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RECENT CASES

Advertising—Undisclosed Use of Simulations In Television Commercials—a Deceptive Practice

Colgate-Palmolive Co. purported to prove to its television audience the moisturizing qualities of Palmolive Rapid Shave by demonstrating its effectiveness on "tough, dry sandpaper." In fact, rather than sandpaper, a mock-up[1] of sand on plexiglass was used for demonstration purposes. Colgate-Palmolive maintained that the prop was necessary because of a principal difficulty inherent in television photography—real sandpaper is indistinguishable from smooth colored paper. The Federal Trade Commission held the commercial false and deceptive[2] in violation of section 5 of the Federal Trade Commission Act.[3] It found that since Rapid Shave could not shave sandpaper within the time depicted in the advertisement, respondents had misrepresented the product's moisturizing power. Moreover, the undisclosed use of plexiglass was, in itself, an additional material misrepresentation. The Court of Appeals sustained the conclusion that the respondents had misrepresented the qualities of Rapid Shave, but set aside the Commission's cease-and-desist order forbidding the future use of any undisclosed simulations in television commercials.[4] On may 7, 1963, the Commission issued a new order to comply with the court's ruling.[5] The Court of Appeals again found that portion of the order dealing with simulated props unsatisfactory and, accordingly, refused to enforce it.[6] Granting *certiorari*,[7] the United States Supreme Court, *held*, reversed and remanded for the entry of a

1. In advertising, a "prop" or "mock-up" is an object or device used in a television commercial for a particular purpose relevant to the commercial message. Frequently, it is something made solely for use in the commercial and often it is made to simulate a real object. Any minor differences between a "prop" and "mock-up" are irrelevant for purposes here. Note, 72 YALE L.J. 145 n.2 (1962).

2. Colgate-Palmolive Co., 3 TRADE REG. REP. ¶ 15643 (1961).

3. "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1958).

4. Colgate-Palmolive Co. v. FTC, 310 F.2d 89 (1st Cir. 1962).

5. The principal section of this new order narrowed the "genuine and accurate" standard of the former directive to prohibit respondents from "Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because a mock-up or a substitute material or article is used in the test or demonstration instead of the *genuine material or article represented* to be used therein." Colgate-Palmolive Co. and Ted Bates & Co., Inc., No. 7736, FTC Proposed Final Order, Feb. 18, 1963. (Emphasis added.)

6. Colgate-Palmolive Co. v. FTC, 326 F.2d 517 (6th Cir. 1963).

7. FTC v. Colgate-Palmolive Co., 377 U.S. 942 (1964).

judgment enforcing the Commission's order. The undisclosed use of simulations in television commercials to prove a product claim is a material deceptive practice, independent and separate from any other misrepresentation, and may be prohibited by the Federal Trade Commission. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

The Federal Trade Commission derives its general powers to regulate advertising from section 5 of the Federal Trade Commission Act.[8] Originally, this prevented the Commission's acting upon false advertising unless it was likely to injure competitors of the advertiser.[9] In 1938, however, Congress passed the Wheeler-Lea Amendment,[10] extending the authority of the FTC to "unfair or deceptive acts or practices in commerce."[11] An examination of subsequent non-television advertising cases clearly indicates that some actual or potential injury to competitors *or consumers* has been the determinative factor in finding deception.[12] However, in deciding the question of the proper use of mock-ups in television commercials, the Commission has failed to focus upon the effect produced by the misrepre-

8. See note 3 *supra*.

9. Raladam Co. v. FTC, 42 F.2d 430 (6th Cir. 1930) *aff'd on other grounds*, 283 U.S. 643 (1931).

10. 52 Stat. 111 (1938), 15 U.S.C. § 45(a)(1) (1958).

11. The legislative history of the Wheeler-Lea Amendment clearly indicates that the acts intended to be proscribed were those which cause or threaten to cause injury to the consumer: "[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern before the law, with the merchant or manufacturer injured by the methods of a dishonest competitor." H.R. REP. No. 1613, 75th Cong., 1st Sess. 3 (1937). See also 83 CONG. REC. 391-92 (1938) (remarks of Congressman Lea); Note, *supra* note 1, at 146 n.11.

12. Four general types of injuries have been prohibited by the Federal Trade Commission Act. First, advertising claims which conceal latent dangers or mislead the consumer into believing that a potentially dangerous product is entirely safe have been held illegal. Gelb v. FTC, 144 F.2d 580 (2d Cir. 1944). Second, advertising claims which might induce a consumer to make a purchase expecting to acquire something better than the product being offered have been held illegel. Carter Products, Inc. v. FTC, 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959); Houbigant, Inc. v. FTC, 139 F.2d 1019 (2d Cir.), *cert. denied*, 323 U.S. 763 (1944); Capon Water Co. v. FTC, 107 F.2d 516 (3d Cir. 1939). Included in this category is the testimonial advertisement where a consumer is induced to purchase a product because of an opinion by someone he respects. Howe v. FTC, 148 F.2d 561 (9th Cir. 1945); Moretrench Corp. v. FTC, 127 F.2d 792 (2d Cir. 1942). Third, advertising claims tending to create a false impression about the product and thereby motivate the consumer to make a particular purchase, regardless of whether he ultimately acquires all he expected, have been held illegal. Kerran v. FTC, 265 F.2d 246 (10th Cir. 1959); Royal Oil Corp. v. FTC, 262 F.2d 741 (4th Cir. 1959). Fourth, misleading advertisements which involve injuries to competitors who do not indulge in such advertising practices have been held illegal. Steelco Stainless Steel, Inc. v. FTC, 187 F.2d 693 (7th Cir. 1951); Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941). See also Note, *supra* note 1, at 148-50.

sentation. Rather, the tendency has been to emphasize the subject matter or devices employed.[13]

In the principal case, the basic issue before the Court was whether it is a deceptive trade practice, prohibited by section 5, to represent falsely that a televised test, experiment or demonstration provides a viewer with visual proof of a product claim, regardless of whether the product claim is itself true.[14] The parties agreed that section 5 prohibits the intentional misrepresentation of any fact which would constitute a material factor in a purchaser's decision to buy, but they differed in their conception of what "facts" constitute "a material factor."[15] Respondents argued that the only material facts are those which deal with the substantive qualities of the product: "A buyer's real concern is with the truth of the substantive claims or promises made to him, not with the means used to make them."[16] The Court, however, sustained the conclusions of the FTC to the effect that the misrepresentation of any fact which materially induces a purchaser's decision to buy is a deception prohibited by section 5.[17] It found a strong similarity between the present case and those cases in which a seller induced the public to purchase his product either by misrepresenting his line of business, by concealing the fact that the product was reprocessed, or by misappropriating another's trade-

13. These cases fall generally into three main categories: (1) Use of props or mock-ups to communicate non-existent facts about the product or the manufacturer. Colgate-Palmolive Co., TRADE REG. REP., 1960-61 F.T.C. Complaints and Orders ¶ 28,947 (formation of invisible shield around teeth by use of toothpaste); Max Factor & Co., 55 F.T.C. 1328 (1959), Complaint, 1957-58 F.T.C. Complaints and Orders ¶ 27,510 ("Natural Wave" creates a "natural" curl in hair); American Chicle Co., 54 F.T.C. 1625 (1958), Complaint, 1957-58 F.T.C. Complaints and Orders ¶26,501 ("Rolaids" are endorsed by the medical profession). (2) Use of props or mock-ups to distort results of comparative tests. Carter Products, Inc., 3 TRADE REG. REP. ¶ 15,859 (1962) ("Rise Shaving Cream" is more moist than Brand X); The Mennan Co., 3 TRADE REG. REP. ¶ 15,133 (1961) ("Sof' Stroke" has more consistency than competitive brand—"underwater test"); Aluminum Co. of America, 3 TRADE REG. REP. ¶ 25,448 (1961) (aluminum foil keeps ham fresher than competitive foil). (3) Use of props or mock-ups in tests or demonstrations that do not prove what is purported. Standard Brands, Inc., 1960-61 F.T.C. Complaints and Orders ¶ 28,819, Complaint, 1959-60 F.T.C. Complaints and Orders ¶ 28,491 (1960) ("moisturizing drops" prove that margarine tastes better than butter); Eversbarp, Inc. 1960-61 Complaints and Orders ¶ 29,094 (1960), Complaint, 1959-60 F.T.C. Complaints and Orders ¶ 28,627 (smooth shave for boxing glove proves smooth shave for person); Brown & Williams Tobacco Corp. 1959-60 F.T.C. Complaints and Orders ¶ 28,631, Complaint, *id.* at ¶ 28,491 (1960) (absorbtion of liquid proves that Life cigarette's "Millicel Filter" will absorb tar and nicotine); Hutchinson Chemical Corp., 55 F.T.C. 1942 (1959) ("flaming auto" commercial to prove that car wax could withstand extreme heat and cold). See 37 NOTRE DAME LAW. 524 (1962); Note, *supra* note 1, at 151 n.34.

14. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 375-76 (1965).

15. *Id.* at 386.

16. Brief for Respondent, FTC v. Colgate-Palmolive Co., p. 20, *supra* note 14.

17. FTC v. Colgate-Palmolive Co., *supra* note 14, at 387.

mark.[18] In each, the primary objective is to persuade the buyer to change his habit of avoiding unknown brand names and reprocessed goods. The seller reasons that when this habit is once broken, the consumer will be satisfied with the performance of the product he receives. Yet, misrepresentation to achieve such an end is not permissible.[19] In answer to the respondent's objection that the Commission's decision discriminates against sellers whose product claims cannot be "verified" through the television media without the use of simulations, the Court said that "if the inherent limitations of a method do not permit its use in the way a seller desires, the seller cannot by material misrepresentation compensate for those limitations."[20] Distinguishing the present situation from those in which the use of a prop is not employed for additional proof of the product claim,[21] the Court concluded that an undisclosed mock-up which gives the viewer objective proof of the claims made is illegal.[22] To prevent respondents from engaging in similarly illegal practices in future advertisements, the Court sustained the broad cease-and-desist order of the Commission. The crucial term—"test, experiment or demonstration . . . represented . . . as actual proof of a claim"—are as specific as the circumstances will permit.[23]

Although it appears at first glance that the Supreme Court has failed to focus upon the harmful effects of the misrepresentation, thereby ignoring the alleged purpose of section 5 of the Federal Trade Commission Act,[24] a closer examination reveals that this is not the case. Admittedly, there is no injury peculiar to the consumer,[25] but misrepresentation does result in a threat of injury to those competitors not using undisclosed simulations in television commercials.[26] As the Court points out, "the present case is not concerned with a mode of communication, but with a misrepresentation that viewers have objective proof of a seller's product claim over and above the seller's word."[27] This, of course, was found to violate section 5. The Court's primary concern was with unfair competition. All three of the cases relied upon[28] placed strong emphasis on the

18. *Id.* at 388-89.
19. FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934).
20. FTC v. Colgate-Palmolive Co., *supra* note 14, at 391.
21. See text accompanying note 35 *infra.*
22. The Court said, "In the ice cream case the mashed potato prop is not being used for additional proof of the product claim, while the purpose of the Rapid Shave commercial is to give the viewer objective proof of the claims made." *Id.* at 393.
23. *Ibid.*
24. See note 11 *supra.*
25. The Court said that the present case dealt "with methods designed to get a consumer to purchase a product, not with whether the product, when purchased, will perform up to expectations." See Note, *supra* note 1, at 159.
26. See notes 18 & 19 *supra* and accompanying text.
27. FTC v. Colgate-Palmolive Co., *supra* note 14, at 388.

injury suffered by the competitor. In *FTC v. Raladam Co.*,[29] the Court concluded,

> It is not necessary that the evidence show specifically that losses to any particular trader or traders arise from Raladam's success in capturing part of the market. One of the objects of the Act creating the Federal Trade Commission was to prevent potential injury by stopping unfair methods of competition in their incipiency.[30]

In the instant case, the visual experimental proof that Rapid Shave could shave sandpaper was a material inducement to the potential consumer. Because an undisclosed mock-up was substituted for sandpaper, there was a misrepresentation to the public that it was being given objective proof of a product claim. The consequent injury was suffered by those competitors of Colgate-Palmolive having a product which could in fact shave sandpaper, but who refrained from so demonstrating because of the aforementioned television technicalities.[31] The Wheeler-Lea Amendment did not abandon protection to the competitor, but rather expanded the authority of the FTC to include protection of the consumer.[32] The present decision, therefore, is clearly within the scope of section 5.

Yet, whether the Supreme Court, in an effort to avoid one type of injury to the competitor has created a danger of yet another form of discrimination against the seller whose product claims cannot be "verified" on television without the use of simulations, remains unanswered. This is probably not the case since the present holding places all competitors on an equal footing. If one is unable to substitute an undisclosed prop in the commercial, his competitors are equally inhibited. The "blue towel" to demonstrate whiteness, "mashed potatoes" to portray the rich texture of ice cream, and "red wine" to prove the finer qualities of coffee, must now be fully identified before being employed.[33] Further, there is no discrimination where competition exists through a "cross-elasticity" of demand, as that between a dessert such as ice cream, which cannot be televised, and other desserts, such as candy or pastries, which face no technical problems with television.[34] Such competition does not require proof of

28. FTC v. Raladam Co., 316 U.S. 149 (1942); FTC v. Algoma Lumber Co., *supra* note 19; FTC v. Royal Milling Co., 288 U.S. 212 (1933).

29. *Supra* note 28.

30. *Id.* at 152.

31. See notes 1 & 2 *supra* and accompanying text.

32. "By the proposed amendment to section 5, the Commission can prevent such acts or practices which injuriously affect the general public *as well as those which are unfair to competitors.*" H.R. REP. No. 1613, 75th Cong., 1st Sess. 3 (1937) (Emphasis added.)

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

34. Note, *supra* note 1, at 159 n.49.

product claims. The seller merely needs to place his product before the public, and the Court expressly permits the undisclosed use of props for such purposes.[35] "Clearly . . . a commercial which depicts happy actors delightedly eating ice cream that is in fact mashed potatoes . . . is not covered by the present order."[36] Only when sellers are competing for the market in the same product is it essential to portray objective proof of product claims.

It is true that the Supreme Court, in sustaining this order, has bypassed an unsettled area of technical difficulties. Advertisers are still left without specific guidelines as to the scope of permissibility in the use of simulations. However, just as in the past, the Court may be expected to clarify its initially broad pronouncement in future litigation.

Antitrust Law—News Service Package Contract, a Tying Arrangement under Section I of the Sherman Act

Associated Press is a non-profit corporation organized in New York and engaged in collecting and disseminating news among its member publishers and broadcasters.[1] Being the largest independent news gathering agency in the United States, it has only one major competitor, United Press International.[2] Associated Press had for several

35. FTC v. Colgate-Palmolive Co., *supra* note 14, at 393.
36. *Ibid.*

1. The membership of Associated Press includes newspapers, magazines, and radio and television stations. The breadth of its organization is indicated by the following footnote to the opinion in the instant case: "AP has approximately 250,000 miles of leased news wire connecting most of the cities of the United States. This network of wires is leased by AP from the American Telephone and Telegraph Company and the Western Union Telegraph Company. In each AP office and in the office of each AP member where there are AP employees, there is one transmitting machine and one receiving machine attached to each circuit for the purpose of transmitting and receiving news on the circuit. Each member that uses this kind of equipment leases it from AP and pays AP for it. There are approximately 43 metropolitan areas throughout the country including Cincinnati, which are considered by AP to be 'trunk point cities.' These cities make up the major newspaper markets of the United States.

"News originating in the United States is not sent to a single point, but is transmitted to AP members directly from the AP news bureau in the area in which the news originates. News from abroad is sent to AP offices in New York, from which it is transmitted throughout the United States. Leased wire services furnished to newspapers in smaller cities are transmitted over a single circuit, and to members in large cities over multiple circuits . . .' commonly called trunks, [which] have come into existence because, under present technology, it is impossible to transmit all state, national and international news on one circuit.'" Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 6 n.758 (6th Cir.), *cert. denied*, 86 Sup. Ct. 47 (1965).

years[3] supplied Taft-Ingalls,[4] a member Ohio corporation publishing the *Cincinnati Times-Star,* with its basic wire service. Included in this service were four wire circuits, called "trunks," each of which carried primarily one category of news, *i.e.*, stories of general interest, financial stories, *et cetera.*[5] In 1948 Associated Press and Taft-Ingalls had entered into a contract which provided that Taft-Ingalls would continue to subscribe to and pay assessments for this basic service until the contract was terminated by either party on two years notice. There was a further provision that in the event of sale of its publication, Taft-Ingalls was to require its successor to assume its obligations under that contract and to apply for membership in the Associated Press. Beginning in 1957, however, Taft-Ingalls, faced with an operating deficit, undertook a cost reduction program. Pursuant to that program, it applied to Associated Press for an across-the-board reduction in its membership assessment. That request was denied. Taft-Ingalls responded by requesting that Associated Press furnish to it only the Ohio Big Cities Circuit,[6] which Taft-Ingalls considered the most necessary of the four trunks it had been receiving. The Associated Press again refused, stating that if Taft-Ingalls desired the Ohio Big Cities Circuit, it would have to continue to pay the unit price for the basic, four-wire service. One year later, on July 19, 1958, Taft-Ingalls discontinued publication of the *Cincinnati Times-Star* and sold the paper without requiring its successor to assume the contract with Associated Press as it had agreed to do. On the same day it notified Associated Press of its cancellation. Thereafter, no services were furnished by Associated Press and no further payments were made by Taft-Ingalls. Associated Press brought this action in a United States District Court[7] to recover assessments for the two-year

2. United Press and International News Service merged into United Press International in 1957.

3. Taft-Ingalls has been a member of Associated Press since the latter was organized in 1900. The use of multiple circuits was initiated by the larger city newspapers sometime prior to the contract in question here, though the record is not clear as to the precise date.

4. Prior to the sale of its newspaper, the name of appellant was *The Cincinnati Times-Star Company.* Contemporaucously with the sale its name was changed to Taft-Ingalls Corporation. 340 F.2d at 755 n.1

5. The four wire services were described by Associated Press's Chief of Bureau at Columbus: "'A' *trunk circuit.* This is a general news wire carrying stories of top general interest. 'D' *trunk circuit.* This circuit carries financial stories, commodity quotations and other business news. *Ohio Big Cities Circuit.* This circuit carries Ohio, regional and general news copy. *Kentucky Regional.* Two circuits, one operating in TTS style, one in all-caps, deliver Kentucky state news." *Id.* at 756-57.

6. See *ibid.*

7. Associated Press v. Taft-Ingalls Corp., unreported memorandum opinion, filed with Clerk of United States District Court, S.D. Ohio, April 5, 1963. The entire opinion is reproduced in Assoeiated Press v. Taft-Ingalls Corp., 323 F.2d 114 (6th Cir. 1963).

period following that cancellation. Taft-Ingalls counterclaimed alleging that the contract was a tying arrangement unlawful under section 1 of the Sherman Act[8] because it was being used by Associated Press to require member newspapers in key metropolitan areas to receive and pay for all its basic services as a condition for receiving any one of them. On appeal to the Court of Appeals for the Sixth Circuit from a judgment for Associated Press,[9] *held,* reversed. Since the Ohio Big Cities Circuit was separable on a cost basis from the other three trunks in Associated Press's basic package and possessed sufficient uniqueness and consumer desirability to enable Associated Press to force Taft-Ingalls to continue to receipt of the three trunks in order to receive the Ohio Big Cities Circuit, the package contract was a tying arrangement, unlawful per se under section 1 of the Sherman Act. *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied,* 85 Sup. Ct. 47 (1965).

This case presents a unique combination of Sherman Act issues, though, individually, each of the issues presented has been litigated before. There is no longer any doubt that Associated Press, despite its function as an integral part of our free press, is subject to the provisions of the Sherman Act.[10] Some doubt does remain, however, as to the treatment that Associated Press will be given under Section 1 of that act. In *Associated Press v. United States,*[11] the Supreme Court affirmed a district court decree enjoining the enforcement of certain Associated Press by-laws controlling membership, "Interpreting the

8. "§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several *States,* or with foreign nations, is declared to be illegal. . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964). "§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1964).

9. The district court held that Taft-Ingalls had failed to establish that the cost of transmitting over the various trunks was separable. Therefore, a violation of the Sherman Act as a defense or a counterclaim could not be established. The court in the instant case affirmed the district court's decision as to the counterclaim for treble damages, since the evidence of damages was "too speculative." 340 F.2d at 769.

10. Associated Press v. United States, 326 U.S. 1 (1945). The Court relied on two earlier cases. In Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268 (1934), it was held that the publisher of a newspaper had no special immunity by virtue of the first amendment from the application of general laws which did not purport to censor news or control editorial policies. To establish Congress' jurisdiction over the Associated Press, the Court relied on Associated Press v. NLRB, 301 U.S. 103 (1937), wherein it was held that the exchange of news between publishers—though not for profit—amounted to "commerce" and that publishers exchanging news throughout the country are "engaged in interstate commerce within the . . . meaning of Article I, § 8 of the Constitution." *Id.* at 128.

11. *Supra* note 10.

decree to mean that AP news is to be furnished to competitors of old members without discrimination through By-Laws controlling membership, or otherwise. . . ."[12] The Delphic "or otherwise," together with language recognizing that the size and dominant position of Associated Press as a news gathering agency rendered access to its services as "indispensable" requisite to effective competition with its members,[13] could be said to indicate a "public utility" approach to the Associated Press.[14] However, the Court expressly denied using a public utility concept: "we merely hold that arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose."[15] No subsequent case has resolved the doubt arising from the Court's 1945 treatment of the Associated Press.

Tying arrangements are not a new subject of litigation under section 1 of the Sherman Act.[16] In general, a tying arrangement is an agreement by a party to sell one (tying) product only on the condition that the buyer also purchase a different (tied) product.[17] Such an agreement may suppress competition in two ways. First, if the seller has sufficient economic power in the market for the tying product, the use of a tying arrangement may restrict competition on the merits in the market for the tied product.[18] This results because the customer

12. *Id.* at 21.

13. "[T]he argument . . . that AP had not yet achieved a complete monopoly is wholly irrelevant." *Id.* at 13. "[T]he fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act. It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members, gives many newspapers a competitive advantage over their rivals. Conversely, a newspaper without AP service is more than likely to be at a competitive disadvantage. . . . 'AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American Press, universally agreed to be of great consequence.'" *Id.* at 17-18. "Inability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers. . . . 'It is practically impossible for any one newspaper alone to establish or maintain the organization requisite for collecting all of the news of the world, or any substantial part thereof; aside from the administrative and organization difficulties thereof, the financial cost is so great that no single newspaper acting alone could sustain it.'" *Id.* at 13 n.10.

14. Compare United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912). *But see* Associated Press v. United States, *supra* note 10, at 23, 25 (Douglas, J. concurring).

15. *Id.* at 19. *But see* id. at 25 (Douglas, J. concurring), as follows: "Only if a monopoly were shown to exist would we be faced with the public utility theory which has been much discussed in connection with this case and adopted by MR. JUSTICE FRANKFURTER."

16. For an excellent review of the early development of the law in this area, see Baldwin & McFarland, *Tying Arrangements in Law and Economics*, 8 ANTITRUST BULL. 743 (1963).

17. See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

18. In *Northern Pacific Ry.* the Court said: "[T]he vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another . . . ." *Id.* at 11.

who finds it necessary to purchase the tying product is forced to take the tied product from the same seller regardless of whether that particular tied product is the best of its kind available. Second, to the extent that such restriction actually takes place, competitors are foreclosed from the market for the tied product.[19] Thus, a tying arrangement may constitute an unreasonable restraint on interstate commerce and may thereby be found unlawful under the traditional tests of detriment to the public interest which section 1 of the Sherman Act has been interpreted to require:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applicd; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[20]

Such an elaborate analysis, however, is not always necessary. Under certain circumstances tying arrangements may be unlawful per se. Accordingly, where a party engaging in a tying arrangement has "sufficient economic power to impose an appreciable restraint on free competition in the tied product" and a "not insubstantial" amount of interstate commerce is affected, the arrangement may be found unlawful without an elaborate analysis of the unreasonableness of the restraint.[21] The phrase "sufficient economic power to impose an

19. In International Salt Co. v. United States, 332 U.S. 392, 396 (1947), the Court stated: "[I]t is unreasonable, *per se*, to foreclose competitors from any substantial market." Essentially, this is merely the other side of the coin with respect to the first point. See note 18 *supra* and accompanying text. In many of the early tying arrangement cases, involving the use of a patented product—or other product over which the seller had a legal monopoly—as a tie-in with another product, the only reason given for holding the arrangement unlawful, was that it foreclosed competing sellers from the market for the tied product. Baldwin & McFarland, *supra* note 16, at 748-50. Wrongful abdication of consumer judgment in the market for the tied product is a rationale which has developed coneurrently with the application of the tying arrangement principle to situations in whieh the actual market foreclosure is less significaut. *Compare* International Salt Co. v. United States, *supra*, *with* Northern Pac. Ry. v. United States, *supra* note 17.

20. Board of Trade v. United States, 246 U.S. 231, 238 (1918). See also Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614-24 (1953).

21. Northern Pac. Ry. v. United States, *supra* note 17, at 11. The development of the per se doctrine in the tying cases is interesting. It originated in International Salt Co. v. United States, *supra* note 19, where, in answer to International's contention that summary judgment was unauthorized because it precluded a trial of issues of fact as to whether the restraint was unreasonable, the Court said: "[I]t is unreasonable, *per se*, to foreclose competitors from any substantial market. . . . The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." *Id.* at

appreciable restraint on free competition in the tied product" has received significant judicial interpretation. As interpreted, the phrase is essentially equivalent to the economist's notion of "market leverage."[22] Clearly, a position of "dominance" in the market for the tying product will establish the existence of "sufficient economic power"—dominance being defined as power to control price and to exclude competition.[23] Sufficient power has also been inferred from the existence of a large number of tying agreements, at least where the agreements involve no benefit for the consumer and no other explanation for their existence can be given.[24] Even the uniqueness

396. In the years immediately following this decision, there remained much confusion as to the scope of the per se rule. Then in Times-Picayune Publishing Co. v. United States, *supra* note 20, the Court attempted to dispel the confusion: "From the 'tying' cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is 'unreasonable, per se, to foreclose competitors from any substantial market,' a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met." *Id.* at 608-09. Whatever sense of comfort was derived by those who read the *Times-Picayune* opinion as a definitive statement of the law, it was short lived. Within five years the Supreme Court changed its position significantly. Northern Pac. Ry. v. United States, *supra* note 17. In holding that Northern Pacific had violated Section 1 of the Sherman Act by leasing and selling tracts of land, initially granted to it by Congress, on the condition that certain "preferential routing" clauses be included in the contracts and leases, the Court said: "While there is some language in the *Times-Picayune* opinion which speaks of 'monopoly power' or 'dominance' over the tying product as a necessary precondition for application of the rule of per se unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a 'not insubstantial' amount of interstate commerce is affected)." *Id.* at 11. The impact of this statement is most clearly seen by its application to the facts of that case. The Court conceded that Northern Pacific did not enjoy a "monopolistic" or "dominant" position in real estate in the several Northwestern states (the tying product); under the *Times-Picayune* case, therefore, the per se rule would not have been applicable. However, the Court in *Northern Pacific* based its finding of "sufficient economic power to impose an appreciable restraint on free competition in the tied product" merely on its finding that a large number of the tying arrangements were in existence: "The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. The 'preferential routing' clauses conferred no benefit on the purchasers or lessees. . . . [D]efendant makes no claim that it came any cheaper than if the restrictive clauses had been omitted. . . . So far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition. . . . In short, we are convinced that the essential prerequisites for treating the defendant's tying arrangements as unreasonable 'per se' were conclusively established below and that the defendant has offered to prove nothing there or here which would alter this conclusion." *Id.* at 7-8.

22. See Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).

23. This is clear from the evolution of the phrase. See note 21 *supra*.

24. Northern Pac. Ry. v. United States, *supra* note 17, at 7-8.

of the tying product or its desirability to the consumer may be the basis for inferring sufficient economic power.[25] In contrast to the abundance of judicial comment on the requirement of sufficient economic power, there has been virtually none on the requirement that a "not insubstantial" amount of interstate commerce be affected. This is explained in part by the absence, in the majority of the tying arrangements to come before the court, of any real doubt that a substantial amount of interstate commerce was affected.[26] The per se approach had been justified on the ground that tying arrangements "serve hardly any purpose beyond the suppression of competition."[27] Apparently, though, a strict application of the per se rule may be foregone if the tying arrangement is used to accomplish some legitimate objective which could not be accomplished by some other means. For example, even where the two requirements for the per se rule are met, the use of tying arrangements by a small company trying to break into a market may be permissible in order to protect the integrity of a novel (tying) product.[28] Such justifications have not been readily accepted by the Court, however, once the two prerequisites for the per se rule have been established.[29]

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25. United States v. Loew's, Inc., 371 U.S. 38 (1962). Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." *Id.* at 45.

26. A brief review of the cases will bear this out. In International Salt Co. v. United States, *supra* note 19, the first case to apply the per se rule to tying arrangements, the Court seemed to base its holding that the volume of business affected was not insubstantial or insignificant on its finding that in 1944, appellant sold approximately 119,000 tons of salt (the tied product), for about $500,000, for use in machines (the tying product). *Id.* at 395-96. In United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), the Court did not concern itself with the problem. Similarly, in Times-Picayune Publishing Co. v. United States, *supra* note 21, the Court assumed without deciding, that the test had been met. *Id.* at 610 n.28. In Northern Pac. Ry. v. United States, *supra* note 17, the Court could see no "real doubt that a 'not insubstantial' amount of interstate commerce was . . . affected. . . ." *Id.* at 7. Of course, in that case the Court had found that many of the goods produced on the land (the tying product) would be shipped from one state to another on Northern Pacific's lines (the tied product). *Id.* at 3. Finally, in United States v. Loew's, Inc., *supra* note 25, a substantial amount of commerce was obviously affected considering the dollar amounts involved in the many contracts which, admittedly, extended across state lines. *Id.* at 49.

27. Northern Pac. Ry. v. United States, *supra* note 17, at 6; Times-Picayune Publishing Co. v. United States, *supra* note 20, at 605.

28. White Motor Co. v. United States, 372 U.S. 253 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 330 (1962); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa.), *aff'd per curiam*, 365 U.S. 567 (1961). *But cf.* United States v. Loew's, Inc., *supra* note 25, at 51-52.

29. See, *e.g.*, United States v. Loew's, Inc., *supra* note 25, wherein the Court rejected such a justification saying: "[T]ying arrangements, once found to exist in a context of sufficient economic power, are illegal 'without elaborate inquiry as to . . . the business excuse for their use. . . ." *Id.* at 52.

One additional issue must be considered. According to the definition of a tying arrangement given above,[30] the tying product must be different, or distinct, from the tied product. This problem of product differentiation was first dealt with in *Times-Picayune Publishing Co. v. United States*.[31] There the Court dismissed the contention that the defendant had tied the sale of advertising space in its evening paper to the sale of advertising space in its morning paper because "nothing in the record . . . [suggested] that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential."[32] Since purchasers of advertising space considered advertising space in both papers identical, indistinguishable products, there could be no tying arrangement.[33] The instant case illustrates that the problem of product differentiation, though seldom litigated,[34] could be extremely difficult. Yet, certain aspects of this problem may be reduced to general rules. Clearly, the two products (the tying and tied product) do not have to be in entirely different product markets. Particularly susceptible to unlawful tying arrangements are product markets in which a distinct consumer appeal is inherent in each unit. In the motion picture industry, for example, the practice of block booking—offering to license one feature or group of features on condition that the exhibitor also license another feature or group of features—has been held an unlawful tying arrangement.[35] Even in a product market in which distinct consumer appeal is not inherent in each unit, if one such unit acquires a distinct appeal by virtue of technological innovation or consumer orientation, the use of that unit as a tie-in with another similar, though less desirable, unit might be unlawful. For example, in *Times-Picayune Publishing Co. v. United States*,[36] the Court implied that if the advertisers had considered advertising space in a morning paper more essential to complete customer coverage than advertising space in an evening paper, space in each would have been treated as a separate product.[37] On the issue

30. See note 17 *supra* and accompanying text.
31. 345 U.S. 594 (1953).
32. *Id.* at 613.
33. *Id.* at 614.
34. This problem is not to be confused with the "integrity of the product" defense. See Note, 62 MICH. L. REV. 1413 (1964). At times the distinction is hard to see. See, *e.g.*, United States v. Jerrold Electronics Corp., *supra* note 28. Product differentiation is prerequisite to the very existence of any tying arrangement, legal or illegal. The integrity of the product defense, however, raises the question whether an existing tying arrangement is legal or illegal.
35. United States v. Paramount Pictures, Inc., *supra* note 26. See also United States v. Lowe's, Inc., *supra* note 25.
36. *Supra* note 20.
37. See note 32 *supra* and accompanying text. In fact, the Court could be criticised for taking a naive conception of the advertiser's approach to newspaper coverage, particularly in light of modern consumer analysis.

of product differentiation, then, the crucial question is whether the consumer has differentiated between the products involved.

In the instant case, after stating that a party to an illegal contract "cannot recover damages for the breach thereof,"[38] the court commenced consideration of the Sherman Act issue. There was no doubt, in view of *Associated Press v. United States*,[39] that Associated Press is subject to the provisions of the Sherman Act.[40] The definition of a tying arrangement as an " 'agreement by a party to sell one product but only on the condition that the buyer also purchase a *different* (or tied) product,' "[41] formed the basis for Associated Press's contention that it was engaged in distributing only one product, news, and that the news transmitted by it over the several trunks was so intermingled that the several trunks were inseparable.[42] In view of the limited request made by Taft-Ingalls for separate services,[43] the court felt that it was necessary only to determine whether the Ohio Big Cities Circuit was separable from the other three trunks.[44] The court recognized that product differentiation had rarely posed an issue before the courts,[45] but went on to review those cases which were regarded as bearing on the problem.[46] Associated Press relied in part upon the district court finding that there was no "natural division in the cost of gathering news transmitted over the . . . [various] trunks."[47] This finding, however, was held "clearly erroneous" with respect to the Ohio Big Cities Circuit in view of Associated Press's quotation of charges for

38. 340 F.2d at 759.

39. *Supra* note 11.

40. 340 F.2d at 758.

41. *Id.* at 759. (Emphasis added.)

42. *Id.* at 759-60. Associated Press argued that establishment of multiple circuits, or 'trunks' (See *supra* note 1) did not imply that the news sent over one of those trunks was separable from news sent over another trunk. To support this contention, reference was made to the "spill over" method of transmission. See 340 F.2d at 763. For example, while trunk 'A' may be used primarily to transmit stories of top general interest, if that trunk should become overcrowded, some of the general interest stories might be transmitted over trunk 'D,' which is normally used primarily to transmit financial news. This "spill over," argued Associated Press, made all of the trunk lines inseparable. Thus, the package contraet was necessary for complete news coverage. The court's answer was two-fold. In the first place Associated Press had not shown that there was any "spill over" from the Ohio Big Cities Circuit to the other trunks in the package. *Id.* at 763. Second, what Associate Press thought was necessary for complete news coverage was not determinative. "In this situation, who better than . . . [Taft-Ingalls] was in a position to choose which wire services it needed and wanted and to exercise independent judgment to that end?" *Id.* at 762.

43. See text accompanying note 6 *supra*.

44. 340 F.2d at 766.

45. *Id.* at 760.

46. *Id.* at 760-61. The court cited United States v. Jerrold Electronics Corp., *supra* note 28; United States v. Loew's, Inc., *supra* note 25; and Times-Picayune Publishing Co. v. United States, *supra* note 20.

47. 340 F.2d at 765.

separate trunks to non-member publishers,[48] its practice of making separate charges for other services to member publishers,[49] and the availability of a complete news service from United Press International on less than a package basis.[50] Morever, prior decisions, according to the court, did not impose upon Taft-Ingalls the burden of establishing a clear division of costs.[51] Having found a tying arrangement, there was little problem finding the requisites for the application of the per se rule of unreasonableness.[52] Since Associated Press had a quasi-property right in its news dispatches,[53] those dispatches were held to have a uniqueness suggesting "comparison with a monopoly by patent."[54] Furthermore, since Taft-Ingalls had been willing to experience a "recurring operational deficit"[55] by continuing its subscription to Associated Press's entire package rather than give up the Ohio Big Cities Circuit, "there . . . [could] be no doubt of the desirability of . . . [the tying product].[56] The court was, therefore, following precedent in holding, on the basis of the uniqueness and desirability of the tying product, that sufficient economic power was established.[57] The court also found that a "not insubstantial" amount of interstate commerce was affected. Of course, in *Associated Press v.*

48. 340 F.2d at 766. In 1958 after it had purchased the Cincinnati Times-Star from Taft-Ingalls, the E. W. Scripps Company approached Associated Press. Since Scripps was already receiving services equivalent to the Kentucky Regional trunk from United Press International, it was interested only in Associated Press' "A," "D," and Ohio Big Cities Circuit trunks. Associated Press quoted a charge for those three trunks.

49. *Id.* at 765. For example, the sports wire, which was once part of the basic service, was separated and a specific charge made for those who continued to subscribe. *Ibid.*

50. *Id.* at 764.

51. *Id.* at 765. "Once the other elements of an unlawful tie-in have been established, appellant's defense should not be nullified by the manner in which AP keeps its books or the unavailability of cost records upon which a precise computation of separate costs could be made." *Ibid.*

52. See note 21 *supra.*

53. With respect to its dispatches, Associated Press, though it does not maintain a copyright, has been held to have a quasi-property right which may serve as a basis for an action against those making unauthorized use of them. International News Serv. v. Associated Press, 248 U.S. 215 (1918). Of course, the potential value of this quasi-property right may have been considerably lessened by the decision in Associated Press v. United States, *supra* note 11.

54. 340 F.2d at 767.

55. While only a minor point, it is significant to note that Taft-Ingalls experienced an operational deficit for only one year prior to its decision to sell out. "Recurring" was an overstatement of the facts. Even if Taft-Ingalls had chosen to experience a "recurring operational deficit," that fact does not necessarily indicate that the Ohio Big Cities Circuit was desirable; it was contractually bound to take the entire package for at least two years after the arrangement had become unfavorable to it.

56. *Ibid.* The court also quoted Associated Press v. United States, supra note 11, at 13: "Inability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers, both those presently published and those which, but for these restrictions, might be published in the future."

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

NLRB[58] it had already been held that the exchange of news between Associated Press members constituted interstate commerce. The findings that Associated Press, since 1935, had continually required members in principal metropolitan trunk points to subscribe to the single package, and that ninety-four per cent of the total circulation of all newspapers at those forty-three trunk points was traceable to Associated Press members, conclusively established that the amount of interstate commerce involved was substantial.

Two aspects of this case deserve particular comment. The first is the court's treatment of the problem of product differentiation. Putting to one side the dubious nature of the authority relied upon in dealing with this point,[59] the court's approach indicates a state of confusion. A reasonable person viewing the various trunk services of Associated Press,[60] their specialization in a particular category of news,[61] and their separate physical apparatus,[62] would have no doubt that each trunk was a separate product.[63] The various factors cited by the court to support its conclusion that these trunks were separable were all circumstantial support for the finding that the costs were divisible.[64] However, the court should have gone further than to say that Taft-Ingalls did not have the burden of establishing a clear division of costs,[65] for that issue is irrelevant to the question of product differentiation. The crucial test on this point is whether the consumer differentiated the tied product from the tying product. If potential competition is to be maintained at a maximum level, the market for any product which a consumer might desire should be scrutinized. This approach does not lead inevitably to the conclusion that a consumer may require that a producer sell him a product delineated according to his every whim, for the consumer's demand will prevail only if the producer's delineation results in an unreasonable restraint on trade.[66] This approach merely recognizes that the evils of the tie-in

58. *Supra* note 11.

59. *Supra* note 46. In addition to the inappropriateness of the court's use of *United States v. Jerrold Electronics Corp.* noted above, we see note 34 *supra*, it should be noted that the affirmance in that case was limited to the ultimate conclusion that the tying arrangement was unlawful on the basis of the holding in Northern Pacific Ry. v. United States, *supra* note 17. See 365 U.S. at 567.

60. See note 5 *supra.*

61. *Ibid.*

62. See note 1 *supra.*

63. While less obvious than justifying the tie-in of, for example, "Gone With the Wind" to "Getting Gertie's Garter" as the sale of the product feature films, the justification in this case has little more merit. See United States v. Loew's, Inc., *supra* note 35 at 48 n.6.

64. See notes 48 through 50 *supra* and accompanying text.

65. *Supra* note 51.

66. For example, it does not mean that a consumer could require Westinghouse to sell its radios without a speaker. However, that is so, not because a speaker-less radio is not a distinct product from the speaker—high fidelity equipment is often sold in

may exist wherever a consumer's product delineation differs from that of the producer. Divisibility of costs and other like factors are relevant not to the existence of a distinct product, but to the ultimate issue under Section 1 of the Sherman Act—the reasonableness of the restraint resulting from the sale of two distinct products as one.

Confusing issues, like that of product differentiation, arise, no doubt, from the existence of the per se rule of illegality. As traditionally applied, the per se rule forecloses any consideration of possible justifications for the practice in question. If the per se rule is applied to tying arrangements in the traditional manner, a court may feel constrained by the harshness of its application to a particular set of facts to avoid that application by technical or artifical distinctions. Yet, the cases seem to indicate that, *as applied* to tying arrangements, the per se rule will not necessarily foreclose a consideration of all possible justifications.[67] Certainly this is as it should be. Courts should not feel constrained to follow blindly their own judicial short-cuts when it clearly appears that in so doing they will not reach the intended destination—a reasonable decision.

A second aspect of this case, equally significant, is the court's treatment of the "uniqueness and desirability" test for finding "sufficient economic power to impose an appreciable restraint on free competition in the tied product."[68] The court was clearly correct in holding that sufficient economic power may be inferred from the uniqueness of the tying product or its desirability to the consumer.[69] A finding, however, that the tying product is unique or desirable as those words are generally used is not enough. The tying product must be unique enough or desirable enough that sufficient economic power may be reasonably inferred. The "uniqueness and desirability" test originated with the cases dealing with block-booking in the motion picture industry.[70] It is obvious that a film distributor who offered "Gone With the Wind," for example, on the condition that the exhibitor also accept several fourth-rate films, might be able to impose an appreciable restraint on the market for fourth-rate films. Yet, to say that Associated Press news dispatches offer a similar amount of leverage is not nearly so reasonable. Certainly, the fact, upon which the court in the instant case relied heavily,[71] that the dispatches may not be used without Associated Press's authorization is irrelevant. The determinative question is whether they are desirable to the consumer,

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that form—but rather because to require the purchase of the complete unit does not place an unreasonable restraint on competition for the sale of radio speakers.

67. See text accompanying note 20 *supra.*

68. See notes 53-57 *supra* and accompanying text.

69. See text accompanying note 57 *supra.*

70. See text accompanying note 37 *supra.*

71. See note 53 *supra* and accompanying text.

in this case the publisher. The court's reliance upon *Associated Press v. United States*[72] as authority for the proposition that Associated Press's news dispatches have sufficient consumer appeal to serve as a basis for an inference of sufficient economic power is equally naive. Not only have twenty years passed since that decision, but the competitive structure of the news agency market may have been substantially changed by the merger of United Press and International News Service into United Press International in 1957.[73] It may be that an analysis of the present market would still find Associated Press so dominant that its dispatches do provide the requisite leverage. The point is that no such analysis was made. Taft-Ingalls' willingness to suffer an operational deficit by continuing its subscription to Associated Press's basic package rather than give up the Ohio Big Cities Circuit might serve as a basis for a reasonable inference that Associated Press had sufficient economic power with respect to the Ohio Big Cities Circuit.[74] Yet, even assuming that to be true, two problems remain. It would be extremely difficult to find that a "not insubstantial" amount of *interstate* commerce would be restrained thereby.[75] Moreover, where the issue of illegality is raised as a defense to an action on the contract, a finding of illegality based solely on the defendant's continued operation at a deficit under the contract seems inconsistent with the well established principle that financial setback is no defense to an action for breach of contract.[76] While sufficient economic power might be inferred from the very existence of the large number of these package contracts were there no other explanation for their existence,[77] there is such an explanation here. The members of Associated Press surely realized that by agreeing to take a minimum package and thereby share a minimum amount of the costs each member would benefit. This is the very idea behind a cooperative venture such as Associated Press. Indeed, this relationship between Associated Press and Taft-Ingalls may well be the factor which makes the tie-in argument so inappropriate. While Taft-Ingalls might be viewed as an independent purchaser of news from Associated Press, this view of the facts ignores the nature of the cooperative undertaking. The members of Associated Press merely combined their resources for the more efficient and economical performance of one of the integral functions of newspaper publication, the gathering and dissemination of news. Associated Press, as a legal

72. *Supra* note 10.
73. *Supra* note 2.
74. *But see* note 57 *supra.*
75. Certainly, it would be a great deal more difficult than it was in this case where sufficient economic power was found to exist in all of the Associated Press dispatches.
76. 6 CORBIN, CONTRACTS § 1333 (1962).
77. See note 26 *supra* and accompanying text.

entity, stood to gain nothing from the package assessment of certain of its members; it was not operated for profit. If there was any leverage or coercion exerted upon Taft-Ingalls, it was not the economic coercion of an independent seller, but the coercion of a majority on a minority—a type of coercion inherent in any cooperative enterprise. Perhaps the appropriate method of controlling this sort of coercion, if the cooperative enterprise should become so significant a segment of the national economy that such control is desirable, would be the application of the "public utility" concept to Associated Press.[78] While recognizing that big business is often in the public interest,[79] the public utility approach also recognizes that as an enterprise approaches monopolistic proportions,[80] the potential effect of its decisions on the national economy may be undesirable if those decisions are entirely unrestrained. Rather than requiring that the enterprise be decentralized—a requirement which, itself, could be detrimental to the national economy—the court merely acts as a check on the decisional processes of the enterprise. Thus, if a given decision is thought to be inimical to the national interest, the court may step in and modify that decision.[81]

78. See text accompanying note 6 *supra.*

79. This is particularly true in the instant case. The very reason for the formation of Associated Press was the financial inability of individual newspapers to establish world-wide news gathering apparatus. In addition to providing the public with a service which might not have been possible were it not for that cooperative undertaking, Associated Press has saved the public those expensive and wasteful duplications of effort inevitable if individual attempts had been made.

80. The leading case dealing with the public utility approach, United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912), involved a monopoly situation. At least one member of the United States Supreme Court would limit the application of that approach to enterprises actually occupying a monopolistic position. See note 15 *supra.* Yet, its application to large oligopolistic enterprises seems equally appropriate.

81. This approach, at least, would not hamstring appropriate policy considerations with inappropriate legal concepts like tying arrangements. Once the tying arrangement format is abandoned, the competing policy considerations present in the instant case become obvious. On the one hand is the public utility of the package service plan of Associated Press. That plan enables the association to provide a more comprehensive service for members in principal metropolitan areas than would be possible otherwise. On the other hand is the public detriment resulting from the restraint on competition which this package service plan may exert. However, two factors render this latter consideration less significant than the former. First, Taft-Ingalls was able to illustrate only one instance where an actual restraint on competition resulted. That instance involved competition for one small component of the more comprehensive service involved. Second, there is some doubt in this writer's mind that any significant restraint exists beyond that shown by Taft-Ingalls. If a majority of the member metropolitan publishers felt restrained by this arrangement, it seems strange that it has not been abandoned. They voted it into existence and they could vote it out of existence. Where the public detriment is as minor or speculative as that in the instant case, a policy in favor of comprehensive and efficient dissemination of news should result in a decision which would permit Associated Press to continue its package service agreement with member metropolitan newspapers.

Antitrust–Union-Employer Agreements as to Labor Demands To Be Sought From Other Employers

United Mine Workers of America Welfare and Retirement Fund, as petitioner, brought suit in the United States District Court for the Eastern District of Tennessee against the respondents, small coal mine operators, for failure to make royalty payments alleged to be due and payable under a national wage agreement executed by UMW and the respondents. The coal companies filed an answer and a crossclaim against UMW, alleging that UMW and certain large coal mine operators had conspired to restrain and monopolize interstate commerce in violation of the antitrust laws. Respondent's crossclaim alleged that UMW agreed with the large coal companies to impose the terms of the wage agreement on all coal operators, regardless of their ability to pay. Respondents further alleged that the agreement sought to solve the critical overproduction problem in the coal industry by eliminating the smaller companies, thereby leaving the larger operators in control of the market.[1] UMW urged exemption from any antitrust liability because it had legitimately acted as a labor union in executing the complained-of agreement. The trial court denied UMW's motion to dismiss, holding that the facts alleged, if true, would warrant recovery. A verdict for the respondents was entered, and both UMW's motions for a judgment notwithstanding the verdict or, in the alternative, for a new trial were denied. The Court of Appeals affirmed,[2] ruling that on the facts of the case UMW was not exempt from liability under the Sherman Act. On writ of *certiorari*, the Supreme Court of the United States, *held*, reversed. UMW's activities were not exempt from the antitrust laws, and the trial court did not err in refusing the union's motions. The Court's reversal was based on the trial court's erroneous instruction that union efforts to influence public officials, if intended to eliminate competition, constituted a conspiracy covered by the antitrust laws.[3] Such conduct, though intended to eliminate competition and though part of a broader scheme itself violative of the Sherman Act, is absolutely

1. Respondents' specific allegations of union activities aimed at this elimination were in substance: The union (a) abandoned efforts to control the working time of the miners; (b) agreed not to oppose mechanization of the mine; (c) agreed to help finance such mechanization; (d) agreed to impose the terms of the 1950 agreement on all operators without regard to their ability to pay; (e) agreed with large coal operators upon other steps to exclude the marketing, production, and sale of non-union coal, one of which was the union joining with coal companies to approach the Secretary of Labor to obtain establishment under the Walsh-Healey Act, 49 Stat. 2037, 41 U.S.C. §§ 35-45 (1958), of a minimum wage for employers of contractors selling coal to the TVA.

2. Pennington v. UMW, 325 F.2d 804 (6th Cir. 1963).

3. See note 1(e) *supra*.

exempt from the Sherman Act, and the jury should have been so instructed. *UMW v. Pennington,* 85 Sup. Ct. 1585 (1965).

Similar allegations of union conduct resulting in antitrust violations were presented before the Supreme Court in a companion case to *Pennington.* Here the petitioners, meat cutters' unions representing virtually all the butchers in the Chicago area, and an association of Chicago grocers agreed to forbid the sale of fresh meat before 9 A.M. and after 6 P.M., Monday through Saturday. In its own negotiations with the unions, the respondent, Jewel Tea Company, a large chain of retail stores, proposed the evening sale of prepackaged meat only.[4] The unions rejected this plan, and Jewel Tea, under duress of a strike, also agreed to the marketing hours restriction. It later brought suit against both the unions and the association, alleging violations of sections 1 and 2 of the Sherman Act. The trial court dismissed the complaints upon finding that the unions had bargained for the marketing hours restriction to serve their own interests rather than those of the association, for the evening sale of meat would necessarily place a heavier burden on the butchers. Thus, the court concluded that no conspiracy to impose the marketing hours restriction on Jewel Tea could be found. The United States Court of Appeals for the Seventh Circuit reversed,[5] without disturbing the trial court's decision, concluding that the agreement itself was evidence of a conspiracy in restraint of trade. "The unions and the association entered into a combination or agreement, which constituted a conspiracy, as charged in the complaint. Whether it be called an agreement, contract, or conspiracy is immaterial."[6] On writ of *certiorari,* the Supreme Court of the United States, *held,* reversed. An agreement between the union and the employers in a bargaining unit on the opening and closing hours of the employers' shops was not illegal under the Sherman Act; the union's imposition of the same contract terms on other employers in the industry was likewise not illegal. *Meat Cutters Union v. Jewel Tea Co.,* 85 Sup. Ct. 1596 (1965).[7]

The Sherman Act[8] "was enacted in the era of 'trusts' and 'combinations' of business and of capital organized and directed to control of the market by suppression of competition on the marketing

4. In 174 of the Jewel Tea stores, the respondent had installed a pre-packaged, self-service system where the meat was cut and wrapped prior to sales. This arrangement was to eliminate the need of butchering services for customers as the respondent provided for the storage of the meats in large, self-service refrigeration equipment.

5. 331 F.2d 547 (7th Cir. 1964).

6. *Id.* at 551.

7. Mr. Justice White announced the judgment of the Court and delivered an opinion, in whch the Chief Justice and Mr. Justice Brennan joined; the remaining votes necessary to make a majority came with the separate opinion of Mr. Justice Goldberg, with whom Mr. Justice Harlan and Mr. Justice Stewart joined.

8. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

of goods and business, the monopolistic tendency of which had become a matter of public concern."[9] Desiring to correct this evil and thereby foster competition, Congress enacted the Sherman Act. The problem soon arose as to whether labor activities were to be included under Sherman Act coverage.[10] In the early days of the labor movement, union strikes were employed to organize the workers of an entire industry into union membership. Secondary consumer boycotts, directed at eliminating sales of non-union-made goods, naturally resulted in a direct restraining effect on interstate commerce.[11] In 1908, the Supreme Court in *Loewe v. Lawler*,[12] held that the use of a secondary boycott designed to compel an employer to unionize his shop was a combination in restraint of commerce within the purview of the Sherman Act. In 1914, in response to the judiciary's attempt to formulate a national labor policy, Congress amended and supplemented the Sherman Act with the Clayton Act.[13] Section 6 of the latter enunciates a national policy exempting labor unions from the Sherman Act:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid . . . such organizations from lawfully carrying ont the legitimate objects thereof. . . .[14]

The Supreme Court first applied the Clayton Act in *Duplex Printing Press v. Deering*.[15] In this case, as in *Lawler*, the union had employed a secondary boycott which interfered with the purchase and installation of the complainant's printing presses in other states. The Court refused to give a broad interpretation of the Clayton Act, interpreting the language of section 6 to grant no immunity from antitrust liability "where [unions] depart from normal and legitimate objects. . . ."[16] Thus, under *Duplex*, work stoppages executed by a combination of employees were deemed illegal under the antitrust laws where the

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9. Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-04 (1940). For the economic, social, constitutional, and political background of the passage of the Sherman Act, see generally THORELLI, THE FEDERAL ANTITRUST POLICY—ORGANIZATION OF AN AMERICAN TRADITION (1955).

10. Daykin, *The Status of Unions Under Our Antitrust Laws*, 11 LABOR L.J. 216 (1960).

11. Crabtree, *The Antitrust Exemption of Labor Unions Considered In Conjunction With Unfair Labor Practices Which Restrain Interstate Commerce*, 2 TULSA L.J. 32 (1965).

12. 208 U.S. 274 (1908).

13. See 21 CONG. REC. 2457, 2611 (1890); FRANKFURTER & GREEN, THE LABOR INJUNCTION 139 n.17 (1930), as to why this amendment was needed.

14. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

15. 254 U.S. 443 (1921).

16. *Id.* at 469.

purpose of such stoppage was to restrain interstate commerce.[17] The Norris-LaGuardia Act[18] was passed by Congress in 1932 as a result of the Supreme Court's decision in *Duplex* and the line of cases which followed.[19] While framed in terms of restrictions on the use of injunctions, the statute has subsequently been viewed as representing an "underlying aim to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated,"[20] [that purpose being to grant labor unions freedom from antitrust liability.] Another purpose attributed to the Norris-LaGuardia Act was the congressional desire to limit the judiciary's role in any labor-antitrust controversy.[21] Subsequent labor statutes have further narrowed judicial discretion in interpreting the antitrust effects of labor policy. The National Labor Relations Act (Wagner Act) entrusted principal control of labor policy to the National Labor Relations Board.[22] The act also defined certain activities applicable to employers, as "unfair labor practices," and provided that unions must bargain over "wages, hours, and other terms and conditions of employment."[23] The Labor Management Relations Act (Taft-Hartley Act) amended the Wagner Act by making certain employer "unfair labor practices" applicable to unions and by defining a series of "unfair labor practices" applicable to unions specifically.[24] The Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act)[25] also amended the Wagner Act by describing labor practices deemed to be detrimental to the public good. The full impact of the Norris-LaGuardia Act could be seen in the Supreme Court's decision in *Apex Hosiery v. Leader*[26] and *United States v. Hutcheson.*[27] In *Apex*, a union had seized a hosiery factory through the use of an extended "sit-down" strike. The union's conduct prevented the completion of a large number of orders from interstate customers. After an extensive examination of the Sherman Act, the Court stated:

17. See, *e.g.*, Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U.S. 37 (1927); Coronado Coal Co. v. UMW, 268 U.S. 295 (1924); Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F. Supp. 203 (E.D. Pa. 1929).

18. 47 Stat. 70 (1932), 29 U.S.C. § 101 (1964).

19. See United States v. Hutcheson, 312 U.S. 219, 235-36 (1941); Milk Wagon Drivers Union v. Lake Valley Farm Products Inc., 311 U.S. 91, 102-03 (1940); Comment, 70 YALE L.J. 70, 73-74 (1961).

20. United States v. Hutcheson, *supra* note 19.

21. Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 370 n.7 (1960).

22. 49 Stat. 449 (1935), as amended, 29 U.S.C. § 153 (1964).

23. 49 Stat. 449 (1935), 29 U.S.C. § 158 (a)(5) (1964).

24. 61 Stat. 136 (1947), 29 U.S.C. § 158 (1964).

25. 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).

26. *Supra* note 9.

27. *Supra* note 19.

> Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act.[28]

The test applied by the Court in *Apex* required union activity to be aimed at the control of the product market, with intent to restrict competition, before a violation of the Sherman Act resulted.[29] In *Hutcheson*, the Supreme Court was faced with a boycott similar to the *Duplex* situation. There the Court reasoned that the Norris-LaGuardia Act was more than a bar to the use of injunctions in labor disputes. The rule derived from *Hutcheson* stated: "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit . . . are not to be distinguished by any judgment. . . of the wisdom or unwisdom. . . of the ends of which the particular union activities are the means."[30] *Hutcheson*, in reality, exempted organized labor from the antitrust laws, except under rare circumstances, an example of which is found in the factual situation involved in *Allen Bradley Co. v. Local 3, IBEW*.[31] There the union was successful in obtaining agreements whereby all electrical contractors were to purchase electrical equipment exclusively from local manufacturers employing union workers. The manufacturers in turn agreed to sell only to contractors who employed union members. The Court felt that such arrangements resulted in "industry-wide understandings, looking not merely to terms and conditions of employment [legitimate labor objectives], but also to price and market control [illegitimate labor objectives]."[32] The Court concluded that "when the unions participated with a combination of business men . . . to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts."[33] Thus, prior to the Court's decisions in *Pennington and Jewel Tea*, labor's exemption from the antitrust laws depended upon whether the union, had moved outside its legitimate field of activities, even though solely for its self-interest, by combining with a business group to restrain commerce.

In later cases, including *Pennington and Jewel Tea*, the courts

28. 310 U.S. at 503.
29. Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 29 (1964).
30. 312 U.S. at 232.
31. 325 U.S. 797 (1945).
32. *Id.* at 799-800.
33. *Id.* at 809.

were faced with the difficult proposition of ascertaining whether labor agreements conferred a direct benefit upon the union members and only incidentally benefitted employers, or whether the agreement merely employed union participation as a shield to conceal illegal schemes by employers.[34] The majority opinion of the Court in *Pennington* was delivered by Mr. Justice White. He stated that even agreements concerned with mandatory subjects of collective bargaining generally not subject to the antitrust laws, are not automatically exempt from the Sherman Act. The exemption does not apply to such agreements if they are indicative of a combination or conspiracy with employers, even though the mechanism for effectuating the purpose of the combination may be an agreement regarding terms or conditions of employment. When a union bargains with the wilful intention of destroying competition, then the bargaining exceeds the permissible scope of labor activities exempted from antitrust liability.[35] Relying on labor policy as expressed in the National Labor Relations Act, Mr. Justice White stated that the limits of the labor exemption are dependent upon the unions' duty to bargain. Any agreement made pursuant to duty-to-bargain negotiations (mandatory subjects of bargaining) is exempt from the Sherman Act. He stressed, however, that the duty-to-bargain is a "duty to bargain unit by unit." A union agreement with certain employers in a bargaining unit as to what wages that union will seek with other employers in that unit is outside the scope of the union's duty to bargain and is not covered by the labor exemption.[36] In *Jewel Tea,* in which he also wrote the opinion of the Court,[37] Mr. Justice White again stated that the labor exemption protects only agreements dealing with mandatory subjects of bargaining. Applying this rationale to this different fact situation, however, he found the question of hours during which employees must work to be so closely linked to "wages, hours, and working conditions" as to be within that mandatory classification. Relying upon the trial court's finding that evening sales of meat could not be made without an increased burden on the union butchers, he concluded that the marketing hours restriction was a legitimate concern of the union. In *Pennington,* Mr. Justice

34. Wesson, The Legal Effect of Antitrust Laws on Collective Bargaining 14, April 1965 (unpublished dissertation in the Vanderbilt Law School Library).

35. "A union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors . . . and the union is liable with the employers if it becomes a party. . . . This is true even though the union's part . . . is an undertaking to secure the same wages, hours or conditions of employment from the remaining employers in the industry." UMW v. Pennington, 85 Sup. Ct. 1585, 1591 (1965).

36. 1 BNA 1965 LAB. REL. REP. 59: 240.

37. See note 7 *supra.*

White had stated that a union, as long as it acted "as a matter of its own policy, and not by agreement with all or part of the employers of that unit"[38] could legally seek to impose a uniform wage rate on all employers within a bargaining unit. In line with this view, he concluded that in *Jewel Tea* the union had sought its market hours restriction, not as a result of a bargain with employers, but independently in pursuit of what it deemed to be in the best interests of the union.[39] However, had the union agreement not been so intimately related to a mandatory subject of bargaining, it might well have been in violation of the Sherman Act.

In his concurring opinion in *Pennington,* Mr. Justice Douglas read the majority opinion as setting forth the rule that an industry-wide agreement which exceeds the ability of some employers to conform thereto is prima facie evidence of a violation of the antitrust laws. Applying this rule in his dissent to *Jewel Tea,* Mr. Justice Douglas contended that the collective bargaining agreement concerning the market hours restriction was itself sufficient evidence of a conspiracy. To Mr. Justice Douglas, the agreements in both cases had such a direct effect on competition and such an obvious restraint upon the product market that they should establish a prima facie violation.[40] The Court should not allow big business and big labor acting in concert to exercise a power which can result in the control and molding of whole sectors of the national economy. Mr. Justice Douglas rejects the trial court's findings that Jewel Tea could not operate its self-service stores without burdening the working hours of the union butchers.

In his separate union, Mr. Justice Goldberg, joined by Mr. Justice Harlan and Mr. Justice Stewart, dissented from the majority opinion in *Pennington* but concured in its reversal and concurred in the judgment of the Court in *Jewel Tea.* Extensively reviewing the history of judicial interpretation of labor's exemption from the antitrust laws, he contended that Congress clearly intended to foreclose judges and juries from making essentially economic judgments in antitrust actions by determining whether unions or employers had proper motives for their agreements with respect to subjects of a mandatory bargaining. It is precisely in this area of wages, hours, and other working conditions that Congress has recognized that unions "have a substantial, direct, and basic interest of their own to advance."[41] Mr. Justice Goldberg concluded that this direct and overriding union interest should make any union agreement on a mandatory subject

38. UMW v. Pennington, *supra* note 35, at 1590.
39. Meat Cutters Union v. Jewel Tea Co., 85 Sup. Ct. 1601 (1965).
40. 85 Sup. Ct. at 1595.
41. 85 Sup. Ct. at 1607, 1620.

of collective bargaining immune from antitrust liability, regardless of the economic results involved. To implement the congressional intent, Mr. Justice Goldberg felt the only restrictions on free collective bargaining should be those expressly outlined in the Wagner Act, as amended.[42] By his reasoning, the application of the majority rule in *Pennington* would be an unworkable restraint upon collective bargaining and an interference with the clear national labor policy objective of promoting the establishment of wages, hours, and other terms or conditions of employment through free collective bargaining. Mr. Justice Goldberg stressed the damaging consequences to labor as a result of the majority rationale: union liability is laid open to the particular prejudices and economic philosophies of the judges and juries in future cases.

The central problem posed by the labor exemption is how to remove the restraints on competition created by a combination of union and employer power without undermining perpetuation and promotion of collective bargaining. Both are familiar and generally accepted national policies. It is, however, inevitable that as collective bargaining will generally result in an agreement, it should have anti-competitive reverberations. Each court confronted with an alleged union violation of the antitrust laws is therefore faced with a complex policy interplay. The court must consider what types of restraints on competition society seeks to prevent or wishes to allow. Moreover, before a court can make this decision it must also decide if the judiciary is the proper instrument to implement the national labor policy, or whether this interpretation and formulation should be left to the National Labor Relations Board. Mr. Justice Goldberg would argue that Congress has made this selection by leaving these policy decisions to the NLRB rather than to the judiciary. In *Pennington*, Mr. Justice White discussed the issue of whether the NLRB should have primary jurisdiction over the case, and decided it should not, since the Court had the necessary knowledge to deal adequately with the controversies in point. The NLRB should be granted primary jurisdiction when the courts are significantly less competent to determine issues involved. Mr. Justice Goldberg's reasoning on this issue would severely restrict the judiciary's role in dealing with cases involving mandatory subjects of collective bargaining. Under procedures of administrative law, a court in reviewing an administrative ruling should reverse only when an error clearly appears.[43] Such a severe restriction on grounds for reversal would reduce the judiciary's role substantially. While such a narrowed judicial role would no

42. *Id.* at 1615.

43. See 2 AM. JUR. 2d *Administrative Law* §§ 553-775 (1962). See especially *id.* § 661 on the "clearly erroneous" rule of judicial review.

doubt be favorable to the promotion of collective bargaining, its advisability seems highly doubtful when viewed in light of the purposes and goals of the antitrust laws.

> The solution of the trust problem represented by the Sherman Act was an elegant one. . . . Rather than attempting the grueling task of defining once and for all the multitude of forms in which the evil might appear Congress resorted to a few concise phrases of exceedingly broad significance. In applying this act the federal courts could be counted on to make use of that certain technique of judicial reasoning characteristic of common law courts. Aware that the modes of restraint will vary considerably from one industry and period to another, Congress thus deliberately provided for a certain degree of flexibility in the law.[44]

Once over the jurisdictional hurdle, the court must reach a policy decision as to whether the labor restraint on competition is acceptable. The majority opinion in *Pennington,* as expressed by Mr. Justice White, viewed with alarm the powerful anti-competitive potential inherent in concerted action by big business and big labor. The social good calls for the outlawing of such a preponderance of economic strength and control, and the antitrust laws have been designed expressly to accomplish this end. Mr. Justice Goldberg presented the opposing policy argument that when a labor organization makes a bona-fide, long-range effort to remedy the ills affecting its members with respect to their terms or conditions of employment, society should tolerate the resulting restraints on competition. The economic effect of UMW's agreement was detrimental to the interest of the small coal operator in the coal industry; the economic effect of agreement in *Jewel Tea* was to protect the smaller meat stores in the Chicago area. Thus, the Court's decisions in both cases have resulted in a preservation of the small economic unit in the respective industry. This fact may reflect a judicial preference for the policy of the antitrust laws.[45]

The most obvious result of these cases is to establish that union-employer agreement concerning what terms will be sought from other employers in the bargaining unit constitutes a per se violation of the Sherman Act. This inevitably places a restraint on the process of collective bargaining. The fact that under antitrust law an illegal agreement between labor and management can be inferred from surrounding facts leaves bargaining participants in doubt as to just what

44. THORELLI, *op. cit. supra* note 9, at 571.

45. Yet, in the coal industry it can be strongly argued that little social or economic good results from the preservation of destructive competition by the small producers at the industry's edge. See BAIN, INDUSTRIAL ORGANIZATION 579-82 (1959), for a brief history of the pattern of destructive competition in the coal industry, along with a description of the beneficial effects of union interference with the "free" product market.

facts will be sufficient to establish a "conspiracy." As stressed in Mr. Justice Goldberg's dissenting opinion, the majority decision seems to be unduly restrictive in that it ignores the realities involved in every labor-employer negotiation. As long as employers face the insecurity associated with competition, the temptation to refrain from collective bargaining agreements will be strong. The employer becomes a willing collective bargaining participant only when his position in the market is insured by union-imposed restraints on competition.[46] The rule fails to take into account that it is vital to every bargain that notice be taken of the condition of the industry involved in terms of economic realities. Yet, under *Pennington* it is unclear at just what point liability will result under the antitrust laws when union and employer include in their negotiations a discussion of their industry in terms of their individual agreement. An ironical result of the Court's decisions in these two cases falls upon the employers themselves. Equal liability is imposed upon them by the Court, and in reality they are even more susceptible to antitrust liability than the union since the latter can legitimately act independently in areas forbidden to the employer. A possible future application of *Pennington* would be in a union-brought antitrust suit against employers who have acted together to lockout unions when a union strikes against one employer.[47] The separate opinions of Justices White, Douglas and Goldberg range across the whole scale of policy in regard to labor's exemption from the Sherman Act. Mr. Justice White focuses on two issues emphasizing the form of the union action and its effect on competition. He would ask: "Is the union acting individualy for its best interests or has it joined with business to accomplish an unlawful consequence." Mr. Justice Douglas focuses on the second of these points, the economic results brought about by the collective bargaining agreement. He would ask: "Does the agreement result in a direct restraint on competition? If so, it is prima facie evidence of a conspiracy in restraint of trade. Mr. Justice Goldberg, on the other hand, would have the courts look to the subject involved in the union agreement. He would ask: "Is this a mandatory subject of bargaining?" If so, then he would hold the agreement immune from antitrust liability. In light of this wide range of opinion and philosophy advanced by the members of the Court, it seems likely that rather than using *Pennington* or *Jewel Tea* as precise guidelines to union antitrust liability, subsequent court decisions must continue to grapple with the dual social values recognized by the majority, hoping to allow each its optimum realization when the two are in conflict.

46. Winter, *supra* note 29, at 21. The arguments here presented on the unrealistic quality of the *Allen Bradley* decision are equally applicable to the present case.

47. *Supra* note 36, at 244.

Constitutional Law–Laws Prohibiting the Use of Contraceptives by Married Couples for the Prevention of Conception Are Unconstitutional

Two directors of the Planned Parenthood League[1] were convicted of being accessories to the violation of a Connecticut statute prohibiting the use of contraceptives for the purpose of preventing conception.[2] Defendant Buxton had examined married women and prescribed contraceptive devices to be used for the purpose proscribed by the statute. The Connecticut Supreme Court of Errors upheld the convictions.[3] Defendants appealed to the United States Supreme Court claiming the statute under which they were convicted violated the due process clause of the fourteenth amendment. In a seven-to-two decision involving three concurring opinions the Supreme Court *held,* reversed.[4] Marital privacy is a fundamental right protected from state infringement by the fourteenth amendment, and the Connecticut law prohibiting the use of contraceptives by married couples is an infringement on that right.[5] *Griswold v. Connecticut,* 381 U.S. 479 (1965).

The present case is the third in a series of attempts to have the Connecticut contraceptive statute declared unconstitutional by the United States Supreme Court. In *Tileston v. Ullman,*[6] the first attempt,

1. Griswold was Executive Director of the League. Dr. Buxton was Medical Director for one of the League's clinics. A licensed physician and professor at Yale Medical School, he was challenging the statute for the second time. His first appearance was in Poe v. Ullman, 367 U.S. 497 (1961).

2. CONN. GEN. STAT. REV. § 53-32 (1958) reads: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

CONN. GEN. STAT. REV. § 54-196 (1958) reads: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the prineipal offender."

3. Griswold v. State, 151 Conn. 544, 200 A.2d 479 (1964).

4. Griswold v. Connecticut, 381 U.S. 479 (1965).

5. Connecticut's contraceptive law, in the opinion of one writer, is the strictest in the nation. Comment, 49 CORNELL L.Q. 275 (1964). There are, however, 29 state statutes and one federal statute which regulate some phase of the manufacture, sale or distribution of contraceptives. The original federal law was the Comstock Act passed by Congress in 1873. 18 U.S.C. §§ 1461-62 (1964). Physicians were excepted from the first bill, but the exception was removed by amendment. CONG. GLOBE, 42d Cong., 3d Sess. 1436 (1873). Later court interpretation read the exception back into the act. United States v. One Package, 13 F. Supp. 334 (S.D.N.Y.), *aff'd,* 86 F.2d 737 (2d Cir. 1936).

6. 129 Conn. 84, 26 A.2d 582 (1942), *appeal dismissed,* 318 U.S. 44 (1943). *Tileston* involved the effort of a doctor to get a declaratory judgment as to whether the Connecticut statute precluded doctors from prescribing contraceptives in cases where conception endangered the patient's life. A further declaration as to the statute's constitutionality was sought if the court should find the statute applicable to doctors. Three years earlier the Connecticut court had specifically refused to rule on

the Court dismissed the doctor's appeal stating, "patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life."[7] The Court also noted that the petitioner had raised no question of deprivation of "liberty or property in contravention of the Fourteenth Amendment."[8] The second occasion on which the Supreme Court had the opportunity to review the Connecticut law was in *Poe v. Ullman.*[9] To avoid the procedural difficulties of *Tileston,* the patient and the doctor both filed complaints in a declaratory judgment proceeding challenging the statute. The petitioner's efforts were again frustrated when the Supreme Court refused, in a five-to-four decision, to rule on the merits.[10] It was the opinion of the majority of the Court that violators would not be prosecuted and that therefore no true controversy was presented[11]

In the principal case, Mr. Justice Douglas delivered the opinion of the Court. He distinguished *Tileston* on the theory that the petitioner in *Tileston* sought a declaration of the patient's right to due process. Petitioner in the present case was an accessory and should "have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime."[12] In discussing the merits of the case, Mr. Justice Douglas did not find that the Connecticut statute violated any specific language of the Constitution. He made no mention of the view that the guarantees of the Bill of Rights are incorporated as a group into the fourteenth amendment and thereby made applicable to the states. He adopted, instead, the

the statute's applicability if a patient's life was endangered. State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940), involved a physician and his associates who prescribed contraceptives for a married woman to protect her general health, and then demurred to a charge of violating the statute. They claimed it was not applicable to physicians where the prevention of conception was necessary to preserve health. The Connecticut Superior Court upheld the demurrer, but the Supreme Court of Errors reversed and reinstated the trial court's conviction. Connecticut's highest court concluded that the *Nelson* decision controlled in *Tileston* and thereby closed the door to any possible exceptions. The Planned Parenthood League subsequently closed all its clinics. Tileston v. Ullman, *supra* at 87, 26 A.2d at 584.

7. 318 U.S. at 44.

8. *Ibid.* The Court had failed to find a federal question five years earlier in a similar case involving Massachusetts' contraceptive law. Massachusetts v. Gardner, 300 Mass. 372, 15 N.E.2d 222 (1938), *appeal denied,* 305 U.S. 559 (1939).

9. See note 1 *supra.*

10. Mr. Justice Frankfurter writing for the Court said, "Appellants' complaints in these declaratory judgment proceedings do not clearly, and certainly do not in terms, allege that the appellee Ullman threatens to prosecute." 367 U.S. at 501.

11. Mr. Justice Douglas and Mr. Justice Harlan wrote extensive dissenting opinions in which Mr. Justice Stewart concurred. Mr. Justice Black briefly stated his belief that the Court should deal with the case on its merits. Poe v. Ullman, *supra* note 1.

12. 381 U.S. at 480.

theory that the constitution protects certain "peripheral"[13] rights which are not specifically mentioned in the first ten amendments. First among these is the right of parents to educate their children in the school of their choice, as established in *Pierce v. Society of Sisters.*[14] Another is the right of association as established by *NAACP v. Alabama.*[15] He also included the right to read, freedom of inquiry, freedom of thought, freedom to teach and the right of assembly as "peripheral rights" which accompany and secure the specific guarantees of the Bill of Rights. Meaning and substance is given to the Bill of Rights by these peripheral rights.[16] The specific constitutional guarantees create a penumbra, a zone of privacy, which also protects the right of marital privacy. Mr. Justice Douglas concluded that states may not invade this right by enacting sweeping legislation in an effort to regulate other activities.[17]

Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Brennan, concurred in a separate opinion. While agreeing that the right of marital privacy is protected by the shadows of the specific guarantees, he pointed out that the ninth amendment is a manifestation of the framers' intention that not all fundamental rights are included in the Bill of Rights.[18] He denied that his position was one which incorporated the entire Bill of Rights into the fourteenth amendment or that the ninth constitutes an independent source of rights.[19] He also denied that fundamental rights are to be determined by the personal or private notions of judges. For a right to be "fundamental" it must meet the standards established for the determination of such rights. The guarantees of the right to marry and raise a family clearly demonstrate the "fundamental" character of marital privacy. Connecticut had failed to demonstrate that the law is "necessary . . . to the accomplishment of a permissible state policy."[20] In conclusion Mr. Justice Goldberg said, "I believe that the right of privacy in the marital relation is fundamental and basic—

13. Rights which have been reeognized by the Court as fundamental but which are not speeifically mentioned in the Bill of Rights.

14. 268 U.S. 510 (1925).

15. 357 U.S. 449 (1958).

16. 381 U.S. at 481.

17. *Id.* at 485.

18. *Id.* at 488 (concurring opinion). The ninth amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST., amend. IX.

19. "I do not take the position that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights proteeted from infringement by either the States or the Federal Government." 381 U.S. at 492 (concurring opinion).

20. *Id.* at 498 (coneurring opinion).

a personal right 'retained by the people' within the meaning of the ninth amendment."[21] His conclusion clearly seems to conflict with his earlier statements concerning the ninth amendment as a source of fundamental rights.[22]

Mr. Justice Harlan, while concurring in the result reached, maintained that the Court's opinion reflected another form of the incorporation doctrine. The proper inquiry was whether the statute "violated basic values implicit in the 'concept of ordered liberty.' "[23] No support from the Bill of Rights is necessary for the due process clause. It stands on its own foundation and protects certain areas of liberty without assistance from other provisions of the Constitution.[24]

Mr. Justice White in a separate concurring opinion took the position that the statute "as applied to married couples deprives them of 'liberty' without due process of law. . . ."[25] Such infringement of a protected liberty places upon the state a heavy burden of justification which had not been met. The state maintained that the statute was a part of its policy against promiscuity and illicit sex. Mr. Justice White pointed out, however, that the use, sale, and importation of contraceptives is not barred in Connecticut when the purpose of such activity is to prevent disease. He concluded that under these circumstances the state's argument that the ban on the use of contraceptives is an effective and necessary reinforcement of the ban on illicit sex is difficult to accept.

Mr. Justice Black and Mr. Justice Stewart wrote separate dissenting opinions, each joined by the other. Mr. Justice Black took the position that certain constitutional provisions are designed to protect privacy under certain circumstances, but that the constitution guarantees no right of privacy as such. He expressed the fear that to permit the substitution of other words for a crucial word of a constitutional guarantee can serve to shrink or expand the protection conferred by the guarantee. Such substitutions can remove the flexibility from the provisions. The derivation of the term "right of privacy" from other provisions of the Bill of Rights illustrates the difficulties involved for the term "privacy" is most ambiguous.[26] Mr. Black felt that no provi-

21. *Id.* at 499 (concurring opinion).

22. See note 19 *supra.*

23. 381 U. S. at 500 (concurring opinion).

24. "In my view, the proper constitutional inquiry in this case is whether the Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates the basic values 'implicit in the concept of ordered liberty.' While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom." *Id.* at 500 (concurring opinion).

25. *Id.* at 502 (concurring opinion).

26. *Id.* at 509 (dissenting opinion).

sion of the Constitution protected the privacy invaded by the Connecticut statute. The Court has no facilities for determining the "collective conscience of the people" in attempting to decide whether a right is fundamental. How, then, can the Court avoid giving undue weight to the personal and private notions of its judges in such a determination of fundamental rights, unless it restricts itself to the protection of specific constitutional guarantees. If no specific provision regulates any one activity, but the people desire such regulation, their course is to appeal to the legislature.[27]

Mr. Justice Stewart, dissenting, took the position that the overturning of state law must be based solely on its violation of the United States Constitution and not on the Court's evaluation of its wisdom or effectiveness. According to this proposition there is no basis in constitutional law for declaring the Connecticut law invalid.[28] If the people of Connecticut are not in accord with the statute, they can apply to the legislature for its repeal.[29]

It is debatable whether the Court's decision will assist in any future determination of fundamental rights." Since Mr. Justice White indicated that his reason for striking down the Connecticut statute was the failure of the state to justify the infringement upon a protected right, he might approve other statutes if the burden of justification was met. The only difference in the Court's opinion and Mr. Justice Goldberg's concurring opinion was the additional emphasis placed by the latter on the ninth amendment. In this connection, it should be noted that Mr. Justice Douglas apparently did not wish to associate the right with any specific amendment. The only conclusion one can draw from the case is that at least five of the remaining members of the Court[30] recognize marital privacy as a fundamental right protected from infringement by state and federal governments.[31] However, in passing, one wonders if such a recognition would not force the Court to strike down any state anti-miscegenation statute brought before it in the future.

The case is unique in the emphasis which it places on the ninth

27. *Id.* at 522 (dissenting opinion).

28. "With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the constitution, or in any case ever before decided by this Court." *Id.* at 530 (dissenting opinion).

29. *Id.* at 531 (dissenting opinion).

30. Mr. Justice Goldberg resigned to take an appointment as United States Ambassador to the United Nations.

31. Mr. Justice Harlan's concurring opinion indicates that while his foundation is different, his belief is the same. Basically, he is espousing substantive due process which Mr. Justice Black and Mr. Justice Stewart are claiming has been abandoned by the Court. The other four members would be the Chief Justice, Mr. Justice Brennan, Mr. Justice Clark, and Mr. Justice Douglas.

amendment.[32] Should a majority on the Court elect to accept the position of Mr. Goldberg on the ninth amendment, one can only speculate on how the Court could influence future state and federal legislation. Substantive due process has been abandoned previously because the Court could find no provision in the Bill of Rights to sustain it. The ninth amendment could conceivably supply the sustaining provision, allowing the Court to return to the method of determining fundamental rights advocated by Mr. Justice Harlan and feared by Mr. Justice Black.[33] Such a change would again cause the Court to be squarely faced with the dilemma of attempting to supply an objective standard to assist in what, of necessity, must be a subjective determination. Since the government is one of delegated powers, it is suggested that a more objective and profitable approach would be to ask whether the power to control certain activity was delegated to the government via the constitution rather than whether the right was retained by the people. In such a context, the ninth amendment would seem to have a more logical relevance to constitutional interpretation.

The essence of the decision is that no mandatory government birth control program would be constitutional under the present circumstances. However, two possible developments could altar this situation. One is a constitutional amendment; the other is that the population increase could threaten the health and welfare of the nation to such an extent as to justify a compulsory law. Mr. Justice White expressly leaves open the latter possibility, and other opinions of the majority indicate that justification is not impossible.[34] One problem, however, arises in regard to justification. Should conditions become so pronounced, the utility of such a law would be doubtful; for if birth control is to provide salvation from the "population explosion," it must be effectuated before the population becomes so large as to pose a threat to the health and welfare.

Many important changes have taken place in the two month period since this decision. New York and Massachusetts have taken action which result in a liberalization of their contraceptive laws.[35] The Federal Department of the Interior has initiated a program of advice and service with regard to birth control, including the dispensation of contraceptive devices.[36] It is estimated by some educators and businessmen that the *Griswold* decision will result in an increased private

32. See also United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), the only other case discussing the ninth amendment.

33. See text accompanying notes 23-27 *supra*.

34. 381 U.S. at 485, 503.

35. N.Y. Times, June 8, 1965, p. 1, col. 2.

36. N.Y. Times, June 20, 1965, p. 108.

and governmental investment in contraceptive research.[37] Prior to the decision, government spending for contraceptive research was limited because of the political problems such expenditures could engender.[38] Increased research activity holds the promise of developing contraceptives which are less expensive, more effective, and less inconvenient. Such developments could render moot the legal questions surrounding mandatory government birth control by making voluntary birth control more acceptable to—and more widely accepted by—the general population.

Constitutional Law—Rights of Addressee To Receive "Communist Political Propaganda" Protected Under First Amendment

Two cases testing the constitutionality of government detention of "communist political propaganda" pursuant to section 305(a) of the Postal Service and Federal Employees Salary Act of 1962[1] were consolidated for decision by the United States Supreme Court. Section 305(a) provides for detention of unsealed mail determined by the Secretary of the Treasury to be "communist political propaganda"[2] and

37. Business Week, June 19, 1965, p. 108.

38. *Ibid.* At least one nation has developed a positive policy on birth control. According to an Indian Consulate, India now operates over 3,700 Family Planning and Advice Clinics and distributes contraceptives from over 7,200 of its distribution centers. N.Y. Times, June 20, 1965, p. 1, col. 7.

1. 39 U.S.C. § 4008(a) (1964): "Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda' shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee."

2. Foreign Agents Registration Act, 56 Stat. 249 (1942), 22 U.S.G. § 611(j) (1964), which defines "political propaganda" as "any oral, visual, graphic, written, pictoral or other communication or expression by any person (1) which is reasonably adapted to or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political or religious disorder, civil riot or other conflict involving the use of force or violence in other American republic by any means involving the use of force or violence." See generally Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A.L. Rev. 805 (1963).

for notification to the addressee of such detention. If the addressee wishes to receive the detained mail, he must sign and return to the Post Office a card provided for that purpose in the notification form. The parties in the instant cases were addresses of certain detained publications who were duly notified pursuant to the statute. Both parties then instituted suit to enjoin enforcement of the act on the ground that it was in violation of the first amendment of the United States Constitution. The Post Office subsequently notified each of the parties that it considered their suits to constitute affirmative declarations of a desire to receive "communist political propaganda" and that the Post Office would not detain such material in the future. One three judge district court ruled that the Post Office's action rendered the complaint moot,[3] but another three-judge court reached the merits and held the statute unconstitutional.[4] Upon appeal to the Supreme Court, *held,* a statute requiring an addressee to request in writing the delivery of mail determined to be "communist political propaganda" is an unconstitutional burden upon the exercise of the addressee's first amendment rights. *Lamont v. Postmaster General,* 381 U.S. 301 (1965).

The history of the enforcement of the first amendment freedoms has centered on protecting the rights of the disseminator of ideas rather than the rights of the receiver. The right to freedom of speech has not been regarded as an absolute one. Rather, in each case the decision whether to enforce this right has been reached by balancing the public and private interests involved. Using this balancing process, the court has held invalid: a statute requiring a labor organizer to obtain an organizer's card before delivering a speech for the purpose of soliciting union membership;[5] a license tax on door-to-door solicitation and delivery;[6] a municipal ordinance requiring a license for the distribution of literature.[7] Previously, the court's most definite statement concerning the enforceability of the right of a receiver was dictum in *Martin v. City of Struther.*[8] The Court stated, "This [first amendment] freedom embraces the right to distribute literature, and necessarily protects the right to receive it."[9]

Mr. Justice Douglas, speaking for the Court, expressly held the statute unconstitutional on the narrow ground that the "addressee in

3. Lamont v. Postmaster General, 229 F. Supp. 913 (S.D.N.Y. 1964). See Note, 65 COLUM. L. REV. 867 (1965).

4. Heilberg v. Fixa, 236 F. Supp. 405 (N.D. Cal. 1964).

5. Thomas v. Collins, 323 U.S. 516 (1945).

6. Murdock v. Pennsylvania, 319 U.S. 105 (1942).

7. Lovell v. Griffin, 303 U.S. 444 (1937). See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Talley v. California, 362 U.S. 60 (1960); Jamison v. Texas, 318 U.S. 412 (1942).

8. 319 U.S. 141 (1943).

9. *Id.* at 143.

order to receive his mail must request in writing that it be delivered."[10] This requirement of an affirmative act as a condition of receipt of the mail is said to be a burdensome restriction on the "unfettered exercise of the addressee's First Amendment rights."[11] The Court notes that such a requirement is almost certain to have a deterrent effect, particularly on persons such as public officials, who have sensitive positions or whose livelihood may be dependent on a security clearance. The majority, in dealing with the question of the rights of the receiver, scarcely touches the concept of balancing of interests.[12] However, Mr. Justice Brennan in his concurring opinion, treats the concept more extensively, concluding that the government has proven no public interest which is of such importance that it outweighs the fundamental privilege of an individual to receive a publication without hindrance.

The precise basis of the majority's holding is admittedly narrow;[13] the implication, however, is broad indeed: that the protected first amendment rights of the hearer or receiver of speech are co-extensive with the protected rights of the speaker or disseminator, and can be restricted only if justified by "a compelling state interest in the regulation of the subject."[14] The brief handling accorded the instant case by the Court, as well as the absence of a dissent, indicate that there was little doubt that the requirements of the act in question were unconstitutional abridgements by Congress of the right of freedom of speech. The majority's final statement that "the regime of this Act is at war with the uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment"[15] would make it appear that the same decision would likely be reached in other cases in which a receiver of ideas seeks to enforce his right to receive those ideas without restraint.

10. Lamont v. Postmaster General 381 U.S. 301, 307 (1965).

11. *Id.* at 1495-96

12. See, *e.g.*, Talley v. California, *supra* note 7; (dissenting opinion); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1957); Schneider v. New Jersey, 308 U.S. 147 (1939). See also Schwartz, *supra* note 1, for a detailed discussion of the governmental interests which might be set forth to balance the interests of the individual.

13. 381 U.S. at 301.

14. NAACP v. Button, 371 U.S. 440, 446 (1963).

15. 381 U.S. at 305, quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1963).

Federal Courts–*Erie* Doctrine Not the Test for Applicability of Federal Rules of Civil Proccdure

In a diversity action in the Federal District Court of Massachusetts, plaintiff, an Ohio citizen, sought to recover damages for personal injuries allegedly caused by the negligence of a now deceased Massachusetts citizen. Service of process was made on defendant, decedent's executor, by leaving copies of the complaint and summons with his wife in compliance with rule 4(d)(1) of the Federal Rules of Civil Procedure. The defendant moved for summary judgment contending that the action could not be maintained because a Massachusetts statute[1] required "in hand" service of process[2] and that the adequacy of service should be measured by the state statute. The district court granted defendant's motion and the Court of Appeals unanimously affirmed.[3] On *certiorari* to the Supreme Court, *held*, reversed. Rule 4(d)(1) is valid under both the Rules Enabling Act[4] and the Constitution, and is therefore the standard by which the adequacy of service of process must be measured in diversity actions despite state law to the contrary. *Hanna v. Plumer*, 85 Sup. Ct. 136 (1965).

Prior to this decision it was generally assumed that *Erie R.R. v. Tompkins*[5] determined the applicability of the federal rules in diversity actions. *Erie* commanded the federal courts to apply federal procedural law, but state substantive law. *Guaranty Trust Co. v. York*[6] redefined the *Erie* doctrine by establishing an "outcome-determinative" test that classified legal rules as substantive if their application would cause the outcome of litigation to be different in a federal court than in a state court. However, the Court's application of the outcome-determinative test in the cases of *Ragan v.*

1. MASS. GEN. LAWS ANN. ch. 197, § 9 (1958).

2. There are two alternatives to delivery in hand listed in the statute: acceptance of service by the executor, or filing of a notice of claim in the appropriate registry of probate. The plaintiff's Ohio counsel did file such a notice, but it was technically invalid, since it did not state the name of the court in which the claim was pursued. Brief for Petitioner, p. 3, Hanna v. Plumer, 85 Sup. Ct. 1136 (1965).

3. Hanna v. Plumer, 331 F.2d 157 (1st Cir. 1964). The Court of Appeals found that § 9 of the statute represented a strong state policy of requiring actual notice to the executor and applied the balancing test of *Byrd, infra* note 12, concluding that the state rule outweighed the federal policy of having a uniform procedure in all federal courts.

4. 28 U.S.C. § 2072 (1964). "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions. "Such rules shall not abridge, enlarge or modify any substantive right. . . ."

5. 304 U.S. 64 (1938).

6. 326 U.S. 99 (1945). This case involved a state statute of limitations which, if applied, would bar the action. The Court held that the statute of limitations applied even though it was recognized as procedural for many purposes.

Merchants Transfer & Warehouse Co.,[7] *Cohen v. Beneficial Industrial Loan Corp.*,[8] and *Woods v. Interstate Realty Corp.*[9] prompted many writers to conclude that the federal rules were no longer applicable in diversity actions.[10] In *Byrd v. Blue Ridge Rural Electric Co-operative*,[11] the Court decided that the outcome-determinative test was not the sole criterion for deciding whether a legal rule was substantive or procedural and called for a balancing of the federal policies involved.[12]

The leading case upholding the validity of the federal rules is *Sibbach v. Wilson & Co.*[13] in which the Court held that Rule 35 requiring a physical examination of a party was within the power of Congress and did not modify any substantive rights. In *Mississippi*

7. 337 U.S. 530 (1949). FED. R. CIV. P. 3, provides that an action commences when the complaint is filed, but a state statute said that the action did not commence until the summons was served. The summons was not served until after the statute of limitations barred the action, although the complaint had been filed before the statute of limitations had run. The Court held that the state law applied and the action was barred. In Hanna v. Plumer, *supra* note 2, there was no question about the timeliness of the service.

8. 337 U.S. 541 (1949). A state statute requiring the plaintiff in a stockholder's suit to post a bond for security was applied, even though there was no such requirement in the federal rule governing the bringing of a suit. The Court said that if the plaintiff would be deterred from bringing the action in a state court because of his inability to post the required security, he should be deterred in a federal court also.

9. 337 U.S. 535 (1949). A foreign corporation which had not qualified to do business in the state was barred from suing in the state by a state statute. The Court held that it was also barred from bringing an action in a federal court within the state without discussing rule 17(b) of the FRCP.

10. Applied literally this test would almost nullify the federal rules in diversity actions, since almost every procedural rule may have a substantial effect upon the outcome of a case. WRIGHT, FEDERAL COURTS § 55 (1963). See Merrigan, *Erie to York to Ragan: A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950).

11. 356 U.S. 525 (1958). A state court decision indicated that contributory negligence was to be decided by the court rather than the jury. The Court found that there was a strong federal policy against allowing state rules to disrupt the judge-jury relationship in federal courts and held that this policy outweighed the policy of having the same outcome in state and federal courts. No Federal Rule of Civil Procedure was involved in this case.

12. The two policies actually balanced against each other were the federal policy of guaranteeing the right to trial by jury and the federal policy of discouraging forum-shopping by assuring the same result in state and federal courts. The Court also indicated that it found no strong state policy behind the rule of letting the judge decide the issue of contributory negligence.

13. 312 U.S. 1 (1941). The majority refused to recognize a category of substantial procedural rights as a limitation on its power to promulgate rules. The dissenting opinion did not deny the power of Congress to make such rules, but implied that the FRCP should not have the force of statutory law.

It should be noted that in this case there was no conflict between the applicable state and federal law, since, even though the federal court sat in Illinois which did not allow physical examination of a party, the accident which provoked the litigation occurred in Indiana where the state rule was the same as the federal rule. This was as alternative ground for the decision.

Publishing Corp. v. Murphree,[14] the Court held that even though the application of a federal rule would affect a litigant's rights, it went only to the manner and means of enforcing state-created rights and did not "abridge, enlarge, or modify the rules of decision."[15] These cases, however, did not involve a direct conflict between the FRCP and state statute. The Courts of Appeal, when considering cases presenting a direct conflict, have usually held the federal rules to be applicable, but have done so by using the balancing test of *Byrd* rather than by looking only to the Enabling Act and the Constitution as did *Sibbach*.[16] This approach has produced much disagreement as to what effect the presence of a federal rule should have as an indication of federal policy.

In rejecting the defendant's argument that the *Erie* doctrine required the use of the state rule, the Court first pointed out that, even if no federal rule were involved, there would have to be a balancing of policies under *Byrd*. The Court indicated that by this test the federal rule would be applicable, but it did not decide the case on this ground. A "more fundamental flaw" in defendant's reasoning was "the incorrect assumption that the rule of *Erie* . . . constitutes the appropriate test of the validity . . . of a Federal Rule of Civil Procedure."[17] The Court stated that it had never applied the *Erie* doctrine to void a federal rule, and distinguished the cases involving a federal rule which applied the *Erie* doctrine as instances in which the rule was simply not broad enough to cover the situation.[18] Although both the Rules Enabling Act and the *Erie* rule state that federal courts must apply state substantive law and federal procedural

14. 326 U.S. 438 (1946).

15. *Id.* at 445.

16. WRIGHT, *op. cit. supra* note 10, § 59. Some circuits say that only slight weight should be given to the presence of a federal rule as an indication of federal policy while others hold that it should be given greater weight.

In Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), a federal court in New York permitted the substitution of the personal representative of a New Jersey decedent in a diversity case, even though this would have been impossible in a state court.

In Monarch Ins. Co., v. Spach, 281 F.2d 401 (5th Cir. 1960), the Court of Appeals held that the FRCP showed a policy of uniformity within the whole federal system. The presence of a federal rule was emphasized by this court.

In Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960), the court held that a state policy was stronger than the federal policy and indicated that it give only slight weight to the policy of federal uniformity as shown by the FRCP.

Lumberman's Mut. Cas. Co. v. Wright, 332 F.2d 759 (5th Cir. 1963), relied on both Sibbach, *supra* note 14, and Byrd, *supra* note 12, to sustain the application of a federal rule, stating that whenever a federal rule is involved, it will be applied because of the affirmative countervailing consideration of a congressional mandate. *Id.* at 764.

17. Hauna v. Plumer, *supra* note 2 at 1143.

18. Mr. Justice Harlan, concurring, felt that the Ragan case, *supra* note 7, was not distinguishable and should be overruled. Because he believed that *Erie* was decided on a constitutional basis, he would apply the *Erie* and *Byrd* tests to determine the applicability of the FRCP when they conflict with state rules.

law, the tests are different. When a situation is covered by a federal rule, a federal court must apply it unless it transgresses either the Rules Enabling Act or the Constitution.

The applicability of the Federal Rules of Civil Procedure in diversity actions has caused confusion since the *York* case in 1945. The instant case resolves that difficulty. Now any federal rule, promulgated under the Enabling Act, must be applied by a federal court in a diversity action if it is arguably procedural, even if there is a conflicting state rule. Uniformity of federal procedure is therefore assured. Achieving uniformity solely by reference to the Enabling Act and the Constitution, as the Court has done, is preferable to doing so by using the balancing test of *Byrd* because of the greater certainty which the former method provides. Attorneys in diversity actions may now rely on the FRCP with confidence, knowing that no opposing federal policy will outweigh that of providing a uniform federal procedure. The Court rightly concludes that in most cases the procedural differences on the state and federal levels will not determine in which court the suit will be brought, and, therefore, this decision will not result in increased forum-shopping.

Constitutional Law—Televising of Criminal Trials Held Violative of the Right to a Fair Trial

The Constitution of the United States guarantees to every individual both freedom of speech and press[1] and the right to a fair trial.[2] However, these two fundamental liberties may come in conflict,[3] as has been the case in the struggle between the news media and the courts. This conflict has come to focus at three stages. The first is before the trial begins, when there is a continuing problem over pretrial publicity.[4] Here the rule is that newspapers, radio and television are to be allowed the widest possible latitude consonant with the orderly administration of justice, so long as the presumption of in-

1. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

2. The sixth amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

3. See generally Note, 63 HARV. L. REV. 840 (1950); Note, 34 N.Y.U.L. REV. 1278 (1959); Note, 35 TEMPLE L.Q. 412 (1962).

4. See generally Note, 34 N.Y.U.L. REV. at 1286; 36 MISS. L.J. 369 (1965).

nocence is not destroyed.[5] At the second stage after the close of the trial—few major difficulties arise.[6] The separate branches of the news media are on an equal footing and are free to report anything about the trial which is not within the prohibited area of libel and slander.[7] It is at the third stage, during the trial itself, that the controversy in question developed.[8] Should criminal trials be televised? While newspaper reporters are generally permitted inside the courtroom, only two states[9] have extended the same privilege to television cameramen. Canon 35 of the Judicial Canons and the Federal Rules of Criminal Procedure expressly exclude television and radio from the courtroom. The news media insists that such a denial is unjustified. On the one side, it is argued that to allow radio and television coverage throughout the trial would detract from the dignity of the courtroom,[10] psychologically affect the participants,[11] and create public misconceptions of the legal process.[12] On the other, the contention is that the refusal of the privilege is a denial of both the right to a public trial[13] and freedom of the press.[14]

The precise issue first squarely faced the United States Supreme Court in *Estes v. Texas*, 381 U.S. 532 (1965). In granting *certiorari*, the Court limited review to the question of whether requiring petitioner, over his continued objection, to submit to a live telecast of his trial, denied him due process of law and equal protection of the law under the fourteenth amendment. The case, involving a charge of swindling, was originally set for trial on September 24, 1964. At that time, however, the court heard a defense motion to prevent telecasting, broadcasting by radio, and news photography.[15] After a two-day

5. *E.g.*, Rideau v. Louisiana, 373 U.S. 723 (1963) (television); Shephard v. Florida, 341 U.S. 50 (1951) (newspapers); Baltimore Radio Show, Inc. v. Maryland, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950). *But see* the very strict English rule, Gillmore, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE L. REV. 17 (1965).

6. See Note, 34 N.Y.U.L. REV. at 1293.

7. 37 TUL. L. REV. 147 (1962).

8. See Note, 34 N.Y.U.L. REV. at 1289.

9. Colorado and Oklahoma. For a detailed discussion of the Colorado and Oklahoma rules see Warden, *Canon 35: Is There Room For Objectivity?*, 4 WASHBURN L.J. 211, 221-34 (1965).

10. Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486, 494 (W.D. Pa. 1957), *aff'd*, 254 F.2d 883 (3rd Cir. 1958).

11. See generally Douglas, *The Public Trial and the Free Press*, 33 ROCKY MT. L. REV. 1 (1960); Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A.B.A.J. 615 (1962); Warden, *supra* note 9, at 212; Note, 51 KY. L.J. 737, 754-57 (1963).

12. Note, 51 KY. L.J., at 757.

13. See generally, Note, 35 TEMPLE L.Q. at 419. For a list of seven policy arguments, see *id.* at 420. *Contra*, Douglas, *supra* note 11, at 4.

14. See generally Doubles, *A Camera in the Courtroom*, 22 WASH & LEE L. REV. 1, 9-15 (1965); Warden, *supra* note 9, at 218; Note, 35 TEMPLE L.Q. at 416.

15. A defense motion for continuance was presented at the same time and granted.

hearing, which was fully covered by television, radio, and news photographers, the motion was denied.[16] The trial commenced on October 22, 1962, and continued for three days. A booth, painted to blend with the walls, had been constructed at the back of the courtroom in order to conceal all television and newsreel cameras. An aperture permitted the lenses with an unrestricted view. Only certain parts of the trial, namely the opening and closing arguments of the State, the return of the jury's verdict and its receipt by the trial judge, were carried live with sound. Estes was convicted and the Texas Court of Criminal Appeals affirmed.[17]

A close examination of the several opinions is useful in delineating the policy considerations involved and in indicating the future lines of development in subsequent cases. Mr. Justice Clark, speaking for the Court, explained that the issue under review encompassed the activities of the news media both at the September hearings and at the actual trial. These combined activities constituted a denial of due process even in the absence of a showing of specific prejudice. Furthermore, any future use of television, at its present stage of technological development, during criminal trials would be inherently prejudicial and constitute, in itself, a violation of the fourteenth amendment. "[I]ts use amounts to the injection of an irrelevant factor into the court proceedings."[18] Mr. Justice Clark expressly recognized the sixth amendment guarantee to the accused of a right to "public" trial. Even so, he insisted that the freedoms granted in the first amendment do not extend a right to the news media to televise from the courtroom. Freedom of the press must necessarily be subject to the maintenance of fairness in the judicial process, and permitting television and radio within the courtroom would inevitably inject prejudice into the criminal trial. To support his view, Mr. Justice Clark turned to the potential psychological impact of television upon trial participants. Jurors, "the nerve center of the fact-finding process,"[19] are influenced by increased pre-trial publicity due to the judge's announcement that the case will be televised, and by continued telecasts of the proceedings. Awareness that the proceedings are being televised adds a distraction not otherwise present. Also, witnesses may be "demoralized and frightened, [or] . . . cocky and given to overstatement;

16. "Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings." Estes v. Texas, 381 U.S. 532, 536 (1965).

17. *Id.* at 535.

18. *Id.* at 544.

19. *Id.* at 545.

memories may falter . . . and accuracy of statement may be severely undermined."[20] Further, the judge will have the additional responsibility of supervising the use of television to assure a fair trial. Should he be elected to office, there is the tendency to allow telecasting of a trial to become a political asset.[21] This makes it difficult for him "to remain oblivious to the pressures that the news media can bring to bear . . . both directly and through the shaping of public opinion."[22] Finally, there will be a decided psychological effect upon the accused. The presence of television "is a form of mental—if not physical—harassment, resembling a police line-up or a third degree.[23] The increased public clamour from television and radio will inevitably prejudice him. Furthermore, telecasting may deprive him of effective counsel. "The distractions, intrusions into confidential attorney-client relationships, and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses."[24] In answer to the argument that to deny televising of criminal trials is to discriminate against the television industry in favor of newspapers, whose reporters are given access to the courtroom, Mr. Justice Clark pointed out that "the television and the radio reporter [have] the same privilege. All are entitled to the same rights as the general public."[25]

While Mr. Justice Clark's opinion might be taken as a denial of access to the courtroom for all television and radio equipment, both at present and in the future, two express reservations preclude such a broad interpretation. First, he confined his review to the use of television in criminal cases, leaving unanswered the question of the status of televising civil cases.[26] This reservation, however, loses substantial significance in light of the stated fact that

> The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the beam of the

20. *Id.* at 547.

21. A clear example of this was found in the present case, as pointed out by Chief Justice Warren in his concurring opinion. The trial judge made the following speech: "'This case is not being tried under the Federal Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution . . . . I took an oath to uphold this Constitution; not the Federal Constitution but the State Constitution; and I am going to do my best to do that as long as I preside on this Court, and if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful.'" The Chief Justice observed "One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing audience." *Id.* at 566 (concurring opinion).

22. *Id.* at 548.

23. *Id.* at 549.

24. *Ibid.*

25. *Id.* at 540.

26. *Id.* at 541.

> lens upon the unpopular or infamous accused. Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit.[27]

Secondly, and of more importance, he clearly hesitated to deal with "future developments in the field of electronics."[28] Mr. Justice Clark limited this holding to television in its present stage of technological development, explicitly recognizing the possibility "that the ever advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials."[29]

It is solely with this second reservation that the concurring opinion of Chief Justice Warren, joined by Justices Douglas and Goldberg, disagreed. They reasoned that television, regardless of how technically refined it may become in the future, should not be allowed access to the courtroom during a criminal trial.[30] To permit such intrusion into federal and state courts would violate the sixth and the fourteenth amendments. Three reasons were given to justify this position. The first, inevitable psychological impact upon trial participants, differed little from the reasoning of Mr. Justice Clark.[31] The second was that televising of trials would leave the public with a misconception of the judicial system, detracting from the dignity and integrity of the trial process.[32] To permit the television industry to invade the courtroom would be a very real threat to both. "The sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization."[33] Third, the television industry would necessarily be compelled to "single out certain defendants and subject them to trial under prejudicial conditions not experienced by others."[34] Generally, the nature of the case would be

27. *Id.* at 549.

28. *Id.* at 552.

29. *Id.* at 551.

30. "For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted." *Id.* at 564 (concurring opinion).

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

32. "The television of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the industry." 381 U.S. at 571. "There would be a real threat to the integrity of the trial process if the television industry and the trial judges were allowed to become partners in the staging of criminal proceedings." *Id* at 573 (concurring opinion).

33. *Id.* at 574 (concurring opinion).

34. *Id.* at 576 (concurring opinion). Chief Justice Warren went on to say, "The alleged perpetrator of the sensational murder, the fallen idol, or some other person who, like petitioner, has attracted the public interest would find his trial turned into a vehicle for television. Yet these are the very persons who encounter the greatest difficulty in securing an imparital trial, even without the presence of television." *Ibid.*

determinative of selection. Viewing the above factors conjunctively, the three Justices felt compelled to recognize the inherent unfairness of television in the courtroom and ruled that its presence, both now and in the future, is necessarily inconsistent with the "fundamental conception" of what a trial should be.

> The television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend to an American courtroom. On entering that hallowed sanctuary, where lives, liberty, and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and, thereafter, if they chose, to report them.[35]

Mr. Justice Harlan, also concurring, fully agreed with the four above-mentioned Justices that "television is capable of distorting the trial process so as to deprive it of fundamental fairness."[36] He insisted, however, upon limiting his opinion only to well publicized and highly sensationalized trials similar to the one before the court. This does not mean that he was prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case, but only that he would refrain from deciding the question of the use of television in less sensationalized trials until the appropriate case should arise. He emphasized that there is no constitutional right of the news media to televise trials. The right of "public" trial under the sixth amendment is one belonging only to the accused, not to the public. "It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present. . . ."[37] The same holds for the free speech and press guarantees under the first amendment. "Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from the goal, due process requires that its use be forbidden."[38] Under the present circumstances, he was convinced that permitting television access to the courtroom was inherently prejudicial and should be constitutionally banned.

Justices Stewart, Black, Brennan and White dissented. They agreed that the introduction of television into the courtroom was, at least in its present state, an extremely unwise policy which invited many constitutional risks and detracted from courtroom dignity.[39] They were unable, however, due to the probability of further technological development, to transform these personal views into a constitutional

35. *Id.* at 585 (concurring opinion).
36. *Id.* at 588 (concurring opinion).
37. *Id.* at 589 (concurring opinion).
38. *Ibid.*
39. *Id.* at 601 (dissenting opinion).

rule.[40] Nor could they find, in the record, that the "limited televising" of the trial constituted a denial of any constitutional right. It was their position that because of the initial refusal to review the claim that pre-trial publicity prejudiced the jurors, consideration of the September hearings, insofar as they were an element of that publicity, was not before the Court. As for the trial itself, they could not find a specific showing of prejudice. The Texas sequestration rule prevented the jurors from seeing any telecasts of the trial and insulated them from association with the public. In the courtroom, the trial proceeded no differently than it would have had the cameras not been present. Furthermore, there was no harassment of the judge and no resulting confusion. "What ultimately emerges from the record, therefore, is one bald question—whether the Fourteenth Amendment of the United States Constitution prohibits all television cameras from a state courtroom whenever a criminal trial is in progress."[41] This they answered in the negative.[42] Mr. Justice Brennan added a final caveat:

> I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances. . . . Thus, today's decision is *not* a blanket constitutional prohibition against the televising of state criminal trials.[43]

The present holding renders it unlikely that a state judge will, in the future, assume the risk of reversal by granting permission to televise a criminal trial. In fact, as to television, the fair trial versus free press controversy may have been laid to rest. Five of the Justices expressly rejected the media's arguments of right to "public" trial and absolute freedom of the press. Also, *all* recognized that the potential psychological effect of television upon the participants is, at the very least, a definite constitutional risk. If this does not eliminate the arguments of the news media, it gravely weakens them. However no five to four decision can be considered conclusive and, as Mr. Justice Brennan pointed out, no sweeping constitutional prohibition has as yet been handed down. The appointment of Mr. Justice Fortas presents the possibility of a change of position in the future and leaves unanswered the question of whether future litigation will ultimately result in an absolute denial of television in the courtroom.

40. *Ibid.*

41. *Id.* at 614 (dissenting opinion).

42. "I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film. I cannot now hold that the Constitution absolutely bars television cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any wituess, and no influence upon the conduct of the judge." *Id.* at 615 (dissenting opinion).

43. *Id.* at 617 (dissenting opinion).

Labor Law—National Labor Relations Act—Bargaining Lockout of a Single Employer Held Valid

Having reached a bargaining impasse after a series of good faith negotiations, the American Ship Building Company, apprehensive of a strike in light of past bargaining history, temporarily closed down one of its shipyards and laid off employees at the other. Shortly thereafter negotiations were resumed, resulting in a two year contract and the recalling of all employees. The union then filed an unfair labor practice complaint with the NLRB, charging American Ship Building Company with violation of sections 8(a)(1),[1] 8(a)(3)[2] and 8(a)(5)[3] of the National Labor Relations Act. Although the trial examiner found the employer to have been economically justified and motivated in its lockout and thus innocent of any unfair labor practice, the NLRB in a three-to-two decision rejected his analysis that the employer could have reasonably anticipated a strike. The Board found that the petitioner's sole purpose was to bring economic pressure to force a favorable settlement, thus violating sections 8(a)(1) and 8(a)(3) of the Act.[4] The Court of Appeals for the District of Columbia affirmed, enforcing the order;[5] and the Supreme Court granted *certiorari*.[6] *Held*, reversed. After a good faith bargaining impasse has been reached, a temporary lockout to bring economic pressure in support of an employer's legitimate bargaining position is not an unfair labor practice under the National Labor Relations Act. *American Ship Building Company v. NLRB*, 380 U.S. 300 (1965).

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1. National Labor Relations Act § 8(a)(1), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(1) (1964), 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."

2. National Labor Relations Act § 8(a)(3), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964), which provides in relevant part that "It shall be an unfair labor practice for an employer—(3) By discrimination in regard to hire or tenure of employment or by any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

3. National Labor Relations Act § 8(a)(5), 49 Stat. 453 (1935), 29 U.S.C. § 158(a)(5) (1964), which provides in relevant part that "It shall be an unfair labor practice for an employer— (5) To refuse to bargain collectively with the representatives of his employees . . . ."

4. 142 N.L.R.B. 1362 (1963) (Chairman McCulloch and Member Rogers dissenting). The Board made no findings as to the violation of § 8(a)(5) charged in the complaint. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 306 n.5 (1965).

5. 331 F.2d 839 (D.C. Cir. 1964).

6. 379 U.S. 814 (1964). It is interesting to note that the specific question for which the Supreme Court granted *certiorari* was whether the lockout is the corollary of the statutory protection given to the employees' right to strike.

The legality of employer lockouts[7] has been a fertile source for legal controversy.[8] Prior to the passage of the NLRA it was generally agreed that a lockout could be legitimately used as the employer's counterpart to a strike.[9] Although there were several wartime measures passed by Congress regulating strikes and lockouts,[10] nowhere—either in the Wagner Act or any subsequent legislation—is the lockout specifically outlawed.[11] Nevertheless, despite the fact that it has always decided each complaint on a case-by-case basis, the Board has generally, without any higher judicial objection, held lockouts to be invalid when designed solely to frustrate organizational efforts, to destroy or render ineffective the union involved, to evade the duty to bargain with the union, or to affect a union in any such prohibited manner[12] —all of which involve a strong antiunion motivation. The Board, however, has established one instance where the lockout may be used: lockouts justified by the existence of an economic or operational reason, exclusive of any antiunion motivations. Thus, lockouts solely motivated by a desire to strengthen the economic position of the

7. No one definition of the term lockout has ever been settled upon. It is here used as most often quoted in the case law: "A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms." Iron Molder's Union v. Allis-Chalmers Co., 166 Fed. 45 (7th Cir. 1908) (concurring opinion); *accord*, Jeffery-DeWitt Insolator Co. v. NLRB, 91 F.2d 134, 137 (4th Cir. 1937). For a complete discussion of the various meanings attributed to the term, see Betts Cadillac Olds, Inc., 96 N.L.R.B. 268, 282-83 (1951).

8. Not only have the NLRB and the courts disagreed as to the legality of these lockouts, but scholars also take different approaches to the problem. See, *e.g.*, Koretz, *Legality of the Lockout*, 4 SYRACUSE L. REV. 250 (1952); Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956); Sweetall & Aiges, *Lockouts*, 9 LAB. L.J. 43 (1958).

9. Iron Molder's Union v. Allis-Chalmers Co., *supra* note 5. See also the cases collected in Annot., 173 A.L.R. 674 (1948). A former Board chairman has expressed it in the following manner: "In exerting pressure upon employers to recognize them and accept their demands, unions resort to the strike. . . . (The strike's) counterpart . . . and matching it fairly accurately, is the lockout." MILLIS & MONTGOMERY, ORGANIZED LABOR 554 (1945). This statement is typical of the widespread feeling that exists today among both legal scholars and laymen that the lockout is the corollary of the strike. See Denbo, *Is the Lockout the Corollary of the Strike?*, 14 LAB. L.J. 400 (1963).

10. War Labor Disputes Act, ch. 144, § 3, 57 Stat. 164 (1943); H.R. 4908, 79th Cong., 1st Sess. § 4(a)(2) (1945).

11. In fact, it is clear from the legislative history of the Wagner and Taft-Hartley Acts that the congressional purpose was explicitly not to outlaw the lockout as a gun in the employer's arsenal. See 79 CONG. REC. 7673 (1935) (remarks of Senator Walsh concerning the Wagner Act); 93 CONG. REC. 1827-28, 1893-94 (1947) (remarks of Senator Walsh concerning the Taft-Hartley Act); S. REP. No. 105, 80th Cong., 1st Sess. 21-24 (1947); H.R. REP. No. 245, 80th Cong., 1st Sess. 21 (1947). Thus, it is apparently well-settled today that the lockout is not per se invalid and authorities agree that there is at least some area of legal lockouts. See NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962).

12. See, *e.g.*, NLRB v. Piedmont Cotton Mills, 179 F.2d 345 (5th Cir. 1950); NLRB v. Santa Cruz Fruit Packing Co., 91 F.2d 790 (9th Cir. 1937). For a good summary of similar cases, see Koretz, *supra* note 8, at 254 n.21.

employer are unlawful.[13] In addition, after lengthy controversy,[14] the Board finally sanctioned the use of the lockout by a multi-employer bargaining unit in response to a whipsaw strike against one of its members.[15] The Board's initial position on this multi-employer situation made no such exception, holding such a lockout to be an unfair labor practice.[16] Such a position was strongly challenged by several Courts of Appeal[17] and finally the Board, newly composed of Eisenhower appointees, reversed its position to permit a defensive lockout instituted to protect employers from the whipsaw strike.[18] Although the Court of Appeals for the Second Circuit reversed its holding, supporting the Board's early view,[19] the Supreme Court upheld the Board[20] and has further strengthened the legality of multi-employer lockouts with its recent decision of *NLRB v. Brown*.[21]

Until the present case, however, there has remained a conflict among the circuits as to the legality of single employer lockouts.[22] Justice

13. See, *e.g.*, Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951) (to avert loss of automobiles brought about by sudden work stoppage); International Shoe Co., 93 N.L.R.B. 907 (1951) (to stop repetitive disruption caused by quickie strikes); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (to avoid spoilage of materials). See also Koretz, *supra* note 8, at 254-57; Meltzer, *supra* note 8, at 73-76.

14. See notes 16-18 *infra* and accompanying text.

15. Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954).

16. Davis Furniture Co., 100 N.L.R.B. 1016 (1952); Morand Bros. Beverage Co., 99 N.L.R.B. 1448 (1951).

17. See, *e.g.*, NLRB v. Continental Baking Co., 221 F.2d 427 (8th Cir. 1955); Davis Furniture Co. v. NLRB, 197 F.2d 435 (9th Cir. 1952); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951), *on remand*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

18. Buffalo Linen Supply Co., *supra* note 15. See also 11 VAND. L. REV. 246 (1957), for a discussion of the Board's reversal of its position.

19. Truck Drivers Local Union v. NLRB, 231 F.2d 110 (2d Cir. 1956).

20. Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954), *enforced sub nom.* NLRB v. Truck Drivers Union, 353 U.S. 87 (1957).

21. NLRB v. Brown, 380 U.S. 278 (1965). The Court held that in absence of unlawful, antiunion motivation, a lockout in response to a whipsaw strike against a multi-employer bargaining group is valid, even though the employer continued operations with temporary replacements. Again, however, the Court refused to go beyond the case at hand and specifically reserved the question of permanent replacements. *Id.* at 292 n.6. As in the instant case, the fact that there was no unlawful intent, *i.e.*, some element of antiunion animus, was the deciding factor. The case in essence preserves the defensive-offensive dichotomy established by the Board in the *Buffalo Linen* case which the Court relied heavily upon to support its decision in *Brown*. Mr. Justice White dissented in the case, believing that the Board's balancing was well within reason and within the policy behind the act (not so irrational as it was in the instant case in which he concurred) and that the Court should not "assume for itself the delicate task of weighing the interests." *Id.* at 299. It appears in light of this decision, however, that the validity of the defensive lockout in a multi-employer response to a whipsaw strike is now well-established unless unlawful intent can be proved.

22. *Compare* NLRB v. Dalton Brick & Tile Corp., *supra* note 1; NLRB v. Continental Baking Co., *supra* note 17; Morand Bros. Beverage Co. v. NLRB, *supra* note 17, *with* Body & Tank Corp. v. NLRB, 339 F.2d 76 (2d Cir. 1964); Utah Plumbing & Heating Contractors Ass'n v. NLRB, 294 F.2d 165 (10th Cir. 1961); Quaker State Oil Refining Corp. v. NLRB, 270 F.2d 40 (3d Cir. 1959).

Stewart's majority opinion implies three major conditions for the validity of such lockouts. The lockout must occur after a bargaining impasse has been reached and must involve only a temporary layoff; it must serve a legitimate business interest; and it must not be motivated by an antiunion purpose. In so limiting its decision,[23] the Court found it unnecessary to decide directly the important underlying issue of whether the lockout is a corollary to the strike. However, the majority does take another step toward resolving this question by emphasizing that the key to the legality of a lockout is the employer's actual motivation. Thus, under the authority of this decision an employer has a definite right to lock out his employees after a bargaining impasse has occurred if he does so merely to better his economic interests without evidencing an antiunion intent. Consequently, the Court has made a major contribution to the developing analogy of the strike and lockout;[24] and no longer is it so significant that the lockout tends to discourage union membership or place the union at an economic disadvantage so long as its purpose is to serve some legitimate business interest.[25] The Court, in overturning the Board's decision, also criticizes the Board for attempting to act as an arbiter of the sort of economic weapons which the parties may use in collective bargaining.[26] There is no uncertainty among the majority that where the Board makes such an "unauthorized assumption of major policy decisions properly made by Congress"[27] the Court may set aside the Board's decision. Therefore, though the Board has been vested with judicial powers and must utilize them in its function as a quasi-judicial body engaged in the formulation of policy, it was apparent to the majority that the use of such powers

23. See note 8 *supra* and the authorities cited therein, which presents a convincing justification of the analogy between the lockout and the strike. Basically, the feeling is that the employee has a fundamental right to refuse to work in order to bring economic pressure to bear on his employer; similarly, the employer has such a right to cease furnishing work to his employees in an effort to secure a better bargaining position. In the instant case, the Court implies that this is a valid analogy only, by sanctioning of the single employer lockout where there is an absence of antiunion intent and a bargaining impasse has been reached.

24. 380 U.S. at 308. Here the majority states: "What we are concerned with is the use of a temporary layoff of employees *solely* as a measure to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached. This is the only issue before us, and all that we decide." (Emphasis added.)

25. 380 U.S. at 311-13. Consequently, the lockout did not violate § 8(a)(3). The Court also held that the employer's use of a lockout solely in support of a legitimate bargaining position was not in any way inconsistent with the right to bargain collectively or with the right to strike; thus, the lockout was held not to violate § 8(a)(1). *Id.* at 310.

26. The Court in fact, had expressly forbidden the Board from entering this area in an earlier decision. See NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 497-98 (1959). See also Brief for Petitioner, pp. 22-23, American Ship Bldg. Co. v. NLRB, *supra* note 4.

27. *Id.* at 318.

should not extend beyond the boundaries of what the Court feels is acceptable policy making.

In his concurring opinion, Justice White follows an older line of cases which uphold the right of an employer to lay off employees because of lack of work.[28] In his view, the Court reached out to decide an issue not even presented by the case; namely, the validity of the bargaining lockout[29] in which an employer uses the lockout to enhance his bargaining position. Although the majority decision was somewhat limited,[30] Justice White apparently felt that the Court gave complete sanction to all bargaining lockouts.[31] In refusing to overturn the Board's balancing of the conflicting interests where such findings are supported by substantial evidence, he essentially supports the view argued by the Board. Although he feels the majority erred in its failure to give the Board's conclusion due consideration and in restriking the balance the Board had reached, he concurred because of his opinion that the Board had erred in its use of the bargaining lockout analysis to judge the legality of the layoffs when the case clearly fell into the category of a valid layoff for lack of work.[32]

Justice Goldberg, joined by Chief Justice Warren in his concurring opinion, preferred to decide the case by fitting it into one of the exceptions set up by the Board; namely, the defensive lockout used by the employer to guard against unusual problems or economic loss where he has reasonable grounds for believing a strike to be imminent upon the termination of a collective bargaining agreement.[33] He reasoned that the Board had no rational basis for its conclusion that the employer's fear of a strike was unreasonable. Therefore, he would have held on this record that the lockout was justified since there

28. See, *e.g.*, Pepsi Cola Bottling Co., 145 N.L.R.B. 785 (1964); H. H. Zimmerli, 133 N.L.R.B. 1217 (1961); Associated Gen. Contractors of America, Inc., 105 N.L.R.B. 767 (1953).

29. 380 U.S. at 322.

30. *Supra* note 24.

31. "The Court today holds that . . . a bargaining lockout of employers in resistance to the demands of a union is invariably exempt from the prescriptions of the Act." 380 U.S. at 318. See also *id.* at 324, where he comments: "If the Court means what it says today, an employer may . . . replace his locked-out employees with temporary help . . . or permanent replacements, and also lock-out long before an impasse is reached." *Contra, id.* at 308 n.8. However, the case of Detroit Newspaper Publishers Ass'n v. NLRB, (6th Cir. 1965), gives some support to White's position. Here the court, relying solely on the *American Ship Building* case, upheld a lockout before an impasse had been reached, regarding the findings as to whether the employer's purpose was solely antiunion or whether it was to bring about a favorable economic settlement as controlling in determining his intent.

32. 380 U.S. at 322.

33. See, *e.g.*, Packard Bell Electronics Corp., 130 N.L.R.B. 1122 (1961); Betts Cadillac Olds, Inc., *supra* note 13; International Shoe Co., *supra* note 13 (all defensive lockouts held valid). *But see* Quaker State Oil Refining Corp., *supra* note 22 (an invalid offensive lockout where there was no reasonable belief that a strike was imminent).

was no substantial evidence which could support the Board's findings. In addition, Justice Goldberg commented on the need to avoid "sweeping generalizations in this complex area."[34] and to avoid setting up any "simple formula which readily demarks the permissible from the impermissible lockout."[35] The key to the lockout problem, according to the Goldberg analysis, involves a balancing of the conflicting interests, with due respect for the Board's findings, which can only be accomplished on a case by case basis.

The Court, in resolving the conflict among the circuits as to the validity of single employer lockouts, has placed at the employer's disposal a bargaining weapon which approaches or equals the strength of the employee's most powerful weapon, the strike. Although the exact limits of the majority opinion are inconclusive and shadowy, a major step was taken toward stabilizing an area of labor law which has had many inconsistencies.[36] There is no specific language in the Court's opinion to the effect that the lockout is now to be considered a valid corollary to the strike, but there are definite signs that the Court was leaning in this direction. In order for a lockout, either by a single employer or by a multi-employer bargaining unit, to be held unfair labor practice, the Court now requires some definite evidence of antiunion intent. The lockout may no longer be held invalid because it incidentally interferes with or discourages strikes or other concerted employee activities. If he acts in good faith and not solely for antiunion purposes, an employer may now successfully lockout his employees to force a favorable settlement of labor dispute, but according to the majority he may do so *only* after a bargaining impasse has been reached. In this sense then, it may be implied from the case that the lockout is the corollary of the strike, since it is now held to be a valid method whereby the employer may exert economic pressure on the union after a bargaining impasse has been reached;[37] and today this is true irrespective of whether it is used by a single employer or a multi-employer bargaining unit. Such distinctions are no longer necessary because the Court sets out the same rule for both

34. 380 U.S. at 338.

35. *Id.* at 341.

36. The most crucial of the inconsistencies was the fact that the Board allowed the multi-employer lockout whereas they failed to allow a single employer lockout. Both this distinction and the one between the defensive and offensive lockout have led to many inconsistencies in the law and have been highly criticized as being completely useless. See Brief for Petitioner, pp. 10-12, American Ship Bldg. Co. v. NLRB, *supra* note 4; Meltzer, *supra* note 7, at 82-84.

37. In fact, the Court appears to give sanction to the following statement by the Court of Appeals for the Seventh Circuit: "The temporary lockout should be recognized for what it actually is, *i.e.*, the employer's means of exerting economic pressure on the Union, a *corollary* of the Union's right to strike." Morand Bros. Beverage Co., *supra* note 16, at 582. (Emphasis added.) See also note 22 *supra* and accompanying text.

situations, and, in effect, establishes the lockout as the corollary to the strike.[38]

It is much too early to judge the ultimate effect of this decision. The Court of Appeal for the Sixth Circuit[39] has already interpreted the case quite broadly, holding that any bargaining lockout even before an impasse has been reached is valid so long as no antiunion intent is discernible. There may be, however, some question as to whether the other circuits will follow such a broad interpretation in light of the limits the Court placed upon the issue.[40] In all probability, decisions as to the validity of lockouts will continue to require a close analysis of the facts on an *ad hoc* basis. It is now clear, however, that if the employer can satisfy the Board and the courts that following a bargaining impasse, he is using the lockout as an economic weapon within the framework of collective bargaining and not solely as an antiunion weapon, his action will be upheld.

Power To Compel United States Attorney To Sign Indictments Returned by Grand Jury

The foreman of the federal grand jury for the Southern District of Mississippi desired to have indictments prepared against two Negroes accused of violating perjury laws when they testified in federal voter discrimination cases. The United States Attorney for the Southern District refused to prepare or sign these indictments because of instructions he had received from the Acting Attorney General of the United States. The federal district judge ordered the attorney to draft such true bills or no bills as the grand jury might return and to sign said bills in accordance with the requirements of rule 7(c) of the Federal Rules of Criminal Procedure.[1] Upon refusal to prepare and sign the indictments returned by the grand jury, the United

38. It is important to realize, however, that even prior to this decision, most authorities and labor and management officials in actuality looked to the lockout as the corollary of the strike. See Brief for Petitioner, p. 14, American Ship Bldg. Co. v. NLRB, *supra* note 4. For data supporting the conclusion that most labor and management officials agree on the permissability of the lockout, see U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR BULL. No. 908-13.

39. *Supra* note 31.

40. *Supra* note 24. It will be interesting to see what effect the hiring of permanent replacements will have since this question was specifically reserved by the Court.

1. FED. R. CRIM. P. 7(c), in referring to indictments states: "It shall be signed by the attorney for the government." Since the rule uses the word "shall," the signature of the government attorney becomes a necessary element in order to create a valid indictment. Yet, this does not mean that the attorney is under a duty to sign the indictment, as the case holds.

States Attorney was adjudged in civil contempt of court. On appeal to the Court of Appeals for the Fifth Circuit, *held,* in a four to three decision, reversed. The United States Attorney cannot be compelled to sign indictments returned by the grand jury. *United States v. Cox,* 342 F.2d 167 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965).

Circuit Judge Jones, joined by Chief Judge Tuttle, wrote the opinion for the court in which he stated that the United States Attorney should not be required to prepare or sign the indictments returned by the grand jury. Judge Wisdom, in a special concurring opinion, agreed with the reasoning of the majority, but emphasized the broad discretion of the government attorney in prosecuting cases. Judge Brown, while concurring with the court's reversal of the contempt order, offered a compromise which would require the attorney to prepare the indictments, but not compel him to sign them.[2]

In order to understand the significance of the instant case, it is necessary to review the traditional functions of the grand jury and of the United States Attorney.[3] It has been stated that:

> The grand jury serves two great functions. One is to bring to trial persons accused of crime upon just grounds. The other is to protect persons against unfounded or malicious prosecutions by insuring that no criminal proceeding will be undertaken without a disinterested determination of probable guilt. The inquisitorial function has been called the most important.[4]

Thus, it appears that the primary purpose of the grand jury is to insure that an individual will not be prosecuted without just cause.[5] However, the grand jury is not only under a duty to protect individuals from unwarranted charges; it also has the power to see that corrupt conditions are remedied.[6] The Constitution of the United

2. Circuit Judges Rives, Gewin, and Bell dissented, on grounds that the government attorney should be required to draft and sign the indictments.

3. The constitutional mandate reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . ." U. S. CONST. amend. V. The prosecuting body is in the office of the Attorney General. Reorganization Plan No. 2 of 1950, 64 Stat. 1261, 5 U.S.C. § 133 (z)-15 (1958); 28 U.S.C. § 507 (1958); Exec. Order No. 6166, 5 U.S.C. § 132 (1958).

4. Orfield, *The Federal Grand Jury,* 22 F.R.D. 343, 394 (1959). 4 WHARTON, CRIMINAL LAW AND PROCEDURE § 1710 (12th ed. 1957): "The function of the grand jury, which is regarded at common law as an informing and accusing body rather than as a judicial tribunal, is, as a general rule, the investigation of crimes, primarily with a view to determine against whom, if anyone, there is sufficient suspicion to warrant holding him for trial." Application of United Elec. Workers, 111 F. Supp. 858, 864 (S.D.N.Y. 1953).

5. Costello v. United States, 350 U.S. 359 (1956); Application of United Elec. Workers, *supra* note 4, at 863; United States v. Atlantic Comm. Co., 45 F. Supp. 187, 192 (E.D.N.C. 1942); 4 WHARTON, *op. cit. supra* note 4; WHITMAN, FEDERAL CRIMINAL PROCEDURE § 6.5 (1950); Orfield, *supra* note 4; Note, 4 STAN. L. REV. 68.71 (1951).

6. United States v. Smyth, 104 F. Supp. 283, 288 (N.D. Cal. 1952); Orfield, *supra* note 4, at 436.

States authorizes the grand jury either to "present or indict."[7] In the federal courts, the presentment,[8] though "obsolete,"[9] is still available.[10] In order to carry out its accusatorial and inquisitorial functions, the grand jury possesses broad power to inquire into and investigate all matters brought before it.[11] Thus, it can make an impartial determination as to the existence or non-existence of grounds for prosecution. Therefore, before any individual charged with a capital or infamous crime can be brought to trial, an indictment must be issued against him.[12] The power to return indictments rests solely with the grand jury, and

> while the court may exercise an influence over the [grand jury] proceedings, there is neither a method whereby an indictment can be peremptorily required, nor, on the other hand, is there any method of preventing the presentment of an indictment except by summary discharge.[13]

After indictments have been returned by the grand jury in federal cases, the duty of prosecuting is performed by the Attorney General of the United States[14] and the duly appointed United States Attorneys who serve each district.[15] "[T]he United States Attorney is vested with broad discretion to protect the public from crime, such discretion being derived both from statutory grant and the authority of the Attorney General at common law."[16] The courts cannot compel him

7. U.S. CONST. amend. V.

8. "A presentment differs from an indictment in that it is an accusation made by the grand jury of their own motion either upon their own observation and knowledge, or upon evidence before them; while an indictment is preferred as the suit of the government, and is usually framed in the first instance by the prosecuting officer of the government, and by him laid before the grand jury, to be found or ignored." BLACK, LAW DICTIONARY 912 (4th ed. 1951).

9. Hale v. Henkel, 201 U.S. 43, 61 (1906); Application of United Elec. Workers, *supra* note 4, at 863 n.13; WHARTON, *op. cit. supra* note 4, § 1723; Orfield, *supra* note 4, at 437.

10. Hale v. Henkel, *supra* note 9, at 61; In the Matter of April 1956 Term Grand Jury, 239 F.2d 263, 268-69 (7th Cir. 1956).

11. Frisbie v. United States, 157 U.S. 160, 163 (1885); United States *ex rel.* McCann v. Adams, 3 F.R.D. 396, 406 (S.D.N.Y. 1944).

12. U.S. CONST. amend. V. *Ex parte* Bain, 121 U.S. 1, 6 (1887). Of course, under FED. R. CRIM. P. 7(b), the defendant may waive his right to an indictment.

13. United States v. Smyth, *supra* note 6, at 292.

14. 28 U.S.C. § 507(b) (1964); *Ex parte* United States, 287 U.S. 241 (1932); Ponzi v. Fessenden, 258 U.S. 254, 262 (1922); Parker v. Kennedy, 212 F. Supp. 594, 595 (S.D.N.Y. 1963).

15. 28 U.S.C. § 507(a)(1) (1958): "(a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to: (1) prosecute for all offenses against the United States. . . ."

16. Fay v. Miller, 183 F.2d 986, 988 (D.C. Cir. 1950). Other cases emphasizing this broad discretion are United States v. Thompson, 251 U.S. 407, 412-13, 415 (1920); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868); Dear Wing Jung v. United States, 312 F.2d 73, 75 (9th Cir. 1962); Goldberg v. Hoffman, 225 F.2d 463, 466 (7th Cir. 1955); District of Columbia v. Buckley, 128 F.2d 17, 20 (D.C. Cir. 1942); Moses v. Kennedy, 219 F. Supp. 762, 764 (D.D.C. 1963); United States

to prosecute an action.[17] The courts have "no general supervisory powers over the United States Attorney; he is a public official having independent responsibilities as such."[18] The remedy for any dereliction of duty rests not with the courts, but with the executive branch.[19]

Circuit Judge Jones thought it an act of futility to require the attorney to prepare an indictment which he would refuse to validate by signing.[20] The court reasoned that "the constitutional provision [indictment by grand jury] is not to be read as conferring on or preserving to the grand jury, as such, any rights or prerogatives,"[21] and emphasized that "the constitutional provision is . . . for the benefit of the accused."[22] The grand jury's role was viewed as being "restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed."[23] This view appears to overlook the accusatorial function of the grand jury through the power of the presentment;[24] but the probable reason for the majority's narrow statement is that proceedings by presentment are seldom used in the federal courts.[25] The majority recognized the wide discretion of the United States Attorney in deciding whether to prosecute a case against an individual.[26] It reiterated the long established view

v. Verra, 203 F. Supp. 87, 91 (S.D.N.Y. 1962); Pugach v. Klein, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961), which said: "[I]t is, nevertheless, clear beyond question that it is not the business of the Courts to tell the United States Attorney to perform what they conceive to be his duties. . . . The prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government. Congress has implemented the powers of the President by conferring the power and the duty to institute prosecution for federal offenses upon the United States Attorney for each district. . . . *The federal courts are powerless to interfere with his discretionary power.*" (Emphasis added.); United States v. Brokaw, 60 F. Supp. 100 (S.D. Ill. 1945); United States v. Woody, 2 F.2d 262 (D. Mont. 1924).

17. Goldberg v. Hoffman, *supra* note 16, at 467; Parker v. Kennedy, *supra* note 14, at 594; Pugach v. Klein, *supra* note 16, at 635: "The Court cannot compel him [United States Attorney] to prosecute a complaint, or even an indictment, whatever his reasons for not acting." Howell v. Brown, 85 F. Supp. 537, 538 (D. Neb. 1949): "Put briefly, no power of jurisdiction is vested in this court to control, whether by writ or mandamus or otherwise, the exercise by the United States Attorney of the discretion and judgment which the law entrusts to him in the prosecution of persons suspected of the violation of the laws of the United States." Milliken v. Stone, 7 F.2d 397, 399 (S.D.N.Y. 1925).

18. United States v. Cohen, 231 F. Supp. 171-72 (S.D.N.Y. 1964).

19. Pugach v. Klein, *supra* note 16, at 635; United States v. Brokaw, *supra* note 16, at 103; Milliken v. Stone, *supra* note 17.

20. Judge Wisdom, who voted with the majority, concurred specially. He reasoned that the attorney for the government has broad discretion in deciding whether to prosecute cases, and that by withholding his signature and refusing to prepare indictments, he was properly exercising this discretion.

21. 342 F.2d at 170.

22. *Ibid.*

23. *Id.* at 171.

24. See cases cited note 10 *supra.*

25. See cases cited note 9 *supra.*

26. See cases cited note16 *supra.*

that courts are not to interfere with this discretion.[27] Since the United States Attorney's refusal to sign[28] the indictment returned by the grand jury renders it invalid, the majority did not agree that the signature of the prosecuting attorney is merely an "attestation of the act of the grand jury"[29] and thus not actually a part of the indictment.[30] The court stated "that the requirement of the signature is for the purpose of evidencing the joinder of the attorney for the United States with the grand jury in instituting a criminal proceeding in the Court."[31] Under this view the signature on the indictment initiates the institution of a prosecution; and because of his discretionary power in beginning criminal proceedings, the attorney for the government cannot be compelled to sign the indictment.[32]

The three justices who dissented argued that the attorney for the government could be compelled to draft and sign the indictments returned by the grand jury. The dissent placed much emphasis on several cases[33] which state that mere failure to sign the indictment does not cause it to be invalid. In one of the early cases interpreting the effect of the United States Attorney's signature in relation to rule 7(c), it was held that "the signature of the prosecuting attorney is no part of the indictment and is necessary only as evidence of the authenticity of the document. . . ."[34] The dissent reasoned that since the signature is not part of the indictment, but only attests to the action of the grand jury, the prosecuting attorney could be compelled to perform the purely ministerial act of signing the indictments. While the cases relied on by the dissent appear to support this position, it is significant to note that all these cases involved mere technicalities concerning the method of signing the indictment, rather than a refusal by the United States Attorney to sign.[35] Such technical

27. See cases cited note 17 *supra.*

28. FED. R. CRIM. P. 7(c).

29. 342 F.2d at 171. The court does not view the cases which the dissenters cited in note 33 *infra* as authority, for in all of these cases a mere technical deficiency was the cause of the disagreement; whereas, in the instant case the failure of the prosecutor to sign involves no technicality.

30. The court says that without the United States Attorney's signature, the indictment is invalid. 342 F.2d at 171. This clearly indicates that the majority think the attorney's signature is definitely a part of the indictment.

31. 342 F.2d at 172.

32. See cases cited in notes 16 and 17 *supra.*

33. *In re* Lane, 135 U.S. 443, 449 (1890); Abramson v. United States, 326 F.2d 565, 567 (5th Cir. 1964); United States v. Keig, 334 F.2d 823 (7th Cir. 1964); Wiltsey v. United States, 222 F.2d 600-01 (4th Cir. 1955); Wheatley v. United States, 159 F.2d 599-601 (4th Cir. 1946).

34. Wheatley v. United States, *supra* note 33, at 600.

35. See cases cited note 33 *supra.* It must be noted that in all these cases the questions involved was not a refusal of the prosecuting attorney to sign, but merely some technical deficiency in the manner in which the indictment was signed. The dissenters cite no case holding that the court can compel the prosecutor to sign the indictments.

errors would seem to come within the harmless error provision of rule 52(a) of the Federal Rules of Criminal Procedure.[36] In the instant case, there was no harmless error; there was simply a refusal by the United States Attorney to prosecute, and this power to refuse to prosecute cannot be modified by the courts.[37] The dissenters freely admit the wide discretion of the prosecutor in instituting actions.[38] However, according to their view, the proper method for the prosecuting attorney to follow in exercising his discretion not to prosecute a case would be first to move for dismissal under rule 48(a) of the Federal Rules of Criminal Procedure,[39] and if this motion is denied, then to enter a nolle prosequi.[40] The dissent indicated the desirability of public disclosure of the prosecuting attorney's reasons for wanting an indictment dismissed.[41] Even though the dissent does not so state, it appears to interpret the use of the word "shall" in rule 7(c) as demanding the signature of the government attorney.[42]

Circuit Judge Brown, though voting with the majority, nevertheless agreed with the dissent that the attorney should be compelled to prepare the indictments returned by the grand jury. This reasoning may not seem logical, since it would appear meaningless to require the government attorney to draft indictments which he did not intend to validate by signing. Judge Brown reasoned, however, that in order for the grand jury and prosecuting attorney to function properly, it is necessary to have someone prepare the indictments. Certainly the grand jury does not have the requisite legal skill to fulfill this function. Since it has traditionally been the function of

36. FED. R. CRIM. P. 52(a): "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

37. See cases cited in note 17 *supra*.

38. 342 F.2d at 179.

39. FED. R. CRIM. P. 48(a): "The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

40. 342 F.2d at 179. The dissent cites from United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483, 489 (S.D.N.Y. 1964), which indicates clearly the prosecutor's discretion in instituting actions: "The Attorney General is the head of the Department of Justice, a part of the Executive branch of the Government. Even were leave of Court to the dismissal of the indictment denied, the Attorney General would still have the right to adhere to the Department's view that the indictment cannot be supported by proof upon a trial of the merits, and accordingly, in the exercise of his discretion, decline to move the case for trial. The Court in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine."

41. 342 F.2d at 179: "That refusal [to proceed on an indictment] will, of course, be in open court and not in the secret confines of the grand jury room."

42. 342 F.2d at 177: "It is not for us to pass upon the wisdom of requiring such authentication. It is enough that the law [rule 7(c)] provides for the indictment to be authenticated by the siguature of the attorney for the government."

the prosecuting attorney to prepare indictments,[43] this reasoning has some merit.

The case is significant with respect to rule 7(c) of the Federal Rules of Criminal Procedure, for the holding clearly indicates that the signature of the prosecuting attorney is definitely a part of the indictment, and that in order for there to be a valid indictment, the signature must be present. Thus, the statute of limitations will continue to run even after the grand jury returns an indictment, and will be tolled only when the United States Attorney signs the document. This decision in no way derogates from the authority of the grand jury, as the dissent presupposes; it remains the only body possessing the power to return an indictment.[44] Its power is independent and discretionary[45]; it cannot be required by the court to return an indictment[46]; and it is under no duty "to follow the orders of the prosecutors"[47] in respect to matters before it. The principal case, while recognizing the wide discretion of the prosecuting attorney in instituting prosecutions, reaffirms the efficacy of rule 48(a) of the Federal Rules of Criminal Procedure,[48] which was designed to protect the defendant[49] and not to control the discretion of the prosecuting attorney. The power of the prosecuting attorney in refusing to initiate a suit on an "indictment" returned by the grand jury provides a check on "runaway grand juries"; for public policy[50] and other reasons may require that a prosecution not initiated against certain individuals. In federal cases the discretion and power to prosecute is for the United States Attorney.[51] This power is preserved by this decision.

43. United States v. Brumfield, 85 F. Supp. 696, 704 (W.D. La. 1949): "It is common knowledge, to those who are familiar with the practice, that the District Attorney, or someone in his office, in a large percentage of cases, prepares the indictment. . . ." HOUSEL & WALSER, DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES § 220 (2d ed. 1946); 5 WHARTON, *op. cit. supra* note 4, § 2017; Orfield, *supra* note 4, at 425.

44. U.S. CONST. amend. V.

45. Stirone v. United States, 361 U.S. 212, 218 (1960); United States v. Smyth, *supra* note 6, at 293-94.

46. United States v. Smyth, *supra* note 6.

47. *Id.* at 294.

48. FED. R. CRIM. P. 48(a).

49. Woodring v. United States, 311 F.2d 417, 424 (8th Cir. 1963).

50. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64 (1948).

51. See cases cited in note 16 *supra*.

Taxation—Federal Excise Tax—Discrimination and Abuse of Discretion Under Section 7805(b)

In April 1955, Remington Rand requested a ruling[1] from the Commissioner of Internal Revenue concerning the excise tax status[2] of certain of its computer systems. Two days later the Commissioner wired Remington Rand a favorable private ruling. Having learned of the excise tax exemption granted its largest competitor, plaintiff IBM, sought a ruling in July 1955 as to the tax status of its own computer. The request for the ruling contained all the necessary information and was captioned "Urgent! Please Expedite." Shortly after this request was instituted, both the plaintiff and Remington Rand filed claims for refunds for periods prior to 1955. Thereafter, Remington Rand was refunded taxes paid between 1952 and 1955. On May 1, 1957, however, the Commissioner notified Remington Rand that after further study the Internal Revenue Service had decided that the computers in question were taxable. The revocation of the earlier favorable ruling did not go into effect, however, until February 1, 1958, and operated prospectively only. The effect of the refund and ruling combined, was to free Remington Rand from collecting the excise tax on its computers sold over a six year period. The Commissioner did not respond to plaintiff's request for a ruling for more than two years, until November 26, 1957, when he notified plaintiff that its computers were taxable as business machines. Plaintiff then

1. "A ruling is a written statement issued to a taxpayer or his authorized representative by the National Office which interprets and applies the tax laws to a specific set of facts . . . ." Rev. Proc. 28, 1962-2 CUM. BULL. 496, 497. A private ruling is valid only if the facts under which it was granted were true, and remains valid only so long as the facts do not change. Mid-Ridge Inv. Co. v. United States, 214 F. Supp. 8 (E.D. Wis. 1962). The Commissioner takes the positiou that he is in no way bound by these rulings, and that "a ruling . . . may be revoked or modified at any time in the wise administration of the taxing statutes. . . ." Rev. Proc. 28, 1962-2 CUM. BULL. 496, 504. If a ruling is revoked, that revocation automatically is applicable to all the previous taxable years unless the Commissioner wishes to limit the retroactive effect by using "the discretionary powers granted to him under § 7805(b) of the Code. . . ." Rev. Proc. 28, *supra*. It is the general policy of the Commissioner not to revoke a private letter ruling retroactively. Rev. Proc. 28, *supra* at 505. In the words of Mortimer Caplin (then Commissioner of Internal Revenue), "advance rulings contribute substantially to reasonable and orderly administration of the tax laws, and their issuance is of mutual advantage to taxpayers and Government." Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, N.Y.U. 20TH INST. ON FED. TAX 1, 6 (1962). Mr. Caplin also states that the use of rulings (1) gives the taxpayer a measure of certainty, (2) serves to minimize future litigation, (3) creates uniformity in the application of law and regulations, (4) contributes to fair and economical tax administration. Caplin, *supra* at 8. See Lynn & Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487, 508-09 (1964).

2. INT. REV. CODE OF 1954, § 4191. This section applies an excise tax to sales of business machines. The tax is collected by the seller directly from the purchaser.

filed a second refund claim for the period from June 1, 1955, to January 31, 1958. The Commissioner disallowed both refund claims, holding plaintiff liable for the excise tax for roughly the same period during which Remington Rand was relieved of the tax. The Court of Claims *held*, refund granted. The refusal of the Commissioner to exercise his power to limit the retroactive application of his ruling was, under the circumstances, an abuse of discretion. *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965).

Section 7805(b) of the Internal Revenue Code of 1954[3] was designed to reduce the hardship resulting from the mandatory retroactive tax collection by the Internal Revenue Service.[4] The statute was "intended to provide the Treasury with power to apply changes in position prospectively when in its discretion it wished to so limit the change."[5] It is now settled that the Commissioner can abuse his discretion,[6] and that whether he has done so is a question subject to judicial review.[7] Normally, abuse of discretion is found when a taxpayer is given a ruling and relies on it, only to have the ruling revoked retroactively.[8] Retroactive revocation can be extremely harmful in an excise tax situation, since an arbitrary excise tax ruling with retroactive effect can seriously injure a business by wiping out past profits.[9] Abuse of discretion may also be found when the Commissioner issues an arbitrary ruling which favors or injures certain taxpayers and

3. INT. REV. CODE OF 1954, § 7805(b): "Retroactivity of Regulations or Rulings—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

4. Section 506 the 1934 Act was the direct predecessor of § 7805(b) of the 1954 Code. Revenue Act of 1934, ch. 277, § 506, 48 Stat. 757. This act gave the Commissioner the power to limit the retroactive effect of rulings as well as regulations and Treasury decisions. "[I]n some cases the application of regulations, Treasury Decisions, and rulings to past transactions which have been closed by taxpayers in reliance upon existing practice, will work such inequitable results that it is believed desirable to lodge in the Treasury Department the power to avoid these results by applying certain regulations, Treasury Decisions, and rulings with prospective effect only." H.R. REP. No. 704, 73d Cong., 2d Sess. 38 (1934).

5. Lynn & Gerson, *supra* note 1, at 507.

6. See Automobile Club v. Commissioner, 353 U.S. 180, 185 (1957); Lesavoy Foundation v. Commissioner, 238 F.2d 589 (3d Cir. 1959).

7. Goodstein v. Commissioner, 267 F.2d 127 (1st Cir. 1959).

8. Lesavoy Foundation v. Commissioner, *supra* note 6.

9. See Exchange Parts Co. v. United States, 279 F.2d 251 (Ct. Cl. 1960). There is a great need for fair excise tax administration due to the tremendous competitive factors involved in passing the tax on to the ultimate consumer. If a company were to rely on a ruling, and not pass the tax on to the customer, and the ruling were revoked with retroactive effect, the tax for the period of reliance might be greater than the profit for the same period. Equality of treatment is also necessary in excise taxation, since exemption of one company would allow the company to undersell its competitors. See generally, Caplin, *supra* note 1, at 22-23.

not others who are in similar situations.[10] In *Automobile Club v. Commissioner*,[11] the Supreme Court indicated that the Commissioner can abuse his discretion under section 7805(b), but that since all the taxpayers in the case were treated equally, the acts of the Commissioner did not constitute an abuse of discretion.[12] Though the Court did not find an abuse of discretion, the opinion clearly recognized the importance of equality in taxation, and pointed out that the Commissioner could not use his power of revocation in a discriminatory or arbitrary manner.[13] The ideal of equality in taxation has been the basis for numerous tax refund suits.[14] In these cases, the success of the suit depended upon the Court's response to the Commissioner's reasons for treating similar taxpayers differently.[15] In *Exchange Parts Co. v. United States*,[16] the Commissioner revoked a prior ruling, and conditioned retroactivity on whether the taxpayer had previously been paying the tax. The Court of Claims decided that payment or non-payment was not a rational basis of classification, and that the ruling was discriminatory and therefore an abuse of discretion. The same classification was used by the Commissioner in *Connecticut Ry. & Lighting Co. v. United States*.[17] The court recognized the legality of the tax in question, but was not satisfied with the Commissioner's actions because they resulted in discrimination.[18] The Commissioner had applied different standards to identical tax-

10. Automobile Club v. Commissioner, *supra* note 6, City Loan & Sav. Co. v. United States, 177 F. Supp. 843 (N.D. Ohio 1959); *aff'd*, 287 F.2d 612 (6th Cir. 1961); Connecticut Ry. & Lighting Co. v. United States, 142 F. Supp. 907 (Ct. Cl. 1956).

11. 353 U.S. 180 (1957).

12. *Id.* at 186.

13. "On the contrary, it is clear from the language of the section . . . that Congress thereby confirmed the authority of the Commissioner to correct any ruling . . . retroactively, but empowered him, in his discretion, to limit retroactive application to the extent necessary *to avoid inequitable results.*" *Id.* at 184. (Emphasis added.)

14. See Exchange Parts Co. v. United States, *supra* note 9; Weller v. Commissioner, 270 F.2d 294 (3d Cir. 1959), *cert. denied*, 364 U.S. 908 (1960); Wolinsky v. United States, 271 F.2d 865 (2d Cir. 1959); City Loan & Sav. Co. v. United States, *supra* note 10; Connecticut Ry. & Lighting Co. v. United States, *supra* note 10.

15. If the court were satisfied that a valid distinction between the taxpayers existed, it would not consider the Commissioner's actions arbitrary or discriminatory. See Weller v. Commissioner, *supra* note 14. In *Weller v. Commissioner* the taxpayer never requested a ruling, and the court found that he had been treated equally with other taxpayers who had not been issued a ruling. In Arnold A. Schwartz, 40 T.C. 191 (1963), the taxpayer owned certain investment certificates which were similar to those declared non-taxable in an earlier case. He objected to the taxation of his certificates, while other certificates similar to his were not taxed. The court did not consider this discrimination because there was some distinction between the types of certificates.

16. *Supra* note 9.

17. *Supra* note 10.

18. "We think that the law in action cannot be so divorced from the law in the books as to make the latter applicable only to an occasional unfortunate who happened to pay his taxes on the basis of the law in the books." *Id.* at 909.

payers without a "rational basis for the difference."[19] In the great majority of the cases denying refunds sought on these grounds, the courts were able to see a rational and non-arbitrary basis for the distinction between taxpayers,[20] even though the taxpayers' situations were strikingly similar.[21] It has also been the policy of the courts to deny suits which involve reliance by one taxpayer on a private ruling issued to another.[22] Even though the taxpayers have been in similar situations,[23] mere reliance has not been enough to allow the courts to grant relief. In order to avoid the harsh results of arbitrary tax rulings, the courts have utilized three principal methods to prevent the Commissioner from asserting tax deficiences: (1) quasi-estoppel,[24] (2) abuse of discretion under section 7805(b),[25] and (3) discrimination.[26] While these methods have only minority support, it appears that the courts have grown more interested in equitable solutions to unfair tax rulings and are willing to study claims for refunds with the above-mentioned methods in mind.[27]

In the instant case, the court first determined that in specified areas

19. In the words of Mr. Justice Frankfurter: "The only reason urged in this case for holding the Commissioner bound to follow rulings of non-taxability which he considers inapplicable is respect for an overriding principle of 'equal' tax treatment. The Commissioner cannot tax one and not tax another *without some rational basis for the difference.*" United States v. Kaiser, 353 U.S. 299, 308 (1960). (Emphasis added.)

20. Wolinsky v. United States, *supra* note 14, is the exception. In this case the taxpayer had paid excise taxes while other taxpayers similarly situated had not. The Commissioner revoked the other taxpayers' private rulings prospectively, but would not allow any refunds. In this case, the taxpayer did not obtain knowledge of the ruling until shortly before its change by the Internal Revenue Service. The court, without clear explanation of its reasoning, concentrated on the lack of detrimental reliance by the taxpayer and ignored the possible question of discrimination. In *Wolinsky*, however, there was no negligence on the part of the Internal Revenue Service, nor any pattern of obvious, knowing discrimination.

21. Weller v. Commissioner, *supra* note 14; Arnold A. Schwartz, *supra* note 14; Goodstein v. Commissioner, 267 F.2d 127 (1st Cir. 1959).

22. See Hanover Bank v. Commissioner, 369 U.S. 672 (1962); Pomeroy Co-op. Grain Co. v. Commissioner, 288 F.2d 326 (8th Cir. 1961); Goodstein v. Commissioner, *supra* note 20.

23. Weller v. Commissioner, *supra* note 14; Arnold A. Schwartz, *supra* note 15.

24. See Schuster v. Commissioner, 312 F.2d 311 (9th Cir. 1962); Simmons v. United States, 308 F.2d 938 (5th Cir. 1962); Smale & Robinson, Inc. v. United States, 123 F. Supp. 457 (S.D. Cal. 1954). For a thorough discussion of quasi-estoppel, abuse of discretion, and discrimination, see Lynn & Gerson, *supra* note 1.

25. See Lesavoy Foundation v. Commissioner, *supra* note 6.

26. See Connecticut Ry. & Lighting Co. v. United States, *supra* note 10; City Loan & Sav. Co. v. United States, *supra* note 10.

27. Even in cases in which the court has denied relief—Weller v. Commissioner, *supra* note 14; Goodstein v. Commissioner, *supra* note 20—the courts examined the actions of the Commissioner carefully for arbitrary action, and indicate that if there had been discrimination or an abuse of discretion, the courts would have been more hesitant to rule in favor of the Commissioner.

of taxation,[28] Congress has adopted a strong policy of equality of taxation among "competitors or persons in the same or comparable situation."[29] When Congress has established a policy which demands equality, the courts are bound to give effect to the congressional mandate. The court pointed out that section 7805(b) obliges the Commissioner to use his discretion to avoid unequal treatment of taxpayers who are identically situated. The Commissioner must "consider the totality of the circumstances surrounding the handling down of a ruling—including the comparative or differential effect on the other taxpayers in the same class."[30] Secondly, the court found that the actions of the Commissioner did not satisfy the court's standard of fair tax administration. Since the Commissioner knew that his actions could in all probability result in competitive disadvantage to the plaintiff, he "was compelled to decide that the ruling given to IBM should be 'applied without retroactive effect' so as to place the two competitors on the same plane."[31] The Commissioner could not collect any of the taxes which Remington Rand had been excused from paying,[32] and could only equalize the situation by freeing the plaintiff from the same taxes for the same time period. Since the Commissioner failed to use the powers granted him under section 7805(b) to equalize the comparative tax burden, the court, after examining his previous discrimination, viewed this failure as an abuse of discretion. The typical situation in which the Commissioner is held to have abused his discretion occurs when a taxpayer relies on a personal, private ruling which is later retroactively revoked.[33] In the

28. The court indicated that Congress passed § 7805(b) as a mandate of fair treatment in the area of rules and regulations. The court reasoned that § 7805(b) is a direct congressional command to the Commissioner to make every effort to afford equal treatment to similar taxpayers. The court found that § 7805(b) has three consequences for those who seek rulings from the Internal Revenue Service: (1) The section is congressional authorization for the non-collection of past taxes which would otherwise be due under the substantive taxing provisions, (2) the Commissioner must consider the totality of circumstances in handing down a ruling, and (3) the Commissioner's discretion is subject to review. 343 F.2d at 919-20.

29. *Id.* at 919.

30. *Id.* at 920.

31. *Id.* at 923.

32. Revenue Act of 1926, ch. 27, § 1108(b), 44 Stat. (pt. 2) 114, states in relevant part: "No tax shall be levied, assessed, or collected under the provisions of Title VI of this Act on any article sold or leased by the manufacturer . . . if at the time of the sale or lease there was an existing ruling . . . holding that the sale or lease of such article was not taxable, and the manufacturer . . . parted with possession or ownership of such article, relying on the ruling. . . ." See generally Beaman, *How Much Reliance on a Revenue Ruling? Law Forbids Some Retroactive Revocations,* 13 J. TAXATION 22 (1960).

33. "Hence, abuse of discretion may be involved only if a taxpayer fully and honestly discloses a factual context; receives a letter ruling which purports to apply the law to the facts; relies upon the ruling to his detriment; and is damaged by an asserted retroactive revocation." Lynn & Gerson, *supra* note 1, at 509.

instant case, IBM was never issued a ruling upon which to rely prior to the 1957 notification, which merely confirmed the tax that had already been paid. Though there was no reliance on the part of IBM, the court viewed the power to limit retroactivity as the proper remedy for the previous discriminatory treatment. Since the Commissioner caused the injustice, it was his duty to remedy the situation. His failure to issue a prompt ruling, when combined with the gentle treatment accorded Remington Rand, set up a pattern of discrimination which the court refused to accept. The concept that one taxpayer cannot rely on a private ruling issued to another was not important to the court because IBM had not tried to rely on the ruling issued to Remington Rand, and had requested its own ruling on identical subject matter. The plaintiff had a right, according to the court, to receive a ruling, and the Commissioner had the duty to act in the light of the Congressional policy of equality. His subsequent failure to act was contrary to the tax policy established by Congress, and constituted an abuse of the discretion granted by Congress under section 7805(b). The principles of fair tax administration demanded that the court afford IBM the relief which it was granted.[34]

The decision should prove a valuable aid in assuring equitable tax administration and in eliminating competitive advantages which the Internal Revenue Service may inadvertently create. In the court's opinion, principles of equality, when established by Congress, outweigh any arguments concerning the practical administrative problems of the Internal Revenue Service.[35] This appears to be the trend, and this trend will have a beneficial effect by instilling in the public a greater sense of confidence in the fairness of the tax system. This case may appear to be an opening in the court's policy of refusing to allow reliance by one taxpayer on another taxpayer's private ruling. Actually, the court ignored this narrow point and viewed the problem in the light of the public policy that a fair tax system must strive to correct its own mistakes and provide equality of treatment, with judicial control acting as a remedy for administrative caprice. In the words of the court, "curbing tax collection in the interest of equality, where Congress has so decreed, is as much a part of the internal revenue laws as the affirmative exaction of taxes."[36]

34. See Caplin, *supra* note 1, for his discussion of the advantages of tax rulings.

35. For the viewpoint of the Internal Revenue Service concerning mandatory rulings, see *id.* at 8-9.

36. 343 F.2d at 919.

Taxation—Federal Income Taxation—Attorneys' Fees Incurred in the Unsuccessful Defense of a Criminal Prosecution Deductible Under Section 162

The taxpayer, engaged in the business of underwriting public stock offerings, was convicted of violating the fraud section[1] of the Securities Act of 1933. He subsequently claimed that the legal fees incurred in his unsuccessful defense were "ordinary and necessary"[2] business expenses and therefore deductible from his gross income. The Commissioner disallowed this deduction, and his ruling was sustained by the Tax Court.[3] On appeal, *held* en banc, reversed. Attorneys' fees incurred in the unsuccessful defense of a criminal prosecution arising out of the conduct of a business are deductible as ordinary and necessary business expenses under section 162 of the Internal Revenue Code. *Tellier v. Commissioner*, 342 F.2d 690 (2d Cir. 1965).

In the leading case of *Commissioner v. Heininger*[4] the Supreme Court held that legal fees incurred in unsuccessfully defending against a civil fraud order forbidding the taxpayer's business from using the mails were deductible under section 162 as "ordinary and necessary," since, regardless of the trial's outcome, taxpayer's response to the threat to his business was that ordinarily to be expected.[5] The Court added that it would not allow the deduction if to do so would frustrate a sharply defined public policy of the state or federal government. It concluded, however, that the primary policy of the fraud order statute was to protect the public rather than punish violators.[6] While *Heininger* makes it certain that the deductibility of legal fees incurred in *civil* actions arising out of a taxpayer's trade or business is not affected by the taxpayer's success in that suit, all federal courts of appeal[7] have long held that legal fees incurred in the defense of a *criminal* prosecution arising out of the taxpayer's trade or business are not deductible unless the taxpayer is successful in his defense.[8] Two reasons have been advanced for denying deductibility where the

1. 48 Stat. 84 (1933), 15 U.S.C. § 77q(a) (1964).
2. INT. REV. CODE OF 1954, § 162.
3. Walter F. Tellick, 22 CCH Tax Ct. Mem. 1062, 1069 (1963).
4. 320 U.S. 467 (1943).
5. *Id.* at 472.
6. *Id.* at 474.
7. The Supreme Court has never ruled specifically on the deductibility of legal fees incurred in the defense of a criminal prosecution.
8. Thomas A. Joseph, 26 T.C. 562 (1956); Estate of Albert E. MacCrowe 14 CCH Tax Ct. Mem. 958 (1955); Union Packing Co., 14 CCH Tax Ct. Mem. 1188, 1209 (1955); C. W. Thomas, 16 T.C. 1417 (1951). No distinction has been made between unlawful businesses and lawful businesses unlawfully conducted, attorneys' fees for the unsuccessful defense being held nondeductible in all instances.

defense was unsuccessful: that expenses occasioned by unlawful activities are avoidable and therefore not "ordinary and necessary" in the conduct of a business,[9] and that allowing a deduction for such expenses would be contrary to public policy because it would give governmental sanction to illegal acts.[10] Such a disallowance of legal expenses has been criticized by numerous commentators on the ground that in *Heininger* the Supreme Court said nothing to warrant a distinction between civil and criminal litigation expenses; it held simply that litigation expenses are deductible unless their deduction would frustrate sharply defined governmental policies. Thus, it has been urged that the deductibility of litigation expenses be determined by whether they frustrate "sharply defined governmental policies," without distinction between civil and criminal cases.[11]

The principal case is the first in any circuit which has actually allowed a deduction for legal expenses incurred in an unsuccessful criminal defense.[12] The court noted first that section 162 allows deduction of "all the ordinary and necessary expenses . . . incurred . . . in carrying on any . . . business . . ." There is nothing in the statute which dictates or even suggests that because an expense is incurred in an unsuccessful criminal defense it cannot be an "ordinary and necessary" expense.[13] In the Senate debate the object of the bill was explained to be "to tax . . . what . . . [a man] . . . has at the end of the year after deducting from his receipts his expenditures or losses . . . not to reform men's moral character."[14] The court also noted that in *Heininger* the deduction allowed was for the unsuccessful defense of a civil fraud action, contending that there was no essential difference between that situation and the one at bar, in which the legal fees were incurred in an unsuccessful criminal defense.[15] Finally, the court reasoned that to deny the deductibility of the legal fees of an unsuccessful criminal defense would itself be contrary to public policy since it would discourage the hiring of counsel in defense against a criminal charge. In fact, the court noted that it is highly doubtful whether such a policy could exist in the face of the sixth

9. See, *e.g.*, National Outdoor Advertising Bureau, Inc. v. Helvering, 89 F.2d 878, 880-81 (2d Cir. 1937).

10. See, *e.g.*, Burroughs Bldg. Material Co. v. Commissioner, 47 F.2d 178 (2d Cir. 1931).

11. See, *e.g.*, Brookes, *Litigation Expenses and the Income Tax*, 12 TAX L. REV. 241 (1957); Keesling, *Illegal Transactions and the Income Tax*, 5 U.C.L.A.L. REV. 26 (1958); Comment, 72 YALE L.J. 108, 132-36 (1962). It has also been suggested that the disallowance of criminal litigation expenses actually frustrates the policy of the sixth amendment's guarantees of the assistance of counsel in all criminal prosecutions.

12. Tellier v. Commissioner, 342 F.2d 690 (2d Cir. 1965).

13. *Id.* at 692-93.

14. 50 CONG. REG. 3849 (1913).

15. *Supra* note 12, at 693-94.

amendment's guarantee of the right to counsel.

It is submitted that the instant opinion is correct in surmising that the Supreme Court will eventually hold that section 162 requires that attorneys' fees incurred in the unsuccessful defense of criminal prosecutions arising out of business transactions be deductible. Section 162 does state that all ordinary and necessary business expenses are deductible, and gives no indication that legal fees incurred in criminal defenses are not "ordinary and necessary." In truth, no real distinction has been shown between legal fees incurred in a *Heininger*-type civil suit and those incurred in a criminal action, and therefore it would seem that *Heininger* will require deductibility. Surely the Congress did not enact the Internal Revenue Code for the purpose of stifling economic activity. If a taxpayer could reasonably believe his business activities to be lawful, should he be penalized because that belief is tested in a criminal case rather than a civil case? It would seem not. An affirmative answer is seriously undercut by the coexistence of civil and criminal remedies dealing with essentially the same conduct, in such diverse fields as libel, antitrust and fraud. The converse of this is obvious: No deduction should be allowed where there could be no reasonable belief in the lawfulness of the conduct, whether tested in a civil or a criminal action. Finally, while it is to some extent true, that the allowance of the deduction results in a governmental subsidy of crime, it is also true that to disallow the deduction would frustrate the sixth amendment's guarantee of right to counsel. Indeed, does allowing the deduction subsidize crime any more than providing counsel to indigent defendants?

Torts—Government Tort Immunity—Statement of a Cause of Action for Injuries Resulting From Assault by Police Dog

Plaintiff, an innocent bystander, sued the District of Columbia for injuries sustained when he was attacked by an unleashed, unmuzzled police dog, which had been released by a police officer to capture a fleeing house breaker. The District pleaded that the operation of the police department was a governmental function, and thus the doctrine of sovereign immunity barred the plaintiff's action. The lower court on this ground granted summary judgment to the District. On appeal, *held*, reversed. The plaintiff has stated a cause of action and he should be permitted to develop the question of whether the District of Columbia, as proprietor of a vicious dog, had taken reasonable precautions to prevent his injuries. *Harbin v. District of Columbia*, 336 F.2d 950 (D.C. Cir. 1964).

The doctrine of sovereign immunity has undergone a process of constant, but slow disintegration. The first assault upon the doctrine was the judicial distinction made between the public and proprietary functions of the municipal corporation.[1] The courts generally recognize that a municipal corporation is not liable to respond in damages for the negligence of its officers, agents or employees when they are acting in the discharge of public or governmental functions,[2] including those which relate to education, health, public charities and the protection of persons and property.[3] The municipal corporation, however, is generally held liable when injury results in the performance of a proprietary function.[4] Proprietary functions are those from which the municipality derives a substantial revenue, such as the furnishing of water, light, power and transportation to its inhabitants.[5] This distinction, while it has afforded a remedy to innocent sufferers, has also led to results often confusing, frequently incongruous,[6] and at times absurd.[7] The maintenance and operation of a municipal police department is universally recognized as a governmental function.

1. See generally Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97 (1932).
2. 18 McQUILLEN, MUNICIPAL CORPORATIONS §§ 53.23-.59 (3d ed. 1950).
3. PROSSER, TORTS § 125 (3d ed. 1964).
4. 18 McQUILLEN, *op. cit. supra* note 2.
5. PROSSER, *op. cit. supra* note 3.
6. *Compare* Mocha v. Cedar Rapids, 204 Iowa 51, 214 N.W. 587 (1927) (operation of bathing beach is governmental function), *with* Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939) (operation of swimming pool is a proprietary function).
7. See, *e.g.*, Pleasants v. City of Greensboro, 192 N.C. 820, 135 S.E. 321 (1926) (dependent on purpose for which plaintiff entered the building).

Thus, in the absence of a statute,[8] ordinarily no liability is imposed on the municipality for the torts of its law enforcement officers acting in the line of duty. The immunity has been held to extend to an unjustifiable assault and battery[9] and to negligent police administration of the jails.[10] Some courts have created an exception to the rule, permitting actions to be maintained where the municipality has retained a policeman known to be unsuited for his work,[11] or where there has been inadequate training of a policeman in the use of firearms.[12] Two fairly recent decisions have imposed liability for the failure to protect a police informer[13] and for the suffocation of a prisoner due to the negligence of the jailer.[14]

In the instant case the court stated that the general rule of sovereign immunity for governmental functions still applied, and remarked that its abolition is not to be undertaken by the judicial branch.[15] However, the court looked at two statutes which the lower court had failed to consider, one of which imposed liability on an owner for injuries caused by his dog,[16] and the other of which provided that the District stands in the shoes of a private individual as to the compromising of claims against the District, irrespective of the

8. See, *e.g.*, N.Y. Ct. Cl. Act § 8: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. . . ." The courts of New York have applied this waiver of immunity to all its agencies and political subdivisions. Another example is the Illinois statute which provides for the indemnification of policemen by municipalities for judgments recovered as a result of injuries to third persons, except when the injuries result from the policemen's "wilful misconduct." Ill. Ann. Stat. ch. 24, § 1-4-5 (Smith-Hurd 1962). For a complete summary of all the states, see Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. Rev. 1363 (1954).

9. McSheridan v. City of Talladega, 243 Ala. 162, 8 So. 2d 831 (1942); Craig v. City of Charleston, 180 Ill. 154, 54 N.E. 184 (1899); Brown v. City of Shreveport, 129 So. 2d 540 (La. App. 1961); Simpson v. Poindexter, 241 Miss. 854, 133 So. 2d 286 (1961). See Shapo, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. Miami L. Rev. 475 (1963).

10. Evans v. City of Kankakee, 231 Ill. 223, 83 N.E. 223 (1907) (prisoner put with carriers of smallpox); Gentry v. Town of Hot Springs, 227 N.C. 665, 44 S.E.2d 85 (1947) (negligence in connection with a jail that burned with prisoners inside); Valdez v. Amaya, 327 S.W.2d 708 (Tex. Civ. App. 1959) (failure to provide needed medical attention).

11. McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947).

12. McAndrew v. Mularchuk, 56 N.J. Super. 219, 152 A.2d 372 (1959).

13. Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534 (1958). It must be remembered that New York has waived immunity by statute. See note 8 *supra*.

14. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). In this case, the Florida Supreme Court overruled a long line of contrary precedent.

15. 336 F.2d at 952.

16. D.C. Code Ann. § 47-2005 (1961) provides that any person owning a dog "shall be liable in a civil action for any damage done by said dog to the full amount of the injury inflicted."

performance of a governmental function.[17] By treating the District as the proprietor of the dog, the court found the District subject to liability within the meaning of the first statute. The court supported this conclusion by referring to the second statute which permits the District to compromise claims that can be brought either under a statute, such as the "dog statute," or on the authority of previously decided cases. The court felt that since the District had adopted the use of trained police dogs as a means of apprehending fugitives, there was a duty upon it to control those means. Since the District had permitted a vicious dog to go unleashed, the plaintiff should have been given the opportunity to show that reasonable precautions were not taken.[18] In a separate concurring opinion, Circuit Judge Washington stated that he did not think that the doctrine of sovereign immunity should be applied to non-human agencies, and that the District should be liable for the injuries resulting from the use of an inherently dangerous instrumentality. While conceding that trained police dogs can be a valuable asset to the police department, he felt that if proper training and precautions were not taken, the dogs could create a nuisance by injuring innocent persons.[19]

The instant decision is another in a growing series of opinions reflecting the view that the doctrine of sovereign immunity should be discarded as a relic of the past.[20] While this court refused to abolish the doctrine, it was able to seize upon two statutory provisions by which it could conclude that liability should be imposed on the District as the proprietor of the dog.[21] The court avoids stating forthrightly that the doctrine of sovereign immunity for governmental functions will no longer bar this sort of action; rather, it seems to imply that the maintenance of trained police dogs is a proprietary function. Even if there is no statute, the negligent performance of a proprietary function has long been held to result in liability. The majority opinion, and more explicitly the concurring opinion, seems

17. D.C. CODE ANN. § 1-902 (1961) authorizes the Commissioners to settle claims asserted against the District of Columbia whenever the cause of action "Arises out of negligence or wrongful act, either of commission or omission of any officer or employee of the District of Columbia for whose negligence or acts the District of Columbia, if a private individual, would be liable prima facie to respond in damages, irrespective of whether such negligence occurred or such acts were done in the performance of a municipal or a governmental function of said District. . . ."

18. 336 F.2d at 953.

19. *Ibid.*

20. A citation of cases would be futile, therefore the reader is directed to a few of the leading articles which describe the injustice of the doctrine. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924); (pt. VI), 36 YALE L.J. 1 (1926); (pt. VII), 28 COLUM. L. REV. 577 (1928); Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921); Tooke, *supra* note 1.

21. D.C. CODE ANN. §§ 1-902, 47-2005 (1961).

to premise its decision on the theory of nuisance, a well-recognized exception to the doctrine of sovereign immunity,[22] by stating that the benefit to be derived from the use of trained police dogs might be overcome by the possibility of serious injury to members of the public if reasonable precautions are not taken. As in many other cases, the court's attempt to find a nuisance is actually based upon nothing more than negligence, for which the municipality is not liable.[23] In the maintenance and operation of non-human agencies, the court has, by declining the opportunity to strike down the barrier of immunity in toto, created another tenuous classification which is typical of this area of the law.[24]

The doctrine of sovereign immunity has been in effect for over a century and a half, and with such impressive authority facing them, courts are naturally reluctant to overturn this well-entrenched rule. Furthermore, most courts feel that overruling this authority is tantamount to "judicial legislation." Such reluctance is not entirely without justification, for when sovereign immunity is abolished by the judiciary, questions relating to the extent and basis of liability are left unanswered. Of real concern if liability is extended to all municipal agencies, is the problem of what is to be done about injuries arising from the negligent performance of "discretionary" functions? This is a principal fear of the municipality—that the discretionary acts of its officials will be subject to examination by the judiciary, a result which could adversely affect the proper performance of their duties.[25] Undoubtedly, however, the chief concern of the municipality is the heavy burden that might be imposed upon the public treasury if immunity is abolished. In light of these two overriding interests of the municipality on the one hand, and on the other the obvious injustice inherent in the doctrine of sovereign immunity and the reluctance of courts to abrogate it, various legislative solutions have been proposed. The use of liability insurance,[26] for example, would necessitate statutory authorization since the majority of courts have held that the purchase

22. See PROSSER, *op. cit. supra* note 3; MCQUILLEN, *op. cit. supra* note 2.

23. The origin of the theory seems to be that the creation of a private nuisance amounted to a taking of land without compensation, or that the city, as landowner, was necessarily a proprietor and subject to the responsibilities of one toward other landowners. The futile attempts to distinguish between nuisance and negligence have caused considerable confusion among courts. See PROSSER, *op. cit. supra* note 3.

24. These tenuous distinctions have been vigorously attacked by Professor Edwin Borchard. See authorities cited in notes 1 & 19 *supra.*

25. A critical view of this argument is taken in 7 DUKE L.J. 142 (1958). "It is at least arguable that such a doctrine might rather tend to insure a more circumspect performance of duties and an increased selectivity and training of municipal employees." *Id.* at 146.

26. See Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government,* 8 DUKE L.J. 588 (1959).

of liability insurance without this authorization is ultra vires and a wasteful dissipation of public funds.[27] A second suggestion is legislative action establishing a rule of tort liability against the municipality but limiting recovery to pecuniary loss. To effectuate this legislation, a well-formulated plan of administrative settlement of tort claims has been proposed.[28] If the boards which would be set up under such a plan were efficiently administered, they could save both the time and expense that result from bickering over these claims and the question of immunity. A properly functioning administrative board could also, by the speedy disposition of "nuisance suits," prevent their interfering with governmental functions. A third alternative would be a statutory enactment similar to the Federal Tort Claims Act,[29] by which a maximum amount could be set for injuries to person and property. As in the Federal Tort Claims Act, the statute should expressly exclude the municipality from liability for the intentional torts of its officers, agents and employees.[30] The statute should also exclude "discretionary" functions, as does the federal statute, because many situations can be contemplated where a municipal officer has to act with alacrity, and his judgment, if at all reasonable, should not be subject to subsequent judicial scrutiny. With the ever-increasing activities of municipal corporations it is not unreasonable to say that the settlement of tort claims is a necessary expenditure of municipal funds. The remote possibility of a heavy drain on the public treasury is not a sufficient argument to deny redress for injuries inflicted upon innocent citizens. The doctrine of sovereign immunity can not be squared with our modern sense of justice, and while it is preferable

27. Hartford Acc. Indem. Co. v. Wainscott, 41 Ariz. 439, 19 P.2d 328 (1933); Burns v. American Cas. Co., 127 Cal. App. 2d 198, 273 P.2d 605 (1954); Adams v. City of New Haven, 131 Conn. 552, 41 A.2d 111 (1945); Adkins v. Western & So. Indem. Co., 117 W. Va. 541, 186 S.E. 302 (1936).

28. Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).

29. 28 U.S.C. §§ 1346, 2680 (1964). The claims authorized are for a "negligent or wrongful act or omission" of employees acting within the scope of their governmental employment. The act specifically excludes acts done in connection with "discretionary" functions. It also excludes a list of intentional torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Professor Edwin Borchard has drafted a model statute along similar lines. Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A.J. 747, 752, 793-94 (1934). See generally Antieau, *Statutory Expansion of Municipal Tort Liability*, 4 ST. LOUIS U.L.J. 351 (1957); Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963).

30. Admittedly, such an exclusion could still work hardship on an injured plaintiff; for even though he will still have a cause of action against the individual, it may prove difficult to collect a judgment.

that the legislature act, the courts should not be reluctant to act if the legislature fails to do so.[31]

31. The doctrine of sovereign immunity is of judicial origin. Russell v. Men of Devon, 2 Term. Rep. 667, 100 Eng. Rep. 359 (K.B. 1788). Thus, it has been argued that the judiciary is competent to abolish the doctrine. The argument of judicial abrogation was made to the California Supreme Court in Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961), and was accepted. It would seem, however, that once the courts begin to abrogate sovereign immunity, the legislatures, heretofore slow to act, will undoubtedly be prompted to define the scope of liability and limit the amonnt of recovery.