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Recent Case Comments

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RECENT CASE COMMENTS

Conflict of Laws–Full Faith and Credit–Prior Conflicting Divorce Decrees

This was an attack in Nevada on a Nevada divorce. A Nevada ex parte divorce was entered against the petitioner, a Maryland domiciliary.[1] Later, in a Maryland divorce proceeding, in which the petitioner's wife personally appeared, the court found that she had not been a bona fide domiciliary of Nevada and granted the petitioner a divorce *a mensa et thoro*.[2] Subsequently, the petitioner commenced the present Nevada action to vacate and set aside the Nevada divorce.[3] On appeal to the Nevada Supreme Court from a summary judgment of the Eighth Judicial District Court of Nevada declaring the Nevada divorce null and void,[4] *held*, reversed. The complaint does not state a claim for relief amounting to extrinsic fraud nor is a claim for relief stated under the Uniform Declaratory Judgment Act; in addition, the subsequent Maryland divorce is not entitled to full faith and credit, for the Nevada divorce was a final and conclusive determination of the marital status of the parties in Nevada. *Colby v. Colby*, 369 P.2d 1019 (Nev.), *cert. denied*, 371 U.S. 888 (1962).

The decisions of the Supreme Court of the United States in the two cases of *Williams v. North Carolina*[5] have provided the foundation for the recognition of ex parte divorces in foreign states.[6] The first *Williams* case established the principle that an ex parte divorce granted by the domiciliary state of only the plaintiff is entitled to full faith and credit in foreign states.[7] The second *Williams* case held that

1. The petitioner's wife had met the statutory requirements for residence under NEV. REV. STAT. § 125.020 (1961). "Divorce from the bonds of matrimony may be obtained . . . . (e) If the plaintiff shall have resided 6 weeks in the state before suit be brought."

The petitioner was personally served in Maryland pursuant to NEV. RULES C.P. 4(e)(2), but did not appear in the Nevada proceedings.

2. Colby v. Colby, 217 Md. 35, 141 A.2d 506 (1958).

3. Prior to the commencement of the second Nevada action, the petitioner sought to have his marital status determined in a Florida declaratory judgment action. The action was dismissed, for declaratory relief is not available to adjudicate rights of parties who have obtained a previous determination of their rights. Colby v. Colby, 120 So. 2d 797 (Fla. App. 1960).

4. Colby v. Colby, 369 P.2d 1019, 1020 (Nev. 1962).

5. This case involved two Supreme Court decisions, 317 U.S. 287 (1942) (full faith and credit) and 325 U.S. 226 (1945) (determination of domicile).

6. Sumner, *Full Faith And Credit For Divorce Decrees–Present Doctrine And Possible Changes*, 9 VAND. L. REV. 1 (1955).

7. Williams v. North Carolina, 317 U.S. 287 (1942).

a second state may determine whether the plaintiff was actually domiciled in the state granting the divorce;[8] if he was not, the second state need not grant full faith and credit to the divorce.[9] On the other hand, a defendant is precluded from attacking the basis of jurisdiction (domicile)[10] if he personally appeared.[11] The question (as in the instant case) of the inter partes effect of an earlier ex parte divorce on a subsequent divorce, where both parties appeared, has not been determined by the Supreme Court. In an analogous situation involving two conflicting judgments, it was held in *Treinies v. Sunshine Mining Co.* that the latest judgment in time is entitled to full faith and credit.[12] *A fortiori,* a subsequent divorce, in which both parties appeared, overrides an earlier ex parte divorce and is entitled to full faith and credit.[13]

Though the Nevada court dismissed the petitioner's complaint for failure to state a claim for relief based on either extrinsic fraud or the Declaratory Judgment Act, the question of conflicting divorces was avoided, for Nevada said that its courts were not competent[14] because Nevada had previously determined the marital status of the parties

8. "[T]he decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact." Williams v. North Carolina, 325 U.S. 226, 232 (1945).

9. Williams v. North Carolina, 325 U.S. 226 (1945).

10. See, *e.g.,* GOODRICH, CONFLICT OF LAWS §§ 128-29 (3d ed. 1949); LEFLAR, CONFLICT OF LAWS §§ 162-63 (1959); Summer, *supra* note 6.

11. Sherrer v. Sherrer, 334 U.S. 343 (1948). "It is one thing to recognize as permissible the judicial re-examination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in *ex parte* proceedings. It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated." *Id.* at 355-56. See Davis v. Davis, 305 U.S. 32 (1938); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); Pratt v. Miedema, 311 Mich. 64, 18 N.W.2d 279, *cert. denied,* 326 U.S. 739 (1945); Norris v. Norris, 200 Minn. 246, 273 N.W. 708 (1937).

12. Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Garden Suburbs Golf Club v. Murrel, 180 F.2d 435 (5th Cir.), *cert. denied,* 340 U.S. 822 (1950); California Bank v. Traeger, 215 Cal. 346, 10 P.2d 57 (1932); Johnson v. Johnson, 199 Md. 520, 86 A.2d 520 (1952) (application of the *Treinies* principle in a divorce case); Ambatielos v. Foundation Co., 203 Misc. 470, 116 N.Y.S.2d 641, 648 (Sup. Ct. 1952); RESTATEMENT, JUDGMENTS § 42 (1942), "Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties"; 2 FREEMAN, JUDGMENTS § 629 (5th ed. 1925). *Contra,* Hammell v. Britton, 19 Cal. 2d 72, 119 P.2d 333 (1941); Marthin Bros. Box Co. v. Fitz, 228 Iowa 482, 292 N.W. 143 (1940); Kessler v. Fauguier Nat'l Bank, 195 Va. 1095, 81 S.E.2d 440, *cert. denied,* 348 U.S. 834 (1954).

13. New York has applied the *Treinies* principle in a case similar to the present case. Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748 (1951). *Cf.* Johnson v. Johnson, 199 Md. 520, 86 A.2d 520 (1952).

14. Colby v. Colby, 369 P.2d 1019 (Nev. 1962). Subject to constitutional limitations, a state has the legal power to determine the competence of its courts; thus it is questionable whether Nevada had to entertain this action.

in Nevada. By dicta, the Nevada Supreme Court refuted the petitioner's full faith and credit argument and rejected the *Treinies* principle.[15] Implicit in the court's rationale is the principle that a Nevada divorce is based on something less than domicile—a principle that has not been passed on by the Supreme Court, though the problem has been mentioned several times.[16]

The decision of the Nevada court is unfortunate, for the purpose of litigation is to adjudicate the controversy between the litigants. The Nevada court, by refusing to follow the *Treinies* principle, has not determined the effect of the Maryland divorce on the earlier ex parte divorce of Nevada, but has continued the controversy.[17] The application of the *Treinies* principle in this action would: (1) encourage the successful litigant in the first action to plead his judgment as a defense in the second action; (2) promote uniformity of judgments among the neighboring states; and (3) clarify the litigants' status.

Conflict of Laws—Tax Claims of One State Held Not Enforceable in Another State

Plaintiff, a municipality in Pennsylvania, assessed a tax deficiency against defendant and gave him notice of it pursuant to provisions of a municipal ordinance.[1] Defendant did not appeal from the assessment within the time prescribed by the ordinance,[2] and subsequently

15. Colby v. Colby, 369 P.2d 1019, 1023 (Nev. 1962). The petitioner's full faith and credit argument was predicated on Sutton v. Leib, 342 U.S. 402 (1952), where the petitioner, Sutton, divorced the respondent, Leib, in Illinois, after which the petitioner married Henzel, who had on the day of marriage obtained a Nevada divorce from his wife. Thereafter New York, in a separate proceeding brought by Henzel's wife, declared Henzel's Nevada divorce null and void; then, the petitioner's marriage to Henzel was annulled in a subsequent New York proceeding in which Henzel personally appeared. Later, the petitioner brought an action to collect alimony, pursuant to the Illinois divorce decree, in a federal court. Subsequently, on certiorari in the Supreme Court, it was held that the New York decree annulling the Nevada marriage was entitled to full faith and credit throughout the Nation, although Illinois law will determine the question of alimony. Sutton v. Leib was distinguished from the present case in that the Supreme Court did not say that the Nevada divorce was invalid in Nevada and the marital status of Mrs. Leib was never determined in Nevada. Colby v. Colby, 369 P.2d 1019, 1022, 1023 (Nev. 1962).

16. See LEFLAR, CONFLICT OF LAWS § 163 (1959).

17. See note 11 *supra*.

1. PHILADELPHIA, PA. CODE OF GENERAL ORDINANCES, ch. 9-601, subd. (4) chapter 19-1200 required parties in defendant's business, operation of parking lot, to obtain a license and file monthly gross receipts returns on which a 10% tax was to be paid. An audit by the city disclosed that defendant's actual receipts exceeded his reported returns.

2. *Id.* § 19-1702, allowed defendant 60 days for appeal of the assessment.

moved to New York. Plaintiff brought this action in a New York state court for the collection of the tax. The trial court dismissed the complaint and the appellate division affirmed.[3] On appeal to the Court of Appeals of New York, *held,* affirmed. The courts of one state are not required by full faith and credit nor by principles of conflict of laws to enforce tax claims of a sister state. *City of Philadelphia v. Cohen,* 11 N.Y.2d 401, 184 N.E.2d 167 (1962), *cert. denied,* 83 Sup. Ct. 306 (1963).

The traditional rule that one state will not enforce taxes due another state is derived from eighteenth century English dicta in cases involving not collection of taxes, but enforcement of private contracts where violation of a revenue law was rejected as a defense.[4] The rule was transplanted to the United States without considering whether the economic and international policies prompting its adoption in England were applicable among states that form a single economic and political unit.[5] The rule, though still applied in England,[6] has begun to recede in the United States under attack on three fronts: common law principles of intranational conflict of laws,[7] reciprocity statutes,[8] and constitutional full faith and credit requirements.[9] Al-

3. City of Philadelphia v. Cohen, 15 App. Div. 2d 464, 222 N.Y.S.2d 226 (1961).

4. In Boucher v. Lawson, 1 Cases T. Hard. 85, 95 Eng. Rep. 53 (K.B. 1734), plaintiff sued on a private contract to recover gold smuggled out of Portugal in contravention of Portugal's tariff laws. In rejecting the defense of *participis criminis,* Hardwick by dictum first stated the rule. *Accord,* Holman v. Johnson, 1 Cowp. 342, 98 Eng. Rep. 1120 (K.B. 1775); Planche v. Fletcher, 1 Doug. 251, 99 Eng. Rep. 164 (K.B. 1779). For contemporary criticism of the rule see 3 KENT, COMMENTARIES 434, 435 (14th ed. 1896). For more modern criticisms see, *e.g.,* Freeye, *Extraterritorial Enforcement of Revenue Laws,* 23 WASH. U.L.Q. 321 (1937).

5. See, *e.g.,* Ludlow v. Van Rensselear, 1 Johns. R. 94 (N.Y. 1806); Henry v. Sargeant, 13 N.H. 321, 40 Am. Dec. 146 (1843) (rule stated in dictum); Maryland v. Turner, 75 Misc. 9, 132 N.Y. Supp. 173 (App. Div. 1911) (first application of rule). The case of Colorado v. Harbeck, 232 N.Y. 71, 133 N.E. 357 (1921) is cited as controlling authority in New York, but the rule is only one of five possible grounds for the holding; for discussion of possible holdings see 25 ST. JOHN'S L. REV. 341, 344 (1951). In City of Detroit v. Procter, 44 Del. 193, 61 A.2d 412 (1948), the court said: "Michigan's sovereignty is as foreign to Delaware as Russia's." 61 A.2d at 416. *Contra,* J. A. Holshouser Co. v. Gold Hill Copper Co., 138 N.C. 248, 50 S.E. 650 (1905).

6. See, *e.g.,* Government of India v. Taylor, [1955] A.C. 491.

7. See, *e.g.,* Ohio *ex rel.* Duffy v. Arnett, 314 Ky. 403, 234 S.W.2d 722 (1950) (reciprocity statute immaterial). In State *ex rel.* Oklahoma Tax Comm'n v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919 (1946), the court examined the reasons for the rule and found them inapplicable to the modern United States. See Roesken, *Out-of-State Tax Collection,* 27 TAXES 955 (1949); *cf.* Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918), where the court said: "The courts are not free to refuse to enforce a foreign right at pleasure of judges . . . . They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." 120 N.E. at 202.

8. *E.g.,* State *ex rel.* Oklahoma Tax Comm'n v. Neely, 225 Ark. 230, 282 S.W.2d 150 (1955); *cf.* City of Detroit v. Gould, 12 Ill. 2d 297, 146 N.E.2d 61 (1957).

9. Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935) (judgment for taxes within full faith and credit); City of New York v. Shapiro, 129 F. Supp. 149 (D.

though enforcement of tax claims appears warranted by conflict of laws principles and should be accorded treatment similar to other causes of action,[10] courts adhering to the rule treat a revenue law as similar to a penal law or as being violative of public policy.[11] Twenty-two states have in part dealt with the problem by enacting reciprocity statutes.[12] A broader method of attack is the claim that under the Constitution[13] "full faith and credit" must be given the tax statutes and administrative determinations of the taxing state. Although article IV section 1 makes no distinction between judgments and public acts, the latter stand on less well established ground. The Supreme Court has held that a judgment for taxes is entitled to full faith and credit but has expressly left open the question whether a tax statute is so protected.[14] The question whether an administrative determination of tax liability is complete enough to be considered a judicial proceeding or a record within full faith and credit is also an open one, although a federal district court has so held,[15] and the Supreme Court

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Mass. 1954) (administrative determination of taxes within "full faith and credit"); *cf.* Massachusetts v. Missouri, 308 U.S. 1 (1939) (dictum); Hughes v. Fetter, 341 U.S. 609 (1951).

10. Various types of state statutes enjoy extraterritorial application by conflict of laws principles; there appears to be no legitimate reason for distinguishing between an action by a state on a tax statute and an action by an individual on a right founded on a state statute. See, *e.g.*, Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927); Loucks v. Standard Oil Co., *supra* note 7; Comment, 47 MICH. L. REV. 796 (1949).

11. Judge Learned Hand concurring in Moore v. Mitchell, 30 F.2d 600 (2d Cir. 1929), *aff'd on other grounds*, 281 U.S. 18, (1930), said, "To pass upon the provisions for the public order of another state . . . should be, beyond the powers of a court; it involves the relations between the states themselves . . . . It may commit the domestic state to a position which would seriously embarrass its neighbor." 30 F.2d at 604. See Note, 41 ILL. L. REV. 439 (1946) for a list of standard justifications for the rule. For criticism of these justifications see State *ex rel.* Oklahoma Tax Comm'n v. Rodgers, *supra* note 7; Lefler, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 203, 204 (1932); Comment, 47 MICH. L. REV. 796 (1948); 46 COLUM. L. REV. 1013 (1946).

12. For a list of the states see 23 STATE TAX REVIEW, No. 38, p. 1 (Sept. 17, 1962).

13. U.S. CONST. art. IV, § 1; "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The implementing legislation, 28 U.S.C. § 1738, 1739 (1958), brings "nonjudicial records and books" within the scope. For discussion that this is the framework for a national conflict of laws rule see Cheatham, *A Federal Nation and Conflict of Laws*, 22 ROCKY MT. L. REV. 109 (1949); Note, 30 N.Y.U.L. REV. 984 (1955). See also Daum, *Interstate Comity and Governmental Claims*, 33 ILL. L. REV. 249 (1938).

14. Milwaukee County v. M. E. White Co., *supra* note 9. *But see* Hughes v. Fetter, *supra* note 9 (statute within full faith and credit); Bradford Elec. Co., v. Clapper, 286 U.S. 145 (1931); RESTATEMENT, CONFLICT OF LAWS § 610 (Supp. 1948).

15. In City of New York v. Shapiro, *supra* note 9, the court said: "Nor can it be justly said that there is some reason of policy for distinguishing between a State's duty to give effect to a sister State's court judgment for taxes and its duty to give effect to a sister State's binding administrative determination of taxes." 129 F. Supp. at 154. See Abel, *Administrative Determinations and Full Faith and Credit*, 22 IOWA L. REV. 461 (1936).

has held[16] some administrative proceedings are within it. The old rule has not been rejected in the majority of states, but the present trend is toward the enforcement of sister state taxes.[17]

The court in the instant case was faced directly with the argument that full faith and credit requires enforcement of a tax in the form of an unappealed assessment. The majority rejected this argument, even though they assumed that the ordinance was a public act, that defendant's liability was complete in Pennsylvania, and that the ordinance is not repugnant to the laws of New York.[18] The court said it would be an intrusion to judge a controversy between another state and a former citizen. The dissent, agreeing that full faith and credit does not include a tax claim, maintained that the administrative determination was tantamount to a judgment and should be accorded full faith and credit under *Milwaukee County v. M. E. White Co.*[19]

A rule that a person who has enjoyed the protection and privileges of a government can avoid payment of his share of the taxes by merely crossing a boundary line has no place in the United States. This is inequitable to the taxing state whose tax is ineffectual if it cannot be collected and to the fellow taxpayers who must pay the evader's share; moreover, it is against public policy in that it sanctions tax evasion. In a period of increased governmental spending and increased costs the power to collect a tax is essential to the financial stability of the state. Whether it would be an intrusion for one state to judge a controvery between another state and a former citizen, as stated by the court, is immaterial, because it is the taxing state requesting the intrusion; the taxing state which is suing for the taxes would certainly be less offended by an intrusion plus collection than by no intrusion and no collection. With the Supreme Court slowly expanding the scope of federal control of conflict of laws,[20] it is now appropriate to include revenue laws and administrative determinations within this scope. Another solution of the difficulty is the

16. See, *e.g.*, Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). This case was commented on and the problems discussed by Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330 (1944). In Broderick v. Rosner, 294 U.S. 629 (1935), the Court held that full faith and credit was not to be denied because the assessment was derived from an administrative officer.

17. Goldstein, *Interstate Enforcement of the Tax Laws of Sister States*, 30 TAXES 247 (1952).

18. 184 N.E.2d at 169.

19. 296 U.S. 268 (1935). The dissent said that the policy considerations applying to a judgment for taxes are applicable to administrative determinations of tax liability. 184 N.E.2d at 170-71.

20. See Hughes v. Fetter, *supra* note 9; Cheatham, *supra* note 13. *But see* Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953).

application of the *Hess v. Pawloski*[21] rationale, which has expressly been done in one case;[22] *i.e.*, the operation of a business within a state is sufficient to confer continued jurisdiction over the taxpayer by the taxing state allowing it to enter against the fleeing taxpayer a judgment which is protected by full faith and credit. Whether the abolition of the rule is accomplished through common law principles, legislative action, or constitutional fiat, its abandonment would strengthen financial stability of states and apportion the tax burden equitably.

Constitutional Law—Discrimination—Statute Prohibiting Racial Discrimination in Renting of Private Apartment Houses Does Not Violate Due Process

Defendants, the owner and the rental agent of an apartment house which was privately financed with no governmental assistance,[1] refused to rent an apartment to a Negro. Alleging that defendants had discriminated against him unlawfully because of his color in violation of a Massachusetts statute,[2] the Negro filed a complaint with the Massachusetts Commission Against Discrimination.[3] At the commission's hearing the defendants contested the statute's constitution-

21. 274 U.S. 352 (1927). The Court stated that due process is satisfied by a statute making operation of automobiles on public roads of a state equivalent to appointment of the secretary of state to accept service for any action arising out of said operation.

22. Ohio Dep't of Taxation v. Kleitch Bros., Inc., 357 Mich. 504, 98 N.W.2d 636 (1959). See McElroy, *The Enforcement of Foreign Tax Claims*, 38 U. DET. L.J. 1 (1960) for discussions of this case and suggested methods for setting up such a machinery.

1. There was no governmental guaranty, insurance, or other assistance in any form.

2. "It shall be an unlawful practice: . . . 6. For the owner, lessee, sublessee, licensed real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other person having the right of ownership or possession or right to rent or lease, or negotiate for the sale of such accommodations, or any agent or employee of such a person:—(a) to refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withhold from any person or group of persons such accommodations because of the race, creed, color or national origin of such person or persons; (b) to discriminate against any person because of his race, creed, color or national origin in the terms, conditions or privileges of such accommodations or acquisition thereof, or in the furnishing of facilities and services in connection therewith . . . ." MASS. GEN. LAWS c. 151B, § 4, as amended, (Supp. 1961). The statute defines "multiple dwelling" as "a dwelling which is usually occupied for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other." MASS. GEN. LAWS c. 151B, § 1 (Supp. 1961).

3. The commission was established pursuant to MASS. GEN. LAWS c. 6, § 56 (1951).

ality on the ground that it deprived them of liberty and property[4] guaranteed by the fourteenth amendment. The commission ruled against the defendants and subsequently an injunction was granted to enforce its cease and desist order.[5] On appeal to the Supreme Judicial Court of Massachusetts, *held*, affirmed.[6] A state statute prohibiting racial discrimination by persons renting units in private apartment houses with which there has been absolutely no governmental assistance does not deprive the owner of "liberty, or property without due process of law."[7] *Massachusetts Comm'n Against Discrimination v. Colangelo*, 182 N.E.2d 595 (Mass. 1962).

The Massachusetts statute here sustained indicates a current evolutionary development in some state legislatures extending the statutory perimeter of prohibited racial discrimination from public housing and publicly assisted housing to private housing.[8] The rights under these state anti-discrimination statutes must be distinguished clearly from the constitutional right to be free of discriminatory governmental action. The major constitutional attack on all of these state housing statutes is that they violate the due process clause in the fourteenth amendment by depriving the owner of liberty and property in restricting his right to rent or sell the property to whomever he chooses.[9] In addition, the statutes[10] solely affecting publicly assisted housing

4. Specifically, the owner alleged (1) a deprivation of the rights to acquire, possess, and protect property, (2) a deprivation of the liberty to contract, and (3) the appropriation of his property without compensation; the rental agent alleged that (1) his liberty to contract, (2) his freedom of association, and (3) his freedom from coercion had been infringed.

5. Among other things, it ordered the defendants to make an apartment available to the Negro and to cease discrimination in renting apartments.

6. The court actually modified the order by eliminating one paragraph because of a technicality. The effect of the order remained unchanged.

7. U.S. CONST. amend. XIV, § 1.

8. "Public housing" means governmental housing projects built with tax money; "publicly assisted housing" includes all housing built by private individuals who financed construction with any form of governmental assistance; and "private housing" refers to the houses which were built and financed without governmental assistance. See statutes cited notes 37-39 *infra*.

9. See, *e.g.*, New York State Comm'n Against Discrimination v. Pelham Hall Apartments, 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958), where an anti-discrimination prohibition which affected publicly assisted housing was held to be within the police power and not to be an unconstitutional deprivation of property.

10. Statutes prohibiting racial discrimination in publicly assisted housing have been enacted in numerous northeastern and western states and usually have been found to be constitutional. For recent developments in that area, see O'Meara v. Washington State Bd. Against Discrimination, 58 Wash. 2d 793, 365 P.2d 1 (1961), *cert. denied*, 369 U.S. 839 (1962). In that case, although a five-to-four decision declared such a statute unconstitutional because it denied equal protection of the laws, three judges in the majority intimated that the statute would be valid except for the unreasonable classification, *i.e.*, publicly assisted housing versus private housing. However, a similar California statute withstood all attacks on its constitutionality. Burks v. Poppy Construction Co., 370 P.2d 313 (Cal. 1962). These cases are scrutinized in Colley & McGhee, *The California and Washington Fair Housing Cases*, 22 LAW IN TRANSITION 79 (1962).

have been attacked as denying equal protection of the laws, *i.e.*, that publicly assisted housing is an unreasonable, arbitrary classification since there is no difference among housing owners' ability to discriminate or the effect of the discrimination.[11] State courts have held generally that such a restriction of an individual's right to contract freely and to dispose of or manage his property freely is not unreasonable since property rights are not absolute and since some "state of facts reasonably can be conceived that would sustain [the legislation]."[12] In short, the courts have held that these statutory regulations are within the state police power as a reasonable regulation of local matters and that the wisdom and determination of the need for such regulation is left to the legislature, not the courts. Unfortunately, the courts have neither articulated the factors of reasonableness nor precisely defined police power in this area.[13] Instead, they give almost complete and unquestioning efficacy to the presumption of constitutionality as the answer to the legal question without analyzing the elements of reasonableness of the restriction.[14] In this new area affecting private housing, the New York City Council acted first by passing the Sharkey-Brown-Isaacs ordinance[15] in December, 1957. On the state level Colorado and Massachusetts in April, 1959, enacted the first statutes.[16] Connecticut, Minnesota, New Hampshire, New Jersey, New York, Oregon, and Pennsylvania followed this innovation with similar statutes[17] affecting private housing, making a total of nine states with such legislation. Of course, the scope of all these enactments varies, but the broadest law, the

11. See, *e.g.*, Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 158 A.2d 177, *appeal dismissed*, 363 U.S. 418 (1960). See generally note 10 *supra*.

12. The quote is from Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) where the Court stated its four-step test concerning the equal protection clause. The test was used expressly in Morey v. Doud, 354 U.S. 457, 463-64 (1957).

13. Concerning police power, see Noble State Bank v. Haskell, 219 U.S. 104 (1911), where Mr. Justice Holmes wrote: "It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U.S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." 219 U.S. at 111.

14. In contrast, note the Court's analysis, for example, of the reasonableness of another economic restriction on realty in Miller v. Schoene, 276 U.S. 272 (1928), which upheld a state statute requiring the removal of cedar trees to prevent the communication of cedar rust, a plant disease, to apple trees.

15. NEW YORK CITY, N.Y. ADMIN. CODE c. 41, tit. X, § X41-1.0 (1957). Almost a year later, the City Council of Pittsburgh, Pa., enacted a similar ordinance. Pittsburgh, Pa., Ordinance 523, Dec. 8, 1958.

16. COLO. REV. STAT. c. 68, art. 7 (Supp. 1960); MASS. GEN. LAWS c. 151B, §§ 1, 4, as amended (Supp. 1961).

17. CONN. GEN. STAT. c. 939, §§ 53-35, -36, as amended (Supp. 1961); MINN. STAT. ANN. §§ 363.01-13, as amended (Supp. 1961); N.H. REV. STAT. ANN. § 354.1-.4, as amended (1961); N.J. STAT. ANN. §§ 18:25-1 to -28, as amended (Supp. 1961); N.Y. EXECUTIVE LAW §§ 290-99, as amended (Supp. 1962); ORE. REV. STAT. § 659.010-.115 (1959); PA. STAT. ANN. tit. 43, §§ 951-63, as amended (Supp. 1961).

New York City ordinance as amended in 1961,[18] covers all rental of housing except one apartment of a duplex where the other apartment is owner-occupied. The constitutionality of four statutes and of the original New York City ordinance has been contested in the respective state courts.[19] These decisions sustained the statutes on reasoning analogous to that applied in the cases concerning publicly assisted housing as discussed above.[20] All these courts failed to distinguish legally between publicly assisted housing and private housing. They treated the private housing statutes as presenting the same constitutional issues as publicly assisted housing statutes, except that the issue of equal protection of the laws was not raised. However, one can argue that this distinction is significant because the stated objectives of the governmental assistance indicates a special public interest in the housing which justifies state regulation or because the basis of state regulatory power over publicly assisted housing is the owner's acceptance of governmental assistance. In summary, although this new area of civil rights is still in the formative stage, attacks on the regulations' constitutionality have been generally unsuccessful.

The reasoning of the Massachusetts court is not unique, but follows the general arguments outlined above. After reaffirming basic principles, including the presumption of constitutionality and of valid statutory objectives, the court discussed the constitutional protection of property rights.[21] Stating that the constitutional right of property is not absolute, the court merely needed to discern valid statutory objectives in order to sustain the statute. Yet the court never expressly stated a possible specific objective of the statute. The opinion glossed over this step in its reasoning with generalities by saying, "[T]here is no constitutional distinction between legislating in these areas [public accommodations, employment, and publicly assisted housing] and legislating in the field of [private] multiple-dwelling housing."[22] Then

18. NEW YORK CITY, N.Y. ADMIN. CODE c. 41, tit. X, § X41-10, as amended, (1961).

19. Martin v. City of New York, 201 N.Y.S.2d 111 (Sup. Ct. 1960); Massachusetts Comm'n against Discrimination v. Colangelo, 182 N.E.2d 595 (Mass. 1962); Case v. Colorado Anti-Discrimination Comm'n, No. 19988, Sup. Ct. Colo., 1962; Swanson v. Commission on Civil Rights, No. 94802, Super. Ct. Conn., July 11, 1961, Jones v. Haridor Realty Corp., 181 A.2d 481 (N.J. 1962). Although the facts of this New Jersey case concerned publicly assisted housing, the rationale of the supreme court's decision clearly encompassed the statute's sections regulating private housing.

20. See note 9 *supra*.

21. 182 N.E.2d at 600. Here the court quotes from Nebbia v. New York, 291 U.S. 502, 523 (1934) where the Supreme Court held a New York milk price regulation constitutional: "But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

22. 182 N.E.2d at 599.

the opinion enumerated "certain possible findings which the legislature could have made to support valid objectives."[23] These surmises were that housing discrimination might restrict Negroes to a small area thereby encouraging slums, might impede relocation affected by urban redevelopment programs, or might cause Negroes to suffer more in a housing shortage. To fortify the argument, the court pointed to cases in other areas—*e.g.*, public accommodations,[24] private employment,[25] and union membership[26]—as analogous situations in which courts have upheld anti-discrimination statutes; it also pointed to cases upholding restrictions on the free and most profitable use of realty—*e.g.*, zoning,[27] compelled remodeling,[28] historic districts,[29] and temporary rent control[30]—to emphasize that the constitutional property right is not absolute. Although one dissenting justice raised some important, relevant questions[31] the majority's discussion of the constitutional issue concurs with the arguments and conclusions of the few cases on this subject.

The importance of this case is twofold: (1) it will influence greatly both legislatures and courts when they are confronted with similar problems; and (2) it indicates the rapid evolutionary trend of legislation extending state regulation into numerous areas to prevent racial discrimination. Concerning the first factor, racial discrimination in housing now is probably the most acute race relations problem outside the South.[32] The housing problem also inherently affects other phases of race relations such as integration of educational institutions.[33] As other legislatures extend anti-discrimination regulation to private housing, the courts will be called on to scrutinize

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23. *Ibid.*

24. See, *e.g.*, Pickett v. Kuchan, 323 Ill. 138, 153 N.E. 667 (1926) (theater); People v. King, 110 N.Y. 418, 18 N.E. 245 (1888) (roller rink).

25. See, *e.g.*, City of Highland Park v. Fair Employment Practices Comm'n, 364 Mich. 508, 111 N.W.2d 797 (1961); Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (1954).

26. See, *e.g.*, Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

27. See, *e.g.*, Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Lamarre v. Commissioner of Pub. Works, 324 Mass. 542, 87 N.E.2d 211 (1949).

28. See, *e.g.*, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Paquette v. City of Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959).

29. See, *e.g.*, Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955).

30. See, *e.g.*, Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).

31. 182 N.E.2d at 605-07 (dissenting opinion).

32. See generally GLAZER & MCENTIRE, STUDIES IN HOUSING AND MINORITY GROUPS (1960); MCENTIRE, RESIDENCE AND RACE (1960).

33. NEW YORK CITY, N.Y. ADMIN. CODE c. 41, tit. X § X41-1.0(a) (1957). See generally GREENBERG, RACE RELATIONS AND AMERICAN LAW 275-312 (1959).

the Massachusetts court's conclusion that a state can regulate rental and sales practices of a private house owner without violating his constitutional right not to be deprived of property by the state without due process of law. Concerning the second factor, the trend of expanding anti-discrimination legislation has reached such areas as public accommodations,[34] educational institutions,[35] labor unions,[36] employment,[37] and housing. As implied above, even within the housing field, the legislation has evolved and expanded from public housing[38] to publicly assisted housing[39] and now to some private housing.[40] Courts have held that legislation in all these areas is a valid exercise of state police power. Yet, while our federal constitution indicates the existence of state governmental powers in various areas, this power is restricted by positive prohibitions such as those in the fourteenth amendment. Where is the undefined line of demarcation in housing regulation across which there is no governmental power? Since the regulation was upheld in this case, is a regulation of private single housing constitutional? With the current paramount emphasis on minority groups' civil rights, such state regulations of private single housing probably will come and probably will be declared constitutional by using arguments similar to those of this decision. However, as they have done in other areas, courts should analyze more acutely all the elements of the regulation's reasonableness—*e.g.*, the relationship between the regulation's effect and its actual purpose, the real social need for such regulation, and its economic effect on property owners—giving less importance to the presumption of validity, although the same result may be reached when this is done. Based on the general precedent of cases[41] holding that anti-discrimination statutes are constitutional and on the United States Supreme Court's dismissal of the *Levitt* case,[42] that Court probably also will uphold all of these housing statutes. However, the decisions now rest in the twilight zone, the penumbra of constitutionality.

34. See, *e.g.*, MASS. GEN. LAWS c. 272, §§ 92A, 98 (1959); N.J. STAT. ANN. §§ 10:1-2 to 7, 18:25-5 (Supp. 1960).

35. See, *e.g.*, MASS. GEN. LAWS c. 151C (1959); N.J. STAT. ANN. § 18:14-2 (Supp. 1960); WASH. REV. CODE § 9.91.010 (1957).

36. See, *e.g.*, N.Y. CIV. RIGHTS LAW § 43.

37. See, *e.g.*, COLO. REV. STAT. ANN. §§ 80-24-1 to -8 (Supp. 1960); MASS. GEN. LAWS c. 151B, § 1-10 (Supp. 1961); N.J. STAT. ANN. § 18:25-4 to -6 (Supp. 1960).

38. See, *e.g.*, MASS. GEN. LAWS c. 121, § 26 FF(e) (Supp. 1961); R.I. GEN. LAWS ANN. § 11-24-3 (1956).

39. See, *e.g.*, MASS. GEN. LAWS c. 151B, §§ 1,4,6 (Supp. 1961); WASH. REV. CODE §§ 49.60.030-.040 (1958).

40. See notes 15-17 *supra.*

41. See, *e.g.*, cases cited note 26 *supra.* See also cases cited notes 27, 28 & 30 *supra.*

42. Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 158 A.2d 177, *appeal dismissed,* 363 U.S. 418 (1960).

Constitutional Law—Establishment of Religion—Recitation of State Composed Prayer in Public Schools Held Unconstitutional

The New York Board of Regents composed the following prayer and recommended its daily recital in the state's public schools: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."[1] Respondent board of education adopted a resolution directing the prayer's use in the schools of its district. Petitioners, taxpayers of the district and parents of pupils enrolled therein, instituted proceedings[2] to obtain an order compelling discontinuance of the practice. They insisted that the use of the prayer was contrary to the religious beliefs and practices of themselves and their children, and contended that the board's action constituted a violation of the first amendment to the United States Constitution as made applicable to the states by the fourteenth amendment.[3] The trial court held[4] that the "establishment" clause of the first amendment[5] did not prohibit the non-compulsory saying of the prayer.[6] The appellate division[7] and the court of appeals[8] affirmed. On certiorari in the Supreme Court of the United States, *held,* reversed. The prayer program was a religious activity, and the use of the state's school system to promote

1. The Regents Statement on Moral and Spiritual Training in the Schools, adopted November 30, 1951. This was later supplemented by The Regents' Recommendations for School Programs on America's Moral and Spiritual Heritage, adopted March 25, 1955. The regents suggested that the prayer be joined with the act of allegiance to the flag at the beginning of each school day.

2. The action was brought under article 78 of the New York Civil Practice Act, which provides for a statutory proceeding in the nature of mandamus.

3. Petitioners also contended that the state constitution prohibited the practice. The trial court held that the "free exercise" part of the state constitution (N.Y. CONST. art. 1, § 3) was no broader in its prohibitions than the "free exercise" clause of the United States Constitution (compare note 5 *infra*), and added, although the point was not argued, that the "establishment" part of the state constitution, which prohibits public aid to a school "in which any denominational tenet or doctrine is taught" (N.Y. CONST. art. 11, § 4), did not apply because the prayer was not denominational. Engel v. Vitale, 18 Misc. 2d 659, 191 N.Y.S.2d 453, 496 (Sup. Ct. 1959).

4. Engel v. Vitale, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959).

5. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

6. Engel v. Vitale, *supra* note 4, 191 N.Y.S.2d at 461. The trial court also held that the "free exercise" clause required the board to take affirmative steps to avoid any element of compulsion on those who might choose not to participate. Thus, the board's unpublicized practice of permitting non-participation by those students who expressed such a desire was not sufficient. A procedure had to be established whereby each parent would be informed of the text of the prayer and the nature of the program, and left to indicate whether or not his child would participate. 191 N.Y.S.2d at 491. This part of the holding was not raised on appeal.

7. Engel v. Vitale, 11 App. Div. 2d 340, 206 N.Y.S.2d 183 (1960).

8. Engel v. Vitale, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961).

the saying of a prayer composed and endorsed by a state agency was a violation of the "establishment" clause. *Engel v. Vitale*, 370 U.S. 421 (1962).

The constitutionality of non-compulsory religious activity[9] in the public schools has been tested numerous times in the state courts.[10]

9. Compulsion renders the activity unconstitutional. *E.g.*, holding compulsory Bible reading unconstitutional under state constitutions, People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); State *ex rel.* Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902); State *ex rel.* Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929). *Contra*, Spiller v. Inhabitants of Woburn, 94 Mass. (12 Allen) 127 (1866); Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908). The compulsory features of the program in the instant case were held invalid by the state courts. Note 6 *supra*.

10. Such activity often takes the form of Bible reading, either practiced alone or in conjunction with the recitation of prayer and perhaps the singing of hymns. Sustaining non-compulsory Bible reading programs: People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); Chamberlin v. Dade County Bd. of Pub. Inst., 143 So. 2d 21 (Fla. 1962); Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1922); Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884); Billard v. Board of Educ., 69 Kan. 53, 76 Pac. 422 (1904); Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905); Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962); Pfeiffer v. Board of Educ., 118 Mich. 560, 77 N.W. 250 (1898); Kaplan v. Independent School Dist., 171 Minn. 142, 214 N.W. 18 (1927); Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1952); Lewis v. Board of Educ., 247 App. Div. 106, 286 N.Y. Supp. 174 (1936); Board of Educ. v. Minor, 23 Ohio St. 211 (1872); Nessle v. Hum, 2 Ohio Dec. 60 (Mahoning County C.P. 1894); Stevenson v. Hanyon, 7 Pa. Dist. 585 (Lackawanna County C.P. 1898); Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956). Holding non-compulsory Bible reading invalid: Herold v. Parish Bd. of School Directors, 136 La. 1034, 68 So. 116 (1915); State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890). *Cf.* State *ex rel.* Clithero v. Showalter, 159 Wash. 519, 293 Pac. 1000 (1930) (refusal of mandamus to force school board to institute Bible reading program). For an extensive treatment of the use of the Bible in public schools, see BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS (1961). Also useful are Harrison, *The Bible, the Constitution and Public Education*, 29 TENN. L. REV. 363 (1962); Comment, *Bible Reading in the Public Schools*, 22 ALBANY L. REV. 156 (1958); Note, *Bible Reading in Public Schools*, 9 VAND. L. REV. 849 (1956); 13 VAND. L. REV. 550 (1960).

On the other hand, religious literature may not be distributed in the classroom, even if given only to those children whose parents requested that they receive it. Brown v. Orange County Bd. of Pub. Inst., 128 So. 2d 181 (Fla. 1960); Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953); Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952). See Note, *The First Amendment and Distribution of Religious Literature in the Public Schools*, 41 VA. L. REV. 789 (1955).

An early Massachusetts case held that a teacher incurred no liability for punishing a child who refused to recite the Ten Commandments. Commonwealth *ex rel.* Wall v. Cooke, 7 AM. L. REGISTER 417 (Boston Police Ct. 1859).

One court has held unconstitutional the distribution in school of cards for children to take home on which the parents were to indicate whether or not their child should take part in a "released time" program. Perry v. School Dist., 54 Wash. 2d 886, 344 P.2d 1036 (1959). *Contra*, Gordon v. Board of Educ., 78 Cal. App. 2d 464, 178 P.2d 488 (Dist. Ct. App. 1947); People *ex rel.* Lewis v. Graves, 245 N.Y. 195, 156 N.E. 663 (1927).

A related problem is raised when teachers wear distinctive religious garb to school. Some courts uphold the teacher's right to wear these garments, on the ground that it does not constitute sectarian instruction. New Haven v. Torrington, 132 Conn. 194, 43 A.2d 455 (1945); State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940); Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936). Other courts have

The majority of jurisdictions considering the question have held that such activity does not violate state constitutional prohibitions against the use of public funds for sectarian purposes.[11] They have felt that these prohibitions were intended to prevent governmental support of specific religious bodies, not non-discriminatory encouragement to religion (or Christianity) in general.[12] In recent years, however, recognition that the first amendment to the United States Constitution applies directly to the states[13] has resulted in a slight trend in the opposite direction.[14] Furthermore, when called upon to apply Su-

held the practice unconstitutional, on the ground that it inspires sympathy and respect for the religious sect to which the instructor belongs. Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906). Pennsylvania originally upheld the teacher's right to wear distinctive garments, Hysong v. School Dist., 164 Pa. 629, 30 Atl. 482 (1894), but later ruled constitutional a statutory reversal of that position, Commonwealth v. Herr, 229 Pa. 132, 78 Atl. 68 (1910). See Comment, *Religious Garb in the Public Schools—A Study in Conflicting Liberties*, 22 U. CHI. L. REV. 888 (1955).

11. Almost every state has a constitutional prohibition against the use of public funds for sectarian purposes. There is considerable variation in the wording of the various provisions, but the wording has been unimportant in affecting the outcome of cases involving similar fact situations. Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475, 477-78 & n.12 (1955). On the various state provisions, see BOLES, *op. cit. supra* note 10, at 43-46; Fellman, *Separation of Church and State in The United States: A Summary View*, 1950 WIS. L. REV. 427, 443-44; Note, *Public Aid to Establishment of Religion*, 96 U. PA. L. REV. 230, 234 (1947).

It has already been seen that a majority of cases uphold religious activity in the schools. See note 10 *supra*.

12. *E.g.*, in Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956), the court upheld a prayer and Bible reading program, saying: "With all deference to counsel for the complainants, we feel that they have taken a rather narrow and dogmatic view of these constitutional inhibitions. In their commendable zeal in behalf of liberty of conscience, and of religious worship, they have overlooked the broader concept that religion *per se* is something which transcends all man-made creeds. *Id.* at 677, 288 S.W.2d at 723. In Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), another Bible reading case, the court said that the practice did "not constitute sectarian instruction or sectarian worship but . . . [was] a simple recognition of the Supreme Ruler of the Universe . . . ." 5 N.J. at 453-54, 75 A.2d at 889.

13. The so-called "Magna Carta of religious liberty in the United States" is Cantwell v. Connecticut, 310 U.S. 296 (1940). The Court announced its position in no uncertain terms: "The First Amendment declares that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws . . . ." 310 U.S. at 303. Since *Cantwell* was a "free exercise" case, it remained for a later case, Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948), to actually apply the "establishment" clause to a state. In the instant case the New York court recognized applicability of the first amendment. 191 N.Y.S.2d at 477.

14. Of the post-1948 cases involving non-compulsory religious activity in public schools, five have invalidated the practice and four have upheld it. Holding it invalid: Brown v. Orange County Bd. of Pub. Inst., 128 So. 2d 181 (Fla. 1960); Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953); Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952); Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); Perry v. School Dist., 54 Wash. 2d 886, 344 P.2d 1036 (1959). Sustaining it: Chamberlin v. Dade County Bd. of Pub. Inst., 143 So. 2d 21 (Fla. 1962); Murray v.

preme Court rulings on the first amendment, some state courts have used the opportunity to broaden the scope of their own state "establishment" prohibitions.[15]

Sometimes showing a reluctance to enter into the stream of cases dealing with religious activity in the schools,[16] the Supreme Court has interpreted the "establishment" clause as barring all governmental aid to religion, whether given to a particular sect or to religion in general, and as erecting a "wall of separation"[17] between church and state.[18] In applying this interpretation the Court has left a tortuous record.[19]

Curlett, 228 Md. 239, 179 A.2d 698 (1962); Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950); Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956).

15. The *Brown, Tudor,* and *Perry* cases, note 14 *supra,* held that the activity which violated the first amendment also breached the state constitution.

16. The Court has twice refused on highly technical grounds to reach the merits of Bible reading cases. In Doremus v. Board of Educ., 342 U.S. 429 (1952), plaintiffs were found to lack standing, on the grounds that the complaint was insufficient in setting up taxpayer standing, and that parent standing was destroyed by the child's graduation before the case came up. Again in School Dist. v. Schempp, 364 U.S. 298 (1960), a district court decision holding unconstitutional a Bible reading program in Pennsylvania was vacated, and the case sent back down, on the ground that the offending statute had been amended while appeal was pending. It has been suggested that these results were largely due to the Court's reluctance to enter this area. BOLES, *op. cit. supra* note 10, at 133-35. It is certainly noteworthy that in the instant case the Court was unconcerned with standing. *Cf.* note 43 *infra.*

On the rehearing of the *Schempp* case the district court again held the statute unconstitutional. Schempp v. School Dist., 201 F. Supp. 815 (E.D. Pa. 1962). Subsequent to the decision in the instant case, the Court has noted probable jurisdiction on the appeal of *Schempp,* School Dist. v. Schempp, 371 U.S. 807 (1962), and has also granted certiorari in a Maryland Bible reading case, Murray v. Curlett, 371 U.S. 809 (1962).

17. The phrase originated in a letter written by Jefferson in 1802 to a Baptist association. It was picked up by the Court in Reynolds v. United States, 98 U.S. 145, 164 (1878), and declared to be an authoritative declaration of the meaning of the first amendment. The expression has seen active duty in almost every case concerned with the "establishment" clause.

18. Everson v. Board of Educ., 330 U.S. 1 (1947). The Court used the following oft-quoted language: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and State.'" 330 U.S. at 15-16.

It has been recognized that the "establishment" clause has an impact far broader than merely to prohibit a national church (in the Church of England sense). Concurring in the *McCollum* case, 333 U.S. 203 (1948), Mr. Justice Frankfurter said: "We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.'" 333 U.S. at 213.

Thus, the reimbursement at public expense of school bus costs to parents of parochial school pupils was upheld in *Everson v. Board of Education*,[20] where the separation doctrine was first announced.[21] To be sure, a year later the Court in *Illinois ex rel. McCollum v. Board of Education*[22] held unconstitutional a program whereby upon parental request students were released from regular classes to attend religious instruction on school premises.[23] However, a comparable program was subsequently upheld in *Zorach v. Clauson*,[24] the Court distinguishing *McCollum* on the basis that in the later case the religious instruction was given off the school premises.[25] In two recent

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After its application in the *McCollum* ease, the *Everson* interpretation of the first amendment received considerable criticism. See, *e.g.*, BRADY, CONFUSION TWICE CONFOUNDED *passim* (1955); O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION *passim* (1949); Corwin, *The Supreme Court as a National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949). *But see, e.g.*, PFEFFER, CHURCH, STATE AND FREEDOM *passim* (1953); Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP. PROB. 44 (1949).

19. Professor Cahn expresses bafflement in an article, *The "Establishment of Religion" Puzzle*, 36 N.Y.U.L. REV. 1274-77 (1961). See also Pfeffer, *Some Current Issues in Church and State*, 13 WESTERN RES. L. REV. 9, 11-12 (1961), where the leading advocate of the separation of church and state suggests that the "released time" cases, *McCollum*, 333 U.S. 203 (1948) and Zorach v. Clauson, 343 U.S. 306 (1952), are irreconcilable.

20. 330 U.S. 1 (1947).

21. Note 18 *supra*.

22. 333 U.S. 203 (1948).

23. "The . . . facts . . . show the use of tax-supported property for religious instruction and the close co-operation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released iu part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . ." 333 U.S. at 209-10.

24. 343 U.S. 306 (1952).

25. "This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations." 343 U.S. at 308-09. "In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of cutside religious instruction. We follow the *McCollum* case." 343 U.S. at 315.

Often quoted from the majority opinion by Mr. Justice Douglas are the following phrases: "The First Amendment, however, dces not say that in every and all respects there shall be a separation of Church and State." 343 U.S. at 312. "We are a religicus people whose institutions presuppose a Supreme Being." 343 U.S. at 313.

Dissenting, Mr. Justice Black pointed to *McCollum*: "We said: 'Here *not only* are the State's tax-supported publie school buildings used for the dissemination of religious doctrines. The State *also* affords sectarian grcups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. *This* is not separation of Church and State.' (Emphasis supplied.) *McCollum v. Board of Education*, . . . [333 U.S. at 212]. *McCollum* thus held that Illinois could not constitutionally manipulate the compelled classroom hours . . . so

cases, *McGowan v. Maryland*[26] and *Torcaso v. Watkins*,[27] the Court reaffirmed its reliance upon the *Everson* separation doctrine,[28] and went on to hold in the first case that Sunday closing laws could be enforced without effecting an establishment of religion[29] and in the second that a declaration of belief in the existence of God could not be required as a qualification for state public office without so doing.[30] Throughout these cases the Court failed to distinguish between two distinct lines of approach to the "establishment" clause, sometimes treating it as an adjunct or auxiliary to the "free exercise" clause, and at other times giving it the status of a self-sufficient and independent imperative.[31]

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as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do." 343 U.S. at 316-17.

Mr. Justice Jackson also dissented, using stronger language: "The distinction attempted between that case [*McCollum*] and this is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity . . . . The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial process than to students of constitutional law." 343 U.S. at 325.

26. 366 U.S. 420 (1961). Three other cases with similar facts were decided at the same time: Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961). The last two cases involved stores owned by Orthodox Jews who abstained from business activity on Saturday; the other two dealt with discount stores which sought to be open for business seven days a week.

27. 367 U.S. 488 (1961).

28. 366 U.S. at 443; 367 U.S. at 492-93.

29. "Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become a part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." 366 U.S. at 444-45.

Mr. Justice Douglas dissented in this case (compare his position in *Zorach*, note 25 *supra*) saying that the laws in question were a governmental sanction of the practices of religious groups. 366 U.S. at 576.

30. The opinion is devoted to a discussion of the meaning and applicability of the "establishment" clause. The last sentence, however, states that the test oath "unconstitutionally invades the appellant's freedom of belief and religion . . . ." 367 U.S. at 496.

31. Cahn, *supra* note 19, especially at 1281-82. *Cf.* Pfeffer, *supra* note 19, at 32. Pfeffer points out that in the Sunday law cases, note 26 *supra*, the "establishment" clause was treated as independent of and on a par with the "free exercise" clause, whereas in *Torcaso*, decided in the same term of court, the implication was that the two clauses were unitary (as Pfeffer puts it, "two sides of the same coin.").

The Court in the instant case adopted the view that the "establishment" clause is independent in objective of the "free exercise" clause, and, unlike the latter, prohibits governmental support of religion even when the element of compulsion is absent.[32] The purpose of the "establishment" clause is to prevent the civil disorder and debasement of religion which tends to follow from a union of church and state.[33] But the history of 16th and 17th century England shows that official prescription of prayer is such a union as to produce those very evils.[34] And, since the founders were aware of and influenced by the English experience, the Court concluded that this control of prayer must have been at least one of the practices the first amendment was designed to prohibit.[35] Thus, the New York program is invalid because of the state government's role in composing and encouraging the recitation of the regents' prayer.[36] That this unquestioned religious activity[37] is prohibited, said the Court, does not prevent reference being made to a Supreme Being on patriotic or ceremonial occasions.[38] However, the fact that the program in question does not establish one sect to the exclusion of all others will not save it; sectarianism is no longer the test, and, in the words of Madison, "[I]t is proper to

The state courts seem to have taken the position that an "establishment" prohibition is a mere means to effecting free exercise. At least, as we have seen, note 10 *supra*, few state courts have invalidated a religious activity in the public school when compulsion was absent.

32. 370 U.S. at 430-33. The Court recognized that the two clauses would overlap in some instances, but declared that they were designed to prohibit two quite different kinds of governmental encroachment.

33. *Id.* at 431.

34. *Id.* at 425-27, 432-33.

35. *Id.* at 429-30. "The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say . . . ." *Id.* at 429.

36. The Court formulated its holding several times throughout the opinion, with varied wording:

"We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause . . . ." *Id.* at 424.

"[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425.

"[E]ach separate government in this country should stay out of the business of writing or sanctioning official prayers . . . ." *Id.* at 435. It is seen that in the first passage the Court found recitation of the prayer objectionable, in the second composition and recitation were the offending features when used in conjunction, and in the third composition alone invalidated the practice. These passages, however, read in the light of that set out above, note 35 *supra*, indicate that the Court was concerned with *any* governmental control exercised over prayer, whether it be by composition of an official state prayer, or by the setting up of a state-backed prayer recitation program.

37. *Id.* at 424-25.

38. *Id.* at 435 n.21.

take alarm at the first experiment on our liberties."[39] Concurring separately, Mr. Justice Douglas saw the principal issue to be whether or not government could constitutionally finance a religious exercise.[40] He found that it could not, for the reason that such financing would make government a divisive influence in our society.[41] Mr. Justice Stewart was the lone dissenter; he could not see "how an 'official religion' is established by letting those who want to say a prayer say it."[42]

The historical technique employed by the Court gives this case both its principal strength and its principal weakness.[43] Its strength lies in the clear-cut adoption of the "independent imperative" view of the "establishment" clause; here, history showed the Court that the framers had a broader purpose when they prohibited "establishment" than merely to preserve free exercise of religious belief.[44] In applying the newly independent "establishment" clause, however, the Court used an approach which, if followed, will cast a rigidity into the clause that may negate its purpose. The Court's test seems to be: Does history tell us that the practice in question was one the framers must have had in mind to prevent when the first amendment was written?[45] The weakness of this test is apparent, apart from its super-

39. *Id.* at 436.

40. *Id.* at 437.

41. *Id.* at 442. It is significant that Mr. Justice Douglas, who voted with the majority in the five-to-four decision of the *Everson* case, note 20 *supra*, stated in the instant case that he now feels *Everson* was wrongly decided. *Id.* at 443-44.

42. *Id.* at 445. Justices Frankfurter and White took no part in the decision.

43. There are other difficulties with the opinion. Standing, which was such a big factor in the *Doremus* case, note 16 *supra*, was not raised here. Petitioners had standing in the New York courts by virtue of their position as parents, but here, where their complaint was founded on the "establishment" clause, it might be thought that fourteenth amendment requirements would require them to establish taxpayer standing. The answer to this problem is probably that the Court no longer feels itself limited in applying the first amendment to the states by the requirements of the fourteenth amendment, and that any type of standing will suffice to enable petitioners to attack any first amendment violation. See *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 120-21 (1952).

A bigger difficulty is raised by the Court's "patriotic and ceremonial occasion" exclusion, note 38 *supra*. It is hard to imagine a more patriotic ceremony than that used by New York here: The Pledge of Allegiance to the Flag (which includes reference to God) followed by a short, set prayer in which God's blessings are begged for, *inter alia*, the country. It is submitted that what the Court was struggling with was the fact that the same act may constitute an "establishment" in one context, and not in another. As suggested in the text below, a more fruitful approach would be to consider whether or not the activity in question introduced a divisive note, and to be aware that what may be a divisive influence in a public schoolroom may be no more than a pro forma routine in the halls of Congress.

44. This is what Cahn calls the Madisonian view of the first amendment. Cahn, *supra* note 19, *passim*. The opposite view is called the Jeffersonian view. Note that the Court makes extensive footnote reference to Madison's Memorial and Remonstrance, and no reference at all to the writings of Jefferson.

45. This is the same approach which the Court used in the *Torcaso* case, note 27 *supra*. There the historical inquiry was directed at test oaths, and the Court found

ficiality; activities once dangerous have lost their threat, while others unknown to the past have become potent, thus making it an often useless criterion. The weakness stems from the fact that the Court, in formulating the test, avoided inquiry into the underlying policy of the "establishment" clause, and failed to take proper account of modern changes in social institutions (*e.g.*, the rise of the public school). It is submitted that a more profitable approach is that suggested by Mr. Justice Frankfurter in his concurring opinion in *McCollum*,[46] and hinted at in the instant case by Mr. Justice Douglas.[47] The civil disorder produced by the entrance of government into religious affairs results from the divisive influence that such interference exerts on the community. The "establishment" clause is a command to eliminate this divisiveness. But it must be recognized that a limited amount of intertwining of government and religion is inevitable in our society.[48] The question is where to draw the line so as to assure the elimination of divisive influence without doing unnecessary harm to existing social institutions. The answer will vary as time changes the impact of the activity in question and the character of the institutional context, and, at any given time, the answer will vary from one context to another. That which constitutes a real divisive force in the schoolroom may be no more than a pro forma routine when practiced in the halls of Congress. And nowhere must divisiveness be weighed more critically than in the public schools,

that such oaths were in use in pre-Revolutionary days, and were among the specific items that the first amendment was designed to eliminate.

46. It would be presumptive to do more than quote certain pertinent passages from Mr. Justice Frankfurter's opinion:

"Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogenous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice." McCollum v. Board of Educ., *supra* note 22, at 216-17. "The children belonging to these non-participating sects will . . . have inculcated in them a feeling of separatism when the school should be the training ground for habits of community . . . ." 333 U.S. at 227. "[T]he public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. *These are consequences not amendable to statistics* . . . ." *Id.* at 228. (Emphasis added.) "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive force than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Id.* at 231.

47. 370 U.S. at 442.

48. A marked decline in religious interest would, of course, completely alter the situation. An area where a non-Christian religion predominates may also be confronted with a far less serious problem (*e.g.*, Hawaii).

which have perhaps the key role in our society in fostering national unity. Both by the Court's test and by that proposed here the Bible reading programs now on their way up[49] should be invalidated; Bible reading is a traditional technique for teaching religious doctrine,[50] and it certainly generates a divisive force.[51] As to the myriad of other activities[52] which are yet to be tested, it is submitted that the proposed method for approaching the problem will prove more fruitful than that used by the Court in the instant case.

Criminal Law—Narcotics—Criminal Proseeution for Addiction Is a Cruel and Unusual Punishment Violating Eighth and Fourteenth Amendments

Defendant, a resident of the city of Los Angeles, was prosecuted in the Municipal Court of Los Angeles under section 11721 of the California Health and Safety Code.[1] The court instructed the jurors

49. The cases referred to are the *Murray* and *Schempp* cases, note 16 *supra.* The Miami Bible reading case, Chamberlin v. Dade County Bd. of Pub. Inst., 143 So. 2d 21 (Fla. 1962), will also be brought up for the Court's attention.

50. Most Protestant church services consist in part of reading, without comment, from the Bible. In fact, Bible reading without comment is one of the geneses and characteristic features of Protestantism.

51. Recall the large number of Bible reading cases which have been brought in the state courts, note 10 *supra.*

52. Wearing of religious garb, distribution of religious literature, released time, recitation of the Lord's Prayer, and similar activities, note 10 *supra,* will no doubt make their appearance before the Court in due time. A number of other problems have been suggested: baccalaureate programs on school premises; meetings of student religious organizations before or after school on school premises; timing of school holidays to coincide with Christian religious observances; Christmas and Easter displays in the schoolroom; etc. No pat solution may be given for these questions, but it is suggested that the Court's test in the instant case will prove of little use in tackling many of these situations.

Another difficulty is to determine the status of the *McCollum-Zorach* duo. If the method of approach proposed herein were followed, *Zorach* would be overturned. Abolition of released time and relegation of off-campus religious instruction to after-school hours will surely not seriously hamper either the school system or religious education; the manipulation of compelled classroom hours so as to channel children into religious classes clearly sets apart those channeled, and is thus a divisive influence.

Potentially the hottest issue is raised by Mr. Justice Douglas' repudiation of *Everson,* note 41 *supra.* Aid to parochial schools is a very live question. An answer cannot be attempted here, other than to say that the Court will again be forced to penetrate to a deeper level than that heretofore reached in the consideration of such cases.

1. "No person shall use, or be under the influence of, or be addicted to the use of narcoties, excepting when administered by or under the direction of a person liscensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced

that they were to find the defendant guilty if they all agreed either: (a) that defendant had used illegally obtained narcotics in Los Angeles County, or (b) that while in the city of Los Angeles defendant was addicted[2] to the use of such narcotics.[3] The jury returned a verdict of guilty. In accordance with the provisions of the statute,[4] defendant was sentenced to ninety days in jail. The Appellate Department of the Los Angeles Superior Court affirmed the conviction.[5] On appeal to the Supreme Court of the United States, *held*, reversed. A state statute classifying as criminal the status of being addicted to the use of illegally obtained narcotics and imposing as punishment confinement in jail without medical treatment violates the "cruel and unusual punishment" prohibition of the eighth amendment[6] of the United States Constitution made applicable to the states by the fourteenth amendment. *Robinson v. California*, 370 U.S. 660 (1962).[7]

This decision by the nation's highest Court compels a re-evaluation of federal and state statutes which employ criminal sanctions as a means of coping with the problem of narcotics addition.[8] With

to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail." CAL. HEALTH & SAFETY CODE § 11721.

2. "The court instructed the jury that, 'The word "addicted" means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. . . . To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually.'" 370 U.S. at 686 n.2.

3. In distinguishing addiction from use, the trial judge instructed the jury, "'To be addicted to the use of narcoties is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [sic] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms.'" *Id.* at 662.

4. See note 1 *supra*.

5. This was the highest state court to which appeal could be taken. Habeas corpus relief was denied by the California District Court of Appeal and by the California Supreme Court. The Supreme Court of the United States noted probable jurisdiction of the appeal, 368 U.S. 918 (1961).

6. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

7. Appellees petitioned for a rehearing on the grounds that the defendant had died, apparently from an overdose of narcotics, ten months prior to the Court's consideration of his appeal. Rehearing was denied, 83 Sup. Ct. 202 (1962).

8. In recent years dissatisfaction has been expressed with the criminal approach to the problem of narcotics addiction. "The present policy . . . enforces the prohibition of all narcotics for the satisfaction of addiction. Since, at the time of its inauguration, there was a sizeable addict population . . . this prohibition policy apparently assumed that total abstinence was a feasible goal for all addicts. . . . The adoption of this policy confronted every addict with the dilemma of either seeking to cure his addiction or violating the law and, thus, exposing himself to criminal prosecution, conviction, and incarceration. The fact that many thousands chose the latter course, despite the threat of imprisoument and the destructive personal and social

respect to their direct effect on the narcotic addict,[9] these statutes fall into two general categories: (1) those which make a criminal offense of the condition or status of addiction,[10] and (2) those which make a criminal offense of an act essential to this status—acquisition, possession, or use of narcotics. In addition to California, fifteen states and

consequences of addict status, raises some question as to the practicality of a policy that attempts to enforce total abstinence on the part of addicts." Finestone, *Narcotics and Criminality*, 22 LAW & CONTEMP. PROB. 69, 79 (1957).

This dissatisfaction is due to two factors which are closely related. One, as mentioned above, has been the inability of the criminal approach to sufficiently reduce the number of persons addicted to narcotics. See Cantor, *The Criminal Law and the Narcotics Problem*, 51 J. CRIM. L., C. & P.S. 512 (1960-61); King, *Narcotic Drug Laws and Enforcement Policies*, 22 LAW & CONTEMP. PROB. 113 (1957); Note, *Narcotics Regulation*, 62 YALE L.J. 751 (1953). *Contra*, ANSLINGER & TOMPKINS, THE TRAFFIC IN NARCOTICS (1953).

The second factor is the belief that the narcotic addict cannot overcome his desire for narcoties without appropriate medical and psychiatric treatment, *i.e.*, addiction is an illness. NYSWANDER, THE DRUG ADDICT AS A PATIENT (1956); Winick, *Narcotics Addiction and its Treatment*, 22 LAW & CONTEMP. PROB. 9 (1957).

The narcotics problem was the subject of a recent study by a joint committee of the American Bar Association and the American Medical Association. Among the conclusions reached by this committee were the following:

"1. There appears to have been a considerable increase in drug addiction in the United States immediately following World War II . . . .

"2. As a result, the federal government and many states passed legislation imposing increasingly severe penalties upon violators of the drug laws, as a means of dealing with the apparent increase in addiction.

"3. This penal legislation subjects both the drug peddler and his victim, the addict, to long prison sentences, often imposed by mandatory statutory requirements without benefit of the probation and parole opportunities afforded other prisoners.

"4. Though drug peddling is acknowledged to be a vicious and predatory crime, a grave question remains whether severe jail and prison sentences are the most rational way of dealing with narcotic addicts. . . .

"5. The narcotic drug addict because of his physical and psychological dependence on drugs and because of his frequently abnormal personality patterns should be as much a subject of concern to medicine and public health as to those having to do with law enforcement. . . ." ABA-AMA JOINT COMMITTEE ON NARCOTIC DRUGS, FINAL REPORT, as reproduced in DRUG ADDICTION: CRIME OR DISEASE 163 (1961). For comments by the Bureau of Narcotics on this committee's interim report see ADVISARY COMM. TO FED. BUREAU OF NARCOTICS, COMMENTS ON NARCOTIC DRUGS (1958).

9. Not all jurisdictions employ the definition of "addiction" adopted by the California court, *supra* note 2. Some require a greater degree of dependence on narcotics: "habitually uses . . . to such an extent as to create a tolerance for such drugs," LA. REV. STAT. ANN. tit. 40, § 961 (1951); "so far addicted to the use of such habit-forming narcotic drugs as to have lost the power of self control with reference to his addiction," D.C. CODE ANN. § 24-602(a) (1961).

10. Generally an essential element of a criminal offense is an act. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 18, 171-211 (2d ed. 1960). Nevertheless persons have been subjeeted to criminal prosecution merely for being in a particular status. "Vagrancy is the principal crime in which the offense consists of being a certain kind of person rather than in having done or failed to do certain acts. Other crimes of this nature include being a common drunkard, common prostitute, common thief, tramp, or disorderly person." Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953). Statutes which make an offense of the status of vagrancy "are generally looked upon as regulatory measures to prevent crime rather than as ordinary criminal laws which prohibit and punish certain acts as crimes." People v. Belcastro, 356 Ill. 144, 148, 190 N.E. 301, 303 (1934).

the District of Columbia subject the addict to criminal prosecution because of his status. In two states, treatment is an essential feature of the addict's confinement.[11] In the remaining jurisdictions, statutes either make no provision for treatment[12] or provide for treatment at the discretion of the court.[13] If the addict is discovered with narcotics in his possession, he is subject to criminal prosecution under federal statutes which make possession prima facie evidence of violation of the statute.[14] Unauthorized possession is a criminal offense in every state.[15] Only in New York is the addict given statutory protection from criminal prosecution. A measure passed by the New York legislature in 1962 entitles the addict charged with possession to undergo a thirty-six month program of institutionalized and environmental treatment.[16] The criminal charge is held in abeyance and is dismissed when the addict completes the treatment program.[17]

In the present decision, the Court expressly limited its considera-

11. MICH. STAT. ANN. § 18.1124 (1957); WASH. REV. CODE §§ 69.32.080-90 (Supp. 1959).

12. ILL. ANN. STAT. c. 38, § 22-40 (Smith-Hurd Supp. 1961); MO. ANN. STAT. §§ 195.020, .200 (1962); N.J. STAT. ANN. § 2A:170-8 (Supp. 1961); OKLA. STAT. ANN. tit. 63, §§ 470.11, -12 (Supp. 1962); VA. CODE ANN. §§ 63-338(9), -339 (1950).

13. COLO. REV. STAT. ANN. § 48-5-5 (1953); D.C. CODE ANN. § 33.416a (1961); IND. ANN. STAT. § 10-3538a (Supp. 1962); KY. REV. STAT. § 218.250 (Supp. 1962); LA. REV. STAT. ANN. tit. 40, §§ 961, 981 (1951); NEV. REV. STAT. § 453.250 (Supp. 1961); ORE. REV. STAT. §§ 475.625-45 (Supp. 1961); UTAH CODE ANN. § 76-42-9 (Supp. 1961); WIS. STAT. ANN. § 161.02(3) (1957).

14. INT. REV. CODE OF 1954, § 4724(c); 70 Stat. 570 (1956), as amended, 21 U.S.C. § 174 (1958).

15. For a list of the states with appropriate code sections which have prohibited possession through enactment of the Uniform Narcotic Drug Act see 21 WIS. STAT. ANN. at 262 (1957). States omitted from this list also prohibit possession. CAL. HEALTH & SAFETY CODE § 11500; MASS. ANN. LAWS c. 94, § 205 (Supp. 1961); MISS. CODE ANN. § 6846 (1942); N.H. REV. STAT. ANN. § 318:49 (1955); PA. STAT. ANN. tit. 35, § 780-4 (Supp. 1961).

16. N.Y. MENTAL HYGIENE LAW §§ 211-213 (Supp. 1962).

17. In enforcing the statutes which subject the addict to criminal prosecution, the courts have afforded the addict little protection prior to the present decision. As a general rule, courts have been reluctant to set aside as so excessive as to be cruel and unusual, punishment imposed by a legislative body. "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility . . . these are peculiarly questions of legislative policy." Gore v. United States, 357 U.S. 386, 393 (1958). In affirming sentences imposed for violation of federal narcotic statutes, the federal courts have adhered to this rule. *E.g.*, Black v. United States, 269 F.2d 38 (9th Cir.), *cert. denied*, 361 U.S. 938 (1959); Smith v. United States, 273 F.2d 462 (10th Cir.), *cert. denied*, 363 U.S. 846 (1959); Hagan v. United States, 256 F.2d 34 (5th Cir.), *cert. denied*, 358 U.S. 850 (1958). In the courts of the states the addict has not fared much better. In two jurisdictions state courts have indicated that an addict possessing narcotics for his own use could not be prosecuted under state statutes prohibiting possession. State v. Reed, 62 N.J. Super. 303, 162 A.2d 873 (App. Div. 1960), *rev'd on other grounds*, 34 N.J. 554, 170 A.2d 419 (1961); Commonwealth v. Warner, 87 Pa. D. & C. 91 (C.P. 1953) (dictum).

tion[18] and its holding[19] to that aspect of the California statute which subjected the addict to criminal prosecution and imprisonment because of his status. In the majority opinion and at greater length in the concurring opinion of Mr. Justice Douglas, the proposition was developed that the condition of being addicted to narcotics is an illness. The Court then held that to brand a person a criminal and imprison him because he is in such a status is a cruel and unusual punishment. Mr. Justice Harlan concurred in holding the statute unconstitutional but disagreed with the use of the cruel and unusual punishment prohibition as incorporated in the due process clause of the fourteenth amendment. He did not think that the present state of medical knowledge justified the categorical conclusion that narcotic addiction is an illness, thereby making it a cruel and unusual punishment for the state to subject narcotics addicts to its criminal law.[20] His objection to the statute centered upon the fact that it did not require an act but made a criminal offense of the addict's status. Although he did not mention the fourteenth amendment, it was clear that he would have preferred striking the statute down via the due process clause alone as an "arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law."[21]

Although the Court expressly limited its holding to those statutes which make a criminal offense of the addict's status, its reliance upon the substance of the eighth amendment[22] tends to broaden the effect of the holding to include statutes which subject the addict to criminal prosecution because of an act essential to his status. The use of the eighth amendment raises the question of whether it would be any less cruel and unusual to imprison an addict for acquiring, possessing,

18. "This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for anti-social or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'" 370 U.S. at 666.

19. "We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." *Id.* at 667.

20. *Id.* at 678.

21. *Id.* at 679.

22. This is the first time that the Court has held the eighth amendment applicable to the states although it has previously indicated a willingness to do so. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947). In Weems v. United States, 217 U.S. 349 (1910), the Court extended the scope of the eighth amendment to include disproportionate punishment as well as intrinsically cruel and unusual punishment. The present use of the eighth seems to follow that interpretation to its logical conclusion. For a discussion of cases interpreting the eighth amendment see Sutherland, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271 (1951); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846 (1961).

or using narcotics. Logic dictates a negative answer. Mr. Justice Harlan suggested grounds for holding the California statute unconstitutional which very clearly would have limited the effect of the holding to the status statutes. If the due process clause of the fourteenth amendment without the incorporation of the eighth amendment would have provided a satisfactory basis for striking the statute down, the Court's choice of the eighth would appear to indicate a present willingness to expand the holding to include the act statutes. However, it seems that the fourteenth amendment alone would not have been adequate. As noted by Mr. Justice White in his dissenting opinion, conviction authorized by the statute did not rest on "sheer status."[23] "As defined by the trial court, addiction *is* the regular use of narcotics and can be proved only by evidence of such use."[24] In addition, making the status of addiction a criminal offense is not an "arbitrary imposition." Such legislation has the same purpose as that which subjects those in the status of vagrancy to criminal prosecution —the prevention of criminal acts.[25] Indeed, in six jurisdictions the addict is classified either a vagrant[26] or a disorderly person.[27] The reasonableness of placing the addict in the same category as the vagrant becomes apparent when one considers the close relationship between narcotics addiction and crime. Not only must the addict transgress state and federal law in acquiring, possessing, and using narcotics, but "for most narcotic addicts, predatory crime . . . is a necessary way of life."[28]

Thus, it appears that it may have been necessary for the Court to utilize the cruel and unusual punishment prohibition in its attack on the status aspect of the California statute. The effect of the decision on similar statutes which make no provision for treatment is clear. They have been struck down.[29] The effect of the decision on the status statutes which do provide for treatment is not clear beyond the fact that if these statutes are valid, the courts may have lost the right to exercise their discretion with regard to treatment for the addict. It may very well be that these statutes have also been struck down since the Court objected to branding the addict a criminal.

23. 370 U.S. at 685.
24. *Id.* at 686.
25. See note 10 *supra.*
26. D.C. CODE ANN. § 33-416a (1961); UTAH CODE ANN. § 76-61-1(12) (1953); VA. CODE ANN. § 63-338(9) (1950); WASH. REV. CODE § 9.87.010(12) (Supp. 1957).
27. COLO. REV. STAT. ANN. § 48-6-20(5) (Supp. 1960); N.J. STAT. ANN. 2A:170-8 (Supp. 1961).
23. DRUG ADDICTION: CRIME OR DISEASE 64 (1961); *accord,* ANSLINGER & TOMPKINS, *op. cit. supra* note 8, at 267-78.
29. The present decision has already been cited by the Supreme Court of Missouri in striking down that state's statute (see note 12 *supra*) which subjected the addict to imprisonment without treatment because of his status. State v. Bridges, 360 S.W.2d 648 (Mo. 1962).

In that event, the only avenue open to the states for confining an addict without proof of an act is civil commitment. Even though the use of the eighth amendment in the present decision may have been justified, the broad implications of the holding remain and cannot be ignored by Congress or the legislatures of the states. There may be no indication that the Court will apply the eighth amendment to the act statutes in the immediate future, but the present decision has established a basis for doing so at a later date. The decision calls for further modification of the criminal approach to the problem of narcotics addiction. This modification might take the form of the legislation recently enacted by New York.

Damages—Collateral Source Rule—Value of Medical Services Plaintiff Received as a Gratuity Not Allowed as Special Damages

Plaintiff, a physician, was injured as a result of defendant's negligence. Plaintiff's fellow doctors rendered him medical services without charge, and the necessary physiotherapy treatments were given him by his regularly-employed office nurse during regular office hours. In his bill of particulars plaintiff claimed as special damages the reasonable value of medical and nursing care. The trial court ruled that these were not proper items of damages. The supreme court, appellate division, affirmed. On appeal to the Court of Appeals of New York, *held*, affirmed. Since a plaintiff in a personal injury action is entitled only to compensation from the defendant, he cannot further recover as special damages the value of services which he received as a gratuity. *Coyne v. Campbell*, 183 N.E.2d 891 (N.Y. 1962).

Damages at early common law proposed to do no more than make the plaintiff whole.[1] The plaintiff in a personal injury action was entitled to reimbursement for any out-of-pocket expense incurred as a result of the defendant's wrong, as well as general damages for pain and suffering.[2] But he was entitled to no more than this, and if, as a result of the defendant's wrong, he received any benefits which tended to reduce out-of-pocket expenses, such benefits were considered by the courts in determining the amount of the plaintiff's damages. A rather limited exception was recognized when the benefit was "col-

1. MCCORMICK, DAMAGES § 137 (1935); OLECK, DAMAGES TO PERSON AND PROPERTY § 1 (1961).

2. OLECK, *op. cit. supra* note 1, § 1.

lateral to the defendant," that is, was only remotely connected with the wrong, in which case evidence of the benefit was considered irrelevant.[3] English tort law is still largely controlled by this rule,[4] although some revision is apparently now in process.[5] In the United States, however, this "collateral source" exception has been extended in personal injury cases to exclude evidence of almost all payments and services received by a plaintiff from any source other than the defendant.[6] In a personal injury action a defendant is not allowed to benefit by sums paid or services rendered the plaintiff, whether gratuitously or not.[7] The broadening of the exception began with life and accident insurance cases[8] and was later extended to cases involving continuation of wages,[9] pension plans,[10] workman's compensation and other statutory benefits,[11] gratuitious medical and nursing services, and gifts given plaintiff by friends,[12] members of the family,[13] and charity.[14] In life and accident insurance cases the collateral source

3. MAYNE, DAMAGES 149, 151 (11th ed. 1946). The limited scope of this exception is shown in the following discussion by Young, L. J., differentiating between a pension given a widow and a gift to the widow by her husband's fellow workers. The case involved a wrongful death statute, but the common law of damages in this area is well illustrated. "[W]hile the fatal accident to the deceased was in these cases the causa sine qua non of the subscription, it was the occasion but not the causa causans of its payment. I conceive that normally in such cases the amount of the subscription is largely personal to the beneficiaries, and is materially affected by their merit in the eyes of the subscribers or the reverse. Such considerations have no place in the pension payment, and if a case were to occur where such subscriptions as I have referred to were shown to be motived solely on the death of the deceased and were handed over for his widow and children solely because of their relationship to him and irrespective entirely of any personal qualification or merit or otherwise of their own, I should be of opinion that these payments too, like the pension payment must be brought into account against the defendant's liability. And the reason is that, as Lord Watson says, the right to recover damages is restricted to the actual pecuniary loss sustained by each individual entitled to sue." Baker v. Dalgleish Steam Shipping Co., [1922] 1 K.B. 361, 380-81 (1921).

4. See British Transp. Comm'n v. Gourley, [1956] A.C. 185 (1955); Jeuner v. Allen West & Co., [1959] 1 Weekly L.R. 554 (C.A.), noted in 75 L.Q. REV. 298 (1959); Mead v. Clarke Chapman & Co., [1956] 1 Weekly L.R. 76 (C.A.); Baker v. Dalgleish Steam Shipping Co., *supra* note 3.

5. See Judd v. Hammersmith Hosp. Bd., [1960] 1 Weekly L.R. 1328 (Q.B.), noted in 76 L.Q. REV. 345 (1960) (plaintiff's benefits from contributing pension cannot aid defendant); Schneider v. Eisovitch, [1960] 2 Q.B. 430, noted in 76 L.Q. REV. 187 (1960) (recovery for gratuitous services of plaintiff's brother where plaintiff intends to repay him); Peacock v. Amusement Equip. Co., [1954] 2 Q.B. 347 (aid given plaintiff by his stepchildren irrelevant to question of amount of damages).

6. 1 SUTHERLAND, DAMAGES § 158 (4th ed. 1916).

7. *Ibid.*

8. *E.g.*, Harding v. Town of Townshend, 43 Vt. 536 (1870).

9. *E.g.*, Nashville, C. & St. L. Ry. v. Miller, 120 Ga. 453, 47 S.E. 959 (1904); Illinois Cent. R.R. v. Porter, 117 Tenn. 13, 94 S.W. 666 (1906).

10. *E.g.*, Simovich v. Erie R.R., 230 F.2d 658 (3d Cir. 1956).

11. *E.g.*, Sheffield Co. v. Phillips, 69 Ga. App. 41, 24 S.E.2d 834 (1943).

12. *E.g.*, Clark v. Berry Seed Co., 225 Iowa 262, 280 N.W. 505 (1938).

13. *E.g.*, Wells v. Minneapolis Baseball & Athletic Ass'n, 122 Minn. 327, 142 N.W. 706 (1913).

14. *E.g.*, Mobley v. Garcia, 54 N.M. 175, 217 P.2d 256 (1950).

rule is applied in all jurisdictions. A few American courts still do not apply the doctrine in all areas: New York[15] and Alabama[16] seem to hold to the early common law; Missouri[17] and Pennsylvania[18] allow recovery where the aid is gratuitous, but not when paid under a contract other than insurance; and other courts have made special rules in special fact situations.[19] However, the collateral source rule, disallowing evidence of any mitigating benefits from a source other than the defendant, is now broadly applied in all personal injury cases in the great majority of states.[20]

The instant case reaffirms the New York rule that a plaintiff may not recover for medical expenses for which he incurred no legal liability. The court follows *Drinkwater v. Dinsmore*,[21] the leading New York case decided in 1880, declaring it still to be the law of New York.[22] *Drinkwater* held that evidence that plaintiff's employer had paid him regular wages during his incapacity was admissible. By way of dictum, the *Drinkwater* court also purported to rule that only out-of-pocket medical expenses are recoverable as special damages.[23] The court in the instant case points out that in 1957 the New York Law Revision Committee recommended legislation specifically designed "to abrogate the rule of *Drinkwater v. Dinsmore*,"[24] which it

15. See Drinkwater v. Dinsmore, 80 N.Y. 390 (1880). *But see* Healy v. Rennert, 9 N.Y.2d 202, 173 N.E.2d 777 (1961), discussed note 31 *infra*.

16. See Note, 14 ALA. L. REV. 148 (1961).

17. Moon v. St. Louis Transit Co., 247 Mo. 227, 152 S.W. 303 (1912).

18. Pensak v. Peerless Oil Co., 311 Pa. 207, 166 Atl. 792 (1933); Quigley v. Pennsylvania Ry., 210 Pa. 162, 59 Atl. 958 (1904). *But cf.* Schwoerer v. City of Philadelphia, 167 Pa. Super. 356, 74 A.2d 755 (1950) where it is said: "since the plaintiff rendered to his employer no service of any kind (during the period of disability), the sums paid to the plaintiff by his employer *must* be a gift or gratuity." 74 A.2d at 757.

19. Connecticut: Di Leo v. Dolinsky, 129 Conn. 203, 27 A.2d 126 (1942) (no recovery for value of services rendered by charity hospital); Massachusetts: Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1 (1939) (no recovery for nursing rendered by wife since wife could enforce no claim against plaintiff); Colorado: United States v. Gaidys, 194 F.2d 762 (10th Cir. 1952) (no recovery for value of medical services, hospitalization, or loss of time where these were furnished serviceman by government); Publix Cab Co. v. Colorado Nat'l Bank, 139 Colo. 205, 338 P.2d 702 (1959) (plaintiff's health and hospital insurance cannot aid defendant); City of Englewood v. Bryant, 100 Colo. 552, 68 P.2d 913 (1937) (recovery for value of nursing by plaintiff's mother without expectation of pay, but no recovery for medical treatment rendered gratuitously by county hospital).

20. See Hudson v. Lazarus, 217 F.2d 344 (D.C. Cir. 1954); Conley v. Foster, 335 S.W.2d 904 (Ky. 1960); Plank v. Summers, 203 Md. 552, 102 A.2d 262 (1954); RESTATEMENT, TORTS § 920, comment *e*, § 924, comment *f* (1939) (exception made in the charity hospital cases).

21. 80 N.Y. 390 (1880).

22. "Although decided more than 80 years ago, the Drinkwater case has continuously been and still is recognized as the prevailing law of this State . . . ." 183 N.E.2d at 891.

23. "[T]he plaintiff must show what he paid the doctor, and can recover only so much as he paid or was bound to pay." 80 N.Y. at 393, quoted in 183 N.E.2d at 891.

24. 1957 REPORT OF N.Y. LAW REVISION COMM'N 223.

criticized as "unfair, illogical, and unduly complex,"[25] but that the legislature "declined to enact"[26] the proposed amendment to the Civil Practice Act.[27] The court treats this inaction as a manifestation of legislative intent to leave the *Drinkwater* rule in effect. Plaintiff argued that the services rendered him were not actually gratuitous, since he is under a moral obligation to reciprocate with free services should his fellow doctors ever need them; however, the court rejected this contention.[28] The court apparently assumes that the fact that plaintiff's nurse was paid no additional compensation for treating plaintiff is equivalent to the services being gratuitous.[29] Finally, the court rejects the contention that *Healy v. Rennert*,[30] a recent case applying the collateral source rule to a fireman's pension and health insurance benefits, abrogates *Drinkwater*.[31] According to the court, to depart from *Drinkwater* would be to adopt a rule which would do more than compensate plaintiff "where damages are compensatory and not pumitive,"[32] and would "in the end simply require a defendant to pay a plaintiff the value of a gift."[33] A concurring opinion also distinguishes the *Healy* case and applies the early common law limitation to the scope of that which is to be regarded as a "collateral source."[34] A vigorous dissenting opinion is based primarily on the *Healy* case and the Law Revision Committee Report.

The court in the instant case apparently confines the application of "collateral source" rule in New York to services for which plaintiff has paid or is bound to pay.[35] If this is now the New York rule, however, it seems to be wrongly applied to the claimed damages for the nurse's services. The services of a salaried nurse are not a gratuity to her employer when they become part of the duties of her regular work

25. *Id.* at 227.

26. 183 N.E.2d at 891.

27. See generally *Legislation*, 26 FORDHAM L. REV. 372, 380 (1957).

28. "[I]n any event such a moral obligation is not an injury for which tort damages, which 'must be compensatory only' . . . may be awarded. A moral obligation, without more, will not support a claim for legal damages." 183 N.E.2d at 892.

29. "Plaintiff does not claim that he was required to or in fact did pay any additional compensation to his nurse for her performance of these duties, and, therefore, this has not resulted in compensable damage to plaintiff." 183 N.E.2d at 892.

30. 9 N.Y.2d 202, 173 N.E.2d 777 (1961).

31. The *Healy* case makes no mention of *Drinkwater;* it merely recognizes that the majority view in the United States allows recovery and then applies that rule to the facts.

32. 183 N.E.2d at 893.

33. *Ibid.*

34. "If this were—and it is not—a case of 'payment from collateral source,' Healy v. Rennert . . . would be authority for recovery." 183 N.E.2d at 893.

35. "In short, insurance, pension, vacation and other benefits which were contracted and paid for are not relevant here. Gratuitous services rendered by relatives, neighbors and friends are not compensable." 183 N.E.2d at 892.

week.[36] The holding as to the medical services, while definitely against the weight of authority, seems to be a desirable result. The function served by the collateral source rule at its early stages was to save judicial time and trouble in having to hear evidence and arguments which could do no more than point up the basic conflict between two equally attractive ideas of justice: that civil damages should be compensatory only, and that the defendant should not receive the benefit of the plaintiff's friends' generosity or provident contracts with which the defendant's only connection is his wrong to the plaintiff. Perhaps the collateral source rule is the best solution to the problem in those areas where the background remains unchanged by modern developments and where the arguments on either side merely emphasize this conceptual difficulty.[37] But unfortunately, while new "collateral sources" have been brought into the courts as society has become more complex, the courts have continued to speak in terms of "compensation" and the established "collateral source" exception. Rather fine distinctions as to the definition of a "collateral source" have resulted in confusion and uncertainty in the law of the jurisdictions which more or less follow the common law view with its emphasis on compensation;[38] the more liberal jurisdictions avoid this evil by applying the rule to all relief from sources other than the defendant, apparently overlooking other important considerations. A better approach in these cases would be to examine the rather clearly defined areas in which the collateral source rule has been applied and to consider, in addition to the theoretical distinctions, the interests of society served by allowing or disallowing recovery. It is fairly clear that public policy demands that recovery from the defendant not be precluded by insurance coverage, not so much because the source is collateral to the defendant as because to hold otherwise

36. These services consumed two hours a week for some three and a half years. Brief for Appellant, p. 6, Coyne v. Campbell, 183 N.E.2d 891 (N.Y. 1962). Plaintiff paid his nurse for these services just as he paid for her office duties; she certainly did not work for plaintiff gratuitously. The nurse did not spend extra time for the same salary because of plaintiff's injury; on the contrary, plaintiff lost the value of her services to his business during the two hours a week she was treating him.

37. The usual reason given for the collateral source rule here is that "where a gift is intended to be made to the injured person its benefits should not inure to the tortfeasor." RESTATEMENT, TORTS § 924, comment *f* (1939). This argument usually ignores the fact that the plaintiff would still be benefited considerably by being relieved of worry over the uncertainities of litigation and by having the use of the money when he most needs it. And to allow recovery from the defendant does more than compensate. A gift at any other time would be completely irrelevant, but here the gift was caused or occasioned by the accident. Proximate cause (policy) questions might enter the discussion, as well as the question of the intent of the donor. 2 HARPER & JAMES, TORTS § 25.22 (1956). These arguments and discussions do no more than point up the fact that a conflict exists.

38. *I.e.*, the criticisms in the 1957 REPORT OF N.Y. LAW REVISION COMM'N, *op. cit. supra* note 24. See review of Alabama decisions in Note, 14 ALA. L. REV. 148, 154-60 (1961).

might tend to encourage persons to leave themselves unprotected and would increase the cost of insurance protection by eliminating rights of subrogation.[39] The same would seem to apply to cases in which the plaintiff has protected himself by contract with his employer, especially where subrogation is provided.[40] In those states in which a right of subrogation is given the insurer under workmen's compensation statutes, the legislature has made the policy determination that defendant, rather than the public, will be made to bear the burden of compensating the injured party, with the public bearing the risks of non-recovery.[41] In other cases, however, the application of the collateral source rule can have no other result than to allow the plaintiff damages which are not needed to compensate him for his injuries. For example, the charity hospital cases and cases under those workmen's compensation statutes which have no subrogation provisions[42] give the plaintiff the necessary services or payments as a matter of right with no obligation to pay for them. These "collateral sources" are today part of the social background in which the injury occurs. Nothing in these cases demands that the plaintiff be allowed to recover from the defendant.[43] The only results of the collateral source rule here are punishment of the defendant and giving the plaintiff a profit, both of which are contrary to the general theory of civil liability. In the present case, the medical services received by the plaintiff seem to come within this area. At the time of the accident there was little danger of plaintiff's having to pay for medical treatment. This aspect of professional courtesy was one of the facts of life as far as plaintiff was concerned. Plaintiff had paid nothing for this protection. The services were available to plaintiff as a practical certainty, although not as a matter of right. The collateral source rule is perhaps the best solution to the problems arising in cases of unexpected gifts by friends and family, where arguments do no more than emphasize the basic conflict.[44] In the future, however, it is

39. If subrogation is not provided, perhaps the policy of preventing insurance wagers might be considered strong enough to confine recovery from the defendant to the amount of premiums paid.

40. These considerations are in addition to the fact that the plaintiff has in one way or another paid for the protection, and the compensation idea is not stretched much by allowing recovery.

41. Legislative intent will be an important consideration in all cases where the right of action or the collateral sources is a statutory creation.

42. Originally the Veterans Hospital cases might have been brought within this class. Today, however, the Veterans' Administration Regulations require that an assignment of the plaintiff's rights be made to the administration. 38 C.F.R. § 17.48 (f) (Supp. 1962).

43. The defendant does not keep the plaintiff from receiving the entire amount of the plaintiff's friends' generosity; there is no subrogated right, no expeuse to the plaintiff, no taking advantage of the plaintiff's provident contracts.

44. A recent English case, however, seems to have solved this basic conflict by allowing the plaintiff to recover provided she promised the court to use the money re-

hoped that the courts will take a broader, more discerning look at both the interests of society and the principles of civil liability rather than confining their inquiry to definitions of "collateral source."[45]

Due Process—Taxation of Insurance Premiums Paid to Foreign Insurers on Property Within State

A Texas statute[1] levied a five per cent tax on premiums paid under insurance contracts made with an insurer not licensed to do business in Texas. Plaintiff-insured paid the tax under protest and brought suit for recovery. The policies were negotiated and paid for outside of Texas. The insurers were not licensed to do business in Texas, had no agents or offices in Texas, and neither solicited business nor investigated risks or claims in Texas. The plaintiff-insured was a New York corporation domiciled in New York and doing business in Texas. Losses under the policies were payable to plaintiff at its principal office in New York City. The insured property was located in Texas. The Texas Court of Civil Appeals declared the statute unconstitutional.[2] On certiorari in the Supreme Court of the United States, *held*, affirmed. A state may not tax premiums on an out-of-state insurance contract when the only contacts between the state and the insurance transactions are the presence of the insured property in the state and the fact that the insured is doing business in the state. *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

In *Allgeyer v. Louisiana*[3] the Supreme Court invalidated a Louisiana statute levying a fine on any person insuring property located in the state with an insurance company that had not compiled with Louisiana law. The Court ruled that a state had no power to regulate a contract effected beyond its borders since this would abridge liberty of contract without due process of law. The Court later ruled that a state could not tax insurance premiums under similar circumstances.[4] A state, however, could tax insurance contracts if the formation of the contract could be physically connected with the state by

covered under this head to repay her generous benefactor. Schneider v. Eisovitch, *supra* note 5.

45. See generally, 2 HARPER & JAMES, TORTS §§ 25.22, .23 (1956); Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962).

1. TEX. INS. CODE art. 21.38, § 2(e) (Supp. 1962).
2. 340 S.W.2d 339 (Tex. Civ. App. 1960).
3. 165 U.S. 578 (1897).
4. St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922).

an act taking place within its borders,[5] or if the insurance company were licensed to do business in the jurisdiction so that the tax could be construed as being levied on the general right of doing business in the jurisdiction.[6] Under the *Allgeyer* doctrine the presence of the insured property in the state and the fact that the insured was a resident of the state were held to not constitute a sufficient basis for regulation or taxation by the state.[7] The Court seems to have been even more reluctant to allow state regulation of the terms of an extra-state insurance contract than to permit taxation. Thus, the Court held that a state could not modify the terms of an out-of-state contract insuring local property although the insurer was licensed to do business in the state and the insured was a resident of the state.[8] In *Osborn v. Ozlin*[9] and *Hoopeston Canning Co. v. Cullen*,[10] however, the Court shifted abruptly from the conceptualistic *Allgeyer* place-of-the-contract criterion to a "sufficient state interest" test. In *Osborn* the Court upheld a Virginia statute requiring all insurance companies authorized to do business in the state to insure Virginia risks through resident agents even though the contract was negotiated outside of the state. The Court held that the state had sufficient interest in the contracts to warrant such regulation.[11] In *Hoopeston*, regulation by New York of out-of-state reciprocal insurance associations was declared constitutional although the contracts of insurance were executed in Illinois and claims were paid by mail from Illinois. The

5. Palmetto Fire Ins. Co. v. Connecticut, 272 U.S. 295 (1926). Palmetto entered into a contract in Michigan with the Chrysler Corporation in which Chrysler automobiles were insured from the date of the sale. The Court ruled that such insurance on cars sold in Ohio was subject to the Ohio taxing power since: "When a man bought a car in Ohio, by that act he made effective the agreement of the Company to insure future purchasers, and imposed upon it an obligation that did not exist before. It is true that the obligation arose from a contract made under the law of another State, but the act was done in Ohio and the capacity to do it came from the law of Ohio, so that the cooperation of that law was necessary to the obligation imposed." *Id.* at 304.

6. Compañia General de Tabacos de Filipinas v. Collector, 275 U.S. 87 (1927) (premiums paid to the London Company): "We may properly assume that this tax, placed upon the assured, must ultimately be paid by the insurer, and treating its real incidence as such, the question arises whether making and carrying out the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because the policy covers fire risks on property within the Philippine Islands which may require adjustment and the activities of agents in the Philippine Islands with respect to settlement of losses arising thereunder." *Id.* at 98.

7. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938); Compañia General de Tabacos v. Collector, 275 U.S. 87 (1927) (premiums paid to the Paris Company) St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922).

8. Boseman v. Connecticut Gen. Life Ins. Co., 301 U.S. 196 (1937); Hartford Acc. & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934).

9. 310 U.S. 53 (1943).

10. 318 U.S. 313 (1943).

11. "For it is clear that Virginia has a definable interest in the contracts she seeks to regulate . . . ." 310 U.S. at 65.

Court recognized New York's substantial interests in the regulation.[12] In 1944, in *United States v. South-Eastern Underwriters Ass'n*,[13] the Supreme Court unexpectedly ruled that the insurance business is interstate commerce, impliedly subjecting state regulation to commerce clause restrictions. But in 1945 Congress passed the McCarren Act,[14] thereby removing the commerce clause barrier against state regulation and taxation of insurance.

In the present case Texas argued that the vitality of the *Allgeyer* doctrine had been destroyed by the state interest theory of *Osborn* and *Hoopeston*.[15] Texas contended that her vital interest in regulating the insurance of Texas risks with unauthorized companies was sufficient to overcome due process objections to the taxing statute. However, the Supreme Court distinguished the instant case from *Osborn* and *Hoopeston* on the grounds that the insurers in this case carried on no activities in the state. Without deciding whether the *Allgeyer* line of cases is incompatible with *Osborn* and *Hoopeston*, the majority found an express intention by Congress in the McCarren Act to confine the power of the states over insurance to the limitations set forth in the specific cases of *Allgeyer v. Louisiana*,[16] *St. Louis Cotton Compress Co. v. Arkansas*,[17] and *Connecticut General Life Insurance Co. v. Johnson*.[18] The Court then reasoned that, even though "Congress . . . does not have the final say as to what constitutes due process . . . ,"[19] if there is a strong congressional policy present in a close constitutional question, the Court will be reluctant to upset that

12. "In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. (Footnote omitted.) More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors." 318 U.S. at 316.

13. 322 U.S. 533 (1944).

14. 59 Stat. 33 (1945), 15 U.S.C. § 1012(a) (1958): "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

15. "To the petitioner, it is clear . . . that the test of validity for state regulation is no longer a conceptualistic one, but rather the test is one of determining the degree of interest in the insurance contracts by the regulating state." Petition for Certiorari, p. 10, State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451 (1962).

16. 165 U.S. 578 (1897).

17. 260 U.S. 346 (1922). See text accompanying notes 4 & 7 *supra*.

18. 303 U.S. 77 (1938). See text accompanying note 7 *supra*. "We need not decide *de novo* whether the results (and the reasons given) in the *Allgeyer*, *St. Louis Cotton Compress*, and *Connecticut General Life Insurance* decisions are sound and acceptable. For we have in the history of the McCarran-Ferguson Act an explicit, unequivocal statement that the Act was so designed as not to displace those three decisions." 370 U.S. at 455. The opinion then quotes from H.R. REP. No. 143, 79th Cong., 1st Sess. 3 (1945).

19. 370 U.S. at 457.

policy.[20] Mr. Justice Black dissented vigorously on the policy grounds that the majority's interpretation of the McCarran Act would threaten the "whole foundation of the Texas regulatory program . . . ."[21]

A more reasonable interpretation of the McCarren Act would seem to be that it was intended simply to remove the commerce clause impediment against state regulation and taxation of the insurance business impliedly imposed by the *South-Eastern Underwriters* case.[22] The Court's interpretation of the act to avoid overruling *Allgeyer* seems contrived, especially since *Osborn* and *Hoopeston* were also decided before the *South-Eastern Underwriters*. In refusing to rule on the validity of the reasoning of the *Allgeyer* line of cases, the instant case seems to leave two conflicting constitutional theories of due process in the field of state taxation and regulation of insurance. For the basic principle of *Allgeyer* is that a state has no power to tax or regulate a contract made beyond its borders. The basic principle of *Osborn* and *Hoopeston* is that a state has such a concern in the insurance field that it has the constitutional power reasonably to tax or regulate a particular insurance contract if its interest in that contract is vital enough. Eventually, a choice between these two theories must be made.[23] Perhaps in this case the Court would have been more influenced by the *Osborn* and *Hoopeston* decisions if it could have found more contacts between Texas and the insurance transactions. However, under the interest analysis theory it is the quality, not the quantity, of the contacts that is important. And there is hardly a more important contact than the presence of the insured real property in the taxing state. For example, a state is certainly substantially interested in the restoration of its real property if it is injured. Moreover, plaintiff-insured was a corporation doing business in Texas and therefore could be considered a resident of Texas. As Mr. Justice Black points out in his dissent:

> This holding seems to me to threaten the whole foundation of the Texas regulatory program for it plainly encourages Texas residents to insure their property with unregulated companies and discourages out-of-state com-

20. "When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions . . . we should be loathe to change them." 370 U.S. at 457.

21. 370 U.S. at 459.

22. "[W]e give to the States no more powers than they previously had, and we take none from them." 370 U.S. at 456, quoting from 91 CONG. REC. 1442 (1945) (remarks of Senator McCarran).

23. The Court has made such a shift in constitutional rationale in other due process-conflict of laws fields. *Cf.* International Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (in personam jurisdiction of foreign corporations); Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935) (workmen's compensation). See Note, 35 COLUM. L. REV. 751 (1935).

> panies from qualifying to do business in and subjecting themselves to regulation and taxation by the State of Texas.[24]

According to the petition for the writ of certiorari, twenty-two other states have statutes similar to the statute in question.[25] The Supreme Court, however, by its strained interpretation of the McCarran Act, never reached the point of considering the state's interests in the tax.

There is possibly another approach to the problem of the present case. Since the statute in question merely places a tax on the insurance premiums and does not seek to regulate or modify the terms of the contract itself, it would seem reasonable simply to consider this tax in relation to the broader field of general state taxing power under the due process clause. The Supreme Court has held that the taxation of intangibles by two different states is not in itself a denial of due process.[26] Later, the Court upheld a Wisconsin tax upon dividends of a foreign corporation licensed to do business in the state even though the dividends were declared outside of the state to non-residents. The tax was measured by the Wisconsin earnings of the corporation. The Court said:

> [The] test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to the protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.[27]

Since the Court has recognized that the ultimate economic incidence of a tax on insurance premiums is on the insurer,[28] it must be determined whether the insurance companies, although not doing business in Texas, received commensurate benefits from Texas to sustain the tax. It can well be argued that they did on the grounds that the insured property, from which their liability would arise, was subject to Texas fire and police protection. This approach to the case, however, was not dealt with either in petitioner's brief or in the Court's opinion.

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24. 370 U.S. at 459.

25. Petition for certiorari, p. E-1, State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451 (1962).

26. Curry v. McCanless, 307 U.S. 357 (1939).

27. Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940); *accord,* International Harvester Co. v. Wisconsin Dep't of Taxation, 322 U.S. 435 (1944) (upholding same statute); see Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 465 (1959) (quoting generally with approval).

28. See note 6 *supra.*

Federal Jurisdiction—Sovereign Immunity—Suits Against Officers of the Federal Government

Defendant, a Forest Service officer of the United States Department of Agriculture, was required in the discharge of his official duties to be in possession of certain land in Jasper County, Georgia. Plaintiffs brought suit in ejectment, alleging that they held legal title to the property as remaindermen under a will which had devised a life estate in the property to one Martha Sanders. The United States had purchased the land from its supposed owners in fee, who had obtained it by devise from Mrs. Sanders; plaintiff asserted that these devisees had received nothing under Mrs. Sanders' will, because having only a life estate, she had nothing to devise. The action was removed to the federal district court by defendant,[1] whose motion to dismiss for lack of jurisdiction was granted on the ground that his possession of the property was pursuant to his authority as an officer of the United States Government.[2] The court of appeals reversed.[3] On certiorari in the Supreme Court of the United States, *held,* reversed. A federal court has no jurisdiction over an officer of the federal government in an action ensuing from acts performed within the scope of the officer's statutory authority, unless the statute granting such authority is unconstitutional in its application to the facts of the particular case. *Malone v. Bowdoin,* 369 U.S. 643 (1962).

The doctrine that the United States is immune to suit without its consent has been a continuing source of judicial obfuscation throughout the history of this country.[4] That the germinal idea for the application of this principle in the United States came from England, where it had become firmly established under the common-law monarchy[5] (though quite possibly under a misconception of the maxim "the king can do no wrong"[6]), cannot be seriously questioned,[7]

1. 28 U.S.C. § 1442 (a) (1958) provides in part:
"A civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
"(1) Any officer of the United States or any agency thereof . . . for any act under color of such office . . . ."

2. *Sub nom.* Doe v. Roe, 186 F. Supp. 407 (M.D. Ga. 1959).

3. Bowdoin v. Malone, 284 F.2d 95 (5th Cir. 1960).

4. Mr. Justice Frankfurter in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 706 (1949) (dissenting opinion) observed that "consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of *ad hoc* determinations making for eventual confusion and conflict."

5. Borchard, *Governmental Responsibility in Tort, VI,* 36 YALE L.J. 1, 17-37 (1926).

6. Bracton states that the maxim meant simply that the king was not privileged to do wrong. 1 BRACTON, DE LEGIBUS ET CONSUETUDINES ANGLIAE 39, 269 (Twiss ed. 1878). See also Borchard, *supra* note 5, at 22.

7. Borchard, *supra* note 5, at 39-40; see Pugh, *Historical Approach to the Doctrine*

although a monarchial basis for the principle is certainly inapplicable to our republican system of government.[8] Of major significance in the development of the confusion concerning the scope of the doctrine is the fact that while the scope is largely determined by the basis arrived at, eminent authorities have been totally unable to agree as to such basis in this country.[9] It seems clear, however, that prior to 1949 sovereign immunity was not a jurisdictional bar to the type of action here involved—that in which a plaintiff alleged a colorable claim to title to specific property in the possession of an officer of the United States[10]—despite the fact that specific relief was involved. In the first four cases of this class which reached the Supreme Court,[11] no indication was given by the Court that the doctrine had any application whatsoever to such a situation.[12] The first vigorous attempt to defeat such an action on the basis of sovereign immunity was specifically rejected in *United States v. Lee*.[13] The holding of this

of Sovereign Immunity, 13 LA. L. REV. 476 (1953).

8. Borchard, *supra* note 5, at 37-41.

9. Mr. Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) suggested that the basis is "the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Mr. Justice Field, however, in The Siren, 74 U.S. (7 Wall.) 152, 154 (1868) stated that "the doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government." Mr. Chief Justice Jay in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 478 (1793) reasoned that "in all cases of actions against States or individual citizens, the National Courts are supported in all their legal and Constitutional proceedings and judgments, by the arm of the Executive power of the *United States*; but in cases of actions against the *United States*, there is no power which the Courts can call to their aid." The suggestion has been made that "the exemption [from suits without consent], as one of the attributes of sovereignty" is in some vague manner retained as being outside the broad language of article III of the Constitution. THE FEDERALIST No. 81, at 567-68 (Dawson ed. 1864) (Hamilton).

10. A judgment on the merits in favor of the plaintiff was not res judicata against the United States, since the United States could not be made a party defendant; such judgment simply had the effect of putting the plaintiff in possession. The United States, if it so desired, could then bring its own action to try title. See discussion on this point in United States v. Lee, 106 U.S. 196, 222 (1882).

11. Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11 (1815); Wilcox v. Jackson, 38 U.S. (13 Pet.) 496 (1839); Brown v. Huger, 62 U.S. (21 How.) 305 (1858); Grisar v. McDowell, 73 U.S. (6 Wall.) 363 (1867).

12. In three of the cases the question was clearly before the Court because set out in the bill of exceptions. Meigs v. McClung's Lessee, *supra* note 11, at 13; Brown v. Huger, *supra* note 11, at 308; Grisar v. McDowell, *supra* note 11, at 365. In Wilcox v. Jackson, *supra* note 11, the issue was apparently never raised. See discussion on these cases in United States v. Lee, 106 U.S. at 210-15. It should be noted here that the Court in these four cases did not peek around the question of sovereign immunity to look at the merits; in the *Wilcox*, *Brown*, and *Grisar* cases the plaintiff lost.

13. 106 U.S. 196 (1882) (5-to-4 decision). The suit was in ejectment against military officers of the United States. The property involved had been the Arlington estate of the wife of Robert E. Lee but was occupied at the time by the defendants, one

landmark case was controlling authority for almost seventy years.[14] In 1949, however, in *Larson v. Domestic & Foreign Commerce Corp.*[15] Mr. Chief Justice Vinson, speaking for the majority,[16] stated after a lengthy discussion of previous cases[17] that historically the only two instances in which recovery had been allowed in suits against officers of the United States were (1) when the statute purporting to grant authority to the officer was itself unconstitutional,[18] and (2) when the officer was acting outside the scope of his validly-granted statutory authority.[19] The *Lee* case was distinguished[20] on the ground that it was decided at a time when, if jurisdiction had been denied, the plaintiff would have had no remedy for the taking of his land[21] and that

part of the land serving as a military station and the other part as a national cemetery. Both the majority opinion (*id.* at 204-23) and the dissent (*id.* at 226-51) contain exhaustive discussions of the history and scope of the doctrine in this country, the dissent placing great emphasis on the development of the doctrine in England. *Id.* at 227-38. The majority concludes that "the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defence, it was neither urged by counsel nor considered by the court here, though, if it had been a good defence, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound . . . ." *Id.* at 215-16.

14. See, *e.g.*, Land v. Dollar, 330 U.S. 731 (1947); Ickes v. Fox, 300 U.S. 82 (1937); Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., 258 U.S. 549 (1922); Scranton v. Wheeler, 179 U.S. 141 (1900). In Land v. Dollar, *supra,* the Court concluded that "where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States v. Lee, supra,* has been repeatedly approved." 330 U.S. at 737.

15. 337 U.S. 682 (1949). The case involved a contract for the sale of surplus coal to plaintiff by the War Assets Administration. Plaintiff sought an injunction to prevent the War Assets Administrator, who was about to breach the contract, from selling the coal to anyone other than plaintiff. The suit was, therefore, essentially for specific performance.

16. The decision was 6-to-3, but Mr. Justice Rutledge concurred only in the result; and Mr. Justice Douglas concurred on the grounds that "the principles announced by the Court are the ones which should govern the selling of government property. Less strict applications of those principles would cause intolerable interference with public administration." 337 U.S. at 705.

17. 337 U.S. at 692-705. Mr. Justice Frankfurter wrote a lengthy dissent in which he also attempted to classify the types of actions in which the defense of sovereign immunity had been defeated. 337 U.S. at 705-32.

18. 337 U.S. at 690 (dictum).

19. 337 U.S. at 689 (dictum). The holding of the *Larson* case is summarized at 695 as follows: "We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency."

20. 337 U.S. at 696-97.

21. The Tucker Act, 24 Stat. 505 (1887) (codified in scattered sections of 28 U.S.C.) was not passed until five years after the *Lee* decision.

such taking would, therefore, have been unconstitutional.[22] Since the *Larson* decision there has been considerable conjecture concerning the outcome of the obvious conflict between the majority opinion in that case and the line of cases following *Lee*.[23]

In the instant case the Court resolved this conflict in favor of *Larson*, expressly approving the rule set down in the majority opinion of that case.[24] The plaintiff having alleged neither of the requisite bases of jurisdiction, his action necessarily failed. The *Lee* case was distinguished on the same grounds as in *Larson*.[25] Mr. Justice Douglas dissented, reaffirming the principle upon which his concurrence was based in *Larson*.[26] He determined that prior decisions are irreconcilable because of the weight covertly given to policy considerations[27] and suggested that the decision as to jurisdiction in suits against government officials should be the resultant of balancing the interests of the individual with those of the Government according to the nature of the particular suit.[28] He then concluded that in this situation the balance was with the plaintiff.[29]

There is no question but that this decision has emasculated *Lee*[30] by limiting it to a situation which will never again arise because of the availability of a remedy for damages in the Court of Claims. The majority's unquestioning acceptance of the rule stated in *Larson*[31] is somewhat surprising. In that case some of the distinctions drawn in regard to the type of action here involved were particularly feeble.[32]

22. The Chief Justice characterized the holding of *Lee* as "a specific application of the constitutional exception to the doctrine of sovereign immunity." 337 U.S. at 696 (dictum). In fact the question of due process was not raised in *Lee*. That case was nothing more than an ordinary ejectment action. It should be noted, moreover, that the contention that the availability of a remedy in the Court of Claims, as such, bars an action at law had twice been specifically rejected by the Supreme Court. Land v. Dollar, 330 U.S. 731, 738 (1947); Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., 258 U.S. 549, 567-68 (1922).

23. See, *e.g.*, *Developments in the Law—Remedies against the United States and Its Officials*, 70 HARV. L. REV. 827, 854-61 (1957); Note, *Sovereign Immunity and Specific Relief against Federal Officers*, 55 COLUM. L. REV. 73 (1955).

24. "[T]he action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.' 337 U.S. at 702." 369 U.S. 643, 647 (1962).

25. See note 22 *supra*.

26. 369 U.S. at 649-50 (dissenting opinion); see note 16 *supra*.

27. *Id.* at 650.

28. *Id* at 653.

29. *Ibid.* Of course, if for any reason the United States desires immediate possession, "it can bring its arsenal of power into play," including eminent domain. *Id.* at 650.

30. See note 22 *supra*. In fact the instant case is on all fours with *Lee*.

31. See note 19 *supra*.

32. 337 U.S. at 702 n.26. The Court distinguished Land v. Dollar, *supra* note 14, on the grounds that the complaint alleged that the officers acted outside the scope of their authority; the Court in *Land*, however, made it clear that sovereign immunity would not bar the suit even if the officers' action was within the scope of their

If, as seems much more likely, the majority in *Larson*[33] determined that the irreconcilable hodge-podge of decisions in suits against federal officers necessitated a revaluation of the principles controlling such actions and then decided that the announced rule was that which should govern, it should have so stated and avoided the resulting confusion. If the plaintiff's interest in realty to which he claims title is weighed against the slight interference with any governmental activity which would result from an exercise of jurisdiction in this case, it is seen that the case presents a situation most strongly favoring such exercise. But the Court's adoption of the *Larson* rule precludes the suit against the officer; thus it seems clear that the rule now covers the full breadth of suits against an officer of the federal government.[34] From the point of view of judicial administration the rule seems relatively simple to apply, and it instills a heretofore almost unknown quality of predictability into this area of the law. But the announced rule undeniably broadens the scope of a doctrine which the Court at least professes to frown upon;[35] the federal government's increasing involvement in commercial activity has certainly contributed to this attitude. The rigidity of the rule, with its consequent relief from prior judicial confusion, is its greatest liability. It is submitted that sovereign immunity is a judicially created anachronism which should now be judicially abolished. The scope of remedies available to a private litigant in a suit against an officer of the United States should be the same as those available in an action against

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authority. The case was remanded with the instruction that the property was to be returned to plaintiffs "if it is decided on the merits *either* that the contract was illegal *or that [plaintiffs] are pledgors.*" 330 U.S. at 739. (Emphasis added.) Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., *supra* note 14, was distinguished on the ground that the "officer" was in that case a corporation, when in fact the basis of the holding was an analogy between the Fleet Corporation and an individual officer, who, according to Mr. Justice Holmes, would unquestionably not be protected by sovereign immunity. 258 U.S. at 567. The fact that the government officer is a corporation rather than an individual is irrelevant in determining liability.

33. See note 16 *supra.*

34. For an interesting example of an extreme application of the *Larson* rule, see Andrews v. White, 121 F. Supp. 570 (E.D. Tenn. 1954), *aff'd per curiam,* 221 F.2d 790 (6th Cir. 1955).

35. "[T]he immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as 'Public opinion as to the peculiar rights and preferences due to the sovereign has changed,' *Davis v. Pringle,* 268 U.S. 315, 318; 'There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past . . . ,' *White v. Mechanics Securities Corp.,* 269 U.S. 283, 301; '. . . the present climate of opinion . . . has brought governmental immunity from suit into disfavor . . . ,' *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 391." National City Bank v. Republic of China, 348 U.S. 356, 359 (1955) (dictum).

another private litigant unless the government officer can show that the activity in which he is engaged is such that the granting of specific relief would jeopardize the performance of a governmental function which by its nature requires freedom from such interference.[36] Only when a substantial probability of such a threat is shown can sufficient reason be found for denying a litigant the full scope of normally available remedies.[37] Whenever it is shown that the officer is acting outside the scope of his authority or that the statute granting authority is unconstitutional, the officer would unavoidably fail to carry his burden of showing the necessity of unhampered operation.

Federal Tort Claims Act—Recovery by Federal Prisoner for Negligence of Prison Employees

Plaintiff, a prisoner in a federal penitentiary, sustained injuries as a result of alleged negligent treatment by prison doctors.[1] Plaintiff brought this action against the United States under the Federal Tort Claims Act. The district court sustained defendant's motion to dismiss. On appeal, *held*, reversed (2-1, and on rehearing *en banc*, 5-4). The Federal Tort Claims Act authorizes recovery by a federal prisoner from the United States for injuries sustained during his incarceration as a result of the negligence of prison employees. *Winston v. United States*, 305 F.2d 253 (2d Cir. 1962).

The Federal Tort Claims Act authorizes claims in the district courts for injuries caused by the negligent acts or omissions of federal employees within the scope of their employment under circumstances

36. The facts of the *Larson* case present an example of a situation in which a refusal to exercise jurisdiction under the proposed rule would be justified. See note 15 *supra*. The War Assets Administration was involved in a tremendous number of transactions; its efficiency would have been greatly impaired had it been unable to dispose of its property every time someone with whom it dealt was unsatisfied.

37. An acceptance of the proposed rule could have a possible derivative effect of encouraging the courts to re-evaluate the doctrine of common law unreviewability which has plagued litigants in actions against administrative agencies. See 4 DAVIS, ADMINISTRATIVE LAW §§ 28.01, —.08 (1958). Although sovereign immunity seems to go unnoticed in such decisions, the two doctrines are not dissimilar. It is thought that an abandonment of the traditional view of sovereign immunity might well compel the courts to ascertain the reasons for a refusal to review, in which case the problem would at least be placed in proper perspective and a rational promulgation of standards for reviewability would be facilitated; such standards would, moreover, prove quite helpful to the agencies themselves as bases for future action.

1. Plaintiff contracted a brain tumor which prison doctors failed to discover in the course of examinations over a two year period. As a result of the delay in treatment, he was made permanently blind.

where the United States, if a private person, would be liable under local law.[2] It is further provided that the United States is liable "in the same manner and to the same extent as a private individual under like circumstances."[3] Congress then listed twelve specific exceptions to the act.[4] The Supreme Court held in *Feres Ex'rx v. United States*[5] that soldiers cannot recover under the act for injuries negligently inflicted by military personnel where such injuries "arise out of or are in the course of activity incident to service."[6] The great majority of the lower federal courts which have considered the problem have held that *Feres*, by analogy, is controlling in the prisoner-jailer situation.[7] In *Feres*, the Court reasoned that there was no analogous liability under local law since a soldier had never been allowed to recover for negligence from his superiors or from the government he served,[8] and that there was no liability "under like circumstances" since no private person can maintain an army.[9] Apparently feeling that the plain meaning of the act was not conclusive against recovery, the Court proceeded to a discussion of various policy considerations. The Court premised that the soldier-government relationship, being "distinctively federal," required uniformity[10] and that there was no need for recovery under the act since Congress had provided an adequate system of compensation for soldiers which was "simple, certain, and uniform."[11] The courts which have followed *Feres* in disallowing prisoner claims have reasoned that the prison system, like

2. 28 U.S.C. § 1346(b) (1958) provides, in part: "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

3. 28 U.S.C. § 2674 (1958) provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."

4. 28 U.S.C. § 2680 (1958).

5. 340 U.S. 135 (1950).

6. *Id.* at 146. A serviceman on leave can recover if injured by military personnel. Brooks v. United States, 337 U.S. 49 (1949). This would seem to indicate that it is not the status of either party which precludes recovery, but the nature of the relationship between soldier and Government.

7. Lack v. United States, 262 F.2d 167 (8th Cir. 1958); Jones v. United States, 249 F.2d 864 (7th Cir. 1957); Berman v. United States, 170 F. Supp. 107 (E.D.N.Y. 1959); Van Zuch v. United States, 118 F. Supp. 468 (E.D.N.Y. 1954); Shew v. United States, 116 F. Supp. 1 (M.D.N.C. 1953); Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953). *Contra*, Lawrence v. United States, 193 F. Supp. 243 (N.D. Ala. 1961).

8. The Court seemed to imply that where state sovereign immunity was a bar to recovery in an analogous situation under state law, such immunity would preclude recovery under the Tort Claims Act. 340 U.S. at 141.

9. *Ibid.*

10. *Id.* at 143.

11. *Id.* at 144.

the military, is "distinctively federal" and requires uniformity. They have found further similarity in the fact that private persons do not operate prisons just as they do not maintain armies, so that they would not be "under like circumstances." All except three of these cases, however, were decided prior to two Supreme Court decisions which appear to have largely undermined the *Feres* reasoning. In *Indian Towing Co. v. United States*[12] the Government was held liable for the negligent operation of a lighthouse. The Government contended that there was no liability "under like circumstances" since private persons do not operate lighthouses, but the Court rejected this argument as irrelevant and found analogous liability in the "Good Samaritan" doctrine[13] of tort law. In *Rayonier, Inc. v. United States*[14] the Government was held liable for the negligence of the Forest Service in fighting a fire even though there was no cause of action at common law for negligent fire fighting by a state or local goverument. The Court held that the test was not whether some similar local governmental agency would be liable for negligence, but whether a private person would be liable for similar negligence.[15]

The court in the instant case based its decision primarily upon a literal interpretation of the act. It found analogous liability under local law in two situations,[16] the liability of a doctor or hospital for negligent care of a patient,[17] and the liability of a jailer individually to a prisoner.[18] Invoking the familiar *expressio unius* doctrine, the court reasoned that since Congress had listed twelve specific exceptions,[19] additional exceptions were precluded. The court had little difficulty in distinguishing *Feres* on several grounds: (1) there was analogous local liability here,[20] (2) the need for uniformity in a "distinctively federal" relationship expressed in *Feres* was based on

12. 350 U.S. 61 (1955).

13. The Court based liability on the settled principle that one who voluntarily undertakes to warn the public and thereby induces reliance is liable for a failure to give warning. *Id.* at 64-65.

14. 352 U.S. 315 (1957).

15. *Id.* at 319. In other words, the test is not whether an employee would be liable under local law as a member of some analogous local governmental group or agency, but whether he would be liable as an individual. It would appear that under this test, a prison doctor would be liable for a failure to exercise the standard of care required of private doctors. The circumstance that he was a prison doctor might be relevant in determining negligence, but not liability.

16. 305 F.2d at 265. The court applied the law of Indiana where the tort occurred.

17. Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953).

18. Magenheimer v. State *ex rel.* Dalton, 120 Ind. App. 128, 90 N.E.2d 813 (1950).

19. 28 U.S.C. § 2680 (1958).

20. Even applying the strict test of *Feres*, there was analogous liability since federal and state jailers had traditionally been liable as individuals. See Hill v. Gentry, 280 F.2d 88 (8th Cir. 1960); Asher v. Cabell, 50 Fed. 818 (5th Cir. 1892); Smith v. Miller, 241 Iowa 625, 40 N.W.2d 597 (1950). See also cases cited in Annot., 14 A.L.R.2d 353 (1950).

considerations of military efficiency not here pertinent,[21] and (3) the compensation system for prisoners is limited to one class of prisoners and is inadequate as to that class[22] whereas the compensation act for soldiers is broad in scope and adequate in amount. The court was unable to distinguish the *Feres* objection that a soldier's recovery was dependent on geographic chance over which he had no control, but did not consider this objection to be conclusive.[23] In answer to the Government's contention that discipline would be impaired, the court reasoned that this was a matter of policy within the sphere of Congress and not the courts; and even if it were a proper consideration, it had little merit since jailers' personal liability had not adversely affected discipline nor had the state's waiver of immunity in New York.[24] And finally, the contention that Congress had expressly recognized the lower federal court interpretation of the act[25] and had acquiesced in such interpretation was disposed of on the theory that the opinion of one Congress as to the intent of a prior Congress is of little significance,[26] especially when expressed in connection with private legislation.

The decision in the instant case seems to be in accord with the plain meaning of the Tort Claims Act and with the liberal construction given the act by the Supreme Court in the *Indian Towing Co.* and *Rayonier* cases. Congress expressly excepted twelve types of claims, and the Supreme Court added another in the *Feres* decision. If an additional exception is to be made in the present situation, it must be by analogy to the *Feres* situation. But it is submitted that *Feres* was grounded upon a proper judicial reluctance to allow claims which might hamper the efficient operation of the military. There appear to be no such vital policy considerations against the allowance of claims by prisoners. Since *Feres* was primarily a policy decision,

21. 305 F.2d at 256.

22. 18 U.S.C. § 4126 (1958), as amended, 75 Stat. 681 (1961). This act provides a remedy for only those prisoners who are injured while working in prison industries. Only a small percentage of the injuries are incurred in this manner.

23. The court reasoned that Congress has envisioned such a lack of uniformity in expressly making local law applicable as had the *Erie* doctrine and the Bankruptcy Act, which depends in many cases on state priority and contract law. 305 F.2d at 256.

24. *Id.* at 270.

25. The House Committee on the Judiciary, in considering legislation to compensate prisoners injured in the course of employment, reported: "Presently there is no way under the general law to compensate prisoners while so engaged. Their only recourse has been to appeal to Congress, and this Committee has reported numbers of private relief bills for such prisoners." H.R. REP. No. 534, 87th Cong., 1st Sess. 3 (1961).

26. The court cited as authority for this proposition Rainwater v. United States, 356 U.S. 590 (1958) wherein it was said: "At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance." *Id.* at 593. The present court's reasoning appears to be sound in view of this case.

it should not be extended to a new situation where the same considerations do not pertain. Congress did not except prisoners from the coverage of the act and neither should the courts.

Insurance—Products Liability Policy—Coverage Includes Damages Sustained While Replacing Defective Product

The plaintiff, a manufacturer of tubing used as material for radiant heating, was the insured under policies of liability insurance issued by the defendant. These policies contained a "products hazard" coverage which provided that the insurer would pay damages which the insured incurred as a result of property destruction "caused by accident,"[1] excluding recovery for injury to any products manufactured or sold by the insured. Suits alleging negligence and breach of warranty were brought against the plaintiff by dealers who had purchased and installed his product seeking damages sustained by reason of defective tubing.[2] The insurer refused to pay for the removal and replacement of the concrete flooring necessitated by the installation of new tubing, contending that damage to the old concrete flooring had not been "caused by accident" and that liability was excluded under the policy.[3] This action was brought by the insured to recover costs of settling and defending these suits. The trial court found for the defendant. On appeal to the Sixth Circuit, *held*, reversed. A products liability policy, excluding recovery for injury to goods or products manufactured, sold, handled or distributed by the insured, should be construed to exclude liability for damage to the product itself, but not damage to the property of others caused either directly or indirectly by failure of the product. *Bundy Tubing Co. v. Royal Indemnity Co.*, 298 F.2d 151 (6th Cir. 1962).

1. The insuring clause of the policy provided: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." The exclusion clause was as follows: "This policy does not apply: . . . (d) Under Coverage B, to injury to or destruction of . . . (3) any goods or products manufactured, sold, handled or distributed . . . by the named insured, or work completed by or for the named insured, out of which the accident arises . . . ." Bundy Tubing Co. v. Royal Indem. Co., 298 F.2d 151, 152 (6th Cir. 1962).

2. The insurance company defended the suits in California but refused to defend suits brought in Michigan.

3. The company conceded that it was liable for damage to household furnishings caused by the leakage of water from the defective tubing, and it offered to pay for such damage.

Because products liability insurance has only recently come of age, no general rule can be deduced from the cases involving these policies and dealing with the construction of the various terms used therein, except that they will be construed most strongly against the insurer.[4] The principal problem arising in the cases seems to be a failure to understand the scope of the insured risks.[5] "Caused by accident" as used in most products liability policies has been uniformly held to mean any unexpected and unintended event;[6] the fact that the event resulted from any negligence or breach of warranty on the insured's part has not been held to prevent the damage from being considered accidental.[7] It is usually expressly provided that damage sustained by any goods or products manufactured or sold by the named insured is excluded.[8] As a general rule it is conceded that a policy containing such an exclusion would not reimburse the insured for the cost of the replacement he provides for a defective product,[9] and it is also

4. See, *e.g.*, Smith v. Mutual Benefit Health & Acc. Ass'n, 175 Kan. 68, 258 P.2d 993 (1953); Liberty Life Ins. Co. v. Guthrie, 148 Kan. 907, 84 P.2d 891 (1938); Bader v. New Amsterdam Cas. Co., 102 Minn. 186, 112 N.W. 1065 (1907); Boswell v. Travelers Indem. Co., 38 N.J. Super. 599, 120 A.2d 250 (Super. Ct. 1956). *Contra,* Kendall Plumbing, Inc. v. St. Paul Mercury Ins. Co., 189 Kan. 528, 370 P.2d 396, 400 (1962). "We find nothing ambiguous in the words or phrases used in the exclusion clause and this court should not search for ambiguities where the words used in the contract have a common and well understood meaning.' Teeples v. Tolson, 207 F. Supp. 212 (D. Ore. 1962). See also 7a APPLEMAN, INSURANCE LAW AND PRACTICE § 4508 (1962); HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 10 (1961).

5. See 7a APPLEMAN, *op. cit. supra* note 4; Arnold, *Products Liability Insurance,* 25 INS. COUNSEL J. 42 (1958).

6. See, *e.g.*, C. Y. Thomason Co. v. Lnnbermen's Mut. Cas. Co., 183 F.2d 729 (4th Cir. 1950); Gilliland v. Ash Grove Lime & Portland Cement Co., 104 Kan. 771, 180 Pac. 793 (1919) (undesigned, sudden, and unexpected); Hauenstein v. St. Paul Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122 (1954) (unexpected, unforeseen, or undesigned happening or consequence from either known or unknown cause); United States Fid. & Guar. Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754 (1951) (accident defined according to its common usage; has no technical meaning.). See also Neale Constr. Co. v. United States Fid. & Guar. Co., 199 F.2d 591 (10th Cir. 1952) (results which are the natural and probable consequences are not accidents, even though they were not intended or anticipated.); Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953).

7. Cross v. Zurich Gen. Acc. & Liab. Ins. Co., 184 F.2d 609 (7th Cir. 1950); Swillie v. General Motors Corp., 133 So. 2d 813 (La. App. 1961); Diefenbach v. Great Atlantic & Pacific Tea Co., 280 Mich. 507, 273 N.W. 783 (1937); Rex Roofing Co. v. Lumber Mut. Cas. Co., 280 App. Div. 665, 116 N.Y.S.2d 876 (1952). *But see* Volf v. Ocean Acc. & Guar. Corp., 316 P.2d 651 (Cal. 1957) (use of defective materials in the construction of a building not an accident); Womack v. Employer's Mut. Liab. Ins. Co., 233 Miss. 110, 101 So. 2d 107 (1953) (defective garage work on a car not an accident).

8. Note 1 *supra.*

9. See, *e.g.*, L. L. Jarrell Constr. Co. v. Columbia Cas. Co., 130 F. Supp. 436 (S.D. Ala. 1955) (no recovery for damage to building completed by the insured); Liberty Building Co. v. Royal Indem. Co., 2 Cal. Reptr. 329, 346 P.2d 444 (1959) (no recovery allowed for defective plaster); Kendall Plumbing, Inc. v. St. Paul Mercury Indem. Co., 189 Kan. 528, 370 P.2d 396 (1962) (recovery denied when an electric starter and refrigerator unit installed by the insured were damaged when the starter

clear that the insurer is liable for damages to the property of others directly resulting from the accident.[10] The most difficult problems encountered by the courts have been in cases where the damages sustained did not fall within either of these clear-cut areas, but were expenses made necessary by the repair or replacement of the defective product.[11] Although there are very few cases dealing with this problem, the majority of the courts hold that such a policy covers injury or loss to others caused by the defective condition of the product, but does not reimburse the insured for replacement of his product or any expenses incurred as a result thereof.[12] These courts do not feel that the words, "damages because of injury to or destruction of property . . . caused by accident,"[13] should be construed to include the manu-

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hung and caused the refrigeration unit to burn up); Hauenstein v. St. Paul Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122 (1954) (no recovery allowed for defective plaster); Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co., 51 Cal. App. 2d 558, 334 P.2d 881 (Dist. Ct. App. 1959) (no recovery for defective aluminum doors manufactured by the insured), the court said, "It is not disputed that injury to or destruction of the doors themselves was excluded." 344 P.2d at 885. *But see* Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co., 281 F.2d 538 (3d Cir. 1960) (recovery allowed for defective paint sold by insured); Meiser v. Aetna Cas. & Sur. Co., 8 WIS. 2d 233, 98 N.W.2d 919 (1959) (insured allowed recovery for negligent work done by his employees). See also 7a APPLEMAN, *op. cit. supra* note 4; Arnold, *supra* note 5.

10. See, *e.g.*, McLouth Steel Corp. v. Mesta Machine Co., 214 F.2d 608 (3d Cir. 1954); Cross v. Zurich Gen. Acc. & Liab. Co., 184 F.2d 609 (7th Cir. 1950) (recovery allowed for damages to customer's windows); Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co., 51 Cal. App. 2d 558, 334 P.2d 881 (Dist. Ct. App. 1959) (damages to houses where defective aluminum doors were installed); Hauenstein v. St. Panl Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122 (1954) (recovery allowed for damage to the building.); Meiser v. Aetna Cas. & Sur. Co., 8 Wis. 2d 233, 98 N.W.2d 919 (1959) (recovery allowed for damage to windows caused by insured employee's negligence). In Liberty Building Co. v. Royal Indem. Co., 2 Cal. Reptr. 329, 346 P.2d 444, 446 (1959) the court said, "if the accident also caused damage to some other property or caused personal injury, the insured's liability for such damage or injury becomes a liability of the insurer under the policy, and is not excluded."

11. See 7a APPLEMAN, *op. cit. supra* note 4; HURSH, *op. cit. supra* note 4.

12. See, *e.g.*, Heyward v. American Cas. Co., 129 F. Supp. 4 (E.D.S.C. 1955); "This exclusion means that the policy will not protect the insured if he has to repair or replace some product or work which proved defective and caused an accident." 129 F. Supp. at 8; Liberty Building Co. v. Royal Indem. Co., 2 Calif. Reptr. 329, 346 P.2d 444 (Dist. Ct. App. 1959). "This exclusion means that if the insured becomes liable to replace or repair any goods or products . . . or work completed after the same has caused an accident because of a defective condition, the cost of such replacement or repair is not recoverable under the policy." 346 P.2d at 446; Volf v. Ocean Acc. & Guar. Corp., 316 P.2d 651 (Cal. 1957) (cost of replacement or repair not recoverable under the policy); Ritchie v. Anchor Cas. Co., 135 Cal. App. 2d 245, 286 P.2d 1000 (Dist. Ct. App. 1955); Gaddes & Smith, Inc. v. St. Paul Mercury Indem. Co., 51 Cal. App. 2d 558, 334 P.2d 881 (Dist. Ct. App. 1959) (recovery denied insured for the cost of removal of the defective product, costs of handling, loss of profits, loss of good-will); Kendall Plumbing, Inc. v. St. Paul Mercury Ins. Co., 189 Kan. 528, 370 P.2d 396 (1962); "It is clear that the policy was intended to cover only damage to property or items which had not been handled by appellant. Goods or products handled by it, or work completed by it, were specifically excluded." 370 P.2d at 397.

13. Note 1 *supra*.

facturer's liability for the cost of repair or replacement of its product. A minority of the courts deciding this question would allow recovery for all damage except that to the product itself, reasoning that expenses incurred in replacement and repair—such as the tearing up of the concrete flooring in the instant case—are indirectly "caused by accident" whenever the event is unforeseen, unexpected, and unintended, regardless of any negligence on the insured's part.[14] A few courts have gone so far as to allow recovery for cost of the defective product itself, when it is so attached to another finished product as to be inseparable.[15]

Following the minority view,[16] the court in the instant case allowed the insured to recover the cost of replacing the concrete in which the defective tubing was imbedded, although it denied recovery for the tubing itself.[17] The insurer contended that the damage to the concrete had not been "caused by accident" and, secondly, that liability was excluded under the exclusion clause. Because the failure of the tubing in a relatively short time was unforeseen, unexpected, and unintended the court said the damage was "caused by accident" and therefore recoverable under the policy.[18] The clause eliminating recovery for "any goods or products manufactured, sold, handled or distributed"[19] was found to be irrevelant,[20] the court deciding that this applied only to the defective product, and not to recovery for other damages sustained. A well written dissenting opinion[21] expressed a fear that the court had gone too far and thus converted a public liability policy into an agreement to indemnify the insured

14. See, *e.g.*, Hauenstein v. St. Paul Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122 (1954). The court said, "The measure of damages is the diminution in the market value of the building, or the cost of removing the defective plaster and restoring the building to its former condition plus any loss from deprival of use, whichever is the lesser." 65 N.W.2d at 125; McLouth Steel Corp. v. Mesta Machine Co., 214 F.2d 608 (3d Cir. 1954) (recovery allowed when insured's employees were installing a machine and it was severely damaged as a result of their negligence); Meiser v. Aetna Cas. & Sur. Co., 8 Wis. 2d 233, 98 N.W.2d 919 (1959) (insured allowed to recover for damage to windows resulting from the removal of defective plaster). See also Swillie v. General Motors Corp., 133 So. 2d 813 (La. App. 1961) (recovery allowed for negligent installation of brake linings).

15. See Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co., 281 F.2d 538 (3d Cir. 1960). The court said concerning recovery for the defective paint, "Once the paint has been baked on the steel and aluminum parts of the jalousies, the paint is no longer identifiable as a separate entity but is intended to and does become a part of the finished product." 281 F.2d at 541.

16. Note 14 *supra.*

17. 298 F.2d at 151.

18. The court said, "The failure of the tubing in the heating system in a relatively short time was unforeseen, unexpected and unintended. Damage to the property was therefore caused by accident." 298 F.2d at 153.

19. Note 1 *supra.*

20. "Under this clause no recovery may be had for the value of the defective tubing or the cost of new tubing to replace it." 298 F.2d at 153.

21. 298 F.2d at 154.

against liability for his failure to perform faithfully his contractual obligations regardless of the showing of any accident.[22]

The court in the instant case seems to have reached a proper and logical decision, although convincing arguments can be made for the other position.[23] A layman might find it difficult to understand the coverage, purpose, and construction meant to be given this type of policy,[24] but this alone does not warrant a distortion of the risks undertaken. It is true that ambiguities should not be searched for where none exist,[25] but if there is any doubt as to the intention of the parties the policy language should be construed strictly against the insurer. The policy language here involved, while not ambiguous in the strict sense of the word, can be troublesome, and therefore any doubt should be resolved in favor of the insured. It is evident that a person would never buy a home with such tubing installed if he knew that it would last only a very short time; thus the failure of the tubing may be said to be unforeseen, unexpected, and unintended and therefore accidental.[26] Damage is "caused by accident" in the sense used in this and other types of insurance policies if it naturally flows from an accident without any intervening cause; as one court has said, it is the cause "whose share in the matter is most conspicuous and is most immediately preceeding and proximate in the event."[27] Damages sustained while replacing a defective product are quite clearly "caused by accident" since such damage would not have been

22. "I am unable to agree that the words, 'damages because of injury to or destruction of property . . . *caused by accident*' should be held to encompass an insured manufacturer's liability for the cost of repair or replacement of its product which failed to function as expected or warranted." 298 F.2d at 154.

23. The majority of the courts seem to look to what they feel was the intention of the parties, reasoning that coverage for such damages was not contemplated by the insurer or the insured, and secondly that such damage is not "caused by accident," but rather that the accident ceases when the repair and replacement begins. Other courts seem to reason that because installation of a product and any expenses incurred as a result thereof are, as a general rule, incidental to the sale of such product, these damages are more directly related to the product itself than to the accidental event. Therefore, liability is excluded under the policy provisions. For cases accepting this position see note 12 *supra*.

24. In Ocean Acc. & Guarantee Corp. v. Aconomy Erectors, 224 F.2d 242 (7th Cir. 1955) the court said, "The true meaning of the policy is difficult to determine. An examination of it involves a physical effort of no mean proportions." 224 F.2d at 247. See also Arnold, *Products Liability Insurance*, 25 INS. COUNSEL J. 42 (1958); 7a APPLEMAN, *op. cit. supra* note 4, at 98: "People in the insurance business, and practioners of law, ought to be aware of such coverages, their purposes, and their construction."

25. In Kendall Plumbing, Inc. v. St. Paul Mercury Ins. Co., 189 Kan. 528, 370 P.2d 396, 399 (1962) the court said, "Although ambiguities in the wording of an insurance contract are to be construed in favor of the insured, this rule of construction has no application whatever to language that is clear in its meaning. Unless a contrary intention is shown, words used in an insurance contract are to be given a natural and ordinary meaning that they convey to the ordinary mind."

26. Note 14 *supra*.

27. Maryland Clay Co. v. Goodnow, 95 Md. 330, 51 Atl. 292, 298 (1902).

necessary had it not been for the defective nature of the product.[28] Furthermore, it is apparent that an insured having both public and products liability coverage intended damage of this nature to be covered by his products liability policy, since a public liability insurer would not be liable for damage resulting after the insured's duties in connection with the installation of a product have been completed.[29] Of course, it is wrong to extend one type of coverage to fit a completely different situation from that which was contemplated by the insurer, but it would be equally unjust to deprive a purchaser of the protection to which he is entitled.

Labor Law—Federal Courts Have No Jurisdiction To Enjoin the Breach of a No-Strike Provision of a Collective Bargaining Agreement Calling for Arbitration

Plaintiff employer brought suit under section 301 of the Labor Management Relations Act (Taft-Hartley Act)[1] to enjoin defendant union and its agents from strikes and slowdowns in violation of a collective bargaining agreement containing no-strike and obligatory arbitration provisions. Defendant moved to dismiss the complaint on the ground that the injunctive relief sought had been removed from the jurisdiction of the United States courts by the Norris-LaGuardia

28. See Protane Corp. v. Travelers Indem. Co., 343 Pa. 189, 22 A.2d 674 (1941). It was there held that where the negligence of the plaintiff was the actual and proximate cause of a casualty, the lapse of time and the distance from the original cause to the casualty are unimportant. This same principle is applied in the interpretation of fire insurance policies. 5 APPLEMAN, INSURANCE LAW AND PRACTICE § 3083, at 220 (1941). "Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss." See *e.g.*, Frisbie v. Fidelity & Guar. Co., 133 Mo. App. 30, 112 S.W. 1024 (1908); Cova v. Bankers & Shippers Ins. Co., 100 S.W.2d 23 (Mo. App. 1937); Hall v. Great American Ins. Co., 217 Iowa 1005, 252 N.W. 763 (1934).

29. See 7a APPLEMAN, *op. cit. supra* note 4, at 98. The author there said, "An injury or a loss may result while an activity is in progress, and prior to the completion thereof, either as the result of an act of negligence or an ommission. That is what is embraced within the ordinary liability aspect of a public liability policy."

1. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156 (1947), as amended, 29 U.S.C. § 185(a) (1958).

Act.[2] The Court of Appeals for the Seventh Circuit affirmed[3] the order of dismissal by the district court.[4] On certiorari[5] in the Supreme Court of the United States, *held*,[6] affirmed. The express limitations in section 4 of the Norris-LaGuardia Act may not be "accommodated" to section 301 of the Taft-Hartley Act so as to allow an injunction against activities breaching a no-strike provision of a collective bargaining agreement under which there was an obligation to submit the dispute to arbitration. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962).

The Norris-LaGuardia Act was a response to public opinion that the federal courts were making excessive use of the injunction, in order to void labors' effective use of the strike.[7] Section 4 of the Norris-LaGuardia Act deprived the federal courts of jurisdiction to issue injunctions against strikes as such in any case involving any labor dispute.[8] Following World War II, public reaction to union activity deemed to be excessive, culminated in the passage of the Taft-Hartley Act.[9] Section 301 of this act provides that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States . . . ."[10] In one of

2. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such disputes (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
(a) Ceasing or refusing to perform any work or to remain in any relation of employment;
. . . .
(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
. . . .
(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified. . . ." 47 Stat. 70 (1932), as amended, 29 U.S.C. § 104 (1958).

3. Sinclair Refining Co. v. Atkinson, 290 F.2d 312 (7th Cir. 1961).

4. Sinclair Refining Co. v. Atkinson, 187 F. Supp. 225 (N.D. Ind. 1960).

5. Certiorari was granted because the decision presented a conflict in the circuits. *Compare* W. L. Mead, Inc., v. Teamsters Local 25, 217 F.2d 6 (1st Cir. 1954), Alcoa S.S. Co. v. McMahon, 173 F.2d 567 (2d Cir. 1949), *In re* Third Ave. Transit Corp., 192 F.2d 971 (2d Cir. 1951), *and* A. H. Bull S.S. Co. v. Seafarers' Int'l Union, 250 F.2d 326 (2d Cir. 1957), *with* Chauffeurs Local 795 v. Yellow Transit Freight Lines, 282 F.2d 345 (10th Cir. 1960), *rev'd per curiam*, 370 U.S. 711 (1962).

6. Mr. Justice Black delivered the opinion of the court joined by Mr. Chief Justice Warren and Justices Clark, Stewart, and White. Mr. Justice Frankfurter took no part in the consideration of the case. Mr. Justice Brennan, joined by Justices Douglas and Harlan, dissented.

7. FRANKFURTER & GREEN, THE LABOR INJUNCTION 199-205 (1930). Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261, 1263 (1957).

8. 47 Stat. 70 (1932), as amended, 29 U.S.C. § 104 (1958).

9. Feinsinger, *supra* note 7, at 1265.

10. 61 Stat. 156 (1947), as amended, 29 U.S.C. § 185(a) (1958).

the first cases under this section, Mr. Justice Frankfurter denied that section 301 or its legislative history implied the existence of a body of general federal substantive law for application to suits under Taft-Hartley.[11] Two years later, however, the majority of the Court held in *Textile Workers Union v. Lincoln Mills*[12] that the "substantive law to be applied in suits under section 301(a) is federal law which the courts must fashion from the policy of our national labor laws."[13] As a part of this national labor policy the Court held that an agreement to arbitrate may be enforced by a mandatory injunction in federal court, since a failure to arbitrate was not one of the abuses which led to the restrictions in Norris-LaGuardia.[14] Recently the Court has exhibited a policy of encouraging arbitration on a widespread basis, indicating that the courts should refrain, insofar as possible, from interfering with the arbitration process.[15] Thus, a union may even specificially enforce an agreement to arbitrate which is stated in permissive terms.[16] However, Taft-Hartley did not affirmatively repeal the Norris-LaGuardia Act which deprived federal courts of jurisdiction to enjoin peaceful striking, even for breaches of a collective bargaining agreement.[17] In situations analogous to the instant case, the Court has held in *Brotherhood of R.R. Trainmen v. Chicago River*

11. Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

12. 353 U.S. 448 (1957).

13. *Id.* at 456.

14. *Id.* at 457-59. See also Independent Petroleum Workers v. Standard Oil Co., 275 F.2d 706 (7th Cir. 1960); Local 1912, Int'l Ass'n of Machinists v. United States Potash Co., 270 F.2d 496 (10th Cir. 1959); Local 201, Int'l Union of Elec. Workers v. General Elec. Co., 262 F.2d 265 (1st Cir. 1959); American Lava Corp. v. Local Union No. 222, UAW, 250 F.2d 137 (6th Cir. 1958); Couch v. Prescolite Mfg. Corp., 191 F. Supp. 737 (W.D. Ark. 1961); General Tire & Rubber Co. v. Local 512, United Rubber Workers, 191 F. Supp. 911 (D.R.I.), *aff'd per curiam*, 294 F.2d 957 (1st Cir. 1961); Johnson & Johnson v. Textile Workers, 184 F. Supp. 359 (D.N.J. 1960); Freight Drivers 557 v. Quinn Freight Lines, Inc., 195 F. Supp. 180 (D. Mass. 1961); Employee's Labor Ass'n v. Proctor & Gamble Mfg. Co., 172 F. Supp. 210 (D. Kan. 1959); Food Handlers Local 425 v. Pluss Poultry, Inc., 260 F.2d 835 (8th Cir. 1958), *affirming* 158 F. Supp. 650 (W.D. Ark. 1958); Local Union 1055, Int'l Bhd. of Elec. Workers v. Gulf Power Co., 175 F. Supp. 315 (N.D. Fla. 1959); Butte Miners' Union, UMW v. Anaconda Co., 159 F. Supp. 431 (D. Mont. 1958), *aff'd per curiam*, 267 F.2d 940 (9th Cir. 1959).

15. Section 203(d) of the Taft-Hartley Act has been cited as a basis for this policy. United Steelworkers, v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). See also NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND PUBLIC POLICY 1-29 (1961); Kovarsky, *Comment: The Enforcement of Agreements To Arbitrate*, 14 VAND. L. REV. 1105 (1960); 74 HARV. L. REV. 81, 178-82 (1960).

16. Local 19, Warehouse Workers Union v. Buckeye Cotton Oil Co., 236 F.2d 776 (6th Cir. 1956).

17. A. H. Bull S.S. Co. v. Seafarers' Int'l Union, 250 F.2d 326 (2d Cir. 1957); A. H. Bull S.S. Co. v. National Marine Eng'r Beneficial Ass'n, 250 F.2d 332 (2d Cir. 1957).

& Indiana R.R.[18] that section 4 of the Norris-LaGuardia Act[19] must be accommodated to the Railway Labor Act[20] so that federal courts may enjoin strikes designed to defeat the jurisdiction of the National Railway Adjustment Board[21] over minor disputes.[22] The Court did so on the ground that only through this accommodation could the obvious purpose of the mediation provisions of the Railway Labor Act be given effect.[23]

In the instant case the Court held that the alleged work stoppage constituted a labor dispute within the meaning of section 13 of the Norris-LaGuardia Act and that it could not therefore be enjoined even though the stoppage breached the collective bargaining agreement.[24] The Court concluded that section 301 of the Taft-Hartley Act was not intended to have any partial repealing effect upon Norris-LaGuardia for two principal reasons. First, section 301 contains no language of direct repeal; if Congress had intended that section 301 suits should not be subject to the anti-injunction provisions of Norris-LaGuardia, it would have made its "intent" known as it did in sections 101(h) and 208(b)[25] of the Taft-Hartley Act which expressly removed the anti-injunction bar of the Norris-LaGuardia Act.[26] Second, the Court pointed out that the legislative history of section 301 indicated that Congress had considered repealing the Norris-LaGuardia Act in so far as it pertains to suits for breach of collective bargaining agreements, but expressly rejected the proposal.[27] To the employer's argument that Congress had impliedly left it to the courts to accommodate the two statutes when they found it expedient, the Court replied simply that this was "a wholly unrealistic view of the manner in which Congress handles its business."[28] It distinguished *Chicago River*[29] by stating that the provisions for settlement of disputes under the Railway Labor Act are significantly different from those which have grown up under the Taft-Hartley Act.[30] To the contention that

18. 353 U.S. 30 (1957).
19. 47 Stat. 70 (1932), as amended, 29 U.S.C. § 104 (1958).
20. 44 Stat. 577 (1934), as amended, 45 U.S.C. § 152 (1958) and 44 Stat. 578 (1934), as amended, 45 U.S.C. 153 (1958).
21. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., *supra* note 18, at 39-42.
22. Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960) (denial of specific performance of no-strike agreement in the case of a major dispute).
23. 353 U.S. at 39-42.
24. 370 U.S. at 195-99. *Contra,* GREGORY, LABOR AND THE LAW 456 (2d rev. ed. 1958) (to the effect that "insofar as . . . [a] strike involves a breach of the collective agreement, to that extent and in that respect, it is *not* a labor dispute . . . .").
25. 61 Stat. 146, 155 (1947), as amended, 29 U.S.C. §§ 160(h), 178(b) (1958).
26. 370 U.S. at 204-05.
27. *Id.* at 205-10.
28. *Id.* at 209.
29. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., *supra* note 18.
30. 370 U.S. at 210-12.

Lincoln Mills[31] was controlling, the Court replied that the injunction granted in that case, to carry out an agreement to arbitrate, "did not enjoin any one of the kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of the United States Courts."[32] Further, the cases implementing section 301 could not be said to have freed the Court from the plainly expressed congressional purpose in Norris-LaGuardia.[33] The majority concluded that effect had to be given to discernible legislative intent and that the changes to be made, if any, in the present law were up to Congress.[34]

The dissent, conceding that Taft-Hartley did not repeal Norris-LaGuardia in whole or in part,[35] considered that the Court had reached the wrong decision because it failed to grasp the full import of petitioner's second argument: that the two statutes should be accommodated.[36] Stressing the fact that Taft-Hartley does not specify remedies, and that enjoining a strike may be indispensible to the effective enforcement of an arbitration scheme, the dissent reasoned that the same basic purpose would be served by accommodating Norris-LaGuardia to Taft-Hartley, as when the Court accommodated it to the Railway Labor Act.[37] Since federal law strongly favors the effective enforcement of arbitration agreements, the dissent argued that injunctive relief was called for even more in the instant decision, because of the express contractual agreement not to strike, than it was in the *Chicago River* case.[38] Moreover, to refuse the relief asked for by petitioner would seem to create a considerable inequity in labor-management relations. *Lincoln Mills*[39] held that section 7 of Norris-

31. Textile Workers v. Lincoln Mills, *supra* note 12.

32. 370 U.S. at 212.

33. *Id.* at 213. But see the statement in *Lincoln Mills:* "[W]e see no justification in policy for restricting § 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act." 353 U.S. at 458.

34. 370 U.S. at 213-15.

35. 370 U.S. at 215-16 (Brennan, J., dissenting).

36. "Our duty, therefore, is to seek out that accommodation of the two which will give the fullest possible effect to the central purpose of both." 370 U.S. at 216 (Brennan, J., dissenting).

37. 61 Stat. 155 (1947), as amended, 29 U.S.C. § 178(b) (1958).

38. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., *supra* note 18. This is true when the agreement calls for obligatory arbitration as the dissent realized. However, since the decision of the instant case, one similar fact situation has come before the Court. The court of appeals in Chauffeurs Local 795 v. Yellow Transit Freight Lines, *supra* note 5, enjoined a strike in breach of a collective bargaining agreement containing no-strike provisions. The three justices who dissented in the instant case concurred in reversing the circuit court's decision, on the grounds that "the collective bargaining agreement involved in this case does not bind either party to arbitrate any dispute. . . ." Chauffeurs Local 795 v. Yellow Transit Freight Lines, 370 U.S. 711, 712 (1962).

39. Textile workers v. Lincoln Mills, *supra* note 12.

LaGuardia would not be construed to limit the power of the courts to grant specific enforcement of agreements to arbitrate under section 301 of Taft-Hartley. Therefore, it should follow that section 4 of Norris-LaGuardia would not be used to curtain the court's power to grant specific performance of no-strike agreements under the same section of Taft-Hartley.[40] The dissent denied that elimination by the conference committee of the proposed repeal of Norris-LaGuardia necessarily meant that the Congress was hostile to allowing accommodation of the two statutes; no accommodation alone was before the committee and it never ruled on such an approach.[41] Finally, the dissent concluded that the instant decision would tend to channel labor actions into state rather than federal courts, thereby imperilling the effective creation of a uniform national labor policy.[42]

Under the instant decision an employer will be unable to obtain a federal court injunction barring a union from breaching a no-strike provision of a collective bargaining agreement which calls for arbitration. The employer will be left to his remedies at law, which would appear to be inadequate.[43] Previously the Court has reached substantially similar results under the Railway Labor Act and the Taft-Hartley Act, and it was widely felt that this would be true in the situation presented by the instant case.[44] Since the Court decided

40. 370 U.S. at 219-20 (Brennan, J., dissenting). The Court in *Lincoln Mills* stated that the agreement to arbitrate is the *quid pro quo* for an agreement not to strike. Furthermore the Court held that a district court could properly decree specific performance of the agreement to arbitrate. See also United Steelworkers v. American Mfg. Co., *supra* note 15; United Steelworkers v. Warrior & Gulf Navigation Co., *supra* note 15; United Steelworkers v. Enterprise Wheel & Car Corp., *supra* note 15. However, in Drake Bakeries, Inc. v. Local 50, Amer. Bakery Workers, 370 U.S. 254, 261 (1962), decided the same day as the instant case, Mr. Justice White speaking for the Court stated that "[T]his Court has prescribed no such inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation."

41. 370 U.S. at 223-25 (Brennan, J., dissenting).

42. 370 U.S. at 225-27 (Brennan, J., dissenting). *But see* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

43. 370 U.S. at 220 (Brennan, J., dissenting). "A damage action, tried years later to the vagaries of a jury, is small recompense to the employer denied business because he cannot deliver. Equitable relief is not only the most appropriate remedy, but also the only effective one." Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 673, 675 (1961). "Damages are inadequate because the injury to the business cannot be measured accurately. Furthermore, an employer can rarely afford to exacerbate labor-management relations by suing a union made up of his employees after the end of the strike." Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 255 (1958). See generally, Mangum, *Taming Wildcat Strikes*, in Harv. Bus. Rev., Mar.-Apr. 1960, p. 88, at 95-96.

44. GREGORY, LABOR AND THE LAW 455-56 (2d rev. ed. 1958); Cox, *supra* note 43, at 256; " 'an absolute prohibition of strikes' would surely seem to be enforceable by injunction, particularly if the duty to arbitrate and the duty to comply with an award can be specifically enforced." Hays, *The Supreme Court and Labor Law October Term 1959*, 60 COLUM. L. REV. 901, 918 (1960); "The application of the Norris-LaGuardia

that under the two acts different rules must be applied, it would seem preferable for the Court to have spelled out what differences it felt were controlling on this precise point, instead of relying almost entirely on a somewhat ambigious legislative history.[45] In taking this course, the Court may have ignored the stronger argument for its decision: that the Railway Labor Act provides a congressionally approved mechanism for the settling of disputes while under Taft-Hartley a wide variety of arbitration clauses, some much less satisfactory than others, are the chief means of settling disputes. It would appear that the instant decision leaves open three important areas for future litigation. First, can a similar suit (within the purview of section 301) be brought in a state court and an injunction secured there?[46] Second, can an employer secure a federal court order to compel arbitration of a union's violation of a no-strike clause? Third, can an employer enforce in federal court an arbitrator's order in the nature of an injunction against a strike?[47]

Obscenity—Mailability of Magazines Which Appeal to Homosexuals

Petitioners, publishers of three magazines,[1] deposited copies of their magazines in the United States Post Office at Alexandria, Virginia, whose postmaster detained these parcels pending an administrative hearing before the Judicial Officer of the Post Office, on suspicion that the publications were obscene and hence nonmailable under 18 United States Code section 1461.[2] These magazines contained pic-

Act to breaches of contracts creates a serious inconsistency between it and our national labor policy of promoting collective bargaining to the formation of contracts." Rice, *A Paradox of Our National Labor Law*, 34 MARQ. L. REV. 233, 236 (1951); Feinsinger, *supra* note 7, at 1275; Comment, 25 U. CHI. L. REV. 496, 506-07 (1958). See generally, for the proposition that no-strike clauses should be specificaly enforced in federal courts, Mangum, *supra* note 43, at 95-96; CHAFEE, SOME PROBLEMS OF EQUITY 364-80 (1950).

45. *Compare* 370 U.S. at 205-10, *with* 370 U.S. at 220-25 (Brennan, J., dissenting).

46. McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957).

47. Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129 (1958).

1. *MANual, Trim,* and *Grecian Guild.*

2. 18 U.S.C. § 1461. "Mailing obscene or crime inciting matter.

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character. . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made. . . .

tures of nude and seminude male "models"[3] and advertisements[4] which gave information where other such materials might be obtained. The magazines were, by the publisher's admission, slanted toward homosexual appeal.[5] The Judicial Officer found that the pictures, taken as a whole, had as their dominant theme an appeal to the prurient interest of homosexuals,[6] that the advertisements gave information where more such materials could be obtained,[7] and that the magazines were therefore nonmailable.[8] Petitioners thereupon sought injunctive relief in the District Court for the District of Columbia which affirmed the Judicial Officer's ruling and denied injunctive relief;[9] the Court of Appeals for the District of Columbia Circuit affirmed. On certiorari in the Supreme Court of the United States, *held*, reversed. Both patent offensiveness, judged in the light of a national standard of decency, and prurient interest must be proved to sustain a finding of obscenity. *MANual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).[10]

That obscene materials are not protected by the freedom of expression provision of the Constitution seems well settled. The legal standard, however, by which writings and pictures are to be declared obscene has been a source of continuing controversy.[11] The famous

"Is declared to be nonmailable and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5000 or imprisoned not more than five years, or both."

3. According to expert psychiatric testimony at the hearing, the poses, clothing worn, and props used in the pictures would tend to arouse great prurient interest in a homosexual, would have possible detrimental effects on young readers, and would not be likely to arouse prurient interest in normal male adults. See Record, vol. 1, pp. 2-65, MANual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). Each picture was accompanied by a caption giving names of model and photographer. MANual Enterprises, Inc. v. Day, 289 F.2d 455 (D.C. Cir. 1961).

4. These advertised materials, admittedly hard core pornography, were not placed by petitioner but by independent advertisers; while petitioner had notice from postal authorities that some of these advertisers were under prosecution, he was never shown any of this material. 370 U.S. at 491 n.15, 493.

5. Record, vol. 1, p. 85. See also letter from petitioner to Mercury Photographic Service wherein petitioner writes "physique fans want their 'truck driver types' already cleaned up, showered, and ready for bed." *Id.* at 89 (Government's exhibit G).

6. *Id.* at 87 (Government's exhibit A).

7. *Ibid.*

8. *Id.* at 88.

9. *Id.* at 78.

10. Mr. Justice Harlan joined by Mr. Justice Stewart announced the decision with Mr. Justice Black concurring in the result; Mr. Justice Brennan joined by the Chief Justice concurred in a separate opinion on separate procedural grounds; Mr. Justice Douglas concurred in the result but on different grounds; Mr. Justice Clark dissented; and Justices Frankfurter and White took no part in the decision.

11. See generally PAUL & SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL (1961); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5-13 (1960); Zuckman, *Obscenity in*

English case of *Regina v. Hicklin*[12] announced in 1868 that tendency to deprave and corrupt the minds of those into whose hands the material might fall was the proper test. This standard was quickly adopted in the United States[13] and followed, though sometimes reluctantly,[14] by the majority of courts[15] until the decision in *United States v. One Book Entitled "Ulysses."*[16] Therein the court declared that obscenity was matter which had a tendency to stir the sex impulses and lustful thoughts of "a person with average sex instincts."[17] The *Ulysses* case established that the standard to be applied was not that of any specific group, as would be the case under *Hicklin*, but the standard of a general idealized "average man." This test, though often applied,[18] was greatly criticized by legal writers for its vagueness[19] and by judges for its propensity for crowding the appellate dockets.[20] The search for definiteness[21] continued through

the Mails, 33 So. CAL. L. REV. 171, 184-88 (1960); Note, 11 VAND. L. REV. 585 (1958).

12. L.R. 3 Q.B. 360 (1868). The proper test was stated to be "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." L.R. 3 Q.B. at 371.

13. Rosen v. United States, 161 U.S. 29 (1896); McFadden v. United States, 165 Fed. 51 (3d Cir.), *writ of error denied*, 213 U.S. 288, *cert. denied*, 214 U.S. 511 (1909); United States v. Bennett, 24 Fed. Cas. 1093, 1103-04 (No. 14571) (2d Cir. 1879).

14. United States v. Kennerly, 209 Fed. 119 (S.D.N.Y. 1913); Learned Hand, while reluctantly applying the *Hicklin* test on the basis of *stare decisis*, proposed that, "If there had been no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now"? 209 Fed. at 121. See generally Lancaster, *Judge Hand's Views on the Free Speech Problem*, 10 VAND. L. REV. 301 (1957).

15. See Annots., 1 L. Ed. 2d 2211 (1957), 4 L. Ed. 2d 1821 (1960).

16. 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); Note, 33 So. CAL. L. REV. 171, 173 (1960).

17. 5 F. Supp. at 184. "The meaning of the word 'obscene' as legally defined by the courts is: Tendency to stir the sex impulses and lustful thoughts . . . . Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts. . . ." *Ibid.*

18. "Our state decisions tend to adhere to the 'dominant effect' test. *United States v. One Book Entitled Ulysses*. . . . The question is whether the dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire,' dirt for dirt's sake only, smut and inartistic filth, with no evident purpose but 'to counsel or invite to vice or voluptuousness.'" Adams Theatre Co. v. Keenan, 12 N.J. 267, 272, 96 A.2d 519, 521 (1953). See, *e.g.*, Butler v. Michigan, 352 U.S. 380 (1957).

19. See Lockhart & McClure, *supra* note 11, at 72-73.

20. In argument before the Supreme Court the following verbal exchanges occured concerning Doubleday & Co. v. New York, 335 U.S. 848 (1948) (Whitney North Seymour, counsel for the publisher):

"Mr. Justice Jackson: 'This is not a question of geography, but a question of whose standards you adopt. A book written in Greenwich Village might be considered obscene in the vicinity of 50th Street and Fifth Avenue.'

[Mr. Seymour] 'I don't think there is that much difference.'

[Mr. Justice Jackson] 'I had reference to the vicinity of St. Patrick's Church. . . .'

[Mr. Seymour] 'I respectfully submit that a statute conld be drawn to ban the

1957 when, in *Roth v. United States*,[22] the Supreme Court declared that "whether to the average person, applying community standards, the dominant theme of the material taken as whole appeals to a prurient interest. . . . [This test] provides safeguards adequate to withstand the charge of constitutional infirmity."[23] The per curiam decisions which followed close on the heels of *Roth*[24] suggested that those who urged codification and certainty in the law of obscenity might take heart, for these decisions seemed to have indicated that the Court was able to judge the various tests applied in the lower courts in light of the standard, well established and clearly defined—at least in the minds of the Court—in the *Roth* case. However, criticism of the vagueness of the term "community standards" persisted on the ground that no one but the Supreme Court knew the term's meaning,[25] and at least one district court still found it necessary as late as 1959 both to synthesize law and review facts in order to

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sale to minors of picture postcards having representations of nude male and female figures.'

[Mr. Justice Jackson] 'Don't show me any respect on this subject, I don't pose as an expert on it.'

Counsel continued with a statement that it was impossible to determine from the statute either the substantive evil or the applicable standards. . . .

Mr. Justice Jackson: 'Does your argument mean that we would have to take every obscenity case and decide the constitutional issues on the merits of the literary work? It seems to me that would mean we would become the High Court of Obscenity.'" 17 U.S.L. WEEK 3117, 3118-19 (U.S. Oct. 26, 1948).

21. For a discussion of a problem related to the evolving standard, see Note, 11 VAND. L. REV. 585, 588-90 (1958) (freedom of expression).

22. 354 U.S. 476 (1957). For an extensive discussion of the facts and holding in this case, see generally Lockhart & McClure, *supra* note 11, at 19-29; Note, 11 VAND. L. REV. 585, 591 (1958).

23. "In *Roth*, the trial judge instructed the jury: 'the words obscene, lewd and lascivious as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*.' (Emphasis added) In *Alberts*, the trial judge applied the test laid down in *People v. Wepple*, 78 Cal. App.2d Supp. [sic] 959, 178 P.2d 853, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires.' (Emphasis added)" 354 U.S. at 486. "Obscene material is material which deals with sex in a manner appealing to prurient interest." *Id.* at 487. "Some American courts adopted this standard [the *Hicklin* test] but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. . . . On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity. Both trial courts below sufficiently followed the proper standard." *Id.* at 489.

24. *E.g.*, One, Inc. v. Olesen, 355 U.S. 371 (1958) (per curiam); Adams Newark Theater Co. v. City of Newark, 354 U.S. 931 (1957) (per curiam); Klaw v. Schaeffer, 251 F.2d 615 (1958) (per curiam). See generally Lockhart & McClure, *supra* note 11, at 32-39.

25. *E.g.*, Kalven, *Metaphysics of the Law of Obscenity*, in THE SUPREME COURT REVIEW 15 (1960); Lockhart & McClure, *supra* note 11, at 13; Note, 11 VAND. L. REV. 585 (1958); 14 VAND. L. REV. 1525 (1961).

determine the standard for declaring obscenity.[26]

In the instant case, the Court declared that the *Roth* case did not, as the court of appeals had ruled,[27] make prurient interest the sole test of obscenity. Declining to attribute to Congress an intent to bar from the mail all non-patently offensive material which stimulates impure desires relating to sex,[28] the Court ruled that a finding of obscenity requires proof of two distinct elements: patent offensiveness, and prurient interest.[29] In addition, the Court ruled that the relevant community standard to be used in finding patent offensiveness is a national standard of decency[30]—not merely appeal to the prurient interest of any significant group, such as homosexuals. Moreover, the Court refused to say that only hard core pornography is barred (as is suggested by the case of *People v. Richmond County News, Inc.*[31] and writers Lockhart and McClure[32]), saying only that

26. Grove Press, Inc. v. Christenberry, 175 F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960). Where a book is written with honesty and seriousness of purpose, and the portions which might be considered obscene are relevant to the theme, it is not condemned by the statute even though 'it justly may offend many'. . . Roth v. United States, *supra*, . . . did not deal with the application of the obscenity statutes to specific material. It laid down general tests circumscribing the area in which matter is excludable from constitutional protections because it is obscene, so as to avoid impingement on First Amendment guarantees." 175 F. Supp. at 498. "Both cases [*Roth* and *Ulysees*] held that, to be obscene, the dominant effect of the book must be an appeal to prurient interest. . . . The material must be judged in terms of those it is likely to reach who are conceived of as the average man of normal sensual impulses. . . . The material must also exceed the limits of toleranee imposed by current standards of the community with respect to freedom of expression in matters concerning sex and sex relations. Moreover, a book is not to be judged by excerpts or individual passages but must be judged as a whole." *Id.* at 499. "The tests of obseemity are not whether the book or passages from it are in bad taste or shock or offend the sensibilities of an individual, or even of a substantial segment of the community." *Id.* at 501. "Thus, this is an honest and sincere novel of literary merit and its dominant theme and effect, taken as a whole, is not an appeal to the prurient interest of the average reader." *Id.* at 502. See generally MODEL PENAL CODE § 251.4 (Proposed Official Draft 1962); PAUL & SCHWARTZ, *op. cit. supra* note 11, at 165-66.

27. MANual Enterprises, Inc. v. Day, 289 F.2d 455 (D.C. Cir. 1961). "The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexuals." 289 F.2d at 456.

28. "We decline to attribute to Congress any such Quixotic and deadening purpose as would bar from the mails all matcrial, not patently offensive, which stimulates impure desires relating to sex. Indeed such a construction of § 1461 would doubtless encounter constitutional barriers." 370 U.S. at 487 (1962).

29. *Id.* at 486.

30. "There must first be decided the relevant 'community' in terms of whose standards of deceney the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." *Id.* at 488.

31. 9 N.Y.2d 578, 586, 216 N.Y.S.2d 369, 375, 175 N.E.2d 681, 685 (1961). For clarification of the *Richmond* case, see People v. Finkelstein, 11 N.Y.2d 300, 229 N.Y.S.2d 367, 183 N.E. 2d 661 (1962).

32. Lockhart & McClure, *supra* note 11, at 58-60.

the pictures at issue could not, under any permissible standard, be deemed to transcend contemporary notions of rudimentary decency.[33] By finding that the pictures were not obscene and that *scienter*, requisite for conviction regarding the advertisements, was not proved, the Court obviated the necessity of reaching the issue of the constitutionality of restraining matter from mail prior to a judicial determination of obscenity—a field of law as unsettled and controversial as the standard of obscenity.[34] The opinion makes clear, however, that where, as here, factual matters of allegedly obscene materials are entangled in a constitutional claim, that issue is ultimately one for the Supreme Court.[35]

The Court, in a conscious effort to refine the *Roth* test,[36] has once again felt constrained not to define in precise language the criteria by which obscenity is found. Rather, it has merely numbered the component parts of the test in *Roth*, and declared that patent obscenity is that which lies beyond the pale of contemporary notions of decency,[37] judged in the light of a national standard of decency.[38] Clarification of what the Court considers to constitute this national standard is not to be found in the instant decision. One may question the assertion that the Justices do "have something fairly definite in mind—something they apparently are not yet able or ready to describe,"[39] but it cannot be denied that the task of promulgating a definitive test presents many difficulties.[40] Few topics exist on which public and private views are so divergent, yet the Court must express a sober public view. The issue is imbued with all the contingencies of free speech and free press, and the variables treated by such a

33. 370 U.S. at 489.

34. The issue of prior restraint under 18 U.S.C. § 1461 is discussed in Mr. Justice Breunan's concurring opinion in the instant case, wherein he concludes that: (1) § 1461 was not intended by Congress to authorize administrative censorship (370 U.S. at 510); (2) congressional legislation subsequent to § 1461 stripped the postmaster of power to issue interim orders prior to a judicial hearing in a federal district court (*id.* at 513); and (3) that while Congress could constitutionally authorize an administrative process, it has not done so, and § 1461 remains a wholly criminal statute (*id.* at 519).

For an indication of the controversy surrounding prior restraint, see PAUL & SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL (1961); Paul, *The Post Office and Non-Mailability of Obscenity*, 8 U.C.L.A.L. REV. 44 (1961); Zuckman, *Obscenity in the Mails*, 33 So. CAL. L. REV. 171 (1960); Comment, 27 U. CHI. L. REV. 354 (1960).

35. "That issue, involving factual matters entangled in a constitutional claim, see Grove Press, Inc., v. Christenberry, 276 F.2d 433, 436, is ultimately one for this court." 370 U.S. at 488.

36. *Id.* at 486-87.

37. *Id.* at 489.

38. *Id.* at 488.

39. Lockhart & McClure, *supra* note 11, at 58.

40. *Id.* at 121; MODEL PENAL CODE § 207.10, comment, at 8 (Tent. Draft No. 6, 1957); PAUL & SCHWARTZ, *op. cit. supra* note 34, at 206, 210.

decision are multitudinous.[41] However, recognizing that a modern law of obscenity must reflect man's changing views of the importance of freedom of expression and the proper purposes and fields of operation of criminal law,[42] the American Law Institute has proposed a test of obscenity which is strikingly similar to the *Roth* test with one important exception: where it is shown that the material is consciously slanted toward children or other specially susceptible audiences, prurient interest will be judged with reference to that group.[43] It is submitted that the six pertinent variables therein proposed[44] go far toward eliminating the vagueness which has been the basic source of criticism of the *Roth* test, as it now stands. However, it might very well be concluded that under the "specially susceptible audience" provision of the Model Penal Code, the Court would have reached an opposite decision in the instant case since the publications were admittedly slanted toward homosexuals.[45] Finally, the instant case leaves unanswered the question of reviewability of findings of fact under proper instructions of obscenity.[46]

41. "The difficulties have, I think, three main strands. . . . Finally they perform their roles in an institutional context that necessarily raises issues about federalism, about judicial review, about holding statutes unconstitutional on their face or only in their application, about *de novo* review of constitutional fact, about whether they should ever decide any more issues than they are compelled to, and about whether they are obliged to give legislative draftsmen advice on how to cure the defects the Court may find in their work." Kalven, *supra* note 25, at 45.

42. MODEL PENAL CODE § 207.10, comment, at 7-8 (Tent. Draft No. 6, 1957).

43. "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudidity, sex, or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience." MODEL PENAL CODE § 251.4 (Proposed Official Draft, 1962). *But see* Butler v. Michigan, 352 U.S. 380 (1957).

44. "(4) . . .

(a) the character of the audience for which the material was designed or to which it was directed;

(b) what the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on the conduct of such people;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; and

(f) the good repute of the author, creator, publisher or other person from whom the material originated." *Ibid.*

45. See notes 3, 5-9 *supra.*

46. See note 35 *supra.*

Tax Liens—Federal Tax Lien Subordinated to Local Lien Which Was Included as an Expense of Sale

The defendant mortgagor executed a real property mortgage to the plaintiff bank. The United States filed a tax lien against the defendant and, subsequent to this, local taxes and assessments became liens upon the property. This action was commenced to foreclose the mortgage. Upon plaintiff's motion, the Erie County Court granted summary judgment and directed the referee to include all local taxes and assessments as expenses of the sale, thereby subordinating the prior federal lien to the subsequent local lien[1] in accord with an applicable state statute.[2] This judgment was modified by the appellate division to the extent that the local tax liens were not to be included as expenses of sale.[3] On appeal, *held*, reversed, and judgment of the county court reinstated. The direction to pay local taxes as expenses of the sale was proper within a state statute, and the federal tax lien is thus subordinated to the local lien. *Buffalo Savings Bank v. Victory*, 11 N.Y.2d 31, 181 N.E.2d 413 (1962), *rev'd*, 83 Sup. Ct. 314 (1963).*

In considering the problem of whether state procedure can be used indirectly to subordinate federal liens to local liens, the Supreme Court has held that the relative priority of federal tax liens as against state or local tax liens is always a federal question.[4] The current view

*While this article was undergoing editorial process the Supreme Court handed down a *per curiam* opinion, 83 Sup. Ct. 314 (1963), reversing the New York Court of Appeals relying primarily upon the same principles as are enunciated herein. See notes 16-20 *infra* and accompanying text.

1. In initial proceedings, the county court held that the land should be sold free of the United States tax lien, but subject to local taxes. On appeal, the appellate division reversed and remitted to the county court, stating that the discretionary authority to have the property sold subject to local taxes could not be exercised in a case involving circular priorities. Buffalo Sav. Bank v. Victory, 11 App. Div. 2d 158, 202 N.Y.S.2d 70 (Sup. Ct. 1960).

2. N.Y. CIV. PRAC. ACT § 1087: "Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute. The sums necessary to make these payments and redemptions are deemed expenses of the sale within the meaning of that expression as used in any provision of this article."

3. Buffalo Savings Bank v. Victory, 13 App. Div. 2d 207, 215 N.Y.S.2d 189 (Sup. Ct. 1961).

4. "The relative priority of the lien of the United States for unpaid taxes is . . . always a federal question to be determined finally by federal courts. The state's characterization of its liens, while good for all state purposes, does not necessarily bind this Court." United States v. Acri, 348 U.S. 211, 213 (1955). See also United States

of the Supreme Court, as expressed in *United States v. City of New Britain*,[5] one that has withstood the test of time, is that "a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds . . . ."[6] Since the Supreme Court feels that the priority of the competing liens is governed by time rather than statute,[7] the fact that state law has been allowed to ascertain the taxpayers' property rights[8] is not determinative even though the local liens attach to the mortgagor's interest in the property.[9] The scattered New York cases that uphold this section of the statute in question against federal liens interpret it as a procedural statute defining expenses of sale rather than controlling the priority of federal liens,[10] and therefore inapplicable in contesting the relative priority of federal and local liens.[11] Another argument in support of the statute is that its purpose is to protect purchasers by enabling them to obtain clear titles at foreclosure sales.[12] Some courts in similar situations urge that the

v. City of New Britain, 347 U.S. 81 (1954); United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950); Dunkirk Trust Co. v. Dunkirk Laundry Co., 182 N.Y.S.2d 381 (Chautagua County Ct. 1959); Metropolitan Life Ins. Co. v. United States, 9 App. Div. 2d 356, 194 N.Y.S.2d 168 (Sup. Ct. 1959).

In Stadelman v. Hornell Woodworking Corp., 172 F. Supp. 156, 158 (W.D.N.Y. 1958), the court made a more specific statement: "New York State cannot impair the standing of federal liens without the consent of Congress." The Supreme Court put forth its position in an analagous situation in United States v. Gilbert Associates, 345 U.S. 361 (1953). In this case, New Hampshire treated its tax assessments as judgments for state purposes, putting the state in the position of a judgment creditor which would take priority over an unrecorded federal tax lien. While the Court said this may be fine for state purposes, nevertheless, the states, by declaring themselves judgment creditors did not make them such within § 3672 of the United States Code, so as to defeat an unrecorded federal tax lien. Since a cardinal principle of Congress in its tax scheme is uniformity, it would seem that the term "expenses of sale," as well as "judgment creditor," should have the same application in all states. *Cf.* Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952).

5. The leading case in this area is United States v. City of New Britain, *supra* note 4, which set forth the "first in time, first in right" doctrine.

6. Rankin v. Scott, 25 U.S. 175, 179 (1827).

7. United States v. City of New Britain, *supra* note 4.

8. Aquilino v. United States, 363 U.S. 509 (1960).

9. United States v. City of New Britain, *supra* note 4.

10. Rikoon v. Two Boro Dress, Inc., 9 Misc. 2d 591, 171 N.Y.S.2d 19 (Sup. Ct. 1957); Kronenberg v. Ellenville Nurseries & Green Houses, Inc., 22 Misc. 2d 247, 196 N.Y.S.2d 106 (Sup. Ct. 1960).

11. Metropolitan Life Ins. Co. v. United States, *supra* note 4. See also Dunkirk Trust Co. v. Dunkirk Laundry Co., *supra* note 4.

12. "It [§ 1087] merely provides that taxes and assessments *'which are liens upon the property sold* . . . are deemed expenses of the *sale* within the meaning of that expression as used in any provision of *this article*. . . .' The purpose of this section is to protect, not the mortgagee, but the purchaser on a foreclosure sale, who is entitled to a clear title. . . ." Wesselman v. Engel Co., 309 N.Y. 27, 127 N.E.2d 736, 737 (1955). This same case said that the term "expense of sale" had often been interpreted to include taxes. One interpretation of § 1087 of the Civil Practice Act is that it was enacted to protect purchasers, rather than state or local governments, by making possible the transfer of clear titles. Without this procedural device, a purchaser would be asked to accept a title clouded by unpaid liens. See Kronenberg v. Ellenville Nurseries & Green Houses, Inc., *supra* note 10.

position of the United States in this matter threatens the stability of the mortgage business, for the mortgagee is not assured of being made whole in a foreclosure action.[13]

In deciding the *Buffalo Savings Bank* case, the court declared that the respective competing liens were not comparable since the mortgagee had an absolute preference, while the federal government, as a creditor of the mortgagor, can look only to the surplus proceeds. The *Buffalo* court further held that a local lien is not a levy against the mortgagee, but a charge against the land that must be paid together with the other costs of the sale. The *Buffalo* court declined to follow the *New Britain* case, declaring that the Supreme Court did not indicate that Congress intended to upset established state procedure or curtain the absolute preference given to mortgagees. In further distinguishing *New Britain*, the court said that there the contest was between the local and federal governments regarding the surplus proceeds, while in the instant case, the contest is between the mortgagee and the federal government. Here the federal lien attached to the mortgagor's interest in the property, which could only be determined after the expenses of sale and the mortgagee's share had been subtracted from the proceeds. The court puts much emphasis upon a case in which the Supreme Court allowed state law to control the procedure of foreclosure and payment of liens.[14] The court's strong policy argnment is that the overriding of state procedure in this instance wonld make it difficult to transfer property free and clear of liens and that this same uncertainty would affect the credit rating of municipal bonds and impair the borrowing power of municipalities.[15] The majority states that precedent demands the reaffirmance of the principle that state procedure governs the matter of the relative priority of liens.

The ruling in the instant case is inconsistent with the *New Britain* case and with the general trend of federal decisions. It allows an exercise of state power to override a uniform policy of the United States. This holding permits the priority laws of the individual states to frustrate the federal government in the collection of revenue. The consequences in this area could be far reaching, for if the state is allowed to advance a local tax lien ahead of a federal lien by a mere procedural step, the doctrine of "first in time, first in right"[16] will be nullified and the status of the relative priority of liens will be thrown

13. See Rikoon v. Two Boro Dress, Inc., *supra* note 10. The argument on this point is that if these local liens were not paid out of the expenses of sale, the federal lien might consume the remainder of the proceeds and force the mortgagee to pay the local taxes out of his supposedly protected share of the proceeds.

14. United States v. Brosnan, 363 U.S. 237 (1960).

15. The court feared the municipality would become liable for the debts that tax delinquent property owners owed the government, thus hindering its borrowing power.

16. Note 5 *supra*.

into confusion. The characterization of a lien by an individual state is not conclusive against the federal government[17] for the federal revenue statutes require a uniform application of the terminology involved.[18] Allowing a state to classify local liens as expenses of sale would render these statutes ineffective.[19] The weight of cases and the current view of the Supreme Court seem to suggest that state procedure will not be allowed to function as a means of circumventing federal tax lien priority. If a state were allowed to declare a local tax lien an expense of sale, there would seem to be no reason why it could not similarly legislate mechanic's liens, attorney's liens, and all other claims into the same category, thereby making them superior to prior federal liens. The Supreme Court has previously frowned on a similar practice in *United States v. Gilbert Associates*,[20] where a state tried to achieve priority over a federal tax lien by the simple expedient of treating a local tax claim as a judgment, when, in fact, the tax claim had not been reduced to judgment. Following the view contrary to the *Buffalo* case would result in a more uniform application of the federal revenue laws among the states, thereby upholding a strong principle of tax policy.

Taxation—Inheritance, Estate & Gift Taxes—A Specific Dollar Amount Held To Be a Specific Portion So as To Qualify for Marital Deduction

A surviving spouse was given by will a life interest[1] in a residuary trust with a general testamentary power of appointment over a variable portion of the "trust funds."[2] In addition, the will named the spouse as a co-trustee of the trust. The estate tax return, filed under the auspices of the Internal Revenue Code of 1939,[3] claimed the

17. United States v. City of New Britain, *supra* note 4.
18. INT. REV. CODE OF 1954, §§ 6321, 6323.
19. *Ibid.*
20. 345 U. S. 361 (1953).

1. As life beneficiary, the spouse was granted an annual income of $10,000 to be derived from trust income and, if necessary, an invasion of corpus. As a practical matter, the court of appeals took notice that the trust assets had never realized in excess of $3,500 income and regular corpus invasions were anticipated by the deceased.
2. The life interest of the spouse was subject to a maximum withdrawal of $5,000 annually from the funds of the trust for the support and education of the younger of the deceased's two daughters, at the discretion of the trustees.
3. Testator died November 16, 1953.

residuary trust as a marital deduction.[4] The Commissioner rejected the inclusion of the trust in the marital deduction since the power to appoint was not over the entire corpus, or a "specific portion," *i.e.*, a "fractional or percentile share" of it. The Tax Court upheld the Commissioner.[5] On appeal to the United States Court of Appeals for the Second Circuit, *held,* reversed and remanded. A general power to appoint what the court construed to be in effect a "specific dollar amount of a residuary trust," is a power over a specific portion and qualifies, under section 812 of the Internal Revenue Code of 1939, as a marital deduction. *Gelb v. Commissioner,* 298 F.2d 544 (2d Cir. 1962).

Generally, the 1939 Code taxed the gross estate of a decedent with few deductions.[6] This tax was severely criticized by the common law states as presenting a tax inequality which favored the community property states since only one-half of the "community estate" was taxable upon the death of a marital partner.[7] The ensuing federal efforts at equality, although directed primarily at a solution through the use of an income tax provision,[8] resulted also in a congressional revision of the 1939 Code to include "community interests."[9] Rather than quieting the agitation for tax reform, the inclusionary measure served only to enlist the now disgruntled community property states.[10] Through joint efforts, in 1948 these interests achieved the repeal of the 1942 Act[11] and an equality between the two through an act allowing an optional marital splitting of the estate into taxable and

4. INT. REV. CODE OF 1954, § 2056(a) allowed as a marital deduction from the estate tax "[T]he value of the taxable estate . . . determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse . . . ."

5. Gelb v. Commissioner, 19 CCH Tax Ct. Mem. 987 (1960).

6. INT. REV. CODE OF 1939, § 812.

7. In Poe v. Seaborn, 282 U.S. 101 (1930), the Court recognized the states' concept of community property as a limitation on the federal taxing authorities. Consequently, in community property jurisdictions, only that property representing the equity of the testator was taxable.

8. See the Statement of Secretary of the Treasury, Henry Morgenthau, Jr., *Hearings on the Revenue Revision of 1942 Before the House Committee on Ways and Means,* 77th Cong., 2d Sess. 1 (1942), recommending the mandatory filing of joint income tax returns by married couples in community property states.

9. Revenue Act of 1942, tit. IV, § 402(b)(1)(e)(2), 56 Stat. 942 amending the INT. REV. CODE OF 1939, § 811 to include in the value of the gross estate of the decedent, the "community interest, to the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any state . . . ."

10. Community property states criticized this result contending that it merely reversed the inequity. Now the common law jurisdictions allowed the testator to give the spouse a life interest in the entire estate and by such action postpone any tax until the death of the beneficiary. Whereas, in the community property states, the testator's one-half would be taxed upon his demise, as well as upon the demise of the grantee-spouse. S. REP. NO. 1013, 80th Cong., 2d Sess. 5 (1948).

11. Repealed, April 2, 1948, ch. 168, § 351(a), 62 Stat. 116.

non-taxable halves.[12] The apparent congressional objective was to allow a postponement of the tax, by permitting a tax free bequest to a surviving spouse, provided the amount given would be subject to tax on the death of the survivor.[13] One of the most widely used methods of qualifying estates in respect to this objective became the trust with a general power of appointment in the life beneficiary, commonly referred to as the "marital deduction" trust.[14] The courts, however, in a strict interpretation of the 1948 Act, denied as a qualifying deduction, any interest less than an entire one as to either the trust income,[15] or the corpus.[16] This potential pitfall in estate planning was recognized by the 1954 Code which extended the marital deduction to a specific portion of the entire interest, so that a general power to appoint need only prevail over a specific portion of the entire trust.[17] In 1958, the specific portion provision was made applicable to the 1939 Code, for estates arising subsequent to April 1, 1948, and before August 17, 1954.[18] Yet, the strict interpretation of the marital deduction which sired the specific portion provision was revived by the Treasury Department to bridle the legislative foal, *i.e.*, by interpreting the provision to apply only to such portions of an entire interest as were representative of a fractional or percentile share, expressly excluding a specific sum.[19]

The court of appeals, Judge Friendly writing the opinion, recognized that in the case at hand the surviving spouse did not have the

12. Revenue Act of 1948, ch. 168, § 351(a), 62 Stat. 116.

13. See H.R. REP. No. 1274, 80th Cong., 2d Sess. 4 (1948); S. REP. No. 1013, 80th Cong., 2d Sess. 5 (1948). See generally the Statement of Allan H. W. Higgins, on behalf of the American Bar Association, *Hearings on Revenue Revisions 1947-48 Before the House Committee on Ways and Means*, 80th Cong., 1st Sess. 3361 (1948); Estate of Reilly v. Commissioner, 239 F.2d 797 (3d Cir. 1957).

14. BOWE, ESTATE PLANNING AND TAXATION § 4.17, at 81 (1961).

15. *Cf.* Estate of Tingley, 22 T.C. 402 (1954); Starrett v. Commissioner, 223 F.2d 163 (1st Cir. 1955); Estate of Shedd, 23 T.C. 41, 46 (1954), *aff'd*, 237 F.2d 345, 359 (9th Cir. 1956), *cert. denied*, 352 U.S. 1024 (1957).

16. Estate of Hoffenberg, 22 T.C. 1185, *aff'd per curiam*, 223 F.2d 470 (2d Cir. 1955).

17. INT. REV. CODE OF 1954, § 2056(b)(5).

18. Technical Amendments Act of 1958, 72 Stat. 1668, amending Int. Rev. Code of 1939, § 812.

19. Treas. Reg. § 20.2056(b)(5)(a) (1959) further stated that requisite to Code compliance, all of the five conditions set forth below must be satisfied:

"(1) The surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion of all the income from the entire interest.

"(2) The ineome payable to the surviving spouse must be payable annually or at more frequent intervals.

"(3) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate.

"(4) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.

"(5) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse."

power to appoint the entire trust corpus.[20] Rather, the provision as to the trustee's discretionary withdrawal was held to be an additional power to invade corpus.[21] But the invasionary power was held estimable by actuarial calculation[22] and, as a result, a specific sum out of a larger fund ascertainable. The specific sum was recognized by the court as a specific portion under the 1939 Code, as amended,[23] and as such a portion, allowable as a marital deduction. In arriving at this result, the court expressly disapproved Treasury Regulation 105, section 81.47a(c)(3),[24] insofar as it would limit a specific portion to a fractional or percentile share. As to the Commissioner's argument that the congressional reports regarding the 1954 Code and the 1958 amendment to the 1939 Code use only examples of fractional or percentile shares,[25] the court failed to attribute such significance to the examples as would warrant an exclusive construction.[26] The Commissioner's contention that in order for a portion of a trust to qualify as a deduction it must be susceptible to "a proportionate share of the increment or decline in the whole of the property"[27] in trust, was equally unacceptable.[28] Recognizing that Congress spoke of specific portion and not fractional or percentile share, the court found no sympathy for, or justification of any such "elaboration of

20. Counsel for taxpayer had insisted that since the surviving spouse as life beneficiary with the power to appoint, also was one of two trustees by whom the discretionary power in question could be negated, there was in practicality an entire corpus under the life beneficiary's control. However, the court observed the possible existence of a "successor trustee" and the consequent frustration of the theory of control by the beneficiary. In addition the court cited the exercise of an equitable restraint as a remedy for a prejudiced beneficiary. Starrett v. Commissioner, 223 F.2d 163 (1st Cir. 1955); 1 SCOTT, TRUSTS § 25.2, at 194-95 (2d ed. 1956).

21. Gelb v. Commissioner, 298 F.2d 544, 547 (2d Cir. 1962). Both the Commissioner and the Tax Court had regarded the provision as violative of the INT. REV. CODE OF 1954, § 2056, requiring that the surviving spouse must be "entitled for life to all the income from the corpus of the trust"; Judge Friendly reversed their factual finding and held the provision an unequivocal power to invade corpus, "not one to divert income from the widow."

22. The use of actuarial computation has long been sanctioned by the Commissioner. See Commissioner v. Estate of Sternberger, 348 U.S. 187, 190-92 (1955) (a gift to charity made subject to a life estate); BOUTWELL, MANUAL 203 (1863) (legacies); Art. 20, Regulations 37 (1919) (charitable remainders). See generally 4 MERTENS, FEDERAL GIFT AND ESTATE TAXATION § 28.30 (1959).

23. Technical Amendments Act of 1958, 72 Stat. 1668, amending Int. Rev. Code of 1939, § 812.

24. As to the 1954 Code, the Regulation is § 20.2056(b)(5)(c).

25. H.R. REP. No. 1337, 83d Cong., 2d Sess. 92 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 5119 (1954); S. REP. No. 1983, 85th Cong., 2d Sess. 5029, 5030 (1958).

26. 298 F.2d at 551.

27. The Commissioner based this argument upon the rationale expressed by Treas. Reg. 105, § 81.47a(c)(3), example (1) (1942).

28. "Congress . . . nowhere indicated any policy that deductability of a 'specifie portion' should be governed by the possibility that the spouse's portion will change in value relatively more or less than the clearly non qualifying part." 298 F.2d at 550, 551.

the statutory language."[29] Rather, the court found that the "liberalization" in the provision as to the marital deduction trust allowed by the 1954 Code was "designed to permit certain normal testamentary dispositions without the total forfeiture of the deduction that the 1939 Code had occasioned in some instances."[30] The case was thereupon remanded to the Tax Court for a determination of that portion of the residuary trust qualifying for the marital deduction.[31]

Code section 2056(b)(5) allows a marital deduction for what is essentially a terminable interest if the surviving spouse is entitled to all the income for life with a general testamentary power to appoint either (1) the "entire interest," or (2) "a specific portion thereof." The legislative intent and word symbols implementing it indicate that the term, "a specific portion thereof," is one pertaining to only a relative share of the entire interest.[32] The Treasury Regulation reflects this intent by regarding a specific portion as a fractional or percentile share.[33] Is it possible to say that a power to appoint a specific sum, *e.g.*, $100,000 is a power to appoint a specific portion of a larger fund? This is the problem in the *Gelb* case. At first glance it would seem that a specific sum would always be a specific portion of a larger fund, because the specific sum is but the numerator over the whole of the larger fund and therefore a stated fraction of it $\frac{(\$100,000)}{(\$200,000)}$ at that time—the time of *H*'s death. Yet, the denominator varies with economic circumstances, *e.g.*, inflation may appreciate the trust corpus to $350,000 by the time of *W*'s death. The sum over which the appointive power may be exercised has remained constant, but the portion has varied by a relative diminution—hardly remaining a specific portion. To argue an alternate contention that an express power to appoint $100,000 of a previously valued estate of $200,000 is also an implied power to appoint one-half of the appreciated estate $\frac{(\$175,000)}{(\$350,000)}$ is to challenge the probable decision of a state probate court and to incur the wrath of the residuary legatee(s). A distinction between the residuary trust less a specific sum as compared to a specific sum, would be no more successful in satisfying the statutory

29. *Id.* at 550.

30. *Id.* at 551.

31. The Tax Court was also asked to consider whether the power in respect to the trustee's discretionary withdrawal was not a qualifying power to the extent that it was exercisable during the recipient's minority. See Treas. Reg. 105, § 81.47a(c)(9) (1942).

32. "The bill makes it clear . . . that a right to income plus a general power of appointment over only an undivided part of the property will qualify that part of the property for the marital deduction." See generally H.R. REP. No. 1337, 83d Cong., 2d Sess. 92 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 125 (1954); S. REP. No. 1983, 85th Cong., 2d Sess. (1958).

33. Treas. Reg. 105, § 81.47a (1942).

requirements. The suggestion[34] that this provides a method of circumventing the underlying Treasury objections to a variable portion is beside the point; the problem is a compliance with the statute. Consequently, an estate planner aware that federal taxation is not a common law subject will find little in the *Gelb* decision to justify any hope for acquiring the marital deduction for a power to appoint a specific sum of a larger fund.[35]

Torts—Negligent Misrepresentations in Business Transactions—Persons to Whom Duty Is Owed

Plaintiff entered into a subcontract to dig a sewer tunnel through a hill for the city. It based its price on information contained in drawings prepared for the city by defendant consulting engineers. Through "oversight or at most simple and unintentional carelessness,"[1] information concerning the amount of rock to be encountered was omitted from the drawings, thus leading the plaintiff to believe the job could be done for substantially less than its ultimate cost. Actual working time was almost double the estimated time based on the drawings. Plaintiff sought to recover damages sustained as the result of reliance on negligent misrepresentation. *Held,* judgment for plaintiff. An action will lie where a misrepresentation is merely negligent and not intentionally false, and furthermore the action can be maintained by a member of a class of persons whom the act may foreseeably affect. *Texas Tunneling Co. v. City of Chattanooga,* 204 F. Supp. 821 (E.D. Tenn. 1962), *appeal docketed,* No. 15,075, 6th Cir., 1962.

The case of *Derry v. Peek,*[2] the fountainhead of the modern action of deceit, established *scienter,* or something akin thereto, as a necessary element of that action.[3] Deceit and, where it exists, the kindred action of negligent misrepresentation are confined to actions for injury

34. See Covey, *New Doctrines on Marital Deduction,* 101 TRUSTS & ESTATES 322, 392 (1962).

35. "There is coming to be a significant amount of common law of federal taxation, but federal taxation is not a common law subject." GRISWOLD, CASES ON TAXATION ch. 1, at 15 (4th ed. 1955).

1. Texas Tunneling Co. v. City of Chattanooga, 204 F. Supp. 821, 826 (E.D. Tenn. 1962), *appeal docketed,* No. 15,075, 6th Cir., 1962.

2. 14 App. Cas. 337 (1889).

3. "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false represeutation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." *Id.* at 374 (opinion of Herschell, C.J.).

to commercial or financial interests.[4] Statements approving the rule of *Derry v. Peek*[5] can be found in most jurisdictions;[6] but when justice requires it, many courts will find a remedy for a negligent misrepresentation made directly to the plaintiff.[7] A minority of jurisdictions have repudiated the criterion of *Derry v. Peek*.[8] Where recovery is allowed, it might be under either of two theories: abolition of the *scienter* requirement for deceit,[9] or allowance of a separate action for negligent misrepresentation.[10]

4. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931); Hedley Byrne & Co. v. Heller & Partners, Ltd., [1962] 1 Q.B. 396, 411 (C.A.); GREEN, JUDGE AND JURY 280 (1930); 1 HARPER & JAMES, TORTS 528 (1956); PROSSER, TORTS 521 (2d ed. 1955); 3 RESTATEMENT, TORTS, scope note to ch. 22, at 56-57 (1938); *cf.* Vartan Garapedian, Inc. v. Anderson, 92 N.H. 390, 31 A.2d 371 (1943).

There are several other theories upon which a party who suffers financial loss caused by negligent or fraudulent representation may proceed: warranty (PROSSER, *op. cit. supra* at 523, 525-26), equitable relief when plaintiff is able to restore what he has received (*ibid.*), quasi-contract (*ibid.*), third party beneficiary (see Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Title Co., 118 Tenn. 678, 102 S.W. 901 (1907); Roady, *Professional Liability of Abstracters*, 12 VAND. L. REV. 783, 788-89 (1959)), or by statute (CAL. CIV. CODE § 1710 (Deering 1961), as interpreted by Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15, 20 (1954), which equated negligence with "no reasonable ground" for belief). The *Gagne* case is particularly interesting in that it discusses the applicability of warranty, deceit, and negligence to the same set of facts. It would seem that the plaintiff in the instant case would have been on more solid ground had it rescinded the contract for mistake, sued the city in restitution for benefits conferred, and left the city to pursue its remedy against the engineering firm in a contract action.

5. Note 3 *supra*.

6. See, *e.g.*, Dundee Land Co. v. Simmons, 204 Ga. 248, 249 S.E.2d 488 (1948); Newman v. Kendall, 103 Vt. 421, 154 Atl. 662 (1931).

7. *E.g.*, Clark v. Haggard, 141 Conn. 668, 109 A.2d 358 (1954); Davis v. Central Land Co., 162 Iowa 296, 143 N.W. 1073 (1913); Becker v. McKinnie, 106 Kan. 426, 186 Pac. 496 (1920); GREEN, JUDGE AND JURY 284-93 (1930); PROSSER, TORTS 537, 547 (2d ed. 1955); Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184, 191 (1900). *Cf.* 1 HARPER & JAMES, TORTS 528-29, 536 (1956). PROSSER, *op. cit. supra*, at 547 lists some of the fictions used to avoid the *scienter* requirement: duty to know, imputed knowledge, intentional misstatement of extent of knowledge, conclusive presumption of knowledge.

8. See, *e.g.*, Weston v. Brown, 82 N.H. 157, 131 Atl. 141 (1925); Brown v. Underwriters at Lloyd's, 53 Wash. 2d 142, 332 P.2d 228 (1938).

9. Aldrich v. Scribner, 154 Mich. 23, 117 N.W. 581 (1908).

10. Weston v. Brown, *supra* note 8; Brown v. Underwriters at Lloyd's, *supra* note 8. At the time of the instant decision, some cases indicated this to be the situation in Tennessee, whose law the court was bound to follow in this diversity action. See Figuers v. Fly, 137 Tenn. 358, 193 S.W. 119 (1917); Denton v. Nashville Title Co., 112 Tenn. 678, 102 S.W. 901 (1904); Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890), allowing recovery for negligent misrepresentation. But compare these cases with Shwab v. Walters, 147 Tenn. 638, 251 S.W. 42 (1922) where the court, without mentioning the earlier cases, expressly approves *Derry v. Peek*. The court in the *Shwab* case was not called upon to consider the negligence question, though, because the facts fell well within the traditioual deceit formula. Likewise, it is said in Crouch v. Gray, 154 Tenn. 521, 290 S.W. 391 (1926), that actual fraud is necessary to support an action for deceit, but there was nothing to indicate negligent conduct in that case. A recent opinion effectively dispels any controversy by stating that a cause of action does lie "in tort for negligent misrepresentation." Howell v. Betts, 362 S.W. 2d 924 (Tenn. 1963).

The court here justified its holding that an action will lie for negligent misrepresentation largely by showing an absence of any Tennessee law to the contrary. The only case dealing directly with the *scienter* requirement[11] was explained by pointing out that the court there, while purporting to follow *Derry v. Peek*, actually laid down a negligence standard and lowered the traditional degree of proof required for fraud.[12] Also some language was found in an earlier case[13] indicating a recognition of a duty of care—the common law negligence standard.[14] The conclusion was that the more accurate interpretation of the law in this field disregards the rule of *Derry v. Peek* and the various fictions derived for getting around it.[15] It should be noted that the court considered the action to be based on deceit and then proceeded to discuss it in terms of negligence. Since there was a failure to differentiate between the two theories, it is not clear whether the holding is that *scienter* is not necessary in the action of deceit or that there is a separate action for negligent misrepresentation causing damage to financial interests.

When, as here, the plaintiff is not the party to whom the representation was made, a slightly different problem is presented. Most early precedent sharply restricted the ambit of defendant's responsibility,[16] but many courts have been willing to broaden this ambit in the case of fraudnlent misrepresentation to include those whose reliance the defendant might reasonably have anticipated.[17] However, they have

11. Shwab v. Walters, 147 Tenn. 638, 251 S.W. 42 (1922). *Cf.* Crouch v. Gray, *supra* note 10, not cited by this court.

12. 204 F. Supp. at 827-28.

13. Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890).

14. 204 F. Supp. at 829. This conclusion is weakened by the statement in Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 686, 102 S.W. 901, 904 (1907) that such an action sounds "in contract, and not in tort . . . ." However, the court in the instant case did not mention the case of Figuers v. Fly, 137 Tenn. 358, 193 S.W. 119 (1917), where a notary was held liable to the grantee of a deed by application of the traditional proximate cause principles of negligence.

15. 204 F. Supp. at 830. See examples of fictions in note 7 *supra*. See, PROSSER, TORTS 537 (2d ed. 1955). *Cf.* 1 HARPER & JAMES, TORTS § 7.6 (1956); WINFIELD, TORTS 460, 463 (6th ed. 1954). The court also notes the anomaly of allowing recovery when the injury is to the person but not when it is financial loss. 204 F. Supp. at 830.

16. The principal such case is Peek v. Gurney, 6 H.L. 377, 412-13 (1873) (liability only to those the representor intended to influence and only for such damage as was intended). *Accord*, Cheney v. Dickinson, 172 Fed. 109 (7th Cir. 1909); Mackworth v. State Sav. Bank, 212 Iowa 954, 237 N.W. 471 (1931); Wells v. Cook, 16 Ohio St. 67 (1865).

17. *E.g.*, Hindman v. First Nat'l Bank; this case involved two court of appeal decisions, 98 Fed. 562 (6th Cir. 1899), and 112 Fed. 931 (6th Cir.), *cert. denied*, 186 U.S. 483 (1902); Cleveland Wrecking Co. v. Struck Constr. Co., 41 F. Supp. 70 (W. D. Ky. 1941); Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 25 P.2d 839 (1933); Highland Motor Co. v. Heyburn Bldg. Co., 237 Ky. 337, 35 S.W.2d 521 (1931); Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441, 448-50 (1931); Cohen v. Glassman, 110 N.Y.S.2d 835 (Sup. Ct. 1952). See Keeton, *The Ambit of a Fraudulent Representer's Responsibility*, 17 TEXAS L. REV. 1 (1938).

been more reluctant to fashion a remedy in favor of members of that class in the case of negligent misstatement.[18] Where such action is allowed the status of the law permits no general statement as to the class of plaintiffs entitled to rely on the defendant's misrepresentations.[19] A recent California case[20] indicates the reason for this apparent confusion is that the ability of a third party to recover "is a matter of policy and involves the balancing of various factors."[21]

Some of the precedent for the instant case seems to indicate that privity is a prerequisite to recovery,[22] but these cases were distinguished.[23] The court having already decided that the action sounded in negligence, rejection of a privity requirement was held to follow naturally.[24] Once free of this requirement it was possible to make a choice between the negligence doctrines of duty to a specifically contemplated plaintiff[25] and duty to a foreseeable class of persons.[26] The court, after a thorough examination of the authorities, chose the broader concept of a duty to a foreseeable class of persons.[27]

The application of usual negligence standards to determine whether

18. *E.g.*, Ultramares Corp. v. Touche, *supra* note 17, at 444-48. Categorical statements in this regard are apt to be misleading, however, since the scope of the plaintiff's responsibility is a matter of degree, varying with the individual circumstances. *Compare* Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922), *with* Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). See Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); 3 RESTATEMENT, TORTS §§ 533, 552 (1938).

19. See note 18 *supra*. *Compare* Weston v. Brown, 82 N.H. 157, 131 Atl. 141 (1925), *and* Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890), *with* Vartan Garapedian Inc. v. Anderson, 92 N.H. 390, 31 A.2d 371 (1943) *and* Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 901 (1907).

20. Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).

21. 49 Cal. 2d 647, 320 P.2d at 19. Among the factors to be considered are "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Ibid.* See 3 RESTATEMENT, TORTS § 552 (1938).

22. See Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 901 (1907) denying recovery on the ground that privity was lacking and distinguishing Denton v. Nashville Title Co., 112 Tenn. 320, 79 S.W. 799 (1904) and Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890) by finding privity in them. In Howell v. Betts, *supra* note 10, it is affirmed that privity is no longer required in an action for negligent misrepresentation. This case also furnishes an example of how the factors set out in note 21 *supra*, mitigate against recovery. Here the misrepresentation was a surveyor's error; 24 years and several grantees later the plaintiffs purchased the property relying on the survey; they subsequently discovered the error and attempted to recover for the injury caused by the erroneous survey; recovery was denied.

23. 204 F. Supp. at 829. The relevance of the distinction is questionable, since it was on the ground that they were suits "in equity for an accounting."

24. *Id.* at 832.

25. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931); Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

26. 3 RESTATEMENT, TORTS § 552 (1938).

27. 204 F. Supp. at 834.

this plaintiff was within the class to whom this defendant owed a duty to protect from financial loss requires careful analysis. Any negligence standard should be derived from a balancing of the basic interests involved.[28] If, in this situation, a comparison of the value of insulating the individual from liability with the value of protecting the interest of the injured party leads to the same result as in the situation where the injury is to the person or tangible property, then the scope of duty should be the same. There is significant social utility in providing a person some degree of immunity from certain consequences of his negligent acts, particularly when the act is the use of language. But there seems to be no logical basis for saying that the quantitative value of this utility varies as the result of the negligence changes from injury to property or personality to injury to financial condition.[29] Heretofore, the law has attached a greater value to a person's tangible interests.[30] Herein lies the unsoundness in the distinction between so-called tangible interests and financial interest, at least insofar as those tangible interests are property and not the person. Thus, the court was correct in looking to the established law of negligence to determine the scope of defendant's liability for non-fraudulent misrepresentation. It may be suggested that since the defendant here offered a professional service to the public, both his duty to refrain from making misstatements and the scope of his liability may be greater than in the ordinary case. This is probably so, not, however, because the standard is different, but because these are merely factors to be taken into consideration in applying the standard.[31]

28. See Terry, *Negligence*, 29 HARV. L. REV. 40 (1915); *cf.* GREEN, RATIONALE OF PROXIMATE CAUSE 5, 6, 8, 12-14 (1927).

29. In opposition to this conclusion one might argue that (1) there is a significantly greater utility in protecting the individual from the "liability in an indeterminate amount for an indeterminate time to an indeterminate class" envisioned by Judge Cardozo in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. at 444, and (2) the sum total of possible liability hanging over an individual is already great enough, thus it should not be increased by the addition of a new basis of liability. It may be answered that the usual negligence doctrines of actual and legal causation should be sufficient to hold the liability within reasonable bounds, and the second argument does not address itself to this particular problem—maintenance of a logical inconsistency is not the way to cure the ill, if it in fact exists.

30. "Thus the law protects human life and bodily safety, the safety of property, and various other valuable objects. To some extent it protects pecuniary condition, *i.e.* the avoidance of pecuniary loss is generally, but . . . not always, a legal object." Terry, *supra* note 28, at 44; 3 RESTATEMENT, TORTS, scope note to ch. 22, at 56-57 (1938).

31. See Curran, *Professional Negligence—Some General Comments*, 12 VAND. L. REV. 535 (1959); *cf.* 1 HARPER & JAMES, TORTS 546-47 (1956).

Torts—Recovery for Emotional Distress Resulting From Fear of Injury to Another

Plaintiff, standing near her infant son, observed defendant's truck negligently run over the child. Incurring physical illness from the shock, she brought an action, stipulating that the fright which resulted in her illness was for her child's safety, not her own. The trial court sustained defendant's general demurrer and entered judgment against the plaintiff. On appeal[1] to the California District Court of Appeal, *held,* reversed. A parent who witnesses the exposure of his child to danger caused by defendant's negligence is included within the class of persons to whom the defendant owes a duty. *Amaya v. Home Ice, Fuel & Supply Co.,* 205 Cal. App. 468, 23 Cal. Rptr. 131 (Dist. Ct. App. 1962).

In the past, courts refused to allow compensation for mental distress on the ground that the damage was too remote, that is, there was not such an injury as would naturally result from the defendant's conduct.[2] This rule and its explanation, being obviously inadequate, gave way to recovery where contemporaneous physical impact was shown.[3] An increasing number of courts, however, have repudiated the necessity of impact when physical injury results from the fright, apparently reasoning that the physical consequences sufficiently guaranteed the substantiality of the claim.[4] But where the distress was not caused by the plaintiff's fear for his own safety, courts have generally denied recovery under the concept of duty, saying that "the plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."[5] The reason for this conclusion was that the defendant's responsibility must be restricted to some reasonable bounds;[6] thus, the "unforeseeable

1. The orginal complaint included a cause of actiou for the child's injuries. Judgment was entered against both plaintiffs, and only the mother appealed.

2. See, *e.g.,* Victorian Ry. Comm'rs v. Coultas, 13 App. Cas. 222, 225 (P.C. 1888).

3. Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896), since overruled in Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961), the court saying of the *Mitchell* doctrine, "[I]t is well to note that it has been thoroughly repudiated by the English courts which initiated it, rejected by a majority of American jurisdictions, abandoned by many which originally adopted it, and diluted, through numerous exceptions, in the minority which retained it." *Id.* at 730. Of impact jurisdictions, Dr. Smith says, "They object, not to a psychic link in the chain of causatiou but to pit-falls of proof involved when physical injury must be traeed *solely* through internal mental aud pyschic reactions." Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli,* 30 VA. L. REV. 193, 232 (1944).

4. PROSSER, TORTS 179 & n.19 (2d ed. 1955).

5. Palsgraf v. Long Island R.R., 248 N.Y. 339, 342, 162 N.E. 99, 100 (1928). *Accord,* Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

6. "It is still ineonceivable that any defeudant should be held liable to infinity for all of the consequeuces which flow from his act, and some boundary must be set." PROSSER, *op. cit. supra* note 4, at 262.

plaintiff"[7] encountered only infrequent success in the courts.[8] Indeed, bystanders, other than near relatives, were always denied recovery.[9] A majority of courts[10] in the United States, including those of California,[11] also denied recovery to near relatives, following *Waube v. Warrington*,[12] where the Wisconsin Supreme Court held that the defendant was under no duty to a parent since no harm to her was anticipated. The minority view found expression in *Hambrook v. Stokes Brothers*,[13] an English case, which has been cited with approval by text writers.[14] There were American cases, similar to *Hambrook*, in which parents recovered for fear for their children, but only where they, too, were in immediate physical danger. In those cases, the courts would not attempt to separate the simultaneous fears in order to compensate only for the plaintiff's fear for himself.[15]

In the instant case, the court first found that California precedent

7. PROSSER, *op. cit. supra* note 4, at 170.

8. Principally, the exception to the general rule against recovery for such plaintiffs has been found in the rescue cases, where the defendant has endangered one man and been held liable for injuries sustained by the victim's rescuer. Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921). "It may be asked how the cases protecting one who goes to the rescue of another imperilled by the negligence of the defendant can be justified . . . . Common sense is necessary in the administration of any principle of law." Campbell, *Duty, Fault, and Legal Cause,* 1938 WIS. L. REV. 402, 409.

9. RESTATEMENT, TORTS, Explanatory Notes § 313, at 10 (Tent. Draft No. 5, 1960).

10. See, *e.g.*, Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Lessard v. Tarca, 20 Conn. Supp. 295, 133 A.2d 625 (Super. Ct. 1957); Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 23 (1916); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); Carey v. Pure Distrib. Corp., 133 Tex. 31, 124 S.W.2d 847 (1939); and collected cases in Annot., 18 A.L.R.2d 220, 224-34 (1951).

11. In Maury v. United States, 139 F. Supp. 532, 534 (N.D. Cal. 1956), where parents sued for mental distress resulting from seeing their child die in a fire caused by defendant's negligence, the federal court, in applying California law, said: "Thus far the California courts have not permitted damages in any case where there was not some element of physical injury to, or reasonable fear of injury to the claimant, except in cases of intentional torts, outrageous conduct, or interference with some interest in real property." See also Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (Dist. Ct. App. 1957); Minkus v. Coca-Cola Bottling Co., 44 F. Supp. 10 (N.D. Cal. 1942); Kelley v. Fretz, 19 Cal. App. 2d 356, 65 P.2d 914 (Dist. Ct. App. 1937). Compare Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918) and Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 Pac. 597 (1916).

12. 216 Wis. 603, 258 N.W. 497 (1935).

13. [1925] 1 K.B. 141. King v. Phillips, [1953] 1 Q.B. 429, has since emasculated the doctrine in that jurisdiction.

14. See, *e.g.*, PROSSER, TORTS 181-82 (2d ed. 1955); Goodhart, *The Shock Cases and Area of Risk,* 16 MOD. L. REV. 14, 23 (1953). *Contra,* Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033, 1041 (1936).

15. See Lindley v. Knowlton, *supra* note 11. "[F]ear for another was not the only cause of injury. . . . [T]here is nothing . . . to indicate that she was not concerned for her own safety." *Id.* at 441. *Accord,* Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (Ct. App. 1912); Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933), overruled in Resavage v. Davies, *supra* note 10.

supported recovery for physical injury resulting from emotional distress,[16] and then considered the scope of the duty of the defendant. Dismissing the earlier theories[17] for denying relief as inapplicable to the central issue, whether defendant owed a duty because of the foreseeability of the plaintiff's shock,[18] the court said: "The need for delineating the area of liability does not justify the obliteration of the liability."[19] Thus, while objective bystanders may be excluded, the court found that the parent is not, for it is a reasonable expectation that a mother will fear for her child.[20] To ascertain the limits of duty, the court adopted Dean Prosser's standards—the injury threatened or inflicted upon the third party must be a serious one; the shock must result in actual physical harm; the plaintiff must be a close relative; and the plaintiff must be present, or at least the shock must be fairly contemporaneous with the injury.[21]

In denying the premise that plaintiff can recover for fear of injury to another, courts have enunciated a restricted approach to duty based on limited liability and prevention of fraudulent claims. While these "practical considerations offer the strongest arguments against recovery,"[22] it has been said:

> If it is reasonable and just that a person should be held liable in such circumstances, why should he escape liability merely because there is a possibility that others, in similar circumstances, will also be held liable? If it is argued that such an extension may lead to illegitimate claims, the answer is that similar fears, expressed when shock was first recognized as a cause of action, have proved to be groundless. Fear is an unsatisfactory foundation on which to build a legal doctrine.[23]

As the instant case notes, the question remains one of duty, a concept usually defined in terms of foreseeability.[24] Employing the

16. See, *e.g.*, Sloan v. Southern Cal. Ry., 111 Cal. 668, 44 Pac. 320 (1896); Emden v. Vitz, 88 Cal. App. 2d 313, 198 P.2d 696 (Dist. Ct. App. 1948); Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 Pac. 597 (1916); Lindley v. Knowlton, *supra* note 11.

17. 23 Cal. Rptr. at 135.

18. *Id.* at 140.

19. *Ibid.*

20. *Id.* at 140-41. "Most of the decisions denying recovery have said that there is no duty to the plaintiff on the Palsgraf theory, because no harm to the plaintiff was reasonably to be foreseen. This sounds unreasonable; if a small child is run down in the street, it is not at all unlikely that the mother may be somewhere in the vicinity, and suffer severe mental disturbance resulting in bodily harm." RESTATEMENT, TORTS, Explanatory Notes § 313, at 10 (Tent. Draft No. 5, 1960).

21. 23 Cal. Rptr. at 140; PROSSER, TORTS 182 (2d ed. 1955).

22. Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253, 270 (1933).

23. Goodhart, *supra* note 14, at 23.

24. PROSSER, TORTS 239 (2d ed. 1955). Some courts, however, hold a defendant liable for all the proximate results of his negligent act, regardless of foreseeability. See *In Re* Polemis & Furness, Withy & Co., [1921] 3 K.B. 560. For criticisms of that

foreseeability formula,[25] the court properly held that the invasion of a parent's emotional tranquility under these circumstances was reasonably foreseeable.[26] The American courts which have allowed recovery to plaintiff parents have done so on the basis of the "zone of danger" test as a means of limiting liability.[27] But why deny recovery to the parent who confesses that his injury occurred solely through concern for his child?[28] The policy arguments against recovery lose much of their effectiveness when reasonable limitations can be drawn and applied. The problem therefore narrows into one of drawing reasonable limitations in order to allow meritorious claims, while protecting the defendant from exaggerated ones.[29] In departing from the "zone of danger" theory, the court rejected a test for limiting liability which is easy to apply and objective. However, instead of applying one test, which might so easily preclude a valid claim, the court rested its decision on several limiting factors that will allow recovery to worthy claimants, while rejecting the unworthy.

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case and comments on the overruling case, Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'r Co., [1961] A.C. 388 (P.C. Austl.), see Comment, 36 N.Y.U.L. REV. 1043 (1961); Comment, 35 TUL. L. REV. 619 (1961); and for a discussion of the problems of a foreseeability formula, see Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961).

25. 23 Cal. Rptr. at 134, 135, 140. "The foreseeability of harm or probable consequence formula has a legitimate place in translating a negligence case to a jury. It has become crystalized and probably serves as well as any other ritual that could be devised." Green, *The Palsgraf Case*, 30 COLUM. L. REV. 789, 800 (1930).

26. 23 Cal. Rptr. at 140. "Numerous American cases have gone beyond the bounds of foreseeability of consequences, except as it is employed to determine the issue of negligence, and for that purpose it is only necessary that harm to plaintiff from defendant's conduct, not the specific consequences, should have been foreseen." Green, *supra* note 24, at 1424.

27. See note 15 *supra*. "[T]here is neither logic nor reason to hold . . . that a distinction is to be taken so that, if a party suffer an injury . . . through fears of safety for self, a recovery may be had for the negligent act of another; but may not recover under similar circumstances, if the fear be of safety for another." Bowman v. Williams, *supra* note 15, at 183.

28. "It would result in a state of the law in which a mother, shocked by fright for herself, would recover, while a mother shocked by her child being killed before her eyes, could not. . . . In my opinion such distinctions would be discreditable to any system of jurisprudence in which they formed part." Hambrook v. Stokes Bros., *supra* note 13, at 157.

29. The question may be asked, how far would this court extend Prosser's limitations that "the injury *threatened* or inflicted upon the third person must be a serious one" and "the shock must be *fairly contemporaneous*"? For example, could a mother recover for shock through learning from a neighbor that the mother's infant barely missed being hit by a truck, the news of the threatened injury following seconds after its occurrence?

Workmen's Compensation—Recovery for Suicide Induced by Work-Connected Mental Disorder

Decedent, an employee of a state mental hospital, became depressed[1] when repeatedly questioned[2] during an extensive legislative investigation of the hospital.[3] After learning the investigation would be resumed, decedent committed suicide.[4] The Michigan Workmen's Compensation Appeal Board affirmed an award of compensation to decedent's widow. On certiorari in the Supreme Court of Michigan, *held,* affirmed by an equally divided court. Suicide induced by work-connected mental disorder is an accidental personal injury arising out of and in the course of employment. *Trombley v. State,* 366 Mich. 649, 115 N.W.2d 561 (1962).

It is well settled that mental injuries are compensable under workmen's compensation when it can be shown that they arise out of and in the course of employment, even though no physical injury is involved.[5] But when suicide is the end product of the mental disorder, three interrelated objections have been raised against compensation. First, most state statutes require a compensable injury to stem from an "accident" or that the injury must be "accidental" to satisfy the causation requirement.[6] With this in mind, courts have often denied compensation, saying suicide is not an accident because it results from intentional conduct.[7] But the idea of an untoward or unexpected event,

1. Prior to the investigation, decedent was described as a relatively happy man, the epitome of a good father and husband. It appears that subsequent to the investigation he lost interest in his home, children, and life in general, undergoing a drastic change in personality.

2. Decedent felt he was being unjustly accused of misconduct by the committee. His feelings did not manifest themselves in anger or lack of mental control, showing themselves instead through the personality change and continued depression. Decedent's health was generally good prior to the investigations although he suffered periodically from bronchial asthma and had once spent two months in an army psychiatric hospital during World War II for treatment of asthma and for "neurosis." Nothing more is said about the neurosis.

3. Included among patients in the cottage at the mental institution where decedent worked was Joseph Kibiloski, who died as a result of injuries sustained at the institution. Kibiloski's injury and death triggered highly publicized investigations of the incident which included the legislative committee probe.

4. Decedent learned from an evening television newscast that the committee would return to the institution. He quietly arose early the next morning, drove to a secluded spot a short distance away and fatally shot himself with his rifle. Ironically, it appears that investigators other than the legislative committee had absolved decedent in Kibiloski's death. Decedent was to be informed of the finding the day of his death.

5. Horovitz, *Workmen's Compensation: Half Century of Judicial Developments,* 41 NEB. L. REV. 1, 8-9 (1962). *Contra,* Young v. Melrose Granite Co., 152 Minn. 512, 189 N.W. 426 (1922); Bekeleski v. O. F. Neal Co., 141 Neb. 657, 4 N.W.2d 741 (1942); Toth v. Standard Oil Co., 160 Ohio St. 1, 113 N.E.2d 81 (1953). See note 20 *infra.*

6. 1 LARSON, WORKMEN'S COMPENSATION LAW § 37.10 (1952).

7. See *e.g.,* McGill Mfg. Co. v. Dodd, 116 Ind. App. 66, 59 N.E.2d 899 (1945) (physician attributes neurosis to claimant's work); Star Publishing Co. v. Jackson, 115

either in cause or result, is the core of the accident concept[8]—not the question of intent. The requirement of accident may then be met if the suicide is an unexpected result of a work-connected mental injury.[9] Second, compensation has been denied on the ground that suicide does not arise out of the employment.[10] And third, compensation has been denied because nearly all workmen's compensation statutes expressly prohibit compensation for self-inflicted injuries.[11] It is argued, however, that if the suicide victim was insane and without control over his will at the time of the suicide, the act is neither wilful nor intentional.[12] This volitional test is employed by the majority of American jurisdictions to decide the insanity question by attempting a subjective look into the mind of the victim to determine absence or presence of volition at the time of the act.[13] A small minority has

Ind. App. 221, 58 N.E.2d 202 (1944) (neurosis prevents printer from operating linotype machine); Voss v. Prudential Ins. Co., 14 N.J. Misc. 791, 187 Atl. 334 (1936) (woman suffers mental injury after being called "idiot"); Chernin v. Progress Serv. Co., 9 App. Div. 2d 170, 192 N.Y.S.2d 758 (1959) (taxicab driver suffers psychological trauma after hitting pedestrian).

8. Unexpectedness is the basic, indispensable ingredient of an accident; but it also has been held that a definite time, place, and cause must be pinpointed. Larson breaks down the component parts of an accident into unexpectedness and definiteness in time—of either cause or result. He concludes that the requirement of unexpectedness is met if either the cause or result is unexpected. 1 LARSON, *op. cit. supra* note 6, § 37.20.

9. In the principal case, the end result—the suicide—was unexpected, although the cause of the suicide—the investigation—could not be said to be unexpected. The definite time and place of suicide can be accurately determined although the investigation leading to the suicide extended over a period of about two weeks.

10. Baltimore & O.R.R. v. Brooks, 158 Md. 149, 148 Atl. 276 (1930); Joseph v. United Kimono Co., 194 App. Div. 568, 185 N.Y. Supp. 700 (1921); Shewczuk v. Contrexeville Mfg. Co., 53 R.I. 223, 165 Atl. 444 (1933); Veloz v. Fidelity-Union Cas. Co., 8 S.W.2d 205 (Tex. 1928).

11. This is no such problem in the instant case although reference is made to the Michigan statute in the dissenting opinion. 115 N.W.2d at 566. Michigan along with Connecticut, Illinois, Montana, Nebraska, New Hampshire, and Wyoming are the only American jurisdictions that do not specifically prohibit by statute any compensation for suicide or self-inflicted injuries. 1 LARSON, *op. cit. supra* note 6, § 36.10.

12. *E.g.*, *In re* Sponatski, 220 Mass. 526, 108 N.E. 466 (1915).

13. "[W]here there follows as the direct result of a physical injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy 'without conscious volition to produce death, having knowledge of the physical nature and consequences of the act,' then there is a direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary willful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act even though choice is dominated and ruled by a disordered mind, then there is a new and independent agency which breaks the chain of causation arising from the injury." *In re* Sponatski, *supra* note 12, at 530, 108 N.E. at 468. This test is characterized by the neat classifications it makes possible, basing decisions on the victim's outward manifestations of volitional ability prior to the suicide. Suicides which are gory, violent, or eccentric in method have as a rule been held compensable. On the other hand, suicides marked by quiet depression and a period of time in which it may have been planned chronically have been held noncompensable. 1 LARSON, *op. cit. supra* note 6, § 36.20.

adopted the chain-of-causation test[14] following the English view that if the injury does produce insanity and the insanity results in suicide, the suicide is compensable.[15] Both tests demand insanity, but disagree on exactly how and where to draw the line.[16] The difficult question is one of causation—can the act of suicide be directly linked to a work-connected mental injury.[17] Problems involving insanity and mental injuries are not peculiar to the field of workmen's compensation, but also harrass criminal law[18] and torts.[19]

Speaking for the three justices voting to affirm, Justice Souris relies on this court's earlier ruling that a work-connected mental disorder, unaccompanied by physical injury, is compensable.[20] This ruling is extended in the instant case to encompass suicide resulting from work-connected mental injuries.[21] Justice Souris concludes the

14. See Whitehead v. Keene Roofing Co., 43 So. 2d 464 (Fla. 1949); Harper v. Industrial Comm'n, 24 Ill. App. 2d 103, 180 N.E.2d 480 (1962); Prentiss Truck & Tractor Co. v. Spencer, 228 Miss. 66, 87 So. 2d 272 (1956); Nohe v. Sheffield Farms Co., 4 App. Div. 2d 711, 163 N.Y.S.2d 455 (1957).

15. Marriott v. Maltby Main Colliery Co., [1920] 13 B.W.C.C. 353 (C.A.); Graham v. Christie, [1916] 10 B.W.C.C. 486 (Scot.); Fanning v. Richard Evans & Co., [1923] 16 B.W.C.C. 43.

16. "The only controversy involves the kind or degree of mental disorder which will lead a court to say that the self-destruction was not an independent intervening cause." 1 LARSON, *op. cit. supra* note 6, § 36.10.

17. "The issue boils down to one of proximate versus independent intervening cause. At the outset, you must find an injury which itself arose out of and in the course of employment, and then trace the suicide directly to it. If there is no such employment-connected injury setting in motion the causal sequence leading to the suicide, the suicide is a complete defense. . . . The basic legal question seems to be agreed upon by almost all authorities: it is whether the act of suicide was an intervening cause breaking the chain of causation between the initial injury and the death." 1 LARSON, *op. cit. supra* note 6, § 36.10.

18. "Indeed, it is probably no exaggeration to say that this subject is receiving more attention today than any other subject in the criminal law." Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914, 919 (1958). For criticism of the subjective M'Naghten Rule, the classic measure of criminal insanity, which is closely analogous to Sponatski's Rule used in workmen's compensation, see ROYAL COMMISSION ON CAPITAL PUNISHMENT (1953); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933); ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT (1954). Despite inroads and continual criticism, M'Naghten, like Sponatski, still retains vitality as evidenced by two recent decisions relying on the M'Naghten formula. Chase v. State, 369 P.2d 997 (Alaska 1962); State v. Esser, 115 N.W.2d 505 (Wis. 1962).

19. "Mental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may well be unwilling to open the door to an even more dubious field." But Dean Prosser also notes: "The very clear tendency of the recent cases is to refuse to admit incompetence to deal with such a problem, and to find some basis for redress in a proper case." PROSSER, TORTS § 37 (2d ed. 1955). See Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344, 347 (1961).

20. The Michigan court rejected the time-worn distinction between mental and physical injuries and treated the emotional pressures arising from ordinary work as mental stimuli sufficient to produce a compensable mental injury. Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960).

21. "I would affirm the appeal board on the gound that the evidence discloses Trombley's mental disorder was caused by the legislative committee's investigation and

suicide would be compensable under either test.[22] He then rejects the subjective volitional test[23] in favor of the chain-of-causation test.[24] On the other hand, Justice Carr defends denial of the claim by relying squarely on the volitional test,[25] contending decedent's suicide was a planned event.[26] Further, he argued that if there was present an "uncontrollable impulse," it did not satisfy the volitional test because it did not result from a compensable physical injury or occupational disease.[27]

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that it so impaired his reasoning faculties that his act of suicide was not voluntary . . . ." 115 N.W.2d at 571.

22. Justice Souris said there was ample evidence to support the finding of the Workmen's Compensation Appeal Board that "Trombley reacted to an uncontrollable impulse in committing suicide . . . which was the product of . . . depression and drastic personality change caused by his involvement in . . . occurrences at his place of employment . . . ." 115 N.W.2d at 570.

23. "[A]pplication of Sponatski's rule in other states has produced such apparently absurd results that I would reject it." 115 N.W.2d at 570. For instances where compensation was denied because the court was unable to find an uncontrollable impulse, see Ruschetti's Case, 299 Mass. 426, 13 N.E.2d 34 (1938) (hanged self six months after amputation of arm); Konazewska v. Erie R.R., 132 N.J.L. 424, 41 A.2d 130 (Sup. Ct. 1945), *aff'd*, 133 N.J.L. 577, 45 A.2d 315 (Ct. Err. & App. 1946) (hanged self two months after head injury); Industrial Comm'n v. Brubaker, 129 Ohio St. 617, 196 N.E. 409 (1935) (suicide followed one week after hip injury); Jones v. Traders & Gen. Ins. Co., 140 Tex. 599, 169 S.W.2d 160 (1943) (drank lye after foot infection); Barber v. Industrial Comm'n, 241 Wis. 462, 6 N.W.2d 199 (1942) (killed self after injury caused sexual impotence and bladder trouble).

24. Justice Souris cited Harper v. Industrial Comm'n, *supra* note 14, in which the Supreme Court of Illinois adopted the chain-of-causation test. 115 N.W.2d at 570-71. In the *Harper* opinion, Justice Schaefer concludes: "The evidence shows a clear connection between Harper's injury, his operation, the resulting pain and physical and mental changes, and his ultimate suicide. We find it unnecessary, therefore, to attempt to assess the precise quality of his mental condition at the time of his suicide, or to determine if his conduct was the result of 'an uncontrollable impulse,' or occurred during a 'delirium of frenzy.'" 180 N.E.2d at 483.

25. In citing various courts which have applied the Sponatski test, Justice Carr noted: "The inquiry has been . . . whether death occurred because of an uncontrollable impulse . . . or whether suicide was the result of a voluntary choice determined by the exercise of mental powers sufficient to realize the purpose and effect of the act." 115 N.W.2d at 563. *E.g.*, *In re* Sponatski, *supra* note 12; Tetrault's Case, 278 Mass. 447, 180 N.E. 231 (1932); Karlen v. Department of Labor & Indus., 41 Wash. 2d 301, 249 P.2d 364 (1952).

26. "Deliberate planning of an act of suicide, with mental ability to understand the nature of the act, involves the introduction of an intervening cause in the chain of circumstances to which cause of death must be attributed." 115 N.W.2d at 566. *Contra*, "The [suicide] was an intervening act but not an intervening cause. An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is the cause of that result." Barber v. Industrial Comm'n, 241 Wis. 462, 6 N.W.2d 199, 202 (1942) (Fowler, J., dissenting).

27. Justice Carr appears to cling to the idea that a suicide can have no causal connection with decedent's work unless it grows out of compensable physical injury as called for in the Sponatski test or a compensable occupational disease. But see Burnight v. Industrial Acc. Comm'n, 5 Cal. Rptr. 786 (Cal. App. 1960); Wilder v. Russell Library Co., 107 Conn. 56, 139 Atl. 644 (1927); Anderson v. Armour & Co., 275 Minn. 281, 101 N.W.2d 435 (1960); 1 LARSON, *op. cit. supra* note 6, § 36.40.

This holding does not appear to radically change fundamental concepts of the law; rather, it contributes to the continuing erosion of the volitional test.[28] Taking a wider view, it notes the reality of mental injury as recognized by advanced medical thought[29] and expands the concept of personal injury by accident[30] in harmony with the remedial nature of workmen's compensation.[31] With the chain-of-causation test practically changing the question of insanity from one of law to one of fact, there remains the formidable problem of assessing contradictory testimony of medical experts[32] and the problem of additional time and expense required to marshal such evidence.[33] The difficulties should not deter courts from making a forthright effort at solution with the best medical evidence available.[34] In adopting what appears the better reasoned position of the minority,[35] it is believed this progressive decision correctly mirrors future trends in this field.[36]

Zoning—Municipal Corporations—Acquisition by One Local Governmental Unit of Property Within Another Such Unit for a Function Which Violates Zoning Ordinances

The plaintiff, a municipal corporation, owned property on which it planned to construct a sewage disposal plant and which was within the corporate limits of the defendant, also a municipal corporation. The land was acquired by purchase for this purpose prior to its an-

28. The equally divided court is a factor, indicating that a change in personnel on the court might tip the scale either way. It is worthy of note, however, that of the five justices affirming in Carter v. General Motors Corp., *supra* note 20, only three sat in the instant case. The three dissenting justices in the *Carter* case are the same as the three dissenting justices in the case at hand.

29. "[The Sponatski test] seems to assume that a man's capacity to choose is a constant, unvariable factor, unaffected by whatever stresses may be brought to bear against it, and so it minimizes to the point of exclusion the possibility that capacity to choose may itself be impaired as the result of a compensable injury. . . . [T]his underlying assumption of the Sponatski test is dubious, both from a medical and from a legal point of view. . . . As far as the law is concerned, it regularly recognizes . . . under the concept of duress, that freedom of choice may be so impaired by extrinsic pressures, physical and mental, as to deprive conduct of its normal legal significance." Harper v. Industrial Comm'n, *supra* note 14, 180 N.E.2d at 481, 482. See also 26-27 NACCA L.J. 287, 291-93 (1961).

30. Carter v. General Motors Corp., *supra* note 20.

31. 1 LARSON, *op. cit. supra* note 6, § 5.

32. MORGAN, BASIC PROBLEMS OF EVIDENCE 202 (1954).

33. Maguire & Hahesy, *Requisite Proof of Basis for Expert Testimony*, 5 VAND. L. REV. 432, 448 (1952).

34. *Cf.* note 1 *supra.*

35. See note 14 *supra.*

36. 1 LARSON, *op. cit. supra* note 6, §§ 42.20, 42.30.

nexation by the defendant city.[1] Although the defendant refused to issue plaintiff a use permit for the construction of the disposal plant, plaintiff began construction, and was subsequently cited by defendant's Municipal Court for violation of its zoning laws.[2] Thereafter, this original proceeding for an alternative writ of prohibition was brought before the Arizona Supreme Court, seeking to prohibit the Municipal Court of defendant city from enforcing its local ordinances against plaintiff's property.[3] *Held,* the alternative writ of prohibition should be made permanent. A municipal corporation may, by purchase or eminent domain, acquire property located within another municipality and use it in discharging governmental functions free from restrictions imposed by the zoning ordinances of the city in which the land is located. *City of Scottsdale v. Municipal Court,* 368 P.2d 637 (Ariz. 1962).

Since the Supreme Court decision in *Village of Euclid v. Ambler Realty Co.,*[4] courts have recognized the rights of municipalities to enact comprehensive zoning ordinances when authorized by statutes or constitutions,[5] but this use of police power has created problems in intergovernmental relations.[6] Litigation between local units of government has increased[7] as new municipalities have been incorporated and older ones have expanded to accommodate the population explosion.[8] One source of this litigation has been the conflict between the power of eminent domain and the police power that arises when one governmental body acquires property within the confines of another governmental unit.[9] These disputes occur most frequently over the location of airports, water-works, recreational facilities, and sew-

1. Plaintiff, the city of Scottsdale, had for some years owned and operated a disposal plant in this locality near the Salt River. An additional twenty acres were purchased to expand its facilities in 1958. Thereafter, in 1960, Tempe annexed land including both the plant and the twenty acres.

2. There was no contention by Tempe that the sewage facilities would constitute a nuisance.

3. The Fisher Contracting Company, which was constructing the facilities, was also a party plaintiff.

4. 272 U.S. 365 (1926). This case upheld the right of a municipality to enact zoning ordinances.

5. See 8 MCQUILLIN, MUNICIPAL CORPORATIONS § 25.05 (3d rev. ed. 1957).

6. See generally Evans, *Overlapping, Duplication and Conflicts Among Municipal Corporations,* 7 VAND. L. REV. 35 (1953); Kneier, *The Use of the Police Power by Local Governments and Some Problems of Intergovernmental Relations,* 8 J. PUB. L. 109 (1959).

7. Kneier, *supra* note 6.

8. The 1957 Census of Governments revealed there were 3,050 counties, 17,198 townships, 17,215 municipalities, 14,424 special districts, and 50,454 school districts in the United States. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE U.S. 413 (83d ed. 1962).

9. Evans, *supra* note 6; Kneier, *supra* note 6.

age disposal systems.[10] While it is generally recognized that federal and state governments are not subject to local zoning regulations,[11] disputes between political subdivisions of the state are fraught with grave difficulty.[12] Although most of the conflicts have been between counties and municipalities or between cities and villages, a few cases involve co-equal political subdivisions.[13] As a general rule local governments are said to be immune from their own zoning laws when engaged in a governmental function.[14] Courts have usually applied this same rule when statutes[15] have been passed permitting a subdivision of the state to condemn private property[16] without local boundaries and within the limits of another county or municipality.[17]

10. See Antieau, *The Powers of Municipal Corporations*, 16 Mo. L. Rev. 118, 126 (1951). For a good discussion and a comprehensive listing of municipal activities causing disputes, see Annot., 61 A.L.R.2d 970 (1958).

11. See, *e.g.*, Davidson County v. Harmon, 200 Tenn. 575, 292 S.W.2d 777 (1956) (state not bound by local zoning laws in locating a state hospital). See 8 McQuillin, *op. cit. supra* note 5, §§ 25.15, 25.16; 1 Yokely, Zoning Law and Practice §§ 39, 40 (2d ed. 1953).

12. Antieau, *supra* note 10; Evans, *supra* note 6; Kneier, *supra* note 6; Sales, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 Texas L. Rev. 316 (1961); 11 Vand. L. Rev. 642 (1957).

13. For a general annotation with an extensive compilation of cases showing the problems and the parties involved in intergovernmental disputes, see Annot., 61 A.L.R.2d 970 (1958).

14. Pruett v. Dayton, 168 A.2d 543 (Del. Ch. 1961) (disposal of garbage by city); Mayor of Savannah v. Collins, 211 Ga. 191, 84 S.E.2d 454 (1954) (erection of fire station by city); O'Brien v. Town of Greenburgh, 239 App. Div. 555, 268 N.Y. Supp. 173 (1933), *aff'd*, 266 N.Y. 582, 195 N.E. 210 (1935) (erection of garbage incinerator). "Whether or not an activity or property of the city is subject to zoning has been made to depend upon the proprietary or governmental capacity of the city relative to that activity or property." 8 McQuillin, *op. cit. supra* note 5, § 25.15. "A well established rule grants immunity from zoning ordinances to the city enacting the ordinance." Sales, *supra* note 12, at 317.

15. Authority must be given to a city by the state's statutes or its constitution before it can acquire property outside its boundaries. "Under proper authority, private property may be taken for public purposes by a municipality even beyond the corporate limits thereof." 3 Yokely, Municipal Corporations § 486 (1958). "To acquire such outside properties municipal corporations often receive grants of extraterritorial powers of eminent domain which are regularly upheld." 1 Antieau, Municipal Corporation Law § 5.09 (1961). For an example of such a statute see note 24 *infra*.

16. There have been few cases where there has been an attempt to condemn public property of another municipality. See Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940) where the court allowed streets of an adjoining municipality to be taken for the building of an airport. *But see* Village of Blue Ash v. City of Cincinnati, 182 N.E.2d 557 (Ohio 1962) in which a grant of power to the city to condemn land without its corporate limits for public utilities, as airports, was held not to extend to the appropriation of a public street in another municipality.

17. Petition of City of Detroit, 308 Mich. 480, 14 N.W.2d 140 (1944); State *ex rel.* Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960); Aviation Servs., Inc. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761 (1956); Union Free School Dist. v. Village of Hewlett Bay Park, 198 Misc. 932, 102 N.Y.S.2d 81 (Sup. Ct. 1950); State *ex rel.* Helsel v. Board of County Comm'rs, 79 N.E.2d 698 (Ohio Com. Pl.), *affirming* 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1947). "Zoning restrictions cannot apply to the state or any of its agencies vested

Furthermore, no distinction is made as to whether the property is purchased rather than condemned, provided there exists a power of eminent domain.[18] The basis for the above rule appears to rest in the belief that the power of eminent domain is inherently superior to the police power.[19] Some authorities reject this position, believing the two powers can be reconciled.[20] Although most courts allow zoning ordinances to be ignored when a governmental function, as opposed to proprietary or corporate activities,[21] is involved, there is criticism that this test is improper and outdated.[22] Authorities are

with the right of eminent domain in the use of land for public purposes." 8 McQUILLIN, *op. cit. supra* note 5, § 25.15. "Such acquisition outside the corporate limits of the condemnor may be of private property situate in another municipality. . . ." NICHOLS, EMINENT DOMAIN § 2.24 (1950). See also 2 METZENBAUM, LAW OF ZONING 1280 (2d ed. 1955).

18. Mayor of Savannah v. Collins, *supra* note 5; State *ex rel.* Askew v. Kopp, *supra* note 17, at 889 (immaterial whether city purchased or condemned the property as long as it had "the right to condemn"); State *ex rel.* Helsel v. Board of County Comm'rs, *supra* note 17.

19. See Petition of City of Detroit, *supra* note 17; State *ex rel.* Helsel v. Board of County Comm'rs, *supra* note 17; State *ex rel.* Askew v. Kopp, *supra* note 17.

20. In construing statutes allowing a jail to be constructed outside the city, the court in City of Richmond v. Board of Supervisors, 199 Va. 679, 101 S.E.2d 641 (1958) said, "They protect the city in the performance of an extraterritorial Act . . . . They do not . . . expressly or impliedly authorize the city to establish a penal institution at any place, inside or outside of the city, in violation of the zoning ordinance of such place." *Id.* at 646. The court said there is no conflict in requiring a city to conform to zoning regulations when it condemns property in another municipality; the two powers can be reconciled. Although the court in Aviation Servs., Inc. v. Board of Adjustment, *supra* note 17, allowed property to be taken in another village for an airport against the zoning regulations, it said, "this court would not condone arbitrary action in the establishment or operation of airport facilities within the domain of another governing power. . . ." *Id.* at 767. The same court followed this two years later by refusing to allow a water tower to be constructed in a neighboring village when no consideration was given to alternate sites. Washington Township v. Ridgewood Village, 46 N.J. Super. 152, 134 A.2d 345 (Super. Ct. 1957). After allowing property to be taken in a township for a county airport, State *ex rel.* Helsel v. Board of County Comm'rs, *supra* note 17, said, "It is not to be understood from the foregoing that the Court is indicating an opinion that municipalities . . . are powerless to prevent counties or other public bodies from constructing public improvements in neighborhoods within municipalities that are palpably unsuited to the proposed public use." *Id.* at 705. Also, certain writers have suggested that zoning laws should be followed by public units within a municipality's borders. "Whether one municipality should have police power over the property and activity of another within its boundaries should in general be answered in the affirmative and zoning ordinances should be obeyed by all units which come in some way into another municipality's confines." Evans, *supra* note 6, at 52.

21. See Mayor of Savannah v. Collins, *supra* note 14. Nehrbas v. Incorporated Village of Lloyd Harbor, 2 N.Y.2d 190, 159 N.Y.S.2d 145, 140 N.E.2d 241 (1957; State *ex rel.* Helsel v. Board of County Comm'rs, *supra* note 17. For a good discussion and definition of governmental and proprietary functions see Sales, *supra* note 12, at 318. There is often confusion and disagreement as to whether certain activities are governmental or proprietary in nature. For a collection of decisions reaching different conclusions see Annot., 61 A.L.R.2d 970 (1958).

22. Some courts point out that certain functions have been classified as governmental for one purpose and proprietary for another. Courts have classified a function as governmental for tort actions and proprietary in zoning cases. Jefferson County v.

divided upon whether a sewage disposal plant is properly classified as a governmental or proprietary function.[23]

The court in the instant case first determined that the Arizona statute[24] authorized a municipality to acquire land for a sewage disposal plant within or without its corporate limits. Eminent domain was then described as "a necessary, constant and unextinguishable attribute" of sovereignty which is not created but merely limited by constitutional provisions.[25] Proceeding upon this basis, the court adopted the view of other authorities that the power of eminent domain is superior to police power enforced through zoning laws. Without discussion of the position's merits, reasonableness, or consequences, decisions from other jurisdictions were cited and followed[26] which extend immunity from zoning regulations to property acquired by one municipality within another municipality. Although it was recognized that this immunity generally depends upon whether the use of the land is classified as governmental or proprietary, the court decided that operation of a sewage disposal plant is a governmental function. The rationale for this classification was that the "preservation of the public health is one of the duties that devolves upon the state as a sovereignty"[27] and the subsequent discharge of this duty by the state or a municipality constitutes a governmental function. The operation of proper sewage facilities was described as vital and necessary to protect the health and welfare of the people. The dissenting judge objects to the majority opinion, charging that "the principles laid down therein are unsound because they embrace legal conclusions of other courts, without careful analysis of the bases of such conclusions."[28] The dissent further suggests that eminent domain

Birmingham, 256 Ala. 436, 55 So. 2d 196 (Ala. 1951) (sewage disposal plant a proprietary function although previously considered as governmental in a tort action); State *ex rel.* Askew v. Kopp, *supra* note 17, at 890 (refusal to apply the governmental and proprietary test saying it is "a distinction useful and most usually invoked in determining questions of tort liability"); Aviation Servs., Inc. v. Board of Adjustment, *supra* note 17 (refusal to apply this test in a condemnation case involving airport property). *Cf.* Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936).

23. Jefferson County v. Birmingham, *supra* note 22 (sewage disposal plant held proprietary); State *ex rel.* Askew v. Kopp, *supra* note 17 (dictum) (sewage disposal plant would be regarded as governmental).

24. ARIZ. REV. STAT. ch. 5, § 9-522 (1956). "A. In addition to its other powers, a municipality may: 1. [W]ithin or without its corporate limits, construct, improve, reconstruct, extend, operate, maintain and acquire, by gift, purchase or the exercise of the right of eminent domain, a utility undertaking. . . ."

25. 368 P.2d at 638.

26. The court relied on four leading cases for this proposition. Petition of City of Detroit, *supra* note 17; State *ex rel.* Askew v. Kopp, *supra* note 17; Aviation Servs., Inc. v. Board of Adjustment, *supra* note 17; State *ex rel.* Helsel v. Board of County Comm'rs, *supra* note 17.

27. 368 P.2d at 640.

28. *Id.* at 640.

statutes should be construed strictly, while police powers should be expanded to accomplish general objectives. It is finally argued that courts have not been "so much concerned with a conflict between *eminent domain* and the *police power*, as they are with which is the ascendant or *superior right* in the particular fact situation."[29] Thus, the dissent wishes to examine each factual situation, compare the conflicting public interests, and thereby determine which is more beneficial in promoting the general welfare.

Decisions such as that reached by the Arizona court in the instant case may encourage municipalities to acquire land located within the boundaries of other municipalities, particularly if more accessible and less costly. It may also result in undesirable utilities being removed from one municipality and located within another political subdivision. Courts would do well to examine carefully the consequences, reasonableness, and fairness of such procedure. One element of reasonableness that is found when the rule is applied to condemnation proceedings of the state or federal government or by a municipality within its own boundaries, is lacking when disputes are between co-equal units. In each of the former situations the governmental authorities will weigh the advantages and disadvantages of condemning property for use in violation of zoning ordinances, since such officials represent all those persons and are responsible for the general welfare of the community. As public officials they must answer to the people for their actions. However, where property is condemned in another municipality as in the present case, the condemning officials are primarily concerned with the welfare and interest of their own citizens. Also, to follow the view that the power of eminent domain is inherently superior to the police powers and then to say proprietary functions are subject to zoning laws, seems inconsistent since property for proprietary uses can be obtained by eminent domain. Taking into account the municipalities' need for acquiring property for utilities, there would seem to be three alternative methods which would eliminate the harshness of the arbitrary rule of the present case. They are: (1) allow the exercise of eminent domain, but require it to be consistent with zoning regulations;[30] (2) examine the facts in each case to establish which power is inconsistent with the public interest;[31] and (3) allow the use of eminent domain subject to the approval of the governmental unit

29. *Id.* at 643.

30. See the discussion of this theory as advanced in City of Richmond v. Board of Supervisors, *supra* note 20.

31. This is the position taken by the dissent in the instant case. See also note 20 *supra* for other cases with similar language. Washington Township v. Ridgewood Village, *supra* note 20; Aviation Servs., Inc. v. Board of Adjustment, *supra* note 17; State *ex rel.* Helsel v. Board of County Comm'rs, *supra* note 17.

in which the land is located or of local regulatory boards.[32] Finally, it is submitted that the court in the instant case reached the proper result, the plaintiff having acquired the property for the proposed use prior to its annexation by the defendant.[33] On these facts it would appear equitable to permit the plaintiff to go ahead with the planned use.

32. New Jersey has passed statutes embodying this principle. See, *e.g.*, N.J. STAT. ANN. § 40.63-2 (1940) which is entitled "Location and erection of sewerage works in other municipalities; consent required." This section reads, "No work shall be undertaken, or land acquired, or any public street, highway, alley or other public place occupied or any sewer or drain outlet, or system thereof, filtration plant, sewerage disposal works or receptacles acquired, occupied or used under this article in any other municipality, without the consent, expressed by resolution, of the governing body and of the board of health of such other municipality, upon application made therefor in writing to each of them."

33. See note 1 *supra*.