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RECENT CASES

Constitutional Law—Obscenity—Materials May Be Obscene for Minors without Being Obscene for Adults

Defendant Ginsberg was found guilty of violating section 484-h of the NEW YORK PENAL LAW, which prohibits the sale to minors under seventeen years of age of material defined to be obscene on the basis of its appeal to them, whether or not it would be obscene to adults.¹ Defendant contended that section 484-h was unconstitutional on the ground that the scope of constitutional freedom of expression secured to a citizen to read or see material concerned with sex may not be made to depend upon whether the citizen is an adult or a minor.² The Nassau County District Court judgment was affirmed without opinion by the Appellate Term of the New York Supreme Court, and leave to appeal to the New York Court of Appeals was denied. On appeal to the United States Supreme Court, held, *affirmed*. A statute prohibiting the sale to minors under seventeen of material defined to be obscene on the basis of its appeal to minors without regard for whether the material would be obscene to adults is a valid and reasonable regulation of obscenity.³ *Ginsberg v. New York*, 390 U.S. 629 (1968).

1. Section 484-h of the N.Y. PENAL LAW reads in pertinent part:

"1. Definitions. As used in this section: (a) "Minor" means any person under the age of seventeen years. . . . (f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors. . . ."

"2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor: (a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or (b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors." NEW YORK PENAL LAW § 484-h, now §§ 235.20 to -22 of N.Y. PEN. LAW (McKinney ed. 1967).

2. *Ginsberg v. New York*, 390 U.S. 629, 636 (1968). The defendant also contended that section 484-h was unconstitutional, because (1) the denial to minors under seventeen of access to material condemned by section 484-h, insofar as that material is not obscene for persons seventeen years or older, is an unconstitutional deprivation of protected liberties, and (2) section 484-h is void for vagueness. *Id.* at 637, 643.

3. The Supreme Court also held that section 484-h was not an invasion of a minor's constitutionally protected rights, nor was section 484-h void for vagueness. *Id.*

The constitutionality of an obscenity statute was first expressly determined by the Supreme Court in 1948 in *Doubleday & Co. v. New York*,⁴ which affirmed, by an equally divided Court, a New York Court of Appeals decision⁵ that had declared the New York statute unconstitutional on the ground of vagueness.⁶ In 1957, however, the Court held in *Roth v. United States* and *Alberts v. California*⁷ that sufficiently explicit drafting of an obscenity statute could immunize it from constitutional attack.⁸ The test for judging obscenity laid down by Mr. Justice Brennan⁹ was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."¹⁰ This has remained the most important test of obscenity.¹¹ In three separate opinions, Chief Justice Warren and Justices Harlan, Black, and Douglas announced differing views on the definition of obscenity and the constitutionality of obscenity statutes to which they all still substantially adhere.¹² Chief Justice Warren maintained that since the conduct of the defendant is the central issue, allegedly obscene materials should be considered in the context from which they draw

4. 335 U.S. 848 (1948). Prior to the *Doubleday* case, "dicta had referred to governmental regulation of obscenity as valid, and in 1942 dicta declaring obscenity an area of unprotected speech began to appear." 36 TEX. L. REV. 226, 227 (1957) (footnote omitted).

5. *People v. Doubleday & Co.*, 297 N.Y. 687, 77 N.E. 2d 6 (1947).

6. At this time the doctrine as applied to statutes which infringed first amendment guarantees seemed to be: "Any statute authorizing governmental interference (whether by 'prior restraint' or punishment) with free speech or free press runs counter to the First Amendment, except when the government can show that the statute strikes at words which are likely to incite to a breach of the peace, or with sufficient probability tend either to the overthrow of the government by illegal means or to some other overt anti-social conduct." *United States v. Roth*, 237 F.2d 796, 802 (2d Cir. 1956) (Frank, J., concurring) (footnotes omitted).

7. 354 U.S. 476 (1957). The *Roth* and *Alberts* cases were combined for hearing. See *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 226 (1957).

8. *Roth v. United States*, 354 U.S. 476, 481 (1957). Earlier in 1957, in *Butler v. Michigan*, 352 U.S. 380 (1957), the Supreme Court had unanimously declared an obscenity statute unconstitutional on the ground that the statute was not reasonably restricted to the evil with which it purported to deal. *Id.* at 383.

9. Justice Brennan was joined by Justices Burton, Frankfurter, Clark and Whittaker.

10. *Roth v. United States*, 354 U.S. 476, 489 (1957).

11. See *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

12. Compare *Roth v. United States*, 354 U.S. 476, 494 (1957) (Warren, C.J., concurring) and *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (Warren, C.J., dissenting), with *Ginzburg v. United States*, 383 U.S. 463 (1966), and *Mishkin v. New York*, 383 U.S. 502 (1966). Compare *Roth v. United States*, 354 U.S. 476, 496 (1957) (opinion of Harlan, J.), with *Memoirs v. Massachusetts*, 383 U.S. 413, 455 (1966). Compare *Roth v. United States*, 354 U.S. 476, 508 (1957) (Douglas, J., dissenting), with *Ginzburg v. New York*, 383 U.S. 463, 482 (1966) (same). Compare *Roth v. United States*, 354 U.S. 476, 508 (1957) (Douglas, J., dissenting), with *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Black, J., concurring).

color and character.¹³ Mr. Justice Harlan argued that the permissible scope of state obscenity statutes should be broader than the permissible scope of federal obscenity statutes.¹⁴ The Court, he said, when reviewing state obscenity cases, should inquire only "whether the state action so subverts the fundamental liberties implicit in the due process clause that it cannot be sustained as a rational exercise of power."¹⁵ As to the permissible scope of federal obscenity statutes, Justice Harlan said that they should not be construed to reach more than "hard-core" pornography.¹⁶ Justices Black and Douglas, on the other hand, dissented on the ground that "[f]reedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it."¹⁷

In 1958, the Court reversed without opinion four court of appeals decisions upholding obscenity censorship.¹⁸ Although the basis of these per curiam decisions was not elaborated, it would seem that the Court intended to apply the first amendment "to confine obscenity censorship within very narrow limits indeed."¹⁹ In the following year, in *Smith v. California*,²⁰ the Court confined obscenity convictions within even narrower limits by applying the element of *scienter* to criminal obscenity convictions.²¹ Then, in 1962 and 1964, decisions

13. *Roth v. United States*, 354 U.S. 494-95 (1957) (concurring opinion). Warren said that he would affirm the convictions because the defendants were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient appeal. *Id.* at 495-96. In addition, the Chief Justice said: "Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached." *Id.* at 495.

14. *Id.* at 503. Justice Harlan's opinion stems from his refusal to adopt the "incorporation theory" of the fourteenth amendment.

15. *Id.* at 501.

16. *Id.* at 507. Justice Harlan also said that he did not see how the Court could resolve the constitutional problems of obscenity without making an independent judgment on the character of the material upon which the convictions were based. 354 U.S. at 497-98.

17. *Id.* at 514.

18. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *One, Inc. v. Olesen*, 355 U.S. 371 (1958); *Mounce v. United States*, 355 U.S. 180 (1958); *Times Film Corp. v. Chicago*, 355 U.S. 35 (1958).

19. Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 35 (1960). See also *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959), in which the Court unanimously, but in no less than six opinions, held a New York obscenity statute unconstitutional.

20. 361 U.S. 147 (1959); see *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 126 (1960).

21. *Id.* at 153. The Court declared the Los Angeles ordinance unconstitutional because it eliminated all mental elements from the crime and thus tended seriously to restrict the dissemination of books that are not obscene. See also Lockhart and McClure, *supra* note 19, at 46.

in two additional cases, *Manual Enterprises v. Day*²² and *Jacobellis v. Ohio*,²³ gave the opportunity for further exposition of the Justices' positions, although no opinion was joined by a majority.²⁴ These varied positions were clarified somewhat by three decisions handed down in 1966. In *Ginzburg v. United States*²⁵ the majority opinion²⁶ added to the *Roth* test a "pandering" element under which materials could be found obscene because of the context in which they were disseminated.²⁷ In *Mishkin v. New York*,²⁸ the majority of the Court²⁹ said that when material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole

22. 370 U.S. 478 (1962); see 16 VAND. L. REV. 251 (1962).

23. 378 U.S. 184 (1964); see Meara and Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME L. REV. 1 (1964).

24. It is clear from these decisions that: (1) Justices Harlan, Stewart, Brennan and Goldberg advocated the use of a national standard of decency in judging federal obscenity cases. *Jacobellis v. Ohio*, 378 U.S. 184, 192-95 (1964); *Manual Enterprises v. Day*, 370 U.S. 478, 488 (1962); (2) Justices Brennan and Goldberg advocated the use of a national standard of decency in all obscenity cases. *Jacobellis v. Ohio*, 378 U.S. 184, 192-95 (1964); (3) Chief Justice Warren and Justice Clark advocated a community standard of decency, rather than a national standard. *Id.* at 200; (4) Justice Stewart would limit state and federal criminal obscenity laws to "hard-core" pornography. *Id.* at 197; (5) Justice Clark would declare obscene materials containing information as to where obscene material may be obtained. *Manual Enterprises v. Day*, 370 U.S. 478, 520 (1962); (6) Justices Brennan and Goldberg, and possibly a majority of the Court, would hold that material dealing with sex in a manner that "advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection." *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964); see also, *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959); *Lockhart and McClure, supra* note 19, at 39; and (7) Justices Brennan and Goldberg, and possibly a majority of the Court, would hold that obscenity is excluded from constitutional protection only when it is completely without redeeming social importance, and that the constitutional status of material cannot be made to turn on a weighing of its social importance against its prurient appeal. *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964); *Roth v. United States*, 354 U.S. 476, 484 (1957). See also *Grove Press v. Gerstein*, 378 U.S. 577 (1964); *Tralins v. Gerstein*, 378 U.S. 576 (1964).

25. 383 U.S. 463 (1966). See also 44 TEX. L. REV. 1382 (1966).

26. The majority was composed of Chief Justice Warren and Justices Brennan, Clark, Fortas and White.

27. *Ginzburg v. United States*, 383 U.S. 463, 470 (1966). The majority said that where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. *Id.* The majority obviously followed the concurring opinion of Chief Justice Warren in *Roth* and his dissenting opinion in *Kingsley Books*. See *Roth v. United States*, 354 U.S. 476, 494 (1957) (concurring opinion); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (dissenting opinion).

28. 383 U.S. 502 (1966); see *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 186 (1966).

29. The majority was composed of Chief Justice Warren, and Justices Brennan, Clark, Fortas and White.

appeals to the prurient interest in sex of the members of that group.³⁰ And in *Memoirs v. Massachusetts*,³¹ Justice Brennan, joined by Chief Justice Warren and Justice Fortas, reaffirmed the validity of the *Roth* test and held that a determination of obscenity could stand only when three elements coalesce: (1) the dominant theme of the material must appeal to a prurient interest in sex; (2) the material must be patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material must be utterly lacking in redeeming social importance.³² Justice Brennan added that each of these elements must be satisfied independently, although the circumstances of production and dissemination may be decisive when the material has only slight social value.³³ Finally, in 1967, the Supreme Court, refusing to find the materials involved obscene, handed down a number of per curiam decisions³⁴ which tended to establish realistic guidelines for the application of the *Roth*, *Ginzburg* and *Mishkin* cases by providing numerous concrete examples of nonobscene materials.³⁵

In the instant case, the Court, by Justice Brennan,³⁶ recognized that the "girlie" magazines sold by the defendant were not obscene for adults; but held that they could be proscribed by the states as obscene for minors, even when there is an invasion of protected freedoms.³⁷ Reasoning that constitutional decisions have consistently recognized parents' claims to authority in the rearing of their children as basic in our society, the Court concluded that legislatures could properly determine that those primarily responsible for children's well-being are entitled to the support of laws designed to aid in the discharge of that responsibility.³⁸ In addition, the Court noted

30. *Mishkin v. New York*, 383 U.S. 502, 508 (1966). This clearly overrules the decisions, adhered to by Justices Brennan, Harlan, Stewart and Goldberg in *Jacobellis v. Ohio*, 378 U.S. 184, 192-95 (1964), and *Manual Enterprises v. Day*, 370 U.S. 478, 488 (1962), in which a national standard of decency was espoused.

31. 383 U.S. 413 (1966); see *The Supreme Court, 1965 Term, supra* note 28 at 186; 44 *Tex. L. Rev.* 1382 (1966).

32. *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

33. *Id.* at 420.

34. See, e.g., *Central Magazine Sales v. United States*, 389 U.S. 50 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Aday v. United States*, 388 U.S. 447 (1967).

35. In these cases, the Supreme Court held that books, such as *Orgy Club* and *Sex Life of a Cop*, and magazines, such as *Exclusive* (a collection of nude women), *Revue International* (a collection of nude men), and *International Nudist Sun* (same), were not obscene. *Central Magazine Sales v. United States*, 389 U.S. 50, *rev'g* 373 F.2d 633 (4th Cir. 1967); *Mazes v. Ohio*, 388 U.S. 453 (1967), *rev'g* 7 Ohio St. 2d 136, 218 N.E.2d 725 (1966); *Aday v. United States*, 388 U.S. 447 (1967), *rev'g* 357 F.2d 855 (6th Cir. 1966).

36. Justice Brennan was joined by the Chief Justice, and Justices Harlan, White and Marshall.

37. *Ginsberg v. New York*, 390 U.S. 629, 634, 638 (1968).

38. *Id.* at 639.

that the states quite properly have an independent interest in the development of their youth and that the Court could not say that section 484-h has no rational relation to the objective of safeguarding their youth from harm.³⁹ Consequently, the Court concluded that it is not unconstitutional to accord minors under seventeen years of age a more restricted right than that assured to adults to judge for themselves what sex material they may see and read.⁴⁰

In the instant case the Supreme Court follows the principle that materials should be considered in the context in which they are disseminated, a position first enunciated by Chief Justice Warren in *Roth*⁴¹ and followed in *Memoirs*,⁴² *Ginzburg*,⁴³ and *Mishkin*.⁴⁴ Although the instant case is a particularly logical extension of *Mishkin*,⁴⁵ it has none of the less added confusion to an area of law already inextricably confused. Now that (1) the nature of obscenity varies with the group to which it is directed; and (2) the context in which allegedly obscene materials are sold may be determinative of the question of obscenity, it is increasingly more difficult to synthesize

39. *Id.* at 640, 643.

40. *Id.* at 637. The Court also concluded that § 484-h was not unconstitutionally void for vagueness, because the essential words of the section have been defined properly by the state's highest court. *Id.* at 643-44. In a concurring opinion, Justice Stewart said that the Constitution not only protects one's freedom to say or write or publish what he wishes, but the Constitution also guarantees a society of free choice. *Id.* at 648, 649. Stewart continued, however, that when expression occurs in a setting in which the capacity to make a choice is missing, government regulation of that expression may co-exist with the first amendment. Stewart also said that states could permissibly determine that children do not possess the full capacity for individual choice which is the presupposition of first amendment guarantees. Consequently, Stewart concluded that in certain well-delineated areas, such as obscenity, the states could deprive children of rights even though similar deprivation would be constitutionally intolerable for adults. *Id.* at 649-50. In a dissenting opinion, Justice Douglas, with whom Justice Black concurred, said that he did not believe obscenity was implicitly excluded from the protections of the first and fourteenth amendments. *Id.* at 650, 652-53. Thus, Douglas concluded that § 484-h was an unconstitutional abridgment of first and fourteenth amendment guarantees. *Id.* at 655. Justice Fortas also dissented. Agreeing that states in the exercise of their police powers, even in the first amendment domain, could make proper differentiation between adults and children, nonetheless this differentiation could not be made on an arbitrary basis. Fortas therefore concluded that the Court must define what it means by obscenity with respect to minors in order to prevent the arbitrary exercises of state censorship. *Id.* at 671, 673.

41. 354 U.S. 476, 494, 495 (1957) (Warren, C.J., concurring).

42. 383 U.S. 413, 420 (1966).

43. 383 U.S. 463, 470 (1966).

44. 383 U.S. 502, 508 (1966).

45. In *Mishkin*, the Court said that ". . . when the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. . . . We adjust the prurient appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group." *Id.* at 508-09.

these factors in a coherent and predictable test for obscenity. If the Court adheres to the trend apparently established by *Mishkin* and the instant case, greater emphasis will have to be placed on specific group characteristics. To the extent that this has already happened, the guidelines as to what is not obscene which were set down by the Court in the numerous per curiam decisions in 1967⁴⁶ are of minimal value, since there is now required not only a consideration of the allegedly obscene materials, but also a consideration of the context in which they were disseminated and a consideration of the primary groups to whom the materials are disseminated. The result is that while the Court would seem to be attempting to escape a case by case determination of obscenity,⁴⁷ the nature of the Court's obscenity decisions make a case by case analysis inevitable. Thus, although the Supreme Court cannot abdicate completely its first amendment jurisdiction, it is arguable that the Court is not the proper agency to fashion a coherent body of common law. Mass interstate distribution, of course, requires federal overseeing, but state concern need not be entirely overlooked in the process. For this reason it may be argued, with Justice Harlan, "that the Constitution tolerates much wider authority and discretion in the States to control the dissemination of obscene materials than it does in the Federal Government"⁴⁸ and that federal control of obscene materials should be limited to "hard-core" pornography.

Constitutional Law—Standing—Federal Taxpayer Has Standing To Challenge Federal Expenditures Violating Specific Constitutional Prohibition

Appellants sued in federal district court to enjoin the allegedly unconstitutional expenditure of federal funds,¹ which appellants contended were being used to finance studies and purchases of textbooks in religious schools in contravention of the free exercise and establishment clauses of the first amendment. Appellants rested solely on their

46. The decisions are cited in the *Ginsberg* case, 390 U.S. at 634, n.3.

47. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 199, 202-203 (1964) (Warren, C.J., dissenting).

48. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part). Unfortunately, Justice Harlan's view would probably require the repudiation by the Court of the "incorporation" theory of the fourteenth amendment.

1. The funds were appropriated under the Elementary and Secondary Education Act of 1965, Titles I and II, 20 U.S.C. §§ 241(a) *etc.*, 811 *etc.* (Supp. 1966).

status as federal taxpayers in asserting standing to bring the action. A three judge court² granted the government's motion to dismiss for lack of standing. On direct appeal to the United States Supreme Court, *held*, reversed. A taxpayer has standing to invoke the federal judicial power upon a showing that Congressional action under powers granted by the taxing and spending clause is in derogation of express constitutional restrictions upon those powers. *Flast v. Cohen*, 392 U.S. 83 (1968).

In *Frothingham v. Melon*,³ the Supreme Court held that one's mere status as a federal taxpayer was insufficient to impart standing to challenge the legality of federal expenditures. In order to achieve standing, said the Court, the challenger must show past or impending "direct injury" resulting from the expenditure, not merely an indefinite suffering common to all taxpayers.⁴ The Court distinguished a municipal taxpayer's challenge of municipal expenditures on the ground that his interest in the application of such funds is direct and immediate,⁵ whereas a federal taxpayer's interest in the disbursement of federal funds is "comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of funds, is so removed, fluctuating, and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."⁶ The prevailing view has been that *Frothingham* declared a rule of judicial self-restraint rather than providing an additional gloss on the constitution's "cases and controversies"⁷ limitation of federal court jurisdiction.⁸ As such a declaration, the case has been widely criticized,⁹ principally on the illusory distinction it made between the relative impacts on federal and municipal taxpayers,¹⁰ a distinction few state courts have drawn between state and municipal taxpayers.¹¹ Even courts purporting to sustain a rule similar to that declared in *Frothingham* have been willing to overlook or bypass the problem of standing when they have been presented with substantive issues of unusual importance,¹² and the Supreme Court itself has seemingly ignored the standing

2. See 28 U.S.C. § 2284 (1964).

3. 262 U.S. 447 (1923).

4. *Id.* at 488.

5. *Id.* at 486.

6. *Id.* at 487.

7. U.S. CONST. art. III, § 2.

8. *Flast v. Cohen*, 392 U.S. at 92 n.6 (1968).

9. See, e.g., WRIGHT, *FEDERAL COURTS* 37 (1963); Davis, "Judicial Control of Administrative Action": A Review, 66 COLUM. L. REV. 635, 659-69 (1966).

10. Davis, *supra* note 9, at 664-65; Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 388 (1955).

11. *Id.*

12. See, e.g., *Kush v. Curran*, 294 N.Y. 207, 61 N.E.2d 513 (1945); *Reiter v. Wallgren*, 28 Wash. 2d 872, 184 P.2d 571 (1947).

problem when sufficiently eager to proceed to substantive questions.¹³ Despite the criticism it has engendered and its analytic inconsistencies, *Frothingham* has continued to be relied upon.¹⁴

In the instant case, the Court first examined the government's argument that article III of the Constitution demanded the broad rule announced in *Frothingham*.¹⁵ The Court noted that justiciability, an aspect of which is standing, had become a "blend of constitutional requirements and policy considerations."¹⁶ Thus, said the Court, the relation of standing to article III limitations was that it served as a standard by which the propriety of a suit as a dispute capable of judicial resolution could be measured. This historical standard emphasized the stake a plaintiff had in the outcome of his suit; since a taxpayer might or might not have the requisite personal stake, his status as a mere taxpayer was not an absolute bar under article III.¹⁷ The Court then noted that past decisions had established the necessity of examining substantive issues in cases to determine whether there was "a logical nexus between the status asserted and the claim sought to be adjudicated."¹⁸ The nexus demanded had two aspects: (1) a logical link between the taxpayer's status and the legislation attacked; and (2) a link between his status and the nature of the alleged constitutional infringement. "When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction."¹⁹ The taxpayer in the instant case was held to have met this test in that (1) the constitutional challenge was made to an exercise of Congress's spending power which involved a

13. *Everson v. Board of Education*, 330 U.S. 1 (1947). Though the petitioner was a local taxpayer, questions of standing were raised but not discussed. *But see Doremus v. Board of Education*, 342 U.S. 429 (1952) distinguishing *Everson*; Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1310 (1961).

14. *See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151 (1951); *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305 (1945).

15. Before considering the issue of standing, the Court met the government's contention that the improper convening of the three judge court precluded a direct appeal to the Supreme Court under 28 U.S.C. § 1253 (1964). In response to the government's argument that appellants wished only to enjoin specific local programs rather than a broad range of programs under a statutory scheme, the Court said it viewed the complaint's specific allegations as merely narrowing the issues in the suit and not limiting the appellant's constitutional challenges. To the government's contention that the appellant's challenge of the Elementary and Secondary Education Act's administration as well as its constitutionality rendered the convening of the three judge court improper, the Court responded that, under the rule announced in *Zemel v. Rusk*, 381 U.S. 1 (1965), "a litigant need not abandon his constitutional arguments in order to obtain a three judge court. . . ." 381 U.S. at 5-6.

16. 392 U.S. at 97.

17. *Id.* at 101.

18. *Id.* at 102, citing *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961).

19. 392 U.S. at 103.

substantial expenditure of federal tax funds, and (2) the challenged expenditures allegedly violated the specific limitations found in the establishment and free exercise clauses of the first amendment. The Court then distinguished the instant case from *Frothingham* on the ground that, while the taxpayer in *Frothingham* had, in attacking a federal spending program, established the first nexus, she had lacked standing because her attack on the expenditure was not based on an alleged breach of a specific limitation on Congress's spending power.²⁰ In his dissent²¹ Mr. Justice Harlan argued that the two criteria established by the majority did not measure a plaintiff's interest in the outcome of his suit. Neither the fact that the challenged expenditure was pursuant to a federal spending program, rather than incidental to a regulatory program, nor the plaintiff's claiming under a constitutional provision which specifically limited Congress's spending power, rather than under any constitutional provision, was viewed by Justice Harlan as related to the determination of standing. Without a broad interpretation of *Frothingham's* restriction on taxpayer's suits, suggested Justice Harlan, "unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government."²²

The fundamental aspect of standing, as opposed to other aspects of justiciability, is that it focuses on the litigant rather than on the substantive matters in a case.²³ Standing serves two policies: first, it helps insure that cases brought before the Supreme Court have "that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions."²⁴ Secondly, the concept of standing limits the role of the Supreme Court to adjudication of disputes traditionally thought to be capable of resolution. It thus maintains the balance of powers by limiting the number and scope of public actions and pre-

20. *Id.* at 105. In *Frothingham*, the taxpayer had alleged a violation of the due process clause of the fourteenth amendment. The instant court noted, however, that the due process clause does not protect taxpayers from increases in tax liability.

21. Three concurring opinions were also entered. Mr. Justice Douglas thought that although the court's standards were imprecise, they would eventually lead to the complete erosion of *Frothingham*, a demise Justice Douglas would encourage. Mr. Justice Stewart emphasized the distinction between the instant case and *Frothingham* and expressed his understanding that the instant case held "only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment." Mr. Justice Fortas agreed substantially with Mr. Justice Stewart and warned that the instant case "should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause."

22. 392 U.S. at 130.

23. 392 U.S. at 99.

24. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

venting the Court from becoming a mere instrument of revision. The concept of standing as an absolute bar to federal taxpayers' suits has been an inadequate standard insofar as it has rested on the myth of the taxpayer's lack of a stake in the action. Many large corporations, for example, have a substantial stake in the expenditure of every tax dollar.²⁵ Though his personal tax contribution may be lost in the general revenue, becoming unidentifiable when revenues are disbursed, the individual taxpayer undeniably has some stake in the expenditure of his tax dollar. Although he has no direct property interest in his tax contribution, that contribution was made with the understanding that it would not be spent in violation of the Constitution. If no taxpayer or other person can show a unique and direct injury from unconstitutional disbursements of federal funds, it follows that unconstitutional expenditures could be immune from all but Congressional attack. Furthermore, the suggestion that the question be settled by a decision on the merits of a constitutional issue—whether Congress has the full power under the Constitution to make expenditures for the general welfare²⁶—is an avoidance rather than a solution. While not all taxpayers should be permitted to challenge any federal expenditure, it should be possible for taxpayers who suffer no other injury to challenge expenditures which are allegedly unconstitutional. The instant case is a step toward the realization of that possibility and toward a redefinition of standing. Hopefully, the result will be, rather than one of the “most amorphous [concepts] in the domain of public law,”²⁷ a workable set of rules which will serve the traditional policies on which standing has rested and will, at the same time, permit a taxpayer to instigate needed challenges of unconstitutional federal expenditures.

Copyright—Telecommunication—CATV Carriage of Copyrighted Material Does not Constitute Infringement

Petitioner owned and operated community antenna television (CATV) stations in two West Virginia towns. Although local television

25. Davis, *Standing To Challenge Governmental Action*, 39 MINN. L. REV. 353, 387 (1955), noting that General Motors has as much as a 2% stake in every federal expenditure.

26. U.S. CONST. art. I, § 8; Davis, *supra* note 24, at 391.

27. 392 U.S. at 99, cited Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2 Sess., 465, 498 (1966) (Statement of Prof. Paul A. Freund).

stations served the area, reception of television broadcasts from more distant stations was prevented by surrounding mountainous terrain. Seeking more program variety than the local stations could provide, the majority of television owners in both communities subscribed at a flat monthly rate to petitioner's CATV service,¹ which was capable of receiving the signals of five distant stations. These signals were then amplified, modulated and converted to different frequencies, increasing their strength, and then transmitted to the individual subscriber by means of a coaxial cable system. The petitioner neither edited the programs received from the distant stations nor originated any programs of its own.² Respondent, holding copyrights on several motion pictures, licensed the five distant television stations to broadcast the copyrighted films, which were received by the petitioner and carried to its subscribers. Neither respondent nor the five distant stations had licensed the petitioner to carry the film broadcasts. Indeed, the licenses granted by respondent to the five distant stations, in several instances, specifically prohibited CATV carriage. Seeking damages and injunctive relief, respondent urged that carriage of the film broadcasts by the petitioner's CATV system was an unlicensed performance of copyrighted material, constituting an infringement of copyright under the Copyright Act of 1909.³

1. See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) for a general discussion of CATV systems. CATV systems are usually operated in small towns or in cities which are either too far from regular television stations to receive programming of all of the major networks or are shielded from stations' signals by obstructions such as hills, mountains, or tall buildings. See also B. RUCKER, *THE FIRST FREEDOM* 175 (1968).

2. Some CATV systems do originate their own programs. It is estimated that three hundred systems provide twenty-four-hour weather service and news programs, while an additional seventy-five produce live programs of local interest. Some systems also sell commercial time. See RUCKER, *supra* note 1, at 179.

3. 35 Stat. 1075, as amended, 17 U.S.C. § 1 et seq. In pertinent part the Act provides that any person holding a copyright shall have the exclusive right: "(c) To deliver, authorize delivery of, read or present the copyrighted work in public for profit . . . to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. . . . (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever. . . . (e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit . . . to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced"

Petitioner contended that a CATV system, regardless of its complexity, was merely a device designed to carry out the same function as a simple antenna in allowing an individual set owner to receive distant television broadcasts. Petitioner further argued that the "performance" of the work in question was the active function of the original broadcaster and that therefore it could not be said that the operation of a CATV system functioning as a mere passive antenna constituted a performance. The district court held for respondent,⁴ and the Court of Appeals affirmed.⁵ On certiorari to the United States Supreme Court, *held*, reversed. Since a CATV system does no more than enhance an individual subscriber's capacity to receive the original broadcast signal, such an operation does not constitute an infringing performance of a copyrighted work. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

Initially, CATV systems were designed to provide television service to areas which were either too far distant from regular television stations to receive their signals or were unable to pick up clear signals due to interference from tall buildings or mountains.⁶ Increasingly, however, CATV systems have expanded into areas without a real topographical need, and which are already served by local television.⁷ Because of this continued expansion,⁸ a great deal of opposition to CATV has been generated among two groups deeply involved in the television industry. One of these groups is composed of television broadcasters who fear that further CATV expansion will significantly decrease the size of their audiences. Members of this group launched a futile legal attack on CATV systems under state unfair competition

4. *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966).

5. *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872 (2d Cir. 1967).

6. See RUCKER, *supra* note 1, at 175. The facts of the instant case demonstrate clearly the effects of mountainous terrain on regular television signals. Rucker reports that individual viewers in the big urban areas may also need CATV service to receive clear signals due to the interference of tall buildings with regular broadcast signals. For example, 500,000 viewers in Manhattan do not get adequate television service for this reason.

7. *Id.* at 176 n.22. Rucker reports that there are 460 CATV systems in the "top one hundred markets," with 119 under construction and 500 more franchises having been awarded. Another 1200 applications for franchises are now pending.

8. *Id.* at 176. In 1966, the number of operational CATV systems in the U.S. had increased to an estimated 1,675 serving approximately two million subscribers. At the same time, 1,503 new franchises had been granted and 1,420 cities were considering applications; the figures rose to 2,138 systems in operation or under construction, 1,082 additional franchises granted, and 1,630 applications pending in 1967. It is estimated that the number of systems and subscribers will double by 1970. It is obvious that a tremendous amount of money has been invested in CATV systems by their operators, and it is not uncommon for the initial investment alone to run as high as several million dollars. Multiplying this figure by the number of systems planned or in operation gives an indication of the economic factors involved.

laws, but it would appear that this mode of attack has been precluded.⁹ The second group is comprised of copyright holders who contend that the number of local markets for the sale of licenses to perform their dramatic or filmed works will be greatly reduced, because carriage of these works by CATV systems will make licenses to perform them less marketable to local broadcasters in areas served by such systems. Unless CATV systems can be made to pay royalties to the copyright holders, they fear great economic losses.¹⁰ The litigation culminating in the instant proceeding is the first major legal effort to hold a CATV system liable for copyright infringement and thus to assure the future payment of royalties by CATV systems. At the trial level, the district court¹¹ employed a rather technical electronic analysis as a method for reaching a decision in favor of the copyright holder. The rationale of the district court decision appears to be that whenever a CATV system applies energy from its own sources to reproduce and amplify signals received from a television broadcast of copyrighted material, then the CATV system renders a "performance" of the work.¹² If the performance is not licensed by the copyright holder, then the CATV system is guilty of copyright infringement. The Court of Appeals for the Second Circuit, while affirming the decision of the district court in favor of the copyright holder,¹³ found that there was no particular legal significance to be attached to the electronic aspects of the CATV system,¹⁴ and chose to decide the case

9. See, e.g., *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965), rev'g 211 F. Supp. 47 (S.D. Idaho 1962); *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315 (S.D. Idaho 1961). In the *Cable Vision* case, the court held that broadcasters were precluded from using state unfair competition laws to attack CATV, because of the holdings of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day Brite Lighting, Inc.*, 376 U.S. 234 (1964). The circuit court suggested that the copyright laws might provide an avenue for relief.

10. It is reliably reported that "substantial" CATV penetration does indeed destroy prospects for future licensing of copyrighted material without compensating gains in royalties from the penetrating stations. Note, 80 HARV. L. REV. 1514, 1524 (1967); *Hearings on H.R. 4347, Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1349-50, 1378-81 (1965).

11. *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. (1966)).

12. The district court found that the CATV system contained sophisticated equipment to amplify, modulate, and convert to different frequencies the signals received. These operations required the introduction of local energy into the system which was used to produce exact replicas of the signals received. These "processed" signals were then transmitted to petitioner's subscribers. This type of "processing" was found by the district court to be an infringing reproduction and performance of a copyrighted work. For a more detailed discussion of the technical aspects of this process, see note, *supra* note 10, at 1519 n.33; Note, 52 VA. L. REV. 1505 (1966).

13. *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 873 (2d Cir. 1967).

14. *Id.* at 879. The circuit court employed a sounder reasoning here, because the reproduction of exact replicas of the broadcaster's signal by the CATV system, a process

on other grounds, formulating a quantitative test to determine whether the CATV system was guilty of infringement. This test was simply: "how much did the defendant [CATV system] do to bring about the viewing and hearing of a copyrighted work?"¹⁵ In formulating this test, the circuit court relied primarily on the so called "multiple performance doctrine" established in *Buck v. Jewell-LaSalle Realty Co.*¹⁶ and *Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co.*¹⁷ (SESAC), establishing the proposition that even though an original broadcaster has performed copyrighted material, any other person who employs mechanical means to extend the original broadcast of that material to a larger audience than the broadcast would otherwise command may also be considered to have "performed" the copyrighted work.¹⁸ Armed with this doctrine, the circuit court proceeded to compare "how much was done" by the defendant CATV system to increase audience size by mechanical means with "how much was done" by the hotels in *Jewell-LaSalle* and SESAC to accomplish the same result, and concluded that the CATV system "did much more," thus clearly rendering an infringing performance under the multiple performance doctrine.¹⁹ In so finding, the circuit court refused to adopt a theory of "implied license in law" advanced by the defendant CATV system. This theory, enunciated in *Jewell-LaSalle*²⁰ and in an earlier broadcasting case, *Buck v. Debaum*,²¹ holds that when a copyright holder licenses a broadcaster

crucial to the district court's finding of infringement, is not necessary to the operation of a CATV system and by the time the appeal of the district court's decision had reached the court of appeals, the petitioner had converted his equipment so that it did not carry out such a reproduction. See Note, *supra* note 10, at 1519.

15. 377 F.2d at 877.

16. 283 U.S. 191 (1931). In this case, a hotel was held liable for copyright infringement where it maintained a master radio set wired to loudspeakers or headphones throughout the building. The Court found that an independent performance infringing upon a copyright had been rendered when the hotel received and played through this system a song broadcast by a local radio station which had obtained no license from the copyright holder to make such a broadcast.

17. 19 F. Supp. 1 (S.D.N.Y. 1937). In this case, a hotel had installed loudspeakers in its rooms, each one capable of receiving two stations. The choice as to which one was received lay with the individual guests. The court found the hotel guilty of infringement even though the original broadcast was licensed and the choice as to which broadcast to receive lay with the guests. Stating that "the reception of a broadcast program by one who listens to it is not any part of the performance thereof," the court went on to conclude that where a hotel "does as much as is done here to promote the reproduction . . . of a broadcast program received by it, it must be considered as giving a performance." *Id.* at 4.

18. See 283 U.S. at 198, 199 n.7.

19. The court cited the expense of installing antennas, cables, and connections to subscriber's television sets and the fact that such activity was the primary business of CATV, whereas it was only incidental to the hotels' business. 377 F.2d at 878.

20. See note 31 *infra* and accompanying text.

21. 40 F.2d 734 (S.D. Cal. 1929). Rejecting a claim of infringement where a cafe

to perform a copyrighted work, he also grants an "implied license in law" to receive and play the work to anyone who can do so,²² including those who would derive some economic gain therefrom.²³ It has been said that this theory of "implied license" lies "at the heart of the question of CATV copyright liability."²⁴ Certainly it raises clearly the key question of "where, if anywhere, in the chain of transmissions and public reception, the copyright owner's control should stop."²⁵ The circuit court, in rejecting the "implied license" theory, answered that question in a manner giving the copyright holder practically absolute control over his work,²⁶ emphasizing that the primary purpose of the Copyright Act lies in protecting the economic rights of the copyright holder.²⁷

owner had played a radio for his customers over which a licensed broadcast of the plaintiff's song was received, the district court held: "The owner of a copyrighted musical composition can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station to perform his musical composition; but, when he expressly licenses and consents to a radio broadcast of his copyrighted composition, he must be held to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast of his copyrighted musical composition." *Id.* at 736.

22. It is worthy of note here that the defendant CATV system also advanced the argument that even if it had rendered a performance, that performance was a *private* one to which no copyright liability attached, since the broadcast transmitted through its cables was viewed by its subscribers in the privacy of their own homes, on their own television sets. The circuit court dismissed this argument stating, "it is settled that a broadcast or other transmission of a work to the public . . . results in a public performance although each individual who chooses to enjoy it does so in private." 377 F.2d at 879. The circuit court cited as support *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F.2d 411 (6th Cir.) *cert. denied*, 269 U.S. 556 (1925) and *Harms, Inc. v. Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958) *aff'd per curiam sub nom. Leo Feist, Inc. v. Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959).

23. *See supra* note 21. This theory was also advanced as a defense in *SESAC*, but the court there rejected it on the ground that the actual license to broadcast gave no implied license to any other *commercial* user. *See supra* note 17.

24. *See Note, supra* note 10, at 1522.

25. *See B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 104 (1967).*

26. The Court of Appeals held it to be "self evident" in the age of television and motion pictures that a copyright holder be allowed the unquestioned freedom to limit licenses to perform works in public to defined periods, areas, and audiences. The court reasoned that the theory of implied license was clearly inconsistent with this "self evident" right and thus could not be applied. In support of its reasoning the court cited dictum from an older tax case, *Goldsmith v. Commissioner*, 143 F.2d 466 (2d Cir.), *cert. denied*, 323 U.S. 774 (1944). It appears that the court may have been influenced in its decision on this point by the fact that the CATV system was making a sizeable profit on its operation, no part of which was shared by the copyright holder.

27. The Court of Appeals rejected the contention of the defendant CATV system that the primary purpose of the Copyright Act was to encourage authors and artists to release their works to the public, and therefore rewarding the copyright holder was only a secondary aim. Defendant cited several cases in support of its contention, *e.g.*, *Mazer v. Stein*, 347 U.S. 201 (1954); *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). The defendant argued that the secondary

Rejecting the electronic analysis of the district court and the quantitative test of the court of appeals,²⁸ the Supreme Court chose instead a functional approach to the infringement issue. Reasoning that the resolution of the issue depended upon the "function that CATV plays in the total process of television broadcasting and reception,"²⁹ the Court cast aside as out-dated and questionable the precedent of *Jewell-LaSalle*,³⁰ on the basis of a footnoted qualification to the effect that if the original broadcast had been authorized by the copyright holder, then it might not have held the secondary broadcaster liable for infringement.³¹ On the basis of this reservation, the instant Court concluded that *Jewell-LaSalle* was limited to its own facts and could not be controlling in the instant situation, because here the original television broadcast had been authorized by the copyright holder. Further defining its functional approach, the Court noted that broadcasters have always been judicially treated as performers,³² while viewers have not.³³ The Court thus chose to resolve the issue before it by discovering where CATV operations fall within

aim of reward for the copyright holder was satisfied when the copyright holder received compensation for licensing the original broadcast. After this compensation is paid, the CATV system should be allowed to transmit without further payment. The defendant relied on the principle that a copyright holder may not restrict resale of a copyrighted work after he originally sells it. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 349-51 (1908). The circuit court rejected this line of argument by countering with language from *Jewell-LaSalle* to the effect that control of the sale of copies is not permitted by the Act, but that the copyright holder retains a monopoly, expressly granted to him of all public performances for profit.

28. See *supra* note 4. The instant Court stated that "[M]ere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting."

29. 392 U.S. 390, 397 (1968).

30. 283 U.S. 191 (1931). The instant Court stated that "existing 'business relationships' would hardly be preserved by extending a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context." 392 U.S. at 401 n.30.

31. 283 U.S. at 199 n.5. The instant Court ignored the holding of the district court in *SESAC*, and, by its silence, impliedly disapproved the result in that case, at least insofar as it is applicable to CATV disputes. In *SESAC*, the district court had found an infringement even though the original broadcast was licensed by the copyright holder. See *supra* note 17.

32. In support of this statement the Court cited *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F.2d 411 (6th Cir.) *cert. denied*, 269 U.S. 556 (1925) (radio broadcast); *Associated Music Publishers v. Debs Memorial Radio Fund*, 141 F.2d 852 (1944) (radio broadcast of recorded program); and *Select Theatres Corp. v. Ronzoni Macroni Co.*, 59 U.S.P.Q. 288 (S.D.N.Y. 1943) (radio broadcast of program received from network). In each of these cases, broadcasting was held to be the performance of a copyrighted work. See also *supra* note 20 and accompanying text.

33. In support of this contention, the Court quoted the following language from *Buck v. Debaum*, 40 F.2d 734, 735 (1929); "One who manually or by human agency merely activates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the copyright law."

the framework of this broadcaster-viewer dichotomy.³⁴ The resulting test is simple—if a CATV operation is found to have more in common with broadcasting than with viewing, then such an operation amounts to a copyright-infringing performance; however, if the CATV operation is found to have more in common with viewing than with broadcasting, then no copyright liability can be attached to that operation. Concluding that the instant CATV operation fell on the “viewer’s side of the line,” the Court stated that a CATV system merely enhances the viewer’s capacity to receive the broadcaster’s signal by providing a well-located, efficient antenna for the viewer’s television set.³⁵ Conceding that CATV systems play an “active” role in making reception possible in a given area, the Court reasoned that the basic function of CATV equipment is none the less little different from that served by the equipment (receiving sets and antennas) generally furnished by an individual viewer.³⁶ Reasoning further that CATV systems neither broadcast nor rebroadcast but, rather, simply “receive programs that have been released to the public [by the broadcaster] and carry them by private channels to additional viewers,”³⁷ the Court found that petitioner CATV system did not render a performance which infringed on the respondent’s copyright. Dissenting, Mr. Justice Fortas argued that the *Jewell-LaSalle* decision should have been dispositive of the instant case, and that the footnoted qualification relied upon so heavily by the majority was too vague to serve as a basis for distinction. He thus urged application of the multiple performance doctrine in CATV cases.³⁸

The instant decision will undoubtedly receive much acclaim in the CATV camp, while being greeted with trepidation by broadcasters and copyright holders. The effect of the instant holding is to grant CATV systems far-reaching immunity from copyright infringe-

34. It should be noted that while the language of the opinion is stated in broad terms apparently covering all CATV operations, the Court, by way of a footnote, has qualified its opinion to some extent as follows: “While we speak in this opinion generally of CATV, we necessarily do so with reference to the facts of this case.” 392 U.S. at 399 n.25.

35. 392 U.S. at 399. In support of this conclusion the Court cited language from *Lilly v. United States*, 238 F.2d 584, 587 (1956): “This community antenna service was a mere adjunct of the television receiving sets with which it was connected. . . .”

36. The instant Court stated that the “electronic operations performed by the petitioner’s systems are those necessary to transmit the received signal the length of the cable efficiently and deliver a signal of adequate strength. Most of the same operations are performed by individual television sets and antennas.” 392 U.S. at 399 n.27.

37. 392 U.S. at 400.

38. See *supra* note 31 and accompanying text. Mr. Justice Fortas, dissenting, stated that, “the interpretation of the term ‘perform’ cannot logically turn on the question whether the material used is licensed or not licensed.” 392 U.S. at 406-07 n.5.

ment liability. More basic is the Court's adoption of the petitioner's view as to the primary purpose and policy of the Copyright Act—to encourage authors and artists to release their works to the public, while protecting the economic rights of the copyright holder in the fruits of his creativity is only a secondary aim.³⁹ Even though it found that petitioner rendered no performance, an analysis of the court's language in the light of the above policy reveals that there is some reason to believe that even if a "performance" had been found, the Court would have reached a result favorable to the petitioner. Though the Court did not rely on the implied license theory in reaching its decision, because it found no "performance,"⁴⁰ it is difficult to see how a Court with the same policy orientation as the instant one could have failed to adopt the reasoning of *Buck v. DeBaum*, had a "performance" been found.⁴¹ Be that as it may, it is submitted that the entire conduct of the instant litigation, from the district court level to the Supreme Court, has been characterized by a kind of judicial extremism. On the one hand, the decisions of the district and circuit courts and the dissent of Mr. Justice Fortas support a position which would impose full copyright liability on CATV in all situations.⁴² On the other hand, the majority refuses to impose

39. See *supra* note 27 and accompanying text.

40. See 392 U.S. at 401.

41. The instant Court found that once a program is "released to the public" it can then be carried to additional viewers by CATV systems for a profit. See *supra* note 37 and accompanying text. Compare this reasoning of the instant Court with that of the court in *Buck v. Debaum*, 40 F.2d 734 (1929), to the effect that once a copyright holder expressly licenses and consents to a broadcast of his material to the public, he then acquiesces in the reception and playing of that material by anyone who can do so, even if this subsequent operation is done for a profit. Clearly, the reasoning of the two courts is strikingly similar. It is submitted that the reason for this similarity is to be found in the fact that the *Debaum* court and the instant Court both view the primary purpose of the Copyright Act as being the dissemination of copyrighted works to the public. Therefore, whether or not the "subsequent operation" described above is classified as a "performance" or not seems to be reduced to mere semantics. In the policy context of the instant decision, a CATV operation, whether categorized as a performance or not can, in either case, be termed an allowable act of dissemination. Thus, it appears likely that even if the instant Court had found a "performance," its policy orientation would have dictated the same result. Whether such an allowance would have been justified in terms of the theory of implied license or some other such reasoning is left unanswered by the instant Court.

42. Clearly, such a result would have disastrous results for CATV, and, since there is no effective way to screen all telecasts received to determine whether or not they are copyrighted, this would force many systems to go out of business entirely or sell out to groups of copyright holders. It has been said that "blanket extension of copyright liability to CATV . . . could . . . give major copyright holders not just a means of preserving their exclusive marketing arrangements, but a powerful weapon to gain control of the CATV industry itself." See Note, *supra* note 10, at 1528. See also, NEMNER, COPYRIGHT § 107.41 (1967); B. RUCKER, *supra* note 1, at 181; and M. SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY, reprinted in *Hearings on Progress*

any copyright liability on CATV, with the result that copyright holders are left with no remedy for the economic losses which they do incur from CATV operations. It is apparent that none of the courts dealing with the instant litigation effectively reconciled the legitimate competing interests represented in the dispute. Indeed, given the nature of copyright law, it is difficult to envision an adequate judicial solution. It is submitted that the complexity of the problems presented and the unsatisfactory solutions advanced by the courts at each level of litigation demonstrate clearly the need for action in this area by a branch of government more flexible than the judiciary.⁴³ It would appear that the Federal Communications Commission,⁴⁴ buttressed with clear policy guidelines provided by Congress,⁴⁵ would be the logical agency of government to resolve most adequately and amicably the competing economic, private, and public interests⁴⁶ involved in CATV transmission of copyrighted works.

Report From FCC—1965 Before the Subcomm. on Communications of the Sen. Comm. on Commerce, 89th Cong., 1st Sess., ser. 89-18 at 90-92 (1965).

43. This was the opinion of the Solicitor General who, as *amicus curiae*, urged the Court to "stay its hand because, in our view, the matter is not susceptible of definitive resolution in judicial proceedings and plenary consideration here is likely to delay and prejudice the ultimate legislative solution." 392 U.S. at 404.

44. Action has already been begun in this area by the FCC. In March, 1966, the Commission assumed jurisdiction over all CATV systems and promulgated certain rules as to carriage of local television broadcasts and same-day nonduplication of programming on local stations. The rules also required CATV systems to obtain FCC permission before importing signals of distant stations into the primary service area of a station in one of the top 100 markets. However, the authority of the FCC to act in this area is unclear, and requests for clarifying guidelines from Congress have met with no final action to date. See, B. RUCKER, *supra* note 1, at 178. In the absence of Congressional action, the Supreme Court has declared that the FCC has broad powers under the Communications Act of 1934 to regulate CATV systems and prohibit their expansion where such expansion would jeopardize broadcast service to new areas. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

45. It has proved difficult to get Congress to act on this matter because "congressmen have been caught in the crossfire of two vocal pressure groups—from broadcasters demanding restraints on CATV and from the CATV industry which incites its subscribers through a 'Don't Let the Government Turn Off your TV Set' campaign to flood congressmen and the FCC with mail opposing restrictions." B. RUCKER, *supra* note 1, at 178-79. Attempts at congressional action have thus far met with some degree of frustration. The copyright revision bill passed by the House, 113 CONG. REC. H. 3888 (April 11, 1967), originally contained a detailed provision covering CATV. See H.R. 2512, 90th Cong., 1st Sess., § 111. This provision would have dealt flexibly with CATV systems separately with regard to the competing interests involved in each particular case. The provision would have made CATV fully liable for copyright infringement in some instances, partially liable in others, and fully exempt in still others. This provision, however, was deleted and the matter referred to the Interstate and Foreign Commerce Committee for study. See B. KAPLAN *supra* note 25, at 127-28.

46. See notes 5 & 7 *supra* and accompanying text.

Criminal Law—Exclusion for Cause of Prospective Jurors With Scruples Against Death Penalty Violates Due Process

The petitioner was found guilty of murder, the jury fixing his penalty at death. At the trial, under authority of an Illinois statute¹ the prosecution eliminated nearly half the venire of prospective jurors by challenging for cause any veniremen who expressed qualms about capital punishment during the voir dire.² The Supreme Court of Illinois denied post-conviction relief.³ On certiorari to the United States Supreme Court, *held*, reversed as to penalty. Exclusion of prospective jurors for cause because of general, conscientious, or religious scruples against infliction of the death penalty constitutes a denial of due process.⁴ *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

The sixth amendment stipulates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury. . . ."⁵ The right of trial by an impartial jury has been judicially construed to require more than a jury wholly composed of unbiased individuals; it "contemplates an impartial jury drawn from a *cross-section of the community*."⁶ The "cross-section" concept is intended to assure that the jury be "a body truly representative of the community,"⁷ in order that it will reflect contemporary community standards.⁸ To satisfy the "cross-section" requirement it is not neces-

1. ILL. REV. STAT. ch. 38, § 743 (1959). "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

2. Early in the voir dire the trial judge said "let's get these conscientious objectors out of the way," and in rapid succession 47 of the 95 veniremen were challenged for cause. Only five said that under no circumstances would they vote to impose capital punishment.

3. *People v. Witherspoon*, 36 Ill. 2d 471, 224 N.E.2d 259 (1967).

4. The decision was given retroactive application 391 U.S. 510, 523 n.22 (1968).

5. U.S. CONST. amend. VI (emphasis added). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that the sixth amendment's guarantee of trial by jury in criminal cases was fundamental to the American scheme of justice and obligatory on the states under the fourteenth amendment.

6. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (emphasis added). In *Fay v. New York*, 332 U.S. 261, 299-300 (1947), Mr. Justice Murphy, dissenting, said of the "cross-section" principle: "[T]here is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy, or the least successful. It is a democratic institution, representative of all qualified classes of people."

7. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

8. For a discussion of the jury as a reflector of contemporary community standards, see Comment, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Recon-*

sary that all economic, social, religious, racial, political, and geographical groups of the community be included; but it is essential that prospective jurors be selected without systematic and intentional exclusion of any of these groups.⁹ In *Logan v. United States*¹⁰ the Supreme Court upheld the prosecution's challenge for cause of jurors who had conscientious scruples against capital punishment, stating that "[a] juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."¹¹ The conflict between the government's right to an impartial jury and the accused's "cross-section" right has created a profound difficulty where capital punishment is at issue.¹² The Supreme Court has said that impartiality requires not only freedom from bias against the accused, but also from prejudice against his prosecution.¹³ State courts have emphasized that the right to be tried by an impartial jury is no more than the right to reject those who are biased and prejudiced, not to select certain jurors.¹⁴ If the jurors who actually try the case are impartial, it makes no difference that other equally qualified jurors were erroneously excluded,¹⁵ unless the defendant can show that the exclusion actually prejudiced him.¹⁶ The accused has no legal right to include those on the jury whom he believes might favor his cause because of scruples against capital punishment, for to accomplish the "balanced jury" which the "cross-section" concept envisages would then neces-

ciliation, 1968 DUKE L.J. 283, 288-91. In *Labat v. Bennett*, 365 F.2d 698, 723 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967) the Fifth Circuit Court of Appeals declared that "[t]he 'very integrity of the fact-finding process' depends on impartial venires representative of the community as a whole."

9. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

10. 144 U.S. 263 (1892).

11. *Id.* at 298.

12. *Turberville v. United States*, 303 F.2d 411 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962).

13. *Hayes v. Missouri*, 120 U.S. 68, 70 (1887).

14. *Long v. State*, 187 Tenn. 139, 144 (1947); *Commonwealth v. Henderson*, 242 Pa. 372, 378, 89 A. 567, 569 (1913).

15. *United States v. Puff*, 211 F.2d 171, 185 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954): "Having no legal right to a jury which includes those who because of scruple or bias he [the defendant] thinks might favor his cause, he suffers no prejudice if jurors, even without sufficient cause, are excused by the judge. Only if a judge without justification overrules a challenge for cause and thus leaves on the panel a juror not impartial, does legal error occur."

16. *Fay v. New York*, 332 U.S. 261, 293-94 (1947). *See also Commonwealth v. Henderson*, 242 Pa. 372, 89 A. 567 (1913). *But see Glasser v. United States*, 315 U.S. 60 (1942), where the Court recognized that such reasoning as this could lead to dangerous inroads upon the concept of the jury as a cross-section of the community.

sitate the inclusion of those with bias in favor of the death penalty.¹⁷ In *Turberville v. United States*¹⁸ the Court of Appeals for the District of Columbia avoided meeting the problem head-on by reasoning that the point at which an accused is entitled to a cross-section of the community is when the names are put in the box from which the panels are drawn, and that "[c]hance governs the next step."¹⁹

Using a different approach, the Fifth Circuit Court of Appeals reasoned in *Labat v. Bennett*²⁰ that members of groups having an individual viewpoint representative of a cognizable segment of the community must be included as jurors, unless their absence is justified.

Historically, before a particular group's inclusion on juries under the "cross-section" standard is required, it must (1) be one whose exclusion was not reasonably related to the end of assembling an impartial jury and (2) possess some degree of cohesiveness.²¹ The practice of excusing on a challenge for cause prospective jurors who are opposed to capital punishment has been followed in all but two states,²² as well as the federal courts.²³ Originating at a time when conviction of a capital crime brought a compulsory death sentence, exclusion was a necessary remedy; otherwise a juror objecting to capital punishment would never vote in favor of a defendant's guilt because the death penalty would automatically be imposed. Today in most states the jury is invested with a discretionary power to impose death or life imprisonment upon a finding of guilty²⁴ but the general rule that the state may challenge for cause persists on the grounds that the state is entitled to the maximum penalty if the proof

17. *United States v. Puff*, 211 F.2d 171, 185 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954).

18. 303 F.2d 411, 419 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962).

19. *Id.*

20. 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

21. For a general discussion of the principles followed in regulating "group" or "class" exclusion, so as not to damage too severely the "cross-section" concept, yet still result in an impartial jury, see Comment, note 8 *supra*, at 303-09.

22. Iowa and South Dakota are the only states which do not allow capital punishment objectors to be challenged for cause. *State v. Wilson*, 234 Iowa 60, 91, 11 N.W.2d 737, 752 (1943); *State v. Lee*, 91 Iowa 499, 502-03, 60 N.W. 119, 120-21 (1894); *State v. Garrington*, 11 S.D. 178, 184, 76 N.W. 326, 327 (1898). For cases allowing exclusion of capital punishment objectors for cause, see *Gross v. State*, 2 Ind. 329 (1850); *Martin v. State*, 16 Ohio 364 (1847); *State v. Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967), *noted in* 45 N.C.L. Rev. 1070 (1967).

23. *Turberville v. United States*, 303 F.2d 411 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962).

24. See Mr. Justice Douglas' separate opinion in *Witherspoon v. Illinois*, 391 U.S. 510, 523, nn.2-8 (1968). The Illinois statute permits the jury to return a verdict of death, but when such verdict is not returned the judge can only sentence the defendant to imprisonment. The trial judge is empowered, however, to reject a jury's recommendation of death. ILL. REV. STAT. ch. 38, § 1-7(c)(1) (Supp. 1967).

shall justify it.²⁵ Therefore, it is not enough that a juror be able to determine guilt or innocence fairly and impartially; it is equally essential that he be free from any preconceived opinions or convictions which will preclude his joining in a verdict which will result in infliction of the death penalty if the evidence so requires.²⁶ In direct opposition to this line of reasoning is *State v. Lee*,²⁷ in which the Iowa Supreme Court denied the absolute right of the state to the maximum penalty. A juror's opposition to capital punishment does not automatically disqualify him if he states that he does not think his opinions will interfere with the performance of his duty as a juror.²⁸ But the positive statement of a juror that he would not under any circumstances join in a verdict of guilty with the death penalty, or that he could not impose the death penalty on circumstantial evidence,²⁹ renders him incompetent.³⁰ And generally, a statement evidencing a settled conviction that capital punishment is unjustifiable, though accompanied by words indicating a willingness to impose the death penalty if the facts and law so require, is sufficient to disqualify a prospective juror, if the accompanying words create any uncertainty.³¹

The Court in the instant case stated that the narrow issue was whether the prosecution could exclude *all* veniremen admitting opposition to capital punishment and *all* who indicated that they had conscientious scruples against inflicting it. Mr. Justice Stewart's majority opinion explicitly recognized the prosecution's right to challenge for cause those prospective jurors who say their reservations about capital punishment would prevent them from making an impartial decision on guilt and those who say that they could never vote to

25. Annot., 48 A.L.R.2d 560, 563 (1956); *People v. Nicolaus*, 65 Cal. 2d 866, 882, 423 P.2d 787, 798, 56 Cal. Rptr. 635, 646 (1967). ("[W]ere even one juror committed to a policy opposed to imposition of the death penalty in a proper case the rendition of justice in murder cases, as presently defined in our statutes on the subject, could be nullified").

26. *Piccott v. State*, 116 So. 2d 626, 628 (Fla. 1960).

27. 91 Iowa 499, 502-03, 60 N.W. 119, 121 (1894). "It cannot be said that the state is entitled to have the punishment by death inflicted in any case. The statute authorizes the punishment, in the discretion of the jury, when a person is convicted of murder in the first degree; but the state has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorily those who have such objections."

28. *People v. Bandhauer*, 66 Cal. 2d 645, 426 P.2d 900, 58 Cal. Rptr. 332 (1967); *Commonwealth v. Webster*, 59 Mass. 295 (1850); *Williams v. Mississippi*, 32 Miss. 389 (1856) (in the absence of any other evidence, juror's answer under oath that he thinks he can do justice between the parties will be sufficient to make him competent).

29. *Corens v. State*, 185 Md. 561, 45 A.2d 340 (1946); *State v. West*, 69 Mo. 401 (1879).

30. *Demato v. People*, 49 Colo. 147, 111 P. 703 (1910); *Johnson v. State*, 88 Neb. 565, 130 N.W. 282 (1911).

31. *Strattou v. People*, 5 Colo. 276 (1880). For a complete discussion of rules on what constitutes disqualifying scruples, see 31 AM. JUR. *Jury* § 187 (1958).

impose the death penalty or that they would refuse to consider the death penalty in the case before them. Here the jury was entrusted with two distinct responsibilities: (1) to determine whether the petitioner was innocent or guilty and, if guilty, (2) to determine whether his sentence should be imprisonment or death. The Court found no basis for petitioner's contention that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.³² "But," the Court stated, "it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the sixth and fourteenth amendments."³³ Since the statute gave the jury broad discretion in deciding whether death is the proper penalty in a given case,³⁴ the Court believed that a juror's general views about capital punishment should play an inevitable role in any such decision. Premising that less than half of the American public approve the death penalty, the Court concluded that a jury composed exclusively of such people cannot speak for the community, but "only for a distinct and dwindling minority."³⁵ By its zeal to obtain a death-qualified jury, the state succeeded in assembling one described by Mr. Justice Stewart as "uncommonly willing to condemn a man to die."³⁶ Mr. Justice Douglas, in a separate opinion, argued that the constitutional right to a jury drawn from a cross-section of the community forbids exclusion of even those who are so opposed to capital punishment that they would never impose it on a defendant.³⁷ The three dissenting Justices emphasized that the state also had a right to an impartial jury and criticized the majority for requiring that persons biased against one of the critical issues (capital punishment) in a trial be represented on the jury.³⁸

32. In *Bumper v. North Carolina*, 391 U.S. 543 (1968), decided the same day as *Witherspoon*, the Court refused to reverse a convicted rapist's sentence of life imprisonment rendered by a death-qualified jury on the basis of the *Witherspoon* decision. It did reverse on other grounds, however. *But see Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEXAS L. REV. 545 (1961).

33. 391 U.S. 510, 518.

34. On the jury's discretion under the Illinois statute, see note 24 *supra*.

35. 391 U.S. 510, 520.

36. *Id.*

37. Mr. Justice Douglas felt the verdict should have been reversed as to guilt as well as penalty.

38. The dissent pointed out that when the jurors were accepted by defense counsel, the defense still had three peremptory challenges left and that this frequently has been taken as a convincing indication that the jury impaneled was impartial. See cases cited in *United States v. Puff*, 211 F.2d 171, 185 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954). The dissent also took note that this was the third time the petitioner had appeared before the Illinois Supreme Court on appeal, yet the first

Achieving an equitable balance between the prosecution's right to an impartial jury on issues of both guilt and punishment, and the accused's right to a jury drawn from a cross-section of the community, is perhaps an overly idealistic goal. While the instant case is to be a progressive step away from the pre-existing rules on disqualification, some will surely reprove it for adding to the doubt in an already nebulous area. The fine line the Court attempts to draw between those with scruples against capital punishment who could render a verdict according to the law and evidence, and those with such scruples who could not, may prove to be no more than a "semantic illusion"³⁹ with scant effect on the type of jury selected. The practical effect of the decision may be no more than to allow some jurors to entertain a bias against capital punishment, thus impairing the prosecution's right to an impartial jury. Where states have abolished the mandatory death penalty, there may be no necessity for qualifying the jury on capital punishment. May be, since life imprisonment is already a valid legal alternative, as well as one morally acceptable to the juror, there is no reason for the juror's scruples against capital punishment to affect his decision on guilt. It is submitted that jurors with scruples against capital punishment must be allowed to serve if the jury system is to tailor effectively the law to contemporary community standards, and thus serve one of its most basic purposes. Persons opposed to capital punishment form a sizable group in our society, and it is important that such representative community viewpoints be made a part of the tailoring process.⁴⁰ Though courts have generally rejected the argument,⁴¹ a

time he had claimed denial of an impartial jury; that his trial occurred more than six years earlier and that as a rule long delays in raising objections to trial proceedings should not be condoned except to prevent intolerable miscarriages of justice. Mr. Justice White, in a footnote to his separate dissenting opinion, suggested that the states might "adjust" to the instant decision by replacing the requirement of unanimous jury verdicts with majority verdicts on sentence. If, however, the right to trial by jury, made obligatory on the states by *Duncan v. Louisiana*, 391 U.S. 145 (1968), carries with it the requirement of jury unanimity on punishment, *Andres v. United States*, 333 U.S. 740 (1948), the suggestion would not be sound. It would seem that the jury unanimity requirement would be binding on the states since even before *Duncan* the Supreme Court had said that where a state purports to accord a defendant a trial by jury there will be a question of whether the nature of the jury trial accorded is consistent with that which the fourteenth amendment commands. *Turner v. Louisiana*, 379 U.S. 466, 471 (1965).

39. 391 U.S. 510, 539.

40. A Gallup Poll released in 1965 showed 43% of the people in the United States opposed to capital punishment; 45% in favor of it, and 12% undecided. In 1953 only 25% opposed capital punishment. Gallup Institute Press Release (Feb. 5, 1965). A footnote in Mr. Justice Stewart's instant opinion states that in 1966 capital punishment was opposed by 47% of the American people and favored by 42%, with 11% undecided. 391 U.S. 520 n.16.

41. See note 32 *supra* and accompanying text.

jury from which a large segment of society has been excluded because of scruples against capital punishment may result in prejudice to the defendant on the question of guilt.⁴² Most men will feel some opposition, however mild, to sentencing a fellow human being to death. To select a death-qualified jury "the resort must increasingly be to the extremists of the community—those least in touch with modern ideas of criminal motivation, with the constant refinement of the finest part of our cultural heritage, the dedication to human charity and understanding."⁴³ Still, the exclusion of capital punishment opponents could be justified as being reasonably related to assembling an impartial jury on the question of punishment. A bifurcated trial for capital cases might serve as at least a partial solution to this problem. The first stage would be a determination of guilt or innocence by a jury from which no one opposed to capital punishment was excluded, followed by a decision on punishment by a death-qualified jury. Perhaps if a prospective juror could bring in a death penalty in any capital case, he should not be subject to challenge for cause, but only to a peremptory challenge. More simple, of course, would be to limit the prosecution's challenges for death scruples in all capital cases to the peremptory variety. Since the defendant in fact has no effective opportunity to challenge for cause, jurors who might be predisposed in favor of the death penalty, this would seem to be the surest means of securing a "balanced" jury on the question of capital punishment. Furthermore, if deemed necessary to protect the state's statutory right to seek the death penalty, it could be given a specified number of additional peremptory challenges. Sentiment is growing throughout society for the outright abolition of capital punishment.⁴⁴ The bases of opposition range from religious conviction and philosophical distaste to practical considerations, such as the detrimental effect capital punishment has on the humane goal of rehabilitation and the discrimination against the poor and minority groups which seems evident in its administration. The Supreme Court itself has questioned the constitutionality of the

42. See Oberer, *supra* note 32.

43. *Id.* at 557.

44. President Johnson has urged Congress to approve a bill that would abolish capital punishment as a penalty for federal crimes. Only one person has been executed under federal law in the past 10 years, and only one prisoner is now under penalty of death for commission of a federal crime. Thirteen states have abolished the death penalty, as have more than 70 nations. Attorney General Ramsey Clark, testifying before a Senate Judiciary subcommittee considering a bill to abolish capital punishment for federal crimes, said that society pays a heavy price for the penalty of death it imposes: "Our history shows the death penalty has been unjustly imposed, innocents have been killed by the state, effective rehabilitation has been impaired, judicial administration has suffered," although crime has not been deterred. N.Y. Times, July 3, 1968, at 1, col. 2.

death penalty as punishment for anything less than the actual taking of human life.⁴⁵ It is arguable that the real effect of this decision will be to eliminate the death penalty as a possible punishment in all save the most heinous cases. Should this prove true, one may expect the Court to be criticized for achieving such a substantive change by an essentially procedural device.

45. See the dissent of Mr. Justice Goldberg, joined by Douglas and Brennan, JJ., from the Court's denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889 (1963).