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RECENT CASES

Civil Rights—Personal Injnry—Intent to Injure Is Not a Prerequisite to Recovery for Police Abuse Under Section 1983

Plaintiff, a black youth, brought suit in federal court against defendant police officer under section 1983 of Title 42, United States Code,[1] for deprivation of his constitutional rights and for assault and battery under a pendent state claim. Plaintiff's claims arose out of an incident following a chase[2] in which plaintiff, while unarmed and offering no resistance, was shot by defendant. Plaintiff contended that the shooting had been intentional and thus constituted a deprivation of his constitutional right to be free from arbitrary abuse at the hands of police.[3] Defendant maintained that his gun had discharged accidentally and that there had been no act, redressible under section 1983, depriving plaintiff of a federally secured right. The trial court found that the shooting was the result of "gross" or "culpable" negligence and allowed recovery on the state claim[4] but denied the federal claim on the ground that recovery under section 1983 was not available for unintentional injuries. On appeal to the Fourth Circuit Court of Appeals, *held,* reversed.[5] Once a deprivation of constitutional rights resulting from police abuse has been established, no showing of specific intent is required for recovery under section 1983. *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970).

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1. 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, privileges, 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."

2. Although the circumstances of the chase preceding the shooting could have constituted part of plaintiff's assault and constitutional claims, "[t]he prior pursuit of [plaintiff was] not pleaded as in itself tortious conduct." Jenkins v. Averett, 424 F.2d 1228, 1234 (4th Cir. 1970). The circumstances of the chase preceding the shooting, however, influenced the majority's decision. *See* note 25 *infra* and accompanying text.

3. The precise constitutional grounds of plaintiff's claim are not apparent for the court's opinion, but the majority bases its conclusion on both the fourth and fourteenth amendments. *See* note 24 *infra.*

4. Both the trial court and the appeals court allowed recovery on the state claim for assault and battery, despite the fact that intent is normally an essential element of these torts. W. PROSSER, TORTS 35, 40 (3d ed. 1964). In allowing recovery, the courts purported to apply a North Carolina rule that permits intent to be imputed from gross or culpable negligence. This rule, however, has apparently been applied by the North Carolina courts only in cases of criminal assault and battery. The cases relied on in the instant decision were criminal cases.

5. The court affirmed the lower court holding as to liability on the state claim (*see* note 4 *supra*), but ruled that the damages awarded on that claim were inadequate.

Section 1983, originally enacted as section one of the Civil Rights Act of 1871,[6] established in broad language a civil remedy against every person who, while acting "under color of" state law, causes another person to be deprived of any of his federally secured rights.[7] The strength of the section as a private remedy against police abuse[8] was quickly emasculated, however, by the restrictive judicial construction of the language "under color of" state law to encompass only actions taken in pursuance of state law.[9] Consequently, for more than half a century section 1983 was infrequently litigated with only nominal success.[10] In 1945, however, the Supreme Court injected new vitality into the statute through its holding in *Screws v. United States*[11] in which the Court construed the criminal analogue[12] of section 1983 and held that "under color of" law meant under "pretense" of law.[13] Although the *Screws* decision did not involve section 1983, lower federal courts quickly applied the Court's "pretense" construction to actions involving police abuse under that section.[14] In *Monroe v. Pape*,[15] the Supreme Court held

6. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. This Act was popularly known as the Ku Klux Act and constituted a major part of the congressional response to the violence, both public and private, that was plaguing the reconstruction South.

7. 42 U.S.C. § 1983 (1964).

8. This comment is concerned primarily with the development of § 1983 as a remedy against police abuse. The statute has, however, served as the vehicle for attacking a broad spectrum of infringements on constitutional rights. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (malapportionment of representative districts); United States *ex rel.* Campbell v. Pate, 401 F.2d 55 (7th Cir. 1968) (unreasonable delay of prisoner's parole hearing).

9. Monroe v. Pape, 365 U.S. 167, 212-13 (1961) (dissent of Justice Frankfurter discussing the historieal background of the "pursuance" construction of "under color of" state law). Most of the reconstruction civil rights legislation was rendered ineffective by restrictive interpretation of the fourteenth amendment and judicially engrafted limitations in the construction of the statutes. For a general discussion of the early treatment of reconstruction legislation see Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-43 (1952). The early development of § 1983 is diseussed in detail in Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361 (1951).

10. In its first 50 years § 1983 appears to have been litigated only 21 times. Comment, *supra* note 9, at 363. In many of these cases the courts reached remarkably harsh results. *E.g.*, Brawner v. Irwin, 169 F. 964 (C.C.N.D. Ga. 1909) (dismissing a Negro woman's complaint against a sheriff for a publicly administered whipping and a brief imprisonment where no crime was charged). Some small measure of success was enjoyed, however, in attacks on racially discriminatory voting statutes. *E.g.*, Giles v. Harris, 189 U.S. 475 (1903). The success of such actions can be explained in large part by the fact that they comply with the "under color of" state law requirements.

11. 325 U.S. 91 (1945).

12. 18 U.S.C. § 52 (1940), *currently*, 18 U.S.C. § 242 (1964).

13. 325 U.S. at 111.

14. Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953) (unreasonable search and seizure by policemen which exceeded their legal authority was under color of law); Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949) (policemen's illegal actions in denying integrated group of plaintiffs access to public pool was under color of state law).

15. 365 U.S. 167 (1961).

that such an application of the *Screws* construction to section 1983 was proper.[16] The Court's opinion in *Monroe,* however, went beyond the mere application of *Screws* to section 1983. In *Screws,* the Court had construed the criminal statute to require "a specific intent to deprive a person of a federal right."[17] In *Monroe,* the Court refused to read a specific intent requirement into section 1983; instead, it stated that "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[18] Furthermore, the Court expressly rejected the contention that state remedies must be exhausted before recovery is allowed under section 1983, holding the federal remedy to be supplementary to any state remedy that might be available.[19] Subsequently, the Court reiterated its background of tort liability formula in *Pierson v. Ray,*[20] in which it preserved certain common law defenses for defendants in section 1983 actions. Lower federal courts have exhibited considerable confusion in complying with the mandate of *Monroe* to read section 1983 against the background of tort liability.[21] Some courts, apparently feeling that the section 1983 remedy against police abuse should be limited in some way, have required a showing of evil motive or shocking abuse for recovery.[22] Other courts, however, have viewed such attempts to limit section 1983 as inconsistent with the purpose of the statute as a supplementary remedy that is to be "read against the background of tort liability . . . ."[23] The Supreme Court has thus far refrained from elaborating on the basis of liability in a section 1983 claim under its holding in *Monroe.*

In the instant case the court reviewed the constitutional prohibitions against excessive police violence and concluded that both the fourth and

16. *Id.* at 202.

17. 325 U.S. at 103.

18. 365 U.S. at 187.

19. 365 U.S. at 183. The Court, in *Monroe,* specifically enumerated 3 purposes underlying § 1983: (1) to override certain kinds of state laws; (2) to provide a remedy where state law is inadequate; and (3) to provide a federal remedy where the state remedy, although adequate in theory, is not available in practice. 365 U.S. at 173-74. The purpose of providing a supplementary remedy was added, although not enumerated, in the Court's discussion in *Monroe.* In *McNeese v. Board of Educ.,* 373 U.S. 668, 671-72 (1963), however, the Court included the supplementary remedy purpose as coequal with the enumerated purposes in *Monroe.*

20. 386 U.S. 547 (1967).

21. *E.g.,* Pierson v. Ray, 352 F.2d 213 (5th Cir. 1965), *rev'd,* 386 U.S. 547 (1967) (holding that defense of reasonable reliance on statute subsequently declared unconstitutional was not available to policemen under *Monroe*).

22. *E.g.,* Striker v. Pancher, 317 F.2d 780 (6th Cir. 1963); Raab v. Pataechia, 232 F. Supp. 71 (S.D. Cal. 1964).

23. Whirl v. Kern, 407 F.2d 781, 787 (5th Cir. 1969).

the fourteenth amendments afford protection against such violence.[24] In its analysis, the court refused to restrict its consideration to the quality of the single act that resulted in the plaintiff's injury. Rather, it examined the shooting as merely one event in defendant's overall conduct as a police officer. Viewed in this fashion, the court found that while the plaintiff's injury might not have been specifically intended, "it was, however, the direct consequence of defendant's wanton conduct in the course of his attempt to apprehend plaintiff."[25] The court concluded that the plaintiff had been subjected to the reckless use of excessive force that resulted in his injury and amounted to a deprivation of his constitutional rights. Having established the existence of a constitutional deprivation, the court refused to require any additional element of intent. Such a requirement, the court reasoned, would be inconsistent with both the plain language of the statute and with the mandate of *Monroe*. The court expressly aligned itself with the group of courts that have refrained from limiting section 1983 by requiring a showing of evil motive or outrageous conduct.[26]

At first glance, the most striking feature of the court's decision is its conclusion that no specifically intended injury is required for recovery under section 1983, but such a holding is not unprecedented.[27] More important than the court's conclusion, however, is the analytical methodology behind the result. The focus of the court on the character of the overall circumstances surrounding the deprivation, rather than on the peculiar nature of the individual injurious event abstracted from its context, represents an important extension of the Supreme Court's holding in *Monroe*. The Court in that decision posited tort liability as the model against which section 1983 claims should be measured. While constitutional claims for police abuse almost invariably involve a parallel tort injury, there may be fundamental differences in the quality

24. Since the Court's decision in *Screws*, complaints of physical abuse at the hands of police have been frequently upheld. The constitutional protection against such abuse, in fact, seems occasionally to be taken for granted. *See* Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958) (court apparently assumed the constitutional protection against physical abuse); McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955) (court cites defendant's memorandum as accepting the constitutional protection against physical abuse).

25. 424 F.2d at 1232. The dissenting opinion refused to adopt the majority's analysis. Instead, the dissent focused on the shooting alone and concluded that negligence, regardless of how aggravated cannot be used as the basis of recovery under § 1983. The dissent criticized the majority decision for opening the door to a constitutional claim every time a public official is negligent. 424 F.2d at 1234.

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

27. In a recent case, in the Fifth Circuit, the court refused to consider the question of actual fault or negligence where a prisoner was not released for 9 months subsequent to the issuance of a release order. Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969).

of fault underlying the two actions. Thus, a series of "routine" actions taken by police, none of which are tortious in themselves, might evince an overall design of police harassment or abuse. By applying the analytical approach used by the court in the instant case, such difficult problems of constitutional fault can be realistically evaluated without depriving policemen of their legitimate defenses of probable cause, reasonable reliance, and accident.

The instant case does little to answer the criticism generated by the Supreme Court's decision in *Monroe*. This criticism has been based on the three generally distinct grounds that the easing of the requirements for recovery under section 1983 will: (1) clog the federal courts with a flood of trivial litigation;[28] (2) produce an unwarranted offensive use of constitutional principles that have developed as defensive safeguards;[29] and (3) inject the federal courts into the area of local police regulation and thereby upset the balance of authority in the federal-state relationship.[30] Although these criticisms have some merit, they do not appear to be particularly susceptible to a definitive judicial solution. While efficient administration is a valid policy concern of the courts, a judicial method of decreasing the volume of section 1983 litigation without affecting the practical availability of a remedy to legitimate claimants does not appear to be in the offing.[31] Similarly, the essentially defensive nature of constitutional safeguards is admitted, but these safeguards define rights that are occasionally infringed, and section 1983 makes these infringements actionable. As constitutional issues are raised under section 1983, it seems more desirable to decide them on a case-by-case basis than to attempt to establish any final, all-encompassing rule of constitutional fault. Finally, the criticism that section 1983 claims inject the federal courts into essentially local regulatory matters and disrupt the federal-state relationship must be balanced against the

28. Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1493 (1969).

29. Comment, *Tort Liability of Law Enforcement Officers Under Section 1983 of the Civil Rights Act*, 30 LA. L. REV. 100, 114-15 (1969).

30. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 324 (1965).

31. The supplementary remedy purpose of § 1983 has been blamed for the volume of litigation. A modified version of the old exhaustion of state remedies limitation has been suggested as a solution. *See* Note, *supra* note 28. Implicit in this solution, however, is the questionable assumption that state courts and administrative agencies will serve adequately as impartial tribunals, properly sensitive to the delicacy of constitutional issues. Furthermore, it must be recognized that such a limitation would probably result in a large number of legitimate claims being suffocated by lengthy adjudication; and presumably this is precisely the evil that the solution seeks to avoid. *See* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970).

legitimate federal interest in protecting the constitutional rights of citizens. The failure of the instant case to answer the critics of *Monroe* seems to rest primarily in the fact that the criticism is not judicially answerable. Any restrictions on the availability or scope of the remedy under section 1983 should be made by the Congress. In the absence of legislative action, the instant case affords a significant analytical method for evaluating fault in claims under section 1983.

Constitntional Law—Abortion—Statnte Prohibiting Abortion of Unquickened Fetns Violates Mother's Constitntional Right of Privacy

Plaintiff, a physician charged with illegally aborting the life of an unquickened fetus,[1] filed a petition in federal district court seeking to enjoin his prosecution and requesting a declaratory judgment that the Wisconsin abortion statute[2] is unconstitutional. Plaintiff contended chiefly[3] that the statute is unconstitutional because it violates the private right of a woman to refuse to carry an unquickened embryo. The State asserted that the statute is justified as protecting society's interest in regulating abortion.[4] A temporary restraining order was denied by a single-judge district court, and a three-judge panel convened to consider the constitutional issues presented.[5] The United States District Court for

1. The period of the unquickened fetus runs from conception to the sixteenth or eighteenth week of pregnancy. Quickening is marked by interuterine movements of the fetus perceived by the mother. *See* STEDMAN'S MEDICAL DICTIONARY 1340-41 (21st ed. 1966).

2. "(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both. . . .

. . . .

(5) This section does not apply to a therapeutic abortion which:

(a) Is performed by a physician; and

(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

(c) Unless an emergency prevents, is performed in a licensed maternity hospital." WIS. STAT. ANN. § 940.04 (1958). The indictment charged plaintiff with performing an illegal abortion of an unquickened fetus when the operation was not necessary to save the life of the mother.

3. Plaintiff also contended that the phrase "necessary . . . to save the life of the mother" is vague and that the statute denies equal protection of the law.

4. The State maintained that its interest in regulating abortion includes the protection of the life of the fetus, preservation of the health of the mother, and discouragement of illicit sexual relations.

5. 28 U.S.C. § 2281 (1964), provides for a 3-judge federal panel when an injunction is sought to restrain a state officer from enforcing a state statute on the ground that it is repugnant to the Constitution.

the Eastern District of Wisconsin denied injunctive relief,[6] but, *held*, judgment for plaintiff. A state statute that prohibits abortion of an unquickened embryo by a licensed physician violates a woman's basic right of privacy secured by the ninth amendment. *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 39 U.S.L.W. 3132 (U.S. Oct. 13, 1970).

At common law, the destruction of an unquickened embryo with permission of the mother was not an indictable offense.[7] State legislatures, however, began to place legal restrictions on all abortions as early as 1803 in an effort to protect the woman from hazardous surgical procedures.[8] Eventually, all states enacted statutes making the abortion of an unquickened fetus a criminal act, providing exceptions only when the operation was necessary to preserve the life of the mother.[9] Concurrent with the rise of anti-abortion legislation, the Supreme Court began to recognize the potentially conflicting right of individual privacy. Although not specifically enumerated in the Constitution, the right of individual privacy has been recognized through the Court's interpretation of the Bill of Rights.[10] Generally, this personal liberty has found its most vigorous application when the citizen's home and family life have been threatened with invasion.[11] In *Meyer v. Nebraska*,[12] for example, the Court described the right to marry, establish a home, and bring up children as an essential liberty. The modern application of this doctrine has found expression in *Griswold v. Connecticut*.[13] In invalidating Connecticut's anti-contraception law, the Court applied the

6. The abstention doctrine denies federal courts the power to enjoin state proceedings unless authorized specifically by Congress. *See* 28 U.S.C. § 2283 (1964). The policy is to prevent needless state-federal friction. *See* Stefanelli v. Minard, 342 U.S. 117 (1951).

7. R. PERKINS, CRIMINAL LAW 140 (2d ed. 1969).

8. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 732 (1968); Wasmuth, *Abortion Laws: The Perplexing Problem*, 18 CLEV. ST. L. REV. 503, 504 (1969); *see* Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173 (1960).

9. *See* Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647, 653 (1966); Lucas, *supra* note 8.

10. *E.g.*, NAACP v. Alabama, 357 U.S. 449 (1958) (statute requiring membership lists of organizations held abridgment of freedom of association); Breard v. Alexandria, 341 U.S. 622 (1951) (ordinance prohibiting door-to-door solicitation held valid protection of residents' right to privacy); Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891) (plaintiff eannot be compelled to submit to physical examination before trial of civil case). But therc are considerations of public convenience which supersede the right of privacy. Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (allowing commercial broadcasts on public buses against a claim of invasion of privacy).

11. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (invalidating antimiscegenation statute); Mapp v. Ohio, 367 U.S. 643 (1961) (limiting permissible scope of search under warrant).

12. 262 U.S. 390 (1923).

13. 381 U.S. 479 (1965).

essential liberty rationale to the marital relationship, declaring that the penumbra surrounding the first amendment protects family privacy from state encroachment except on showing of a compelling public necessity.[14] Recently, legal writers have recognized the similarity between legislation prohibiting the use of contraceptives and statutes forbidding abortion of an unquickened embryo,[15] and constitutional challenges to the statutes have appeared.[16] In *United States v. Vuitch*,[17] a federal district court, in invalidating the District of Columbia's abortion statute recognized that a woman's liberty may well include the right to remove an unwanted fetus. Similarly, in *People v. Belous*,[18] the Supreme Court of California considered the abortion statute's probable invasion of feminine rights while invalidating California's pre-1967 statute on grounds of vagueness. No court, however, has been faced solely with the conflict between a woman's private right to abort an unquickened fetus and the state's legislative policy surrounding the abortion statutes.

In the instant case, the court initially analyzed recent Supreme Court decisions that recognize a right of privacy in matters related to sex, marriage, and family and concluded that a woman's prerogative to decide whether to carry or reject an unquickened fetus is a fundamental right secured by the ninth amendment. Recognizing that the sole issue for decision[19] was whether the state had a sufficiently compelling interest

14. The majority based its decision on the Bill of Rights as applied to the states through the fourteenth amendment. In a concurring opinion, Justice Goldberg deemed marital privacy an essential right reserved to the people by the ninth amendment. *Id.* at 491. *See also* Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965).

15. *E.g.*, Lamm, *The Reproductive Revolution*, 56 A.B.A.J. 41, 43 (1970); Lucas, *supra* note 8. "[C]ontraception and abortion differ only in degree. . . . Both 'kill' living tissue, but only in the same sense that oral contraceptives cause the unfertilized egg to die at the end of each cycle." *Id.* at 765. *See also* Note, *Abortion Reform: History, Status and Prognosis*, 21 CASE W. RES. L. REV. 521 (1970).

16. Abortion laws have been challenged as vague, denying due process of law; discriminatory, denying equal protection; and suppressive, abridging a woman's personal right to control the reproductive function of her body. Physicians assailing the usual statutes, which condemn all abortions except those necessary to save the life of the mother, contend that the statutes are so vague that the physician is placed in an uneonscionable position. United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *appeal docketed* 38 U.S.L.W. 3303 (U.S. Feb. 5, 1970) (No. 1155); *cf.* Lanzetta v. New Jersey, 306 U.S. 451 (1939). Additionally, it has been argued that abortion legislation discriminates against persons in lower economic brackets because illegal abortions or abortions in foreign countries are readily aecessible only to the wealthy. This argument has not been persuasive. Lucas, *supra* note 8, at 770.

17. 305 F. Supp. 1032 (D.D.C. 1969), *appeal docketed*, 38 U.S.L.W. 3303 (U.S. Feb. 5, 1970) (No. 1155).

18. ___ Cal. 3d ___, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

19. The court brushed aside plaintiff's contention that the statutory language, "necessary

in regulating abortions to justify infringement of this basic right,[20] the court expressly excluded from its consideration matters pertaining to theology and overpopulation. Noting that modern surgical techniques had virtually eliminated the inherent dangers of medical abortions during early pregnancy, the court found no compelling state interest in protecting the life of the mother. The court also concluded that the state's interest in discouraging non-marital sexual relations did not justify the broad proscription of the statute, which did not distinguish between married and unmarried women. Finding no sufficiently compelling interest to justify the restriction on the woman's personal right, the court held that the right of the woman to refuse to carry an unquickened embryo outweighed the state's interest in protecting the life of an embryo of four months or less, thus invalidating the challenged portions of the statute.[21]

The instant case represents the first time a court has declared an abortion statute unconstitutional solely on the ground that it invaded the woman's private right to be free from an unwanted pregnancy. Since practically all abortions occur before quickening of the fetus,[22] the court's holding greatly diminishes the effectiveness of abortion statutes. As a result of the instant decision, presumably the only restriction that a state may place on the mother's right to abort an unquickened fetus is that the operation be performed by a licensed physician. This determination is in sharp contrast to *United States v. Vuitch*,[23] which, although recognizing the woman's interest to be free from an undesired pregnancy, indicated that the state may have sufficient interest to invade the woman's right after a legislative review of current scientific and sociological data. The difficulty, therefore, is not in delineating the rights of the woman, but in determining the weight to be given to the state's interest in protecting the life, health, and morals of its citizenry.[24]

. . . to save the life of the mother," was unduly vague. The court additionally found unpersuasive plaintiff's argument that the statute discriminates against the poor, violating the equal protection clause of the fourteenth amendment.

20. Sherbert v. Verner, 374 U.S. 398, 406 (1963). Although the Supreme Court has recognized the right of privacy, it has also warned that the state may infringe on personal liberties when they conflict with a compelling state interest.

21. 310 F. Supp. at 302.

22. MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959).

23. 305 F. Supp. 1032 (D.D.C. 1969), *appeal docketed*, 38 U.S.L.W. 3303 (U.S. Feb. 5, 1970) (No. 1155).

24. In People v. Belous, ___ Cal. 3d ___, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970), the prosecution conceded the constitutional right of a woman to abort an unwanted pregnancy, but argued that the state had a sufficient interest in protecting the embryo to invade personal freedom. *See* Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (abortion

Although abortion statutes were originally designed to protect the life of the woman, today these statutes compel an estimated 8,000 to 10,000 women per year to die as a result of unskillful illegal abortions,[25] even though the medical abortion is a relatively safe surgical procedure.[26] Additionally, the state's interest in curbing promiscuity by holding to scorn the unwed mother ignores the fact that 90 percent of all abortions are performed on married women and disregards the availability of modern contraceptive techniques.[27] Since abortion statutes are no longer thought to protect the health and morality of the expectant mother, the question becomes the extent of society's interest in insuring the normal growth and development of a fetus. Advocates of abortion legislation argue that at common law the embryo, from the moment of conception, was entitled to receive property by will and through intestacy, be the beneficiary of a private trust, suffer tortious injury, and be protected by penal statutes from parental neglect.[28] In short, they conclude that since a child's legal existence begins at the moment of conception, the embryo is entitled to the full protection of the law.[29] It is to be observed, however, that the fetus may assert the rights he acquires prenatally only by being born alive, or at least reaching the point of viability.[30] Moreover, both

statute held unconstitutional as violating rights secured by the ninth amendment). *But see* Rosen v. Louisiana State Bd. of Medical Examiners, 39 U.S.L.W. 2126 (E.D. La. Aug. 7, 1970) (refusing to extend the constitutional right of privacy to the mother's right to terminate an undesired pregnancy).

25. Rough estimates place the American death rate resulting from abortion at approximately 1% of abortions attempted. *See* Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L.C. & P.S. 88, 91 (1968). This figure should be compared with the death rate of 0.04% in Sweden and an equally low rate in Japan, both countries permitting medical abortion at the election of the mother. L. LADER, ABORTION 125-31 (1966); Darby, *Abortion*, 3 OXFORD LAW. 7, 10 (1960).

26. People v. Belous, ___ Cal. 3d ___, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L.C. & P.S. 88 (1968).

27. MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959).

28. *See, e.g.*, Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (requiring prenatal transfusion of infant's blood over mother's objection); Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834) (holding that conceived embryo could inherit under provision devising to grandchildren living at testator's death); *In re* Holthausen's Will, 175 Misc. 1022, 26 N.Y.S.2d 140 (Sur. Ct. 1941) (a child *en ventre sa mere* is born and alive for all purposes for his benefit); Scattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962) (infant may recover for injuries sustained prenatally); Noonan, *The Constitutionality of the Regulation of Abortion*, 21 HASTINGS L.J. 51, 59 (1969).

29. Noonan, *supra* note 28; Tinnelly, *Aborton and Penal Law*, 5 CATHOLIC LAW, 187 (1959).

30. In the law of property, a fetus may take by descent and distribution only if born alive, and if it is never born, it has not and cannot have an estate from which others may take. *E.g.*, *In re* Scanelli, 208 Misc. 804, 142 N.Y.S.2d 411 (Sur. Ct. 1955); *In re* Lee's Will, 203 Misc. 165, 116 N.Y.S.2d 282 (Sur. Ct. 1952); *see* Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964). Tort law often allows the administrator of a stillborn fetus to bring an action of wrongful death against the

modern statutes and early common law recognize that when the interests of the mother and fetus conflict, the former prevail.[31] Clearly then, the legal status of the embryo is at best ambiguous. The American Law Institute has determined that objections to abortion reform are not primarily grounded on legal considerations, but rather on religious beliefs which deem abortion sinful because it cheapens the value of human life.[32] It is submitted, however, that this consideration alone is not a sufficiently compelling interest to justify the state in imposing the ideals of particular religious groups on society at large.[33] The absence of a compelling state interest in the restriction of abortion has recently been reflected as three states, Alaska, Hawaii, and New York, have abolished their abortion restrictions[34] and six others have enacted liberal therapeutic abortion statutes.[35] In addition, the Department of Defense, state law notwithstanding, now permits abortions to be performed on service personnel and their dependents whenever deemed medically expedient.[36] These new developments aimed at facilitating and regulating

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tortfeasor who injured the fetus in the womb. It is usually held, however, that the fetus must have been viable—capable of maintaining independent life—at the time of the injury. Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969) ("person" in wrongful death statute includes the viable fetus); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (Super. Ct. 1966) (administrator of stillborn viable fetus can maintain action of wrongful death). *But see* Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958) ("person" within meaning of wrongful death statute does not inelude viable fetus). To further confuse the legal status of the embryo, common law and statutory law differentiate between the destruction of a quickened and unquickened fetus, usually providing less severe penalties for destruction of an unquickened fetus. R. PERKINS, *supra* note 7.

31. All 50 states and the District of Columbia permit abortion if necessary to save the life of the mother. *See* D. GRANFIELD, THE ABORTION DECISION 79 (1969). Additionally, Alabama, California, Colorado, the District of Columbia, and North Carolina permit abortion if necessary to preserve the life and health of the mother. Lueas, *supra* note 8, at 740.

32. MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959); *see* R. SHAW, ABORTION ON TRIAL 156-91 (1968).

33. It is at least arguable that since states are required to maintain neutrality in their legislation when dealing with religious matters, the imposition of what is essentially the Roman Catholic position on society in general violates the religious exercise clause of the first amendment. *Cf.* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (indicating that the religious exercise clause has never meant that a majority may use the machinery of the state to practice its beliefs). *See also* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 12 (1964); Note, *Abortion Law Reform at a Crossroads?*, 46 CHI.-KENT L. REV. 102 (1969).

34. NEWSWEEK, July 6, 1970, at 60, col. 2; *id.*, Apr. 13, 1970, at 77, col. 3; TIME, Mar. 9, 1970, at 34, col. I.

35. The states include California, Colorado, Georgia, Maryland, Mississippi, and North Carolina. Wasmuth, *supra* note 8, at 506. In addition, the State of Washington, by referendum, has voted to permit ahortions by licensed physicians in accredited hospitals. N.Y. Times, Nov. 5, 1970, at 38, col. 4.

36. Christian Science Monitor, Aug. 19, 1970, at 2, col. 2. The new AMA policy is that a physician may perform an abortion after due consideration of the patient's welfare. NEWSWEEK,

abortion at the election of the mother support the conclusion that, in reality, the state has no substantial interest in restricting a woman's right to control the reproductive function of her body.

Constitntional Law—Obscenity—State Statute Allowing Injunction Against Dissemination of Allegedly Obscene Material Prior to Adversary Hearing Not Violative of First Amendment

Plaintiff book dealer[1] sought in federal court a declaratory judgment that two Tennessee obscenity statutes were unconstitutional and an injunction that would bar their enforcement.[2] The criminal[3] and civil[4] obscenity statutes challenged empower state courts to enjoin the distribution[5] of allegedly obscene materials before any adversary hearing

July 6, 1970, at 60, col. 2. In addition, the President's Task Force on the Mentally Handicapped has recently recommended the legalization of abortion stating: "In the interest of both maternal and child mental health, no woman should be forced to bear an unwanted child. . . ." Washington Post, Oct. 11, 1970, at 2, col. 6.

1. Plaintiff brought the action as an individual and as the class representative of the book dealers in Tennessee.

2. Plaintiff challenged the constitutionality of all 5 Tennessee obscenity statutes, TENN. CODE ANN. §§ 39-3003 to -3007 (Supp. 1969). Significant constitutional problems were raised in the challenge to only 2 of these statutes.

3. Tennessee's criminal obscenity statute, TENN. CODE ANN. § 39-3003 (Supp. 1969), provides: "[I]f the district attorney-general is of the opinion that this section is being violated, he may file a petition in a circuit, chancery, or criminal court of his district relating his opinion, and request the court to issue a temporary injunction enjoining the person named in said petition from removing the obscene material from the jurisdiction of the court pending an adversary hearing on said petition. Where a temporary injunction is so issued, such adversary hearing shall be held within two (2) days after joinder of issues, at which hearing the court will determine whether or not the material in question is, in fact, obscene. On a finding of obscenity, the court shall continue its injunction in full force and effect for a period not to exceed forty-five (45) days or until an indictment on the matter has been submitted to the grand jury. If forty-five (45) days elapse and the grand jury has taken no action, the injunction terminates. The injunction also terminates on the grand jury returning a not true bill. On the return of a true bill of indictment, the court shall order the obscene material delivered into the hands of the court clerk or district attorney-general, there to be held as evidence in the case."

4. Tennessee's civil obscenity statute, TENN. CODE ANN. § 39-3005 (Supp. 1969), provides: "The circuit, chancery, and criminal courts of this state have jurisdiction to enjoin the sale or distribution of obscene material . . . hereinafter specified:

(b) . . . where a temporary injunction has been issued, trial shall be held within two (2) days after joinder of issues and in such instances the court shall render its decision within two (2) days after the conclusion of the trial.

. . . .

(d) The review of any final decree shall be by broad appeal direct to the Supreme Court."

5. Tennessee's criminal obscenity statute allows the courts to enjoin the distributor from

is held on the issue of their obscenity, but require that such a hearing be held within two days after the complaint is answered. Plaintiff contended that the procedure does not adequately protect non-obscene speech and press because it does not require an adversary hearing on the issue of obscenity before government interference. Furthermore, plaintiff maintained that the absence of such protection intimidated and restrained him from freely exercising his rights of speech and press in violation of the first amendmcnt.[6] A three-judge panel for the Middle District of Tennessee *upheld* the statutes.[7] State obscenity statutes that allow an injunction against the dissemination of allegedly obscene materials prior to an adversary hearing, but that require a hearing shortly after the complaint is answered, do not violate first amendment rights. *ABC Books, Inc. v. Benson,* 315 F. Supp. 695 (M.D. Tenn. 1970).

The Supreme Court in *Roth v. United States*[8] ruled that, since the first amendment does not protect obscene speech or press, the states may prohibit the dissemination of obscene materials. The states may utilize both criminal and civil proceedings to regulate obscene materials and may impose any civil or criminal sanctions.[9] Identical constitutional limitations have bcen imposed on both types of proceedings to assure that non-obscene expression will not be suppressed.[10] First, the requirement that the obscenity of the materials be tested by the liberal standards developed in *Roth* and subsequent cases[11] has limited what can

removing the material from the jurisdiction of the court, but it does not allow the court to prohibit further dissemination. This remedy can be secured only by an aetion under Tennessee's civil obscenity statute. *See* notes 3-4 *supra.* Both statutes were attacked because they permitted interference before an adversary hearing on the obscenity of the material.

6. This contention is based on the doctrine that "prior," or "previous restraint," can violate first amendment rights just as fully as subsequent punishment. *See* Near v. Minnesota, 283 U.S. 697 (1931). For a diseussion of the distinctions between prior and subsequent restraints on first amendment rights see Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533 (1951).

7. A 3-judge district court convened under 28 U.S.C. § 2281 (1964) has the duty to decide the merits of a request for a declaratory judgment that a state statute is on its face an unconstitutional abridgement of protected expression. Zwickler v. Koota, 389 U.S. 241 (1967). *See generally* 34 TENN. L. REV. 235 (1967).

8. 354 U.S. 476 (1957). *See* Annot., 5 A.L.R. 3d 1158 (1966). Justices Black and Douglas dissented in *Roth* on the grounds that all expression, obscene or otherwise, is protected by the first amendment. They have maintained their dissent. *See* Freedman v. Maryland, 380 U.S. 51 (1965); Smitb v. California, 361 U.S. 147 (1959).

9. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957), *citing* Tigner v. Texas, 310 U.S. 141 (1940).

10. *See* Smith v. California, 361 U.S. 147 (1959) (holding that a criminal obscenity statute must include the element of scienter); *cf.* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

11. Whether the criteria in *Roth* have been changed by suhsequent Supreme Court decisions has been the subject of a continuing debate. *See* United States v. Lethe, 312 F. Supp. 421 (E.D. Cal.

be prohibited as obscene. Secondly, the procedural requirement that the final decision on the obscenity of the materials be made by a judicial,[12] rather than administrative, body has assured that the material will be judged by a relatively impartial body.[13] Thirdly, another procedural limitation was imposed in *Bantam Books, Inc. v. Sullivan,*[14] in which the Supreme Court held that the first amendment requires that the obscenity of material be examined searchingly by the judicial officer before authorizing any restraint on its dissemination by arrest, seizure, or injunction. An adversary hearing before restraint satisfies the latter requirement,[15] but the Supreme Court in dicta in two recent decisions has taken conflicting positions on the necessity of such a hearing in all situations.[16] In *A Quantity of Books v. Kansas,*[17] the Court condemned a mass seizure of books before any adversary hearing on their obscenity. It was further indicated in dicta that any procedure disrupting the distribution of books and other material prior to an adversary hearing violates first amendment rights by not adequately protecting non-obscene material. Two federal circuits[18] have agreed with this position, although they have declared that the hearing does not have to be a fully developed action at law but can be any informal proceeding that gives the affected party an opportunity to be heard.[19] On the other hand, two circuits[20] have allowed restraint before an adversary hearing, upon a

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1970); *see, e.g.,* Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing,* 68 MICH. L. REV. 185 (1969); Teeter, *Retreat from Obscenity: Redrup v. New York,* 21 HASTINGS L.J. 175 (1969); Note, *Obscenity from Stanley to Karalexis: A Back Door Approach to First Amendment Protection,* 23 VAND. L. REV. 369 (1970).

12. Freedman v. Maryland, 380 U.S. 51, 58 (1965). *See* notes 20-21 *infra* and accompanying text.

13. Judges will be more impartial than administrative bodies because: (1) they have longer tenure and are thus less susceptible to political pressure; (2) they have a wider range of experience than the expert likely to be chosen for an administrative post. Such an expert is liable to see obscenity in everything he views. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 522-23 (1970). *But see* text accompanying notes 44-46 *infra.*

14. 372 U.S. 58 (1963). The Court stated that the difference between obscene and constitutionally protected expression is often separated by a dim line.

15. Grove Press, Inc. v. City of Philadelphia, 418 F.2d 82, 90 (3d Cir. 1969).

16. Natali v. Municipal Ct., 309 F. Supp. 192, 197 (N.D. Cal. 1969).

17. 378 U.S. 205 (1964) (mass seizure of books cannot be made on basis of finding that 7 books under same eaption were ohscene); *accord,* Marcus v. Search Warrants, 367 U.S. 717 (1961).

18. Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969) (even though magistrate had viewed film, seizure not justified prior to adversary hearing); Metzger v. Pearey, 393 F.2d 202 (7th Cir. 1968) (film so seized had to be returned). In the latter case, the court did allow some restraint in that the exhibitor was ordered to make the film available as an aid in the prosecution.

19. Tyrone, Inc. v. Wilkinson, 410 F.2d 639, 641 (4th Cir. 1969), *citing* Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

20. Astro Cinema Corp. v. Mackell, 422 F.2d 293, 295 (2d Cir. 1970), *citing* Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), *cert. denied,* 397 U.S. 920 (1970); Grove

judicial finding of probable obscenity, when the affected party can secure a prompt adversary hearing and decision on the merits. These circuits relied primarily on *Freedman v. Maryland*,[21] in which the Supreme Court suggested that the availability of a procedure assuring the speedy termination of governmental interference, upon a finding of non-obscenity, so limited the restraint on first amendment rights that the procedure was constitutional.[22] Faced with these inconsistent declarations from the highest Court and circuits, the district courts have differed greatly in their interpretations of what procedure must be followed before suspect materials may be disturbed by seizure, arrest, or injunction. A majority of district courts have required an adversary hearing before any seizure of materials,[23] but not all have extended this requirement to an arrest[24] or to a seizure that is made incident to that arrest.[25] A minority of district courts have allowed materials to be seized before an adversary hearing. All of these courts have permitted an arrest and incident seizure prior to an adversary hearing.[26] Some courts following the minority position have allowed both books and films to be seized before an adversary hearing,[27] while others have allowed some

Press, Inc. v. City of Philadelphia, 418 F.2d 82 (3d Cir. 1969) (striking down a statute allowing an injunction before adversary hearing, but suggesting that such a procedure would be constitutional where a prompt decision on the merits is assured).

21. 380 U.S. 51 (1965).

22. *Id.* at 59.

23. City News Center, Inc. v. Carson, 310 F. Supp. 1018 (M.D. Fla. 1970); Bongiovanni v. Hogan, 309 F. Supp. 1364 (S.D.N.Y. 1970); Jodbor Cinema, Ltd. v. Sedita, 309 F. Supp. 868 (W.D.N.Y. 1970); HMH Publishing Co. v. Oldham, 306 F. Supp. 495 (M.D. Fla. 1969); Central Agency, Inc. v. Brown, 306 F. Supp. 502 (N.D. Ga. 1969); Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969); Fontaine v. Dial, 303 F. Supp. 436 (W.D. Tex. 1969), *appeal dismissed*, 399 U.S. 521 (1970); Cambist Films, Inc. v. Illinois, 292 F. Supp. 185 (N.D. Ill. 1968).

24. In the following decisions, courts did not require an adversary hearing before arrest: Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969); The East Village Other, Inc. v. Koota, 68 Civ. 125 (E.D.N.Y. 1968). Decisions requiring an adversary hearing before arrest include: Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969); Sokolic v. Ryan, 304 F. Supp. 213 (S.D. Ga. 1969); City News Center, Inc. v. Carson, 298 F. Supp. 706 (M.D. Fla. 1969); Cambist Films, Inc. v. Tribell, 293 F. Supp. 407 (E.D. Ky. 1968); Cambist Films, Inc. v. Illinois, 292 F. Supp. 185 (N.D. Ill. 1968).

25. Masters v. Russell, 308 F. Supp. 306 (M.D. Fla. 1969); Carter v. Gautier, 305 F. Supp. 1098 (M.D. Ga. 1969); Natali v. Municipal Ct., 309 F. Supp. 192 (N.D. Cal. 1969).

26. United States v. Pryba, 312 F. Supp. 466 (D.D.C. 1970); Merritt v. Lewis, 309 F. Supp. 1249 (E.D. Cal. 1970); United States v. Thirty-Seven Photographs, 309 F. Supp. 36 (C.D. Cal.), *appeal docketed*, 38 U.S.L.W. 3498 (U.S. Apr. 24, 1970) (No. 1475); Bazzell v. Gibbens, 306 F. Supp. 1057 (E.D. La. 1969); Entertainment Ventures, Inc. v. Brewer, 306 F. Supp. 802 (M.D. Ala. 1969); People v. De Renzy 275 Cal. App. 2d 380, 79 Cal. Rptr. 777 (Ct. App. 1969).

27. Merritt v. Lewis, 309 F. Supp. 1249 (E.D. Cal. 1970); Entertainment Ventures, Inc. v. Brewer, 306 F. Supp. 802 (M.D. Ala. 1969).

books to be seized but no films.[28] The only case dealing with injunctive restraint before an adversary hearing has supported the minority position.[29] This case relied on the landmark five-four decision of *Kingsley Books, Inc. v. Brown*,[30] in which the Supreme Court held that an injunctive procedure that required a trial one day after the complaint was answered and a decision two days after the trial was constitutional. The *Kingsley Books* decision has been questioned by some members of the Court in later decisions.[31]

In the instant case, the court agreed that provisions in Tennessee's obscenity statutes for an injunction prior to an adversary hearing would intimidate and restrain the plaintiff from freely exercising first amendment rights in some degree. The court reasoned, however, that the first amendment does not forbid all prior restraint on the freedom of speech and press but only unreasonable restraints.[32] The court found that restraints in the state obscenity statutes were not unreasonable because a procedure was available for an expedited hearing and decision on the legitimacy of the state's interference. Emphasizing that the Supreme Court in *Kingsley Books* had upheld a statute almost identical to Tennessee's civil obscenity statute against similar objections, the court held that the statutes were constitutional.[33]

The court in the instant decision joins the minority of district courts allowing restraint of first amendment materials prior to an adversary hearing. The court decided that any restraints on first amendment rights were reasonable because they would be of short duration if the plaintiff responded promptly to the complaint against him and if the materials were found not to be obscene in the adversary hearing. Until that hearing, the civil statute authorizes an injunction barring all sales and distribution of the materials. The practical consequences of a pre-hearing injunction for the book dealer and movie exhibitor are no

28. Astro Cinema Corp. v. Mackell, 422 F.2d 293, 295 (2d Cir. 1970), *citing* Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969). The reasoning is that a seizure of one film is likely to be a very great restraint, as the exhibitor will be temporarily out of business if he has no other copies. *See* note 37 *infra* and accompanying text.

29. Grove Press, Inc. v. City of Philadelphia, 418 F.2d 82 (3d Cir. 1969).

30. 354 U.S. 436 (1957) (upholding New York statute authorizing injunction with an adversary hearing obtainable one day after joinder of issues). The New York courts have subsequently held that no *ex parte* injunction may be issued under the statute. Tenney v. Liberty News Distribs., Inc., 13 App. Div. 2d 770, 215 N.Y.S.2d 663 (1961).

31. *See* A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 211 (1964).

32. *See* Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957).

33. The District Court of Western Tennessee upheld Tennessee's civil obscenity statute in Robert-Arthur Management Corp. v. State, 220 Tenn. 101, 414 S.W.2d 638 (1967). This decision was reversed in 389 U.S. 578 (1968), but the brief per curiam opinion did not make clear whether the reversal was on the grounds that the statute was unconstitutional or that the film was not obscene.

different from the mass seizure that the Supreme Court has consistently condemned:[34] both completely halt the dissemination of the materials. Such complete interference by the state prior to an adversary hearing appears to be an unreasonable restraint on first amendment rights, which would render the civil statute unconstitutional. The instant decision demonstrates that restraint on first amendment rights should not be measured solely by its duration. The court relied on *Kingsley Books,* which should be criticized for not adequately protecting first amendment expression insofar as it established duration as the sole test of restraint. A more flexible approach to the problem of determining when first amendment rights are violated has been suggested in recent decisions by the Supreme Court[35] and lower courts.[36] This approach would weigh the likely duration of the restraint and its practical effect on the dissemination of the material against the state's interest in restraining it before any adversary hearing. The guiding policy would be that restraint should be kept to the minimum necessary for protection of the public interest. Although the seizure of one book might be justified in light of the public interest, the seizure of only one film would unduly interfere with normal business.[37] Similarly, a restraining order prohibiting all sales might be appropriate where the material was being foisted on children or an unwilling public; a mass seizure might be justified when the material was needed as evidence and there was danger of alteration. A more limited injunction, such as that authorized by the criminal statute in the instant case, would bar the removal of material from the court's jurisdiction and would be justified by a lesser degree of public interest. The state under such an approach should have the burden of showing that restraint is necessary and that there is no opportunity for a prior adversary hearing. Any seizure or restraining order would be tailored to assure minimum interference with first amendment rights.

Although the decision in the instant case answered, however unsatisfactorily, the question of whether an adversary hearing is required before injunctive restraint, it did not deal with other significant constitutional issues posed by obscenity statutes. The court, for example,

34. A Quantiy of Copies of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant, 367 U.S. 717 (1961). *See* note 41 *infra* and accompanying text.

35. Carroll v. President and Comm'rs of Princess Ann, 393 U.S. 175 (1968).

36. United States v. Pryba, 312 F. Supp. 466 (D.D.C. 1970); Bazzell v. Gibbens, 306 F. Supp. 1057 (E.D. La. 1969).

37. "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other method of expression." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

38. Carroll v. President and Comm'rs of Princess Ann, 393 U.S. 175, 183 (1968).

did not decide whether an adversary hearing is required before an arrest or seizure of allegedly obscene matter under Tennessee's criminal statute.[39] Since the court approves the rationale that injunctive restraint is constitutional when an adversary hearing follows immediately, however, it seems logical that an arrest and seizure, immediately followed by an adversary hearing, should be likewise constitutional.[40] No meaningful distinctions can be drawn between an injunction and a seizure in their potential for interference with the movie distributor's and book dealer's primary interest, the dissemination of material.[41] Moreover, an arrest for a violation of obscenity laws is probably constitutional even without such a provision for a prompt adversary hearing.[42] Another problem ignored by the instant decision concerns the evidence upon which a judge may base his finding that the material is obscene, thereby justifying preliminary restraint. The Supreme Court has ruled that such a finding cannot be based on the conclusionary statements of police officials, and it has recommended, but has not required, that the whole film or book be reviewed by the judge.[43] Since this requirement would place unreasonable burdens on the schedules of judges,[44] it is recommended that a procedure be approved whereby a judge could base his finding on either a partial review[45] or a graphic description in an investigator's affidavit.[46] If there is further question

39. TENN. CODE ANN. § 39-3003 (1965). The court rejected plaintiff's contention that § 39-3003, to be constitutional, had to specifically provide for an adversary hearing prior to seizure of allegedly obscene materials. Noting that the statute provided for a seizure in any manner that was lawful, the court concluded that the statute could be constitutionally applied if an adversary hearing was constitutionally required. *Cf.* Cable v. Jenkins, 309 F. Supp. 998, 1001 (N.D. Ga. 1969), *aff'd*, 90 S. Ct. 1351 (1970). *But cf.* Gundlach v. Rauhauser, 304 F. Supp. 962 (M.D. Pa. 1969).

40. If the court had followed its rationale to this conclusion, it would have brought it into conflict with the District Court of the Western District of Tennessee. *See* Abrams & Parisi, Inc. v. Canale, 309 F. Supp. 1360 (W.D. Tenn. 1969) (ordering the return of film seized under § 39-3003 prior to an adversary hearing).

41. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 533 (1970).

42. *Compare* Rage Books, Inc. v. Leary, 301 F. Supp. 546 (S.D.N.Y. 1969), *with* Delta Book Distribs., Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969). The dissent argued: "It is no longer an accepted proposition in tort law that a dog is entitled to one free bite; there should be no rule in criminal law—even by virtue of the protection accorded to freedom of speech—that every peddler of pornography is entitled to one free lesson at scatology." *Id.* at 674 (footnote omitted).

43. *See* Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968) (per curiam).

44. Merritt v. Lewis, 309 F. Supp. 1249 (E.D. Cal. 1970). "I cannot hold that the Constitution requires a judge to become a nocturnal movie critic in order for society to initiate prosecutions against obscene films." *Id.* at 1253.

45. *See generally* 18 J. PUB. L. 205 (1969).

46. Merritt v. Lewis, 309 F. Supp. 1249 (E.D. Cal. 1970); Overstock Book Co. v. Barry, 305 F. Supp. 842 (E.D.N.Y. 1969). In Hosey v. City of Jackson, 309 F. Supp. 527 (S.D. Miss.), *appeal docketed*, 39 U.S.L.W. 3007 (U.S. Apr. 25, 1970) (No. 134), the court allowed the police to seize a film after they, not the judge, decided it was obscene. The Supreme Court can be expected to

about the material's obscenity, then the judge at his discretion could review it more fully. Finally, the instant decision did not announce what punishment may be imposed for violations of restraining orders when the material is later found not to be obscene. The Supreme Court in *Kingsley Books,* recognizing the additional prior restraint that the knowledge of certain punishment has on one who is otherwise confident that he would be exercising constitutionally protected rights, suggested in dicta that the violator should not be cited for contempt.[47] In *Walker v. City of Birmingham,*[48] however, the Court, concluding that such immunity would encourage gambling with judicial orders and undermine the authority of the courts, rejected this position. In light of the holding in *Walker,* it is submitted that the close decision in *Kingsley,* premised in part on the assumption that the violator of any order restraining constitutionally protected expression would not be punished, should be re-examined by the Supreme Court.

Constitutional Law—Right of Privacy—State Statute Requiring Disclosure of All Substantial Financial Interests of Public Officials is Overbroad and an Unconstitutional Invasion of Privacy

Plaintiff, a California city, brought a declaratory judgment action against the county district attorney, seeking to have the state's financial disclosure law[1] declared unconstitutional. Plaintiff contended that the financial interest statement required of public officials, candidates, and their immediate families[2] was overbroad and an unnecessary intrusion

overturn this decision. *See* Cambist Films, Inc. v. Duggan, 298 F. Supp. 1148 (W.D. Pa.), *rev'd,* 420 F.2d 687 (3d Cir. 1969).

47. The Court drew a distinction between the "prior restraint" involved in a criminal prosecution and an injunction, and concluded that a criminal prosecution involved more "prior restraint" on first amendment rights. The injunctive process was preferred because under it the distributor could "stand his ground" and "keep the book for sale and sell it at his own judgment." *See* Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442-43 (1957). The Court recognized that this would not be possible in a case where the state attempts to punish the book seller for violation of the interim injunction after the issue of obscenity has been ultimately decided in his favor. *Id.* at 443 n.2. *See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 533 n.61 (1970), *citing* Marcus v. Search Warrant, 367 U.S. 717 (1961).

48. 388 U.S. 307 (1967) (5-4 decision) (disobedienee to court order enjoining violation of ordinanee of questionable constitutionality).

1. CAL. GOV'T CODE §§ 3600-07, 3700-04 (West Supp. 1970).

2. CAL. GOV'T CODE § 3700 (West Supp. 1970), provides that, "[e]very public offieer shall file, as a public record, a statement describing the nature and extent of his investments . . . subject

into the right of privacy.[3] The defendant maintained that the statute was necessary to carry out the legitimate state concern of preventing conflicts of interest among public officials.[4] The Superior Court of Monterrey County found the statute constitutional. On appeal to the California Supreme Court, *held,* reversed. Where a statute requires the disclosure of all substantial financial interests of public officials, candidates, and their immediate families, it is overbroad and an unconstitutional invasion of their right of privacy. *City of Carmel-by-the-Sea v. Young,* 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

The California disclosure law, enacted in 1969, was the latest in a series of some 85 state laws dealing with the broad field of conflicts of interest in California.[5] Similar financial disclosure statutes have been enacted recently by other states[6] and the federal government.[7] A common problem in formulating these statutes has been defining a conflict of interest.[8] The most concise definition seems to be "incompatibility between an official's private affairs and public

to regulation by any state or local public agency, if such investment is in excess of ten thousand dollars ($10,000) in value at the time of the statement." Investments are defined in § 3603 to exclude "a home or property used primarily for personal or recreational purposes." CAL. GOV'T CODE § 3702 (West Supp. 1970), requires a candidate to file a § 3700 statement within 10 days of filing his declaration of candidacy. CAL. GOV'T CODE § 3604 (West Supp. 1970), includes those investments of spouses, minor children, corporations in which the official owns more than 25% of the stock, and certain trusts of either spouse or minor children.

3. The plaintiff also alleged, and the defendant admitted, that if the law were upheld as constitutional, the operations of government would be crippled by the resulting resignations of key personnel. The following are the local officials who were planning to resign: 3 of 5 members of the city council; 4 of 7 members of the planning commission; 2 of 5 members of the library board of trustees; one department head; and 3 cultural commissioners. Other public officials submitted amicus curiae briefs.

4. The defendant also asserted that there was no present controversy, that there was no adequate "ripeness" because the filing deadline had not yet passed, and that there were no rights of individuals involved.

5. *See* City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 262 n.1, 466 P.2d 225, 227 n.1, 85 Cal. Rptr. 1, 3 n.1 (1970). The court also acknowledged similar regulations in numerous local ordinances and charter provisions.

6. *See, e.g.,* KY. REV. STAT. ANN. §§ 61.092-.096, .990 (1969); MASS. ANN. LAWS ch. 268A, §§ 1-24 (1968); MINN. STAT. ANN. §§ 3.87-.92 (1967).

7. 18 U.S.C. §§ 201-18 (1964).

8. *See generally* Eisenberg, *Conflicts of Interest Situations and Remedies,* 13 RUTGERS L. REV. 666 (1959). One of the most exact yet comprehensive definitions is the following: "A conflict of interest . . . exists whenever a legislator or other public official has placed himself in a position where, for some advantage gained or to be gained for himself, he finds it difficult if not impossible to devote himself with complete energy, loyalty, and singleness of purpose to the general public interest. The advantage that he seeks is something over and above the salary, the experience, the chance to serve the people, and the public esteem that he gains from public office." MINNESOTA GOVERNOR'S COMM. ON ETHICS IN GOV'T REPORT 17 (1959).

obligations."[9] A more perplexing problem has been determining how to prevent or remove conflicts of interest. No single method has been universally used nor has any met with great success. The devices employed have included instituting a code of ethics,[10] requiring financial statements that are made available only to administrative authorities,[11] and requiring the mandatory filing of such statements for public perusal.[12] Financial disclosure methods generally have required disclosure only of financial interests that have a bearing on official duties.[13] The California statute,[14] however, was designed to strengthen the public's confidence in all levels of government by requiring full disclosure of all significant financial and business holdings.[15] Developing simultaneously with this long-standing public concern for integrity in government has been the establishment of an individual's right of privacy.[16] Tracing its roots from Lord Camden's famous opinion two centuries earlier,[17] the development of the right of privacy was slow[18] until its emergence as a constitutional doctrine in *Griswold v. Connecticut*.[19] In *Griswold*, the United States Supreme Court held that the marital relationship was surrounded by a zone of privacy that was constitutionally protected from the unnecessary intrusion of state action.[20] With the right generally defined and applied to the area of

9. Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. REV. 299 (1965).

10. *See, e.g.*, IOWA CODE ANN. § 68B.7 (Supp. 1970); MONT. CONST. art. V, § 44.

11. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 38-501 to -504 (Supp. 1970); MINN. STAT. ANN. § 3.90(c) (1967).

12. *See, e.g.*, N.Y. PUB. OFFICERS LAW § 74(3)(j) (McKinney Supp. 1970).

13. Many of the older California laws similarly limit disclosure to relevant financial interests. *See, e.g.*, CAL. AGRIC. CODE § 12783 (West 1968); CAL. WATER CODE § 70077 (West 1966).

14. Prior to the 1969 statute, the broadest enactment, CAL. GOV'T CODE § 1090 (West 1966), provided: "Members of the Legislature, state, county, special district, judicial district, and city officers and employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall any state, county, special district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity."

15. A significant interest is one exceeding $10,000 in value. CAL. GOV'T CODE § 3700 (West Supp. 1970). *See* note 2 *supra*.

16. Havighurst, *Foreword to Privacy*, 31 LAW & CONTEMP. PROB. 251 (1966).

17. Entiek v. Carrington, 95 Eng. Rep. 807 (C.P. 1765).

18. Important discussions in the area may be found in Mapp v. Ohio, 367 U.S. 643 (1961); Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting); Boyd v. United States, 116 U.S. 616 (1886); and Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

19. 381 U.S. 479 (1965).

20. Justice Douglas, speaking for the Court, felt the zone of privacy arose from the first, third, fourth, and fifth amendments. *Id.* at 484. Justice Goldberg in a concurring opinion chose to couch the right of privacy in the "liberty" of the fourteenth amendment as supported by the ninth amendment. *Id.* at 493.

marital privacy, the question has become into what other areas, if any, does this right extend?[21] Some courts have reached conflicting conclusions as to the application of the right of privacy in particular areas, such as personal appearance.[22] Others, while recognizing a general right of privacy, have refused to expand its protection beyond the home and family.[23] Where the familial relationship is involved, however, the courts have willingly stretched the zone of protected privacy to such areas as abortion,[24] sodomy,[25] administrative searches of the home,[26] and family background investigations.[27] Only one case concerning a financial aspect of life, that of election contribution and expenditure statements, has been litigated with reference to *Griswold*.[28] The general absence of litigation in the financial area, however, does not indicate a lack of official awareness or concern.[29] At least three congressional committees[30]

21. "[I]t is apparent *that* the right of privacy is constitutionally protected. It is the *when* and *how* which create the problems." Roberts v. Clement, 252 F. Supp. 835, 848 (E.D. Tenn. 1966) (Darr, J., concurring).

22. The greatest disagreement has been in the "long hair" cases. *See, e.g.*, Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970). Both cases held that there was no right to wear long hair. *Contra*, Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969). Total nudity under appropriate circumstances, however, is apparently protected. Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966) (total nudity permissible at nudist camp).

23. *See, e.g.*, Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966) (refusing to grant accused the same rights in a public toilet that he would have in his home); Thom v. New York Stock Exchange, 306 F. Supp. 1002 (S.D.N.Y. 1969) (upholding a law requiring fingerprinting as a prerequisite to employment with SEC related firms).

24. Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970) (woman has private right to decide whether to bear her unquickened child). *See also* United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969); People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970).

25. Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970) (sodomy law declared unconstitutional after a consenting, married couple challenged it). Two other courts have expressed a willingness to strike down sodomy laws if the plaintiffs were consenting, married adults. Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968); Towler v. Peyton, 303 F. Supp. 581 (W.D. Va. 1969).

26. Camara v. Municipal Court, 387 U.S. 523 (1967); People v. Edwards, 80 Cal. Rptr. 633, 458 P.2d 713 (1969).

27. Murphy v. Houma Well Service, 413 F.2d 509 (5th Cir. 1969) (court refused to allow a search of parentage to determine legitimacy of children for priorities under will).

28. Hadnott v. Amos, 295 F. Supp. 1003 (M.D. Ala. 1968) (law upheld as constitutional without reference to an invasion of privacy). *See generally* Rogers, *A Model Bill on the Reporting of Campaign Contributions and Expenditures*, 23 VAND. L. REV. 293 (1970). Statutes requiring election contribution and expenditure statements, *e.g.*, ALA. CODE tit. 17, §§ 268-86 (1959), are frequently called Corrupt Practices Acts.

29. The most notable expression of administrative concern over the individual's right of privacy came in the "Skallerup Memorandum" that cautioned Department of Defense investigators against irrelevant inquiries into personal, domestic, and financial matters unless they have definite security implications. *Hearings on Testing Procedures and the Rights of Federal Employees Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 199 (1965). *See also* Creech, *The Privacy of Government Employees*, 31 LAW & CONTEMP. PROB. 413 (1966).

30. These include the Subcommittee on Constitutional Rights of the Senate Committee on

have investigated the area of federal financial disclosure laws[31] and their effect on employee privacy. Federal legislation also has been introduced in an attempt to alleviate some of the more critical problems.[32] Interactions of other valid governmental purposes with established constitutional rights have caused the United States Supreme Court to analyze carefully the priorities of the interests involved. A policy of balancing the two opposing interests has evolved[33] so that regulation of constitutionally protected freedoms is allowed as long as the means employed narrowly accomplishes a legitimate state purpose and does not stifle protected freedoms.[34] With national concern readily apparent and with some policy misgivings evident in both California's legislative and executive departments,[35] a judicial balancing of privacy and public disclosure was not unexpected.

The instant court initially noted that the state must prove the necessity of any regulation that impinges upon a constitutionally protected right. The court found that the right of privacy, while having no express constitutional support, should encompass the protection of an individual's home, his papers, and his personal life, including his financial affairs. The court further acknowledged the legitimate state concern in creating a public awareness of matters that might result in a public official's conflict of interest. The statute in question, however, was considered to have overreached the state's legitimate interest by

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the Judiciary, a special subcommittee of the House Government Operations Committee, and the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary.

31. *See, e.g.*, Civil Service Commission regulations, 5 C.F.R. §§ 735.401-.412 (Supp. 1970).

32. Senator Sam J. Ervin, Jr., of North Carolina, has introduced a bill twice, S. 3703, 89th Cong., 2d Sess. (1966) and S. 3779, 89th Cong., 2d Sess. (1966), which would have protected employees in the executive branch from invasions of privacy concerning their financial affairs.

33. *See generally* Bruff, *Unconstitutional Conditions upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 HASTINGS L.J. 129 (1969).

34. *E.g.*, Griswold v. Conneeticut, 381 U.S. 479 (1965) (marital privacy held superior to state purpose of eontrolling use of contraceptives); McLaughlin v. Florida, 379 U.S. 184 (1964) (state purpose of preventing breaches of basic concepts of sexual decency must yield when it discriminates racially); NAACP v. Alabama, 377 U.S. 288 (1964) (state requirements for corporate registration supply no basis for mandatory disclosure of all members of corporate organization); Shelton v. Tucker, 364 U.S. 479 (1960) (state concern for competency and fitness of teachers held not sufficient to require disclosure of all organizational memberships of individual teachers); Bates v. City of Little Rock, 361 U.S. 516 (1960) (local ordinanee regulating corporations held not sufficient to require disclosure of all members of corporate association). The California Supreme Court has adopted a similar policy. Vogel v. County of Los Angeles, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967); Baglcy v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

35. City of Carmel-by-the-Sca v. Young, 2 Cal. 3d 259, 277-78, 466 P.2d 225, 238, 85 Cal. Rptr. 1, 14 (1970).

requiring the indiscriminate disclosure of financial interests without apparent concern for their potential relevance. The majority concluded that a comprehensive disclosure law was not precluded, but found that the breadth of the instant statute's intrusion into personal financial affairs caused it to be unconstitutional in its entirety.[36]

The primary significance of the instant decision is that it extends for the first time the zone of constitutionally proteeted privacy to include economic affairs. The protection is certainly not pervasive and the court made it clear that this new aspect of privacy may yield to a narrowly drawn statute that advances a legitimate state purpose. The California legislature is now confronted with the problem of drafting a statute that adequately protects against irrelevant disclosure and still promotes the public's awaruess of potential conflicts of interests. It is submitted that it will be impossible to incorporate the necessary guidelines into a single statute due to the myriad of individuals and positions that will be covered by such a law and the variety of financial interests relevant to each position. Furthermore, the centralization that will be required under such a system will create insuperable complications in administrative control. Therefore, while the basic principles should be established at the state level, specific application of these principles should be handled at a level of government more familiar with the particular positions. The legislature should delegate the authority to establish criteria to determine the relevance of financial interests to the board or political body on which an official serves or to which he is responsible. The effect of the instant case, however, may be considerably broader than its effect on state financial disclosure laws. The decision may have opened the door for judicial scrutiny of many data collection procedures presently in operation. While it is somewhat premature to accurately predict the extent of judicial inquiry into these procedures, it is not inconceivable that judicial examination will include such areas as banking and securities regulation, insurance forms, tax reporting, political campaign contribution and expenditures, and credit dossiers. Thus the present decision may elevate many previously unactionable claims against both government and private agencies to constitutional

36. The court felt that it could not cure its invalid operation by severance or construction; therefore, it was forced to declare it unconstitutional in its entirety. 2 Cal. 3d at 273, 466 P.2d at 235, 85 Cal. Rptr. at 11. The dissent questioned the existence of a case or controversy to support a declaratory judgment, and further expressed doubts as to the desirability of the court substituting its judgment for that of the legislature in the area of conflicting policies. The dissenting judges further contended on the merits that the exclusion of interests less than $10,000 in value from the application of the statute coupled with the valid state concern resulted in a constitutional disclosure law that was not overly broad.

status. In analyzing the validity of this new constitutional challenge, the courts should follow closely the balancing test developed by the Supreme Court[37] and assiduously defend the privacy right unless there is a compelling need for a narrow intrusion into the protected zone. By employing this analysis, precedents will be established that will serve as effective tools to keep the use of data collection schemes within constitutional limits.

Constitutional Law—Sixth Amendment—Admission of Prior Inconsistent Statements as Substantive Evidence Does Not Violate Right of Confrontation

Defendant was tried in a California state court for supplying marijuana to a minor, who testified at a preliminary hearing that he had obtained the drugs from defendant and was cross-examined on this point by defendant's counsel. In order to identify defendant as the supplier, the prosecutor, when the minor became recalcitrant at trial,[1] read excerpts from the minor's previous testimony into the trial record. This evidence was admitted as substantive proof pursuant to a state statute[2] providing that an inconsistent statement at a hearing is not rendered inadmissible by the hearsay rule to prove the truth of the statement. Defendant was convicted and he appealed, contending that the use of the statement as substantive evidence violated his constitutional right of confrontation. The district court of appeals reversed,[3] and the California Supreme Court affirmed the reversal, finding the state law unconstitutional in permitting the substantive use of the witness's prior inconsistent statements, even though the witness was cross-examined at the preliminary hearing.[4] On certiorari to the United States Supreme Court, *held,* reversed. Where a witness's prior inconsistent statement is subject to effective cross-examination either at a preliminary hearing or at trial, its substantive evidentiary use at trial, pursuant to a state statute, does

37. *See* notes 34-35 *supra* and accompanying text.

1. The minor stated he could not remember how he came to have the marijuana and claimed to be under the influence of LSD at the time of the alleged crime.

2. "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." CAL. EVID. CODE § 1235 (West 1966). Section 770(a) provides that the witness should be given the opportunity to explain or deny the inconsistency. *Id.* § 770(a).

3. People v. Green, 71 Cal. Rptr. 100 (Dist. Ct. App. 1968).

4. People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

not violate an accused's sixth amendment right of confrontation. *California v. Green*, 399 U.S. 149 (1970).

The great majority of state hearsay rules provide that pre-trial statements of a witness are inadmissible to prove the truth of the matter contained therein but may be admitted to bear on the credibility of the witness's testimony.[5] The rationale behind this traditional formulation is that absent certain safeguards at the time of the initial statement, such as the witness being under oath or subject to effective cross-examination, the trier of fact can merely observe that the statements are inconsistent but cannot decide which is the truthful statement.[6] On the other hand, the minority view, adopted in California,[7] recognizes that when the witness testifies at the trial, the existence of procedural safeguards largely precludes inadmissibility based on hearsay grounds.[8] Since the witness is present, he can testify and be cross-examined under oath concerning his prior inconsistent remarks and the fact finder can view the witness's demeanor as he explains these inconsistencies. The admission of prior inconsistent statements for their substantive value has been supported by many legal scholars.[9] Nevertheless, there has been some discussion whether the confrontation clause is violated by the minority approach.[10] While the clause[11] did not purport to adopt common law rules of hearsay, the external result of the operation of this constitutional rule in certain circumstances has been similar to that of the hearsay rule. For example, according to both doctrines, out-of-court statements by a witness not previously subject to cross-examination have

5. Annot., 133 A.L.R. 1454, 1455-57 (1941); *see, e.g.*, Ellis v. United States, 138 F.2d 612 (8th Cir. 1943).

6. *See* C. MCCORMICK, EVIDENCE § 39, at 81-82 (1954). *See also* Comment, *Substantive Use of Extrajudicial Statements of Witness Under the Proposed Federal Rules of Evidence*, 4 U. RICH. L. REV. 110 (1969).

7. Only 2 other states, Kentucky and Wisconsin, have adopted such a rule, and these adoptions were by decision rather than through legislative enactment. *See* Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609 (1969).

8. McCormick aptly states: "The argument seems persuasive that if the previous statement and the circumstances surrounding its making are sufficiently probative to empower the jury to disbelieve the story of the witness on the stand, they should be sufficient to warrant the jury in believing the statement itself." C. MCCORMICK, *supra* note 6, at 78. *See also* United States v. Allied Stevedoring Corp., 241 F.2d 925, 933 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957) (upholding a conviction for income tax evasion based on extrajudicial statements).

9. *See, e.g.*, C. MCCORMICK, *supra* note 6, § 39; 3 J. WIGMORE, EVIDENCE § 1018 (3d ed. 1940); Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741 (1961). *See also* Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965).

10. *See* Comment, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966).

11. The confrontation clause affords the criminal defendant "the right . . . to be confronted with his accusers and with the witnesses against him." U.S. CONST. amend. VI.

been inadmissible at trial against a criminal defendant if the witness was not present at the trial.[12] Although the reasons for inadmissibility have differed under each rule, the practical results have been the same. This equivalence led the Supreme Court in several cases to draw parallels between these two rules of law. In one case, the Court held that a significant exception to the hearsay rule, the admissibility of prior testimony of a witness who had since died, was also an exception to the confrontation clause.[13] In another decision, a relationship between confrontation and hearsay was implied by the Court's construction of certain immigration and naturalization regulations as strictly limiting the substantive admission of pre-trial statements despite the maker's presence at the deportation proceedings.[14] More recently, in the landmark case of *Pointer v. Texas*,[15] in which the confrontation clause was made applicable to the states through the fourteenth amendment, the Court, in recognizing the defendant's right to cross-examine opposition witnesses as a primary purpose of confrontation, seemed suddenly to have made the common law rules of hearsay mandatory upon the states. Some correspondence between the clause and common law hearsay was indicated, but the Court failed to set forth at what point, if any, these two rules diverged.[16] Although the cases that have come after *Pointer* have demonstrated that confrontation and hearsay do not mean exactly the same thing, the Court has continued to refer to cross-examination as a constitutional right without delineating the precise boundaries of that right.[17] Thus, a substantive admission of preliminary hearing testimony valid under the hearsay rule was held to

12. *Compare* Donnelly v. United States, 228 U.S. 243, 273-77 (1913) (out-of-court statement by third party implicating defendant in alleged crime held properly excluded as violative of hearsay rule), *with* Douglas v. Alabama, 380 U.S. 415 (1965) (confession of witness refusing to testify inadmissible as violative of confrontation right of defendant).

13. Mattox v. United States, 156 U.S. 237 (1895).

14. Bridges v. Wixon, 326 U.S. 135 (1945). The Court seemed to rely upon the rationale of the majority hearsay approach by construing certain immigration and naturalization regulations to mean that only a recorded statement, obtained by interrogation under oath and signed by the maker, could be used for substantive purposes at trial in the maker's presence. Although *Bridges* was decided on the basis of the federal rules of evidence rather than the confrontation clause, the Court suggested by way of dicta that the same principles were applieable to criminal cases. For a critical evaluation of this decision and its possible impact upon developing state law sce Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 194-96 (1948).

15. 380 U.S. 400 (1965).

16. The Court construed the confrontation clause to except the dying declaration of a witness, which is also a well-known exception to the common law hearsay rule. For an in-depth discussion of the apparent implications of this similarity see Comment, *supra* note 10.

17. *E.g.*, Bruton v. United States, 391 U.S. 123, 137 (1968) (oral confession of co-defendant inadmissible against another defendant).

violate a defendant's right of confrontation in one decision in which the state made no attempt to produce the author of the statement.[18] Similarly, the Supreme Court's most recent pronouncement[19] indicated that confrontation is somehow different from hearsay and that a defendant's opportunity to cross-examine an opposition witness is in some way necessary to the confrontation right.

In the instant case, the Court specifically stated that, while the right of confrontation and hearsay rules may protect similar interests, a violation of one is not necessarily a violation of the other. After an examination of the history of the clause, the Court found that cross-examination was intended to assure the defendant of a face-to-face confrontation with his accusers and of an opportunity to challenge the accusations made against him. The Court concluded that since there had been a preliminary cross-examination, the confrontation clause was not violated and would not have been even if there had been no opportunity for effective cross-examination at trial. Therefore, the Court held that it is not unconstitutional to admit the prior inconsistent statements of a witness as substantive evidence when he is subject to cross-examination at the trial. In a concurring opinion, Justice Harlan felt that the majority did not go far enough in dispelling the confusion concerning the incorporation of hearsay into the Constitution, and stated that the crux of confrontation was the availability of the witness at trial.[20] He finally concluded that the Constitution should, as a matter of due process, prevent a state from admitting hearsay evidence in a criminal proceeding where the witness is available but not present at trial. Dissenting, Justice Brennan reasoned that the confrontation clause guaranteed a defendant the right to challenge the inconsistent statements before the fact finders, and that the witness's conduct at trial in the instant case rendered such cross-examination ineffective.[21]

The instant decision removes the confrontation clause as a barrier

18. Barber v. Page, 390 U.S. 719 (1968).

19. Harrington v. California, 395 U.S. 250 (1969) (substantive admissions of confessions that implicated defendant in alleged crime violated defendant's confrontation right where the authors of the confessions were not present to be subjected to cross-examination).

20. 399 U.S. at 172. Mr. Justice Harlan found that previous confrontation cases could be tied together if the right to confrontation were viewed essentially as requiring the production of a witness in order to admit his prior statements. Some exceptions to the confrontation clause, such as the admission of dying declarations, fit neatly into this framework. Justice Harlan also cautioned against equating the confrontation right with cross-examination, which he felt would enmesh confrontation and hearsay beyond repair. *See* notes 26-27 *infra* and accompanying text.

21. 399 U.S. at 189. Since the witness claimed he could not remember what had occurred at the time of the alleged crime, effective cross-examination was precluded. *See* note 25 *infra* and accompanying text.

to state adoption of the minority hearsay position. Since the minimum confrontation requirements of cross-examination may be satisfied by the minority approach, the states are free to experiment with hearsay laws within well-defined and liberal constitutional boundaries.[22] Thus, far from imposing a federally fashioned common law of evidence on the states, the instant decision sanctions state-by-state hearsay innovations. It is submitted, however, that in separating these two doctrines more has been sacrificed by the Court than uniform hearsay rules. Early cross-examination is not in the best interests of the criminal defendant. Although cross-examination at a preliminary hearing may fully satisfy sixth amendment constitutional standards, as a practical matter defense counsel may often lack sufficient time at this early date in which to plan a searching cross-examination, whereas he would have been more fully prepared to defend the rights of his client given the additional time until trial.[23] Further, depending on the Court's interpretation of "good faith" efforts by the state to produce the witness,[24] a prosecutor might be able to keep a witness from the stand whose very demeanor would tend to affect the credibility of his testimony, yet still have that testimony admitted into evidence against the defendant. In such instances, preliminary examination in the absence of the trial fact finder would satisfy confrontation requirements despite the defendant's interest in having the jury examine the witness's demeanor. Even if the witness is available and present at trial, however, effective cross-examination is not insured. If the witness refuses to assume a position relating to the truth of his prior statements, by asserting a lapse of memory, for example, the trier of fact can only determine the validity of this assertion, not whether the pre-trial statements are themselves true or false.[25] Should the instant decision lead to such injustices, a stricter constitutional standard based on due process[26] could establish a workable balance between the rights of

22. As long as the state hearsay rule provides for cross-examination at trial or before, it will not be in violation of the confrontation clause.

23. The majority opinion indicates that the opportunity for adequate cross-examination is not affected by defense counsel's preparedness for such examination. 399 U.S. at 165-66.

24. The Court restated the long-standing federal policy of Mattox v. United States, 156 U.S. 237 (1895), that the presence of a witness at trial is necessary to admit his prior testimony unless the state, after a good faith effort, cannot produce him. The instant case has made this policy particularly important in the future application of the confrontation clause. *See* note 13 *supra* and accompanying text.

25. The trier of fact can only determine the substantive truth of the alleged lapse of memory since it is this statement that the witness has asserted before the fact finder. If the witness does not specifically contradict his preliminary hearing testimony, the truth of that proposition is not put in question.

26. Due process violation, however, would not have been a desirable basis for the instant

the criminal defendant and the need for hearsay reform.[27] Since the history of the due process clause has not been enmeshed with hearsay, the substitution of due process as a new constitutional base from which to evaluate evidentiary rules would avoid much of the confusion that necessitated the instant clarification.[28] Although what would be violative of due process would depend upon how, if at all, the rights of the criminal-defendant are violated by state hearsay rules, some reliance on due process to anull the adverse effects of an otherwise well-reasoned minority hearsay approach scems the most feasible alternative for the future.

Criminal Procedure—Search and Seizure—Warrantless Search of Automobile Held in Police Custody Does Not Violate the Fourth Amendment

Petitioner, convicted of armed robbery,[1] sought habeas corpus relief in federal district court[2] alleging the improper admission of evidence at his trial. Police officers, relying on descriptions given by witnesses, had arrested petitioner and his companions in a parked car.[3] Afterwards, the car was removed to the police station where it was subjected to a

opinion since the Court would have been pre-empting state action to impose a federal remedy in the absence of a clear infringement of defendant's personal rights.

27. Some current examples of reform advocated include: MODEL CODE OF EVIDENCE rule 503(b) (1942) (hearsay evidence admissible for substantive purposes upon finding that declarant is present and subject to cross-examination); ALI UNIFORM RULES OF EVIDENCE 63 (statement is admissible if previously made by person present at hearing and available for effective cross-examination, provided statement would be admissible if the witness were present at the trial). *See also* note 9 *supra* and accompanying text.

28. A subsequent modification on the basis of effectiveness of cross-examination or on similar grounds associated with the confrontation clause would tend to re-equate confrontation and hearsay, and thus undermine the instant decision.

1. Petitioner was indicted and convicted on 2 counts of armed robbery. He was sentenced to a term of 4 to 8 years on one count and 2 to 7 years on the other, the sentences to run consecutively. Petitioner did not take direct appeal from these convictions.

2. In 1965, petitioner sought a writ of habeas corpus in a state court, which denied the writ after a brief evidentiary hearing. This denial was affirmed by the Pennsylvania appellate courts. Thereafter petitioner initiated habeas corpus proceedings in the United States District Court for the Western District of Pennsylvania.

3. The arrest of petitioner and his 3 companions took place less than an hour after the robbery of a service station. Witnesses had seen a light blue compact station wagon containing 4 men circling the block in the vicinity of the service station. One of the robbers was reported to be wearing a green sweater. Petitioner's car fit the description given by the witnesses, and when arrested, he was wearing a green sweater.

warrantless search, which yielded the incriminating evidence[4] presented at petitioner's trial. The petitioner contended that this evidence was unconstitutionally seized and improperly admitted since police officers had failed to obtain a search warrant as required by the fourth amendment.[5] The state contended that since the police had probable cause to search the car for evidence of the crime, the warrantless seizure did not violate the petitioner's fourth amendment rights. The district court adopted the state's position and denied relief.[6] The Court of Appeals for the Third Circuit affirmed.[7] On certiorari to the United States Supreme Court, *held,* affirmed. A warrantless search of an arrestee's automobile, after it is taken into police custody, does not violate the fourth amendment provided there was probable cause for the search at the time and place of arrest. *Chambers v. Maroney,* 399 U.S. 42 (1970).

In *Carroll v. United States,*[8] the Supreme Court first recognized a distinction for fourth amendment purposes between searching a house and searching a car. The need for this distinction stemmed primarily from problems facing policemen in making highway arrests. While arresting officers legitimately could search a suspect's person, due to fourth amendment proscriptions they could not legally search his car without first procuring a warrant. Frequently, by the time a warrant could be obtained, either the vehicle had been moved out of the jurisdiction, or the evidence within the vehicle had been destroyed. Taking judicial notice of this dilemma, the Court established an exception to the fourth amendment in the case of cars by holding that when police have probable cause to believe a car contains evidence of a crime, a warrantless search is constitutionally permissible. The Supreme Court regularly followed *Carroll* in its subsequent automobile search decisions.[9] Then, in a series of cases culminating with *United States v.*

4. The items produced in the search were two .38 caliher revolvers, a glove containing change, and some eards with the name of the robbery victim on them.

5. 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 of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

6. United States *ex rel.* Chambers v. Maroney, 281 F. Supp. 96 (W.D. Pa. 1968).

7. United States *ex rel.* Chambers v. Maroney, 408 F.2d 1186 (3d Cir. 1969).

8. 267 U.S. 132 (1925).

9. Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931). Each of these cases, like *Carroll,* involved the search of a car for contraband liquor. In *Scher* the Court justified the warrantless search of a car parked in a garage within the eurtilage of a private home, because there was probable cause to believe it contained contraband liquor. While *Scher* is not analogous to the instant case, it illustrates the degree of intrusion possible in the name of probable cause.

Rabinowitz,[10] the Court ruled that the fourth amendment test for the legality of warrantless searches was no longer whether it is practicable or reasonable to procure a search warrant, but whether the search itself is reasonable. The discarded practicability test had been fundamental to *Carroll* and had been adopted in a number of related decisions dealing with house searches incident to arrests.[11] The import of the *Rabinowitz* decision was that *Carroll* was no longer good authority, but it was not until fourteen years later that the Supreme Court gave a decisive indication as to its status. In *Preston v. United States*,[12] an automobile search case, the Court effected a merger of the standards set forth in *Rabinowitz* and *Carroll*. Considering the theory of search incident to arrest, the Court applied the *Rabinowitz* rationale and found that the warrantless search involved was so remote in time and place from the arrest that it clearly violated the fourth amendment. In supporting this conclusion, the Court developed reasoning drawn directly from *Carroll*.[13] Observing that the arrestee's car had ben in poliee custody at the time of the search with the danger of losing the evidence virtually eliminated, the Court determined that there was no justification for allowing an exception to the warrant requirement.[14] The *Preston*

10. 339 U.S. 56 (1950). The Court focused upon 5 considerations to determine the reasonableness of the search: "(1) the search and seizure were incident to a valid arrest; (2) the place of the search was a public room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime . . . ." *Id.* at 64. Mr. Justice Frankfurter issued a strong dissent, arguing that historically the exceptions to the fourth amendment warrant requirement have been narrowly defined. He felt that the opportunity to obtain a warrant was definitely a relevant consideration. The danger of the Court's decision was that the test of reasonableness made it easy to slide from the warrantless search of arrestee's person to his entire premises.

For cases leading up to the *Rabinowitz* rationale see Harris v. United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927).

11. *See* McDonald v. United States, 335 U.S. 451 (1948) (an officer making a warrantless search must show that it was justified by the circumstances); Trupiano v. United States, 334 U.S. 699 (1948) (law enforcement agents in seizing goods must secure and use search warrants whenever reasonably practieal); Taylor v. United States, 286 U.S. 1 (1932) (warrantless search illegal where no danger of change in evidence and where agents had an excellent opportunity to get a warrant).

12. 376 U.S. 364 (1964). *See* Williams v. United States, 412 F.2d 729 (5th Cir. 1969) (court held that *Preston* established a general rule prohibiting warrantless searches of automobiles in police custody). *Contra*, United States *ex rel.* Spero v. McKendrick, 409 F.2d 181 (2d Cir. 1969).

13. 376 U.S. at 368.

14. In *Cooper v. California*, 386 U.S. 58 (1967), the Court allowed the warrantless search of an automobile at a police station. Because of the nature of the crime, a narcotics violation, the entire car was considered evidence under state law. For a discussion of *Cooper's* place in the line of warrantless automobile search decisions see *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 112, 119-21 (1967). The author concludes that the close relationship between the search and the reasons for arrest were the real basis of the *Cooper* decision.

approach was subsequently reaffirmed in *Dyke v. Taylor Implement Manufacturing Co.*[15] in which it was held that the reasons thought sufficient to justify a warrantless search would no longer obtain when the accused was in the custody of police. This trend toward narrowly restricting exceptions to the fourth amendment was continued in *Chimel v. California.*[16] In making a clear break with the reasonableness test of *Rabinowitz,* the Court held that the fourth amendment requires a warrant for the search of any area beyond the arrestee's immediate control. With this decision, the Supreme Court's interpretation of the fourth amendment had gone full circle and returned to its pre-*Rabinowitz* strictness. Because it could reasonably be construed to eliminate the exception to the warrant requirement for automobiles, *Chimel* expressly provided that *Carroll* was still viable authority.

In the instant case, the Court initially reviewed the facts preceding the arrest and the search. Examining the *Preston* and *Dyke* decisions, the Court held that neither could justify the warrantless search of the petitioner's car as being incident to his arrest since the search was clearly too remote in time and place. *Preston* and *Dyke* were further distinguished from the case at hand because probable cause was unmistakably absent from both. Turning its attention to the *Carroll* decision, the Court found that since its rendition probable cause had been sufficient to justify a warrantless automobile search whenever there was danger of losing evidence of a crime.[17] Given the probable cause in this case, the Court concluded that there was little practical difference between an immediate search without a warrant and the automobile's immobilization until a warrant was obtained. Which course of action presented the greater or lesser intrusion upon fourth amendment rights was, in the Court's judgment, "a debatable question . . . the answer [to which] may depend on a variety of circumstances."[18] Accordingly, the Court held that both courses of action were reasonable under the fourth amendment. Justice Harlan, dissenting, strongly objected to the majority's conclusion, arguing that exceptions under the fourth amendment should be no broader than necessitated by the exigencies of the case.[19] Recognizing that the Court had established limited exceptions

15. 391 U.S. 216 (1968).

16. 395 U.S. 752 (1969). For an analysis of *Chimel's* effect on warrantless automobile searches see Note, *Warrantless Searches in Light of Chimel: A Return to the Original Understanding,* 11 ARIZ. L. REV. 457 (1969); Note, *Chimel v. California: A Potential Roadblock to Vehicle Searches,* 17 U.C.L.A. L. REV. 626 (1970).

17. *See* cases cited notes 8-9 *supra* and accompanying text.

18. 399 U.S. at 51-52.

19. *Id.* at 55. This idea has been expressed several times by the Supreme Court during the past

to the warrant requirement to assure the personal safety of policemen and to prevent the removal or destruction of evidence, Justice Harlan determined that the circumstances of this case did not come within either recognized exception. Thus, he concluded that the warrantless search of the petitioner's car clearly involved the greater sacrifice of fourth amendment values.

Despite retaining the probable cause requirement, the instant decision marks a significant departure from the line of automobile search cases that have followed *Carroll.* At the core of *Carroll's* exception to the warrant requirement was the need to prevent the removal or destruction of evidence.[20] In the case at hand, after the police had taken custody of the car, the exigent circumstances deemed necessary under *Carroll* to justify a warrantless search ceased to exist. The petitioner's car was no longer mobile, and the evidence believed to be inside was not in danger of destruction or removal. Had the Court adhered to precedent, it unquestionably would have found that the search did not come within *Carroll's* exception. Instead, the Court took the position that there is no practical or constitutional difference between the immediate, warrantless search of an automobile and the automobile's immobilization until a warrant can be obtained. As Justice Harlan's analysis vividly indicates,[21] the majority's reasoning in this regard is patently fallacious. When a person wishes to avoid a police search—either to protect his privacy or to hide incriminating evidence—the lesser intrusion will always be the seizure of the automobile in exchange for the opportunity to have a magistrate pass upon the justification for the search.[22] On the other hand, when an individual has nothing to hide and is unconcerned about the privacy of his automobile, he can simply consent to an immediate search and thereby avoid any delay. In short, when consent is not forthcoming, there is a vital individual interest protected by the fourth amendment

decade. *See* Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Mapp v. Ohio, 367 U.S. 643 (1961). *Mapp* clearly recognized the preventive function of the fourth amendment.

20. It has been argued that *Carroll* really applies only to cases where there is a crime in the presence of police, as the contraband cases were. This view would severely restrict the exceptions to the fourth amendment. The courts never adopted it. But, given the background of necessity in *Carroll,* it does not seem that any decision can be consistent with it if police could have obtained a warrant.

21. 399 U.S. at 63-65 (Harlan, J., dissenting).

22. The facts which establish probable cause to search usually justify an arrest. Unquestionably, when a person is arrested and taken into police custody, the seizure of his automobile until a warrant is obtained involves a lesser intrusion upon fourth amendment rights than a warrantless search. *Id.*

even though the circumstances justify a temporary seizure of the automobile. Moreover, by the majority's own standards of reasonableness, there is no case in which a warrantless search is permissible unless conducted under exigent circumstances at the time and place of arrest. No greater intrusion can be justified on the basis of probable cause. Yet, the Court in the case at hand allowed a greater intrusion—the warrantless search of petitioner's car after its immobilization even though police could easily have obtained a warrant.[23] The result is a broadening of the exception to the fourth amendment for automobile searches to the extent that the line of decisions following *Carroll* is overruled. In addition, this opinion conflicts with recent decisions, which have been influenced considerably by the historically grounded concept that the fourth amendment is preventive rather than corrective in function.[24] Under this prevailing formulation, the fourth amendment is treated as a barrier protecting individual privacy from arbitrary police intrusion,[25] rather than as a means of suppressing evidence that has been illegally obtained. Much in contrast to these ideas, this case facilitates police evasion of the magistrate's scrutiny. If the existence of probable cause to search a car is questioned, the police can justify their actions after the fact. Plainly, this makes the fourth amendment corrective in function, but more seriously it places a heavy burden of proof on the individual who must henceforth vindicate his rights by showing that a consummated search was unreasonable. This unfortunate result may be further compounded because a court's ultimate determination as to the legality of a search may conceivably be influenced by the nature of the evidence involved. It is doubtful that this decision aids law enforcement enough to justify such a substantial erosion of fourth amendment safeguards. One need look

23. The dissent disapproved of the fact that the Court did not make an inquiry into the officers' ability promptly to take their case before a magistrate. The dissent noted that the car and its contents were at all times secure from removal or destruction and it questioned the necessity of a warrantless search under those circumstances.

24. *See* Frankfurter's dissents in United States v. Rabinowitz, 339 U.S. 56, 68-86 (1950), and Harris v. United States, 331 U.S. 145, 155-81 (1947), where he reviews the history both in England and the United States out of which the warrant requirement grew. For another discussion of the historical background of the warrant requirement see Note, *Warrantless Searches in Light of Chimel: A Return to the Original Understanding*, 11 ARIZ. L. REV. 457, 460 (1969).

25. *See* cases cited note 19 *supra;* Stanley v. Georgia, 394 U.S. 557 (1969) (a man has the right to possess obscene movies and literature within the privacy of his home); Katz v. United States, 389 U.S. 347 (1967) (wiretapping without a warrant violates the fourth amendment). Taken together these decisions reflect a trend towards a highly protected right to be free from arbitrary police intrusion. Underlying each of these decisions is the idea that the fourth amendment is protective in nature. For a discussion of this topic see Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968 (1968).

back no further than the period following *Rabinowitz* with its recurring delayed searches to understand the abuses that inevitably result from leaving individual rights too much in the discretion of police.[26] If that period demonstrates anything, it shows that the constitutional "right of the people to be secure . . . against unreasonable searches and seizures"[27] is meaningless without an effective restraint upon police power in the form of strict adherence to the warrant requirement.

Labor Law—Jurisdictional Dispute—NLRB May Not Resolve Work Assignment Dispute in Section 10(k) Proceeding When Disputing Unions Have Agreed to Binding Arbitration

Petitioner, Plasterers Local 79, was involved in two inter-union jurisdictional disputes,[1] which were eventually submitted[2] to the Joint Board[3] for binding arbitration. The other union, Tile Setters Local 20, refused to relinquish the work assigned to petitioner in the arbitration award, and petitioner's members promptly established picket lines at both jobsites.[4] Subsequently, one of the employers filed unfair labor

26. *See*, Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 496-503 (1963). This article contains a strong criticism of *Rabinowitz* and the effects of the rule of reasonableness under the fourth amendment. *See also* Note, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A.L. REV. 626, 632 (1970). This article discusses the police practice of delayed searches designed to take advantage of the *Rabinowitz* rule that warrantless searches were not illegal where incident to a lawful arrest. Police would delay the arrest until certain that suspect could be seized at the location of the evidence. *Rabinowitz* did not allow such a practice, but proof of a police conspiracy to violate the fourth amendment was almost impossible.

27. U.S. CONST. amend. IV. *See* note 5 *supra*.

1. The term "jurisdictional dispute" denotes a work assignment dispute (dispute over which union, if any, has the right to have work performed by its members), although it has also been used to mean a representational dispute (dispute over which union, if any, has the right to represent or bargain for a group of workers). *See* Sussman, *Section 10(k): Mandate for Change?*, 47 B.U.L. REV. 201 (1967). The disputes in the instant case concerned unrelated jobs.

2. Actually, only one of the 2 disputes was submitted for arbitration, but the tasks were sufficiently similar that the award covered work involved at both jobsites.

3. Both unions are members of the AFL Building and Construction Trades Department and had previously agreed to be bound by decisions of the National Joint Board for the Settlement of Jurisdictional Disputes established by that labor organization in conjunction with certain contractors' associations. For a discussion of the Joint Board see Atleson, *The NLRB and Jurisdictional Disputes: The Aftermath of CBS*, 53 GEO. L.J. 93, 130 (1964). For general discussion of the Joint Board see note 21 *infra* and accompanying text.

4. The rival union refused to relinquish the work on one job and petitioner started picketing before obtaining a clarification of the Joint Board award. After the clarification, continued refusal to accede on both jobs led to picket lines being established on the second jobsite.

practice charges against petitioner, and following a consolidated hearing under section 10(k) of the National Labor Relations Act,[5] the NLRB awarded the disputed work to the Tile Setters Union.[6] Petitioner refused to accept this determination, resumed picketing, and was charged with an unfair labor practice in violation of section 8(b)(4)(D).[7] Petitioner contended that the work assignment issued pursuant to the section 10(k) hearing was invalid because the unions had previously agreed upon a voluntary method for adjusting the dispute, thereby invoking the abstention clause of section 10(k). The abstention clause specifically prohibits the NLRB from resolving a dispute out of which an alleged unfair labor practice arises if the "parties to such dispute" have agreed upon voluntary adjustment.[8] Upon analyzing the statutory language, the Board determined that the employer is a "party to the dispute" who must have participated in the adjustment procedure along with the disputing unions before the abstention clause will become operative. Therefore, the Board found that petitioner's conduct constituted an unfair labor practice and entered a cease-and-desist order.[9] On petition to review[10] and cross-petition to enforce, the Court of Appeals for the

5. "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(d) of section 8(b), the Board is empowered and directed *to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless*, within ten days after notice that such charge has been filed, *the parties to such dispute* submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed." 29 U.S.C. § 160(k) (1964), *formerly* ch. 372, § 10(k), 49 Stat. 453 (1935) (emphasis added).

A § 10(k) hearing is held only after unfair labor practice charges are filed. *See* notes 44, 47 *infra*.

6. Plasterers Local 79, 1968-1 CCH NLRB Dec. 28,419 (1967).

7. "It shall be an unfair labor practice for a labor organization . . . to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . ." 29 U.S.C. § 158(b)(4)(D) (1964), *formerly* ch. 372, § 8(b)(4)(D), 49 Stat. 452 (1935).

8. "[T]he Board is empowered and directed to hear and determine the dispute . . . *unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have . . . agreed upon methods for the voluntary adjustment of . . . the dispute.*" 29 U.S.C. § 160(k) (1964) (emphasis added to abstention clause).

9. The order contained 2 parts: (1) petitioning union must cease and desist from prohibited means of obtaining assignment of work to its members and (2) the union must take affirmative action by posting notice indicating intention to abide by the order. The NLRB decision in the unfair labor practice phase of the case is reported at 1968-2 CCH NLRB Dec. 25,074 (1968).

10. There is no independent review of § 10(k) work assignments. Therefore, the only stage at

District of Columbia Circuit, *held*, enforcement denied. The NLRB may not properly determine a jurisdictional dispute pursuant to section 10(k) of the National Labor Relations Act when the disputing unions have agreed upon settlement through binding arbitration, regardless of employer participation. *Plasterers Local 79 v. NLRB*, 63 CCH LAB. L. REP. (1970 CCH Lab. Cas.) ¶ 10,993 (D.C. Cir. June 30, 1970).

Work assignment disputes were permitted at common law[11] and remained virtually unaffected by attempted remedies.[12] The economic waste[13] and public distaste[14] caused by these disputes resulted in regulatory legislation by the 80th Congress.[15] Although there was considerable debate on the best means of combating problems inherent

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which the union can contest the work award is on review of the § 8(b)(4)(D) unfair labor practice order. If the § 10(k) order fails, the unfair labor practice order fails with it. *See* NLRB v. Local 991, Longshoremen, 332 F.2d 66 (5th Cir. 1964). *See also* note 44 *infra.*

11. Jurisdictional strikes were permissible at common law, except when used as a boycott against an employer who was not a party to the dispute. Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906). Equitable remedies were limited by the Federal Anti-Injunction Act of 1932 (Norris-La Guardia Act) ch. 90, §§ 1-15, 47 Stat. 70, *as amended* 29 U.S.C. §§ 101-15 (1965), which limited the federal judiciary's injunctive jurisdiction. *See* Green v. Obergfell, 121 F.2d 46 (D.C. Cir. 1941) (denying employer requested injunction). The National Labor Relations Act of 1935, ch. 372, § 8, 49 Stat. 452, *as amended* 29 U.S.C. § 158(a) (1965), proscribed employer action as unfair labor practices, so that prior to its amendment in 1947, parties economically injured by jurisdictional strikes were generally without remedy. *See* Blankenship v. Kurfman, 96 F.2d 450 (7th Cir. 1938) (injured party held to be without remedy).

12. Specific causes of jurisdictional disputes include: (1) overlapping of jurisdictional claims and skills; (2) existence of dual unionism; (3) aggressiveness of some unions; and (4) change in methods, machinery, and materials. Several intra-industry methods of settling jurisdictional disputes were attempted unsuccessfully prior to the Taft-Hartley Act. Several states intervened and and enacted statutes "outlawing" jurisdictional strikes. *See generally* K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB 34-70 (1961). Federal prosecution under anti-trust law was also attempted in order to stop jurisdictional strikes. *See* United States v. Hutcheson, 312 U.S. 219 (1941) (jurisdictional strike is not a restraint of trade within the meaning of the Sherman Act).

13. The staggering amount of time lost as a result of work stoppages and strikes over jurisdictional disputes was a prime factor in shaping public opinion and instigating congressional action. The Bureau of Labor Statistics reported in 1944 that approximately 10% of all man days lost as a result of labor disputes were due to jurisdictional disputes. In 1946, a low of 0.9% was recorded as compared to 2.4% in 1947, the year of passage of Taft-Hartley. The low figure for 1946 has been attributed to fear of impending legislation on the part of labor. Sussman, *supra* note 1, at 206.

14. *See* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1012 (1948) (remarks of Senator Taft) [hereinafter cited as LEGISLATIVE HISTORY]; *id.* vol. 1, at 583 (remarks of Representative Landis). President Truman cited public dissatisfaction with these "indefensible" disputes in his appeal for congressional regulation in his 1947 State of the Union Message to Congress. *Id.* at 851; 93 CONG. REC. 136 (1947).

15. President Truman requested legislation to protect innocent employers from inter-union strife, stating in part that "when rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issue." 93 CONG. REC. 136 (1947) (State of the Union Message on January 6, 1947).

in jurisdictional strikes,[16] it was agreed that regulation was necessary to protect the interest of the public and the neutral employer.[17] Legislators expected that a governmental mechanism for resolving work assignment disputes would encourage voluntary settlements,[18] thereby promoting the development of private mechanisms of mediation.[19] As enacted,[20] section 10(k) directed the NLRB to hear and determine the dispute out of which an unfair labor practice charge had arisen, but required abstention from any determination when "the parties to the dispute" submit satisfactory evidence of either a voluntary adjustment or an agreed-upon method of adjustment. The building trade unions responded to section 10(k) by establishing the Joint Board[21] to arbitrate disputes privately.[22] Unlike the Joint Board, however, which acted vigorously to settle jurisdictional disputes, the NLRB narrowly interpreted its duty to hear and determine disputes[23] and declined to make any affirmative awards of disputed work.[24] Thus, the NLRB gave the employer a virtually unlimited right to

16. *See* 2 LEGISLATIVE HISTORY, *supra* note 14, at 1058 (remarks of Senator Ellender proposing to grant an employer the right to seek a private injunction); *Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 1963-64 (1947) (remarks of Senator Morse, author of § 10(k), proposing appointment of arbitrators). *See also* Note, *Determination of Jurisdictional Disputes Under Section 10(k): Conflict with Other Provisions of the National Labor Relations Act*, 61 COLUM. L. REV. 1142, 1144-46 (1961).

17. S. REP. NO. 105, 80th Cong., 1st Sess. (1947); H.R. REP. NO. 245, 80th Cong., 1st Sess. (1947). *See also* 93 CONG. REC. 1890 (1947) (remarks of Senator Morse).

18. *Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 1963, 1965 (1947).

19. *See* Note, *supra* note 16, at 1146 n.22.

20. Senator Morse's original proposal was changed so that NLRB determination was compulsory rather than discretionary by adding the words "and directed." A provision authorizing reference by the Board to an arbitrator also was deleted. *See* 2 LEGISLATIVE HISTORY, *supra* note 14, at 987.

21. With the active encouragement of the NLRB, the National Joint Board for the Settlement of Jurisdictional Disputes was formed in October 1949 by an agreement between the Building and Construction Trades Department of the AFL, later to become the Building Trades Department of the combined AFL-CIO, and nationwide general and special contractors' associations. The Joint Board, which consists of one impartial chairman and an equal number of representatives from both labor and employer groups, renders hundreds of job decisions annually. *See generally* O'Donoghue, *Jurisdictional Disputes in the Construction Industry Since CBS*, 52 GEO. L.J. 314 (1964).

22. The Joint Congressional Committee on Labor-Management Relations approved the creation of the Joint Board as a move toward implementing the congressional purpose of encouraging private settlements of work assignment disputes. *Id.* at 319 n.35. *See also* notes 18-19 *supra* and accompanying text.

23. O'Donoghue, *supra* note 21, at 315. The NLRB merely decided whether a striking union was entitled to have work assigned to it under a prior Board order or certification or a collective bargaining agreement.

24. *See, e.g.*, Local 675, Operating Eng'rs, 116 N.L.R.B. 27, 38 (1956) (merely examined contractual relations).

assign work by affirming his assignments[25] and refusing to hear any dispute on its merits.[26] Some circuits concurred in the Board's narrow interpretation of its role,[27] while others refused to enforce NLRB orders for failure to make the determination that section 10(k) required.[28] This controversy was finally settled by the Supreme Court in *NLRB v. Radio & Television Broadcast Engineers Union*[29] (hereinafter referred to as *CBS*) in which the Court concluded that the Board was required to have a full hearing on the merits to decide the jurisdictional dispute and make an affirmative award, even though section 10(k) contained no standards to "determine the dispute out of which such unfair labor practice shall have arisen."[30] Section 10(k) was interpreted as relieving neutral employers of the necessity of resolving disputes.[31] Despite the mandate of *CBS* and intimations made in its next decision,[32] the NLRB continued its practice of following the employer's assignment,[33] while ignoring

25. The NLRB construed § 8(b)(4)(D) as guaranteeing an employer an unlimited right to make work assignments and viewed § 10(k) simply as a means of upholding that right. Note, *Jurisdictional Disputes Since the CBS Decision*, 39 N.Y.U.L. REV. 657, 659 (1964). *See also* Sussman, *supra* note 1.

26. Broadcast Eng'rs Union, 121 N.L.R.B. 1207 (1958), *enforcement denied*, 272 F.2d 713 (2d Cir. 1959).

27. *E.g.*, NLRB v. Local 450, Operating Eng'rs, 275 F.2d 413 (5th Cir. 1960) (NLRB interpretation of its role—limited to legal considerations of prior Board orders, certifications, or collective bargaining agreements—essentially approved).

28. NLRB v. Broadcast Eng'rs Union, 272 F.2d 713 (2d Cir. 1959), *aff'd*, 364 U.S. 573 (1961); NLRB v. United Bhd. of Carpenters, 261 F.2d 166 (7th Cir. 1958); NLRB v. United Ass'n of Journeymen, 242 F.2d 722 (3d Cir. 1957).

29. 364 U.S. 573 (1961).

30. *Id.* at 583. The Court noted NLRB experience in hearing and disposing of similar labor problems and knowledge of the standards generally used in determining jurisdictional disputes. The Court concluded that the Board should perform the job assigned to it by Congress even though no express standards were given in the statute. *Id.*

31. In citing the legislative history of § 10(k), the Court said that if the NLRB interpretation were accepted, the employer would be left to decide the dispute, as he did prior to § 10(k)'s enactment. Citing H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947), the Court said that § 10(k) was enacted to protect employers from being the "helpless victims of quarrels that do not concern them at all." 364 U.S. at 580-81.

32. The Board said it would consider all relevant factors in making jurisdictional awards, not just the assignment by the employer, and would decide each case on its own facts. Lodge 1743, Machinists, 135 N.L.R.B. 1402 (1962).

33. *See, e.g.*, Local 825, Operating Eng'rs, 137 N.L.R.B. 1425 (1962) (the employer's assignment was determinative). *See generally* Cohen, *The NLRB and Section 10(k): A Study of the Reluctant Dragon*, 14 LAB. L.J. 905 (1963). The Board claimed, however, that it was considering many factors. Local 3, Bricklayers, 144 N.L.R.B. 1279 (1963) (skills); Local 68, Lathers, 142 N.L.R.B. 1073 (1963) (agreements between unions); Teamsters Local 327, 142 N.L.R.B. 170 (1963) (decisions of the AFL-CIO); Local 45, Bridge Workers, 141 N.L.R.B. 1285 (1963) (efficiency); Local 3, Elec. Workers, 141 N.L.R.B. 888 (1963) (economy); Mailers' Union No. 6, 137 N.L.R.B. 665 (1962) (company practices); Local 853, Operating Eng'rs, 136 N.L.R.B. 993 (1962) (collective bargaining agreements).

repeated Joint Board awards to the contrary.[34] The NLRB also continued to follow its earlier decisions[35] indicating that the abstention clause did not oust its power to determine a dispute unless the employer, as well as the rival unions, had agreed to be bound by arbitration.[36] Although the legislative history of section 10(k) does not expressly indicate whether the word "parties" includes the employer,[37] it has been suggested that the theory underlying the NLRB interpretation is that the employer is likely to accept the results of arbitration, making the settlement meaningful and final, only when he is bound.[38] Nevertheless, many authorities have argued that voluntary adjustment by the disputing unions alone should invoke the abstention clause, thereby minimizing jurisdictional strikes and finalizing settlements at the earliest stage possible.[39] Some federal courts have assumed that the employer must be bound by the voluntary adjustment before the abstention clause is invoked;[40] however, at least one federal court has specifically indicated that the dispute referred to in the abstention clause is the jurisdictional dispute between unions and that therefore the employer is not a party to the dispute.[41]

34. *E.g.*, Local 1622, Carpenters, 139 N.L.R.B. 591 (1962) (Board rejected 300 contrary decisions of the Joint Board over a 13 year period in upholding an employer assignment).

35. Local 173, Lathers, 121 N.L.R.B. 1094, 1103-04 (1958) (settled principle that employer responsible for assignment of the disputed work must be a party to adjustment); Lodge 68, Machinists, 81 N.L.R.B. 1108 (1949) (first case ruling that an employer must consent prior to dismissal).

36. *E.g.*, Local 79, Plasterers, 1968-1 CCH NLRB Dec. 28,419 (1967) (employer's original assignment upheld); Local 562, Journeymen, 155 N.L.R.B. 695 (1965) (employer assignment upheld); Carpenters Dist. Council of Denver & Vicinity, 146 N.L.R.B. 1242, 1245 (1964) (Board had jurisdiction because the employer had not agreed to be bound); Deliverers' Union, 141 N.L.R.B. 578, 580 (1963) (voluntary adjustment must bind both disputing unions and the employer). *Contra*, Local 49, Operating Eng'rs, 164 N.L.R.B. 94 (1967) (reversing employer assignment).

37. No mention was made of the employer's participation in private settlements under § 10(k). *See, e.g.*, 2 LEGISLATIVE HISTORY, *supra* note 14, at 1012 (remarks of Senator Taft); *id.* at 1046 (remarks of Senator Murray); *id.* at 1157 (remarks of Senator Smith); *id.* at 950, 1554 (remarks of Senator Morse); *id.* vol. 1, at 615 (remarks of Representative Hartley).

38. *See* Atleson, *supra* note 3, at 111-12.

39. *See, e.g.*, Cohen, *supra* note 33, at 909, 918; O'Donoghue, *supra* note 21, at 338; Sussman, *supra* note 1, at 209, 211, 229.

40. *E.g.*, Typographical Union No. 17 v. NLRB, 368 F.2d 755, 763 (5th Cir. 1966) (contract between employer and one union not controlling in determining jurisdictional dispute); NLRB v. Local 825, Operating Eng'rs, 326 F.2d 213, 216 (3d Cir. 1964) (employer not bound, and one union had expressly refused to be bound); Local 450, Operating Eng'rs v. Elliott, 256 F.2d 630, 636 (5th Cir. 1958) (assumed employer to be bound but did not decide if he need be; showing of satisfactory evidence of agreement is a question for the Board under wording of the statute).

41. Penello v. Local 59, Metal Workers, 195 F. Supp. 458 (D. Del. 1961). The court emphatically pointed out that this case involved a dispute between an employer and a single union and that there was no dispute between rival unions. Therefore, any comments made about the voluntary adjustment abstention provision of § 10(k) were merely dictum.

The instant court examined the text of section 10(k) and held that the phrase "parties to such dispute" in the abstention clause referred to the "dispute out of which [the] unfair labor practice [had arisen]," which the Supreme Court in *CBS*[42] had construed to mean the jurisdictional dispute. Noting precedent for its interpretation,[43] the court examined the legislaive history and found that the purpose of section 10(k) would be effectuated by binding adjustments between the disputing employee groups. The court further recognized that while Congress could have expressly made the employer a necessary party to voluntary adjustment, it had declined to do so. Therefore, the majority concluded that the scope of the term "parties" in the abstention clause includes only the rival unions. The court held, consequently, that the NLRB may not properly resolve a jurisdictional dispute pursuant to section 10(k) after the disputing unions have agreed to settle their dispute through binding arbitration. The dissent contended that because the traditional NLRB interpretation of the abstention clause had gone unchanged, it must be assumed that Congress has acquiesced with approval in the NLRB construction. Observing that the NLRA does not deal with jurisdictional disputes but only with jurisdictional strikes,[44] the dissent interpreted the language "such dispute" as referring to the dispute out of which the unfair labor practice arose, which was found to mean the strike. Thus, the dissent concluded that the phrase "parties to such dispute" means the parties to the jurisdictional strike which necessarily includes the employer.

Although the instant court reaches an interpretation of section 10(k) that is justified by statutory text and administrative feasibility, reliance on federal court dicta and indeterminative legislative history renders the conclusiveness of the decision doubtful. The dissent's theory that congressional acquiescence in NLRB interpretations of section 10(k) indicates unqualified acceptance effectively neutralizes the majority's position that the omission of the employer from the abstention clause implies a deliberate congressional exclusion from the phrase "partics to such dispute." Instead of drawing such tenuous inferences from legislative silence, the court should have determined whether the employer is a requisite "party" in light of section 10(k)'s fundamental purpose of reducing work stoppages brought about by

42. 364 U.S. 573 (1961). *See* note 30 *supra* and accompanying text.

43. The court cited Penello v. Local 59, Metal Workers, 195 F. Supp. 458 (D.Del. 1961). *But see* note 41 *supra* and accompanying text.

44. "[T]he Act does not deal with the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike." Carey v. Westinghouse Corp., 375 U.S. 261, 263 (1964) (Douglas, J.) (representational dispute).

jurisdictional strikes. The basic problem presented is how to properly implement this purpose. The NLRB has consistently proceeded on the theory that only when an employer has agreed to be bound by the voluntary adjustment is he likely to abide by that determination.[45] This theory, however, ignores the unanimous assumption made during congressional debate that protection is needed for the neutral employer[46] who, by definition, is unconcerned with which employee group obtains the work assignment. A more reasonable implementation of the fundamental policies involved could have been achieved by a strict reading and analysis of the statute. A section 10(k) hearing will never be possible until an unfair labor practice charge is filed, which probably means that there is a jurisdictional strike.[47] The NLRB is empowered to determine the dispute out of which the unfair labor charge arose. Consistent with the Supreme Court's holding in *CBS*, this, of necessity, means the jurisdictional dispute because the strike arises therefrom and has reached its climax by the stage at which the employer becomes involved. Therefore the "dispute" that the NLRB must determine is the same "dispute" that must be voluntarily adjusted before the abstention clause is invoked, and the parties to such "dispute" of necessity are the rival unions, not the employer. The instant decision implements specific legislative policy and correctly applies statutory language, but implications of future problems are readily apparent and further refinements are to be expected. The neutral employer is concerned only with having work performed regardless of which employee group does the work, and should he fortuitously fail to agree to be bound by a voluntary adjustment, he will no longer be plagued by jurisdictional strikes from unions dissatisfied with arbitration. The non-neutral employer, however, must await a determination as to whether a binding union agreement can short-circuit his interest in selecting a particular employee group because the instant decision does not define its limitations. Since the abstention clause was intended to protect neutral employers, the non-neutral employer situation does not properly fall within its scope; therefore, it should be decided that the NLRB has jurisdiction to review union arbitration agreements whenever interested

45. *See* text accompanying note 38 *supra*.

46. *See* notes 17, 31 *supra* and accompanying text.

47. Note 44 *supra*. The Taft-Hartley Act was passed over a presidential veto contending: "The bill would force unions to strike or or to boycott if they wish to have a jurisdictional dispute settled by the National Labor Relations Board. This peculiar situation results from the fact that the Board is given authority to determine jurisdictional disputes over assignment of work only after such disputes have been converted into strikes or boycotts." 1 LEGISLATIVE HISTORY, *supra* note 14, at 916.

employers are concerned. This result can be reached by an expansive reading of the statutory requirement of submitting satisfactory evidence of the voluntary adjustment to the NLRB. Any decision to the contrary will render the broader policy of promoting industrial peace subservient to the particular purpose of section 10(k) by omitting any consideration of employer interest. The employer is effectively deprived of any judicial review of an inter-union adjustment unless the award is clearly arbitrary,[48] and an employer who feels that one employee group is better qualified to perform particular tasks will be faced with the option of assigning work to the prevailing group or suffering the possibility of a strike. Another possible implication is more intense controversy in the area of collective bargaining because an employer is effectively bound to deal with the union prevailing in the voluntary adjustment procedure. Nevertheless, public interest will be enhanced by the instant decision, because a jurisdictional strike will no longer serve to initiate the determination of a jurisdictional dispute once the rival unions have agreed to be bound by private settlement.

Property—Mortgages—State Redemption Statutes Not Applicable to Foreclosure by the United States on FHA Insured Mortgage

The United States, assignee of a federally insured mortgage, brought a foreclosure suit in federal court against the mortgagor, Stadium Apartments, Inc.[1] The mortgage had been insured by the FHA.[2] When the mortgagor defaulted, the United States paid the mortgagee the amount of insurance due in return for an assignment.[3] Although a state statute provided redemption rights after foreclosure,[4]

48. It is a general principle that arbitration awards are subject to judicial review when clearly arbitrary.

1. The mortgagee assigned the mortgage to the Secretary of Housing and Urban Development (HUD) pursuant to the applicable provisions of Title VI of the National Housing Act governing its rights upon default. 12 U.S.C. § 1743(c) (Supp. IV, 1969), *amending* 12 U.S.C. § 1743(c) (1964). The Secretary proceeded to foreclose under the authority granted by other provisions of the Act. 12 U.S.C. §§ 1713(k), 1743(f) (Supp. IV, 1969), *amending* 12 U.S.C. §§ 1713(k), 1743(f) (1964).

2. The mortgage was insured under the provisions of Title VI of the National Housing Act, 12 U.S.C. §§ 1736-46(a) (Supp. IV, 1969), *amending* 12 U.S.C. §§ 1736-46(a) (1964).

3. The Secretary of HUD paid the mortgagee the amount of insurance due as required by the applicable provisions of the National Housing Act, 12 U.S.C. § 1743(c) (Supp. IV, 1969), *amending* 12 U.S.C. § 1743(c) (1964).

4. IDAHO CODE ANN. § 11-402 (Supp. 1969). The statute allows the mortgagor or his lien

the United States contended that these rights were not applicable to its own efforts to recover funds paid to a mortgagee under the federal insurance commitment.[5] The district judge framed the foreclosure decree to include a one-year redemption period pursuant to the state statute. On appeal to the United States Court of Appeals for the Ninth Circuit, *held,* reversed. State redemption statutes are not applicable in actions instituted by the United States to foreclose FHA insured mortgages. *United States v. Stadium Apartments, Inc.,* 425 F.2d 358 (9th Cir.), *cert. denied,* 39 U.S.L.W. 3224 (U.S. Nov. 23, 1970).

Many states have statutes permitting mortgagors and, in most cases, junior lien creditors to redeem mortgaged property within a specified time after judicial sale pursuant to a foreclosure decree.[6] While these statutes protect the mortgagor's investment by giving additional time for refinancing,[7] they are primarily designed to force the buyer at a

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creditors to redeem real property of more than 20 acres up to one year after sale by paying the purchaser the amount of purchase and 6% interest from the date of sale. A 6-month period is provided for tracts of less than 20 acres.

5. While not determinative of the United States' contention, the mortgage contained a provision required by federal regulation in which the mortgagor waived "to the extent permitted by law . . . any right to a stay or redemption. . . ." The mortgage form was prescribed by 24 C.F.R. §§ 580.10-37 (Supp. 1947), pursuant to authority granted the Secretary by 12 U.S.C. § 1742 (Supp. IV, 1969), *amending* 12 U.S.C. § 1742 (1964) "to make such rules and regulations as may be necessary to carry out the provisions of this subchapter."

6. ALA. CODE tit. 7, § 727 (1960); ALASKA STAT. §§ 9.35.210-50 (1962 & Supp. 1969); ARIZ. REV. STAT. ANN. §§ 12-1281 to -89 (1956 & Supp. 1969); ARK. STAT. ANN. § 51-1111 (1947) (mortgagor only); CAL. CIV. PRO. CODE §§ 701-07 (West 1955 & Supp. 1970); COLO. REV. STAT. ANN. §§ 118-9-2 to -3 (1963); IDAHO CODE ANN. §§ 11-401 to -407 (1948 & Supp. 1969); ILL. ANN. STAT. ch. 77, §§ 18-27 (Smith-Hurd 1966 & Supp. 1970); IOWA CODE ANN. § 628 (1950 & Supp. 1970); KAN. STAT. ANN. § 60-2414 (1964); KY. REV. STAT. § 426.220 (1969) (mortgagor only); ME. REV. STAT. ANN. tit. 14, §§ 6201-313 (1964 & Supp. 1970); MICH. STAT. ANN. § 27A.3240 (Supp. 1970) (morgagor only); MINN. STAT. ANN. §§ 580.23-.24, 581.10 (Supp. 1970); MO. REV. STAT. § 443.410 (1949) (mortgagor only); MONT. REV. CODES ANN. §§ 93-5833 to -5841 (1963); NEV. REV. STAT. §§ 21.200-50 (1969); N.M. STAT. ANN. § 24-2-19 (Supp. 1969); N.D. CENT. CODE §§ 28-24-01 to -11 (1960 & Supp. 1969); ORE. REV. STAT. §§ 23.530-.600 (1969); S.D. COMPILED LAWS ANN. §§ 21-52-1 to -14 (1967); TENN. CODE ANN. §§ 64-801 to -815 (1955); UTAH CODE ANN. § 78-37-6 (1953) (creates right of redemption); WASH. REV. CODE §§ 6.24.130-.210 (1963 & Supp. 1969); WYO. STAT. ANN. §§ 1-480 to -481 (1957 & Supp. 1969); UTAH R. CIV. P. 69(f) (specifies manner in which redemption is exercised). These statutes generally provide that the right of redemption may be exercised by paying the purchaser the purchase price plus a specified rate of interest along with reimbursement for taxes, assessments, etc. A few statutes provide an additional redemption period after foreclosure and before sale or strict foreclosure. IND. ANN. STAT. § 3-1803 (1968); VT. STAT. ANN. tit. 12, § 4528 (Supp. 1969); WIS. STAT. ANN. § 278.10(2) (Supp. 1969).

7. *See* Note, *State Statutory Redemption Rights and the Federal Housing Administration: Reconciliation of Real and Illusory Conflicts,* 49 B.U.L. REV. 717 (1969).

judicial sale, usually the mortgagee,[8] to bid fair market value for the property, thereby giving maximum protection to the interests of the mortgagor and his creditors.[9] No federal statute or regulation has determined, however, whether state redemption rights are available when the United States forecloses on a federally insured mortgage.[10] In solving similar problems,[11] federal courts have followed the Supreme Court's mandate in *Clearfield Trust Co. v. United States*[12] to fashion federal rules of decision to govern relations arising from the operation of federal laws. One court by applying this doctrine has allowed the adoption of state property laws, such as recording acts and definitions of first mortgage liens, when they can be used to advance federal policy objectives.[13] Moreover, others have required federal agencies to operate within the framework of state law when local interests predominate. In *United States v. Yazell*,[14] for example, the Supreme Court held that a state coverture law controlled a married woman's liability on a loan individually negotiated with the Small Business Administration. On the other hand, local rules have usually been rejected by the courts when

8. The mortgagee is the buyer in over 99.3% of all public sales. Prather, *A Realistic Approach to Foreclosure*, 14 BUS. LAW. 132, 135 (1958).

9. *See* 3 R. POWELL, REAL PROPERTY ¶ 470 (1967); Durfee & Doddridge, *Redemption From Foreclosure Sale—The Uniform Mortgage Act*, 23 MICH. L. REV. 825 (1925).

10. 28 U.S.C. § 2410(c) (Supp. IV, 1969) provides for a one-year redemption period after foreclosure sale as a condition of jurisdiction over the United States when it is a junior lienor. This provision was made inapplicable to the insurance of mortgages under the National Housing Act by 12 U.S.C. § 1701(k) (1964).

11. *E.g.*, United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959) (holding that federal rather than state law would control the appointment of a receiver pending foreclosure on a FHA mortgage).

12. 318 U.S. 363 (1943) (federal rather than state law held to apply in the case of a forged endorsement on a United States check).

13. *See* United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959) (court noted that it was commercially convenient to adopt state recording acts and state definitions of first mortgage liens as the federal rule to govern FHA mortgages); *cf.* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

14. 382 U.S. 341 (1966) (6-3 decision). The Court held that Texas law would apply "in the absence of federal statute, regulation or even any contract provision indicating that the state law would be disregarded." *Id.* at 351-52. The Court emphasized, however, that the Texas law involved governed an area of intense local interest, familial property rights and liabilities, and that this was a highly individualized transaction that contained numerous references to Texas law. For a discussion of the significance of this case see Note, *Federal Jurisdiction—"Federal Common Law" vs. State Law—United States v. Yazell*, 7 B.C. IND. & COM. L. REV. 1021 (1966); Comment, *Courts—State Substantive Law Applies in Non-Diversity Actions When Local Interests Predominate—United States v. Yazell*, 65 MICH. L. REV. 359 (1966); Comment, *Conflict of Laws—Application of Federal Law—United States v. Yazell*, 27 U. PITT. L. REV. 712 (1966). The Ninth Circuit in Bumb v. United States, 276 F.2d 729 (9th Cir. 1960), held that the SBA should comply with a California "bulk sales" statute in perfecting its chattel mortgage. The court stated, however, that this statute controlled only the acquisition of a valid security interest and did not "purport to regulate the remedy of the mortgagee after default by the mortgagor . . . ." *Id.* at 737.

there has been a need for uniformity in the administration of national federal mortgage insurance programs and when they have conflicted with the federal policy of protecting the program against loss.[15] Thus, applicable federal regulations providing for deficiency judgments in mortgage foreclosures have been uniformly given controlling effect despite contrary state anti-deficiency judgment statutes.[16] Some cases have even granted deficiency judgments to the United States in the absence of an applicable regulation or contract provision despite contrary local law.[17] Likewise, express provisions for the appointment of a receiver pending foreclosure in FHA insured mortgage contracts have been held to override conflicting local laws.[18] Several decisions have given effect, however, to state redemption statutes where they did not impair the effective administration of federal mortgage insurance programs.[19]

In the instant case, after disposing of preliminary matters,[20] the court noted that the dominant theme running throughout the applicable cases[21] was the policy of protecting federal investments from local rules

15. *See, e.g.*, United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

16. *E.g.*, United States v. Shimer, 367 U.S. 374 (1961) (loan guaranteed by the Veterans Administration).

17. *See* United States v. Wells, 403 F.2d 596 (5th Cir. 1968) (mortgage held by Veterans Administration under vendee account loan program); United States v. Walker Park Realty, Inc., 383 F.2d 732 (2d Cir. 1967) (FHA insured mortgage); Herlong-Sierra Homes, Inc. v. United States, 358 F.2d 300 (9th Cir.), *cert. denied*, 385 U.S. 919 (1966) (FHA insured mortgage).

18. United States v. Chester Park Apts., Inc., 332 F.2d 1 (8th Cir.), *cert. denied*, 379 U.S. 901 (1964); United States v. Sylacauga Properties, Inc., 323 F.2d 487 (5th Cir. 1963); United States v. Queen's Court Apts., Inc., 296 F.2d 534 (9th Cir. 1961); United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

19. *See* Madison Properties, Inc. v. United States, 375 F.2d 740 (9th Cir. 1967) (holding that the debtor was not entitled to redemption under state law since he had not complied with state procedure); Clark Inv. Co. v. United States, 364 F.2d 7 (9th Cir. 1966) (state law requiring deduction of collected rents from the redemption price not applied to the United States when property was redeemed from it after foreclosure on the FHA insured mortgage); United States v. View Crest Garden Apts., Inc., 268 F.2d 380, 383 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959) (dictum that determination of loss of state redemption rights requires balancing the federal interest against the local policy); United States v. West Willow Apts., Inc., 245 F. Supp. 755 (E.D. Mich. 1965) (United States acquiesced in the inclusion of a redemptive period at the purchaser's request since title could not be insured without it because of state law).

20. The court first concluded that the law governing the relationship between the United States and the parties to the mortgage was federal. Hence, state law would have no application unless adopted by Congress, the FHA, or the federal court to further federal policy.

21. Cases cited notes 16-18 *supra*. The court reasoned that cases relied on by appellee were distinguishable since the Supreme Court had contrasted the individually negotiated loan in *Yazell* with the FHA insured loan in United States v. Helz, 314 F.2d 301 (6th Cir. 1963) (upholding a personal judgment for the United States against a wife who signed the note despite a contrary state law of coverture). *Bumb* was also distinguishable since it dealt with the manner of acquisition rather than the enforcement of a security interest by the United States.

limiting the effectiveness of available remedies. The court found that, since only 26 states have redemption statutes, the policy of uniformity would be negated by adopting local law.[22] It also recognized that such statutes increased the administrative burdens and the cost of federal mortgage insurance programs.[23] Concluding that the redemption statutes have failed to accomplish their purpose of forcing the mortgagee or others to bid the full market value of the property at a foreclosure sale,[24] the court held that state redemption statutes should not be adopted in a foreclosure proceeding brought by the United States on an FHA insured mortgage. The dissent, arguing that it was presumptuous for a federal court to eliminate state redemptive rights for the protection of a federal program when Congress had never deemed it necessary to do so, found a valid purpose for the redemption laws and no harm resulting from their adoption.[25]

Although the instant court's decision is a logical extension of recent decisional law,[26] its rejection of state law is unfortunate. As the dissent points out;[27] in its zeal to protect the federal program against immediate financial loss and additional administrative burdens, the majority overlooked the broader implications of federal policy in the mortgage insurance field. Many federal programs in this area are designed to stimulate individual home ownership[28] and, therefore, must be concerned

22. Periods of redemption in the statutes cited range from 6 months to 2 years. The court said that the conditions of redemption and rules governing right to rents, repairs, and other matters varied widely. It also noted a split of authority among the states as to whether the right of redemption could be waived and over the mortgagee's right to recover the value of improvements made during the redemption period. 425 F.2d at 364.

23. The Farmers Home Administration, Federal Housing Administration, and Veterans Administration informed the court that imposition of the post-foreclosure-sale redemption periods made the foreclosure remedy more costly and administratively time consuming. *Id.* at 365.

24. The court felt that third parties would be even more reluctant to bid and pay full market value for the property knowing that they would not receive good title or full ownership rights until expiration of the redemption period. Doubts as to the effectiveness of the statutes were reinforced by the fact that redemption rights could be easily circumvented in some states through trust deeds with power of sale. The court also noted that the FHA practice of bidding fair market value at the foreclosure sale would satisfy local policy objectives of redemption statutes. *Id.* at 366.

25. Judge Ely argued that the majority had erred in its assumption that a third party would come in to force the price up to market value at the foreclosure sale. The purpose of redemption statutes was to operate as a future threat that would force the mortgagee to bid adequately at fair market value, the mortgagor and junior lienors would achieve full satisfaction, thereby ending any potential threat to the mortgagee. *Id.* at 369-70.

26. *See* cases cited notes 16-18 *supra* and accompanying text.

27. For instance, a mortgagor in a state with redemption provisions might find private financing more desirable than an FHA loan. More importantly, however, contractors and suppliers would be less willing to extend credit with fewer protections for their security interest as junior lienors. 425 F.2d at 369.

28. For example, a National Home Ownership Foundation was established under the

with protection of the mortgagor. Any federal housing program also is concerned with stimulating construction; this policy would be furthered by providing additional security to contractors and suppliers, whom the redemption statutes similarly were designed to benefit. Government agencies set up to accomplish these objectives should be prepared to accept greater risks than the private lender.[29] Furthermore, the majority's conclusion that these statutes have failed in their essential purpose has not been uniformly accepted by writers in the field of real property.[30] Moreover, since the FHA had recognized and operated within the provisions of redemption statutes for many years, the argument that the application of these statutes would diminish needed national uniformity and greatly increase administrative burdens appears particularly unconvincing. Thus, the instant court's decision, if followed, will disrupt a system of safeguards erected by many states to mitigate the potential harshness of foreclosure sales. It also has ominous implications for other state laws designed to protect mortgagor investments and enhance the security of junior lienors. These include provisions for appraisal before sale and upset price adjustments.[31] The majority opinion also runs counter to the traditional inclination of federal courts to uphold state property laws because of the peculiarly local interests involved.[32] The decision sets a precedent for sacrificing legitimate state interests to the expediency of federal programs although this

National Housing Act for the expansion of home ownership and housing opportunities for lower income families. It was given the mandate of making use of existing public and private agencies and programs in accomplishing its objectives. 12 U.S.C. § 1701(y) (Supp. IV, 1969).

29. The argument that the government should assume no risks in a program such as the FHA seems specious in light of Congress' original intention that some risk be present. "Insurance for these large scale rental projects has been aptly designated as the 'apartment boom floated on public risk and private profit.' " S. REP. No. 1286, 81st Cong., 2d Sess. 2093 (1950).

30. For a positive discussion of the purpose and effect of these statutes see 3 R. POWELL, *supra* note 9; Durfee & Doddridge, *supra* note 9; Note, *supra* note 7. Contrary to the majority opinion, trust deeds with power of sale have not nullified the effect of redemption statutes since forcclosure by action is still the most commonly used remedy. *See* 6 AMERICAN LAW OF PROPERTY § 16:204 (J. Casner ed. 1952); 3 R. POWELL, *supra* note 9, at ¶ 468. Nevertheless, statutory redemption has its critics. *E.g.*, G. OSBOURNE, HANDBOOK ON THE LAW OF MORTGAGES § 8, at 24-26 (1951); Murray, *Statutory Redemption: The Enemy of Home Financing*, 28 WASH. L. REV. 39 (1953). *See also* Prather, *supra* note 8.

31. Some jurisdictions require an appraisal before sale and withhold judicial confirmation of the sale unless the sale price is at least two-thirds of the appraisal. Upset price adjustment involves the reopening of bidding if a higher offer is actually received after the foreclosure sale. 3 R. POWELL, *supra* note 9, at ¶ 466.

32. *E.g.*, Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966) (state law allowing a mineral lease to be effected only by written agreement held controlling); Armstrong v. United States, 364 U.S. 40 (1960) (holding that materialmen's liens that had attached under state law must be honored); *cf.*, United States v. Yazell, 382 U.S. 341 (1966); Fink v. O'Neil, 106 U.S. 272 (1882) (state homestead exemption held applicable in spite of detriment to federal interest).

development is neither expressly authorized by a federal statute or regulation nor demonstrated by compelling need. This approach has potential ramifications in any case where a real or illusory conflict between state law and a federal program arises. It is submitted that a more constructive approach would be to adopt state law whenever significant local interests are involved in the absence of any irreconciliable conflict with long-range federal policy objectives.

Public Welfare—Social Security—State Maximum Grant Regulation of AFDC Payments Consistent with Both Social Security Act and Equal Protection Clause

Appellees initiated a class action[1] seeking to declare invalid and permanently enjoin enforcement of Maryland's "maximum grant" regulation, which places an absolute limit of 250 dollars per month[2] on Aid to Families with Dependent Children (AFDC) grants. Under state-computed "standards of need,"[3] the families comprising the class, because of their large size, had subsistence needs that substantially exceeded the maximum grants they received under the regulation.[4] Appellees contended that this maximum grant limitation violates the equal protection clause by discriminating against them merely because of the size of their families. They also maintained that the regulation is contrary to a fundamental purpose of the AFDC program[5] as well as the

1. The suit was brought by 3 parents individually and on behalf of their minor children and all other parents, relatives, or minor children similarly situated. The defendants were officials of Maryland's Department and Board of Public Welfare. Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968).

2. Maryland Manual of the Dep't of Pub. Welfare, Part II, Rule 200, § VII, I (the $250 per month maximum has been promulgated for eligible families of certain counties; for remaining counties there is a $240 maximum grant).

3. The Maryland "standard of need" is a schedule list of monetary need for families units of one to 10 persons. Operatively, it serves as a subsistence table, and any family having a standard of need less than the maximum grant receives the full amount of grant suggested by the standard. In practice the subsistence needs of a family of 6 are fully met, but no additional payments are made to any additional eligible dependent children (i.e., a fifth or sixth child depending upon whether one or both parents are within the assistance unit). Dandridge v. Williams, 397 U.S. 471, 509-10 n.2 (1970).

4. Appellee Linda Williams lives with her 8 children. Under the "standard of need," their requirement for subsistence is $296.15 per month. The other named parties are members of one family living togetber with a standard of need requirement of $331.50. Williams v. Dandridge, 297 F. Supp. 450, 453 (D. Md. 1968).

5. The operative effect of the maximum grant, argued the appellees, is to create an incentive to "farm out" the younger members of large families to eligible relatives. This, they maintained,

Social Security Act, which provides ". . . that aid to dependent children shall be furnished with reasonable promptness to *all eligible individuals.*"[6] Appellants defended the regulation as a legitimate, recognized,[7] and necessary[8] exercise of the latitude given the state to allocate AFDC resources. A three-judge district court found the maximum grant regulation unconstitutional as an arbitrary and irrational classification precipitating different treatment of dependent children who are equally in need.[9] On direct appeal to the United States Supreme Court, *held,* reversed. A maximum grant regulation employed in the allocation of AFDC grants is consistent with requirements of both the Social Security Act and the equal protection clause of the fourteenth amendment. *Dandridge v. Williams,* 397 U.S. 471 (1970).

The AFDC program was conceived during the Depression as a part of the Social Security Act of 1935.[10] Although it was financed largely by the federal government on a matching fund basis,[11] its operation was

subverts the express legislative purpose of the AFDC program to "encourage the care of dependent children *in their own homes* or in the homes of relatives . . . ." 42 U.S.C. § 601 (Supp. IV, 1969) (emphasis added). *See also* S. REP. No. 628, 74th Cong. 1st Sess. 17 (1935) (stating original goal: "Through cash grants adjusted to the needs of the family it is possible to keep young children with their mother *in their own home* . . . .") (emphasis added).

6. 42 U.S.C. § 602(a)(10) (Supp. IV, 1969) (emphasis added). The class members maintained that the regulation is in patent violation of this requirement since it denied benefits to the youngest eligible infants of large families despite the fact that they are as "dependent" as their older siblings under the definition of "dependent child." *See* King v. Smith, 392 U.S. 309 (1968); 42 U.S.C. § 606(a) (Supp. IV, 1969).

7. Appellants pointed to the fact that the Maryland maximum payment regulation had been in force in various forms since 1947. Moreover, they noted that the Secretary had approved the more than 20 state maximum grant systems. 397 U.S. at 481-82. *See also Hearings on H.R. 5710 Before the House Comm. on Ways and Means,* 90th Cong., 1st Sess., pt. 1, at 118 (1967); DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, STATE MAXIMUMS AND OTHER METHODS OF LIMITING MONEY PAYMENTS TO RECIPIENTS OF SPECIAL TYPES OF PUBLIC ASSISTANCE 3 (1962).

8. Of the 32,504 families receiving AFDC assistance, the Maryland Department of Social Services estimated that 2,537 families would be affected by the removal of the maximum grant limitation. Were the regulation stricken, because of limited appropirations for AFDC, the State would be foreed to employ a percentage limitation equally to all recipients. The effect would be that all recipients would receive less than the amount suggested for them by the "standard of need." At the time of the suit, the appellees' class represented only one-thirteenth of AFDC families who were receiving less tban their standard of need. 397 U.S. at 473 n.10.

9. The district court initially predicated its holding on the regulation's violation of § 402 of the Social Security Act, 42 U.S.C. § 602(a)(10) (Supp. IV, 1969), as well as the equal protection clause. Pursuant to FED. R. CIV. P. 52(b), 59, the court granted defendant's motion in part by writing a supplemental opinion basing its holding exclusively on violation of the equal protection clause. Williams v. Dandridge, 297 F. Supp. 450, 459 (D. Md. 1968) (supplemental opinion).

10. Social Security Act, ch. 531, § 401-06, 49 Stat. 620, 627 (1935), *as amended,* 42 U.S.C. §§ 601-1392 (Supp. IV, 1969).

11. The federal government supplies five-sixths of the overall amount spent per recipient up to $18, plus one-half of amount from $18 to $32. *See* 42 U.S.C. § 603(a)(1)(A) (Supp. IV, 1969).

premised on "cooperative federalism."[12] Under this scheme the funds were administered in accordance with state-authored AFDC plans approved by the Social Security Board.[13] In the years immediately following the program's inception, states enjoyed extensive freedom in tailoring their plans to meet their own desires and needs.[14] Over the last two decades, however, AFDC has undergone substantial expansion not only in coverage[15] but also in the extent of statutory limitation on state administrative capacity.[16] Among other restraints, Congress enacted section 402(a)(10),[17] which prevented the previous state practice of using "waiting lists" to limit the number of recipients. When coupled with interpretations of legislative intent favoring broad coverage,[18] these limitations raised serious doubt about the statutory scope of state latitude in administering AFDC grants. Moreover, increased application of equal protection in the area of poverty and welfare,[19] as well as emerging judicial recognition of new fundamental interests,[20] further restricted state welfare regulations. If a state elected to establish a

12. *See* King v. Smith, 392 U.S. 309, 316 (1968). *See also* MD. ANN. CODE art. 88A, §§ 44A-60 (1957) (authorizing the Maryland Department of Public Welfare to carry on a cooperative welfare program with the federal government).

13. State plans are now approved by the Secretary of HEW. For approval the plans must: (1) be mandatory on all political subdivisions of the State; (2) provide for state financial contributions; (3) establish a single state agency to administer the plan; (4) provide for administrative hearing for an aggrieved recipient or potential recipient; and (5) have no residence requirement of more than one year. 42 U.S.C. § 601-02(a) (Supp. IV, 1969). *See also* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, REPORT ON STATUTORY AND ADMINISTRATIVE CONTROLS ASSOCIATED WITH FEDERAL GRANTS FOR PUBLIC ASSISTANCE 6 (1964).

14. States, for example, were able to proscribe grants for children whose mothers cohabitated with an able-bodied man. King v. Smith, 392 U.S. 309 (1968). Others required that a home must be "suitable" before its members became eligible for benefits. *E.g.*, LA. REV. STAT. ANN. § 46:233 (Supp. 1970). *See also* 22 VAND. L. REV. 219 (1968).

15. *E.g.*, 42 U.S.C. § 602(a)(15) (Supp. IV, 1969) (adds family planning service); *id.* § 607(a)(2) (extends coverage to embrace children whose parents are unemployed rather than incapacitated or absent from home); *id.* § 608 (extends benefits to include children in child-care centers).

16. *E.g.*, 42 U.S.C. § 602(a)(10) (Supp. IV, 1969) (prevents states from creating waiting lists); *id.* § 602(a)(23) (requires states to make adjustments in standard of need tables and maximum grant regulations commensurate with changes in living costs); Bureau of Public Assistance, Social Security Administration, Dep't of Health, Education, and Welfare, State Letter No. 452 (1961) (Secretary of HEW's statement that states may not impose eligibility conditions on the basis of "suitability" of a child's home).

17. Social Security Act § 321(a), ch. 809, 64 Stat. 550 (1950), *as amended*, 42 U.S.C. § 602(a)(10) (Supp. IV, 1969).

18. *See* King v. Smith, 392 U.S. 309 (1968).

19. *Compare* Edwards v. California, 314 U.S. 160, 184-85 (1941) (concurring opinion) (defining poverty as "constitutionally an irrelevant") *with* Levy v. Louisiana, 391 U.S. 68 (1968).

20. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (right to procreate).

program of public assistance, for example, it could not altogether exclude an arbitrary portion of its eligible citizenry from the program's offerings without violating the equal protection clause.[21] When applied to maximum grant regulations, the full impact of the equal protection clause cannot be accurately discerned until it is determined which of two possible tests should be employed. The traditional "rational basis" test requires a showing of invidious and "palpably arbitarary" classification devoid of any reasonably conceivable rationality.[22] The application of this test has been confined primarily to cases challenging the constitutionality of business and industrial regulations.[23] Whenever a complainant can demonstrate that a "fundamental interest" is threatened, however, a more stringent equal protection standard is invoked whereby a classification reasonably related to a public purpose and free of invidious discrimination may still be held unconstitutional.[24] In applying the "fundamental interest" test, courts weigh "the benefits flowing from pursuit of the state's objective against the detriment resulting from impairment of a basic personal interest."[25] In 1969, the Supreme Court affirmed a district court decision suggesting that a state AFDC regulation should be tested by the "rational basis" standard,[26] but it later indicated that public welfare is a fundamental need of indigents,[27] thus intimating a need for the more stringent balancing test. One of the pivotal questions in determining which test should be employed is whether children born into AFDC families already receiving a maximum amount are altogether excluded from benefits or whether they merely cause a proportionate dispersion of the grant whereby all children in the family receive less but none are totally deprived. The resolution of this issue would have direct bearing on the invidiousness of the classification as well as on the requirement of section 402(a)(10) that benefits be paid to "all eligible individuals." When confronted with this precise question in *Williams v. Dandridge*,[28] a federal district court held

21. King v. Smith, 392 U.S. 309 (1968) (Douglas, J., concurring); Griffin v. Illinois, 351 U.S. 12 (1956).

22. International Harvester Co. v. Kentucky, 234 U.S. 199, 216 (1914).

23. *E.g.*, Morey v. Doud, 34 U.S. 457 (1957); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

24. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1132 (1968-69).

25. *Id.*

26. Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 323 (1969).

27. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (stating that: "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.").

28. 297 F. Supp. 450 (D. Md. 1968).

that the Maryland maximum grant excluded last born children and thereby violated both section 402(a)(10)[29] and the equal protection clause. Subsequently, maximum grant regulations in three other states were invalidated on the authority of the Maryland decision.[30] Although these decisions failed to indicate which equal protection test was being employed,[31] they nonetheless evinced new impetus in the trend towards broader coverage and tighter restrictions on state regulations of AFDC benefits.

Prior to the instant case, the Supreme Court had never been confronted by a challenge of state maximum grant regulations. In approaching the problem, the Court first considered whether the Maryland regulation was compatible with the requirement of section 402(a)(10) of the Social Security Act that reasonably prompt aid be furnished to "all eligible individuals."[32] In this regard, the Court held that since the focus of the Act was on the family unit rather than on individual dependents,[33] eligible children born into families receiving a maximum grant were not excluded from coverage but were merely forced to share the same benefits with other household members. Although the operative effect of the regulation was, therefore, to diminish the lot of the entire family on a per capita basis, the Court ruled that so long as *some* aid was provided to all eligible individuals no violation of the statute had occurred. The Court further observed that the Maryland regulation was a recognized practice[34] incident to the latitude given the states in selecting methods best suited for disbursing a limited AFDC budget.[35] Turning to the constitutional issue, the Court

29. 42 U.S.C. § 602(a)(10) (Supp. IV, 1969).

30. Lindsey v. Smith, 303 F. Supp. 1203 (W.D. Wash. 1969); Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969); Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969).

31. In fact, the courts showed little awareness that the 2 tests existed. Two courts appeared to use the traditional standard but cited authority that used the stringent test. Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969); Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968).

32. 42 U.S.C. § 602(a)(10) (Supp. IV, 1969).

33. 397 U.S. at 477-78.

34. In this regard, the Court quoted 42 U.S.C. § 602(a)(23) (Supp. IV, 1969): "[The State shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since amounts were established, and *any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.*" 397 U.S. at 482 (emphasis added). *See also* King v. Smith, 392 U.S. 309, 334 (1968).

35. In asserting the State's power the Court was refusing to recognize appellee's "farming out" argument. *See* note 5 *supra*. The Court further buttressed its conclusion by noting that even if there were "farming out" of children, the AFDC requirement that a child must live with one of several enumerated relatives (42 U.S.C. § 606(a) (Supp. IV, 1969)) assured that the "farming out" of children would be done within the family circle. 397 U.S. at 480 ("The kinship tie may be attenuated but it cannot be destroyed").

first noted that the rational basis test should be utilized in evaluating AFDC classifications under the equal protection clause. In deference to the proposition that the fourteenth amendment gives the Court no power to impose its views of wise economic or social policy upon the states, the Court refrained from examining the state's justifications and deemed it sufficient that there were rationally supportable predicates for the regulation, including its incentive to family planning, its encouragement for those affected to seek employment, and its potential for securing full subsistence needs for smaller families.[36] To the three dissenting judges the reasoning of the majority was less than palatable. Mr. Justice Douglas contended that the child and not the family is the heart of the AFDC program, that limitations based on family size violate the fundamental purposes of the program,[37] and that maximum grants did not receive either tacit or express approval of Congress or the Secretary of HEW.[38] Mr. Justice Marshall, joined by Mr. Justice Brennan, favored the use of a more stringent constitutional inquiry[39] and expressed particular concern for the Court's "emasculation of the equal protection clause as a principle applicable to the area of social welfare. . . ."[40]

There can be little doubt that the instant decision has come as a great surprise to many who, prior to its appeal, had anticipated it as another stage in an expanding evolution of AFDC benefits. To the contrary, the immediate impact of the decision has been to check, at least in the area of maximum grants, the shrinkage of state freedom to restrict disbursement of welfare grants. In order to achieve this, the Court has suggested that the "family unit" rather than the individual child is the focus of legislative intent. This conclusion seems tenuous when considered in light of Congress' continued expansion of AFDC. The nature of these extensions radiates the distinct desire to provide benefit to each needy child regardless of surrounding circumstances over which it has no control.[41] The Court itself has participa ⋮ in realizing

36. The Court noted that if the maximum grants were eliminated all recipient families would receive less than their subsistence needs, whereas now only 2,537 families (one-thirteenth of total number of recipients) receive less. 397 U.S. at 480 n.10; *See also* note 3 *supra*.

37. *See* 42 U.S.C. § 602(a)(14) (Supp. IV, 1969) (requiring that state AFDC plans must provide for the development of a program for "each child"). *See also* S. REP. No. 628, 74th Congs., 1st Sess., 16-17 (1935): "All parts of the Social Security Act are in a very real sense measures for the security of children . . . . In addition, however, there is great need for special safeguards for many underprivileged children. Children are in many respects the worst victims of the depression."

38. *See* note 44 *infra* and accompanying text.

39. In addition both were in agreement with Mr. Justice Douglas' statutory arguments. 397 U.S. at 508.

40. *Id.*

41. *See* statutes cited note 16 *supra*.

this goal.[42] In fact, it has in certain cases recognized that the nature of the family unit should not exclude a child from coverage.[43] While the importance of the family unit is of recognized concern, it should be significant only as a conduit for best securing the welfare of the needy child and not as a restrictive tool. The instant decision, however, has sustained a system that restricts benefits solely on the basis of family size and penalizes dependent children of such families because of an accident of birth. The Court has argued that maximum grants represent a recognized practice; however, the conclusion seems unjustified in light of the HEW Secretary's reference to maximum grants as "arbitrary," oppressive of large families, and resulting in "patently different treatment of individuals."[44] Moreover, since federal AFDC contributions are determined by the number of eligible individuals and not family units,[45] the effect of applying a maximum grant regulation is to increase the proportional share of the burden being borne by the federal government. In the case of a Maryland family with more than eleven members, the state actually makes a profit because it receives more money for support of that family than it spends.[46] It is difficult to believe that Congress intended such a result.

The element in this decision that should cause the greatest concern, however, is the Court's treatment of equal protection. Although by invoking the "rational basis" test the Court has ended the confusion as to which equal protection test is applicable to maximum grant provisions, in so doing it has lumped together two dramatically dissimilar types of legislation. As the Court admitted, there is a significant difference between "state regulation of business or industry" and "the most basic needs of impoverished human beings."[47] Despite this admission, however, the Court refused to recognize that a personal interest calling for a more permissive review is involved in cases concerning the AFDC program. That this conclusion will mantle the meaning of fundamental interest with a disconcerting imprecision cannot be denied. How can the Court consistently acknowledge a basic right to travel,[48] to vote,[49] and to procreate[50] while denying the existence

42. King v. Smith, 392 U.S. 309 (1968).
43. *E.g., id.*
44. 397 U.S. 515, n.8. *But see* note 7 *supra.*
45. 42 U.S.C. § 603(a) (Supp. IV, 1969).
46. 397 U.S. at 512-13 (Marshall, J., dissenting).
47. 397 U.S. at 485.
48. Shapiro v. Thompson, 394 U.S. 618 (1969).
49. Reynolds v. Sims, 377 U.S. 533 (1964).
50. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

of a fundamental right to subsist?[51] Trapped by a doctrinaire two-test construct the Court has threatened to reduce the determination of "fundamental interest" to a completely subjective evaluation. Moreover, it has missed the opportunity to fully consider the basic issues created by state regulation of AFDC grants. Under the "rational basis" test if any set of facts that would sustain the elassification's rationality can be reasonably conceived, its existence must be assumed rather than analyzed.[52] Had the Court not felt the need for such restraint, it could have evaluated the legitimate interests of both the state and AFDC recipients with a more realistic sensitivity. For example, it could have inquired more deeply into the effect of Maryland's finite AFDC budget; or it could have considered the true effectiveness of the maximum grant as a panacea for collateral concerns such as family planning and inducement to seek employment.[53] For these reasons it is hoped that the instant decision will be remembered as an aberration rather than a permanent departure.

Selective Service Law—Conscientious Objectors—Deeply Held Moral, Etbical, or Religious Beliefs Satisfy Requirements of "Religious Training and Belief" Exemption

Petitioner was convicted of refusing to be inducted into the United States armed forces[1] after he was denied an exemption under section 6(j) of the Universal Military Training and Service Act.[2] This statute

51. In his dissent, Mr. Justice Marshall captured the irony of this contradiction. "It is certainly difficult to believe that a person whose survival is at stake would be comforted by the knowledge that his 'fundamental' rights are preserved intact." 397 U.S. at 521 n.14. For a full discussion of the "right" to welfare assistance see Graham, *Public Assistance: The Right to Receive; the Obligation to Repay*, 43 N.Y.U.L. REV. 451 (1968); Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALBANY L. REV. 210 (1967).

52. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1080-81 (1969).

53. In this regard, Maryland's argument of collateral incentives for family members to seek gainful employment seems tenuous since the inducement would apply only to the one-thirteenth of all recipients affected by the maximum grant. *See* note 8 *supra*. Moreover, only 6.5% of all AFDC families contain an employable person. Williams v. Dandridge, 297 F. Supp. 450, 468 (D. Md. 1968) (supplemental opinion).

1. Petitioner was convicted in 1966 of violating the Universal Military Serviee and Training Act. Act of June 24, 1948, ch. 625, § 12, 62 Stat. 612.

2. Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612, *as amended*, 50 U.S.C. App. § 456(j) (Supp. IV, 1969). This section provides in part: "Nothing in this title shall be construed to require any person to be subject to combatant training and service . . . who, by reason of religious training and helief, is conscientiously opposed to participation in war in any form."

exempts from military service any person who, because of religious training and belief, is conscientiously opposed to participating in war in any form. Although lacking a formal religious affiliation,[3] petitioner contended that his sincere belief in the value of human life and his total repugnance to killing another human being were sufficiently "religious" to qualify him for an exemption under the statute.[4] Petitioner further contended that the statute would violate the establishment clause of the first amendment if his beliefs were not within its scope.[5] Respondent, the United States, maintained that the petitioner was not entitled to an exemption because his objections were not based upon "religious training and belief" but upon a "merely personal moral code,"[6] which was expressly excluded by the statute[7] as a basis for exemption. The United States Court of Appeals for the Ninth Circuit, agreeing with respondent,[8] affirmed the conviction.[9] On certiorari to the United States Supreme Court, *held,* reversed. A Selective Service registrant is entitled to an exemption from military service as a conscientious objector if he is opposed to war in any form because of sincere ethical or moral

3. A Department of Justice hearing officer interviewed petitioner and found no "belief in the existence of God or a Supreme Being." Welsh v. United States, 404 F.2d 1078, 1090 (9th Cir. 1968). Section 6(j) specifically defines "religious training and belief" as an individual's belief in a relation to a Supreme Being. *See* note 7 *infra.* Petitioner later requested that his original answer to the question be stricken and that the question be left open. Although raised in a religious home, petitioner did not continue childhood religious ties and did not belong to a religious group. Moreover, petitioner was unable to sign the statement, "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form," as printed. Petitioner signed only after carefully striking the words "religious training and." 404 F.2d at 1080.

4. Petitioner held deep conscientious scruples against participating in war; he believed that killing in war was "wrong, unethical, and immoral, and his conscience forbade [his] taking part in such an evil practice." Welsh v. United States, 398 U.S., 333, 337 (1970). In his original application for exemption, he wrote: "I believe that human life is valuable in and of itself; in its living; therefore, I will not injure or kill another human being." *Id.* at 343.

5. Petitioner contended that drawing a distinction between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other was not compatible with the establishment clause.

6. 398 U.S. at 342. This term was synonymous with an individual's political, sociological, or philosophical convictions.

7. As it applied to this case, the statute further stated: "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation but does not include essentially political, sociological, or philosophical views, or a merely personal moral code." Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612.

8. Petitioner's application for exemption was denied because the appeal board of the Selective Service System and the Department of Justice hearing officer "could find no religious basis for the registrant's conscientious objector claim." 404 F.2d at 1082.

9. The court noted, however, that petitioner's beliefs were held with the strength of more traditional religious convictions. 404 F.2d at 1081. There was never any doubt about his sincerity or the depth of his convictions. 398 U.S. at 337.

convictions held with the strength of religious belief. *Welsh v. United States*, 398 U.S. 333 (1970).

Although the courts have not recognized a constitutional right of exemption from military service based upon religious beliefs,[10] Congress traditionally[11] has exempted religious objectors from the draft.[12] It has failed to provide exemptions, however, for persons with ethical, philosophical, or political objections.[13] The Selective Service Act of 1917,[14] for example, extended exemptions only to members of recognized religious sects whose creeds prohibited participation in war.[15] In 1940, Congress mollified the exemption to include individuals who object to participation in war because of "religious training and belief."[16] This broad language left the courts with a free hand to define the word "religious" and thereby determine the scope of the exemption. An intercircuit dialogue subsequently developed between the Second and Ninth Circuits. In *United States v. Kauten*[17] the Second Circuit suggested in dictum[18] that the term "religious" included a man's response to his conscience as well as his response to his god. The Ninth

10. *E.g.*, Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934); United States v. Macintosh, 283 U.S. 605 (1931) (rejecting the contention that exemption for religious conscientious objectors is required by the free exercise clause of the Constitution); George v. United States, 196 F.2d 445 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952). *But see* Freeman, *Exemptions from Civil Responsibilities*, 20 OHIO ST. L.J. 437 (1959).

11. The Draft Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9, exempted conscientious objectors affiliated with established religious organizations whose articles of faith forbade participation in war in any form. For a history of conscientious objector exemptions in the United States see Conklin, *Conscientious Objector Provisions: A View in Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 256-76 (1963); Donnici, *Governmental Encouragement of Religious Ideology: A Study of the Current Conscientious Objector Exemption from Military Service*, 13 J. PUB. L. 16, 25-38 (1964). For a broader historical perspective see W. KELLOGG, THE CONSCIENTIOUS OBJECTOR 2-25 (1919); M. SIBLEY & P. JACOB, CONSCRIPTION OF CONSCIENCE; THE AMERICAN STATE AND THE CONSCIENTIOUS OBJECTOR 1-44 (1952).

12. The right of government to demand universal military service has been upheld over a wide range of objections. *E.g.*, Selective Draft Law Cases, 245 U.S. 366, 390 (1918) (involuntary servitude); *Id.* at 389 (illegal delegation of federal power); *Id.* at 389-90 (establishment of religion). Refusing to submit to induction into the armed forces of the United States is a statutory crime. *See* 50 U.S.C. App. § 462(a) (Supp. IV, 1969).

13. *See* note 11 *supra*.

14. Act of May 18, 1917, ch. 15, 40 Stat. 76.

15. *Id.*, § 4, at 78. These sects were limited to pacifist groups such as the Society of Friends, Church of the Brethren, and the Mennonites. For additional religious pacifist organizations during the First World War, see Note, *The Conscientious Objector Under the Selective Service Act of 1940*, 15 ST. JOHN'S L. REV. 235, 236 n.20 (1941).

16. Selective Training and Serviee Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 889 (1940).

17. 133 F.2d 703 (2d Cir. 1943).

18. *Id.* at 705. The test enunciated in Kauten was dictum because the complainant was not granted an exemption; however, it was followed immediately in United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (2d Cir. 1943).

Circuit, however, held in *Berman v. United States*[19] that the word "religious" was intended to exclude the ethical objector, no matter how strong his convictions, unless his beliefs were based upon some concept of a diety.[20] In 1948 Congress sought to clarify its intent and the scope of the exemption in a new act[21] by defining "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," but excluding "a merely personal moral code."[22] By 1961,[23] the Supreme Court had decided two cases[24] that cast doubt upon the constitutionality of this definition.[25] The Court first held that the legislative power to deny a privilege does not imply a commensurate power to grant that privilege on unconstitutional grounds.[26] Subsequently, the Court held that a statute that discriminates in favor of theistic religions against nontheistic religions or in favor of the religious against the non-religious is unconstitutional.[27] The *Berman* holding was constitutionally inconsistent with these decisions. Nevertheless, the Supreme Court upheld the statutory test and avoided the possible conflict with the establishment clause of the first amendment. The Court in *United States v. Seeger*[28] interpreted the statute to require that a given belief occupy a place in the life of its possessor parallel to that occuped by the Supreme

19. 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

20. "It is our opinion that the expression 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a . . . high moralistic philosophy and one based upon an authority higher and beyond any wordly one." *Id.* at 380.

21. Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 12-13. The report of the Senate Armed Services Committee recommending adoption stated: "This section reenacts substantially the same provisions as were found in the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme Being, is conscientiously opposed to . . . military serviee . . . ." S. REP. No. 1268, 80th Cong., 2d Sess. 14 (1948).

22. This definition is taken from parts of 2 judicial decisions: the first clause of the deflnition is from Justiee Hughes' dissent in United States v. Macintosh, 283 U.S. 605, 633-34 (1931); the restrictive second half is from *Berman*, 156 F.2d at 380.

23. Following the 1948 legislation, the courts of the Second and Ninth Circuits construed the statute in aecord with the *Berman* decision. Etcheverry v. United States, 320 F.2d 873 (9th Cir.), *cert. denied*, 375 U.S. 930 (1963); United States v. Bendik, 220 F.2d 249 (2d Cir. 1955).

24. Torcaso v. Watkins, 367 U.S. 488 (1960); Speiser v. Randall, 357 U.S. 513 (1958).

25. Prior to these cases the constitutionality of the statute had been unsuccessfully challenged. The courts had reasoned that, since exemptions are acts of graee, Congress may limit even by unreasonable conditions those privileges that it may take away completely. George v. United States, 196 F.2d 445 (9th Cir. 1952).

26. Speiser v. Randall, 357 U.S. 513 (1958); *accord*, Sherbert v. Verner, 374 U.S. 398 (1963).

27. Torcaso v. Watkins, 367 U.S. 488 (1961); *accord*, Welsh v. United States, 404 F.2d 1078 (9th Cir. 1968) (dissent) (as against the establishment clause of the first amendment).

28. 380 U.S. 163 (1965). In *Seeger* the Supreme Court ruled that the conscientious objeetor exemption extended to a registrant who characterized his beliefs as "religious" but who did not express a belief in a Supreme Being.

Being in the life of one who clearly qualifies for the exemption.[29] In attempting to distinguish between moral and religious beliefs and at the same time to expand the scope of exemptions, the *Seeger* decision created confusion in the lower courts as to the status of the ethical objector.[30] Moreover, the constitutionality of the statutory exemption remained undecided.[31] In 1967, Congress responded to the *Seeger* decision by deleting the reference to a Supreme Being from the statute.[32]

After declining to address the constitutional issues in the instant case, the Court[33] noted that a Selective Service registrant who denies that his beliefs are "religious" may not be aware of the broad scope of the term "religious" as defined in section 6(j). Finding the *Seeger* definition of "religious" to relate entirely to the role and function of an individual's beliefs, the Court concluded that the petitioner's beliefs qualified as religious under the statute. The Court reasoned that the beliefs could not then be categorized as a "merely personal moral code" regardless of their origins. Following the *Seeger* rationale in considering the relationship of the registrant's belief to his scheme of life, the Court concluded that a registrant is entitled to an exemption as a conscientious objector when his objection to serving in war is based on sincere ethical beliefs held with the strength of religious conviction. The concurring opinion of Justice Harlan renounced the subjective reasoning of the *Seeger* decision.[34] Finding limitation of the exemption to theistic believers to be unconstitutional, Justice Harlan agreed that the Court

29. *Id.* at 166.

30. *See* United States v. Shacter, 293 F. Supp. 1057 (D. Md. 1968) (an attempt to apply the rule to an atheist); Note, *Religious and Conscientious Objection*, 21 STAN. L. REV. 1734 (1969).

31. *See* United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969).

32. Congress amended the statute to read: "As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code." 50 U.S.C. App. § 456(j) (Supp. IV, 1968).

The legislative intent behind the 1967 Act is not clear but there is some evidence of Congressional intent to narrow the effect of *Seeger:*

The Senate conferees . . . concurred in the desire of the House language *to more narrowly* construe the basis for classifying registrants as 'conscientious objectors.' . . .

"The Senate conferees were of the opinion that Congressional intent in this area would be clarified by the inclusion of language indicating that the term 'religious training and belief' as used in this section of the law does not include 'essentially political, sociological, or philosophical views, or a merely personal moral code.' " CONFERENCE REP. NO. 346, 90th Cong., 1st Sess. 1360 (1967) (emphasis added). The House conferees concurred in the Senate recommendation and the amendment was passed.

33. Mr. Justice Black spoke for the majority. He was joined by Justiees Brennan, Douglas, and Marshall. Mr. Justice Harlan wrote a separate concurring opinion. Mr. Justice White, joined by Chief Justice Burger and Mr. Justice Stewart, dissented. Mr. Justice Blackmun took no part in the case.

34. Mr. Justice Harlan joined in the majority opinion in *Seeger*, which he here acknowledges as a "mistake." 398 U.S. at 344.

should extend the coverage of the statute to include those aggrieved by the exclusion rather than to declare it a complete nullity.[35] He argued, however, that the Court should rewrite the statute, by judicial patchwork, so that it would conform with constitutional principles.

The instant decision, in effect, eliminates the distinction between the traditionally religious and non-religious and renders the statutory language denying exemptions on the basis of personal moral codes meaningless. The Court was faced with three alternatives in the disposition of petitioner's interests: (1) to extend the exemption to objectors like the petitioner, (2) to declare the conscientious objector exemption unconstitutional, or (3) to dismiss the petition on the basis of lack of standing and preserve the status quo. The Court's decision to expand the statutory exemption unquestionably embodies the best alternative and the most practical solution, even at the expense of an obviously tortured interpretation of the statutory language. Moreover, this strained interpretation appears justified when compared with the end results of the other alternatives.[36] It is submitted that a balancing of the interests at stake will support the Court's solution. Analyzing the operation of the Selective Service System in the United States today, it is apparent that conscientious objectors are not a major factor in the draft, with only one-half of one percent of all draft-age males classified as conscientious objectors.[37] In addition, Selective Service officials anticipate that the instant decision will not have a substantial impact on the operation of the draft.[38] Thus, the government's interest in raising an

35. Mr. Justice Harlan looked to the history of the legislation and found that the statute clearly expressed an intent to limit the draft exemption to theistic believers, which, in his judgment, violated the establishment clause of the first amendment, and was, therefore, beyond the power of Congress. Since the petitioner would otherwise go remediless, however, Justice Harlan advocated that the Court utilize its presumed grant of power to decide whether it is more nearly in accord with the wishes of Congress to eliminate the statute completely or to render it constitutional. The dissenting opinion of Justice White also found petitioner to be within that class expressly excluded from exemption by the statute. Thus the dissent pointed out that the petitioner lacked standing to raise the constitutional issue, and that, consequently, the conviction should be affirmed.

36. To have avoided a decision on petitioner's claims by finding that he lacked standing to assert them would have left petitioner and those similarly situated with no remedy for a grievance which, in the opinion of the majority, merited relief. In addition, such a disposition of the case would leave section 6(j) practically immune from constitutional attack. To declare the entire conscientious objector exemption unconstitutional would likewise be manifestly unjust to an even larger number of individuals. For the possible ramifications of this latter course, see *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 116 (1965).

37. Selective Service officials state that there are only about 40,000 conscientious objectors out of more than 9,000,000 draft-aged men at the present time. N.Y. Times, June 16, 1970, at 1, col. 8.

38. *Id.*

armed force[39] should not be significantly affected by the broadening of the conscientious objector exemption. More importantly, the interests of the petitioner and others having similar moral and social values worthy of preservation[40] will hereafter be protected. Perhaps the most immediate impact of the instant case has been felt by draft boards. In response to this decision, the National Headquarters for the Selective Service System mailed to all boards new guidelines for conscientious objector classifications.[41] The memorandum instructs the boards that "religious training and belief *as used in law* may include solely moral or ethical beliefs."[42] It also instructs the boards that the primary test to be used is "sincerity."[43] These new guidelines represent a desirable operative effect of the instant case. The decision not only has eliminated the need for religious credentials, which have in the past caused the denial of exemption to deserving applicants, but it also has developed the only honest test for conscientious objection—a sincere and compelling aversion to the taking of another human life. The greatest shortcoming of the decision lies in its failure to take a direct approach to the constitutional issues presented, which not only necessitated the strained interpretation but also raised the issue of whether this decision has effectively removed the substance of a first amendment challenge or merely put it in abeyance. The decision, consequently, has created considerable confusion. The Director of the Selective Service System, Curtis W. Tarr, has complained that the 4,001 local boards charged with the administration of the decision are more confused than ever as to who may qualify for conscientious objector status.[44] Perhaps if Mr. Justice Harlan's suggestion were implemented, a judicially rewritten statute would provide a more intelligible basis for administrative guidelines in the Selective Service System. It is submitted that difficult problems still remain; for example, what is the status of the registrant who objects to a particular war or type of war rather than to all wars? This question is

39. The overriding objective of the Selective Service is "to raise an army speedily and efficiently." Falbo v. United States, 320 U.S. 549, 553 (1944).

40. "A state that preserves its life by a settled policy of violation of the conscience of the individual will in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 COL. UNIV. Q. 254, 269 (1919).

41. Selective Serv. Sys. Local Bd. Memorandum No. 107 (July 6, 1970).

42. *Id.* at 2 (emphasis added).

43. *Id.* The memorandum further provides: "A registrant who is eligible for conscientious objection on the basis of moral, ethical, or religious beliefs is not excluded from the exemption simply because those beliefs may influence his views concerning the nation's domestic or foreign policies." Furthermore, the boards are not free to reject beliefs because they are "incomprehensible."

44. TIME, June 29, 1970, at 40, col. 2; Wall Street Journal, June 19, 1970, at 8, col. 2.

posed in two cases[45] to which certiorari has recently been granted. Hopefully, the Court will take the forthcoming opportunity to clear up the rhetorical cloud now shrouding the concept of conscientious objection.

Taxation—Corporate Distributious—Meaningful Reduction of Sbareholder's Proportionate Interest Required for Section 302(b)(1) Stock Redemptions Regardless of Business Purpose

Taxpayer,[1] an organizer and principal shareholder of a closely held corporation, brought suit for refund of federal income taxes paid under a deficiency assessment. To provide the capital necessary for the corporation to qualify for a loan, taxpayer purchased preferred stock that was to be redeemed at par when the loan was repaid.[2] The taxpayer and his family then became sole owners of the corporation. When the stock was subsequently redeemed, taxpayer claimed he was entitled to capital gains treatment on the proceeds he received because the redemption was not essentially equivalent to a dividend under section 302(b)(1) of the Internal Revenue Code.[3] The Commissioner contended that under the attribution rules of section 318(a),[4] taxpayer was deemed

45. United States v. Gillette, 420 F.2d 298 (2d Cir.), *cert. granted,* 90 S. Ct. 2236 (1970) (No. 1170); Negre v. Larsen, 418 F.2d 908 (9th Cir. 1969), *cert. granted,* 90 S. Ct. 2256 (1970) (No. 1669).

1. All references to "taxpayer" are to Maclin P. Davis. His wife was also a party since joint returns were filed. Taxpayer and another organized the corporation. The other organizer received one-half of the voting stock while taxpayer and his wife each held one-quarter interests.

2. An additional $25,000 working capital was necessary for the corporation to qualify for a Reconstruction Finance Corporation loan. The other organizer, while either unwilling or unable to increase his investment, insisted on retaining 50% of the voting power. Therefore, only 2 methods of providing the necessary capital were considered: (1) preferred stock and (2) subordinated debentures in exchange for a loan. The former was selected since it was more attractive on the corporate balance sheet.

3. INT. REV. CODE of 1954, § 302:

"(a) GENERAL RULE.—If a corporation redeems its stock (within the meaning of § 317(b)), and if paragraph (1), (2), (3), or (4) of subsection (b) applies, such redemption shall be treated as a distribution in part or full payment in exchange for the stock.

"(b) REDEMPTIONS TREATED AS EXCHANGES.—

(1) REDEMPTIONS NOT EQUIVALENT TO DIVIDENDS.—Subsection (a) shall apply if the redemption is not essentially equivalent to a dividend."

4. INT. REV. CODE of 1954, § 318(a):

"(a) GENERAL RULE.—For purposes of those provisions of this subchapter to which the rules contained in this section are expressly made applicable—

to own all the corporation's stock and consequently, the redemption was a pro rata distribution taxable as a dividend under section 301.[5] Taxpayer denied the applicability of the attribution rules to determinations of dividend equivalency under section 302(b)(1)[6] and contended that in any event a pro rata distribution was not essentially equivalent to a dividend when made pursuant to a valid business purpose.[7] The district court[8] held the attribution rules applicable, but sustained the taxpayer's business purpose argument and the Sixth Circuit affirmed.[9] On certiorari to the United States Supreme Court, *held*, reversed. When a corporate distribution in redemption of stock does not result in a meaningful reduction of the shareholder's proportionate interest, it is not essentially equivalent to a dividend under section 302(b)(1). *United States v. Davis*, 397 U.S. 301 (1970).

The Internal Revenue Code provides generally that corporate distributions of property to shareholders are taxable as dividends to the extent of earnings and profits.[10] Exceptions to this general rule are found in section 302, which concerns certain distributions in redemption of stock.[11] Under section 302(a), a distribution in redemption is treated as a

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(1) MEMBERS OF FAMILY.—

(A) IN GENERAL—An individual shall be considered as owning the stock owned, directly or indirectly, by or for—

(i) his spouse (other than a spouse who is legally separated from the individual under a decree of divoree or separate maintenance, and

(ii) his children, grandchildren, and parents."

If applied here at the time of redemption, taxpayer would be considered the constructive owner of all the outstanding stock.

5. INT. REV. CODE of 1954, §§ 301(a), (c) provide that distributions made by a corporation to a stockholder with respect to his stock shall be treated as gross income to the extent they are dividends.

6. Taxpayer argued that the provisions of § 302(c)(1), making the attribution rules applicable to § 302, operate only when the ownership of stock is in issue and not in § 302(b)(1) dividend equivalency determinations, since, unlike the other subdivisions of § 302(b), no mention of stock ownership is made in that subsection. Thus, it was argued that constructive ownership is not properly a part of the factual inquiry into the effect of distributions required by § 302(b)(1).

7. Taxpayer also contended that the return of capital is not "income" within the meaning of the sixteenth amendment and that under the doctrine established in Doyle v. Mitchell Bros., 247 U.S. 179 (1918), the return of capital is not subject to income taxation. Thus, taxpayer argued that since he had received his exact capital contribution on redemption, this was a return of capital not properly includible in income. The Supreme Court did not deal with this argument, which, subsequent to the instant decision, has become the basis for a petition to rehear. Respondents' Petition for Rehearing at I-2, United States v. Davis, 397 U.S. 301 (1970).

8. Davis v. United States, 274 F. Supp. 466 (M.D. Tenn. 1967).

9. Davis v. United States, 408 F.2d 1139 (6th Cir. 1969).

10. INT. REV. CODE of 1954, §§ 301(a), 316(a).

11. Subsection 302(a) sets forth the general rule that certain redemptions enumerated in § 302(b) may properly be characterized as a sale or exchange of such stock entitled to capital gains treatment. Subsections 302(b)(2)-(4) contain objective tests whereby a redemption can gain

payment in exchange for stock and taxed as a capital gain if it comes within one of four categories in part (b). The first category is a redemption "not essentially equivalent to a dividend."[12] This "essentially equivalent" language first appeared in section 201(d) of the Revenue Act of 1921.[13] This provision was an attempt by Congress to eliminate tax avoidance devices[14] that arose following the Supreme Court's ruling in *Eisner v. Macomber*[15] that stock dividends are not taxable as gross income. Subsequent revenue acts retained the equivalency language and broadened its coverage to all redemptive distributions.[16] Since there was no statutory definition of dividend equivalency, courts applying the equivalency test resorted to varying criteria.[17] Initial judicial interpretations limited the effect of the provision to prevention of tax avoidance schemes,[18] and therefore, a legitimate business purpose usually qualified a redemption for capital

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preferred treatment if it is substantially disproportionate, terminates the shareholder's interest, or involves certain railroad stock. Subsection 302(b)(1), involved in the instant case, allows capital gains treatment where "the redemption is not essentially equivalent to a dividend." INT. REV. CODE of 1954, § 302.

12. *See* notes 3, 11 *supra*.

13. "A stock dividend shall not be subject to tax but if after the distribution of any such dividend the corporation proceeds to cancel or redeem its stock at such time and in such manner as to make the distribution and cancellation or redemption *essentially equivalent to the distribution of a taxable dividend*, the amount received in redemption or cancellation of the stock shall be treated as a taxable dividend . . . ." Revenue Act of 1921, ch. 136, § 201(d), 42 Stat. 228, *as amended* INT. REV. CODE OF 1954, § 302(b)(1) (emphasis added).

14. Many corporations developed a practice of declaring tax free stock dividends and subsequently redeeming the dividend stock, allowing the corporation and shareholders to avoid dividend tax treatment. *See generally*, B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 272-76 (2d ed. 1966). When § 201(d) was added to the Revenue Act of 1921, Senator McCumber of the Finance Committee explained that the new section was "for the purpose of preventing the provision relating to the exemption of stock dividends from being used for a fraudulent purpose where the dividend is simply declared and then the stock is taken up or traded back again in some way so that the stockholder will be free from the tax." 61 CONG. REC. 7507 (1921) (remarks of Senator McCumber).

15. 252 U.S. 189 (1920).

16. The Revenue Act of 1924, ch. 234, § 201(f), 43 Stat. 255, made the test applicable to a redemption of shares which preceded a stock dividend. The major change was made by the Revenue Act of 1926, ch. 27, § 201(g), 44 Stat. 11, which required all distributions in redemption to satisfy the equivalency test. This broadened test was included in the Revenue Act of 1932, ch. 209, § 115(g), 47 Stat. 204, and incorporated into the Internal Revenue Code of 1939, ch. 1, § 115(g)(1), 53 Stat. 48 (now INT. REV. CODE OF 1954, § 302(b)(1)). *See* BNA TAX MANAGEMENT MEMORANDUM No. 13, at 4 (June 29, 1970).

17. Factors often utilized by courts in determining dividend equivalency include: (1) bona fide business purpose; (2) whether the action was initiated by the corporation; (3) corporate plan of contraction; (4) corporate profits after the redemption; (5) substantial change in proportionate stock ownership; (6) corporate dividend history; and (7) source of redemption funds. Flanagan v. Helvering, 116 F.2d 937, 939 (D.C. Cir. 1940).

18. *See, e.g.*, Commissioner v. Quackenbos, 78 F.2d 156 (2d Cir. 1935).

treatment.[19] Determination of whether a transaction was motivated by a bona fide business purpose, however, often presented difficult questions of fact.[20] As a result, subsequent judicial emphasis shifted to an analysis of the net effect of a distribution in determining dividend equivalency.[21] In *Commissioner v. Estate of Bedford*,[22] the Supreme Court approved this "net effect" approach, however, in later lower court applications of this test, two competing theories of equivalency developed.[23] Some courts employed a "strict net effect test" that restricted inquiry to whether the redemption had the same net effect as a corporate dividend.[24] Other courts adopted a "flexible net effect test" that continued to permit a bona fide business purpose to rebut an inference of equivalency.[25] As originally proposed, the 1954 Code would have eliminated the confusion surrounding the taxation of redemptive distributions by deleting the "essentially equivalent" language and substituting objective standards that had to be met for capital treatment.[26] When the bill reached the Senate, however, the proposed section was found to be "unnecessarily restrictive"[27] and the dividend equivalency test was reinserted as section

19. *See generally* Mickey & Holden, *Distributions Essentially Equivalent to a Dividend—Understanding the Equation*, 43 N.C.L. REV. 32 (1964). Factors and circumstances generally considered to be bona fide business purposes under the Internal Revenue Code of 1939, ch. 1, § 115(g)(1) (now INT. REV. CODE of 1954, § 302(b)(1)) were: "(1) enabling the business to operate more efficiently as a sole proprietorship or as a partnership; (2) the conduct of part of its business under separate corporate form; (3) enhancement of its credit rating by calling in stock to cancel stockholder indebtedness; (4) resale of stock to junior executives; (5) provision of a profitable investment for an employees' association; (6) adjustment for a legitimate shrinkage of the business following a fire causing a permanent reduction in productive capacity; (7) elimination of unprofitable departments; or (8) contemplation of ultimate liquidation." B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 275-76 (2d ed. 1966), *quoting*, Treusch, *Corporate Distributions and Adjustments: Recent Case Reminders of Some Old Problems Under the New Code*, 32 TAXES 1023, 1037 (1954).

20. *See* Commissioner v. Quackenbos, 78 F.2d 156 (2d Cir. 1935).

21. Flanagan v. Helvering, 116 F.2d 937 (D.C. Cir. 1940) ("net effect" rather than subjective motives and plans is essential criterion of "equivalency").

22. 325 U.S. 283 (1945) (effect, not form, is controlling).

23. *Compare* Kcefe v. Cote, 213 F.2d 651 (1st Cir. 1954) *and* Commissioner v. Sullivan, 210 F.2d 607 (5th Cir. 1954), *with* Boyle v. Commissioner, 187 F.2d 557 (3d Cir. 1951), *cert. denied*, 342 U.S. 817 (1952), *and* Smith v. United States, 121 F.2d 692 (3d Cir. 1941).

24. *See, e.g.*, Boyle v. Commissioner, 187 F.2d 557 (3d Cir. 1951), *cert. denied*, 342 U.S. 817 (1952).

25. *See* Kcefe v. Cote, 213 F.2d 651 (1st Cir. 1954) (essentially pro rata redemption was part of legitimate corporate purpose and therefore not dividend).

26. H.R. REP. NO. 1337, 83d Cong., 2d Sess. 35 (1954). The objective standards in the House bill are now §§ 302(b)(2)-(4) of the Internal Revenue Code of 1954. *See* note 11 *supra*.

27. "While the House bill set forth definite conditions under which stock may be redeemed at capital gain rates, these rules appear unnecessarily restrictive. . . . Accordingly, your committee follows existing law by reinserting the general language indicating that a redemption shall be treated as a distribution in part or full payment in exchange for stock if the redemption is not essentially equivalent to a dividend." S. REP. NO. 1622, 83d Cong., 2d Sess. 44-45 (1954).

302(b)(1). As finally enacted, the statute included both the new objective standards and the equivalency test so that redemptive tax treatment would remain dependent in part upon a factual inquiry.[28] Not surprisingly, the courts[29] continued to disagree over the purpose and scope of the dividend equivalency exception.[30] A number of courts completely disregarded business purpose in determining dividend equivalency,[31] while a majority continued to give varying weight to business motivation.[32]

The 1954 Code contained another new provision that affected determinations of the dividend equivalency of stock redemptions. The House version of the bill included in its original draft the constructive ownership or attribution rules now embodied in section 318(a).[33] By express provision, the rules were made applicable to the proposed section 302(b).[34] The subsequent addition of section 302(b)(1) by the Senate, however, raised the question whether the attribution rules applied to that subseetion.[35] Significantly, the dividend equivalency provision makes no reference to stock ownership.[36] The Commissioner, however, has steadfastly maintained that the attribution rules are applicable in

28. *Id.* at 44.

29. *Compare* Levin v. Commissioner, 385 F.2d 521 (2d Cir. 1967) (business purpose irrelevant), *with* United States v. Fewell, 255 F.2d 496 (5th Cir. 1958) (business purpose may vitiate dividend equivalency).

30. *See* Kerr v. Commissioner, 326 F.2d 225, 230-31 (9th Cir. 1964).

31. *See* Levin v. Commissioner, 385 F.2d 521 (2d Cir. 1967), *noted in* 21 VAND. L. REV. 399 (1968) (business purpose irrelevant in assessing dividend equivalency); Hasbrook v. United States, 343 F.2d 811 (2d Cir. 1965); Kessner v. Commissioner, 248 F.2d 943 (3d Cir. 1957). *Compare* Wiseman v. United States, 371 F.2d 816 (1st Cir. 1967) (business purpose immaterial), *with* Bradbury v. Commissioner, 298 F.2d 111 (1st Cir. 1962) (business purpose insufficient to overcome pro rata distribution), *and* Keefe v. Cote, 213 F.2d 651 (1st Cir. 1954) (essentially pro rata redemption was not equivalent to dividend since part of legitimate corporate purpose).

32. *See, e.g.*, Kerr v. Commissioner, 326 F.2d 225 (9th Cir. 1964); Heman v. Commissioner, 283 F.2d 227 (8th Cir. 1960); United States v. Fewell, 255 F.2d 496 (5th Cir. 1958). Two circuits, while allowing a showing of business purpose, require that the purpose relate to the redemption as opposed to the issuance. *See* Commissioner v. Berenbaum, 369 F.2d 337 (10th Cir. 1966); Ballenger v. United States, 301 F.2d 192 (4th Cir. 1962). A single business purpose standing alone may not dispel equivalency. United States v. Fewell, *supra*. *See also* the Sixth Circuit's opinion in the instant case. Davis v. United States, 408 F.2d 1139 (6th Cir. 1969), *rev'd*, 397 U.S. 301 (1970).

33. *See* note 4 *supra*.

34. The relevant part of the statute provides that the constructive ownership rules of § 318(a) "shall apply in determining the ownership of stock for purposes of this section." INT. REV. CODE of 1954, § 302(c)(1).

35. *See, e.g.*, Cohen, *Redemptions of Stock Under the Internal Revenue Code of 1954*, 103 U. PA. L. REV. 729, 758-59 (1955). The Treasury Regulations initially made the application of the attribution rules to § 302(b)(1) mandatory, but they now provide only that the rules should be considered. Treas. Reg. § 1.302-2(b) (1955).

36. *See* note 3 *supra*.

determining whether a distribution is pro rata under section 302(b)(1),[37] and most courts have agreed.[38] A few courts and the leading commentators have adopted the position that the rules should be applied only when a significant community of interest between the shareholders or the shareholder and the entity dictates.[39]

In the instant case, the Court ruled that the plain language of the statute required application of the attribution rules[40] to dividend equivalency determinations under section 302(b)(1),[41] making the taxpayer the sole shareholder both before and after the distribution. Turning next to the taxpayer's contention that dividend equivalency otherwise established might be vitiated by a bona fide business purpose, the Court examined the legislative and judicial history of section 302(b)(1). Noting that the intended scope of the section was not free from doubt, the Court, nevertheless, concluded that Congress in enacting the section had rejected past court decisions that considered the motive of a redemption relevant to the question of proper tax treatment. The Court found instead that Congress had intended to limit the inquiry solely to whether the transaction could be characterized as a sale.[42] The

37. Treas. Reg. § 1.302-2(b) (1955). This determination takes on added significance in closely held corporations since the fundamental test of dividend equivalency is whether the distribution is pro rata or disproportionate to stock ownership. *See* Treas. Reg. § 1.302-2(b) (1955); B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 291 (2d ed. 1966); S. REP. No. 1622, 83d Cong., 2d Sess. 49 (1954).

38. *See* Levin v. Commissioner, 385 F.2d 521, 526-27 (2d Cir. 1967); Commissioner v. Berenbaum, 369 F.2d 337, 342 (10th Cir. 1966); Ballenger v. United States, 301 F.2d 192, 199 (4th Cir. 1962); Bradbury v. Commissioner, 298 F.2d 111, 116-17 (1st Cir. 1962); Thomas G. Lewis, 35 T.C. 71 (1960). The leading commentators have also determined that the attribution rules generally apply to § 302(b)(1). *See* B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND STOCKHOLDERS 292 n.32 (2d ed. 1966). *Compare* Bradbury v. Commissioner, 298 F.2d 111 (1st Cir. 1962) (applied attribution rules to find shareholder's position did not change significantly), *with* Keefe v. Cote, 213 F.2d 651 (1st Cir. 1954) (essentially pro rata redemption was not equivalent to dividend due to overriding business purpose).

39. *See* Ballenger v. United States, 301 F.2d 192, 199 (4th Cir. 1962); Perry S. Lewis, 47 T.C. 129 (1966) (ignored attribution rules and found no equivalency); Estate of Arthur H. Squier, 35 T.C. 950 (1961) (family estrangement precluded equivalency); B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 272-74 (2d ed. 1966); Bittker, *The Taxation of Stock Redemptions and Partial Liquidations*, 44 CORNELL L.Q. 299 (1959).

40. *See* note 4 *supra*.

41. The Court reasoned that nothing in the history or purpose of § 302(b)(1) showed an intent to limit the express language of § 302(c) making § 318(a) applicable to § 302. The Court further noted that unless § 318(a) was applied to all of § 302, a taxpayer who failed to qualify under § 302(b)(2) or § 302(b)(3) solely because of attribution rules might qualify under § 302(b)(I) because the redemption would not be pro rata. 397 U.S. at 306-07.

42. "In lieu of the approach in the House bill, your committee intends to revert in part to existing law by making the determination of whether a redemption is taxable as a sale at capital gains rates or as a dividend at ordinary income rates dependent, except where it is specifically provided otherwise, upon a *factual inquiry* . . . . The test intended to be incorporated in the

Court therefore held that since only a meaningful reduction of the shareholder's proportionate interest in the corporation could qualify a redemption for capital treatment under section 302(b)(1), the purpose of the transaction was irrelevant to a determination of dividend equivalency. Since the distribution in the instant case was clearly pro rata, the Court concluded that the redemption of taxpayer's stock was taxable at ordinary rates. The dissent[43] contended that a distribution motivated by a legitimate business purpose belied a dividend and concluded that the majority holding effectively eliminates section 302(b)(1) from the Code.[44]

While the Court in the instant case resolved the conflict over the tax treatment to be given redemptive distributions that do not meet the objective requirements of sections 302(b)(2), (3), and (4), the restrictive test adopted hardly promotes clarity in corporate financial planning. The decision discriminates unnecessarily against closely held or family corporations and will probably substantially deter capital investments in such corporations. The "meaningful reduction" requirement, in effect, eliminates section 302(b)(1) capital treatment for redemptions by these corporations and severely narrows the section's availability for any corporate redemption, whether pro rata or non-pro rata. Since the focus now is on the taxpayer's relative position before and after the transaction rather than on what motivated the redemption, the closely held or family corporation is denied utilization of the section by the automatic application of the attribution rules. Moreover, to qualify for capital gains treatment all redemptions must satisfy the "meaningful reduction" requirement established, but not defined, by the instant decision. The availability of section 302(b)(1) is thereby limited to those substantial redemptions that will not satisfy the control test required under section 302(b)(2). Even in these cases, the section will not apply if the attribution rules make the distribution pro rata. Furthermore, since a valid business purpose will no longer assure shareholders of capital treatment for corporate redemptions, the instant decision will affect business tax planning in two additional ways. First, it has the indirect effect of encouraging the taxpayer to satisfy capital requirements with

interpretation of . . . [paragraph (1)] is in general that currently employed under section 115(g)(1) of the 1939 Code. Your committee further intends that *in applying this test* for the future that *the inquiry will be devoted solely to the question of whether or not the transaction by its nature may properly be characterized as a sale* of stock by the redeeming shareholder to the corporation." S. REP. No. 1622, 83d Cong., 2d Sess. 45 (1954) (emphasis added).

43. 397 U.S. at 314 (Burger, C.J., Douglas & Brennan, JJ., dissenting).

44. The dissent asserted that such revision should be left to Congress. *Id.*

debt, as opposed to equity, instruments[45] in order to prevent income tax treatment on the return of essentially capital investments. Secondly, possible future extension of the Court's rationale deters utilization of sections 346(a)(2)[46] and 356(a)(2)[47] of the Code, both of which contain the same "essentially equivalent" language found in section 302(b)(1). It is submitted that the Court elevated form over substance[48] by concluding that business purpose is irrelevant in dividend equivalency determinations under section 302(b)(1). The taxpayer in the instant case would undoubtedly have been entitled to capital treatment if the redemption had occurred before his family obtained control or if he had sold the stock to a third party and the corporation had redeemed it from that source. Dividend equivalency should be determined by a careful analysis of the entire transaction. Section 302(b)(1) and its predecessors were designed to eliminate tax avoidance schemes by permitting factual inquiry into whether a given redemption could properly be characterized as a sale.[49] This inquiry should not be precluded simply because the redemption is pro rata or less than substantial, for the transaction may bear all the indicia of a true sale.[50] In addition, since the applicability of the constructive ownership rules of section 318(a) to dividend equivalency determinations under section 302(b)(1) is questionable,[51] there should not be an automatic application of the attribution rules to distributions in closely held corporations. A more desirable approach would be to apply the attribution rules only where a sufficient community of interest in the questioned transaction dictated,[52] such as where a husband or father actually controlled his family's investments or

45. It has been suggested that in the future preferred stock itself might qualify as a debt instrument under the factors set forth in § 385(b), which was added to the Code by the Tax Reform Act of 1969, Pub. L. No. 91-172, § 415(a), 68A Stat. 72, *amending* INT. REV. CODE of 1954 (codified as INT. REV. CODE of 1954, § 385(b)). This provision may very well become a principal focal point for such determinations in the wake of the instant case. *See* BNA TAX MANAGEMENT MEMORANDUM No. 13, at 14 (June 29, 1970).

46. INT. REV. CODE of 1954, § 346(a)(2) (relating to partial liquidations).

47. *Id.* § 356(a)(2) (dealing with boot in certain reorganizations).

48. Traditionally, courts have sought to avoid rigid acceptance of the form a given transaction took and instead scrutinized the entire transaction to determine its substance for purposes of determining the tax treatment to which it was entitled. "[S]ubstance and not form should control in the application of tax laws . . . . Tax laws deal with realities and look at the entire transaction . . . ." Helvering v. Gordon, 87 F.2d 663, 666 (8th Cir. 1937).

49. *See* notes 27, 42 *supra.*

50. *See* B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 291-94 (2d ed. 1966). *See also* Bradbury v. Commissioner, 298 F.2d 111, 114 (1st Cir. 1962).

51. *See* note 35 *supra* and accompanying text.

52. 21 VAND. L. REV. 399, 406 (1968).

where the taxpayer is truly a constructive owner of another person's stock. Thus, a more detailed "factual inquiry" to determine dividend equivalency than the mere search for a meaningful reduction required by the instant case appears necessary to effectuate the purpose of section 302(b)(1) and its predecessors of preventing tax avoidance. Such examinations would prevent abuse of corporate redemptions while allowing capital treatment for those motivated by a demonstrable nontax avoidance purpose.

Torts—Unfair Competition—Material Misrepresentations Enjoined in Suit of Advertiser's Only Competitor Despite Absence of Trademark Infringement, Passing Off, or Product Disparagement

Plaintiff, Electronic Corporation of America, sought to temporarily enjoin the defendant, its primary competitor in the manufacture of safety control systems,[1] from distributing advertising brochures that allegedly contained numerous misrepresentations.[2] Plaintiff contended that the misrepresentations were actionable because customers who had normally purchased its product were now buying from the defendant as a result of the false and misleading statements.[3] In refusing to grant injunctive relief, the district court held that, despite the presence of some misleading statements,[4] the plaintiff had no cause of

1. Plaintiff is a highly successful producer and supplier of a Fireye control system principally consisting of an electronic programmer. Plaintiff's system provides an easy replacement procedure that enables consumers to merely replace the programmer rather than install a whole new system. Defendant reconstructed its own programmer so that it could be installed in plaintiff's system, thus permitting defendant to compete in the replacement field. Defendant then proceeded with an advertising campaign promoting the quality of its product. The statements to which plaintiff objects were made in this campaign.

2. Defendant's brochure stated that the replacement procedure using defendant's product was "an easy job . . . . No electrician required." Plaintiff contended that actually the replacement procedure using defendant's product was difficult and required specially trained servicemen. The brochure also announced that defendant's product was "[s]mall and relatively inexpensive, yet [gave] full programming, . . . and many other features found only on much more expensive controllers." Plaintiff contended that its product possessed all of these features and was less expensive. *See* note 14 *infra*.

3. Plaintiff also complained of "the entire substance of defendant's activities." The court did not consider this complaint except to hold that defendant's device could be marketed as a replacement for plaintiff's control system. The court did not reach plaintiff's contention that defendant's advertising violated § 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a) (1964), which holds a false advertiser liable to a civil action by "any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

4. The trial court found that the statement that "[n]o electrician [was] required for

action without a showing of trademark infringement, passing off,[5] or express disparagement of plaintiff's product.[6] On appeal to the Court of Appeals for the First Circuit, *held,* reversed and remanded. Material misrepresentations made by a competitor in a two-firm market may be enjoined when injury to the plaintiff is ascertainable, despite the absence of trademark infringement, passing off, or product disparagement. *Electronic Corp. of America v. Honeywell, Inc.,* 428 F.2d 191 (1st Cir. 1970).

Although at common law the right of a consumer to sue for misrepresentation has long been recognized, the courts have been reluctant to afford any protection to a businessman against a competitor's false advertising.[7] Traditionally, an aggrieved competitor has been granted a right of action only when there has been trademark infringement, passing off, or product disparagement.[8] The basis for this doctrine was developed in *American Washboard Co. v. Saginaw Manufacturing Co.*,[9] in which the Sixth Circuit held that a competitor does not have a private right of action unless he can show more definite damage resulting from an invasion of his property right than a possible decrease in future sales revenue. Moreover, the court reasoned that to allow such an action by a competitor who has suffered no definite injury would result in overburdening the courts with suits by many other competitors.[10] Subsequently, an exception to this traditional rule was established. In *Ely-Norris Safe Co. v. Mosler Safe Co.*,[11] the Second Circuit held that the sole manufacturer of an item that is falsely claimed to be offered for sale by another has standing to sue the deceptive advertiser. The court ruled that the traditional restrictions on a competitor's legal actions depend on his inability to show injury and

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replacement of old programmers" was misleading and irresponsible. The court held that the other alleged false statements were directed to the general field of programmers, rather than to plaintiff's product; consequently, they did not constitute false advertising.

5. "Passing off" is a term used to describe the act whereby a producer induces a buyer to purchase his product by falsely advertising it as having been manufactured by someone else.

6. Electronic Corp. of America v. Honeywell, Inc., 303 F. Supp. 1220 (D. Mass. 1969).

7. *See* 1 R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 18.1 (3d ed. 1967); Grismore, *Are Unfair Methods of Competition Actionable at the Suit of a Competitor?,* 33 MICH. L. REV. 321 (1935); *Developments in the Law—Competitive Torts,* 77 HARV. L. REV. 888, 905-07 (1964).

8. *E.g.,* Brown Chem. Co. v. Meyer, 139 U.S. 540 (1891) (trademark infringement); American Washhoard Co. v. Saginaw Mfg. Co., 103 F. 281 (6th Cir. 1900) (passing off); H.E. Allen Mfg. Co. v. Smith, 224 App. Div. 187, 229 N.Y.S. 692 (1928) (disparagement). *See Developments in the Law—Deceptive Advertising,* 80 HARV. L. REV. 1005, 1017-18 (1967).

9. 103 F. 281 (6th Cir. 1900).

10. *Id.* at 286.

11. 7 F.2d 603 (2d Cir. 1925), *rev'd on other grounds,* 273 U.S. 132 (1927).

should not apply where a plaintiff is in a monopoly position because injury in such cases is ascertainable. Other courts have since adopted this rationale and also have held the doctrine in *American Washboard* inapplicable when a plaintiff has a virtual monopoly.[12] Although these traditional limitations on competitors' actions have been continually criticized by legal scholars,[13] and completely rejected by both drafts of the *Restatement of Torts*,[14] no court has overruled them.[15] In response to the hardships caused by these narrow restrictions, federal legislation was enacted to police unfair competition practices.[16] It was thought[17] that section 43(a) of the Lanham Trademark Act of 1946 would alleviate the injustices and hardships often caused by these traditional limitations.[18] Interpretation of this section, however, has not been uniform, and the courts have been divided on whether the common-law rules govern the section's application.[19] Consequently, the traditional limitations have remained effectual,[20] preventing recovery for false advertising unless

12. *E.g.*, Champion Spark Plug Co. v. Sanders, 331 U.S. 125 (1947); Motor Improvements, Inc. v. A.C. Spark Plug Co., 80 F.2d 385 (6th Cir.), *cert. denied*, 298 U.S. 671 (1936).

13. *See, e.g.*, Callmann, *False Advertising as a Competitive Tort*, 48 COLUM. L. REV. 876 (1948); Grismore, *supra* note 7; Handler, *False and Misleading Advertising*, 39 YALE L.J. 22 (1929).

14. RESTATEMENT OF TORTS § 761 (1939): "One who diverts trade from a competitor by fraudulently representing that the goods which he markets have ingredients or qualities which in fact they do not have but which the goods of the competitor do have is liable to the competitor for the harm so caused . . . ." RESTATEMENT (SECOND) OF TORTS § 712 (Tent. Draft No. 8, 1963), breaks even farther from the traditional doctrines by eliminating the requirement that the plaintiff's product have the quality which the defendant falsely claims.

15. *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 907 (1964).

16. Lanham Trademark Act § 43(a), 15 U.S.C. § 1125(a) (1964). *See* note 18 *infra*.

17. For an excellent discussion of the legislative background and purpose of the Lanham Act see Derenberg, *Federal Unfair Competition Law at the End of the First Decade of the Lanham Act: Prologue or Epilogue?*, 32 N.Y.U.L. REV. 1029 (1957).

18. Section 43(a) holds any person who falsely describes or represents goods or services to be entered into commerce liable to a civil action by any other person who believes that he is "likely to be damaged by the use of any such false description or representation." 15 U.S.C. § 1125(a) (1964). From this it appeared that actual false description or misrepresentation with regard to defendant's own goods would be actionable under federal law without the necessary showing of trademark infringement or passing off.

19. Some courts have held that the Act was intended to apply primarily to trademark infringement and to codify the existing law requiring the traditional limitations on a competitor's actions. *E.g.*, Chamberlain v. Columbia Pictures Corp., 186 F.2d 923 (9th Cir. 1951) (using name of Mark Twain not disparaging or passing off); Samson Crame Co. v. Union Nat'l Sales, Inc., 87 F. Supp. 218 (D. Mass. 1949), *aff'd per curiam*, 180 F.2d 896 (1st Cir. 1950) (defendant misrepresents his store as being operated by unions). Other courts, adopting a more liberal approach, have held that the traditional limitations are not applicable to § 43. *E.g.*, L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649 (3d Cir. 1954) (defendant using photos of plaintiff's goods to advertise his goods); Norwich Pharmacal Co. v. Hoffmann-LaRoache, Inc., 180 F. Supp. 222 (D.N.J. 1960) (defendant advertising his goods as originating in a nonexistent specified laboratory).

20. The traditional rule has been modified slightly by a few cases in which truthful users of

there has been trademark infringement, passing off, or product disparagement, or unless the plaintiff has a monopoly of the product involved.[21]

In the instant case the court found that the defendant's advertising brochure contained numerous misrepresentations that could have detrimental effects on the defendant's competitors.[22] The court emphasized that the effect of these misrepresentations could be properly assessed only by analyzing the nature of the market in question. Noting that the instant market was essentially a two-firm market comprised of the plaintiff and the defendant, the court reasoned that since the buyers in this market had the sole alternative of buying either plaintiff's or defendant's product, there was an ascertainable loss of revenue by the plaintiff resulting from the defendant's false advertising. Recognizing that the traditional limitations were premised on the inability of the aggrieved competitor to show injury, the court concluded that they were not applicable and injunctive relief was appropriate.[23]

The instant decision represents a slight, but encouraging, break from the reluctance of courts to protect a business from the false advertising of its competitor. By granting relief to a plaintiff who competes in a two-firm market, the court has expanded the monopoly exception. This extension is minimal, however, because actions for false advertising in a two-firm market are similar to those in a monopoly market. In each case, there are two parties and damages are similarly ascertained. Nevertheless, the court's statement that plaintiff has a cause of action where its injury is ascertainable could be interpreted to broaden the application of its holding. Although a single business in a market with many competitors probably cannot show the damage caused by a competitor's false advertising, several injured businesses, bringing suit

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commercially valuable, geographic terms have been entitled to enjoin persons who used those terms deceptively. *E.g.*, Pillsbury-Washburn Flour Mills Co. v. Eagle, 86 F. 608 (7th Cir. 1898), *cert. denied*, 173 U.S. 703 (1899) (all flour millers of Minneapolis had standing against a Chicago wholesale and retail grocer).

21. *See, e.g.*, California Apparel Creators v. Wieder, Inc., 162 F.2d 893 (2d Cir.), *cert. denied*, 332 U.S. 816 (1947) (proof of actual diversion of the trade required); Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 302 (N.D. Ill. 1965) (no injunction since many other producers in the field); Show Management v. Hearst Publishing Co., 196 Cal. App. 2d 606, 16 Cal. Rptr. 731 (1961) (false statements regarding character of defendant's own show not enjoined).

22. The court took notice of the faet that the defendant, after litigation commenced, withdrew the original brochure and substituted "Minimal electrieal changes required" for the disputed language: "No electrician required." The court found, however, that an order was still required sinee nothing had been done about the invalid price comparisons.

23. In addition to augmenting the monopoly exception to include any 2-firm market in which false advertising would directly injure a competitor, the court abrogated the traditional requirement that plaintiff's goods must have the qualities of which the defendant boasts. *See* note 14 *supra*.

as a class under new Rule 23 of the Federal Rules of Civil Procedure, could present persuasive evidence that their interests as a whole were being injured by a competitor's false advertising. In such a case, a court could grant injunctive relief by following the rationale of the instant court. Problems with this approach may arise, however, in determining the number of injured competitors sufficient to constitute a class.[24]

Although the instant court's decision may subsequently be broadened by judicial interpretation, it is unfortunate that the court did not take this opportunity to emasculate the traditional limitations on competitors' actions. The court could have done this by deciding the case on one of two grounds. First, the court could have molded the facts to bring the case within the traditional doctrines. Although the court held that there was no express disparagement, it could have reasoned that plaintiff's product was actually disparaged since the invalid price comparison caused by defendant's misrepresentations resulted in plaintiff's product becoming less appealing to the buying public. Thus, according to the traditional rule, the plaintiff would have had a cause of action despite the nature of the market. Direct extension of this interpretation would give all competitors whose products have been made less appealing by false advertising a right of action against the advertiser. Secondly, the court could have granted injunctive relief on the basis of section 43(a) of the Lanham Trademark Act.[25] The plaintiff's claim seemed to fall clearly within the statutory language "likely to be damaged."[26] Precedents exist[27] that support this interpretation, and the legislative history[28] of the Act manifests a congressional intent to curb fraudulent competitive practices of the type in question. It is submitted that the foregoing interpretations should be adopted because the increasing impact of advertising on today's markets demonstrates the urgent need for a more comprehensive right of action for false advertising. Although the instant court failed to take these important steps, the small stride it did take gives some encouragement that the hardships of the traditional rules will someday no longer plague the injured competitor.

24. It has been held that as long as the group is substantial, a class action may be brought. Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966). "Substantial" would probably be determined by what percentage of the competitors in the particular market are seeking relief.

25. 15 U.S.C. § 1125(a) (1964).

26. *See* note 18 *supra.*

27. *See* note 19 *supra.*

28. *See* note 17 *supra.*