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RECENT CASES

Constitutional Law—Fourteenth Amendment—Fifth Amendment Privilege Against Self-incrimination Applicable to States—Federal Standard Determinative

Petitioner, who had been previously arrested during a gambling raid,[1] was subpoenaed sixteen months later to be a witness in a state inquiry into gambling and other criminal activities. He refused to answer a number of questions[2] related to events surrounding his previous arrest, claiming a privilege under the fifth amendment. The Connecticut Superior Court adjudged him in contempt and committed him to prison until he was willing to answer. His application for habeas corpus was denied by the superior court, and the Connecticut Supreme Court of Errors affirmed, holding that the fifth amendment privilege against self-incrimination was not available to a witness in a state proceeding, that the fourteenth amendment extends no privilege to him, and that he had not properly invoked the privilege available under the Connecticut Constitution.[3] On writ of certiorari the Supreme Court of the United States, *held*, reversed. The fourteenth amendment makes the fifth amendment privilege against self-incrimination applicable to the states; the privilege, if properly invoked in a state proceeding, is governed by federal standards and, judged by these standards, the petitioner's claim of privilege should have been upheld. *Malloy v. Hogan*, 378 U.S. 1 (1964).

Since the decision in *Twining v. New Jersey*,[4] the United States Supreme Court has consistently refused to apply the fifth amendment privilege against self-incrimination to the states through the fourteenth amendment. Until the instant decision, this view had been followed in cases whenever the question had arisen.[5] Whatever doubt there

1. Malloy pleaded guilty to the crime of pool selling, a misdemeanor in violation of CONN. GEN. STAT. REV. § 53-295 (1958), and was sentenced to one year in jail and fined $500. The sentence was suspended after ninety days, at which time he was placed on probation for two years.

2. The questions put to Malloy at the inquiry were in substance: (a) For whom did he work on September 11, 1959, the date he was arrested on the charge for which he was convicted? (b) Who selected and paid his counsel in connection with that charge and his defense? (c) Who selected his bondsman and who paid him? (d) Who paid Malloy's fine? (e) What was the name of the tenant in the apartment in which he was apprehended? (f) Did he know John Bergotti?

3. Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744 (1963).

4. 211 U.S. 78 (1908).

5. Cohen v. Hurley, 366 U.S. 117 (1961); Snyder v. Massachusetts, 291 U.S. 97 (1934). In the latter case the Court said, "The Commonwealth of Massachusetts is

may have been as to the applicability of the fifth amendment privilege against self-incrimination to the states was seemingly dispelled in *Adamson v. California*,[6] where the Court said that the privilege is not inherent in the right to a fair trial. Despite the Court's refusal to apply the fifth amendment privilege against self-incrimination to the states, it did hold, in *Brown v. Mississippi*,[7] that the due process clause of the fourteenth amendment prohibits the states from using an accused's coerced confessions against him. In subsequent decisions[8] the inquiry was whether the person had been compelled to incriminate himself in violation of due process.[9] In *Mapp v. Ohio*,[10] the Court applied the fourth amendment protection of unreasonable searches and seizures to the states. Relying on *Boyd v. United States*,[11] which considered the fourth and fifth amendments as running "almost into each other,"[12] the Court found that the fourth amendment protection was intimately related to the fifth amendment privilege against self-incrimination.[13] Whenever one of the first eight amendments of the Bill of Rights has been applied to the states there has been a correlative finding that the federal constitutional standards accompanying that right also apply.[14] In cases dealing with the fifth amendment privilege against self-incrimination, the federal standard is the

free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Id.* at 105. The fifth amendment requirements of grand jury indictments, Hurtado v. California, 110 U.S. 516 (1884), and double jeopardy, Palko v. Connecticut, 302 U.S. 319 (1937), have also been held not to apply to the states through the fourteenth amendment.

6. 332 U.S. 46 (1947). Mr. Justice Black vigorously dissented on the grounds that the fourteenth amendment incorporated the first eight amendments of the Bill of Rights. *Id.* at 68.

7. 297 U.S. 278 (1936). The Court, however, said that its conclusion did not involve the privilege against self-incrimination. "Compulsion by torture to extort a confession is a different matter." *Id.* at 285.

8. See, *e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Spano v. New York, 360 U.S. 315 (1959).

9. Rogers v. Richmond, 365 U.S. 534 (1961). "[T]hat ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Id.* at 541.

10. 367 U.S. 643 (1961).

11. 116 U.S. 616 (1886).

12. *Id.* at 630. This view, put forth in the *Boyd* case, has been severely criticized. 8 WIGMORE, EVIDENCE § 2251 (3d ed. 1940); Knox, *Self-Incrimination*, 74 U. PA. L. REV. 139 (1926).

13. Mapp v. Ohio, *supra* note 10, at 656-57.

14. Gideon v. Wainwright, 372 U.S. 335 (1963) (the right to counsel guaranteed by the sixth amendment); Ker v. California, 374 U.S. 23 (1963) (the prohibition of unreasonable searches and seizures of the fourth amendment); Cantwell v. Connecticut, 310 U.S. 296 (1940); Gitlow v. New York, 268 U.S. 652 (1925) (guarantees of the first amendment).

"link in the chain" of evidence rule.[15]

In the instant case, the Court reviewed decisions that had applied various provisions of the Bill of Rights to state action which had formerly been held not applicable.[16] It then reviewed the decisions which prohibited the states from using the accused's coerced confessions against him.[17] Recognizing that one of the basic premises of our system of criminal prosecution is that the accused must not be compelled to incriminate himself, the Court viewed the fifth amendment privilege against self-incrimination as so fundamental that it prevents the states from imprisoning a person in order to compel him to answer questions that might incriminate him.[18] The Court strengthened its conclusion by referring to *Mapp*, which held that evidence obtained in violation of the fourth amendment prohibition against unreasonable searches and seizures was inadmissible in state courts, and that the fifth amendment privilege against self-incrimination implemented the fourth amendment in such cases.[19] The Court then proceeded to reject the state's contention that the federal standard in state inquiries is less stringent than in a federal proceeding by citing cases that demonstrate that where the fourteenth amendment implements one of the first eight amendments the federal standard is also applied to the states.[20] After applying the federal standard to the questions asked the petitioner, the Court concluded that the standard had not been applied because the Comecticut court failed to take into consideration the circumstances and setting in which the questions were asked.[21] In his dissenting opinion, Mr. Justice Harlan objected to the application of federal criminal procedures to state proceedings. He felt that the Court was overlooking the significant differences between state and federal criminal law

15. Hoffman v. United States, 341 U.S. 479 (1951). "The privilege afforded not ouly extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is desigued to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 486-87.

16. 378 U.S. at 5-6. Gideon v. Wainwright, *supra* note 14 (sixth amendment); Mapp v. Ohio, *supra* note 10 (fourth amendment); Gitlow v. New York, *supra* note 14 (first amendment).

17. 378 U.S. at 5-6.

18. *Id.* at 8.

19. *Ibid.*

20. *Id.* at 10. See cases cited in note 14 *supra.*

21. The Court stated that even though the one-year statute of limitations had run on Malloy's past known offenses. His answers might link him with a more recent crime for which he still might be prosecuted. *Id.* at 12-14. See the quotation from *Hoffman v. United States* in note 15 *supra.*

enforcement.[22] He proceeded to cite the cases[23] in which the Court had previously held that the privilege as such did not apply to the states, and disapproved this overruling of a long line of precedent. Mr. Justice Harlan felt that the relevant inquiry was whether the proceedings below met the demands of fundamental fairness which due process embodies.[24] In a separate dissenting opinion, Mr. Justice White, while agreeing with the majority that the fifth amendment privilege against self-incrimination should be applied to the states, felt that the Connecticut court had applied the prevailing federal standard, but that the majority had in effect now made the privilege automatic simply by the witness's invocation of it.[25] He would prefer a standard that allowed the judge rather than the witness to determine when an answer sought is incriminating, or, at the very least, a standard requiring the claimant to state his grounds for asserting the privilege when asked seemingly innocuous questions.[26]

In light of the decisions holding that the first,[27] fourth,[28] and sixth[29] amendments apply to the states through the fourteenth amendment, it seems that the decision in the present case was inevitable. With the many pronouncements describing our criminal system as accusatorial,[30] the fifth amendment privilege against self-incrimination is as "fundamental" to this system as the others, and should be protected against state action. Although the Court has still not accepted Mr. Justice Black's view that the fourteenth amendment incorporates the first eight amendments,[31] it seems to be accomplishing the same result by picking and choosing those rights that are "fundamental." The major difficulty with the application of the fifth amendment privilege against self-incrimination to the states, as with the fourth amendment protection against unreasonable searches and seizures, is its tendency to weaken the federal system. This was ably described by Mr. Justice Harlan in his dissenting opinion.[32]

22. 378 U.S. at 14-16. The most significant differences relate to the vastly greater resources of the federal government, and the skill and education of its law enforcement agents.

23. *Id.* at 17. Mr. Justice Harlan cited the following: Cohen v. Hurley, *supra* note 5; Adamson v. California, *supra* note 6; Palko v. Connecticut, *supra* note 5; Brown v. Mississippi, *supra* note 7; Snyder v. Massachusetts, *supra* note 5; and Twining v. New Jersey, *supra* note 4.

24. 378 U.S. at 28.

25. *Id.* at 33.

26. *Id.* at 38.

27. *E.g.*, Cantwell v. Connecticut, *supra* note 14; Gitlow v. New York, *supra* note 14.

28. Ker v. California, *supra* note 14; Mapp v. Ohio, *supra* note 10.

29. Gideon v. Wainwright, *supra* note 14.

30. See, *e.g.*, Rogers v. Richmond, *supra* note 9.

31. See note 6 *supra.*

32. "The Court endangers this allocation of responsibility for the prevention of

Until this decision the federal courts seem to have experienced no real difficulty in their application of the federal standard.[33] The lower federal courts have allowed the claim of the privilege if the witness can show any connection, not wholly incredible, between an answer to a question and a crime for which he might be prosecuted.[34] The Court in the instant case upheld a claim of the privilege even though the state demonstrated that petitioner could not be prosecuted for the activities that his answers might uncover because the one-year statute of limitations had run both on the misdemeanor and the conspiracy to commit it.[35] If there is strict adherence to this decision, it will have the practical effect of allowing any witness to refuse to answer any question. The fifth amendment protection against self-incrimination must be balanced with the right of the state to the testimony of her citizens. This decision leaves the role of the judge in much doubt because under the existing standard the witness' claim is not final, and yet the judge can never determine conclusively that an answer could not possibly incriminate, as seems to be required by the Court in this decision. Thus, the states are now burdened with the problem of the nature of the current status of the federal standard and the guidelines thereunder. A possible solution would be to return to the reasonable-tendency-to-incriminate test laid down in *Mason v. United States*.[36] In the last analysis it appears that the Court simply determined that the time was ripe to apply the fifth amendment privilege against self-incrimination to the states, even though it was presented with a poor set of facts for such an application. If there is a frank recognition of this motive, perhaps the predicted confusion concerning the standards will not occur.

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crime when it applies to the States doctrines developed in the context of federal law enforcement, without any attention to the special problems which the States as a group or particular States may face. If the power of the States to deal with local crime is unduly restricted, the likely consequence is a shift of responsibility in this area to the Federal Government, with its vastly greater resources. Such a shift, if it occurs, may in the end serve to weaken the very liberties which the Fourteenth Amendment safeguards by bringing us closer to the monolithic society which our federalism rejects." 378 U.S. at 28.

33. Isaacs v. United States, 256 F.2d 654 (8th Cir. 1958); United States v. Doto, 205 F.2d 416 (2d Cir. 1953); United States v. Coffey, 198 F.2d 438 (3d Cir. 1952).

34. See, *e.g.*, Isaacs v. United States, *supra* note 33. "To warrant a denial of the privilege it must appear in the setting in which the question is asked that the answer cannot possibly have a tendency to incriminate." 256 F.2d at 658.

35. The sixth question seemed to be directed at one John Bergotti's activities rather than his own, and the Court has stated that the protection against self-incrimination is solely for the benefit of the witness and not for the protection of others. See Rogers v. United States, 340 U.S. 367 (1951).

36. 244 U.S. 362 (1917). Although *Mason* has not been expressly overruled, the Court in Hoffman, *supra* note 15, after mentioning *Mason*, went on to say that a mere possibility is sufficient.

Criminal Law—Habeas Corpus Relief Where Subsequent Decisions Reveal Prejudicial Error in Original Sentence

Petitioner was found guilty of a rape-murder and, pursuant to a penalty trial, sentenced to death.[1] The verdict of the penalty trial was appealed to the California Supreme Court. There, petitioner made two allegations of error: (1) that the prosecuting attorney had introduced testimony indicating that there was a possibility of early release from prison on parole if only a life sentence were given, and (2) that the trial judge had informed the jury that even if a death sentence were given, it could still be commuted by the Governor. These alleged errors were held not to be prejudicial, and the death penalty was affirmed.[2] Within one year, other cases overruled certain portions of the decision in petitioner's penalty trial appeal, in effect holding that such errors were prejudicial.[3] On subsequent application to the California Supreme Court for writ of habeas corpus to review petitioner's sentence of death, *held*, reversed and remanded for a new penalty trial. Where appellate review has been exhausted, habeas corpus can properly be used to reconsider a prisoner's case on the basis of decisions subsequent to the original sentence. *In re Jackson*, 39 Cal. Rptr. 220, 393 P.2d 420 (1964).

The common law writ of habeas corpus was originally used to bring persons before the bar whose presence was necessary to the conduct of court proceedings.[4] By the end of the fifteenth century it was used by common law courts in asserting their jurisdiction over rival courts, becoming a procedure for protecting a convicted defendant from penalty judgment at the hands of a court lacking proper jurisdiction.[5] Traditionally, in most American jurisdictions, the writ has been properly used only in testing the legality of imprisonment by challenging jurisdictional defects.[6] However, a majority of the

1. California penal law provides for a separate penalty trial if the defendant is first found guilty of an offense for which the penalty is death, or in the alternative, life imprisonment. CAL. PEN. CODE § 190.1.

2. People v. Jackson, 59 Cal. 2d 375, 379 P.2d 937 (1963).

3. In People v. Morse, 60 Cal. 2d 631, 388 P.2d 33 (1964), the California Supreme Court expressly overruled holdings in prior cases that references to possibility of parole or to the Governor's power of commutation were not prejudicial. In subsequent cases heard on appeal such errors have thus been held prejudicial. People v. Terry, 37 Cal. Rptr. 605, 390 P.2d 381 (1964); People v. Hines, 37 Cal. Rptr. 622, 390 P.2d 398 (1964).

4. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 227 (3d ed. 1922). See also Note, 61 COLUM. L. REV. 681, 682 (1961).

5. *Ibid.*

6. A habeas corpus proceeding renders void a conviction by a court without competent jurisdiction. Lack of jurisdiction over either the person or the subject matter has

courts have broadened the use of habeas corpus, making a denial of the defendant's constitutional rights grounds for its issuance.[7] This is on the theory that a court acting unconstitutionally has no jurisdiction to proceed.[8] Use of the writ has also been expanded to extend relief to those imprisoned under unconstitutional statutes, the theory being that an unconstitutional statute has no effect at all and a court is without authority to imprison one who has violated no law.[9] Beyond this, no general statement can be made other than that some jurisdictions now permit the use of habeas corpus in exceptional circumstances to hear a matter of sufficient importance which could not otherwise be reviewed.[10] Thus far, such exceptional circumstances have included applications to attack convictions under a habitual criminal statute where the status of the conviction depended upon a prior conviction of a crime which did not conform to the definition of any offense enumerated in the habitual criminal statute.[11] Another example is where there has been a denial of right to effective counsel in a state criminal trial.[12] In general it can be said that exceptional circumstances include any situation where a conviction has been obtained under circumstances which perpetrate a grave injustice on the accused.[13]

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always been grounds for issuance of the writ. *Ex parte* Newbern, 55 Cal. 2d 500, 360 P.2d 43 (1961); Bowen v. Johuston, 58 F. Supp. 208 (N.D. Cal), *aff'd*, 146 F.2d 268 (9th Cir), *cert. denied*, 324 U.S. 876 (1944); Buie v. King, 50 F. Supp. 952 (W.D. Mo. 1942), *aff'd*, 137 F.2d 495 (8th Cir. 1943). However, as will be seen, some jurisdictions have expanded these grounds and allow the writ to be used to question a conviction for other than strictly jurisdictional reasons. See note 10 *infra*.

7. Minnesota v. Barker, 136 U.S. 313 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886); *Ex parte* Daniels, 183 Cal. 636, 192 Pac. 442 (1920); *Ex parte* Bailey, 155 Cal. 472, 101 Pac. 441 (1909); O'Haver v. Montgomery, 120 Tenn. 448, 111 S.W. 449 (1908).

8. Wojculewicz v. Cummings, 145 Conn. 11, 138 A.2d 512, *cert. denied*, 356 U.S. 969 (1958).

9. *Ex parte* Siebold, 100 U.S. 371 (1879); *Ex parte* Schatz, 307 Mo. 67, 269 S.W. 383 (1925); *Ex parte* Rosenblatt, 19 Nev. 439, 14 Pac. 298 (1887); Servonitz v. State, 133 Wis. 231, 113 N.W. 277 (1907). See also Note, 61 COLUM. L. REV. 681, 689 (1961).

10. "The newer view is that a judgment may be void and thereby subject to attack for certain extreme irregularities other than the lack of jurisdiction of the offense and the person after the judgment or sentence." (Citations omitted.) Rice v. Davis, 366 S.W.2d 153, 155 (Ky. 1963) (denial of counsel). See also Bowen v. Johnston, 306 U.S. 19 (1939) (Conflict between state and federal authorities on a question of law); *In re* McInturff, 37 Cal. 2d 876, 236 P.2d 574 (1951) (habitual criminal statute); Granucci, *Review of Criminal Conviction by Habeas Corpus in California*, 15 HASTINGS L.J. 189, 198 (1963).

11. *In re* McVickers, 99 Cal. 2d 264, 176 P.2d 40 (1946).

12. Gideon v. Wainwright, 372 U.S. 335 (1963). Although *Gideon* was decided on a constitutional basis, it is representative of numerous state cases which permitted use of habeas corpus, based on exceptional circumstances, to collaterally attack a conviction where there had been a denial of right to counsel.

13. Other instances where use of habeas corpus has been held proper even though technically speaking there has been no jurisdictional defect include: A person's right

The court in the instant case chose to liberalize further the use of habeas corpus in California by finding that there were exceptional circumstances which justified use of the writ as a proper post-conviction remedy. It recognized as a matter of general law that habeas corpus applies only to questions of imprisonment as a result of a void proceeding or a jurisdictional defect and to review the constitutionality of statutes—not to correct error.[14] However, the court relied on various apparent dicta[15] to justify its conclusion that habeas corpus was proper "to review a matter that cannot otherwise be reached . . . where the need for the remedy afforded by the writ . . . is apparent."[16] A large portion of the opinion was directed to justifying the retroactive effect of its holding. It dealt with virtually every important case in this area, distinguishing or criticizing those which held habeas corpus unavailable to review a conviction obtained prior to reinterpretation of the law applying to the conviction, and reasoning by analogy from the few cases which do allow a retroactive application of constitutional case decisions via habeas corpus.[17] The court did *not* hold that

to apply for relief from default in perfecting an appeal, *In re* Martin, 23 Cal. Rptr. 167, 373 P.2d 103 (1962); erroneous imposition of an excessive sentence, *In re* Morch, 180 Cal. 384, 181 Pac. 657 (1919); improper rendition of multiple sentences Neal v. California, 9 Cal. Rptr. 607, 357 P.2d 839 (1960); and an erroneous conviction under an inapplicable statute, *In re* Zerbe, 36 Cal. Rptr. 286, 388 P.2d 182 (1964).

14. 39 Cal. Rptr. at 221, 393 P.2d at 421.

15. Bowen v. Johnston, 306 U.S. 19, 26-27 (1939); *In re* Silverstein, 52 Cal. App. 2d 725, 126 P.2d 962, 964 (1942).

16. 39 Cal. Rptr. at 222, 393 P.2d at 422.

17. In United States *ex rel.* Kulick v. Kennedy, 157 F.2d 811 (2d Cir. 1946), where defendant was prevented from offering a defense of improper draft classification in a trial convicting him of failure to submit to introduction in the army, and nine months after lapse of the time for appeal of his case, the United States Supreme Court held in another case that such a defense could be offered, the court granted habeas corpus, holding that the defendant was entitled to review of his case in order to prevent a complete miscarriage of justice. The United States Supreme Court reversed in Sunal v. Large, 332 U.S. 174 (1947), saying that this was not a case where the law had changed but was rather a situation where the definitive ruling on the question of law had not crystalized and by failing to pursue an appeal, the defendant had lost his right to relief. The court, in *Jackson*, distinguished this case on the basis that the rule of law involved had crystalized and the defendant had exhausted his right of appeal.

In Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941), the court held that an overruling decision of the United States Supreme Court was not applicable to an earlier case decided under old law. Because of the date of the case and because it was the only clear holding of its kind, the court in *Jackson* did not seem to consider it persuasive authority.

In Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958), the Supreme Court directed the state court to hear defendant's petition for habeas corpus where he had been imprisoned as a result of an appeal in which the state refused to furnish him a free trauscript of the trial court record. The direction was on the basis of an overruling case which held that an indigent defendant had a coustitutioual right to a free transcript on appeal. The court in *Jackson* relied on this logic of applying an overruling case decision retroactively to a conviction obtained prior to the overruling case. 38 Cal. Rptr. at 225, 393 P.2d at 425.

In Gaitan v. United States, 295 F.2d 277 (10th Cir. 1961), the court denied habeas

habeas corpus is an available remedy to apply retroactively to all convictions under old law, where subsequent cases have changed the law making such similarly obtained subsequent convictions invalid. It merely held that this particular case, on its facts, was a sufficiently exceptional situation to justify the use of habeas corpus, that "this is a fixed group of cases and none hereafter will be added to their number."[18] The resulting opinion in the case seems to be the product of the court's response to two separate forces. The first was the necessity for using habeas corpus to relieve the petitioner from the grave injustice resulting from obviously exceptional circumstances. The second force was the court's reluctance to make a broad holding that habeas corpus could be used to retroactively apply all overruling cases to prior convictions. It was as a result of these two forces that the court strictly limited the case to its facts.

This case is important in that it points up the distinction between two distinct situations: (1) when habeas corpus can be used to retroactively[19] apply an overruling case decision in collaterally attacking a conviction obtained under prior law, and (2) when a change in the law will be applied retrospectively to fact situations occurring *before* the change, but not litigated until afterwards.[20] In the second

corpus relief to a defendant convicted before Mapp v. Ohio, 367 U.S. 643 (1961), which held that the circumstances leading to a conviction such as in defendant's case gave such a defendant a constitutional right to release. The court in *Jackson* said that the circumstances involved in that case and Jackson's were totally different. 39 Cal. Rptr. at 224, 393 P.2d 424 n.6.

18. 39 Cal. Rptr. at 224, 393 P.2d at 424.

19. For purposes of this discussion the word "retroactively" will be used when referring to situations where overruling case law is applied to attack a conviction which was obtained prior to the overruling case. "Retrospectively" will be used when referring to situations where overruling case law is applied in a trial held subsequent to the overruling case but relating to facts occurring prior to that case.

20. Whether a case reinterpretation of law should be applied retroactively to fact situations occurring before the change but litigated afterwards has constantly perplexed courts. The theory behind retroactive application of the law is that in overruling cases, judges do not make law but merely discover what has always been the law, though it had been misrepresented. The problem with retrospective application is that parties often plan their legal relationships in reliance on the stated existing law. This is especially true in the formation of contracts. If the law is subsequently changed the legal consequences flowing from the prior actions of the parties are also changed. This often leads to harsh consequences in individual cases with the result that courts are persuaded to limit retrospective application of overruling decisions where parties have relied on prior law. The result of this has been that in some cases courts apply the law retrospectively while in others they refuse to do so.

The situation where overruling case decisions are applied retrospectively to fact situations occurring before the change but not litigated until after is to be distinguished from collateral attack of a conviction which was obtained before the overruling case. In this situation the courts have been very strict in allowing the use of habeas corpus to retroactively apply the overruling case to prior convictions under old law. Only where the conviction was obtained under a statute later determined unconstitutional or, in some cases, where the prior conviction was obtained under circumstances which

situation, in criminal cases where an individual's life or liberty hangs in the balance, the courts' decision of whether or not to retrospectively apply overruling case law often will depend upon the resulting consequences of this decision to the particular defendant. The courts will generally apply the new decision in such a way as to insure protection of the defendant's life and liberty.[21] Should not the same considerations apply in allowing a defendant convicted under prior law but before the overruling case collaterally to attack his conviction via habeas corpus where life or liberty hang in the balance? As has been said, habeas corpus is available to attack collaterally a conviction under an unconstitutional statute,[22] or in some situations where the conviction was obtained in violation of a constitutional right, where the decision as to constitutionality came after the conviction.[23] This case is an example of the first situation mentioned above: the defendant has been sentenced to death, the law is changed indicating that the procedure so depriving him of life was prejudicial, and under prevailing habeas corpus law, he was prevented from collaterally attacking this procedure. Although the overruling case was not of a constitutional dimension, this fact alone should not prevent his collateral attack of a procedure where he has been prejudicially sentenced to death.[24] In limiting the availability of habeas corpus to retroactively apply a non-constitutional overruling case to these facts,

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are found in the later overruling case to deny constitutional rights, has collateral attack of the conviction been permitted. See Note, 60 HARV. L. REV. 437 (1947); Spruill, *The Effect of an Overruling Decision*, 18 N.C.L. REV. 199, 207-09 (1940); Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 MICH. L. REV. 30 (1939).

21. Thus in State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940), where a prior decision had construed a criminal statute as not applying to certain conduct and the defendant had engaged in such conduct before the prior decision was overruled, the overruling case was confined to prospective operation. However, when a person is convicted under a statute declared unconstitutional after his conviction, the conviction can not stand. See note 9 *supra*. Note, 60 HARV. L. REV. 437, 446 (1947).

22. See note 9 *supra*.

23. See note 7 *supra*. The cases in note 7 refer to situations where the defendant was denied a constitutional right in the trial which resulted in his imprisonment; this denial allowing him to collaterally attack the conviction via habeas corpus. Here, reference is made to a somewhat different situation where the holding that circumstances occurring in a trial are unconstitutional is in *another* case arising after a conviction which included such circumstances and is now being collaterally attacked. In this situation collateral attack of the prior conviction has been permitted on the basis of a subsequent overruling case of a constitutional dimension. See Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958). There is currently one argument which would permit collateral attack of convictions obtained under circumstances which were held unconstitutional in Mapp v. Ohio, 367 U.S. 643 (1961), but were rendered before Mapp. See 18 VAND. L. REV. 762 (1964).

24. In light of the recent emphasis placed upon the protection of personal rights by most courts, this resulting situation could well be found to be of a constitutional dimension. To submit the defendant to the death penalty under such circumstances may be a denial of his life without due process of law.

the court created a single exception to the current general rule which limits such a procedure to situations where the overruling case was of a constitutional dimension. This reluctance to create a broad exception to the general rule, which limits collateral attack of prior convictions, was probably based on the same considerations which account for such a strict general rule. The foremost of these considerations include crowded court dockets resulting from the possibility of numerous retrials and the difficulty in witnesses being found and once found, able to recall events relevant to the old trial.[25] The problem in such an application of habeas corpus as was used in the instant case is how to determine when there is a sufficiently grave injustice warranting such an exception to the rule and allowing retroactive application of the overruling case law. This court said that it is only where life is in jeopardy. It seems more logical[26] to limit retroactive habeas corpus relief to situations where the redefinition of the law is of a constitutional dimension.

Criminal Law—Probable Cause and Fourth Amendment Guarantees as Applied to State Parolees

The parole officer of the defendant, a paroled California prisoner, accompanied by narcotics officers who had received information from an undisclosed informer[1] that the defendant had heroin in his possession, apprehended the defendant and searched his person and his automobile for the heroin. The parole officer had no arrest or search warrant and later testified that he had arranged the meeting with the defendant for the sole purpose of searching him for narcotics.[2] During the defendant's trial for possession of narcotics, the court admitted into evidence the heroin that had been found in his automobile and upon his person. The defense counsel objected to this admission on the grounds that the evidence was the product

25. See, Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319 (1962).

26. It seems quite illogical to have a general rule which admittedly satisfactorily deals with the problem and then create a single exception to this rule for one case which could probably be included within the general rule on the basis of a denial of due process.

1. This anonymous communication was the ouly basis of probable cause for the search.

2. People v. Hernandez, 40 Cal. Rptr. 100, 101 (1964).

of an illegal search and seizure, and also demanded disclosure of the identity of the police informer. The objection was overruled and the parolee-defendant was found guilty. On appeal to the California district court, *held*, affirmed. The requirement of probable cause under the state and federal constitutions does not apply to the search of a parolee or his automobile by parole officers, acting on information received from an undisclosed informer. *People v. Hernandez*, 40 Cal. Rptr. 100 (1964).

Parole has been defined as "the release of a prisoner to the community by the parole board prior to the expiration of his term, subject to conditions imposed by the board and to its supervision."[3] Another view is that parole is "a treatment program in which an offender, after serving part of a term in a correctional institution, is conditionally released under supervision and treatment by a parole worker."[4] The purpose of parole is widely recognized as the rehabilitation of the offender. One court has observed, "The parole system is reformatory and founded upon a plan and policy of helping the inmate to gain strength and resistance to temptation, to build up his self control, to adjust his attitudes and actions to social controls and standards; and it aims to extend his liberties and opportunities for normal living. . . ."[5] The parole officer is often viewed as having two essential goals—a short term goal of insuring that the parolee obeys the term or conditions of his parole, and a long term goal of assisting the parolee in planning his future so that he can lead a normal and productive life. The long term goal stresses the importance of dealing with the parolee as an individual with his own rights.[6] Although the object of parole, *i.e.*, rehabilitation, is clear, the theory upon which a parole is granted is not so clear. Today there are two major concepts concerning the granting of a parole: first that it is an act of grace on the part of the state,[7] and second, that it is a form of contract[8] between the state

3. STANDARD PROBATION AND PAROLE ACT § 2 (1955).

4. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 44 (1959). One authority referred to parole as the "selective process of releasing a prisoner at the psychologically right time when, in the judgment of the releasing authority, he has rceeived maximum benefit from his institutional experience." Reed, *Due Process in Parole Violation Hearings*, 27 Fed. Prob., June 1963, p.38.

5. McCoy v. Harris, 108 Utah 407, 160 P.2d 721, 722 (1945).

6. Zeitoun, *Parole Supervision and Self-Determination*, 26 Fed. Prob., Sept. 1962, pp. 44, 49. California authorities observe that, "The parole agent helps with 'material assistance, vocational guidance, job placement, adjustment within the community . . . and will counsel the parolee in regard to whatever social, marital or personal problems the parolee may have.'" California Department of Corrections, BIENNIAL REPORT 35 (1957-58), quoted in MacGregor, *Adult Probation, Parole, and Pardon in California*, 38 TEXAS L. REV. 887, 902 (1960). See also Ives, *The Essential Task of the Probation-Parole Officer*, 26 Fed. Prob., March 1962, p. 38.

7. "His release is a matter of grace, not a right to be demanded." State v. Brantley, 353 S.W.2d 793, 796 (Mo. 1962). See Berry v. State Board of Parole, 148 Colo. 547,

and the offender. The concept of grace is definitely the majority holding. Under both of these theories the question that is crucial in the determination of the parolee's civil rights is that of his legal position in relation to the state. A study of recent decisions shows that a majority of states regard the parolee as being in the legal custody of the state.[9] Whatever it may be called—legal custody, technical custody,[10] or constructive custody[11]—the effect is the same: the parolee is considered as remaining a prisoner,[12] serving his sentence outside the prison walls or being on "a leave of absence."[13] Some states provide that the warden of the prison from which the parolee is released still has custody[14] of him, while others specify the parole board[15]

367 P.2d 338; People v. Kinney, 25 Ill. 2d 491, 185 N.E.2d 337 (1962); Willard v. Ferguson, 358 S.W.2d 516 (Ct. App. Ky. 1962); State v. Kalkbrenner, 263 Minn. 396, 116 N.W.2d 560 (1962); State v. Powell, 139 Mont. 583, 367 P.2d 553 (1961); Owens v. Swope, 60 N.M. 71, 287 P.2d 605 (1955); People v. Langella, 41 Misc. 2d 65, 244 N.Y.S.2d 802 (1963); Commonwealth v. Maroney, 200 Pa. Super. 254, 188 A.2d 780 (1963); Bearden v. State, 223 S.C. 211, 74 S.E.2d 912 (1953).

8. Fuller v. State, 122 Ala. 32, 26 So. 146 (1899); Davis v. Hunter, 124 Iowa 569, 100 N.W. 510 (1904); Townsend v. Crouse, 191 Kan. 645, 383 P.2d 954 (1963); Owen v. Smith, 89 Neb. 596, 131 N.W. 914 (1911); Rider v. McLeod, 323 P.2d 741 (Okla. Crim. 1958); Wilson v. State, 240 S.W.2d 774 (Tex. Crim. App. 1951); *In re* Saucier, 122 Vt. 168, 167 A.2d 368 (1961). See Note, 65 HARV. L. REV. 309, 310 (1951). The author of this note lists a third important concept, "the parolee remains in the custody of the warden of the prison or parole board." It is suggested that this is not an accurate classification since this constructive custody concept occurs under both the "grace" and "contract" theories. *E.g., In re* Varner, 166 Ohio St. 340, 142 N.E.2d 846 (1957); Hendrickson v. Pennsylvania State Bd. of Parole, 409 Pa. 204, 185 A.2d 581 (1962).

9. Pinana v. State, 76 Nev. 274, 352 P.2d 824 (1960); Tyler v. State Dep't of Pub. Welfare, 19 Wis. 2d 166, 119 N.W.2d 460 (1963).

10. Espinoza v. Tinsley, 390 P.2d 941 (Colo. 1964).

11. Baumhoff v. United States, 200 F.2d 769, (10th Cir. 1952); People v. Hernandez, *supra* note 2; Schooley v. Wilson, 150 Colo. 483, 374 P.2d 353 (1962); Bush v. Maxwell, 175 Ohio St. 207, 192 N.E.2d 774 (1963); Application of Fredericks, 211 Ore. 312, 315 P.2d 1010 (1957).

12. "In respect of that crime and his attitude before the law after conviction of it he is not a citizen, nor entitled to invoke the organic safeguards which hedge about the citizen's liberty, but he is a felon at large by the mere grace of the Executive." Fuller v. State, *supra* note 8, at 40, 26 So. at 148, cited with approval by the court in *In re* Varner, *supra* note 8.

13. Parole is a "leave of absence from prison during which the prisoner remains in legal custody until the expiration of his sentence." Sanders v. MacDougall, 135 S.E.2d 836, 837 (S.C. 1964).

14. Jenkins v. Madigan, 211 F.2d 904 (7th Cir. 1954); Williams v. City of Birmingham, 41 Ala. App. 208, 133 So. 2d 713 (1961); Overlade v. Wells, 234 Ind. 436, 127 N.E.2d 686 (1955); *Cf.* STANDARD PROBATION AND PAROLE ACT § 18, "Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board."

15. People v. Denne, 141 Cal. App. 2d 499, 297 P.2d 451 (1956); Farrant v. Bennett, 123 N.W.2d 888 (Iowa 1963); State v. Rigg, 256 Minn. 275, 98 N.W.2d 243 (1959); Petition of LaDoux, 393 P.2d 778 (Mont. 1964); Greenwood v. Gladden, 231 Ore. 436, 373 P.2d 417 (1962); Hendrickson v. Pennsylvania State Bd. of Parole, *supra* note 8; TENN. CODE ANN. § 40-3614 (Supp. 1964). See Doyle v. Hampton, 207 Tenn. 399, 340 S.W.2d 891 (1960).

as the custodian, but as far as the parolee is concerned the distinction is meaningless.[16] The other legal theory concerning the parolee's relation to the state is a minority view, and might be called the "conditional release" approach. A typical statement of this view is, "A parole is a conditional release . . . which entitles the grantee to leave the institution in which he is imprisoned, and to serve the remainder of his term outside the confines thereof, if he shall satisfactorily comply with all the terms and conditions provided in the parole order."[17] Under this concept, the parolee is still under the supervision of penal authorities, but he does not seem to be regarded as an actual prisoner[18] with simply a wider area of confinement.[19]

Before examining the civil rights of a parolee, it will be helpful to review the field of search and seizure as applicable to the instant case. The United States Supreme Court in *Mapp v. Ohio*[20] held for the first time that the due process clause of the fourteenth amendment forbids the admission in state criminal trials of evidence procured in violation of the prohibition of the fourth amendment against unreasonable search and seizure. The "exclusionary rule" had been previously adopted in California in 1955.[21] A search without a warrant, to be valid, generally must be made pursuant to a valid arrest,[22] or with reasonable or probable cause.[23] One commentator, critical of California's broad interpretation of probable cause, has written, "The crucial issue on which the California and federal courts part company has to do with the standards to be used in defining a 'reasonable search and seizure.' Only a handful of state decisions so much as

16. This is true particularly as regards his civil rights.

17. State v. Swenson, 196 Md. 222, 76 A.2d 150, 153 (1950). See Marsh v. Garwood, 65 So. 2d 15 (Fla. 1955); People v. Kinney, *supra* note 7; Willard v. Ferguson, *supra* note 7; *In re* Cammarata's Petition, 341 Mich. 528, 67 N.W.2d 677 (1954); State v. Brantley, *supra* note 7; Mahoney v. Parole Board, 10 N.J. 269, 90 A.2d 8 (1952); Nibert v. Carroll Trucking Co., 139 W. Va. 583, 82 S.E.2d 445 (1954).

18. See note 12 *supra*.

19. This would seem to be nearer the position advanced in the Model Penal Code. See MODEL PENAL CODE § 305.17, comment (Tent. Draft No. 5, 1956), "the conditions of parole should be as few, reasonable, and precise as possible. They should be of a nature clearly relevant to the parolees' conformity to the requirements of the criminal law. They should not intrude excessively or unnecessarily on the private life of the individual."

20. 367 U.S. 643 (1961).

21. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

22. Aguello v. United States, 269 U.S. 20 (1925).

23. Reasonable or probable cause has been defined as "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offeuse with which he is charged." Lea v. State, 181 Tenn. 378, 381, 181 S.W.2d 351, 352 (1944). "It is less than certainty or proof, but more than suspicion or possibility." Smith v. State, 191 Md. 329, 62 A.2d 287, 291 (1948). See People v. Aguilar, 34 Cal. Rptr. 524 (1963).

mention *Mapp* or any other federal cases . . . ."[24] California, however, with, a minority of jurisdictions,[25] has instituted a judicial safeguard that is important in the instant case. Under the doctrine of *Priestly v. Superior Ct.*,[26] the disclosure of the identity of a police informant is required when his communication is relied upon as probable cause for a warrantless search.[27] The courts feel that this is necessary to make the exclusionary rule effective.[28]

There appear to have been only two jurisdictions that have considered the specific problem of the position of the parolee in relation to the use of evidence obtained through invalid searches. In *People v. Denne*,[29] the California Supreme Court—using a doctrine of constructive custody[30]—held that fourth amendment guarantees could be asserted by a parolee, but that a warrantless search by the police officer was reasonable because of the special relationship[31] between the parolee and the authorities who supervise his conduct. In the *Robarge*[32] and *Contreras*[33] cases, evidence was admitted that had been found in the course of a search incidental to the apprehension of the parolee for a parole violation. The *Triche*[34] case went even further and allowed evidence to be introduced that was the product of a warrantless search merely in the course of surveillance. A recent New York case[35] cites the *Denne* and *Triche* cases and observes, "Within the spirit and intendment of the law, it seems plain that the test of

24. Manwaring, *California and the Fourth Amendment*, 16 STAN. L. REV. 318, 326-27 (1964). The author adds, "search and seizure rules fall below any reasonable standard the United States Court might develop to implement *Mapp v. Ohio*. They are systematically hostile to the defendant and in their total impact unfair." *Id.* at 349. See also, Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.

25. See United States v. Santiago, 327 F.2d 573 (2d Cir. 1964); Cochran v. United States, 291 F.2d 633 (8th Cir. 1961); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); Hill v. State, 151 Miss. 518, 118 So. 539 (1928); State v. Edwards, 317 S.W.2d 441 (Mo. 1958); Smith v. State, 169 Tenn. 633, 90 S.W.2d 523 (1936). *But cf.* Simmons v. State, 198 Tenn. 587, 281 S.W.2d 487 (1955).

26. 50 Cal. 2d 812, 330 P.2d 39 (1958).

27. "Aside from Hernandez's status as a prior narcotics offender, the anonymous communication was the only component of probable cause for the search." People v. Hernandez, *supra* note 2, at 102.

28. Priestly v. Superior Court, *supra* note 26, at 43. The opinion made a strong reference to what it considered the federal rule as stated in Roviaro v. United States, 353 U.S. 53, 61 (1957), "In these cases [helpful to a fair determination of the issue] the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication."

29. 141 Cal. App. 2d 499, 297 P.2d 451 (1956).

30. See notes 9-12 *supra*.

31. See note 6 *supra*.

32. People v. Robarge, 151 Cal. App. 2d 660, 312 P.2d 70 (1957).

33. People v. Contreras, 154 Cal. App. 2d 321, 315 P.2d 916 (1957).

34. People v. Triche, 148 Cal. App. 2d 198, 306 P.2d 616 (1957).

35. People v. Langella, *supra* note 7.

reasonableness is not necessarily the same, when applied to a parolee, as when applied to a person whose rights are not similarly circumscribed . . . ."[36] In all of these cases there was a requirement of probable cause, but the protection afforded by this safeguard was seriously limited since the courts felt that the degree of probable cause required was lessened by the existence of the special relationship between the parolee and parole officer.

In the instant case the court realized that it was difficult to reconcile the cases following *Denne* with the exclusionary rule and the *Priestly* doctrine, but reasoned that the special relationship of parolee and parole officer largely negated the necessity of strict adherence to the customary safeguards of the accused. As the court observed, "Weighed on the standard scale, the officer's entry into the automobile in a direct quest for incriminating evidence possessed dubious legality."[37] The court went much further than those cases holding that the requirements for establishing probable cause may be less stringent in the case of a parolee,[38] for here the court eliminated the need for any probable cause where the special relationship of parolee and parole officer exists. Since under these circumstances there is no requirement of probable cause, the *Priestly* doctrine is held not to apply and the informant can remain anonymous. In a strong application of the constructive custody concept, this court drew an analogy between the parolee and the actual prisoner.[39] To justify the search, it stated, "prison authorities may subject inmates to intense surveillance and search unimpeded by fourth amendment barriers."[40] The court also advanced a public policy argument that close supervision and control are requisites in making the parole system acceptable to the public.[41] The comparison drawn by the defense between the rights of a probationer and of a parolee[42] was rejected by the court since a probationer "never enters state prison and never suffers the disabilities resulting from entry."[43]

The court in the instant case completely avoided discussing several important questions. This is particularly disturbing in light of its statement:

> Conceivably, the close scrutiny available to the parole authorities should be restricted to the sphere of parole administration. The heroin in Hernandez' possession led to results other than parole revocation, serving as

36. *Id.* at 805.
37. People v. Hernandez, *supra* note 2, at 103.
38. People v. Langella, *supra* note 7.
39. People v. Hernandez, *supra* note 2, at 103.
40. *Ibid.*
41. *Ibid.*
42. *Ibid.*
43. *Ibid.*

> foundation for a fresh criminal prosecution and conviction. We would assume that criminal prosecution of a parolee should be accompanied by the procedural safeguards and guaranties attending criminal prosecutions generally.[44]

The court apparently recognized that the import of the above quoted passage threw serious doubt on the very decision it had reached, but attempted to justify its holding by reasoning that if the evidence was lawfully obtained it was available to enforce any law which might have been violated;[45] and that here the heroin was lawfully seized and admitted since there was no requirement of probable cause for the search. The court made the special relationship between parolee and parole officer the key factor in its decision by stating, "There is a marked legal distinction between arbitrary search by the parole authorities whom the law places in control of the parolee and one by general law enforcement officers."[46] The distinction therefore must center about the special relationship between the parolee and parole officer; yet here this special relationship should have been irrelevant because the parole officer was not performing any unique function of his office,[47] but was merely accompanying the narcotics officer so as to validate the search. Although it is recognized that a parole officer has supervision of his parolee, it still seems that the exercise of what the court admits is arbitrary power to arrest and convict for a new crime is not justified by precedent or policy. The parolee, facing a new prosecution, should be as much entitled to discover the identity of the informer as any other defendant. Under the holding of this case, the parolee stands deprived of the right to a judicial review of the parole officer's search. The earlier California cases cited by the court in support of their reasoning dealt with parole revocation and not with the commission of a new crime.[48] The constructive custody doctrine largely led to this result, for jurisdictions following this view regard the parolee as a felon[49] or actual prisoner. One authority has stated, "Even if the parolee is constructively still a prisoner, this still does not authorize either a search or an arrest without legal cause."[50] Calling the doctrine of constructive custody an unnecessary

44. *Ibid.*

45. People v. Denna, 40 Misc. 2d 717, 243 N.Y.S.2d 797, 800 (1963). "[T]he information . . . was not used or to be used by them to convict him of a crime, but merely to recall a privilege."

46. People v. Hernandez, *supra* note 2, at 102 n.2.

47. See note 6 *supra.*

48. The court seems to overlook this distinction as it states "To weigh retaking of a parolee on scales calibrated for standard cases of arrest and probable cause is to compare incomparables." People v. Hernandez, *supra* note 2, at 103. Here, however, there was not a "retaking," but an arrest for a new crime.

49. See note 12 *supra.*

50. Rubin, *Due Process Is Required in Parole Revocation Procecdings,* 27 Fed. Prob., June 1963, p. 44.

legal fiction, he concludes, "if it encourages decisions that contradict the essential purpose of parole—conditional liberty—it should be abandoned."[51] The court could have profitably spent more time in considering the analogy drawn by the defense to the status of a probationer to whom the fourth amendment protections apply.[52] The Supreme Court has stated that "Probation, like parole, 'is intended to be a means of restoring offenders who are good social risks to society.' "[53] The court in the instant case dismissed the comparison since a probationer has never been in prison. It would be more appropriate to look at the status of the probationer and parolee after they have both been granted their conditional liberty. At least four important points of similarity are apparent: (1) the granting of both a parole and probation is discretionary, (2) the purpose of both is rehabilitation, (3) the nature of both types of release is conditional,[54] (4) the judicial or administrative procedures generally followed are comparable. The two acts appear comparable enough to warrant at least more than a summary dismissal. The third point upon which the court should have expanded concerns the *Priestly* doctrine that "Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."[55] It is difficult to understand how the parolee-parole officer relationship makes "the informer's identity . . . irrelevant, and his anonymity . . . no handicap on the defense."[56] The holding in this case dangerously abrogates a significant protection of an individual[57] parolee who faces a trial for a new crime. The court does this by placing undue reliance upon a relationship that by its very nature should not abandon the parolee to the use of arbitrary power by the individual to whom he looks for assistance in adjusting to society.

51. *Id.* at 45.

52. These protections were held to apply to a probationer in Martin v. United States, 183 F.2d 436 (4th Cir. 1950).

53. Korematsu v. United States, 319 U.S. 432, 435 (1943), citing Zerbst v. Kidwell, 304 U.S. 359, 363 (1938).

54. "The word 'probation' by its very name implies that the probationer must fulfill certain conditions to be entitled to the reward." People v. Municipal Court, 145 Cal. App. 2d 767, 772, 303 P.2d 375, 378 (1957).

55. Priestly v. Superior Court, *supra* note 26, at 50 Cal. 2d 812, 818.

56. People v. Hernandez, *supra* note 2, at 105.

57. To some extent there must be a balancing of the rights of the individual with those of the public. The public policy argument of the court in the instant case to the effect that the parolee must not be given normal civil rights in order to make the parole system acceptable to the public does not seem to be fully enough developed. In making this argument, the court should explain in more detail why the public might need or expect such a limitation on the parolee. The court should particularly define its position in cases such as these where the entire public's right to a trial free from evidence seized by arbitrary police power is endangered.

Criminal Law–Retroactivity of *Mapp* Exclusionary Rule

Petitioner was convicted of a narcotics violation in a New York state court in 1951. During his trial evidence was admitted although it was obtained as a result of an unreasonable search and seizure. The illegally obtained evidence was constitutionally admissible in state courts under the view prevailing in the United States Supreme Court at the time of the trial.[1] But ten years later the Court, in *Mapp v. Ohio*,[2] overruled the earlier authority and held that evidence seized unconstitutionally is not admissible in state courts. Petitioner then instituted this federal habeas corpus proceeding, contending that the exclusionary rule announced in *Mapp* applies retroactively. The federal district court denied petitioner's writ.[3] On an appeal, *held* en banc, affirmed. The *Mapp* exclusionary rule does not apply retroactively to convictions on which the time for direct appeal had expired before *Mapp* was decided. *United States ex rel. Angelet v. Fay*, 333 F.2d 12 (2d Cir.), *cert. granted*, 379 U.S. 815 (1964).

Legislation is usually prospective in operation and often must be so under the ex post facto and impairment of contracts clauses.[4] Judicial decisions overruling earlier cases, however, have traditionally been given retroactive application in both civil and criminal matters (normally by the granting of new trials).[5] This is in deference to the Blackstonian theory[6] that the judiciary never "makes" new law, and that in overruling decisions it merely "declares" the previously existing law. Retroactivity is thus thought necessary from a jurisprudential standpoint since the holding of the earlier cases was, in fact, not really law but a misinterpretation of the law.[7] This principle has been criticised in its application to civil matters by Austin[8] and Cardozo.[9] In their view, retroactivity is unjust in its application to those persons who had acted in reliance upon the overruled law, and is unrealistic

1. Wolf v. Colorado, 338 U.S. 25 (1949).
2. 367 U.S. 643 (1961).
3. The order of the United States District Court for the Southern District of New York is apparently unreported. It was entered on September 20, 1963 by Judge Palmieri.
4. Gelpeke v. City of DuBuque, 68 U.S. (1 Wall) 175 (1863).
5. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).
6. I BLACKSTONE, COMMENTARIES *69, *70.
7. Levy, *supra* note 5. According to the Blackstonian theory, *Wolf* never was law, but was merely a misinterpretation of the law. Thus retroactivity would be required for *Mapp*, since those persons convicted under *Wolf* were convicted under a misinterpretation of the law.
8. Discussed in CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 124-25 (1921).
9. *Id.* at 124-25, 147-49.

in its failure to recognize the judiciary's legitimate legislative function. A number of state courts have reasoned similarly and denied retroactivity in civil cases.[10] In *Great Northern Ry. v. Sunburst Oil Co.*[11] the Supreme Court held that it was not unconstitutional for a state court to deny retroactivity to an overruling civil decision. In another civil case, *Chicot County Drainage District v. Baxter State Bank*,[12] the Court indicated that in federal overruling decisions justice to the parties and public policy would determine whether to apply decisions retroactively. These two cases make it clear that retroactivity is not always constitutionally required for overruling civil decisions. The Supreme Court has not, however, indicated clearly whether retroactivity is constitutionally required in all overruling criminal decisions, or, if not, what factors it will use to determine when to apply retroactivity. The Supreme Court has retroactively applied its holdings that indigent defendants must be provided with counsel[13] and with transcripts of trial court proceedings for appellate purposes.[14] The Court has also held that the voluntariness of confessions must be re-evaluated by subsequently developed standards.[15] In none of these cases, however, did the Court even discuss the retroactivity issue; apparently it assumed that retroactivity should be granted. For example, in the coerced confession case the district court recognized that under the present-day standards expounded in cases decided after petitioner's conviction, the confession would have to be excluded, but it nevertheless declined to apply those cases retroactively.[16] The Supreme Court, however, held the confession inadmissible on the basis of the cases decided after petitioner's conviction without even alluding to the problem of retroactivity.[17] One frequently suggested test for determining if overruling decisions are to be applied retroactively is that retroactivity should be denied unless it will advance the "purpose" of the overruling decision (hereafter referred to as the "purpose" test).[18] Another test suggested is that

10. Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1891); Storrie v. Cortes, 90 Tex. 283, 38 S.W. 154 (1896).

11. 287 U.S. 358 (1932).

12. 308 U.S. 371 (1940).

13. *E.g.*, Doughty v. Maxwell, 376 U.S. 202 (1964) (holding that Gideon v. Wainwright, 372 U.S. 335 (1963) applies retroactively).

14. Eskridge v. Washington, 357 U.S. 214 (1958) (holding that Griffin v. Illinois, 351 U.S. 12 (1956) applies retroactively).

15. Reck v. Pate, 367 U.S. 433 (1961).

16. United States *ex rel.* Reck v. Ragen, 172 F. Supp. 734 (N.D. Ill. 1959).

17. Reck v. Pate, *supra* note 15.

18. Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962). See also Comment, 71 YALE L.J. 907, 942 (1962): "In deciding whether to give a new rule retroactive effect, a court . . . first should attempt to identify the purposes of the new rule, next should determine whether on balance those purposes will be served by general retroactive application of the new

"justice" to the individual defendant should be the prime consideration.[19] The cases dealing with *Mapp's* retroactivity have reflected the uncertainty of this area of the law.[20] For example, the Fourth Circuit[21] relied upon the Blackstonian theory[22] and the trial transcript case[23] in granting retroactivity. But the Fifth Circuit rejected the Blackstonian theory, distinguished the trial transcript case, and adopted the "purpose" test in denying retroactivity.[24] The Supreme Court has on three occasisons applied the *Mapp* exclusionary rule (without discussing the retroactivity issue) to convictions not yet final at the time *Mapp* was decided.[25] But these cases are often distinguished (as they were in the instant case) on the ground that since any one of them could have been the vehicle for overruling the prior law, it would be unfair to deny relief simply because the prior law was overruled at a sliglitly earlier date.[26]

In the principal case the court, after first finding that there had been an unreasonable search and seizure, concluded that the Supreme Court had remained silent on the retroactivity of *Mapp* in order to permit the lower courts to render an independent analysis of the problem.[27] Rejecting the Blackstonian theory, the court adopts the principle that overruling criminal decisions should not apply retro-

rule, and finally should decide whether these purposes will be promoted by retroactive application of the new rule in the particular case before it."

19. "I feel assured, however, that its location . . . (the line of distinction between retroactive and prospective application) will be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetich of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice." CARDOZO, *op. cit. supra* note 8, at 148-49. See Note, 60 HARV. L. REV. 437, 446 (1947); Note, 43 VA. L. REV. 1279, 1293-94 (1957).

20. Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963); Hall v. Warden 313 F.2d 483 (4th Cir.), *cert. Denied,* 374 U.S. 809 (1963); United States *ex. rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *cert. granted,* 377 U.S. 930 (1964); Sisk v. Lane, 219 F. Supp. 507 (N.D. Ind. 1963); Hurst v. People of California, 211 F. Supp. 387 (N.D. Cal. 1962); Moore v. State, 41 Ala. 657, 146 So. 2d 734 (1962); *In re* Harris, 56 Cal. 2d 879, 366 P.2d 305 (1961); People v. Figueroa, 220 N.Y.S.2d 131 (Kings County Ct. 1961); Commonwealth *ex rel.* Wilson v. Rundle, 412 Pa. 109, 194 A.2d 143 (1963); Commonwealth *ex. rel.* Stoner v. Myers, 199 Pa. Super. 341, 185 A.2d 806 (1962).

21. Hall v. Warden, 313 F.2d 483 (4th Cir.), *cert. denied,* 374 U.S. 809 (1963).

22. "It must be recognized that, since Weeks and Wolf, there had been no change in the constitutional requirements of due process considered and found controlling in Mapp. If the protections are there now, were they not present when Wolf was decided and were they not present when Hall was tried, convicted and sentenced? An affirmative answer would appear to be inescapable." Hall v. Warden, *supra* note 21, at 495.

23. *Ibid.*

24. United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *cert. granted,* 377 U.S. 930 (1964).

25. Stoner v. California, 376 U.S. 483 (1964); Fahy v. Connecticut, 375 U.S. 85 (1963); Ker v. California, 374 U.S. 23 (1963).

26. 333 F.2d at 15.

27. *Id.* at 15.

actively unless retroactivity would better effectuate the "purpose" of the new rule and the sound administration of the criminal law.[28] In determining the "purpose" of the *Mapp* exclusionary rule the court examined several state[29] and federal[30] court decisions and concluded from them that the purpose of the exclusionary rule is to deter the police from making future illegal seizures by rendering the fruits of such seizures valueless in criminal proceedings.[31] It is then reasoned that since the application of *Mapp* to pre-*Mapp* seizures would have no effect on deterring future police misconduct, the "purpose" of the new rule would not be advanced by retroactivity.[32] Further, since illegality of seizure does not affect the reliability of evidence, the court assumes that most persons convicted with the aid of illegally seized evidence are guilty beyond any reasonable doubt, and that new trials would frequently result in acquittals due to the current unavailability of the original evidence.[33] From this assumption it concluded that retroactivity would adversely affect the sound administration of the criminal law since it would result in the freeing of large numbers of persons against whom legally obtained evidence sufficient for conviction originally existed.[34] In this regard the Supreme Court's granting of retroactivity in the cases where the defendants were convicted without counsel[35] was distinguished on the ground that, unlike persons convicted upon illegally seized evidence,[36] there is substantial uncertainty of the guilt of persons convicted without the aid of counsel.[37] The dissent contended that *Mapp*[38] held that there is a constitutional right not to be convicted upon unconstitutionally seized evidence.[39] It also pointed out that in a footuote to *Mapp*[40] the Court

28. *Id.* at 17-21.

29. *E.g.*, "[Evidence obtained in violation of the constitutional guarantees is inadmissible] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers. . . ." People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905, 911 (1955).

30. *E.g.* "[the exclusionary rule] is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future." 367 U.S. at 680 (dissenting opinion).

31. 333 F.2d at 19.

32. *Ibid.*

33. *Id.* at 20.

34. *Ibid.*

35. Doughty v. Maxwell, *supra* note 13.

36. 333 F.2d at 20.

37. *Id.* at 19.

38. "Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as 'basic to a free society' . . . we find that, as to the . . . States . . . the very least that . . . (the fourth and fourteenth Amendments) . . . assure . . . is that no man is to be convicted on unconstitutional evidence." Mapp v. Ohio, 367 U.S. at 656-57.

39. 333 F.2d at 22.

40. 367 U.S. at 659 n.9.

stated that the class of convictions possibly affected by *Mapp* was small when compared with its holding that indigent defendants must be provided with trial transcripts for appellate purposes. From this footnote it concluded that the Court considered the retroactivity problem, and intended to grant retroactivity.[41] Finally, the dissent noted that in all the cases in which the Supreme Court has dealt with the problem of the retroactivity of overruling criminal decisions it has granted retroactivity.[42]

The court's adoption and application of the "purpose" test as the determining factor in deciding upon the retroactivity issue is subject to serious criticism. First, the right to counsel cases, the trial transcript cases, and the coerced confession case[43] establish that at least in some situations persons have a constitutional right to have criminal overruling decisions apply retroactively. When this right to retroactivity exists, it is a personal right of the person convicted under the overruled law; and because this is a personal right its enforcement should depend upon its existence.[44] But the "purpose" test does not seek to determine the existence of this personal right, rather it makes the enforcement of the right, if it exists, dependent upon such unrelated factors as "will the police be deterred from making future illegal searches and seizures"? Secondly, because there is often great uncertainty as to the "purpose" of an overruling decision, the "purpose" test makes a person's right to a new trial depend on which of several plausible "purposes" a court happens to adopt. This defect is well illustrated by the present case. It is no doubt true that one purpose of the exclusionary rule is to deter police from making unconstitutional seizures. But it is also true that the reason for deterring the police is to insure that the right to privacy remains inviolate. Further, the dissent's contention that the purpose of the exclusionary rule is to protect a defendant's right not to be convicted upon illegally seized evidence is well founded. Each of these three "purposes" seems equally plausible, but the "purpose" test would result in retroactivity if the latter is recognized, but not if the first two purposes are recognized. The court's denial of retroactivity is also based upon the conclusion that many persons against whom sufficient legally obtained evidence sufficient for conviction originally existed would be acquitted upon a new trial simply because the evidence is no longer available. It is true that it would be unwise to acquit those persons against whom legally obtained evidence sufficient for conviction originally existed.

41. 333 F.2d at 23.
42. *Id.* at 24.
43. Doughty v. Maxwell, *supra* note 13; Eskridge v. Washington, *supra* note 14; Reck v. Pate, *supra* note 15.
44. Notes, *supra* note 19.

But it seems manifestly unjust to deny new trials to those against whom all the evidence is still available because in some other instances the original evidence is no longer available. Further, even if this element of unfairness is ignored, the court should determine whether the *actual* number of persons who would be acquitted due to current unavailability of evidence is large enough to justify the denial of new trials to those persons against whom the original evidence is still available. The court's denial of retroactivity is also subject to criticism for its failure to distinguish the Supreme Court's granting of retroactivity in the coerced confession case.[45] In coerced confession cases, as in illegal seizure cases, the Supreme Court has held that the often present independent corroborative evidence has no bearing on the issue of admissibility.[46] But, despite the fact that in both types of cases it is often clear that the defendants are guilty, the court has failed to explain why the Supreme Court would deny retroactivity in one case while requiring it in the other.[47]

The problem of whether to apply the *Mapp* exclusionary rule retroactively seems to involve two main considerations. First, that it is unfair to deny the protection of the exclusionary rule simply because the trial happened to occur before *Mapp* was decided. Second, that it would be unwise to free those persons against whom there once existed sufficient legally obtained evidence. But to incarcerate persons against whom legally obtained evidence sufficient for conviction never existed simply because they were tried before the *Mapp* decision is such a serious deprivation of the due process of law and the equal protection of the laws (vis-à-vis those persons tried after *Mapp*) that the Supreme Court should hold that retroactivity is constitutionally required. But, if the Court does not so hold, then any test used to determine whether or not *Mapp* is to be applied retroactively should have at its core justice to the defendant rather than the effect retroactivity may have upon others.

45. Reek v. Pate, *supra* note 15.

46. Haynes v. Washington, 373 U.S. 503 (1963); Rogers v. Richmond, 365 U.S. 534 (1961).

47. It should be noted that the *Sunburst-Chicot* line of cases, in which the Supreme Court denied retroactivity to civil overruling decisions, are of little or no value in determining the Supreme Court's position on overruling criminal decisions. In civil matters the prime reason for denying retroactivity is the prevention of injustice to those persons who had changed their position in reliance on the overruled law. But in criminal cases the element of "change of position" is lacking, and in its stead is the overriding interest of justice to the accused.

Decedent's Estates—Res Judicata Effect Upon Heir Who Did Not Participate in Prior Will Contest

A beneficiary of decedent's will filed objections to the admission to probate of the will charging that it was invalid on the grounds of undue influence. The contestant failed to appear at the trial, which culminated in a directed verdict for the proponents and the admission of the will to probate. The present complainant, an heir at law who allegedly had no notice of the death of decedent, seeks to contest the will on the same grounds. The trial court held that the present action is barred by the former adjudication. The Supreme Court of Iowa *held,* reversed. An heir who was not made a party to a will contest brought by another heir and who did not participate in any way in the prior action is not bound by the result in the prior contest on the theory of res judicata. *In re Marty's Estate,* 126 N.W.2d 303 (Iowa 1964).

It has been generally concluded by text writers and courts throughout the United States that the administration of a decedent's estate is an in rem proceeding.[1] Since an in rem judgment is binding on all persons as to their interests in a particular thing,[2] it is res judicata as to all subsequent actions affecting the same res, provided that the jurisdictional and constitutional requirements of notice and a fair hearing are satisfied.[3] Because the purpose of administering a decedent's estate is to determine to whom and in what quantity distributions are to be made, a single and final settlement is required. Yet estate administration, by its nature, is a proceeding involving a series of steps and a number of final decrees,[4] and, although the final settlement may be classified as in rem, some of the individual steps may reasonably be considered as in personam or quasi in rem.[5] The will contest,[6] one of these steps, has been treated by the majority of

1. Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem,* 43 MICH. L. REV. 675 (1945).

2. RESTATEMENT, JUDGEMENTS § 32, comment *a* (1942).

3. Publication has been held on numerous occasions to satisfy notiee requirements for an in rem proceeding. It was the only type of notice given in the present case.

4. Simes, *supra* note 1, at 704.

5. *Id.* at 678. One example is a proceeding to sell the real estate of a decedent, which has been classified as quasi in rem in Montana, Lamont v. Vinger, 61 Mont. 530, 202 Pac. 769 (1921), and in Idaho, Kline v. Shoup, 38 Idaho 202, 226 Pac. 729 (1923), and as in personam in Oklahoma, Seal v. Banes, 168 Okla. 550, 35 P.2d 704 (1934).

6. It has been described as "any proeeeding or part of a proceeding in which the question whether a given instrument is the duly executed and unrevoked will of a competent testator is put in issue." Simes, *The Function of Will Contests,* 44 MICH. L. REV. 503, 504-05 (1946). Mr. Simes indicates that the will contest is the common law probate in solemn form where notice is given to interested parties who are permitted

the courts as an in rem proceeding[7] on the ground that the purpose of probate is to establish the validity of a will in order to avoid the inconvenience of having to prove it whenever relied upon and to prevent the incongruous results of declared validity to some persons but invalidity to others.[8] In a will contest the will must be authenticated and proved to have been duly executed by the deceased or else shown to be invalid.[9] In either case there is no need for a subsequent action on the same subject.

The holding in the present case that an unnotified heir is not bound by a prior will contest is contrary to the weight of authority. The court concluded that since a contest involves proponents and contestants,[10] it is essentially an adversary proceeding, and binds only those who are parties to the judgment reached, and those who receive notice but fail to utilize their opportunity to appear. The authority relied upon was *Stead v. Curtis*,[11] in which the court talked in terms of the "conversion" of a proceeding in rem into a personal suit due to its "inter parties" character.[12] While recognizing that this holding subjects the proponents to a multiplicity of suits, the court considered this a consequence of their inadvertent failure to notify all of the interested parties of the forthcoming contest. Once the contest was held to be other than an in rem proceeding, the proponents, in order to support their claim of res judicata, were required to prove that both contestants were privies, and that the same issues and causes of action were involved in both contests.[13] The court stated that in order to be privies one party must claim through the other,[14] and that the proponents failed to prove that this relationship existed.

The majority of courts have rejected[15] both the result and the reasoning of the present case, stating that the designation of certain parties as plaintiffs and defendants has only a procedural effect, and does not destroy the in rem nature of the action, which is the

to oppose the admission of the will, as contrasted to probate in common form where no notice is required and no issues litigated.

7. McCann v. Ellis, 172 Ala. 60, 55 So. 303 (1911); *In re* Will of Storey, 20 Ill. App. 183 (1886); People *ex rel.* Frazer v. Wayne Circuit Judge, 39 Mich. 198 (1878); *In re* Estate of Sweeney, 94 Neb. 834, 144 N.W. 902 (1913); Hutson v. Sawyer, 104 N.C. 1, 10 S.E. 85 (1889); 57 AM. JUR. *Wills* § 932 (1948); AMERICAN LAW OF PROPERTY § 14.35 (Casner ed. 1952); ATKINSON, WILLS 516 (2d ed. 1953).

8. AMERICAN LAW OF PROPERTY § 14.35 (Casner ed. 1952).

9. *Ibid.*

10. This argument arose because of statutes which provide that the contestant shall be plaintiff and the proponent defendant. CAL. PROB. CODE § 371.

11. 205 Fed. 439 (9th Cir. 1913). See also Fitzgerald & Mallory Constr. Co. v. Fitzgerald, 137 U.S. 98 (1890); Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870).

12. 205 Fed. at 450.

13. *In re* Estate of Richardson, 250 Iowa 275, 93 N.W.2d 777 (1958).

14. 50 C.J.S. *Judgments* § 788 (1947).

15. *In re* Relph's Estate, 192 Cal. 451, 221 Pac. 361 (1923).

adjudication of the validity of the will itself, regardless of the parties. These courts have been confronted with two other arguments against the in rem characterization. The first involves statutory provisions which extend the time in which contests may be brought by persons suffering from a disability.[16] To allow a former action to be set aside by a disabled party seems inconsistent with the "binding against the whole world" concept. But the response has been that this does not detract from the in rem character, and that it is binding on all *except* the favored by-statute class.[17] Secondly, it has been noted that since equity acts in personam, and many state statutes confer probate jurisdiction on their chancery courts, the proceeding cannot be in rem.[18] However, this theory has been repudiated on the premise that since this is a statutory proceeding, it can be in rem regardless of which court the legislature chooses to utilize.[19]

On the particular facts of this case, the court's decision was reasonable, but it represents a very narrow approach to the general question of whether a will contest is an in rem proceeding. Undoubtedly, the court was greatly influenced by the fact that the present contestant was an out of state citizen who had no knowledge of decedent's death, that he was a nephew of the decedent as were the proponents, and that the first will contest was really no contest at all. Under these circumstances it is obviously unfair to hold him bound by a prior action in which he had no opportunity to protect his interests. The inequities of this situation are further accentuated by the possibility of collusion[20] between the proponents and one who is contesting the will simply to secure a judgment for the proponents. Apparently the court's solution to the problem is to place the burden of notifying all interested parties on the proponents of the will, and, if they fail to fulfill this obligation, they must suffer the consequences.[21] While this approach may be justified in the present case, the court's holding that a prior action is not res judicata to unnotified

16. Security Trust & Sav. Bank v. Superior Court, 21 Cal. App. 2d 551, 69 P.2d 921 (Dist. Ct. App. 1937); Spencer v. Spencer, 31 Mont. 631, 79 Pac. 320 (1905).

17. Simes, *supra* note 1, at 681.

18. *Id.* at 679.

19. *Ex parte* Walter, 202 Ala. 281, 80 So. 119 (1918); Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919); Dower v. Church, 21 W. Va. 23 (1882).

20. There was no finding of collusion in the present case, but it could easily arise under similar circumstances.

21. After the inception of this case the Iowa legislature attempted to alleviate problems in this area by providing that "all known interested parties who have not joined with the contestants as plaintiffs in the action shall be joined with proponents as defendants. When additional interested parties become known, the court shall order them brought in as party defendants." IOWA CODE ANN. § 633.311 (1964). This legislation is not completely satisfactory because it does not concern itself with the disposition of unknown parties or known interested parties which are inadvertently overlooked.

interested parties will prove to be unduly burdensome to the proponents and decidedly detrimental to the interests of society. It will require the proponents, in order to fully protect themselves, to trace the intestate successors of the decedent, however remote, a procedure which would be expensive, time consuming, and always subject to error. Certainly society has an interest in the settling of decedents' estates as quickly as possible and with finality. As in the case of actions to quiet title to real property,[22] society is best served by the conclusive establishment of ownership of property, in order that the property will be freely alienable and put to those uses which will most benefit society. If the in rem effect is removed, then executors naturally will be hesitant to make rapid distributions, and, if distributions are made, they will be made subject to the outcome of possible future suits. These two reasons, particularly the latter, indicate that there can be no perfectly acceptable solution which will satisfy all interests concerned.[23] Hence the issue becomes one of balancing the interests of society and the proponents of a will against those of unnotified, interested parties, with the former clearly outweighing the latter. For this reason, the proceeding should be considered in rem, and should bar subsequent actions. This is not to say, however, that practical steps cannot be taken which will greatly benefit interested parties by increasing their chances of receiving notice. Legislation could be enacted which would employ a method by which a list of interested parties is acquired[24] and submitted to the proponents and which would require the proponents to show that they have sent notice of the forthcoming contest to the parties on the list as a condition precedent to the contest.[25] This will at least insure that notice has been sent, but it will not allow a subsequent action, even if notice is not actually received.

22. POMEROY, EQUITY JURISPRUDENCE § 1393 (5th ed. 1941).

23. A statute of limitations could provide the element of finality similar to the in rem judgment. But no matter how short the limitation period, it would delay administration and permit the possibility of a multiplicity of suits.

24. This could be attained by requiring the executor to submit an affidavit of heirship. Illinois statutes require the petition to probate to include the names and addresses of all heirs, devisees, and legatees. ILL. ANN. STAT. ch. 3, § 64 (1961).

25. Some states now provide for notice to be sent by mail to the interested parties prior to probate. ILL. STAT. ANN. ch. 3, § 64b (1964). Other states provide for personal service as an alternative to publication. MICH. STAT. ANN. § 27.3178(32) (1962). TURRENTINE, WILLS AND ADMINISTRATION 81 (2d ed. 1962). Michigan also requires proof of service before probate. MICH. STAT. ANN. 27.3178(35) (1962).

Equity—Compulsory Medical Aid to Adult Who Objects on Religious Grounds

Mrs. Jones, mother of a seven-month-old child, was brought to applicant's hospital after having lost two-thirds of her blood due to a ruptured ulcer. In spite of the apparent imminence of death unless blood transfusions were administered, neither Mrs. Jones nor her husband would consent to such transfusions because of their religious beliefs as Jehovah's Witnesses.[1] Counsel for Georgetown University Hospital made application in federal district court for an emergency writ authorizing the transfusions.[2] The application was denied. Counsel for the hospital immediately appealed to Circuit Judge J. Skelly Wright. Judge Wright rushed to the hospital, hurriedly conferred with the patient and other parties concerned, and less than two hours after the district court's denial, signed the order. Judge Wright's order was based on the theory that a writ signed by a single circuit court judge authorizing blood transfusions for the adult mother of an infant, after she voluntarily has sought treatment in a hospital, is proper when the transfusions are necessary to preserve the status quo by saving the patient's life, even though the patient objects upon religious grounds.[3] *President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964), *petition for rehearing denied en banc*, 331 F.2d 1010 (D.C. Cir. 1964).[4]

Most cases dealing with court orders compelling medical aid have proceeded under specific legislation, typically, statutes by which the court may appoint a temporary guardian for children whose parents refuse them medical aid for any reason.[5] No statute was invoked by applicants in the *Georgetown* case, and the procedural aspects of this case are somewhat unusual. Judge Wright based his power to issue the order on rule 62(g) of the Federal Rules of Civil Procedure, and on the All Writs Act.[6] Judge Miller, criticising the procedure used,

1. Jehovah's Witnesses base their refusal to submit to blood transfusions on several scriptural passages, including Lev. 17:10, "I [the Lord] shall certainly set my face against the soul that is eating the blood, and I shall indeed cut him off from among his people." Blood transfusions are equated with "eating the blood."

2. The application was in the nature of a petition in equity under FED. R. CIV. P. 3, 8(f).

3. This holding was made by Judge Wright alone, in support of his own action in granting the temporary writ. Thus, it ought not to be considered a holding of the D.C. Circuit Court.

4. The petition for rehearing apparently was denied because the questions involved had become moot. There was a concurring opinion by Washington, J., and dissenting opinions by Miller, J., and Burger, J.

5. See note 19, *infra*. For representative statute, see TENN. CODE ANN. § 53-1903 (Supp. 1964).

6. 28 U.S.C. § 1651 (1959).

argued, first, that no action was filed properly in district court and thus no proper appeal was possible; and second, in view of 28 U.S.C. section 46(b),[7] "had there been an actual appeal, a single appellate judge was not authorized to act."[8] Judge Miller discounted the use of an appellate judge's injunctive power under rule 62(g) to preserve the status quo, on the ground that the order itself completely changed the status quo.[9] It is significant to note the extent of Judge Wright's dilemma; had he not signed the order, the issue almost certainly would have become moot because of the patient's death. On the other hand, granting the temporary order provided full and final relief for applicant, thereby making the issue equally moot. Despite Judge Miller's strong dissent on procedural grounds, it is submitted that the more important questions raised by this case concern the substantive rights of the person against whom such an order is issued. Nearly a quarter of a century ago Mr. Justice Roberts put forward the familiar rule that the freedom to act upon religious grounds is subject to state regulation only when the acts present a "clear and present danger to a substantial interest of the state."[10] Courts often have been called upon to sustain regulations of religious practices which have been deemed threats to the state's interests,[11] ranging from the practice of polygamy in Utah[12] to that of snake handling in the Tennessee hills.[13] Nevertheless, courts have been particularly careful to protect the "preferred"[14] freedom of religion from undue regulation, as evidenced by several recent cases.[15] Among the cases dealing specifically with enforced medical treatment, many have sustained public health statutes calling for compulsory chest x-rays[16] and water fluoridation,[17]

7. This subsection requires that three judges determine cases and controversies before a circuit court.

8. 331 F.2d at 1013 (dissenting opinion).

9. *Id.* at 1014.

10. Cantwell v. Connecticut, 310 U.S. 296, 311 (1940).

11. See Antieau, *The Limitation of Religious Liberty*, 18 FORDHAM L. REV. 221 (1949).

12. Reynolds v. United States, 98 U.S. 145 (1878).

13. Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948).

14. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). See also Marsh v. Alabama, 326 U.S. 501, 509 (1946); United States v. Ballad, 322 U.S. 78, 86 (1944).

15. See, *e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963), in which appellant's disqualification from unemployment compensation benefits because of her refusal to work on Saturday due to her religious convictions was held an unconstitutional abridgement of her religious freedom; People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), in which the California Supreme Court held that conviction under a state statute proscribing the use of peyote was unconstitutional as applied to Navajo Indians who used peyote in their religious ritual; *In re* Jemison, 125 N.W.2d 588 (Minn. 1963), in which conviction for contempt because of appellant's refusal on religious grounds to serve as juror was reversed as an abridgement of first amendment rights.

16. State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 239 P.2d 545 (1952).

17. Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E.2d 609 (1955), *appeal*

in spite of religious objections, as well as compulsory innoculations[18] when other constitutional objections were raised. These and numerous other public health statutes have been upheld as a proper exercise of the state's police power. Closer to the facts of the instant case is a group of cases dealing with medical aid compelled by court order. Many of these cases involve children whose parents, on religious grounds, refused to consent to their being medically treated.[19] Courts compelling medical aid for children base their action on the doctrine of *parens patriae,* by which courts may assume guardianship over children whose parents are deemed inadequate or negligent in caring for them.[20] The application of this doctrine is generally restricted to situations in which the harm threatened without medical aid is great, and the danger involved in the treatment is relatively slight.[21] The exact limits of the application of *parens patriae* are, however, by no means certain.[22] The New Jersey Supreme Court recently extended the doctrine to compel a thirty-two-weeks pregnant Jehovah's Witness to submit to blood transfusions in order to protect her unborn child.[23]

Clearly, the *Georgetown* case involves neither an exercise of the state's ordinary police power to protect public health nor an exercise of *parens patriae* as the doctrine has been previously applied. Judge Wright based his authority to order the patient's transfusions on several special facts in this case. First, immediate transfusions were necessary to maintain the status quo[24] by preserving the patient's

dismissed, 351 U.S. 935 (1955), 13 WASH. & LEE L. REV. 38 (1956). *But cf.* Nichols, *Freedom of Religion and the Water Supply,* 32 So. CAL. L. REV. 158 (1959).

18. Jacobson v. Massachusetts, 197 U.S. 11 (1905), in which none of appellant's objections to a state statute requiring smallpox vaccinations was based on religious grounds. Nevertheless, the Supreme Court later cited Jacobson for the proposition that one "cannot claim freedom from compulsory vaccination . . . on religious grounds." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

19. See, *e.g.,* People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied,* 344 U.S. 824 (1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947). See generally Notes, *Medical Aid for Children Without Parental Consent,* 13 WYO. L.J. 88 (1958).

20. "A child becomes the ward of the state and is to have protection of its life, limb and its person and property where that is withheld by its parents because of neglect or poverty, or denied because of ignorance." *In re* Rotkowitz, 175 Misc. 948, 949, 25 N.Y.S.2d 624, 625 (1941).

On the *parens patriae* doctrine, Mr. Justice Rutledge wrote, "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children." Prince v. Massachusetts, 321 U.S. 158, 170 (1944). The *Georgetown* case, it might be added, puts this tentative recognition of the parents' freedom to martyr themselves in doubt.

21. See, *e.g.,* Morrison v. State, 252 S.W.2d 97, 102 (Mo. App. 1952).

22. *Compare In re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955), *and In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942), *with* Morrison v. State, *supra* note 21; *In re* Rotkowitz, *supra* note 20.

23. Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964).

24. See FED. R. CIV. P. 62(g).

life. Second, this was not a case of a court's thwarting a religiously inspired suicide, since the patient wanted to live. Third, he theorized that the *parens patriae* doctrine might be extended to this adult patient on the ground that the welfare of her seven-month-old child was sufficiently dependent upon her survival to warrant enforcement of the transfusions; also, that she was *in extremis*, and thereby "as little able competently to decide for herself as any child would be."[25] Fourth, without the order, the hospital, to which the patient voluntarily had come for treatment, might have risked civil and criminal liability for failing to give her proper care. Finally, Judge Wright stressed that his order would not violate the patient's religious convictions, because the treatment was not taken by her own volition.[26]

The *Georgetown* case points up the lamentable lack of certainty concerning the limits to which courts may go in compelling medical aid objected to on religious grounds. Acts by the judiciary are often as much a part of state action as acts by the legislature.[27] It would seem to follow that the clear and present danger test applied to legislation in *Cantwell*[28] should be applied to judicial action with equal force, particularly in view of the preferred position rightfully accorded religious freedom today.[29] Undoubtedly there are situations in which court orders compelling medical aid can be justified, as when the patient is an infant,[30] or is otherwise unable to make the decision for himself.[31] It is submitted, however, that the kind of situation presented in the *Georgetown* case is one which calls for judicial restraint rather than judicial action. Otherwise, ours will be a nation which requires its citizens to risk their lives in defense of their country, but forbids them to risk their lives for their religious convictions. Until guidelines are formulated defining the extent to which the first amendment freedom of religion inhibits a court's power to compel medical aid for both children and adults, judges confronted with dilemmas such as the one Judge Wright faced in the principal case will undoubtedly continue to err on the side of preserving lives rather than on the side of protecting less tangible, though no less perishable, constitutional rights.

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25. 331 F.2d at 1008.

26. Although the order may not have affected the patient's right to *believe*, the important consideration is that it did interfere with her right to *act* on religious grounds.

27. Shelley v. Kraemer, 334 U.S. 1, 13 (1948), Twining v. N. J., 211 U.S. 78, 90-91 (1908). These cases dealt, of course, with action by state courts; however, it must follow that action by a federal court is also state action in the larger sense of the word "state," that is, action by the federal government, and that such action is *a fortiori* limited by the first amendment.

28. *Supra*, note 10.

29. See, *e.g.*, notes 14, 15 *supra*.

30. See notes 19, 20 *supra*, and accompanying text.

31. See, *e.g.*, Collins v. Davis, 33 L.W. 2313 (N.Y. Sup. Ct. 1964).

Federal Courts—Vexatious Suit—Attorney's Fees as Element of Costs—Denial of Plaintiff's Motion to Dismiss With Prejudice

In March of 1964, plaintiff, Dan Smoot, a political analyst who produces television and radio programs, with published reprints to further broadcast his views, commenced suit for libel in the Federal District Court for the Western District of Michigan based upon diversity of citizenship against The League of Women Voters, Grand Traverse Area of Michigan and four of its members. He alleged that a bulletin of the League had defamed him by, *inter alia*, characterizing the Smoot Report as "slanted information, half-truths, innuendos and sometimes worse."[1] Defendant, claiming that the suit was brought and maintained in bad faith, vexatiously and for an oppressive reason,[2] moved to require the plaintiff to post costs, including attorney's fees. *Held*, motion granted and cost bond set at 15,000 dollars. A federal court may require of a non-resident plaintiff security for costs and include attorney's fees as an element of such costs.[3] While the court

1. The basis of the action is the December, 1963 bulletin of the League, a portion of which, as contained in plaintiff's complaint, is as follows: "The Dan Smoot T. V. program . . . is a skillful, professional job of propaganda *against*—against the United Nations, against the income tax, against civil rights for the Negro. It is based on slanted information, half-truths, innuendos, and sometimes worse.

Few of us have ever been so shocked by any event, public or personal, as by the wanton murder of our President. That it could happen in the United States of America! . . . And how did it happen that our Ambassador to the United Nations was spat upon? How could four little girls be dynamited to death in their Sunday School? How could a small Negro boy be gunned down from his bicycle by an Eagle Boy Scout who didn't even know him? . . . Can the right of free speech justify the kind of propaganda that stirs people to fear and hate so unreasoningly?

I urge you all to watch for the Dan Smoot program, and to view it critically. . . . This man is a clever Pied Piper. But after a few programs he cannot but reveal himself to informed and critical listeners." Plaintiff's Complaint PP. 2, 3, Smoot v. League of Women Voters, Civil Nos. 4708-4709, W.D. Mich., Oct. 1964.

2. Defendant in its Answer of April 20 admitted publishing the article but denied the interpretation given to it by the plaintiff. Defendant's Answer p. 2, Smoot v. League of Women Voters, *supra* note 1. The affirmative defenses of truth and privilege were relied upon. Defendant's Answer, *supra* p. 4.

Defendant had earlier published a retraction of its remark and apologized to plaintiff. Defendant's Answer, *supra* p. 3.

Defendant attempted to support its charge as to the vexatious nature of the suit by a direct quotation from the John Birch Society Blue Book which appears to advocate the use of the libel suit for extra-legal purposes. Defendant's Brief in support of defendant's motion for security for costs, pp. 14, 15, Smoot v. League of Women Voters, *supra* note 1. An inherently vexatious quality of the libel suit is that the potential civil liability inhibits the accused from making further comment until the liability is determined in court. The plaintiff can restrain the defendant from further comment and yet evade a general principle that equity will not enjoin the commission of a libel.

3. Smoot v. League of Women Voters, Civil Nos. 4708-4709, W.D. Mich., Oct. 1964 (opinion on motion for jury trial and motion for security for costs).

was considering the above motion, plaintiff moved, under Rule 41(a)(2),[4] to dismiss his action with prejudice.[5] *Held,* motion denied. A motion under Rule 41(a)(2) is addressed to the discretion of the court and the prevention of prejudice to defendants and protection of public interest in settling constitutional questions of freedom of expression demand that the case proceed to trial.[6] *Smoot v. League of Women Voters,* Civil Nos. 4708-4709, W.D. Mich., October 1964.

Courts still find themselves beset by the nagging problem of the suit brought only for its nuisance value.[7] Strike suits,[8] harassment with multiple actions,[9] baseless petitions for injunctions against business competitors,[10] small claims brought in courts of superior juris-

4. "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." FED. R. CIV. P. 41(a)(2).

Rule 41(a)(1) referred to in Rule 41(a)(2) provides that action may be dismissed by plaintiff without order of court by filing notice of dismissal before service by adverse party of answer or of a motion for summary judgment, or by filing a stipulation of dismissal signed by all parties who have appeared in the action. Since defendant had served its answer before plaintiff made his motion to dismiss, Rule 41(a)(2) is applicable.

5. The grounds of plaintiff's motion to dismiss were: (1) the inference in the defendant's article that plaintiff was somehow partly responsible for the murder of President Kennedy had been completely refuted by report of the Warren Commission and thus plaintiff had been vindicated of any responsibility or relation to the alleged assassin; (2) plaintiff's counsel had withdrawn because of illness; (3) that the decision in New York Times v. Sullivan, 376 U.S. 254 (1964), may have extended to defendants a privilege and right of fair comment as to plaintiff.

A treatment of the constitutional questions of freedom of speech is not within the scope of this comment. See 9 VILL. L. REV. 534 (1964); 50 IOWA L. REV. 170 (1964), for comments on New York Times v. Sullivan, *supra.*

6. Smoot v. League of Women Voters, Civil Nos. 4708-4709, W.D. Mich., Oct. 1964 (opinion on motion to dismiss).

The plaintiff petitioned for a writ of prohibition and mandamus demanding that Judge Fox of the federal district court be compelled to allow plaintiff to dismiss his action. The petition was granted on the ground that a trial judge has no power to require a lawyer to submit evidence on behalf of a plaintiff when he considers he has no cause of action or for any reason wishes to dismiss his action with prejudice. Smoot v. Fox, Civil No. 16207, 6th Cir., Dec. 30, 1964.

Both parties have petitioned for a rehearing and clarification so as to determine whether attorney's fees are to be included as an element of costs.

7. See 50 ILL. B.J. 800 (1962).

8. A strike suit has been defined as "an action brought by a security holder, not in good faith, but through the exploitation of its nuisance value, to force the payment of a sum dispropertionate to the normal value of his interest as the price of discontinuance." Note, 34 COLUM. L. REV. 1308 (1934).

9. See, *e.g.,* Soffos v. Eaton, 152 F.2d 682 (D.C. Cir. 1945).

10. See, *e.g.,* Shute v. Shute, 180 N.C. 386, 104 S.E. 764 (1920).

diction,[11] and various procedural devices[12] are but some of the tactics devised by parties plaintiff for purposes of vexation. The only sanction generally available against a vexatious litigant willing to pay his own costs is the threat of taxation with the costs of his adversary.[13] Some legislatures have sought to curb strike suits and even libel suits by enacting statutes requiring security for costs, including attorney's fees, upon motion by the defendant.[14] The statutes have been criticized as a bar to actions by a party who has suffered actual injury and who wishes to bring suit to prevent further abuse of his interest.[15] The efficacy of the American law of taxing costs, moreover, has been seriously questioned by many as a means of preventing this "nuisance suit."[16]

Although security for costs is not, in most instances, provided for in the Federal Rules of Civil Procedure,[17] such security has been required in some cases since, by virtue of Rule 83,[18] the district courts may make their own rules not inconsistent with the Rules or federal statutes.[19] The requirement of security for costs is usually regarded as procedural for purposes of *Erie R.R. v. Tompkins*,[20] and thus within

11. The vexatious nature of these suits arises from the fact that courts of superior jurisdiction have more congested calendars than the lower courts and the court costs are higher. Note, 53 COLUM. L. REV. 78, 83-84 (1953).

12. Some of the more common devices have been listed as sham pleadings, frivolous demurrers, refusal to answer interrogatories, constant requests for continuances and dilatory appeals. *Id.* at 78.

13. *Id.* at 79. It is sometimes possible for a defendant who has prevailed over a vexatious plaintiff to exact a measure of compensation through a separate action for abuse of process or malicious prosecution. The courts, however, do not favor these actions. See PROSSER, TORTS 852-78 (3d ed. 1964).

14. See, *e.g.*, CAL. CORP. CODE § 834 (1959) and N.Y. CIV. PROC. LAW § 8501 (shareholder's derivative suit); CAL. CIV. PROC. § 830 (security for costs in libel action).

15. See, *e.g.*, Hornstein, *The Death Knell of Stockholder's Derivative Suits in New York*, 32 CALIF. L. REV. 123 (1944).

16. See Goodhart, *Costs*, 38 YALE L.J. 849, 877-78 (1929); Greensberger, *The Cost of Justice: An American Problem, an English Solution*, 9 VILL. L. REV. 400 (1964); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 78 (1964); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931).

17. 6 MOORE, FEDERAL PRACTICE 1327 (1951). Rule 65(c) provides for security as a prerequisite for the issuance of a restraining order or preliminary injunction. Rule 73 provides for security for costs on an appeal to the court of appeals.

18. "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." FED. R. CIV. P. 83.

See National Distillers Products Corp. v. Hindech, 10 F.R.D. 229 (D. Colo. 1950); Leake v. New York Cent. R.R., 26 F. Supp. 416 (N.D.N.Y. 1939).

19. Russel v. Cunningham, 233 F.2d 806, 811 (9th Cir. 1956).

20. 304 U.S. 64 (1938). See Moore, *op cit. supra* note 17, at 1331-32. Moore, in discussing whether the problem of security for costs is procedural or substantive within *Erie R.R. v. Tompkins*, notes that the problem may arise in broadly three distinct factual situations. The traditional problem arises when the state requires security for

the rule making power of the individual court. However, a federal court may refer to and adopt state practice in making its court rules.[21] In an ordinary diversity case a state law denying the right to attorney's fees or giving a right thereto which reflects a substantial policy of the state should be followed unless it runs counter to a valid federal statute or rule of court.[22] Many courts, both state and federal, have required security for costs when plaintiff is a non-resident of the forum,[23] but such costs generally do not include attorney's fees.[24] In actions of an equitable nature, costs, including attorney's fees, are often allowed to a plaintiff who has successfully protected a fund.[25] Treating attorney's fees as an element of costs would appear to eliminate any distinction between plaintiff and defendant by reimbursing the successful party regardless of his position in the action. Professor Moore argues that a federal court may have the power, bounded only by its discretion under Rule 54(d),[26] to award attorney's fees in all civil actions.[27] The basis of the argument is that Rule 54(d) appears to make no distinction between actions at law and suits in equity and that equitable growth warrants this exercise of power.[28]

costs but those costs only involve a small liability. Moore states that in this situation the federal court in a diversity action is not bound to follow the state policy. At the other extreme is a situation as in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), where state statute required, in a stockholder's derivative action, that plaintiff stockholder must give security for reasonable expenses, including attorney's fees, which may be incurred by defendants. Since this is a new liability created by the state and the liability extends beyond payment of traditional costs, the Supreme Court held that within *Erie-Tompkins* the federal court had to follow the state's policy. A situation lying between *Cohen* and the traditional problem is that of Keller Research Corp. v. Roquerre, 99 F. Supp. 964 (S.D. Cal. 1951), where a state law requires a party to post $500 in a libel or slander action, including $100 for counsel fees. Here the federal court followed the state requirement since the state had expressed a substantial policy toward limiting defamation actions and a new liability for attorney's fees had been imposed upon the unsuccessful claimant.

Moore concludes that the variation in degree of the state's requirement may be determinative of whether it expresses a substantial policy of the state to impose a new liability. The state's creation of liability of a plaintiff for the defendant's attorney's fees would appear to be substantive for purpose of *Erie*.

21. BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 1198 (1958).

22. MOORE, *op. cit. supra* note 17, at 1354.

23. McPhail, *Security for Costs and Its Treatment in United States Treaties*, 37 TUL. L. REV. 461, 462 (1963).

24. BARRON & HOLTZOFF, *op. cit. supra* note 21, § 1197.

25. See, *e.g.*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164-67 (1939); Trustees v. Greenbough, 105 U.S. 527 (1881) (action by bondholder); John Hancock Mut. Life Ins. Co. v. Lloyd, 194 F. Supp. 816 (N.D.N.Y. 1961); 2 STREET, FEDERAL EQUITY PRACTICE § 2033-34 (1909).

26. "Except when expression therefor is made either in a statute of United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." FED. R. CIV. P. 54(d).

27. MOORE, *op. cit. supra* note 17, at 1354, especially n.18. "Certainly insofar as Rule 54(d) has any bearing on the subject it makes no distinction between actions at law and suits in equity."

28. *Ibid.*

Arguments for inclusion of attorney's fees as costs are that the allowance of them would attempt only to make the successful party whole,[29] and that it would discourage the institution of unfounded litigation and at the same time encourage the meritorious suit.[30] The reply is usually that every man has a right to go to court and should not be deterred by the fear of being saddled with his opponent's legal expenses.[31]

Contrary to common law,[32] a plaintiff under the Federal Rules of Civil Procedure may obtain a voluntary dismissal of his action only by order of the court after service of an answer or motion for summary judgment by the adverse party.[33] The courts are agreed that under Rule 41(a)(2) there is no absolute right to dismiss.[34] In exercising its discretion the Supreme Court follows the principle that "unless the defendant would suffer some plain legal prejudice other than mere prospect of a second law suit" a motion to dismiss without prejudice will be granted.[35] Thus the motion to dismiss without prejudice has been denied a plaintiff who wished to bring a suit in a foreign jurisdiction that would place an onerous burden on defendants who had already incurred substantial expenses.[36] It has also been denied on the ground that there was a public interest in having the controversy settled.[37] The motion to dismiss without prejudice has been granted where the only prejudice to defendant would be attorney's fees already expended.[38] Contrary to a dismissal without prejudice, a dismissal with prejudice is a final judgment on the merits, barring subsequent action.[39] In no reported case has a federal court denied a plaintiff's motion for dismissal with prejudice, although a motion for voluntary

29. Greensberger, *supra* note 16, at 401.

30. Goodrich, *supra* note 16, at 862.

31. Kuenzel, *supra* note 16, at 81. See note 15 *supra.*

32. At common law a plaintiff had an absolute right to dismiss his suit without prejudice at any time before verdict or judgment. See *Ex parte* Skinner & Eddy Corp., 265 U.S. 86 (1924) (judgement); Barret v. Virginian Ry., 250 U.S. 473 (1919) (judgement).

33. See FED. R. CIV. P. 41(a)(1), and 41(a)(2), note 4 *supra.*

34. Bolten v. General Motors Corp., 180 F.2d 379 (7th Cir. 1950), represented the lone example of the belief that the right to dismiss was absolute. It was overruled in Grivas v. Parmelee Transportation Co., 207 F.2d 334 (7th Cir. 1953), *cert. denied,* 347 U.S. 913 (1953). See Moore v. C. R. Anthony Co., 198 F.2d 607 (10th Cir. 1952); Ockert v. Union Barge Line Corp., 190 F.2d 303 (3d Cir. 1951).

35. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217 (1947) (dictum).

36. Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14 (S.D.N.Y. 1953). Plaintiff intended to commence a new action in British Guiana and defendant had already incurred expenses of $84,000.

37. Churchward Int'l Steel Co. v. Carnegie Steel Co., 286 Fed. 158 (W.D. Pa. 1912).

38. Pathe Laboratories, Inc. v. Technicolor Motion Picture Corp., 19 F.R.D. 211 (S.D.N.Y. 1955). The motion to dismiss was granted upon condition that plaintiff pay defendant for reasonable attorney's fees incurred.

39. Cleveland v. Higgins, 148 F.2d 722 (2d Cir. 1945), *cert. denied,* 326 U.S. 722 (1945).

dismissal by stipulation of the parties under Rule 41(a)(2) has been denied in order to protect an attorney's lien on the proceeds of the case.[40]

The court's opinions in the instant cases[41] are colored by its suspicion that the suit was instituted for a vexatious purpose. The court, without indicating whether it was making a rule of court under Rule 83, granted the motion for security costs, reasoning that if proof at trial should show that plaintiff brought suit only to harass defendant and restrain him from making further comments, the defendant should not incur the additional burden of collecting the costs in a foreign jurisdiction. If defendant cannot substantiate its claim, the court reasons that plaintiff will have lost only the cost of the bond or the interest on the cash amount of the bond, either of which would be offset by a recovery of any magnitude at trial. The court cites no authority for the inclusion of attorney's fees as an element of costs.[42] In denying plaintiff's motion to dismiss with prejudice under Rule 41(a)(2), the court concluded that both the defendant and the public would be prejudiced by a dismissal of the action. The League had had its name tainted by the plaintiff's accusations and had, after plaintiff refused to make a settlement, made extensive preparations for trial,[43] and the public was interested in and vitally concerned with an answer to the questions of constitutional law raised by the pleadings.[44]

The instant case raises two important questions. The first, which actually consists of two parts, is whether a federal district court has the

40. "As a matter of fact, Rule 41 was intended for the purpose of setting forth and curbing the right of a plaintiff to discontinue actions. . . ." Ingold v. Ingold, 30 F. Supp. 347, 348 (S.D.N.Y. 1939). See BARRON & HOLTZOFF, *op. cit. supra* note 21, § 911, at 109-10, for presentation of problem whether if the plaintiff had filed the dismissal by stipulation instead of the defendant, the plaintiff could have obtained a writ of mandamus to compel the clerk to file the dismissal.

41. There were two opinions. See notes 3 and 6 *supra*.

42. The court's opinion on security for costs makes no specific mention of the attorney's fees being allowed as an element of costs, but since defendant's motion was for costs including attorney's fees and since the amount, $15,000, is more substantial than the amount generally set for costs without attorney's fees as an element, it is evident the court included attorney's fees as an element of costs. The opinion was obviously not prepared for publication.

43. The court notes that defendant had arranged to have many prominent people from various parts of the country testify at the trial. The court seems to regard the willingness of these national figures to testify as being an indication of the public concern in the issues raised in the suit.

44. See note 5 *supra* for reference to *New York Times v. Sullivan* in the plaintiff's motion to dismiss. There appear to be two aspects to the question: whether the principle of *New York Times v. Sullivan* can be extended to a private citizen who is a journalist, radio-T.V. commentator and the like, and, whether a libel suit brought against a publisher only for a vexatious purpose infringes upon the publisher's constitutional right of freedom of expression when the potentially large monetary liability has forced the publisher to refrain from further comment pending a trial of the suit.

discretionary power to require from a non-resident plaintiff security for costs, including the defendant's attorney's fees, and to deny a voluntary dismissal of the suit by the plaintiff. That a federal district court has the discretionary power to deny a motion for a voluntary nonsuit without prejudice in a fact situation similar to the one presented here seems apparent.[45] No federal court, however, has denied a plaintiff's motion to dismiss with prejudice. That it has the power to require a litigant to post a bond for costs is the general rule.[46] Although it is not a factor in the instant case, a federal court's discretion as to the inclusion of attorney's fees as an element of costs would, doubtless, be limited in some situations by state law.[47]

Assuming this court had the power to do all that it did in this case, the second question is whether it should exercise such power when the effect of its action may be to deter litigants from coming into court. That the courts are open for the redress of injury is a basic premise of the American legal system. The principle of free access to a court, however, does not include a policy which favors vexatious suits known to be groundless.[48] It is suggested that if a court requires a procedure which is reasonable and fair to the plaintiff before ruling on a motion for security for costs, including attorney's fees, the honest litigant will not be deterred from coming to court.[49] In the instant case, a hearing was held on the motion before it was granted, and the defendant will be required to prove at trial that the suit was vexatious and groundless before he can recover the costs. Such procedure seems reasonable and fair. The inclusion of attorney's fees as an element of costs would make the court's action more effective in restraining the use of the "nuisance suit."[50] A federal court has the power to award attorney's fees as an element of costs even in a suit at law,[51] though prior to this case no court has exercised it. The inclusion of attorney's fees in costs might well be extended from the narrowly restricted class of cases in which it is now allowed and applied to all cases where the suit is brought only for its nuisance value.[52] When a court, however, after concluding that the plaintiff is liable for these substantial costs, refuses to permit him voluntarily

45. See notes 36 & 37 *supra.*
46. See note 17 *supra.*
47. See notes 20 & 28 *supra.*
48. "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or injure the opposite party or to work oppression or wrong." Canon 30, ABA CANONS OF PROFESSIONAL AND JUDICIAL ETHICS 6 (1962).
49. See LATTIN, CORPORATIONS 385-88 (1959).
50. See Kuenzel, *supra* note 16.
51. See note 26 *supra.*
52. See Note, *supra* note 11, for good discussion of the general problem.

to withdraw his action on the same basis as if there had been an adjudication on the merits, the lawsuit ceases to be between adversaries and becomes merely a proceeding to punish the litigant for instituting the action. Does the public's interest in the controversy demand that the adversary system be distorted by requiring that an involuntary plaintiff prosecute the action?[53]

Labor Law–Pre-emption–Applicability of Pre-emption Doctrine to Libel Action Arguably Subject to Section 7 or 8 of the NLRA

Defendant union began a campaign to organize the employees of the Ox-Wall Products Manufacturing Co., a corporation engaged in interstate commerce, but its efforts were actively resisted by the employer acting through its plant manager, the plaintiff. During the course of the campaign the union representative allegedly made certain libellous statements concerning the plaintiff through the medium of a pamphlet published periodically by the union. The bitter conflicts arising from this campaign resulted in the issuance of an unfair labor practice complaint by the Regional Director of the National Labor Relations Board, and in the filing of this common law libel action in the Superior Court of New Jersey, Law Division. The Board found that the employer had committed certain unfair labor practices in that it had interfered with employees exercising their section 7[1] rights[2] and had discriminated with regard to tenure of employment to discourage membership in a labor organization.[3] Accordingly, the Board issued a cease and desist order.[4] In the

53. See note 6 *supra* for the conclusion of the appellate court on this problem.

1. National Labor Relations Act § 7, 49 Stat. 452 (1935), 29 U.S.C. § 157 (1958), which provides in relevant part that "Employees shall have the right to self-organization, . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

2. National Labor Relations Act § 8(a)(1), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(1) (1958), which provides that "It shall be an unfair labor practice for an employer–(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

3. National Labor Relations Act § 8(a)(3), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1958), as amended, 29 U.S.C. § 158(a)(3) (Supp. V, 1963), which provides in relevant part that "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

4. In addition, the Board ordered the reinstatement with back pay of certain employees

superior court, the defendant moved for summary judgment on the ground that the statements alleged to be libellous were "part and parcel"[5] of the aforementioned labor dispute, thereby bringing the entire action within the exclusive purview of the NLRA and thus pre-empting it from state jurisdiction. This motion was denied by the trial court. On appeal to the superior court, appellate division, summary judgment was entered against the plaintiff on the ground that the jurisdiction of the state court had been pre-empted by the NLRA. On plaintiff's appeal to the Supreme Court of New Jersey, *held*, affirmed. State courts are pre-empted from entertaining libel actions arising from activities arguably subject to the protections of section 7 or the provisions of section 8 of the NLRA.[6] *Blum v. International Ass'n of Machinists*, 42 N.J. 389, 201 A.2d 46 (1964).

It is apparent that Congress, by the adoption of the NLRA, as amended, intended to enact a comprehensive, nationwide scheme for the regulation of labor relations in industries affecting interstate commerce. Congress, realizing the necessity for expertise as well as for a system of uniform procedures and remedies in the field of labor law, entrusted the primary responsibility of regulating labor relations within the ambit of the act to the National Labor Relations Board,[7] and it further "intended to and did vest in the Board the fullest jurisdictional breadth permissible under the Commerce Clause."[8] Thus, if state law, with its inevitably varying procedures and remedies, were allowed to encroach upon the federal domain, it is obvious that the intent of Congress would be defeated. Of course, it is elementary constitutional law that if there is a direct conflict between the NLRA and the various state laws, the state law or laws must yield under the "supremacy clause"[9] of the Constitution.[10] A more difficult question is presented when the conflict is not prima facie direct, but where such conflict may arise from an independent administration of the respective laws.[11] It was to cope with this problem area where state law and the NLRA cannot "move freely within the orbit of their respective purposes without infringing

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who had been discriminatorily discharged in the labor dispute. This affirmative relief, however, is not relevant to the instant discussion.

5. Defendant's Application for Leave to Appeal, Appendix, p. 16a, Blum v. Int'l Ass'n of Machinists, 80 N.J. Super. 37, 192 A.2d 842 (1963).

6. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (1958), as amended, 29 U.S.C. § 158 (Supp. V, 1963).

7. National Labor Relations Act § 3, 49 Stat. 451 (1935), as amended, 29 U.S.C. § 153 (1958).

8. NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963).

9. U.S. CONST. art. VI, § 2.

10. See Cooper v. Aaron, 358 U.S. 1 (1958).

11. CCH, 1964 CUIDEBOOK TO LABOR RELATIONS § 202 (5th ed.).

upon one another"[12] that the doctrine of pre-emption was first superimposed upon the act by the Supreme Court of the United States, albeit not expressly.[13]

In subsequent cases the Court expressly delineated the concept of pre-emption, striking down state labor statutes purporting to regulate conduct already regulated by the NLRA[14] and emphasizing that conflict is imminent when separate remedies are brought to bear on the same problem.[15] The Court then declared that state common law rules[16] as well as regulatory statutes pertaining to areas other than labor relations[17] would be pre-empted if they tended to regulate activities either protected or prohibited by the NLRA. In so doing the Court laid to rest the contention that a distinction should be made between statutes and rules of decision having mere general application and laws which deal with labor relations as such.[18] A further expansion of the doctrine was made in *Guss v. Utah Labor Board*,[19] where the Court held that under section 10(a)[20] of the act, Congress has completely displaced state power to deal in areas of potential conflict although the NLRB may have declined or would obviously decline to exercise its jurisdiction. Thus, the vigorously condemned "no-man's land" was established into which state law could not and federal law would not enter.[21] Subsequently, the Court handed down its most significant statement of the pre-emption doctrine in the second *San Diego Building & Trades Council v. Garmon*[22]

12. Hill v. Florida, 325 U.S. 538, 543 (1945).

13. Bethlehem Steel Co. v. New York Board, 330 U.S. 767 (1947); Hill v. Florida, 325 U.S. 538 (1945).

14. Garner v. Local 776, Teamsters Union, 346 U.S. 485 (1953); *accord*, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951).

15. Garner v. Local 776, Teamsters Union, *supra* note 14. *But see* Carey v. Westinghouse Elec. Corp., 376 U.S. 261 (1964).

16. Building Trades Council v. Kinard Constr. Co., 346 U.S. 933 (1953).

17. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

18. San Diego Bldg. & Trades Council v. Garmon, 359 U.S. 236 (1959), 13 VAND. L. REV. 416 (1960); Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 543, 555 (1959). *But see* Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1322 (1954).

19. 353 U.S. 1 (1957). Of course, the Board could specifically agree to cede its jurisdiction to the state pursuant to section 10 of the act.

20. National Labor Relations Act § 10(a), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1958).

21. It would appear that the court had recognized the existence of a "no-man's land" some eight years before in LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949).

22. *Supra* note 18. The reader's attention is directed to the interrelationship of two separate concepts at this point: (1) The doctrine of primary jurisdiction which necessitates that the controversy be adjudicated by the proper administrative agency first, and (2) pre-emption which requires that federal law must govern to the exclusion of state law.

decision where it held that when an activity over which the state seeks to exercise its jurisdiction is arguably subject to the provisions of either section 7 or section 8 of the NLRA, the states as well as the federal courts must defer to the exclusive competence of the NLRB.[23] In the same year, the Labor Management Reporting and Disclosure Act of 1959 amended the NLRA to permit the states to assert jurisdiction in cases declined by the NLRB,[24] thereby eliminating the "no-man's land," and lessening the impact of the *Garmon II* decision.[25] The current state of the law in regard to the pre-emption doctrine may be stated thus: The jurisdiction of the NLRB over activities arguably protected or prohibited under the NLRA, as amended, is exclusive, except for those cases declined by the Board for failure to meet its jurisdictional yardsticks.[26] The exclusiveness of the Board's jurisdiction over all cases meeting its jurisdictional yardsticks may be further emphasized by the fact that the states remain powerless to act even after the NLRB refuses to exercise its unquestioned jurisdiction over a particular case on the ground that the controversy involved lacks merit.[27] At this point, mention should be made of the fact that the Board may protect its jurisdiction by petitioning a federal district court for an injunction against the proceedings pending in either the state agency[28] or the state court.[29]

While the general rule, as summarized above, is well settled, it is likewise true that the act, as construed by the Court, has left much authority to the states[30] in the form of what must be considered exceptions to this general rule. First, a state, under its general police power, may exercise jurisdiction over labor activities involving violence,[31] or a threat of violence,[32] although these same activities may constitute unfair labor practices. Second, the states are free to regulate the internal affairs of unions,[33] although the pre-emption doc-

23. *Accord,* DeVries v. Baumgartner's Elec. Constr. Co., 359 U.S. 498 (1959); Local 848, Grocery Drivers Union v. Seven-Up Bottling Co., 359 U.S. 434 (1959); see 3 CCH LAB. L. REP. ¶¶ 5500.0611-.062, and the cases collected therein.

24. 73 Stat. 541 (1959), 29 U.S.C. § 701(a) (Supp. V, 1963).

25. 13 VAND. L. REV. 416, 420 (1960).

26. 3 CCH LAB. L. REP. ¶ 5500.07.

27. *Id.* ¶¶ 5500.19, 5500.194-.198 and see the cases collected therein.

28. Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954).

29. *Ibid.* Note, however, that Congress has provided that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1958).

30. Garner v. Local 776, Teamsters Union, *supra* note 14.

31. International Union, UAW v. Russell, 356 U.S. 634 (1958).

32. United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954). *Accord,* Youngsdahl v. Rainfair, 356 U.S. 131 (1957).

33. International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), 12 VAND. L. REV. 287 (1958).

trine will apply if the activity complained of exceeds the bounds of purely intra-union affairs and involves the employment relation in any fashion whatever.[34] Third, the *Garmon II* decision in no way affects the states' concurrent jurisdiction over damage suits arising from the breach of a collective bargaining agreement under section 301[35] of the act,[36] and the state courts have continued to enjoin picketing conducted in defiance of a collective bargaining agreement.[37] However, a state court may neither enjoin secondary boycotts,[38] nor entertain a suit for damages resulting from secondary boycott activity under section 303[39] of the act.[40] Fourth, the determination of whether a union or agency shop agreement violates a state right to work law may be made by a state court,[41] although the question whether the state has jurisdiction to afford a remedy for such violations remains undecided.[42] Fifth, the state may exercise its jurisdiction in regard to intermittent work stoppages,[43] although subsequent dicta by the Court have rendered this questionable.[44] Sixth, and last, Congress may specifically assent to a state scheme of labor regulation irrespective of the potential conflict, though such cases are understandably rare.[45]

The court in the instant case, in reaching its decision that a state court may not entertain a common law libel action arising out of a labor dispute where the alleged libellous statements are arguably subject to the provisions of the NLRA, based its holding almost exclusively on the line of Supreme Court decisions enumerated above, and relied most heavily on *Garmon II*. The majority reasoned that the NLRB could well be called upon to determine whether the alleged defamatory statements constituted an unfair labor practice, or on the other hand, whether the statements were permissible under

34. Local 27, Int'l Ass'n of Ironworkers v. Perko, 373 U.S. 701 (1963); Local 100, Int'l Ass'n of Journeymen v. Borden, 373 U.S. 690 (1963).

35. Labor Management Relations Act § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

36. Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 503 (1962).

37. McLean Distrib. Co. v. Local 993, Brewery Drivers, 254 Minn. 204, 94 N.W.2d 514 (1959); Benton, Inc. v. Local 333, Painters Union, 45 Cal. 2d 677, 291 P.2d 13 (1955).

38. Pocatello Bldg. & Constr. Trades Council v. E.H. Elle Constr. Co., 352 U.S. 884 (1956).

39. Labor Management Relations Act § 303(b), 61 Stat. 158 (1947), 29 U.S.C. § 187(b) (1958).

40. See Local 120, Teamsters Union v. Morton, 377 U.S. 252 (1964).

41. Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746 (1963).

42. *Ibid.*

43. Local 232, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

44. See San Diego Bldg. & Trades Council v. Garmon, *supra* note 18, at 245 n.4.

45. See DeVeau v. Braisted, 363 U.S. 144 (1960).

8(c)[46] of the act.[47] Further, since the alleged defamation occurred during the course of an organizational campaign which would, in all probability, culminate in an election, the Board might have to determine whether the statements "went too far and impaired the employees' freedom of choice"[48] in connection with its certification proceedings under section 9(c).[49] Accordingly, the majority distinguished *California Dump Truck Owners Ass'n v. Local 42, Teamsters Union*,[50] where the trial court rejected the union's defense of pre-emption, on the ground that there was no organizational dispute involved in that case. The court emphasized the fact that if state courts were allowed to assert jurisdiction over common law libel actions of the type involved here, there would be a very real danger of conflict with the national scheme of regulation in that the Board might find the statements within permissible standards or even truthful, while a jury might find them to be defamatory.[51] Upon these considerations, the court found the alleged libel to be, in the language of *Garmon II*, within one of the "areas of conduct which must be free from state regulation if national policy is to be left unhampered."[52] The three dissenting judges reasoned that since state courts are allowed to entertain damage suits based upon violence, state courts should likewise be free to assert their customary jurisdiction over libel actions because libel is a notorious inciter of violence. They also emphasized the undesirability of leaving the wronged plaintiff without a remedy.

Setting aside any consideration of those areas Congress itself has not seen fit to occupy to the exclusion of the states,[53] the situations over which the states have been allowed to assert their jurisdiction have been those involving a compelling *state* interest or policy.[54] Thus, the question presented here, which must be answered in the negative, is whether the regulation of defamation is so vital a state interest as to permit the inference that Congress has not deprived the states of their power to act in this area.[55] In other words, the salutary effect of allowing a libel victim to pursue his remedy in the state courts must be weighed against the interference with the national

46. Labor Management Relations Act § 8(c), 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958). See the text of this subsection quoted in note 61, *infra*.
47. Blum v. International Ass'n of Machinists, 42 N.J. 389, 201 A.2d 46, 53 (1964).
48. *Ibid.*
49. National Labor Relations Act § 9(c)(1), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(c)(1) (1958).
50. 45 L.C. 50, 546 (Calif. Super. Ct. 1962).
51. *Supra* note 47.
52. 359 U.S. at 246.
53. See text accompanying notes 31-45, *supra*.
54. See *e.g.*, International Union, UAW v. Russell, *supra* note 31.
55. *Ibid.*

scheme of regulation this allowance must inevitably cause. Congress has clearly articulated its intent to protect the workers' full freedom of association and self-organization,[56] and it is axiomatic that the free interchange of ideas and information is essential to a knowledgable exercise of this freedom. Consequently, Congress sought to provide for such free communication by adding the "free speech provision"[57] to the NLRA. Moreover, the threat of state sanctions may well tend "to deprive employees of the fullness of information and debate which is properly part of the scene,"[58] and by so doing infringe upon this area of association which Congress has determined to be free. The conclusion is inescapable that allowing a state court to award damages for libellous statements uttered in the course of a labor dispute would be merely allowing the vindication of a *private* right, a right which must give way to the national purpose of promoting stability in labor relations.[59] Accordingly, it is arguable that communications such as those in question are subject to the right of self-organization as granted by section 7.[60] In addition to finding the statements in question subject to section 7, the court also found them to be arguably subject to the unfair labor practice provisions as well as the "free speech provision" of section 8. It is this latter reasoning which is singularly unconvincing. Section 8(c),[61] although it applies to both employers and unions alike,[62] is a remedial provision, as opposed to an unfair labor practice provision, in that it precludes the finding that a given statement constitutes an unfair labor practice if it complies with the requirements of this subsection. If, in a hypothetical case, it could be determined that an alleged defamation was not arguably subject to section 7 and that it did not constitute an unfair labor practice, the question whether it was protected under 8(c) could not arise. The contrary conclusion, if reached in this hypothetical case, would require pre-emption in order that the Board could determine that what could not possibly be an unfair labor practice may or may not be an unfair labor practice depending on whether or not the statements came within the broad protection of 8(c). Therefore, it is apparent that the court's determination that

56. National Labor Relations Act § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

57. 62 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958).

58. Blum v. International Ass'n of Machinists, *supra* note 47, at 54.

59. Garner v. Local 776, Teamsters Union, *supra* note 14.

60. See San Diego Bldg. & Trades Council v. Garmon, *supra* note 18.

61. 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958), which provides in relevant part that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, [or] printed . . . form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal, or force, or promise of benefit."

62. CCH, LABOR LAW COURSE ¶ 1704 (14th ed. 1964).

the alleged defamation was arguably subject to section 8(c) adds nothing to its opinion.[63]

While the court's reliance on 8(c) was somewhat misplaced, its reasoning that a conflict between competing remedies may well result if state courts are allowed to assert jurisdiction over a libel action arising out of an organizational campaign is well founded. Although representation proceedings are not unfair labor practice proceedings, the Board is often called upon to determine the truth or falsity of statements made during the campaign in order to find whether the statements in question have so impaired the employees' freedom of choice that the preceding election must be set aside.[64] To allow a state court to award damages for libel in a situation where the Board might find the allegedly libellous statements to be truthful would be to condone the very conflict condemned by *Garner*[65] and, at the very least, would allow "two law-making sources to govern," a contingency proscribed by *Garmon II*.[66] In conclusion, it cannot be denied that the defamed party to a labor dispute has suffered a grievous injury to his reputation, but his remedy must be sacrificed to the compelling necessity of promoting industrial peace.

Railroad Regulation—Section 13a(2) Interstate Commerce Act—Standards to be Considered By Interstate Commerce Commission in Granting Interstate Carrier Permission To Discontinue Intrastate Line

The North Carolina State Utilities Commission denied appellant Southern Railway's request for permission to discontinue two of its deficit producing intrastate passenger trains operating between Greensboro and Goldsboro, North Carolina.[1] Appellant then petitioned the Interstate Commerce Commission for such permission under section 13a(2) of the Interstate Commerce Act.[2] After a

63. See Schnell Tool & Die Corp. v. Local Union, United Steelworkers, 200 N.E.2d 727 (Ohio Com. Pl. 1964), where the court held the alleged defamation to be arguably subject to the proteetions of section 7 or the *prohibitions* of section 8.

64. See, *e.g.*, Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).

65. *Supra* note 14.

66. 359 U.S. at 247.

1. The North Carolina State Utilities Commission's decision was affirmed by the state supreme court in State v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

2. Such petition is permitted under the provisions of § 13a(2) of the Interstate Commerce Act, 72 Stat. 571, 49 U.S.C. § 13a(2) (1958), which provides: "Where the dis-

hearing and over objections by the State of North Carolina to the Commission's refusal to consider Southern's freight revenue on the line and the carrier's total intrastate prosperity,[3] the Commission found that there was little public need for the passenger service, that continued operation of the service would constitute an unjust and undue burden upon interstate commerce, and ordered discontinuance of the trains.[4] The State of North Carolina, joined by other protestants, then brought suit in the United States District Court for the Middle District of North Carolina seeking to have the Commission's order set aside and to have Southern enjoined from discontinuing service on the line.[5] The three-judge district court, while not disagreeing with any of the Commission's findings of fact, found, as a matter of law, that the Commission had erred in failing to consider Southern's total intrastate prosperity.[6] The district court then set aside the Commission's order and perpetually enjoined the carrier from discontinuing the trains in question.[7] Southern, joined by the United States and the Interstate Commerce Commission, then brought

continuance or change, in whole or in part, by a carrier or carriers subject to this part, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph."

3. In the year preceding its petition to the State Utilities Commission Southern sustained a $90,000 loss on its passenger service between Greensboro and Goldsboro, North Carolina, while it made a profit on the freight service between the two points of $600,000, and a profit of $36,000,000 for the year on its entire system. North Carolina contended that the Commission should consider Southern's freight revenue and its entire profits, in which case the loss on the particular passenger service would have seemed inconsequential in comparison.

4. Southern Railway Discontinuance of Service Between Greensboro and Goldsboro, N.C., 317 I.C.C. 255, 260 (1962).

5. North Carolina v. United States, 210 F. Supp. 675 (M.D.N. C. 1962).

6. *Id.* at 689.

7. *Ibid.*

the present appeal to the Supreme Court. *Held*, reversed. The Commission did not err in giving little weight to the overall prosperity of Southern's intrastate activities in its determination that continued operation of the unprofitable trains would constitute a burden upon interstate commerce. The Commission is not required, under section 13a(2), to consider a carrier's total intrastate prosperity when there is little public need for the service sought to be discontinued. When there is evidence of significant public need for the service in question, however, the Commission must give weight to the carrier's total intrastate operations and such weight may vary, depending upon the circumstances of public convenience and necessity in each case. *Southern Ry. v. United States*, 376 U.S. 93 (1964).

Prior to 1958, the Interstate Commerce Commission's authority over intrastate carrier operations was limited to cases involving complete abandonment of an unprofitable line which burdened interstate commerce[8] or adjustment of intrastate rates burdening or discriminating against interstate commerce.[9] The Commission was not em-

8. 24 Stat. 379 (1906), 49 U.S.C. § 1(18) (1958), provides: "[N]o carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment . . . ."

24 Stat. 379 (1906), 49 U.S.C. § 1(19) (1958), provides: "The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings . . . ."

24 Stat. 379 (1906), 49 U.S.C. § 1(20) (1958) provides: "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of sueh right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require . . . ."

9. 24 Stat. 383 (1910), 49 U.S.C. § 13(4) (1958), provides: "Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust diserimination against interstate or foreign commerce [which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers, wholly within any State] which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimnm, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be

powered to authorize discontinuance of a particular unprofitable intrastate segment while allowing the rest of the line to continue operating.[10] In 1958, Congress filled this gap with the enactment of section 13a(2) of the Interstate Commerce Act.[11] Section 13a(2) provides that the Commission may authorize a carrier to discontinue a particular service if "the present or future public convenience and necessity permit of such discontinuance . . ." and if continued operation of the train "will constitute an unjust or undue burden upon . . ." the carrier's interstate operations or upon interstate commerce.[12] The statute does not indicate, however, whether the Commission must consider the carrier's total intrastate operations when it decides if continued operation of the train would burden interstate commerce.

A power analogous to that granted the Commission under section 13a(2) is its authority to permit complete abandonment of an unprofitable intrastate line under sections 1(18) through 1(20).[13] The general guideline followed by the Commission in making determinations under sections 1(18) through 1(20) is that such determination to permit abandonment be consistent with public convenience and necessity.[14] The interstate burden should be determined "upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands."[15] Section 13(4), another related section of the Interstate Commerce Act, grants the Commission authority over intrastate rates which cause unjust discrimination against, or undue burden on, interstate commerce. This section

observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination . . . ."

10. Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Board of Pub. Util. Comm'n v. United States, 158 F. Supp. 106 (D.C.N.J. 1957); Gulf, M. & O.R.R. v. Louisiana Pub. Serv. Comm'n, 120 F. Supp. 250 (D.C. La. 1954); Southern Ry. v. South Carolina Pub. Serv. Comm'n, 31 F. Supp. 707 (E.D.S.C. 1940).

11. 72 Stat. 571, 49 U.S.C. § 13a(2) (1958). That the Court considers that congressional enactment of this section was with the intention of filling this gap, see New Jersey v. New York S. & W.R.R., 372 U.S. 1, 5, 6 (1963). For a general discussion of passenger train discontinuances which prior to 1958 were not subject to Commission action, see Conant, *Railroad Service Discontinuances*, 43 MINN. L. REV. 275 (1958).

12. 72 Stat. 571, 49 U.S.C. § 13a(2) (1958). For full text, see note 2 *supra*.

13. 24 Stat. 379 (1906), 49 U.S.C. §§ 1(18) through 1(20) (1958). For full text, see note 8, *supra*.

14. 24 Stat. 379 (1906), 49 U.S.C. § 1(18) (1958). For cases in which the statutory standard has been interpreted and applied, see Colorado v. United States, 271 U.S. 153 (1926); Burke County v. United States, 206 F. Supp. 586 (S.D. Ga. 1962). Note that the term "public convenience and necessity" has not been specifically defined by the courts. The courts instead have relied on the expertise of the Interstate Commerce Commission to determine each case on an *ad hoc* basis, thus giving to the Commission very wide discretion to decide whether the requirements of "public convenience and necessity" are met under the circumstances presented in each case.

15. Colorado v. United States, *supra* note 14, at 169.

specifies that the Commission may determine the question of burden upon interstate commerce without considering total intrastate prosperity.[16] The Commission has discretion under these two related sections,[17] sections 1(18) through 1(20) and 13(4), to determine how much weight, if any, is to be accorded the carrier's total intrastate prosperity when determining whether interstate commerce is burdened.

The instant case is the first to reach the Supreme Court concerning the criteria to be applied by the Commission in a discontinuance proceeding under section 13a(2).[18] Section 13a(2) does not specify the factors the Commission is to consider in deciding whether to permit discontinuance; therefore, the Court examined standards followed by the Commission in deciding cases under sections 1(18) through 1(20) and 13(4) of the Interstate Commerce Act, since these sections grant the Commission powers closely related to those granted under section 13a(2). The Court looked first to section 13(4), which permits the Commission to decide questions arising under it without considering the carrier's total intrastate prosperity. The Court noted that the district court had relied heavily upon two 1958 cases in which the Court had held that under section 13(4) the Commission was required to weigh the carrier's total intrastate prosperity.[19] Following these two decisions[20] however, Congress amended section 13(4) to permit Commission discretion as to whether or not the carrier's total intrastate prosperity should be considered.[21] In the

16. 24 Stat. 383 (1906), 49 U.S.C. § 13(4) (1958).

17. These sections are related to § 13a(2) in that (1) the Commission has authority over a strictly intrastate operation or practice, which authority is premised upon the superceding federal interest in an efficient national transportation system; (2) a determination under the sections requires Commission judgment as to the amount of burden caused to interstate commerce by a particular intrastate activity, and this judgment involves a decision as to whether the federal interest involved is great enough to supercede state interests; (3) similar interests are affected under the three sections when the Commission determines that there is a burden to interstate commerce, namely, (a) under § 1(18) the convenience of state travelers would be lessened by abandonment of a railroad line, (b) under § 13(4) an upward adjustment of an intrastate rate would affect the economic interest of state travelers, and (c) under § 13a(2) some of the train riding public would suffer some inconvenience through discontinuance of a particular train.

18. Southern Ry. v. United States, 376 U.S. 93, 106 (1964).

19. *Id.* at 98. The two cases upon which the district court had relied were Public Serv. Comm'n v. United States, 356 U.S. 421 (1958), and Chicago M. St. P.R.R. v. Illinois, 355 U.S. 300 (1958).

20. *Ibid.*

21. The amendment added to this section the parenthetical portion, "(which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State) . . . ." 72 Stat. 570, 49 U.S.C. § 13(4) (1958). That the amendment to this section was in direct response to the Public Service Comm'n case, *supra* note 19, and the Chicago case, *supra* note 19, see U.S. CODE, CONG. & AD. NEWS 3483-86 (1958).

proceeding below, the district court had concluded that since section 13(4) was thus amended in the same year in which section 13a(2) was enacted, Congress, had it intended that the Commission be allowed the same discretion under section 13a(2) as is allowed under section 13(4), would have specifically provided therefor.[22] The Court rejected this argument and pointed out that the enactment of the section 13(4) amendment merely reflected congressional reaffirmance of what Congress had conceived as the original intent of that section; there is, therefore, no reason to conclude that it represents a new standard which must be specifically incorporated into every statutory provision to which it was intended to apply.[23] In determining that the Commission did not err by failing to consider the carrier's intrastate prosperity, the Court applied to the instant case the guideline for Commission action under sections 1(18) through 1(20), which had been drawn in the case of *Colorado v. United States*.[24] The Court pointed out that it has "long recognized that the Commission may properly give varying weights to the overall prosperity of the carrier in differing situations . . ."[25] and quoting from the *Colorado* case, said:[26]

> In many cases it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. In some cases . . . the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier.

In applying this standard, the Court concluded that where the public need is great,[27] the Commission would err if it did not give considerable weight to the carrier's total prosperity and its ability to absorb the deficit which may result from the unprofitable services.[28] It would be equally proper, said the Court, for the Commission to give little weight to the carrier's overall prosperity when the demands of public necessity and convenience are slight.[29]

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22. North Carolina v. United States, *supra* note 5, at 682.
23. Southern Ry. v. United States, *supra* note 18, at 99-100.
24. *Supra* note 14, at 153.
25. Southern Ry. v. United States, *supra* note 18, at 104-05.
26. *Id.* at 105.
27. The Commission determines the public need under § 13a(2). The statute provides "upon findings by it [Commission] that (a) the present or future public convenience and necessity permit of such discontinuance . . . ." 72 Stat. 571, 49 U.S.C. § 13a(2) (1958).
28. Southern Ry. v. United States, *supra* note 18, at 105.
29. *Ibid.*

The Court's decision properly leaves with the Interstate Commerce Commission the discretion it should have in administering section 13a(2). To require the Commission to consider a carrier's total intrastate operations in each case arising under section 13a(2) would impose a standard too rigid to allow efficient Commission action in the variety of cases which may arise under that section. Deciding how greatly interstate commerce is burdened by a particular unprofitable intrastate service necessarily involves a balancing of interests whose significance may vary greatly from case to case. The flexible standards of sections 1(18) through 1(20) and 13(4) permit Commission discretion to disregard total intrastate carrier prosperity and it therefore seems reasonable that the Commission should have the same degree of discretion under the related section, section 13a(2).

State Taxation—Commerce Clause—Unapportioned Privilege Tax Measured by Gross Receipts on Wholesale Sales of a Multistate Business

Suit was brought by a Delaware corporation to enjoin the State of Washington from collecting a privilege tax, measured by total gross sales receipts, which was levied on wholesale sales of automobiles, parts, and accessories manufactured in California, Missouri, and Michigan, and shipped f.o.b. from a warehouse in Portland, Oregon, to customers in Washington. As part of this corporation's sales organization, zone offices were maintained in various geographical regions[1] with district managers contacting independent dealers, normally at the dealer's local place of business. The district managers gave advice regarding inventory, coordinated incentive programs, and counselled in the improvement of sales and services. Two divisions of the corporation maintained no offices in the state. However, division personnel usually resided in their Washington districts and often used their residences for receipt of business mail and for business phone calls. Orders normally went directly from the dealer to the warehouse which shipped the goods.[2] The Washington State

1. The state of Washington is part of the Portland zone, a subdivision of the Western region, which also includes Oregon, Idaho, Alaska, and portions of Montana and Wyoming.

2. The disputed taxes in this case concerned four divisions of the General Motors organization—Pontiac, Oldsmobile, Chevrolet, and General Motors Parts Division. The Pontiac and Oldsmobile divisions maintained no offices in Washington. The Chevrolet division maintained a one-man branch office in Seattle which served the

Tax Commission levied a tax on the gross receipts from these wholesale sales.[3] Although goods were also shipped from a Seattle warehouse and through a Seattle office of two other divisions, only the taxes measured by the gross proceeds from the f.o.b. sales of the Portland warehouse to the dealers in Washington were disputed. The Washington Superior Court granted injunctive relief against collection of the tax on these sales. On appeal the Washington Supreme Court reversed, holding that the tax bore a reasonable relation to the appellant's activities within the state.[4] On appeal to the Supreme Court, *held*, affirmed. Where taxable business is so mingled with that business claimed nontaxable, absent the showing of an actual multiple burden on commerce, an unapportioned gross receipts tax on wholesale sales of a multi-state business is valid where resident employees perform substantial services in relation to an interstate business channelled through a maze of local connections. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), *rehearing denied*, 379 U.S. 875 (1964).

The doctrine that total gross receipts from interstate commerce may not be made the subject of a state tax[5] has led the Supreme

northern counties of Washington; the rest of the state was served by the Portland office. The General Motors Parts Division maintained warehouses in Seattle and Portland. The Seattle warehouse carried the "heavy volume" items, while those less frequently ordered were stocked in the Portland warehouse. Each dealer was furnished with two order blanks—one for each warehouse.

3. Relevant sections of the Washington statute in force during the taxable periods in this case, January 1, 1949, through June 30, 1953, were:

"Section 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of produets, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

. . .

"(e) Upon every person . . . engaging within this state in the business of making sales at wholesale; as to such persons the amount of the tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent;

. . .

"Section 5. For the purposes of this title . . .

. . .

"(e) The term 'sale at wholesale' or 'wholesale sale' means any sale of tangible personal property and any sale of or charge made for labor and services rendered in respect to real or personal property, which is not a sale at retail;

"(f) The term 'gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered without any deduction on account of the cost of property sold, the cost of materials used, laber costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses." Wash. Laws 1949, ch. 228, at 814-19.

4. General Motors v. State, 60 Wash. 2d 862, 376 P.2d 843 (1962).

5. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938); Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895); Philadelphia & So. S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887).

Court to invalidate many unapportioned gross receipts taxes on interstate commerce.[6] The basis of the doctrine is that since commerce cannot be taxed, neither can its gross receipts.[7] Interstate business, however, is not immune from all state taxation. The conflict between the revenue requirements of the states and the national economy's need for the free flow of commerce[8] has been accommodated by allowing states to tax multi-state business when the requirements of both due process and the commerce clause are satisfied.[9] In holding a tax valid under the due process clause the courts seek to determine whether sufficient contact exists between the particular transactions sought to be taxed and the protection, opportunities, and benefits given by the state to support the finding of a taxable in-state "incident" distinct from commerce itself.[10] This connection has been termed a "nexus."[11]

Although a state may have a substantial relationship with the activity sought to be taxed, the tax still must meet the requirements of the commerce clause.[12] Activities such as the solicitation of sales[13]

6. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937); Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U.S. 217 (1908); Philadelphia & So. S.S. Co. v. Pennsylvania, *supra* note 5; Fargo v. Michigan, 121 U.S. 230 (1887).

7. Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917); Postal Telegraph Cable Co. v. Adams, *supra* note 5; Philadelphia & So. S.S. Co. v. Pennsylvania, *supra* note 5; Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 284 (1874) (dissent).

8. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Miller Bros. Co. v. Maryland, 347 U.S. 340, 343 (1954); Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 259 (1938). *But cf.* Freeman v. Hewitt, 329 U.S. 249 (1946), where the Court said that a state was precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of commerce. "It is immaterial that local commerce is subjected to a similar encumbrance . . . [since] to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables." *Id.* at 252.

9. Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051, 1058-65 (1960).

10. Michigan-Wisconsin Pipe Line Co. v. Calvert, *supra* note 8; Miller Bros. Co. v. Maryland, *supra* note 8; Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940); Western Live Stock v. Bureau of Revenue, *supra* note 8. *Cf.* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

11. Wisconsin v. J.C. Penney Co., *supra* note 10.

12. See HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 13-17 (1953). "The situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of . . . [a] tax. All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result." Nippert v. Richmond, 327 U.S. 416, 423 (1946).

13. Robbins v. Shelby Connty Taxing Dist., 120 U.S. 489 (1887). See also Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923), and cases cited therein at 515.

and the loading and unloading of cargo[14] are considered an essential and integral non-taxable part of interstate commerce; whereas multi-state operations, channelled through local outlets to gain the advantages of a local business, have been held to be incidents subject to the state's sovereign power of taxation.[15] Taxes allowed on such in-state incidents have included net income taxes,[16] property taxes,[17] use taxes,[18] license fees on manufacturing,[19] license taxes,[20] franchise taxes,[21] privilege taxes,[22] and gross receipts taxes apportioned to a reasonable percentage of business done within the state.[23] The virtual impossibility of perfect apportionment[24] has been recognized by the Supreme Court, which has been reluctant to nullify honest state attempts at fairness.[25] If the apportionment result is reasonable, the states have been permitted to use interstate[26] and out-of-state[27] transactions as the measures of many gross receipts tax formulas. The validity of these formulas have been determined under two tests[28] that attempt to equalize the tax burdens of interstate commerce with those of local business.[29] Under the "direct-indirect burden" test of the validity of taxes affecting interstate commerce,[30] generally only those gross receipts taxes levied directly on the commerce itself, as distinguished from excise taxes levied on local events and measured by gross

14. Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947).
15. Norton Co. v. Department of Revenue, 340 U.S. 534 (1951). For the view that all immunity is lost under these circumstances see the dissent of Clark, J., *Id.* at 541.
16. United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918).
17. Virginia v. Imperial Coal Sales Co., 293 U.S. 15 (1934).
18. General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944).
19. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919).
20. Postal Tel. Cable Co. v. Richmond, 249 U.S. 252 (1919).
21. Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959).
22. Western Live Stock v. Bureau of Revenue, *supra* note 8.
23. In Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948), a common carrier challenged the validity of a New York gross receipts tax on the transportation of passengers between two points within the state over a route 42.53 per cent of which was in New Jersey and Pennsylvania. It was held that the tax was valid on that portion of the gross receipts which equalled the ratio the mileage of roads within the state bore to the total amount of mileage. However, the tax on gross receipts from that portion of the mileage outside the taxing state burdened interstate commerce in violation of the commerce clause. See *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 1011 (1962), for an examination of the various formulas of apportioning gross receipts taxes.
24. International Harvester Co. v. Evatt, 329 U.S. 416, 423 (1947); Illinois Cent. R.R. v. Minnesota, 309 U.S. 157, 161 (1940).
25. *Ibid.*
26. *Supra* note 24.
27. International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); American Mfg. Co. v. St. Louis, *supra* note 19.
28. HARTMAN, *op. cit. supra* note 12.
29. *Id.* at 110, 112.
30. Crew Levick Co. v. Pennsylvania, *supra* note 7; Philadelphia & So. S.S. Co. v. Pennsylvania, *supra* note 5. See also Hartman, *supra* note 9, at 1070.

receipts, constitute undue burdens on, or regulations of, interstate commerce.[31] Taxes on local events have been conceded to affect the subjects and operations of the commerce "yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."[32] Under this test the Court has invalidated all unapportioned gross receipts taxes on interstate business.[33] Application of this classical standard in the present case would seem to invalidate this unapportioned wholesaler's privilege tax measured by gross sales receipts. Since it is impossible to engage in interstate commerce without disposing of goods, wholesaling should be considered a continuation of commerce or one of its essential parts. Therefore, the instant excise on wholesaling would seem to be a levy on the privilege of engaging in interstate commerce and thus a direct unconstitutional burden.[34]

Justice Stone was the chief architect of another test, known as the "multiple burdens" theory,[35] for determining the validity of a tax when the challenge is on commerce clause grounds. Under this test interstate business is not immune from a state or local tax merely because the excise is levied upon interstate commerce or its receipts. Rather, such taxes are invalid only if the courts find that they subject interstate commerce to a *"risk of multiple taxation not borne by local commerce."*[36] (Italics supplied.) The question normally to be answered is whether another state can tax the same event. If this question is answered in the negative, state taxation is permitted when the levies are *apportioned* by means which are reasonably designed to measure the state's connection with the receipts, income, or property sought to be taxed. Justice Rutledge further amplified and expounded on this doctrine. In his concurring opinion in *International Harvester Co. v. Department of Treasury*[37] he stated that the states, by virtue of the commerce clause, could not impose upon interstate

31. HELLERSTEIN, STATE AND LOCAL TAXATION 160 (1961).

32. Reading R.R. v. Pennsylvania, *supra* note 7, at 293.

33. Sonneborn Bros. v. Cureton, *supra* note 13; Crew Levick Co. v. Pennsylvania, *supra* note 7.

34. *Cf.* Joseph v. Carter & Weekes Stevedoring Co., *supra* note 14; Robbins v. Shelby County Taxing Dist., *supra* note 13. International Harvester Co. v. Department of Treasury, *supra* note 27, held that a state gross income tax (in effect a gross receipts tax) was validly applied to business transactions of an interstate business which were wholly consummated within the taxing state's borders as long as local transactions were subject to the same taxes. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940), held that a city could validly require an interstate business to collect a transfer of property tax from the purchaser and be liable itself for any taxes not collected. Both of these cases are distinguishable from the tax in the present case since it was levied on the interstate transactions of the multi-state business itself.

35. HELLERSTEIN, *op. cit. supra* note 31, at 161.

36. *Ibid.*

37. 322 U.S. 340 (1944).

commerce tax burdens not borne by local business. Where the practical effect of taxes actually levied by more than one state upon an interstate transaction is to subject it to a cumulative tax burden which is greater than that imposed upon local business, there exists a burden upon interstate commerce that is prohibited by the commerce clause under this test. Since the commerce clause operates independently of the states' taxing discretion, this test also applies when other states have the *right,* constitutionally apart from the commerce clause, to tax the same transaction, with the *risk* of these states exercising this right being a sufficient burden not borne by local business. The multiple burdens test requires extinguishment of the danger of multiple taxation by having the tax of one state give credit for any levy paid to another state, or by apportioning the measure of each tax so that the exaction of each taxing state reflects only that commercial activity fairly attributable to it.[38]

In the present case, application of this standard would subject the Washington tax to invalidation. Since a substantial part of the activities from which the receipts were derived was carried on outside the taxing state, the tax should have been apportioned so that only that segment of the commercial flow reflecting the values attributable to the taxing state could be used as the measure of the tax. Failure to apportion a privilege tax has been considered tantamount to extraterritorial taxing when applied to a multi-state business; and the *risk* of other states taxing the contributing activities which take place within their borders, also measured by the "entire amount of commerce," has been held to be a prohibitive cumulative burden.[39] In the instant case another state could easily tax a contributing activity—the manufacture, for example—and measure it by a portion of the gross receipts.[40] Other cases have held that the same *event* must be capable of taxation by other states for the commerce to be exposed to prohibited cumulative burdens.[41] Here the sales took place in Oregon and that state has the right to tax the same event—the privilege of making these same wholesale sales—thereby creating the risk of a multiple burden. In the present case the Court refused to pass upon the question of multiple burdens because the appellant-taxpayer had not demonstrated that similar taxes of other states *actually* subjected the same event to burdens not borne by local business. This necessity of the demonstration of an *actual*

38. *Id.* at 358-62.
39. Gwin, White & Prince, Inc. v. Henneford, *supra* note 6.
40. See MICH. STAT. ANN. § 7.557(3) (1955); MO. REV. STAT. § 92.040 (1939).
41. International Harvester Co. v. Evatt, *supra* note 24; Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938). See HARTMAN, *op. cit. supra* note 12, at 188-99.

burden is yet a stricter requirement of proof to show the existence of a "multiple burden," and appears to be subjecting the commerce clause to the whimsical contingencies of state taxation[42] as well as establishing a first-come-first-tax[43] concept whereby the state which first taxes the event has a valid tax. Another state attempting to exercise its constitutional right to tax the same event would appear to be precluded from any such levy since the taxpayer could demonstrate the prior tax of the first state as an actual burden not borne by local business and invoke the protection of the commerce clause under the cumulative burdens test recognized by this Court.[44]

The majority of the Court concluded that this privilege tax measured by unapportioned gross receipts was levied on the incident of a local business. Recognizing that interstate commerce could not be burdened by local taxes which would subject it to the danger of "multiple taxation," the decision rested "upon whether the State . . . [was] exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation."[45] The five justices that upheld the tax believed the excise to be in proper proportion to the activities and benefits that the interstate business incurred within the state of Washington. The homes of resident personnel substituted for in-state offices,[46] and their in-state activities in relation to the establishment and maintenance of sales upon which the tax was based were sufficient local incidents upon which to levy a tax.[47] The "bundle of corporate activity" test[48] was applied and satisfied by the total enmeshment of the interstate phase of the business with local connections. The Court demonstrated this enmeshment by pointing to appellant's voluntary payment of taxes on the sales channelled through one of its division's local offices[49] and from the Seattle warehouse.[50] Under these circumstances the majority

42. *Cf.* "Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden." Gwin, White & Prince, Inc. v. Henneford, *supra* note 6, at 340.

43. 377 U.S. at 458 & n.2 (1964) (dissent).

44. 377 U.S. at 440.

45. *Ibid.*

46. *Cf.* Norton Co. v. Department of Revenue, *supra* note 15.

47. The majority cited Norton Co. v. Department of Revenue, *supra* note 15 which held that while interstate business could not be channelled through local outlets to gain the advantages of a local business and still claim the immunities of interstate commerce, orders sent directly to the out-of-state supplier, filled, and then sent directly back to the in-state consumer were too clearly interstate to be taxable. For a detailed comparison of the fact patterns of these two cases see the dissent of Mr. Justice Goldberg in the instant case. 377 U.S. at 452-56.

48. *Id.* at 447.

49. *Id.* at 445.

50. *Id.* at 446.

believed that the taxpayer must show that the operations claimed nontaxable were disassociated from the local business and clearly interstate in nature.

There were two dissenting opinions. Mr. Justice Brennan's dissent conceded that the authority cited by the majority was sufficient to support the finding that the due process requirements were satisfied. However, he took the position that the commerce clause requirement had been completely ignored by the Court. The commerce clause requires that the tax be apportioned to reflect the commercial activity relevant to the particular transaction being taxed and no amount of sales volume will overcome this requirement. Mr. Justice Stewart and Mr. Justice White joined Mr. Justice Goldberg in a forcible dissent denouncing the majority's radical departure from what they considered established principles as applied in the *Norton*[51] case. This dissent considered both factual patterns comparable and had no difficulty in applying the *Norton* standard. It contended that the Court here has established an unworkable, vague, and indefinite standard of "fairness" which could easily result in the multiple taxation of the receipts of interstate commerce. Furthermore, this dissent found actual discrimination against interstate commerce in the statute itself, which, prior to 1950, exempted from this wholesaling tax a Washington manufacturer-wholesaler who had paid a manufacturing tax levied by the state of Washington.[52] Although legislation reversed this exemption in 1950, the dissenting Justices believed the economic effects to be so similar as to discriminate against multi-state business. They believed that the failure of the Washington statute to exempt from the wholesaling tax businesses which paid manufacturing taxes of other states, which are also measured by gross sales receipts, was discrimination against interstate business. The validity of this last contention is questionable since the normal standard of whether or not a tax is discriminatory is whether other related levies of the state impose equal burdens upon local commerce.[53] The measure of the manufacturing tax[54] in Washington is the same as that of the wholesaling tax. No one can doubt a state's inherent sovereign power to determine what it shall tax, subject to constitutional limitations and, in the case of the post-1950 Washington manufacturer-wholesaler, it appears that Washington had chosen not to tax the manu-

51. *Supra* note 15.

52. *Compare* REV. CODE WASH. § 82.04.270 (1961); Wash. Laws 1949, ch. 228, § 1(e), *with* REV. CODE WASH. § 82.04.240; Wash. Laws 1949, ch. 228 § 1(b), *and* REV. CODE WASH. § 82.04.440 (1961); Wash. Laws 1949, ch. 228, § 2-A.

53. HARTMAN, *op. cit. supra* note 12, at 67-70.

54. The manufacturing tax is measured by the value of the goods which is equal to the gross proceeds of sales at wholesale or retail prices. Thus, the two taxes are equal but levied upon different events. REV. CODE WASH. §§ 82.04.240, 82.04.450 (1961).

facturing aspect of the operation so as to equalize the imposition of actual tax within its taxing scheme.[55]

A noted writer has stated that a "tax might satisfy due process requirements and yet transgress the commerce clause . . . . There have, however, apparently been no cases expressly deciding that a tax will withstand a due process assault and yet fall before the commerce clause."[56] This proposition is further substantiated by this case. The standard here promulgated by the Court may easily lead to the virtual extinction of the commerce clause as a restraining force in the area of state taxation of multi-state activities. The "bundle of corporate activity test" is only concerned with due process and, as applied in the present case, appears to be relegating the commerce clause to impotence in its purpose of preventing internal trade barriers.[57] The rationale of this decision indicates that even if the operations of a multi-state business are clearly interstate save for one small segment, that local outlet makes the entire operation of the business within the state vulnerable to state privilege taxes. Stated briefly, this means that no diversified multi-state business will be able to segregate its interstate and intrastate operations in the future for the purposes of state taxation[58] unless it can be shown that the interstate transactions are actually subjected to taxes of other states.[59]

55. Crown Zellerbach Corp. v. State, 45 Wash. 2d 749, 278 P.2d 305 (1954).

56. HARTMAN, *op. cit. supra* note 12, at 17.

57. "The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove." Western Live Stock v. Bureau of Revenue, *supra* note 8, at 256. *Cf.* Gwin, White & Prince, Inc. v. Henneford, *supra* note 6.

58. *Interstate Commerce, Taxation Without Apportionment*, 24 CORP. J. 123, 126 (1964).

59. The fact that General Motors was subject to a heavier tax burden than similar Washington business, and unable to demonstrate to the Court's satisfaction that a multiple tax burden existed, demonstrates the awesome task facing any multi-state business which seeks to challenge a state tax of this nature. The "bundle of corporate activity" test as applied in this case does not appear to be a rule easily applied, and the validity of taxes tested by this standard undoubtedly will depend upon taxing policies of states other than the one imposing the tax. Assume that a substantial enough business is carried on within the following states to satisfy the due process requirement for the bundle of corporate activity test, and then consider the following fact patterns. State *A* has a privilege tax similar to Washington's, but state *B* has none. *X* corporation does a business similar to that of General Motors in the instant case. The result is that state *A* has a valid tax. (This is the holding of the instant case.) Now assume the same facts except that state *B* also has a privilege tax. The result is that either state *A* or state *B*, or both, no longer have a valid tax as applied to *X* corporation. See note 43 *supra* and accompanying text. However, if *Y* corporation does an interstate business between State *C* (which has no privilege tax) and state *A*, and between states *C* and *B*, but not between states *A* and *B*, then both state *A* and state *B* have valid privilege taxes in respect to *Y* corporation although their taxes may be invalid as applied to *X* corporation. The standard is thus completely dependent upon the taxing policies of the states in which the affected multi-state business has a

A logical solution for large corporations would be to fragmentize and localize their operations so as to preclude the risk of multiple taxation, a result inconsistent with the "economic whole United States" theory of the commerce clause.[60]

Taxation–Federal Income Tax–Application of Federal Tax Liens to Insurauce Policy Automatic Premium Loan and Cash Surrender Provisions

In *Sullivan v. United States*,[1] the leading case of the group to be discussed, the federal government brought an action under section 7403 of the Internal Revenue Code of 1954[2] in federal district court against taxpayer-insured and her insurers[3] to foreclose a federal tax lien[4] on two unmatured life insurance policies of the taxpayer's, and

taxable incident. The only ascertainable rule which develops is that before a state may tax a multi-state business it must examine the taxing policies of each state in which the business sought to be taxed operates. It is submitted that the states are unlikely to make such an examination of each business which they seek to tax, and will probably tax all business within their borders. Such a result will require the involved business to examine all of the taxes it pays on the contributing activities of the taxed operation to determine whether it is being subjected to discriminatory multiple taxation not borne by local business. The determination of whether the tax is discriminatory can probably only be solved by litigation construing the tax burden of the multi-state business at the time of the trial. Should a change in taxing policies of the involved states adversely affect the business at a later time, it may well find itself again in court asking for a redetermination of the same tax. The practicality of such a rule is severely criticized in the dissent of Mr. Justice Goldberg, 377 U.S. at 457-62, where he submits that the only result of such a rule will be a wholly permissive attitude by the courts toward state taxation of interstate business except for mail order houses which do not satisfy the due process requirement of a taxable incident.

60. There is evidence that General Motors established a Seattle office for these other two divisions after the initial levy of the Washington tax. See 38 WASH. L. REV. 277 n.3 (1963). Could one of the reasons have been to preclude Oregon from having any base upon which to levy a tax concerning these wholesale sales?

1. 333 F.2d 100 (3d Cir. 1964). Companion cases are cited in note 13 *infra*.

2. Section 7403 authorizes suits to foreclose federal tax liens.

3. Aetna Life Insurance Company hereinafter referred to as Aetna, and Manufacturer's Life Insurance Company, hereinafter referred to as Manufacturer's are the two insurers. Although the Aetna policy was an endowment type and the Manufacturer's was ordinary life, the policies were substantially identical in all material respects.

4. The lien arose under the Int. Rev. Code of 1939, ch. 36, § 3670, 53 Stat. 448, which is virtually identical to INT. REV. CODE OF 1954 § 6321. The latter reads as follows:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

to collect penalties from the insurers. These penalties, which arise under section 6332(b) of the Internal Revenue Code of 1954,[5] were for the amount of decrease in the cash surrender values[6] of the policies occasioned by the operation of the policy loan[7] and automatic premium loan[8] provisions. In 1952, the Commissioner assessed a deficiency against the taxpayer and her spouse jointly for the taxable year 1950 and filed public notice[9] of the resulting lien.[10] In 1953, both insurers issued policies on the life of taxpayer who, retaining the right to exercise all rights of ownership incident thereto,[11] designated her husband as beneficiary. Subsequent to the filing of public notice of the government tax lien but prior to delivery of actual notice of

5. INT. REV. CODE OF 1954, § 6332(b):
"(b) PENALTY FOR VIOLATION.—Any person who fails or refuses to surrender as required by subsection (a) [requires any person in possession of property subject to levy to surrender it on demand of Secretary] and property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy."

6. The cash surrender value is defined as the cash value, that part of the total premium paid which exceeds the insurer's accrued policy costs plus accumulated dividend amounts, less any outstanding policy indebtedness previously incurred by the insured to the insurer. The right to a cash surrender value is one of the incidents of ownership to which the insured was entitled and could be exercised only by surrendering the policy to the company.

7. The right to borrow on the policy is a second incident of ownership to which the insured was entitled and would result in a first lien held by the insurer on the policy. Under neither policy was there a specific obligation to repay the amount borrowed. Failure to repay simply resulted in the permanent reduction in the cash surrender value. Once these arrearages equalled the cash value, the policy was cancelled and obligations on both sides ceased.

8. This provision was optional but insured elected to have it included as part of her policy. On default of premium, the company, so long as a cash surrender value remained, would loan to the insured and apply toward payment the amount due.

9. The court did not deem it neeessary to recite in which counties notice was filed.

10. Int. Rev. Code of 1954, § 6321.

11. Insured retained the right to change the beneficiary. For explanation of cash surrender value see note 6 *supra*. For explanation of insured's right to policy loans see note 7 *supra*. For explanation of insured's revocable right to automatic premium loans see note 8 *supra*.

The policies also provided insured with non-forfeiture benefits. In the event of default of premiums each policy could be continued at the election of the insured to the extent of its cash surrender value either as participating paid-up insurance or as non-participating extended term insurance. Since Mrs. Sullivan elected the automatic premium loan provision, these benefits are only of secondary interest, yet the clause is somewhat relevant in that she could have revoked the automatic premium loan provision at any time.

A further right held by the insured was a right to dividends. Mrs. Sullivan elected to receive these in cash. After notice of levy was served on the insurance companies they paid these amounts to the government without dispute. No argument has arisen as to the disposition of this money.

levy[12] to the insurers (January, 1958), taxpayer received benefit of two automatic premium loans from Aetna and two policy loans from Manufacturer's. Then, *after* actual notice of levy was received (January, 1958) but before this suit was commenced (October, 1958), each company made an automatic premium loan, as they again did after this suit had begun. Prior to judgment in the lower court and pursuant to a stipulation between the government and the Sullivans, in January of 1960, the insured surrendered her policies to the insurers and released them from all liability to her on the policies. The lower court then held that the government was entitled to be paid the amount of the cash surrender value as of the date of surrender and that upon payment of the respective amounts the insurers would be wholly discharged from their policy obligations to the government as well as to the insured. The amount in issue on appeal is the sum deducted from the cash surrender value on account of the automatic premium loans and policy loans effected by the insurance companies after the tax lien had arisen. On appeal by the government to the United States Court of Appeals for the Third Circuit, *held,* affirmed. Neither the amount of automatic premium loans effected subsequent to actual notice of levy to the insurer nor policy loans effected subsequent to filing of public notice of lien but prior to actual notification of levy are "property or rights to property" against which a federal tax lien will arise. *United States v. Sullivan,* 333 F.2d 100 (3d Cir. 1964).

Of three companion cases, one, *United States v. Wilson,*[13] is worthy of note. Factually, it is identical to the *Sullivan* case in all material respects except that in *Wilson* the insured elected, prior to the time when the lien arose, to apply earned dividends to reduce premium payments. Also, he did not voluntarily surrender the policies and release the insurer prior to judgment. Yet the lower court held that the insurer was liable to the government for the amount of the dividends and cash value applied to premium payments at any time after actual notice of levy was served upon him. On appeal by the insurer to the United States Court of Appeals for the Third Circuit, *held,* reversed. The notice of levy served by the Commissioner upon the insurer did not revoke the automatic premium loan provision or act to demand the cash surrender value on behalf of the government and was therefore not controlling as to whether insurer could there-

12. Such levy is authorized under INT. REV. CODE OF 1954, § 6331.

13. 333 F.2d 137 (3d Cir. 1964). The other cases are, United States v. Bankers National Life Ins. Co., 333 F.2d 145 (3d Cir. 1964); United States v. Kann, 333 F.2d 146 (3d Cir. 1964). Both were decided in accordance with *Sullivan* and both involved the question of the applicability of the federal tax lien to policy loans and automatic premium loans.

after effectuate automatic premium loans and apply accrued dividends to amounts outstanding on premiums. *United States v. Wilson,* 333 F.2d 137 (3d Cir. 1964).

Because of the tripartite[14] nature of the insurance contract and the effect modification of one's right has on another's rights in the policy, courts have found the question whether to impose a federal tax lien on the cash surrender value of life insurance policies a troublesome one. The standard policy distributes incidents of ownership among the three parties in accordance with the wishes of the insured. Exercising one such right might limit the exercise of another right or limit an obligation of the policy the benefit of which belongs to someone other than the one exercising it. For example, the insured's exercise of his option to surrender the policy for cash not only limits, but terminates the rights and duties of both the insurer and the beneficiary. If this is done pursuant to the provisions of the policy by the persons authorized therein, there can be no complaint. It is only when a fourth party, *e.g.,* the government, attempts to exercise these rights on behalf of the insured, without authorization that judicially recognizable inequities arise. The diversity of the ownership of this "bundle of rights" has made the courts understandably reluctant to classify as property a single right of ownership, such as the right to the cash surrender value. Were this not the case, the government conld exercise any right that it chose to without consideration of its effect on the other parties to the contract so long as that right belonged to a deficient taxpayer. This is not to say that the value of an insurance policy should not be available to the government to satisfy tax debts, but it is important to recognize that a more sophisticated analysis is necessary when dealing with insurance policies than when dealing with ordinary contract rights so that the concept of their value can be discussed in terms of established notions of "property and rights to property" for federal tax purposes.

An insurance policy is generally considered to be property to the insured where he holds at least a right to borrow on the policy.[15] Working from this premise, the courts have apparently confused the idea of the policy being property to the extent of the cash surrender value and the idea of the cash surrender value itself being property.[16]

14. The three parties involved are the insured, the insurer, and the beneficiary.

15. United States v. Trout, 46 F. Supp. 484 (S.D. Cal. 1942). See also, Meyer v. United States, 375 U.S. 233 (1963); United States v. Fried, 309 F.2d 851 (2d Cir. 1962); Smith v. Donnelly, 65 F. Supp. 415 (E.D. La. 1946); United States v. Aetna Life Ins. Co., 46 F. Supp. 30 (D. Conn. 1942).

16. One conceptual source of this confusion comes from the fact that the courts apply both a state and a federal test to determine whether property exists for the purposes of a federal tax lien. It is generally said that state law defines the existence of

An example of such confusion is offered by the lower court decision in *Wilson.*[17] This problem arises because the courts have not clearly discussed the true basis of their decisions. Presumably, whether the cash surrender value is to be classified as property for the purposes of the federal tax lien, should depend upon the ramifications of so categorizing it. If the cash surrender value itself is held to be property as of any date prior to surrender of the policy or death of the insured the court in effect would be interfering with the internal workings[18] of the insurance contract since the fixing of the value of the policy to the insured by considering it property would in effect cancel any options on which the parties had agreed that would, were they in operation, have had the effect of diminishing the cash surrender value.[19] If on the other hand the policy is considered property to the extent of the cash surrender value as of the date that the cash surrender value becomes fixed in amount either by the death of the insured, or by surrender of the policy, then the difficulties of the previous interpretation would be avoided.[20] Seen from this perspec-

property while federal law classifies it as to whether it is subject to a federal tax lien. Thus a right or thing may be property for the purposes of state law but it may not be property for the purposes of a tax lien under federal classification. The instant case grapples with the problem of whether the cash surrender value is property under the federal classification. For a good general discussion and supporting cases on the relationship between the state test, federal classification and tax liens see, Note, 77 HARV. L. REV. 1485 (1964).

17. See text at note 13 *supra.*

18. United States v. Mitchell, 210 F. Supp. 810 (S.D. Ala. 1962), held that the government's serving notice of levy on the insured will not "rewrite" the insurance contract by cancelling the automatic premium and non-forfeiture provisions. The government has no right to exercise these options on behalf of the insured except as authorized by court order obtained pursuant to foreclosure proceedings.

19. For example, assume that the insured had elected that the automatic premium loan provision would go into effect on default of premium, that a federal tax lien had arisen, and that the insured had defaulted on his premiums. The insurer, on receiving notice of levy, would have to decide whether (1) to cancel the policy and hold the money for the government or (2) to effect a loan and apply it to the premium payment and not pay the government. If the insurer chose the former alternative, and the insured were found not to be liable for the alleged tax deficiency which formed the basis for the lien and levy, then the insurer would be liable to the insured for breach of contract on the cancelled policy. If, on the other hand, the insurer chose to effect such a loan and apply it to the premium payments in accordance with the insurance contract and the insured were found in fact to be deficient in his tax, then the insurer would be liable to the government to the extent of the premium loans under the penalty provision of the INT. REV. CODE OF 1954, § 6332(b). These would be the inequitable results of a rule that considered the cash surrender value to be property as of the date notice of levy was served.

20. Note that the same result would be obtained were the problem analyzed in terms of executed and executory contracts rather than in terms of the cash surrender value having a sum certain or no sum certain. Were the insurance contract executed, the cash surrender value would, by definition, be a sum certain. Thus where the insured died or surrendered the policy, the contract would be executed and the cash surrender value would be certain. Conversely, prior to death or surrender the contract

tive, cases which hold the cash surrender value to be property against which a tax lien might arise can be reconciled with those holding the cash surrender value not to be property on the theory that this determination is dictated by the availability of a cash surrender value that is by one means or another fixed in amount. In the leading case of *United States v. Bess*,[21] where a tax lien arose against taxpayer-insured prior to his death, the government lien was held to attach to the proceeds in the hands of the beneficiary to the extent of the cash surrender value on the theory that it was property.[22] In another case, *United States v. Aetna Life Ins. Co.*,[23] where the insured retained the policy and was living at the time of the suit, the court held that the insurer possessed no property of the insured even though the insured held property rights in the policy to the extent of the cash surrender value. Despite the superficial contradiction, *Aetna* is consistent with *Bess* so long as it is noted that the classification of the cash surrender value as property depends on the existence of certainty in determining the monetary worth of the cash surrender value.[24] Thus, with few exceptions,[25] the cases have uniformally reached the result, though not expressly, that the cash surrender value is not property until such time as it becomes fixed in value by surrender of the policy or by the death of the insured.

In the instant case, Chief Judge Biggs noted that a federal tax lien arises against property rights created by state law, and found that under Pennsylvania law insurance policies are property. The court thereby found that for the purposes of a federal tax lien the insured has only a power of election as to the cash surrender value

would be executory and the cash surrender value still subject to non-volitional fluctuation.

While it is with a view toward these factors that most of the cases in this area have been decided, none of the cases adequately discuss them.

21. 357 U.S. 51 (1958).

22. "The insured has the right under the policy contract to compel the insurer to pay him [the cash surrender value] upon surrender of the policy. This right may be borrowed against, assigned or pledged. . . . Thus Mr. Bess 'possessed just prior to his death, a chose in action in the amount stated [*i.e.* the cash surrender value] which he could have collected from the insurance companies in accordance with the terms of the policies.' [Bess v. United States] 243 F.2d 675, 678. It is therefore clear that Mr. Bess had 'property' or 'rights to property' within the meaning of § 3670 [of the Internal Revenue Code of 1939, see note 4 *supra*], in the cash surrender value." *Id.* at 56.

23. 46 F. Supp. 30 (D. Conn. 1942).

24. In *Bess* death of the insured made the value of the cash surrender certain and in *Aetna* the executory nature of the contract meant that no certain value could be attributed to cash surrender. As a result in *Bess* the cash surrender was property whereas in *Aetna* it was not.

An example of the danger of the superficially inconsistent reasoning of *Bess* and the class of cases of which *Sullivan* is representative is offered by United States v. Wilson, *supra* note 13.

25. See, *e.g.*, United States v. Wilson, 195 F. Supp. 332 (D.N.J. 1961).

which power is property against which a lien might arise.[26] Yet, the insurer holds no property of the insured until the latter, either voluntarily or by judicial order, elects to take the cash surrender value. Rather, the insurer, at all times prior to surrender, is merely an "obligor of a broadly based chose in action arising out of a substantially executory contract."[27] Turning to the insurer's liability for policy loans paid prior to actual notice of levy to the insurer, the court held that since the insured was not obligated to repay the amounts received as policy loans, they were merely advances on the cash surrender value[28] and hence the government held no prior lien that would give it a right to these funds even though these advances took the form of loans on the books of the insurer and the government's lien arose before such advances. That a prohibitive hardship would be imposed on the insurer by requiring him to search lien notices throughout the country before advancing such money was also considered.[29] Thus, no duty to conserve the insured's policy value for the benefit of the government arises on behalf of the insurer prior to his receipt of actual notice of the government levy. In considering the diminution of the cash surrender value caused by operation of the automatic premium loan provision *after* notice of levy was given to the insurer, the court looked to the effect of notice on the insured's rights in the policies and found that such notification was not a legally effective step sufficient to exercise the insured's rights to revoke the automatic premium loan provision.

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26. This finding was predicated on United States v. Penn Mut. Life Ins. Co., 130 F.2d 495 (3d Cir. 1942).

27. United States v. Sullivan, *supra* note 1, at 110-11. The court distinguished *Bess* on its facts saying that *Bess* involved a delinquent taxpayer against whom a lien arose prior to his death, and on the basis of that pre-existing lien the government sought to collect from the beneficiary the amount of the deficiency to the extent of the cash surrender value. It went on to say that, "Since the policies concerned had matured, no specific question was presented in that case as to the effective relationship between the contracting parties during the executory phase of the policies' existence." *Id.* at 111.

28. *Id.* at 113. The court here relied on Mr. Justice Holmes' majority opinion in Board of Assessors v. New York Life Ins. Co., 216 U.S. 517 (1910), in which he said, "The so-called liability of the policy holder never exists as a personal liability, it never is a debt, but merely a deduction in account from the sum that the . . . [insurer] ultimately must pay. . . . In substance it is extinct from the beginning, because . . . it is a payment, not a loan." *Id.* at 522. See also Williams v. Union Cent. Life Co., 291 U.S. 170 (1934); Schwartz v. Seldon, 153 F.2d 334 (2d Cir. 1945); First Nat'l Bank v. State Life Ins. Co., 80 F.2d 499 (5th Cir. 1935); Lee v. Equitable Life Assur. Soc'y, 56 F. Supp. 362 (E.D. Mo. 1944); *In re* Hirsch, 4 F. Supp. 708 (S.D.N.Y. 1933); *In re* Schwartz' Estate, 369 Pa. 574, 87 A.2d 270 (1952). *Cf.* Carpenter v. Commissioner, 322 F.2d 733 (3d Cir. 1963).

29. It is generally held that notice of levy must be served upon the insurer before any such duty is imposed on him. See Rev. Rul. 56-48, 1956-1 CUM. BULL. 561, which requires actual knowledge of the existence of a tax lien on the insured's policy on behalf of the insurer before any duty is imposed on the insurer to conserve the insured's funds for the government.

The court considered the "rough and ready"[30] nature of distraint[31] and found the language of section 6337 of the Internal Revenue Code of 1954,[32] which gives the owner of distrained property a right of redemption, to suggest that where other procedures were available, in this case foreclosure, distraint was not intended to be used, especially when it would have the effect, as here, of destroying property.[33] The court, for reasons of fairness to the beneficiary, was also reluctant to terminate his expectancy of proceeds and held that the Commissioner's notice of levy to the insurer was not legally effective to exercise the insured's revocation rights, therefore, the insurer was not liable for the statutory penalty.[34] The court concluded that since the cash surrender value was not property for the purpose of the

30. This phrase was used in United States v. Stock Yards Bank, 231 F.2d 628 (6th Cir. 1956): "distraint is a rough and ready remedy. This short cut form of self-help developed by the common law has been available to the government in pursuit of delinquent taxpayers since the eighteenth century. . . . Where the value and nature of the taxpayer's property rights are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue laws. But it is a blunt instrument, ill-adapted to carve out property interests where their nature and extent are unclear." *Id.* at 631. See generally Bull v. United States, 295 U.S. 247, 259-60 (1935); United States v. Aetna Life Ins. Co., *supra* note 23, at 37.

31. To destrain is "to take as a pledge property of another, and keep it until he performs his obligation. . . ." BLACK, LAW DICTIONARY 561 (4th ed. 1951).

32. INT. REV. CODE OF 1954 § 6337, which contains no substantial changes from the previous law, reads as follows:

"(a) BEFORE SALE.—Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary or his delegate at any time prior to the sale thereof, and upon such payment the Secretary or his delegate shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

"(b) REDEMPTION OF REAL ESTATE AFTER SALE.—

(1) PERIOD.—The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold or any particular tract of such property at any time within 1 year after the sale thereof.

(2) PRICE.—Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest therein at the rate of 20 percent per annum.

(c) RECORD.—When any lands sold are redeemed as provided in this section, the Secretary or his delegate shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption."

33. The property that would be destroyed in this case is of course the property represented by the incidents of ownership in the policy, *i.e.*, the insured's right to dividends, to borrow on the policy, etc., and the beneficiary's right to proceeds. See Sullivan v. United States, *supra* note 1, at 117: "The application of the remedy of levy and distraint against insurers with respect to unmatured insurance contracts would be unique, therefore, in that such action would result in a *fait accompli*, the insurance contracts and the interests therein being extinguished."

34. See note 4 *supra*.

tax lien until reduced to a sum certain, the amount by which the cash surrender value was reduced due to the operation of the contract, and not from volitional acts by the insured, subsequent to the notice of levy filed with the insurer, is not available to the government.[35]

From a theoretical viewpoint *Sullivan* is probably an incorrect decision. Presumably an insurance policy consists of an insurance element for use in case of premature death and an investment element for use during life. The latter has useable value that is conveniently liquid. If savings accounts[36] or even accounts receivable[37] are "property or rights to property" why should not the insured's cash surrender value also be property? The court answered this question with practical considerations and, by giving deference to such matters, found a new and correct basis for its decision. Chief Judge Biggs recognized that the right to a cash surrender value does not exist in a vacuum like a savings account; that it is inextricably involved with other rights held by other people unlike an account receivable; and that its pre-mature exercise would so re-arrange the just expectations of three parties as to allow the cash surrender value a temporary immunity from the federal tax lien. By recognizing these subtlties, the decision gained the substantive capacity to clarify a confusing area of the law. Yet insofar as it failed to articulate the "sum-certain" principle[38] furnished by the line of authority on which it relied, the court has done a disservice to the law. *Bess* contained language[39] that, because of its ambiguity, could reasonably have been used to justify conclusions other than those which were reached. This court perceived this difficulty and in doing so avoided the trap offered by *Bess*, but still it failed to warn others. So long as courts and lawyers fully comprehend the principle of the *Sullivan* decision, few questions concerning the availability of life insurance policies to satisfy their owner's federal tax debts will find their way to court, but one misunderstanding comparable to that in *Wilson*[40] will require another *Sullivan* case. It is unfortunate that by neglecting this opportunity to furnish the clear, definitive order necessary in this field, Chief Judge Biggs has laid the seeds of future litigation of the same problem.

35. Thus filing notice of levy with the insurer is tantamount to freezing the insured's assets to the extent of the insurance policy. Still the policy is frozen only insofar as the insured might manipulate it. To the extent that the policy would operate without the insured's direct involvement, it will continue to operate.

36. See, *e.g.*, MacKenzie v. United States, 109 F.2d 540 (9th Cir. 1940); United States v. Webster Record Corp., 208 F. Supp. 412 (S.D.N.Y. 1962); United States v. Bowery Sav. Bank, 185 F. Supp. 30 (S.D.N.Y. 1960).

37. See, *e.g.*, *In re* Halprin, 280 F.2d 407 (3d Cir. 1960); Wolverine Ins. Co. v. Phillips, 165 F. Supp. 335 (N.D. Iowa 1958).

38. See note 19 *supra* and accompanying text for a discussion of the sum certain principle.

39. *Supra* note 22.

40. See text at note 13 *supra.*

Taxation—Federal Income Tax—Deductibility of Worthless Security Losses and the "Going Concern" Test

Petitioner Ainsley Corporation owned stock in Santa Clara Frosted Foods Company, a processor of frozen foods. The latter sustained severe operating losses in 1956, 1957, and 1958, although operations in all previous years had produced profits. Its balance sheet in 1958 reflected assets having a fair market value of 184,233 dollars and liabilities of 390,244 dollars.[1] In 1958, the stockholders, Ainsley (925 shares) and William Lloyd (1375 shares), closed Santa Clara's single plant, released its employees, and liquidated its inventory, all the while diligently attempting to sell the business. Not until October 1959, did these efforts to sell Santa Clara bear fruit, at which time Seabrook Farms Company acquired Santa Clara through a corporate reorganization. Under the terms of the reorganization, Ainsley cancelled Santa Clara's principal and interest payments of 74,750 dollars overdue on Ainsley's secured loan to Santa Clara;[2] Ainsley accepted an unsecured, non-interest bearing note of 255,000 dollars for the balance of the loan; and Seabrook received an option to buy Ainsley's 925 shares of stock for 10,000 dollars. Santa Clara issued additional capital stock to Seabrook in exchange for certain trade names and became wholly controlled by Seabrook in 1960 when Seabrook exercised the options acquired from the former stockholders. In its tax return for the year ending December 31, 1958, Ainsley claimed a worthless security deduction of 102,770 dollars, its basis in the Santa Clara stock.[3] The Commissioner's disallowance of this dedue-

1. From the Tax Court findings of fact, the following may be set forth:

Santa Clara Balance Sheet
December 31, 1958
(Fair Market Value Basis)

Current assets	$ 22,542.56
Plant, property, and equipment (net of accumulated depreciation)	161,690.64
Total assets	$184,233.20
Loan due Ainsley, secured by deed of trust on plant and equipment	$350,000.00
Other liabilities	40,243.87
Total liabilities	390,243.87
Stockholders' equity (deficit)	(206,010.67)
Total Liabilities and equity	$184,233.20

2. When Santa Clara's operating losses began to impair its solvency, Ainsley loaned it funds of $100,000 in 1956, $50,000 in early 1957, and $200,000 later in 1957.

3. INT. REV. CODE OF 1954, § 165 provides: "(a) GENERAL RULE.—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise. . . . (g) WORTHLESS SECURITIES.—(1) GENERAL RULE.—

tion was upheld by the Tax Court,[4] which reasoned that Santa Clara's efforts to sell its business for a price of 350,000 dollars, an amount in excess of the value of its tangible assets, indicated that the business had a going-concern value which would attach directly to the stock, thereby giving it some value greater than zero at the end of 1958; furthermore, the actual disposition of Santa Clara in 1959 confirmed the existence of a going-concern value. On appeal to the Ninth Circuit Court of Appeals, *held*, reversed. The deduction is allowed. Santa Clara's shutdown of its plant and its decision to go out of business met the identifiable events test of Regulations section 1.165-1(b)[5] in the year 1958. Even if the business had going-concern value, such value when added to its tangible assets was still less than its liabilities, leaving no residual net worth for its stockholders. *The Ainsley Corporation v. Commissioner*, 332 F.2d 555 (9th Cir. 1964).

The taxpayer must deduct worthless security losses for the year during which they are actually sustained, but the determination of the year of deductibility poses two principal problems for him. First, he must demonstrate the factual existence of total worthlessnes at the end of the taxable year, since a deduction for partial worthlessness is not allowed.[6] Essentially, a corporate security is worthless if the corporation's liabilities exceed its assets, properly valued.[7] If liabilities exceed the value of the corporation's tangible assets, the corporation is said to be insolvent. Although stock in an insolvent corporation has no current liquidating value, it still may not be worthless if the corporation has a reasonable[8] expectation of future earnings.[9] Such expectations, when capitalized, constitute the "potential value" or "going-concern value" of the corporate business.[10] Reasonable expec-

If any security which is a capital asset becomes worthless during the taxable year, the loss resulting therefrom shall, for the purpose of this subtitle, be treated as a loss from the sale or exchange, on the last day of the taxable year, of a capital asset."

4. The Ainsley Corporation, 22 CCH Tax Ct. Mem. 889 (1963).

5. "(b) NATURE OF LOSS ALLOWABLE. To be allowable as a deduction under section 165(a), a loss must be evidenced by closed and completed transactions, fixed by identifiable events, and . . . actually sustained during the taxable year." Treas. Reg. § 1.165-1(b) (1960).

6. Stewart E. Earle, 9 CCH Tax Ct. Mem. 1181 (1950); Treas. Reg. § 1.165-5(b), (c), (d) (1960).

7. Reading Co. v. Commissioner, 132 F.2d 306 (3d Cir. 1942). The crux of the idea is the absence of residual stockholders' equity. Morton, 38 B.T.A. 1270 (1938), *aff'd*, 112 F.2d 320 (7th Cir. 1940).

8. "The Taxing Act does not require the taxpayer to be an incorrigible optimist." United States v. S.S. White Dental Mfg. Co., 274 U.S. 398, 403 (1927). Other cases delineate "foolish optimism." Rassieur v. Commissioner, 129 F.2d 820 (8th Cir. 1942); Walter H. Goodrich & Co., Inc., 40 B.T.A. 960 (1939).

9. Cooley Butler, 45 B.T.A. 593 (1941). The taxpayer must show that the stock has no potential value as well as no liquidating value. William A. Sipprell, 21 CCH Tax Ct. Mem. 491, 494 (1962).

10. Going-concern value was originally defined in Knoxville v. Knoxville Water Co.,

tation of capital recovery through reorganization is another component of the potential value of a corporation.[11] Therefore, a security is worthless only if corporate liabilities exceed the fair market value of the tangible assets *plus* the potential value of the corporation. Secondly, by pointing to one or more objective events, the taxpayer must show that worthlessness occurred in the taxable year, not in some prior year. The events are usually of a nature which terminate the corporation's economic activity, *e.g.*, liquidation, dissolution, bankruptcy, receivership, sale of the corporate assets, or simply a cessation from doing business.[12] Other events identifying year of loss may be characterized as illustrating management or stockholder expectations for the enterprise, *e.g.*, abandonment of corporate properties, discontinuance of necessary stockholder advances to the corporation, or a termination of operations.[13] Prolonged operating losses may decisively buttress dismal expectations.[14] Depending on the factual situation, one or more of these events coupled with insolvency should establish worthlessness in the taxable year, provided, of course, that

212 U.S. 1, 9 (1908), as "an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is an active and successful operation and earning a return."

Quantifying expectations is a difficult problem in both economic and legal literature. The classic statement of the Treasury position is found in A.R.M. 34, 2 CUM. BULL. 31 (1919). The rule of thumb to guide quantification there suggested is to separate average annual earnings over the prior five years into two components: return on tangible assets (suggested to be ten per cent of their value) and return on intangible assets (represented by the residual). Potential value may be capitalized at roughly five times the latter. A more sophisticated statement of the economic criteria to be considered in evaluating the worth of securities of closely held corporations may be found in Rev. Rul. 59-60, 1959 INT. REV. BULL. No. 9, at 8-15. That statement is directed to estate and gift tax evaluation problems, but its relevance to worthless security problems is obvious. However, specific reference to either the ruling or to A.R.M. 34 is seldom found in the case law of worthless security losses.

11. Polizzi v. Commissioner, 265 F.2d 498 (6th Cir. 1959), though recognizing the analytical rule, held no potential value. Although partial recovery may occur due to subsequent events, the reorganization potential or the operations potential must be reasonably foreseeable at the end of the year the deduction is claimed. M. Thompson, 10 P-H Tax Ct. Mem. 1009 (1941).

12. One of the leading cases points out that these events will foreclose the "reasonable hope and expectation that [the corporate security] will become valuable at some future time." Morton, *supra* note 7, at 1278.

If an asset sale is authorized by the stockholders, such that at the price sought, the proceeds would not satisfy the corporation's debts, the year of worthlessness is the year of authorization, not the year of sale. Henry Adamson, 17 B.T.A. 17 (1929). *Cf.* Joseph C. Lineoln, 24 T.C. 669 (1955), *aff'd on other grounds,* 242 F.2d 748 (6th Cir. 1957).

13. For an extensive listing of cases discussing these factors see 5 MERTENS, FEDERAL INCOME TAXATION § 28.67 (1963 rev.). See especially Industrial Rayon Corp. v. Commissioner, 94 F.2d 383 (6th Cir. 1938), and Fairbanks Morse & Co. v. Harrison, 63 F. Supp. 495 (N.C. Ill. 1945), in which the courts held that the securities of an insolvent corporation became worthless in the year in which operations ceased.

14. Squier v. Commissioner, 68 F.2d 25 (2d Cir. 1933).

the stock had worth at the close of the prior year.

The Tax Court in the principal case found a going-concern value, although the corporation had ceased operations in the taxable year. Stockholder efforts to sell Santa Clara for 350,000 dollars, a price well beyond the fair market value of its tangible assets, indicated a potential value, which, in the Tax Court's opinion, attached directly to the stock.[15] The circuit court, while conceding the existence of a potential value, whatever the reason for it,[16] reasoned that it could not exceed the 206,000 dollars excess of liabilities over tangible assets.[17] The higher court discounted the 1958 price tag of 350,000 dollars as nothing more than a figure at which haggling over price might begin; even at that price, there would have been nothing after debt payments left for a stockholder distribution.[18] The government's insistence on the importance of the 1959 sale and 1960 option exercise as evidence of value in Santa Clara stock in 1958 was summarily dismissed by the court: "The government's argument . . . seems to us to contradict the admonition of its Regulation Sec. 1.1651-1 which says . . . 'Substance and not mere form shall govern . . . .'"[19] The decision to go out of business in 1958, coupled with the corporation's insolvency, constituted the identifiable event.

From the case law there emerges a basic analytical theory which must be recognized if its usage is to produce accurate judicial evaluation of widely variant, complex factual situations. Unfortunately, the theory tends to become obscured by such oft-repeated phrases as "worthlessness is a question of fact to be established in each case,"[20] calling for the exercise of "practical judgment"[21] in a test of "reasonableness, common sense and economic reality."[22]. The theory, as it relates to stock not traded on an exchange or in an over-the-counter market, is founded upon an uncomplicated relationship. Stock repre-

15. *Supra* note 4, at 893.
16. The Ainsley Corporation v. Commissioner, 332 F.2d 555, at 557.
17. *Id.* at 557.
18. *Id.* at 558.
19. *Id.* at 559. The court is here referring to the terms of sale whereby Ainsley received $265,000 (a $255,000 unsecured note upon reorganization and $10,000 cash when the option was exercised) in exchange for the secured note of $329,750 and the stock held by Ainsley before reorganization. The net loss suffered by Ainsley in the transaction was $64,750 ($329,750 minus $265,000) assuming the stock had a zero basis, having become worthless in 1958. On the other hand, if the stock had value in 1958, Ainsley's loss in 1959 would have been larger. The contradiction in the Commissioner's position is evident. The foregoing is the substance; the form is the Commissioner's contention that the terms of reorganization assigned a price to the stock, thus indicating a market value. But the terms of reorganization were merely a formal way of arriving at a selling price of the business, the substantive impact of which was clearly to negative any existence of stockholder equity in the corporation.
20. 5 MERTENS, *supra* note 13, § 28.65, at 287 & n.8.
21. *Id.* n.10.
22. *Ibid.*

sents the owners' equity in a corporation. Equity is determined by the excess in value of the corporation's assets, *both tangible and intangible,* over the sum of its obligations. If liabilities exceed assets, the worth of the corporation is nil; *ergo,* the corporation's stock is without value. Once both liabilities and tangible assets[23] are assigned dollar amounts, the only determinant of stock value remaining unquantified is the value of intangible assets, which by their very nature resist quantification. Reluctance and inability to assign definite values to intangible assets has perhaps led the courts to oversimplify in asserting that going-concern value attaches directly to the stock, when, in fact, it does so only to the extent that it is greater than the net excess of liabilities over tangible assets. Oversimplification breeds error, as in the instant opinion of the Tax Court. Similarly invalid is the oft-repeated assertion that stock in a going concern cannot be worthless. The most troublesome component of potential, or going-concern, value is owner- or purchaser-expectations concerning future corporate earnings, especially in view of previous operating losses. Virtually the only applicable generality of merit here is that the owner must not be an incorrigible optimist. Only within this narrow context is it proper to assert pragmatically that each case must rest upon its own facts. Further, a guide for judicial evaluation of the dollar range within which this component of potential value is crucial can be set forth with some precision.[24] Other components of potential value might more easily be quantified: present discounted values could usually be assigned to such intangibles as operating-loss carryovers, investment credit carryovers, long-term leases, patents with earnings histories, and distribution, supply, and employment agreements. Recognition of the variables here mentioned within their proper analytical context is necessary for adequate determination of stock worth or lack of worth.

23. Seldom do the problems of liability determination (typical of which is whether or not a corporation's note payable to its stockholder is merely a contribution of capital) or of the determination of tangible asset fair market value (a different problem area which has many unsettled questions—see, for example, parts of Revenue Ruling 59-60, *supra* note 10) arise in litigation concerning loss deductions for worthless securities. For that reason, these problems are beyond the scope of this comment.

24. To illustrate the meaning of this crucial range, we might assume the following facts. Liabilities are stipulated to be $100,000; fair market value of tangible assets is stipulated to be $40,000; present discounted value of intangibles such as operating-loss carryovers is $25,000. Thus the crucial range is $35,000 ($100,000 minus $25,000 minus $40,000). Under the rule-of-thumb suggested by A.R.M. 34, this represents average annual earnings over the next several years of something in excess of $7,000 ($35,000 plus a discount factory, divided by five). *Supra* note 10. Thus we have arrived at a rough standard of performance which the business must meet if it may be said to have present positive worth. (It is possible that the tools of econometrics, the mathematical science of measuring economic variables of just this nature, might be employed to give greater precision to this estimate.)