 1.71-1(c)(3) (1957). Similiar language is found in the legislative history of § 22(k) of the 1939 Code: "The full amount of periodic payments received under the circumstances described in section 22(k) is required to be included in the gross income of the recipient whether such amounts are derived, in whole or in part, from income received or accrued by the source to which such payments are attributable." S. REP. NO. 1631, *supra* note 15, at 84. It is possible to interpret the section as referring simply to the non-exclusion of corpus.

22. *See, e.g.*, Burke, *Gift, Estate and Income Tax Problems in Marriage and Divorce Arrangements*, 1959 TUL. TAX INST. 174, 210; CCH 1970 STAND. FED. TAX REP. ¶ 3776.014, at 41,110 (comparison of Code §§ 71 & 682); Schartz, *Income Tax Aspects of Alimony*, 42 TAXES 323 (1964); Note, *Tax Aspects of Alimony Trusts*, 66 YALE L.J. 881, 892 (1957).

23. INT. REV. CODE of 1954, § 682. *See* note 4 *supra*.

is the present counterpart of section 171[24] of the Internal Revenue Code of 1939 which was enacted concurrently with section 22(k).[25] Section 171(a) was intended to exclude from the husband's gross income the distributions from income of a trust which was in existence prior to the divorce, which was not created in contemplation of or incident to the divorce, and the income from which, except for the provisions of 171(a), would be included in the settlor's gross income.[26] Treasury Regulation section 1.682(a) indicates that this is also the intended function of section 682(a).[27] However, section 682(b) provides that "[f]or the purpose of computing the taxable income of . . . a wife to whom [section 682(a)] or section 71(a) applies, such wife shall be considered as the beneficiary specified in this part."[28] Although most authorities have concluded that section 682(b) simply states the rule applicable for determining the taxable year in which the beneficiary of a section 71(a) or 682(a) trust is to include trust distributions in gross income,[29] the provision may also be interpreted as extending to the alimony trust beneficiary the privileges of beneficiaries of trusts governed by Subchapter J of the Code.[30] If the latter construction of section 682(b) is adopted, the alimony trust beneficiary when computing her taxable income would, under sections 652(b) and 662(b),

24. Int. Rev. Code of 1939, ch. I, § 171, 56 Stat. 817 (Supp. 1942).

25. *See* note 17 *supra* and accompanying text.

26. *See* INT. REV. CODE of 1939, ch. 1, § 171, 56 Stat. 817 (Supp. 1942) (now INT. REV. CODE of 1954, § 682); S. REP. NO. 1631, *supra* note 15, at 85; H.R. REP. NO. 2333, *supra* note 15, at 73.

27. Treas. Reg. § 1.682(a)-1(a) (3) (1957).

28. INT. REV. CODE OF 1954, § 682(b). "This part" appears to refer to Part 1, Subchapter J, Chapter 1 of the 1954 Code. *See* Treas. Reg. § 1.682(b)-1(a) (1957).

29. *See, e.g.*, Treas. Reg. § 1.682(b)-1(b) (1957); *cf.* Manella, *Current Developments in the Taxation of Alimony*, U. SO. CAL. 1948 TAX INST. 43, 77. This position also finds support in the legislative history of § 171 of the 1939 Code: "The general rules for accounting for the income of a trust or estate, prescribed in supplement E of chapter 1, apply to that part of any periodic payment which is a distribution of income of the trust or estate and which is required under section 22(k) or section 171(a) to be included in the income of the individual receiving such payment. *For the purpose of clarity*, this section [now 682(b)] provides that the wife entitled to receive the payment is considered as the beneficiary of the trust." H.R. REP. NO. 2333, *supra* note 15, at 73 (emphasis added).

30. *See, e.g.*, Anita Quinby Stewart, 9 T.C. 195, 198-99 (1947); Harrow, *Personal tax problems—The alimony trust: when and how to use this valuable but hazardous (taxwise) device*, 6 J. TAX. 365, 369 (1957); *cf.* A. MICHAELSON, *supra* note 5, at 86. Illustrative of the rationale of this interpretation is the following statement of the district court: "The right of beneficiaries to treat tax-exempt interest earned and distributed by trusts as tax-exempt interest in the hands of the beneficiaries is a specific right created by Part 1 of subchapter (J) of the Code. . . . [S]ection 682(b) gives this specific right to beneficiaries of section 71 alimony trusts as well as beneficiaries of other types of trusts. Ellis v. United States, 288 F. Supp. 168, 170 (W.D. Tenn. 1968).

be entitled to retain for tax purposes the tax-exempt character of any trust income distributed to her. Thus while section 71(a) seems to require "the full amount" of alimony payments to be included in gross income,[31] section 682(b) may reasonably be construed as permitting the exclusion from gross income of trust distributions derived from interest on tax-exempt securities.[32] Two cases, *Muriel Dodge Neeman*[33] and *Anita Quinby Stewart*,[34] which were decided under the 1939 Code, are commonly cited as having considered this problem. However, neither of these conflicting Tax Court decisions are of material assistance in determining the question raised by the instant facts because the cases dealt with the issue only peripherally and under substantially different facts.[35]

Interpreting the language of section 71(a) in the "light of its ordinary meaning and significance," the instant court found that even though Congress intended that alimony trust distributions be taxed without distinguishing between income and corpus,[36] Congress did not state that *all* alimony payments, regardless of source, were to be included in the recipient's gross income. The court found no evidence in the language or legislative history of section 71(a) that Congress intended to create an exception to the standard conduit principles applicable to other trusts under Subchapter J of the Internal Revenue Code of 1954.[37] Observing that taxes should be imposed by Congress rather than the courts[38] and finding that serious doubt existed as to the the taxability to plaintiff of the distributions from tax-exempt trust income, the court resolved the doubt in favor of the taxpayer[39] and

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

32. *See* Anita Quinby Stewart, 9 T.C. 195 (1947).

33. 26 T.C. 864 (1956), *aff'd per curiam*, 255 F.2d 841 (2d Cir. 1958).

34. 9 T.C. 195 (1947).

35. Neither case involved the same arrangement for making alimony payments as that in the instant case. In *Stewart*, which allowed the claimed exemption, the wife received distributions of tax-exempt trust income as the assignee of her former husband, the designated trust beneficiary. The court in *Neeman* denied the wife's claim for an exemption of tax-exempt trust income that she allegedly received in payments made directly to her by her husband.

36. *See* note 20 *supra*.

37. In support of the contention that § 71(a) creates an exception to the standard conduit principles stated in §§ 652(b) and 662(b), the Government relied on *Neeman*. The court distinguished *Neeman* and stated that "[t]o the extent that *Neeman* might be construed . . . applicable to the present case in regard to the immateriality of the source of alimony payments, we respectfully decline to follow it." 416 F.2d at 898.

38. *See* Commissioner v. Brown, 380 U.S. 563, 579 (1965); American Automobile Ass'n v. United States, 367 U.S. 687, 697 (1961).

39. *See* McFeely v. Commissioner, 296 U.S. 102, 111 (1935); United States v. Merriam, 263 U.S. 179, 187-88 (1923); Gellman v. United States, 235 F.2d 87, 93 (8th Cir. 1956); Shattuck v. Gallagher, 218 F.2d 428, 429 (6th Cir. 1955).

declined to extend the meaning of section 71(a) beyond the language enacted by Congress. Approving the district court's interpretation[40] of section 682(b), the court held that the section required that the recipient of payments from a section 71(a) trust be considered a trust beneficiary as specified in Part I of Subchapter J[41] and that plaintiff could, therefore, exclude from her gross income, the portion of distributed trust income derived from tax-exempt securities.

Section 71(a) states the rules for the taxation of periodic payments received by a wife to discharge the obligation of support and other marital obligations imposed upon the husband by court decree or written agreement between the parties following a divorce or separation. This section applies as well to the distributions from a trust that is created for the purpose of making such payments. Section 682(a) governs those trusts that are created prior to and not in contemplation of divorce or separation, and the income from which would, except for the provisions of that section, be taxable to the husband.[42] Consequently, a trust that meets the criteria established in section 71(a) cannot qualify for treatment under section 682(a).[43] The applicability of both sections is conditioned upon the existence of a divorce or separation decree or a written separation agreement.[44] It would seem that Congress, having delineated these precise distinctions as to the circumstances in which each section is to apply, did not intend to render them meaningless by taxing the two types of trusts in the same way.[45] Thus an ordinary trust, which because of the divorce or separation of the settlor and the beneficiary becomes a section 682(a) trust, continues to be taxed in accordance with the ordinary trust rules of Subchapter J with the exception that the incidence of the tax on

40. 288 F. Supp. at 169-71.

41. INT. REV. CODE of 1954, §§ 641-83.

42. Treasury Regulation § 1.682-1 indicates that even the beneficiary of a pre-existing trust, otherwise taxable under § 682(a), will be taxable under § 71(a) if trust distributions are used to discharge an obligation imposed upon or assumed by the husband under a divorce or separation decree or separation agreement. *See* Treas. Reg. § 1.682-1(a)(2), (4) (1957); Rev. Rul. 65-283, 1965-2 CUM. BULL. 25. *But cf.* A. Michaelson, *supra* note 5, at 85. This interpretation is predicated upon the somewhat nebulous distinction between a pre-existing trust that is formally included in the decree or agreement and one that, although considered by the parties in determining the amount of the husband's obligation, is not formally included in the court's decree or the parties written agreement. *See* Treas. Reg. § 1.682-1(a)(4) Examples (1)-(2) (1957). This severe restriction upon the applicability of § 682(a) does not seem to be compelled by the statutory language or the legislative history of the section.

43. *See* Treas. Reg. § 1.682(a)-1(a)(2) (1957).

44. *See* Treas. Reg. § 1.71-1(b) (1957); Treas. Reg. § 1.682(a)-1(a)(1) (1957).

45. It has been suggested, however, that there is no policy justification for distinguishing between pre-existing trusts and those taxed under § 71(a). Note, *supra* note 22, at 895.

distributions of trust income is imposed upon the wife rather than the husband. The section 71(a) trust, however, having been created for the special purpose of discharging alimony or support obligations, is subject to special tax rules. The congressional design to tax section 71(a) beneficiaries under rules other than those applicable to beneficiaries of ordinary trusts is demonstrated by the express provision in section 71(a) for the taxation of distributions from trust corpus as well as trust income. This provision has the effect of making alimony trust distributions analogous to alimony payments which are made directly from the income of the husband.[46] In view of the distinctions between the applicability and taxability of section 71(a) and section 682(a) trusts, section 71(a) trust distributions should be taxed consistently with discernible congressional objectives, precluding the determination that section 71(a) does not create exceptions to Subchapter J rules.[47] The construction of section 682(b) adopted by the instant court evidences a failure to accord adequate weight to the intended design and function of section 71[48] as well as an insensitivity to the need for equitable treatment of all taxpayers within the limits of the existing tax structure. The scope of section 682(b), when construed in accordance with the legislative history of all relevant Code sections, should be limited to the determination of the tax year in which distributions from section 71(a) or section 682(a) trusts are to be included in the gross income of trust beneficiaries.[49] Consequently,

46. Under § 71(a), the full amount of payments made directly from the husband's income are taxable to the wife without regard to the source from which these payments are made. *See* Muriel Dodge Neeman, 26 T.C. 864 (1956), *aff'd per curiam*, 255 F.2d 841 (2d Cir. 1958). Even if the husband's income is technically traceable to a tax-exempt source, the income loses its tax-exempt character when it passes tbrough his hands to his former wife.

47. "'The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained . . . by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstanees of its use and other appropriate tests for the ascertainment of the legislative will.'" Gellman v. United States, 235 F.2d 87, 89 (8tb Cir. 1956), *quoting* Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 93-94 (1934).

48. In a comprehensive analysis of the ebanges made by Congress in the 1942 amendment to the Internal Revenue Code of 1939, Alan L. Gornick concluded that "[t]his review of the alimony and separate maintenance provisions of the Revenue Act of 1942 . . . leads to the inescapable conclusion that Congress attempted to cover every conceivable payment that might be made as alimony or in the nature of alimony and to subject all such payments to a uniform rule." Gornick, *supra* note 16, at 51.

49. The congressional committee reports which accompanied the Revenue Bill of 1942 indicate that this was the intended purpose of § 171(b) and that the sentence which designates the wife as a "beneficiary" under Part I, Subchapter J was intended merely to clarify this purpose. *See* S. REP. No. 1631, *supra* note 15, at 85; H.R. REP. No. 2333, *supra* note 15, at 73; note 29 *supra* and accompanying text.

distributions from tax-exempt alimony trust income should not be exempted from taxation by sections 652(b) and 662(b) of Subchapter J as the instant court concluded. These distributions should be fully taxable when received from a trust governed by section 71(a).[50] No rational basis has been suggested for distinguishing between the taxation of distributions from trust corpus and distributions from tax-exempt trust income; it is submitted that none exists. Taxation of *all* payments received by beneficiaries of section 71(a) trusts is consistent with the intended function of section 71,[51] and achieves uniformity in the taxation of this homogenous class of taxpayers, a characteristic which is fundamental to a just and equitable tax system.[52]

50. *See* note 22 *supra* and accompanying text. Prior to the enactment of § 22(k), alimony payments were taxable to the husband and excluded from the gross income of the wife; therefore, any tax-exempt interest received by the husband was not included in the gross income of either party. Taxation of the § 71(a) beneficiary on all distributions from the trust without regard to the character of the income prevents either the husband or wife from benefiting from the exemption. Thus income which was not taxed prior to the 1942 amendment is subjected to income tax under the provisions of § 71(a) without any expression of congressional intent to levy this tax. This result, however, seems to be compelled by the full import of the section and its legislative history.

51. *See* note 51 *supra.*

52. *See* Gornick, *supra* note 16, at 51.