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CONSTITUTIONAL LAW-Equal Protection-Relatives' Responsibility Statutes do not Create a "Suspect" Classification Based on Wealth

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CONSTITUTIONAL LAW—Equal Protection—Relatives' Responsibility Statutes do not Create a "Suspect" Classification Based on Wealth. *Swoap v. Superior Court*, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973).

Two recipients of aid to the aged and their adult children challenged the constitutionality of two state statutes. One imposed a general duty of support on the children of parents unable to support themselves.[1] The other gave county officials a cause of action against the children to compel contribution to the public assistance given by the state to the needy parents.[2] The petitioners alleged that the statutes offended the equal protection clauses of both the federal and state constitutions. The Superior Court of Sacramento County issued a statewide temporary restraining order barring enforcement of the two statutes. On appeal the California Supreme Court upheld the constitutionality of the statutes[3] and issued a writ of prohibition

1. "It is the duty of the father, the mother, and the children of any . . . person in need who is unable to maintain himself by work, to maintain such person to the extent of their ability." CAL. CIV. CODE § 206 (West Supp. 1974).

2. "If an adult child living within this state fails to contribute to the support of his parent as required by Section 12101 [now 12351], the county [now the state] . . . may proceed against such child. Upon request to do so, the district attorney or other civil legal officer of the county [now attorney general] may maintain an action . . . to recover that portion of aid granted as it is determined that the child is liable to pay, and to secure an order requiring payment of any sums which may become due in the future." CAL. WELF. & INST'NS CODE § 12100 (West 1972), *as amended*, § 12350 (West Supp. 1974). As of January 1, 1974, old age assistance programs sharing in Federal revenues must be administered by the state government, pursuant to 42 U.S.C. § 1381 *et seq.* (Supp. 1972).

3. 10 Cal. 3d 490, 508, 516 P.2d 840, 852, 111 Cal. Rptr. 136, 148 (1973). The court does not specify under which constitution it decided the equal protection question. Although the California constitution does not employ the phrase "equal protection," the California courts generally equate the following provisions with equal protection under the United States Constitution: CAL. CONST. art. I § 11. General laws of uniform operation. All laws of a general nature shall have a uniform operation. *Id.* § 21. Privileges and immunities. No special privileges or immunities shall ever be granted

against the Superior Court.

The purpose of the public assistance reimbursement statute was to relieve the public of the burden of supporting parents with children able to maintain them.[4] California courts had held that there was nothing in the challenged duty of support statute, section 206 of the Civil Code, suggesting a legislative intent to impose liability on a child for public assistance extended to his parents,[5] and the county had no subrogation right to recover aid extended to an indigent parent.[6]

Under the Welfare Reform Act of 1971, section 206 was amended to link the duty of support with the obligation to contribute to public assistance benefits received by persons in need.[7] A provision

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which may not be altered, revoked or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." This is not the first time that the California court has failed to specify whether its decision was based on the United States or California Constitution. *See* Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), *vacated and remanded for clarification*, 380 U.S. 194 (1965), *decision clarified and adhered to*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965) (basis was California Constitution although the court had thought United States Constitution equally applicable).

4. Duffy v. Yordi, 149 Cal. 140, 84 P. 838 (1906).

5. County of San Mateo v. Boss, 3 Cal. 3d 962, 970, 479 P.2d 654, 658, 92 Cal. Rptr. 294, 298 (1971); County of Lake v. Forbes, 42 Cal. App. 2d 744, 746, 109 P.2d 972, 974 (1941). The only liability to third persons found in § 206 (prior to 1971) was on a promise to pay for necessities previously furnished to the parent.

6. San Bernardino v. Simmons, 46 Cal. 2d. 394, 296 P.2d 329 (1956). The *Swoap* court did not override this portion of *Simmons*. The right to contribution, the court in *Swoap* concludes, is derived from the Welfare and Institutions Code Section 12350 *et seq.*, not from section 206 of The Civil Code under a subrogation theory. 10 Cal. 3d at 502, 516 P.2d at 848, 111 Cal. Rptr. at 144.

7. "Person in need" was substituted for the words "poor person" by amendment to section 206 of the Civil Code. [1971] Cal. Stats., ch. 578, § 3. The purpose of this substitution was to nullify the decision in County of San Bernardino v. Simmons, 46 Cal. 2d 394, 296 P.2d 329 (1956), where the court held that section 206 was not intended to establish the duty of support referred to in certain enforcement statutes, but was independent of statutes which require contribution from certain relatives to offset cost of public assistance programs.

was added to section 206 defining "a person who is receiving aid to the aged . . . to be a person who is unable to maintain himself by work."[8] Sections 12350 and 12351 of the Welfare & Institutions Code provide for enforcement of support duties by the welfare agency through civil actions for contribution against the responsible relative.[9]

As of 1971, thirty-two states had statutes which imposed a duty upon adult children to render support to needy parents.[10] Although relative-support statutes have a long history dating back to the Elizabethan Poor Laws,[11] only the husband's duty to support his wife and children were enforced at common law. No action against an adult child for parent-support was recognized.[12] Most state

8. CAL. CIV. CODE § 206 (West Supp. 1974). The statute, as amended, continues to provide that a child abandoned during childhood (as defined in the statute) may be released from his duty to support a parent and any release under this section is deemed a release from all statutory support requirements under state law. CAL. CIV. CODE § 206.5 (West Supp. 1974) provides that: "[a]ny adult person may file in the superior court of the county where his parent resides a verified petition alleging that, while he was a minor, he was abandoned by such parent, and such abandonment continued for a period of two or more years prior to the time such person reached the age of 18 years, and such parent during such period was physically and mentally able to support such person, and praying the court to free such person from the obligation otherwise imposed by law to support such parent. . . . A person released from the obligation to support a parent as provided in this section shall be deemed to be so released with respect to any state law. . . ."

9. "The granting of or continued receipt of aid shall not be held to be contingent upon any court action or order or the child's compliance with provisions of Section 12351." CAL. WELF. & INST'NS CODE § 12350 (West Supp. 1974).

10. COUNCIL OF STATE GOVERNMENTS, RECIPROCAL STATE LEGISLATION TO ENFORCE THE SUPPORT OF DEPENDANTS 22 (1971 ed.).

11. 43 Eliz. 1, ch. 2, § 7 (1601), providing that: "[t]he father and grandfather, mother, and the grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability shall, at their own charges, relieve and maintain every such poor person. . . ." For history of the statute, *see* Mandelker, *Family Responsibility Under the American Poor Laws*, 54 MICH. L. REV. 497, 497-501 (1956).

12. H. CLARK, LAW OF DOMESTIC RELATIONS 212 (1968 ed.).

courts, for policy reasons,[13] have not permitted a direct action by a parent against a child even when the state has created a statutory duty of support.[14] Despite reluctance to enforce responsibility statutes, courts have consistently upheld the constitutionality of such laws against a variety of constitutional objections including lack of procedural due process,[15] claims of discriminatory classification,[16] double taxation,[17] and the taking of private property for public use without just compensation.[18]

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13. "[A] large body of social work opinion [has long maintained] that liability of relatives creates and increases family dissension and controversy, weakens and destroys family ties at the very time and in the very circumstances when they are most needed, imposes an undue burden upon the poor . . . and is therefore socially undesireable, financially unproductive, and administratively unfeasible." tenBroeck, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614, 645-46 (1965).

14. Mandelker, *supra* note 11, at 610-16. In regard to relative responsibility statutes, courts generally have not applied the principle "where there is a right, there is a remedy." Exceptions do exist. The relative support statute was enforced against a husband who had otherwise legally relieved himself of his wife's debts. Cunningham v. Cunningham, 72 Conn. 157, 44 A. 41 (1899). A Georgia court likewise reasoned that a direct cause of action was created so that a needy mother could compel support from the estate of her son. Citizens & Southern Nat'l Bank v. Cook, 182 Ga. 341, 185 S.E. 318 (1936).

15. In Mallatt v. Luihn, 206 Or. 678, 294 P.2d 871 (1956), due process was satisfied where after notice and an opportunity for a hearing is extended to the responsible relative, the county sheriff issues a warrant which would result in a lien upon the relative's property.

16. Department of Mental Hygiene v. McGilvery, 50 Cal. 2d 742, 329 P.2d 689 (1958), held that all responsible relatives of mentally ill persons committed to state mental hospitals were treated in the same manner. Their obligation to support was absolute in each case; it is only the collectibility of the obligation which is contigent upon ability to pay.

17. Maricopa County v. Douglas, 69 Ariz. 35, 208 P.2d 646 (1949), rejected the argument that paying taxes, a portion of which maintains a social welfare program, prevents the imposition of a further charge under the relatives' responsibility statute. Everyone who spends money pays taxes directly or indirectly. *See also* Commission v. Eldridge, 7 Cal. App. 298, 94 P.597 (1908).

18. 50 Cal. 2d 742, 329 P.2d 689. The relative receives a substantial equivalent from the agents of the state having management of the institution. In *Mallatt* the statute allows collection of court costs from the respon-

A challenge on equal protection grounds was first heard in *Department of Mental Hygiene v. Kirchner*,[19] where the California Supreme Court struck down the state's attempt to offset the cost of maintaining patients in state mental hospitals by enforcing a duty of contribution against responsible relatives, including adult children.[20] The court reasoned that where the state had undertaken a program which has elements of a public benefit,[21] it cannot arbitrarily charge the costs incurred to a class of persons who would not otherwise have the burden of support.[22] The court saw three possible reasons why equal protection had not been previously argued: first, the argument is basically invalid;[23] second, only now are the courts giving recognition to an expanded *parens patriae* principle under which the state is assuming greater social responsibilities for which all citizens are contributing through duly apportioned taxes[24] and third, the equal protection clause has taken on new vitality because of recent Supreme Court decisions.[25] While basing its holding on

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sible relative. Although this allows collection of an amount greater than that paid to the recipient, the welfare commission's rights were held to be subrogated to the recipient's, who would have been entitled to court costs.

19. 60 Cal. 2d 716, 720-21, 388 P.2d 720, 723, 36 Cal. Rptr. 488, 491 (1964).

20. "The husband, wife, father, mother, or children of a mentally ill person or inebriate . . . shall be liable for his care, support, and maintenance in a state institution of which he is an inmate." [1947] Cal. Stats., ch. 625, § 1, (repealed 1969). The basic duty is now found in CAL. WELF. & INST'NS CODE § 7275 (West Supp. 1974).

21. In this case the "benefit" to society is protection from the insane but there is further public benefit achieved from rehabilitation of the individual. 60 Cal. 2d at 720, 388 P.2d at 723, 36 Cal. Rptr. at 491.

22. The reasoning of the *Kirchner* decision was extended in later California cases to preclude the contribution requirement under other relative responsibility statutes. *See* County of San Mateo v. Boss, 3 Cal. 3d 962, 479 P.2d 654, 92 Cal. Rptr. 294 (1971) (Old Age Security Law); Dep't of Mental Hygiene v. Bank of America, 3 Cal. App. 3d 949, 83 Cal. Rptr. 559 (1970) (support of mentally retarded adult child in state institutions).

23. Comment, *Compulsory Contribution to Support of State Mental Patients Held Deprivation of Equal Protection*, 39 N.Y.U.L. REV. 858, 860 (1964).

24. 60 Cal. 2d at 722, 388 P.2d at 723, 36 Cal. Rptr. at 491.

25. *See* Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 FORDHAM L. REV. 605 (1973).

equal protection grounds, the court in *Kirchner* failed to specify the precise way in which equal protection was violated.[26] The statute was faulted for overbreadth.[27] Moreover, the obligation to contribute was held to be arbitrary since it resulted in the selection of one particular class of persons for a "species of taxation" with no rational basis to support the classification.[28] However, the persons in this class and their suspect characteristics were not described. Rather, the court spoke of the need to reexamine concepts which upheld the imposition of support liability.[29]

In an attempt to clarify and give substance to the equal protection argument, later California cases drew a distinction between a statutory duty of contribution and a "pre-existing" duty of support. The former are constitutional if they do not expand or extend liabilities of persons who are "in no other manner" liable for support.[30] A husband has a common law duty of support arising from the marriage contract to which he is a consenting party. A statute which requires him to contribute to the maintenance of a spouse in a state institution does not violate equal protection guarantees, for it does not impose a new duty of support.[31] Where a contribution statute expands the "pre-existing" duty, it fails under the *Kirchner* reasoning. An example of the "pre-existing" duty standard is *County of San Mateo v. Boss*.[32] Here an adult child was held to be under no obligation to reimburse the county for assistance to his mother who, although owning a home valued at almost $32,000, qualified for public assistance as a person "in need." Since the son was not obliged to support his mother, he had no pre-existing duty of support, and following *Kirchner*, the county could not compel contribution.[33]

The "pre-existing" duty standard presents problems for both its proponents and its critics. If the duty must exist prior to and be

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26. *See* note 3 *supra*.
27. 60 Cal. 2d at 722, 388 P.2d at 724, 36 Cal. Rptr. at 492.
28. *Id.*
29. *Id.* at 722, 388 P.2d at 723-24, 36 Cal. Rptr. at 491-92.
30. *In re* Dudley, 239 Cal. App. 2d 401, 408, 48 Cal. Rptr. 790, 797 (1966).
31. *In re* Guardianship of Thrasher, 105 Cal. App. 2d 768, 234 P.2d 230 (1951).
32. 3 Cal. 3d 962, 479 P.2d 654, 92 Cal. Rptr. 294 (1971).
33. *Id.* at 969, 479 P.2d at 659, 92 Cal. Rptr. at 298.

independent of the enforcement statute, is it limited to those duties found at common law or may it exist in another statute? Is it sufficient that the duty be stated in an independent section of the state statutes? Proponents of the standard must heed the warning raised by the dissent in *Swoap*: "*The change in constitutional standards proposed by the majority removes significant constraints on the abuse of majoritarian power.* . . . [T]he state may be unfairly shifting the burden of public expenses onto a small segment of the citizenry . . . a small minority . . . with no cohesive characteristics that would permit effective political representation."[34] This problem becomes particularly acute where the subject is as politically controversial as a welfare program. Since prejudices may distort the reasoning of the majority, some objective limitations on majoritarian power are desirable. However, a "pre-existing" duty rule which grants validity to so-called "independent" statutory duties of support fails to provide such an objective standard, since the statutory duties are themselves subject to legislative whim.

A second argument made by the plaintiffs in *Swoap* was that the statute created a "suspect" or arbitrary classification based on wealth.[35] Since the statute imposed a duty of support only on those children with needy parents, that is, parents receiving public assistance, these children are singled out to bear an extra burden.[36] Thus, wealth of the parents is the criterion used to discriminate among children and to impose arbitrarily an extra burden on some.

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34. 10 Cal. 3d at 518, 516 P.2d at 859-60, 111 Cal. Rptr. at 155-56.

35. *Id.* at 505, 516 P.2d at 850, 111 Cal. Rptr. at 146.

36. *Id.* The relative's contribution scale was significantly changed in 1971 so as to increase the burden on persons of moderate income. For example a person with 3 individuals depending on his income who had a net monthly income of $600 could be required to contribute $25 per month. Under pre-1971 law, no contribution was required from such a person. "Net income" is defined to be the sum of income constituting the separate property of the adult child (excluding community property and earnings of the spouse) with a flat twenty-five percent deduction. CAL. WELF. & INST'NS CODE § 12351 (West Supp. 1974). Both scales are set forth in an appendix to the majority opinion, 10 Cal. 3d at 508-10, 516 P.2d at 852-53, 111 Cal. Rptr. at 148-50. Significantly, the legislature returned to the pre-1971 scale while *Swoap* was pending. [1973] Cal. Stats., ch. 1216, § 37, urgency, eff. Dec. 5, 1973.

Prior to *Swoap*, in *Serrano v. Priest*, [37] the California Supreme Court had held that distinctions made between persons or groups on the basis of wealth create a "suspect classification." The burden was placed on the state[38] to show a compelling reason for a scheme of financing public education.[39]

The concept of wealth as a "suspect" class was seriously undermined by the Supreme Court in *San Antonio School District v. Rodriquez*,[40] where Mr. Justice Powell observed that "the wealth discrimination discovered by . . . [the *Serrano* court and others] is quite unlike any of the forms of wealth discrimination heretofore reviewed by this court."[41] He found that these decisions ignore the "hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence."[42] Statutes producing an unequal economic burden such as the graduated income tax, are not unconstitutional per se. Yet a statute which imposes an equal economic burden on all may be unconstitutional if the burden effectively denies to one class some fundamental right,[43] or as dicta in *Rodriquez* suggests, there is a total deprivation of something less than a fundamental right.[44]

The court in *Swoap* was neither willing to examine the burden which section 12351 imposed upon plaintiffs nor draw any conclusion from the fact that only certain welfare programs carried relative responsibility provisions. The court's conclusion, that the discrimination was not based on wealth, but parentage,[45] is unconvincing since only children of poor parents are subject to proceedings under

37. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

38. Williams v. Illinois, 399 U.S. 235 (1970); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963).

39. 5 Cal. 3d. at 610, 487 P.2d at 1259-60, 96 Cal. Rptr. at 619-20.

40. 411 U.S. 1 (1973).

41. *Id.* at 18-19.

42. *Id.* at 19.

43. *See* Harper v. Virginia Bd. Of Elections, 383 U.S. 663 (1966), where imposition of a poll tax effectively denied the fundamental right to vote to poor persons.

44. 411 U.S. at 19.

45. 10 Cal. 3d at 505, 516 P.2d at 850, 111 Cal. Rptr. at 146.

the statute. Moreover, why discrimination on the basis of "parentage" is any more permissible than "wealth" is not made clear.

Absent the denial of a fundamental right, or finding of a suspect classification, the court, under the traditional equal protection test, seeks a "rational relationship" between the purposes of a statute and the trait which forms the basis of the legislative classification. While "rationality" has often been based on state interest,[46] the relationship between the classifying criteria and the purposes of the legislation has not been generally examined. Thus, while states are not denied the power to treat different classes of persons in different ways,[47] the equal protection clause does "deny the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."[48]

Recently, the Supreme Court has focused on the *relationship* between the classifying criteria and the purpose of the legislation. In *Reed v. Reed*[49] the court struck down a state statute mandating that males be appointed over females as estate administrators. The mandatory preference of males before females, it was argued, expedites judicial proceedings, thus saving time and public expense. While governmental efficiency is "rational" and a valid state interest, the classifying criteria of sex bore no "relation" to the objective of the statute, which was to qualify administrators.[50]

Similarly, in *James v. Strange*[51] the Supreme Court found that a statute, designed to recover attorney's fees from indigent defendents, introduced collection procedures less favorable than those used against other judgment debtors. If the purpose of the statute was recoupment, then the criteria to be employed must relate to this purpose. Among judgment debtors no classification resulting in unequal treatment can be made unless the basis of the classification is a characteristic related to the objective of recoupment.[52] Because

46. Dandridge v. Williams, 397 U.S. 471, 487 (1970) (sustaining a state maximum welfare grant statute).
47. Barbier v. Connolly, 113 U.S. 27, 32 (1885).
48. Reed v. Reed, 404 U.S. 71, 75-76 (1971).
49. *Id.*
50. *Id.* at 76.
51. 407 U.S. 128 (1972).
52. *Id.* at 141-42.

there was no relationship between the classifying element and the purpose of the statute it was struck down.

In contrast to these decisions, the Court failed to apply the relationship test in *Dandridge v. Williams*,[53] where the Court upheld a state statute which imposed a maximum amount on state welfare benefits to be received by one family. While the general statute sets out the amount of assistance to be granted to each family, equal benefits were denied to members of large families. The "reason" given and accepted by the Court was that the state, which has limited resources available for public assistance programs, wished to maximize the number of families to be benefited by the program.[54] An obvious alternative—dividing resources available by the number of eligibles—would achieve the same result without discriminating against large families. The classifying element was not analyzed in conjunction with the objectives of the statute, which contained no suggestion that public assistance should be used as a means of discouraging large families. Justice Marshall dissented on these grounds:

> The Court holds today that regardless of the arbitrariness of a classification it must be sustained if any state goal can be imagined that is arguably furthered by its effects. This is so even though the classification's underinclusiveness or overinclusiveness clearly demonstrates that its actual basis is something other than that asserted by the State. . . .[55]

As the classifying statutes in *Reed* and *James* were judged within the context of general statutory objectives, so too the relatives' contribution requirements in *Swoap* might have been held to a similar standard—that is whether the enforcement conceals a classifying element unrelated to the objectives of the general welfare statute. Within the parameters of sections 12350 and 12351 all adult children of needy parents are treated equitably—contribution is required according to the child's ability to pay. However, within the entire state welfare program contribution requirements are imposed on relatives of some recipients and not on others—the liability being dependant upon the particular program under which assistance is given.[56] The recipients of all programs are as much "in need" as are

53. 397 U.S. 471 (1970).
54. *Id.* at 480.
55. *Id.* at 508.
56. "No relative, other than the spouse, shall be held to be financially

the parents of the *Swoap* plaintiffs. Furthermore, if it could be shown that children from the poorest backgrounds with the greatest liabilities are those most often subject to this additional burden,[57] states might be subject to an additional standard of justification. Balanced against the cost and effort of obtaining compliance, and the adverse effects upon family relationships, the argument should run against the state.

It is preferable that legislatures recognize the overwhelming disadvantages inherent in enforcement of broad relative responsibility statutes. New York State replaced its relative responsibility statutes[58] in 1966 with statutes reflecting more closely the common law duties of support.[59] The occasion was the enactment of legislation under which New York elected to participate in the federal shared cost medical assistance plan for the needy under Chapter XIX of the Social Security Act.[60] Former Governor Rockefeller used this opportunity to urge total revision of the relative responsibility statutes. His language reflected concerns expressed by the court in *Kirchner* a year earlier in California but obviously considered unimportant by the court in *Swoap*:

> These far reaching limitations on the financial responsibility of relatives for support of the needy will lift an often heavy burden on those obligated to pay for assistance under existing state laws. Experience has shown that the financial responsibility of a broad class of relatives, imposed by statute, is more often a destructive, rather than cohesive, factor in family unity. For the first time, thousands of men and women in need of assistance can now in dignity

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responsible for the cost of health care received by an adult eligible under this chapter." CAL. WELF. & INST'NS CODE § 14008(a) (West Supp. 1974). "This section does not impose liability for the care of mentally retarded persons in state hospitals." *Id.* § 7275 (West 1972).

57. 10 Cal. 3d at 520, 516 P.2d at 861, 111 Cal. Rptr. at 157 (dissenting opinion).

58. "The husband, wife, father, mother, grandparent or child of a recipient of public assistance or care or of a person liable to become in need thereof, if of sufficient ability, is responsible for the support of such person." Law of April 24, 1962, Ch. 686, § 415 [1962]. N.Y. SOC. WELF. LAW § 101 (McKinney 1966).

59. "The spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof. . . ." N.Y. FAM. CT. ACT § 415 (McKinney Supp. 1973). *See also* N.Y. SOC. WELF. LAW § 101 (McKinney 1966).

60. 42 U.S.C. § 1396 (Supp. 1974).

seek such help without feeling that they are a burden to the coming generation."[61]

61. Governor Rockefeller's Message to the Legislature, March 9, 1966, 1966 Sess. Laws of New York 2989, 2990 (McKinney). *See* Jones v. Jones, 51 Misc. 2d 610, 273 N.Y.S.2d 661 (1966).

CONSTITUTIONAL LAW—Right of Privacy—School Program Designed to Identify and Provide Corrective Therapy for Potential Drug Abusers Held Unconstitutional. *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973).

Plaintiffs, Michael Merriken, an eighth grade student, and his mother, Sylvia Merriken, sought to enjoin the defendant school board from instituting a psychological testing and treatment program called Critical Period of Intervention (CPI).[1] CPI was designed to identify potential drug abusers at an early age. Once a student was so identified, a series of corrective steps, such as individual and group therapy, were to be commenced. The corrective aspects of the program were to be run by school personnel, including teachers and guidance counselors.[2] The District Court for the Eastern District of Pennsylvania held that the CPI program violated plaintiffs' right to privacy inherent in the penumbras of the Bill of Rights. Moreover, the court concluded that defendants were attempting to exercise the exclusive privileges of parents in areas beyond matters of conduct and discipline, and that the CPI program was being administered without the knowing, intelligent, voluntary and aware consent of either parents or students. The defendants were permanently enjoined from implementing the CPI.[3]

The right of privacy in the marital relationship as a distinct constitutional guarantee was recognized in *Griswold v. Connecticut.*[4] In *Griswold,* the Supreme Court reversed a decision of the Connecticut Supreme Court upholding the constitutionality of a Connecticut statute which made the use of any drug or article for the purposes of preventing contraception a crime.[5] The Court began its analysis by noting that previous decisions had construed the first amendment to include rights such as freedom of association,[6] the right to educate a child in the school of the parent's choice,[7] and the right to study any particular subject or foreign language[8]—none of which

1. Merriken v. Cressman, 364 F. Supp. 913, (E.D. Pa. 1973).
2. *Id.* at 915-16.
3. *Id.* at 922.
4. 381 U.S. 479 (1965).
5. State v. Griswold, 151 Conn. 544, 200 A.2d 479 (1964).
6. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
7. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
8. Meyer v. Nebraska, 262 U.S. 390 (1923).

are specifically mentioned in the Constitution or the Bill of Rights.[9] The reason for upholding these rights was that "[w]ithout those peripheral rights the specific rights would be less secure."[10] The Court recognized the existence of zones of privacy associated with the first, third, fourth, fifth and ninth amendments. The marital relationship was included within the zone of privacy created by several constitutional guarantees.[11] The Court concluded that the Connecticut statute unconstitutionally invaded the zones of privacy which protect the marital relationship.[12]

Justice Goldberg, in his concurring opinion, found that the right of marital privacy, in addition to "being within the protected penumbra of specific guarantees,"[13] was a fundamental right with an entirely separate constitutional basis—the ninth amendment.[14]

While *Griswold* presented a fairly straightforward privacy issue, many privacy cases do not. Frequently, they involve other rights which have been held fundamental. An example is *Stanley v. Georgia*,[15] in which the Supreme Court reversed a conviction based on a statute which made the possession of obscene material a crime. The obscene material was found in the home of the petitioner by police while searching for drugs. Although the Court based its reversal on the first and fourteenth amendments, the opinion went on to say that "in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy."[16] Thus, al-

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9. 381 U.S. at 482.
10. *Id.* at 482-83.
11. *Id.* at 484.
12. *Id.* at 485.
13. *Id.* at 487.
14. The test applied by Justice Goldberg in determining the fundamental nature of an asserted right was to "look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'" *Id.* at 493. Applying this test to the right of privacy in the area of marital relations, Justice Goldberg concluded that it was a fundamental personal right. *Id.* at 494.
15. 394 U.S. 557 (1969).
16. *Id.* at 564. The Court also stated: "The makers of our Constitution

though entwined with fundamental first amendment rights, the Court recognized that the right of privacy was involved.[17]

One of the most important privacy cases to be decided in recent years, and the primary authority for the district court in *Merriken*, is *Roe v. Wade*.[18] In *Roe* the Court affirmed a district court determination that the Texas criminal abortion statute was an unconstitutional violation of the respondent's right of privacy. Although the lower court had found the right to be within the ninth amendment's reservation of rights to the people, the Supreme Court found it in the fourteenth amendment's concept of personal liberty and restrictions upon state action.[19] The Court characterized the right of privacy as fundamental and reaffirmed the rule that "[w]here certain 'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest.' "[20] However, the Court noted that previous decisions had acknowledged that some state regulation in areas protected by the right of privacy is permissible. In *Roe*, the Court pointed out that regulation was permissible at the point of viability, subsequent to the second trimester of pregnancy, where the state's interests in safeguarding health, maintaining medical standards and protecting potential life "become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."[21] At that point, the conflicting individual and state rights must be considered to determine the proper limit of state regulation.[22]

Paris Adult Theatre v. Slaton,[23] while primarily an obscenity decision, also dealt with the right of privacy. Although the Supreme

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. . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Id. quoting* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

17. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

18. 410 U.S. 113 (1973).

19. *Id.* at 153.

20. *Id.* at 155.

21. *Id.* at 154. The Texas statute did not distinguish between the trimesters of pregnancy and was therefore held to be unconstitutional.

22. *Id. See generally* Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003 (1966).

23. 413 U.S. 49 (1973).

Court expressly affirmed the right, some limitations were observed. The Court stated that the right to privacy included only those rights which can be deemed fundamental or implicit in the concept of ordered liberty, and further noted that this class of rights encompasses and protects personal intimacies of the home, the family, marriage, motherhood, procreation, and childrearing.[24]

Most recently, in *Cleveland Board of Education v. LaFleur,*[25] the petitioners alleged that the mandatory maternity leave rules of their respective school boards infringed their rights under the equal protection clause. In sustaining their claim, the Supreme Court characterized the violated right as that of "freedom of personal choice in matters of marriage and family life,"[26] not as a right to privacy. As precedent for this statement, the Court cited a series of cases which were either explicitly decided upon, or subsequently construed to support, the individual's constitutional right to privacy.[27] The result of this decision has been to further confuse the status of the privacy right, and to undermine any attempt to consolidate and define it.

The above decisions illustrate the amorphous nature of the right to privacy. While some aspects of the right inhere in the individual, as in *Roe,* others are inherent in marital and familial relationships, as in *Griswold.* The *Merriken* court recognized that a right of privacy exists in the parent-child relationship. This relationship was found to be second only to marriage—with privacy inhering in an equally fundamental way.[28] Having decided that the right was applicable to the parent-child relationship, the court concluded that "any invasion of that relationship [is] . . . a direct violation of

24. *Id.* at 65. *But cf.* Roe v. Wade, 410 U.S. 113 (1973), where the Court noted that: "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage . . . family relationships . . . and child rearing and education . . . ." *Id.* at 152-53 (citations omitted). The Court distinguished *Stanley v. Georgia* on the grounds that the ideas which were communicated in the instant case were not within the protection of the first amendment, nor within the protection of the particular privacy of the home.

25. 94 S. Ct. 791 (1974).

26. *Id.* at 796.

27. *Id.*

28. 364 F. Supp. at 918.

one's Constitutional right to privacy."[29] Moreover, neither the child's status as a juvenile nor as a student affected his ability to assert his constitutional right to privacy. In so ruling, the district court followed the principles set down in *In Re Gault*[30] and *Tinker v. Des Moines School District.*[31]

Gault dealt extensively with the procedural due process rights to be afforded the juvenile in judicial proceedings.[32] The due process standards established in *Gault* were identical to those afforded adults.[33] *Tinker* involved a school regulation which prohibited the

29. "[T]he right to privacy is on an equal or possibly more elevated pedestal than some other individual Constitutional rights and should be treated with as much deference as free speech." *Id.* at 918. *See generally* Westin, *supra* note 22. "In the . . . state of privacy [known as] intimacy, the individual is acting as part of a small unit that claims and is allowed to exercise corporate seclusion so that it may achieve that special close, relaxed and frank relationship between two or more individuals which the word intimacy conveys in popular speech. Typical units of intimacy are husband and wife, the family, a friendship circle, or a work clique." *Id.* at 1021. *Cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972), where the Supreme Court stated that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion. . . ." *Id.* at 453.

30. 387 U.S. 1 (1967).

31. 393 U.S. 503 (1969).

32. The Court first examined the "parens patriae" theory of the juvenile court system and found it constitutionally questionable. "The right of the state . . . to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty, but to custody. . . .' If his parents default in effectively performing their custodial functions . . . the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. . . . The constitutional and theoretical basis for this peculiar system is—to say the least—debatable." 387 U.S. at 17.

33. The due process clause of the fourteenth amendment was held to require that the child and his parents have both a right to counsel and a right to express notification of this fact. The Court also held that, absent a valid confession adequate to support the determination of the juvenile court, confrontation and sworn testimony were essential for a finding of delinquency. The constitutional privilege against self-incrimination was found applicable in the case of juveniles as it is with respect to adults; the

wearing of black arm bands by students protesting the Viet Nam War.[34] The regulation was held unconstitutional as a violation of the student's right of free speech: "[s]tudents in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the state must respect."[35]

Although the child's right to privacy in the parent-child relationship was recognized, the district court did not immediately decide whether this right had been violated. Rather, the court looked to the parents' right of privacy and found that the parent had not validly consented to the infringement of that right. This conclusion was reached because misleading information concerning the nature and consequences of the CPI program was given by the school board to the parents: "the letters to the parents were 'selling devices' aimed at gaining consent without giving negative information. . . ."[36] For a waiver, or consent to relinquishment of a legal right, to be valid it must be "an intentional relinquishment or abandonment of a

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scope of its protection extends beyond those proceedings which were labeled criminal, and covers all proceedings in which inculpatory statements may be made. *Id.* at 49, 56. In addition, these rights were extended to the juvenile's parents. Thus, by implication, the Court recognized the fundamental nature of the parent-child relationship.

34. The Court found that any action of school officials in their official capacities was clearly state action within the meaning of the fourteenth amendment. 393 U.S. at 507.

35. *Id.* at 511. *Cf.* Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 404 U.S. 1042 (1972), where the court upheld school regulations establishing dress and grooming codes which were challenged by a student as violating his right to privacy: "Neither *Griswold* or cases akin to *Griswold* are appropriate here. The conduct to be regulated here is not conduct found in the privacy of the home but in public educational institutions where individual liberties cannot be left completely uncontrolled. . . ." *Id.* at 938. In *Olff*, privacy was invoked to protect an individual choice—a way of dress. *Tinker* also concerned an individual choice—the choice to express certain political beliefs. However, the right asserted in *Tinker*, unlike that in *Olff*, was fundamental. Thus, *Olff* implicitly viewed the right of privacy as being dependent upon the existence of some other fundamental right. Arguably, this is the approach that the Supreme Court took in *Stanley*—where privacy was included as a supplement to the first amendment. However, the explicit recognition of the right by the Supreme Court in *Roe* indicates the inadequacy of this view. *See also* Cohen v. California, 403 U.S. 15 (1971).

36. 364 F. Supp. at 919.

known right or privilege."[37] Thus, knowledge of the existence of a constitutionally protected right or privilege is an essential prerequisite to its waiver.[38] The district court looked to *United States v. Brady* for its guiding principle. In *Brady,* the Supreme Court held that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent and done with sufficient awareness of the relevant circumstances and likely consequences."[39] The school board, when presenting the relevant facts and consequences of a psychological testing program to parents, was held to the same standard as a physician presenting the relevant information to his patient prior to surgery.[40] This test is noteworthy for both its high standard of consent and its departure from the rationale of previous cases, which eschewed the formation of a test in favor of a determination made by the trial judge, based on the particular facts and circumstances of each case and the general principles set forth by the Supreme Court.[41] Based on this standard, and the absence of a

37. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

38. "[T]he purpose of the constitutional guarantee of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal constitutional rights. . . ." *Id.* at 465. This principle has been followed and expanded upon in a series of Supreme Court decisions. *See* Bumper v. North Carolina, 391 U.S. 543 (1968) (protection against illegal search); Barber v. Page, 390 U.S. 719 (1968) (right of confrontation and cross-examination); Brady v. United States, 397 U.S. 742 (1970) (right to jury trial); Barker v. Wingo, 407 U.S. 514 (1972) (right to speedy trial). The fact that these cases deal with waiver of rights in a criminal proceeding does not apparently limit their principles to criminal proceedings. The district court in *Merriken* noted that the Supreme Court originally dealt with the question of waiver in a civil context. *See* Ohio Bell Tel. Co. v. Public Util. Comm'n., 301 U.S. 292, 307 (1937); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937). These two civil cases, in turn, became the basis for the law concerning waiver of rights in criminal proceedings in *Johnson v. Zerbst*, 304 U.S. 458 (1938).

39. 397 U.S. at 748.

40. 364 F. Supp. at 920. *See* Sheerer & Roston, *Some Legal and Psychological Concerns About Personality Testing In The Public Schools,* 30 FED. B.J. 111 (1971), which the district court relies upon in the formulation of its test for the required level of consent.

41. The law concerning the amount of information which the physician must furnish to the patient is itself in a transitional stage. In Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972), the

waiver sufficient to meet the *Brady* criteria, the district court held that the parent had not waived her right of privacy.[42]

The district court criticized the CPI program both for its failure to define drug abuse and for the vague relationship between the identification and therapeutic aspects of the program.[43] Indeed the "ultimate use" of the test results and the treatment of identified students were viewed as being the most serious problem presented by the program.[44] Stressing the lack of confidentiality of the test results, the court expressed concern for the potential harm involved

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court noted the long-standing rule that a physician has a duty to make a reasonable divulgence of information to his patient, in order that the patient may give an informed consent to the suggested therapy, and found an additional duty to disclose both possible choices of therapy and the dangers inherently and potentially involved. *Id.* at 782. The court departed radically from previous decisions on the physician's duty to disclose by rejecting the rule that the duty depended upon the customs of the physicians practicing in the community. The court looked instead to the patient's right of self-decision, and found that "[t]he test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked." *Id.* at 786-87. The scope of the relevant facts to be disclosed was found to be dependent upon the materiality of the risk. The court's definition of material fact was "when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy." *Id.* at 787.

42. 364 F. Supp. at 920.

43. *Id.* This defect has usually been considered a violation of the due process clause, based on the principle that no one should be required, at the peril of life, liberty or property, to speculate on what the state commands or forbids. However, the district court did not characterize this shortcoming as a violation of due process, nor was it explicitly used as a basis for the court's ultimate decision. *See* Raley v. Ohio, 360 U.S. 423 (1959); United States v. Harriss, 347 U.S. 612 (1954); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926).

44. 364 F. Supp. at 920. In this regard, one should not forget that drug abuse generally subjects the abuser to criminal sanctions. Viewed in this way, the CPI program was designed to identify people who, potentially, might commit a criminal act. Although the district court considered this question moot in Pennsylvania, in other jurisdictions this kind of identification would pose its own due process problems.

in labeling a child as a drug addict.[45]

The purpose of the CPI's psychological test was to predict tendencies towards drug abuse. Once identified as a potential drug abuser, the child would be placed in a category different from other students.[46] The therapeutic portion of the CPI program would then afford these classes distinctly different treatment.[47] This classification and different treatment afforded the plaintiffs should have presented the court with a clear equal protection issue—triggering the use of equal protection standards. Although the district court in *Merriken* did not explicitly refer to this issue, it did note that "[w]hen a program talks about labeling someone as a particular type and such a label could remain with him for the remainder of his life, the margin of error must be almost nil."[48] This approach is similar to that employed by the Supreme Court in recent decisions.[49]

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45. 364 F. Supp. at 920.

46. *Id.* at 917.

47. *Id.*

48. *Id.* at 920. The two means of determining whether a test is reasonably constructed are known as content validation or predictive validation. The latter method, which the district court employs, requires a showing that there is a correlation between a candidate's performance on the test and his actual performance. Chance v. Board of Examiners, 458 F.2d 1167, 1174 (2d Cir. 1972). However, the cases demonstrate a great amount of variance as to what degree of correlation between test results and actual performance is considered reasonable. *Compare Chance with* Baker v. Columbus Mun. Separate School Dist., 329 F. Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972).

49. The Supreme Court, in Eisenstadt v. Baird, 405 U.S. 438 (1972), began to revise the traditional analysis of equal protection questions. Prior to *Eisenstadt*, the traditional method made the nature of the right asserted determinative. A determination that the individual's right was fundamental almost invariably lead to the conclusion that the scrutinized classification was violative of the equal protection clause, since the Court required the state to show a compelling state interest. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Harper v. Board of Elections, 383 U.S. 663 (1966); Shapiro v. Thompson, 394 U.S. 618 (1969). In cases where the right asserted was not considered fundamental, the discriminatory legislation had only to be reasonably related to the state's purpose in creating the classes; the burden of proof was placed on the individual. Goesaert v. Cleary, 335 U.S. 464 (1948). *But see* Brown v. Board of Educ., 347 U.S. 483 (1954), and Reed v. Reed, 404 U.S. 71 (1971). Although Eisenstadt found the individual's right to be fundamental, the compelling interest test

However, *Merriken* was not decided on the basis of potential harm which might result from the labeling of students, but on the violation of the right to privacy caused by the program.[50] In voiding the program, the interest of the state in identifying potential drug abusers was balanced against the right of privacy—and found wanting.[51] The court based the use of a balancing test on *Barenblatt v. United States,*[52] which dealt with an appeal from a conviction for contempt of Congress. The petitioner had refused to answer ques-

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was not employed, "because the law fails to satisfy even the more lenient equal protection standard. . . ." 405 U.S. at 447 n.7. Instead the Court looked to the premise that "a classification must be reasonable, not arbitrary, and must rest upon some ground having a fair and substantial relation to the object of the legislation" and proceed to examine the nexus between the legislation and its supposed object, and concluded that the questioned legislation did not rationally operate to achieve its supposed object. *Id., citing* Reed v. Reed, 404 U.S. at 75-76. More recently, the Supreme Court has avoided the use of the compelling interest test by adjudicating claims brought under the equal protection clause as due process questions. Significantly, these cases were decided in the lower courts exclusively on equal protection principles, where the rights infringed upon were characterized as fundamental. Stanley v. Illinois, 405 U.S. 645 (1972); Vlandis v. Kline, 412 U.S. 441 (1973). In Cleveland Bd. of Educ. v. La Fleur, 94 S. Ct. 791 (1974), the two petitioners asserted that their rights under the equal protection clause were violated by the mandatory termination rules and the reinstatement rules of their respective school boards. The Supreme Court held that both termination rules were violative of the due process clause. The Court looked to the reinstatement provisions. While it found one rule to be wholly arbitrary and irrational, the other rule was upheld as "[s]erving the legitimate state interests . . . without employing unnecessary presumptions that broadly burden the exercise of protected constitutional liberty." *Id.* at 801. Although the individual's right was fundamental, no reference was made to the compelling interest standard of review. *See also* Rosario v. Rockefeller, 410 U.S. 752 (1973). Here the court upheld a New York State law which required all persons wishing to vote in a party primary to register within 30 days of the general election. This requirement was upheld as being related to the substantial state interest in preventing raiding and maintaining the integrity of the voting process. Significantly, at no point did the Court claim this interest to be compelling.

50. 364 F. Supp. at 921.

51. *Id.*

52. 360 U.S. 109 (1959).

tions concerning his participation in, or knowledge of, Communist party activities while he was attending a graduate educational institution. In holding that the first amendment did not protect the petitioner, the Supreme Court said: "[w]here First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[53] *Barenblatt* was interpreted by the judge in *Merriken* as meaning that "[i]f the Court finds the public need so great and the invasion minimal, then it could sanction the Program in favor of public need."[54] In the instant case, however, the balance was struck in favor of the plaintiff's right of privacy.[55]

In view of the limited scope given the holding in *Barenblatt*, its use as authority for the validity of the balancing test employed in *Merriken* is questionable.[56] More significantly, both *Barenblatt* and *Roe*, which recently employed a balancing test, first found the right of the individual to be fundamental and the right of the state to regulate at some point in time to be compelling. In *Merriken*, although the individual's right to privacy was categorized as fundamental, there was no finding of any state interest which approached

53. *Id.* at 126. The Supreme Court went on to state that this test was an application of the same principles which gave rise to the compelling interest test in NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449 (1958). Emphasizing the wide power of Congress to legislate in the field of Communist activity in this country, the Court based this power on "the right of self-preservation, the ultimate value of any society." 360 U.S. at 128. In effect, the Court found that the Congress had established a "compelling state interest," although it did not so label that interest.

54. 364 F. Supp. at 920-21.

55. *Id.* The danger inherent in this test is its allowance of an unlimited amount of judicial discretion in the balancing process. Some commentators view this test as a return to the era of substantive due process. *See generally* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973), and Tribe, *The Supreme Court 1972 Term: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

56. The Supreme Court was careful to stress that its holding applied only to the area of Congressional legislation concerning the Communist party. "[T]his Court . . . has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. 360 U.S. at 128.

the level of a "compelling interest." In fact, the district court found that the CPI program affected areas beyond those of conduct and discipline and was not within the government's power.[57] This finding of a lack of state power, and a fundamental right to privacy makes the use of a balancing test incongruous.[58]

57. 364 F. Supp. at 922.

58. Under the revised approach to equal protection questions, where the focus of judicial review would look to the rationality of the means by which the school authorities seek to obtain this information, and the nature of the individual right asserted is reduced to only one factor to be considered, this incongruity would be lessened. It would be eliminated if the Supreme Court's recent treatment of equal protection claims as procedural due process questions is indicative of the premise that the power of the state to regulate refers only to the propriety of the means chosen, and not to the subject sought to be regulated. *But compare* Vlandis v. Kline, 412 U.S. 441 (1973), *and* Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974), *with* Roe v. Wade, 410 U.S. 113 (1973).

CONSTITUTIONAL LAW—State Actions—Denial of Abortion by Private Hospital Receiving Federal Financial Support Under the Hill-Burton Program does not Constitute State Action. *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973).

Plaintiffs, a pregnant woman and her doctor, brought suit to enjoin Bellin Memorial Hospital from denying her an abortion.[1] They alleged that since the hospital received federal funds under the Hill-Burton Act, and were also subject to state regulation, the acts of the hospital were taken " 'under color of' state law"[2] within the meaning of the Civil Rights Act of 1871,[3] and were therefore an infringement on the plaintiffs' constitutional rights. The district court agreed and granted a preliminary injunction, which was stayed by the court of appeals pending review.[4] The Supreme Court refused to vacate the stay[5] and the appeal was heard by the seventh circuit. The court of appeals reversed, holding that the hospital's acts were not state action.[6]

The question confronted by the court in *Bellin* was whether the denial of an abortion by a hospital which was the recipient of federal funds under the Hill-Burton Act and was extensively regulated con-

1. In Doe v. Bolton, 410 U.S. 179, 188 (1973) plaintiff doctors were held to have standing to bring suit because they could be prosecuted under a Georgia criminal statute which prohibited the performance of elective abortions. In the instant case, although the physician could not be subjected to any criminal sanctions for performing an abortion, he would be able to show that he had sustained injuries in that he was being restricted in his right to practice his profession, and, possibly, would suffer economic harm. *See* United States v. SCRAP, 412 U.S. 669 (1973).

2. Doe v. Bellin Memorial Hosp., 479 F.2d 756, 761 (7th Cir. 1973).

3. 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. 479 F.2d at 758.

5. *Id.* at 758 n.3.

6. *Id.* at 761-62. On a subsidiary issue the court held that the putative father's consent was not necessary for the operation. *Id.* at 758-59. The United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) reserved decision on the rights of the putative father. *Id.* at 164 n.67.

stituted state action and contravened the Civil Rights Act. A woman's right to an abortion has been recognized by the Supreme Court as among the liberties protected by the due process clause of the fourteenth amendment.[7] The defendant hospital, a private institution, issued regulations restricting abortions performed in the hospital to cases where pregnancy would "seriously threaten the health or life of the mother, or result in delivery of an infant with grave and irreparable physical deformity or mental retardation, or if the pregnancy has resulted from legally established rape or incest."[8] Bellin Memorial Hospital was one of three hospitals in the area, all of which were private institutions with restrictive policies regarding abortions.[9] After consulting with his patient, Dr. Sandmire determined that she required an abortion which should be performed in a hospital.[10]

The fourteenth amendment does not limit private action,[11] but courts have often found state action in the activities of private individuals or groups. The most obvious examples are those cases where private parties perform a function which is primarily public, [12] such as running a primary or pre-primary election.[13] In addition, where

7. U.S. CONST. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In Roe v. Wade, 410 U.S. 113, 153 (1973) the right to privacy was held to encompass a woman's right to terminate her pregnancy. For a more complete discussion of *Roe*, *see* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973); Comment, *In Defense of Liberty: A Look at the Abortion Decisions*, 61 GEO. L.J. 1559 (1973).

8. 479 F.2d at 757-58.

9. *Id.*

10. *Id.* at 757.

11. Civil Rights Cases, 109 U.S. 3, 11 (1883).

12. *Ex Parte* Virginia, 100 U.S. 339 (1880). *See also* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1042 (1973) [hereinafter cited as *State Action*].

13. Smith v. Allwright, 321 U.S. 649 (1944), Terry v. Adams, 345 U.S. 461 (1953). *See also State Action* 1050. On the issue of government involvement in private action *see* Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963). In Kerr v. Enoch Pratt Free Library, 149 F.2d

the state acts interdependently with a private party in such manner that the state "must be recognized as a joint participant in the challenged activity," state action will be recognized.[14] Thus, in determining whether a hospital's acts are state action it is necessary to determine the degree of state participation in the hospital's activities and to decide whether the hospital is performing primarily a public function.

A distinction has been drawn between public and private hospitals.[15] A public hospital is established and operated by the government.[16] The actions of these institutions are clearly actions of the state. Thus, they may not discriminate in the use of their facilities or unconstitutionally limit the types of operations which may be performed.[17] For example, a city hospital rule forbidding the use of

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212, 219 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945), the fact that the library was receiving a substantial amount of state funding and was also subject to state regulation, was held to prove a sufficient nexus so that state action was found in the operation of the library. *See* Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 391 (1958); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1103 (1960); Note, 62 MICH. L. REV. 1433, 1436 (1964).

14. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

15. In Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), a distinction between public and private corporations was drawn, "public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution." *Id.* at 669. Hospitals took the corporate form and were divided according to this dichotomy. *See* Note, *The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy*, 1966 WASH. L.Q. 485, 486.

16. *See* 1966 WASH. L.Q. at 486. *See also* Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 61 (D.D.C. 1963); Edson v. Griffin Hosp., 21 Conn. Supp. 55, 58, 144 A.2d 341, 343 (1958); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y.S. 554 (4th Dep't 1924, *aff'd per curiam*, 239 N.Y. 615 (1925); Khoury v. Community Memorial Hosp. Inc., 203 Va. 236, 123 S.E.2d 533 (1962); State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965).

17. Hathaway v. Worcester City Hosp., 475 F.2d 701, 706 (1st Cir. 1973).

its facilities for consensual sterilization has been struck down as violative of equal protection.[18] A violation of the equal protection clause has likewise been found where public hospitals have refused to perform an abortion.[19]

Finding state action in the acts of private hospitals which receive a certain amount of government funding has posed greater problems for the courts. The decisions have not been consistent. *Schulman v. Washington Hospital Center*[20] involved a hospital built by the government and later conveyed to a private corporation. The court held that "[t]he fact that a private hospital may receive donations or subventions from the Government, or compensation from a city or county for caring for sick or disabled indigent persons, does not transform it into a public institution."[21] However, in *Eaton v. Grubbs*,[22] a different result was reached. There a private party built a hospital, to be run for the benefit of the city and county residents upon the site of a former city hospital. The institution's charter provided that if the hospital were abandoned the property would revert to the city. Further, the original board of directors was selected by the city and the hospital had received substantial municipal funds over the years. The hospital's refusal to admit black physicians to practice was held to be state action.[23]

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18. *Id.*

19. Nyberg v. City of Virginia, 361 F. Supp. 932 (D. Minn. 1973); Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1972). In *Klein* indigents who were entitled to free medical care under state law were denied abortions at the medical center. The Commissioner of Social Services ruled that the free medical care to which indigents were entitled did not include "elective" abortions. The court found that the distinction between elective and necessary abortions was invalid and added "Beyond that, it may well be that a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interest in freely determining whether or not to bear a child." *Id.* at 500.

20. 222 F. Supp. 59 (D.D.C. 1963).

21. *Id.* at 61.

22. 329 F.2d 710 (4th Cir. 1964).

23. *Id.* at 715. The plaintiffs here originally brought suit in Eaton v. Board of Managers of The James Walker Memorial Hosp., 261 F.2d 521 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959), and the court in that case found there was no state action in the hospital discrimination. After the decision in *Burton, supra*, the same plaintiffs brought suit against the

In *Bellin*, plaintiffs' claim of state action was based on the hospital's receipt of Hill-Burton funds and attendant state and federal regulation.[24] The Act provides federal funds for public and private non-profit community hospitals.[25] States receiving these funds are required to submit to the Surgeon General a plan establishing an agency to administer the program[26] and to select an advisory council to confer with the agency.[27] The state must also submit a construction and modernization program,[28] and set out minimum standards to be maintained by Hill-Burton out-patient facilities.[29] Payments may be withheld for noncompliance with federal regulations.[30] Further, hospitals receiving Hill-Burton funds must provide a certain volume of services to indigents.[31]

The leading case involving private hospitals receiving Hill-Burton

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same defendants in Eaton v. Grubbs, this time successfully. *See* Wolfe, *Racial Integration of Professional Associations*, 18 U. FLA. L. REV. 490 (1965).

24. 42 U.S.C. §§ 291-291o (1970). Hill-Burton is the popular name for the statute. *See* H.R. REP. No. 2519, 79th Cong., 2d Sess. 1558 (1946) for legislative history of the Act.

25. 42 U.S.C. § 291a (1970).

26. *Id.* § 291d(a)(1).

27. *Id.* § 291d(a)(3).

28. *Id.* § 291d(a)(5).

29. *Id.* § 291d(a)(6).

30. *Id.* § 291g.

31. The duty may be waived if it is a financial impossibility for the hospital. *Id.* § 291c(e). The purpose of the Hill-Burton Act, stated in § 291(a) is to help the states "to furnish adequate hospital, clinic, or similar services to all their people." Thus, the Hill-Burton program allocates funds to states and submits hospitals receiving funds under the program to regulations in order to help them carry out public functions. And where a public function is being performed, state action has been found. *Cf.* Evans v. Newton, 382 U.S. 296 (1966); Munn v. Illinois, 94 U.S. 113 (1877). 42 U.S.C. § 2000d provides that where federal financial assistance is given to a program, discrimination on grounds of race is prohibited. This is because of the public policy against racial classifications; *cf.* Bolling v. Sharpe, 347 U.S. 497 (1954). There is a similar public policy against state infringement on fundamental rights; *cf.* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973). However, in the instant case a hospital which is performing a public function and receiving federal funds is permitted to infringe on the woman's fundamental right to make the abortion decision. *See* notes 46-47 *infra* and accompanying text.

funds is *Simkins v. Moses H. Cone Memorial Hospital.*[32] Plaintiffs sought to enjoin two hospitals from denying black doctors and dentists the use of staff facilities and from refusing to admit patients on grounds of race.[33] The court held that the state's participation through the Hill-Burton program was sufficiently extensive to render the hospital's conduct state action for fourteenth amendment purposes.[34] Relying on the rationale of *Burton v. Wilmington Parking Authority*,[35] *Simkins* concluded that the interdependency between the state and private institutions supported a finding of state action.[36] Subsequent cases have followed the reasoning of *Simkins*.[37] *Bellin*, however, distinguished *Simkins* on its facts and found no state involvement in "the very activity which is being challenged"—the denial of an abortion.[38] The court found no constitu-

32. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

33. *Id.* at 961.

34. *Id.* at 970. The court also found a portion of 42 U.S.C. § 291e(f) to be unconstitutional. *Id.* at 969.

35. 365 U.S. 715 (1961).

36. 323 F.2d at 967. *See also*, 62 MICH. L. REV. 1433, 1439 (1964).

37. Cypress v. Newport News Gen. and Non-Sectarian Hosp. Ass'n, 251 F. Supp. 667 (E.D. Va. 1966). Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969), where hospital refusal to give staff privileges to doctors from other counties was found to be a violation of equal protection; Stanturf v. Sipes, 335 F.2d 224 (8th Cir. 1964), *cert. denied*, 379 U.S. 977 (1965), where the hospital's refusal to admit plaintiff was upheld. The court distinguished *Simkins* on the ground that there a race question was involved and the constitutionality of 42 U.S.C. § 291e(f) was considered. However, the court "assumed without deciding" that *Simkins* is controlling on the issue of whether receipt of Hill-Burton funds makes hospital action state action. *Id.* at 226-27. *See* Annot., 37 A.L.R.3d 645, 663 (1971), "upon joining the Hill-Burton program, a participating state in effect assumes, as a state function, the obligation of planning for adequate hospital care, and when a state function or responsibility is being exercised, it matters not for fourteenth amendment purposes that the institution would otherwise be private: the equal protection guaranty applies."

38. 479 F.2d at 761. This interpretation is arguable. *Simkins* did indeed find state action in the mere acceptance of Hill-Burton funds. 323 F.2d at 966; *Id.* at 971 (dissenting opinion). However, the court did not reach the question as to whether any action of the hospital was state action. Rather the *Simkins* court found that the practice of discrimination was state

tional impediment to a state policy which "leaves a private hospital free to decide for itself whether . . . it will admit abortion patients or to determine the conditions on which such patients will be accepted."[39] Moreover, the state had not sought to influence the hospital's policy concerning abortions. Quoting Judge Friendly's opinion in *Powe v. Miles*,[40] the court drew a distinction between general state involvement with the institution and state involvement with the specific act:

> [T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint.[41]

Or as the *Bellin* court succinctly stated, "the State has exercised no influence whatsoever on the decision of the defendants which plaintiffs challenge in this litigation."[42]

Both *Bellin* and *Powe* draw a distinction between general state involvement and the state's involvement with the challenged practice.[43] This distinction has been applied in hospital employee discharge situations[44] and in student disciplinary proceedings.[45] In these cases, the courts have generally found an absence of state action since the state was not involved in the discharge or disciplinary proceeding. However, in cases where a hospital receiving Hill-Burton funds has discriminated on the basis of race, the courts have found state action and have voided the policy.[46]

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action. Arguably this is supported by the history of racial segregation practiced in the hospitals in North Carolina and the sanction given this practice by federal regulations permitting the maintenance of separate facilities for different population groups. Thus, the state and federal government, through their support of the historical practice of the institution can be said to have furthered the segregation.

39. 479 F.2d at 760.

40. 407 F.2d 73 (2d Cir. 1968).

41. *Id.* at 81.

42. 479 F.2d at 761.

43. See notes 41-42 *supra* and accompanying text.

44. Mulvihill v. Julia L. Butterfield Memorial Hosp., 329 F. Supp. 1020 (S.D.N.Y. 1971). However dismissal of an employee must not be based on grounds of race. *Id.* at 1024.

45. Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); and Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

46. *See* note 37 *supra* and accompanying text.

These cases raise the question as to whether there are two different state action standards—one applied where a policy discriminates against an identifiable group on the basis of a constitutionally suspect characteristic,[47] and another applied where a policy prevents the exercise of fundamental rights. The cases reviewed in this note would tend to indicate the existence of such a distinction. As one court has recently concluded:

> Where racial discrimination is involved, the courts have found "state action" to exist; where other constitutional claims are at issue (due process, freedom of speech), the courts have generally concluded that no "state action" has occurred. These varying results however, may not indicate a difference in the criteria applied.[48]

The governmental purpose in awarding Hill-Burton funds is to supply specified medical facilities to all of the people.[49] Thus, allowing a Hill-Burton funded private institution to refuse to admit patients on the basis of race is to deny these facilities to a portion of the population, frustrating the governmental purpose.[50] Further, the government has chosen to supply these facilities through private institutions and therefore has an interest in maintaining the private character of these institutions. Discriminatory actions thwart the state policy of making medical facilities available to all, the action which the state has undertaken.[51] On the other hand, an institution's personnel procedure would not appear to be state action because it does not interfere with the state's providing medical care to all the people[52]—that is to say, with the action the state has undertaken. In these areas, the hospital is functioning as a private institution and thus, the question of state action is not involved. An important consideration in favor of this reasoning is that it helps to meet both aspects of the congressional intent—that medical services be provided for all, and that it be provided by private institutions.[53]

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47. *Cf.* Bolling v. Sharpe, 347 U.S. 497 (1954).

48. Statler v. Smith, No. 73-1543 (2d Cir., decided April 5, 1974).

49. 42 U.S.C. § 291(a) (1970).

50. *Id.*

51. Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

52. *Cf.* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971).

53. 42 U.S.C. §291(a) (1970).

This analysis poses several problems, most notably with respect to a hospital's policy regarding the types of services to be offered. Did congress intend that all practicable services be provided to all people, or merely that no person may be discriminatorily denied a service which is offered? In *Bellin* the challenged hospital policy concerned the type of services to be offered.[54] In deciding that state action was not involved, the court implicitly held that Congress' "action" was merely to provide that all people receive any offered medical service and that no person be denied a service for reasons of race or alienage. How far this reasoning can be extended is an open question—could a hospital arbitrarily refuse to perform a service which it is fully capable of performing? Since the policy in *Bellin* concerned abortions—a procedure which the hospital was capable of performing, at least one court has answered in the affirmative.[55] One doubts the efficacy of reaching a similar result where a hospital serving a predominantly black community refuses to treat sickle cell anemia or where a hospital has a policy of refusing to perform the test for taysachs disease. A further problem arises in those areas where the state has mandated that certain services be provided. Here the state has undertaken to provide a service to all people and a hospital's denial of that service could, under this analysis, be held to be state action. The problems raised by the court's decision in *Bellin* are more interesting than the conclusions reached. Future cases will have to resolve the problems which the court's analysis raises.

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54. 479 F.2d at 761.

55. Recently Congress enacted legislation which provided that a Hill-Burton hospital's refusal to grant an abortion shall not be held to be state action, 42 U.S.C.A. § 3000a-7 (Supp. 1974). This statute, while in accord with the reasoning of *Bellin* should not affect a determination of state action. State action turns on the extent of involvement with the challenged activity—it is a factual question and one which Congress cannot resolve by legislative fiat. One court, however, has relied on this enactment and has held that state action is not present. Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973).

FEDERAL REVENUE SHARING—Classification of Funds —Enforceability of the Restrictive Spending Provisions of the Federal Revenue Sharing Act. Mathews v. Massell, 356 F. Supp. 291 (N.D. Ga. 1973).

In *Mathews v. Massell*,[1] Mayor Massell and the city Board of Aldermen of Atlanta passed a resolution whereby 4.5 million dollars received under the federal revenue sharing plan were applied toward the payment of firemen's salaries, a priority expenditure under the Revenue Sharing Act.[2] They further resolved that the general city funds released as a result of federal aid would be transferred to a fund for the payment of a water/sewer rebate to certain individuals and firms having water accounts with the city.[3] This latter provision was a non-priority expenditure under the Act.

These actions by the city administration prompted a class action[4]

1. 356 F. Supp. 291, 293 (N.D. Ga. 1973). Resolution adopted at a meeting of the Board of Aldermen of the City of Atlanta on December 18, 1972.

2. Revenue Sharing Act § 103(a)(1)(A), 31 U.S.C.A. § 1222(a)(1)(A) (Supp. 1973).

3. Resolution adopted at a meeting of the Board of Aldermen of the City of Atlanta on February 5, 1973. 356 F. Supp. at 293. "The water/sewer reduction, or rebate, is not in any way tied to the amount of water consumed. Rather, each water/sewer account, whether residential, commercial or industrial, is to be given the same rebate, amounting to $44 over a period of 11 months." *Id.* at 293 n.1.

4. There were preliminary obstacles which the court had to overcome before it could proceed to the central issue in this case. Initially, it had to be determined whether the plaintiffs had sufficient standing to bring this suit, as taxpayers, against the City of Atlanta. It was incumbent upon plaintiffs to establish a personal stake in the controversy and demonstrate financial injury in order to have standing as taxpayers. Doremus v. Board of Educ., 342 U.S. 429 (1952). The court took note that the "requisite personal stake is more easily demonstrated in a taxpayers' action against *municipal* spending than in actions against state or federal legislation. . . ." 356 F. Supp. at 295. The court found the requisite harm in § 123(a)(3) of the Revenue Sharing Act which in summary provides for a penalty to be paid to the federal government in an amount equal to 110 percent of any amount expended out of the federal funds in violation of any provision of the Revenue Sharing Act. Consequently, the taxpayers of Atlanta could be forced to pay a penalty if the city administration was found to have violated the provisions of the Revenue Sharing Act. 356 F.

by Atlanta taxpayers challenging the manner in which the federal revenue sharing funds were to be appropriated. Specifically, the class action challenged the propriety of evading the guidelines set out under the Act by the transfer of funds from one account to another. The court held that the city plan entailing the expenditure of federal funds for a water/sewer rebate violated the priority restrictions in the Act and permanently enjoined the defendants from utilizing the federal funds in accordance with the city's resolutions.[5]

The Revenue Sharing Act of 1972[6] was a response to the financial

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Supp. at 296. Secondly, it had to be determined if this action fell within the jurisdictional requirements of 28 U.S.C. § 1331 (1970) which confers jurisdiction only if the controversy in question exceeds $10,000. Since it is obvious that no individual member of the class will suffer financial injury in excess of $10,000, the issue is whether the claims of the members may be aggregated to satisfy the jurisdictional requirements. Citing Snyder v. Harris, 394 U.S. 332, 335 (1969), the court found the applicable principle of law which provided that the claims of individual members of a class could be aggregated "in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Id.* at 335. Commenting that it was the character of the right asserted which is essential in determining whether individual claims could be aggregated, the court concluded that the plaintiffs were not challenging the assessment of taxes but were only seeking to insure that the federal funds would be spent in accordance with the provisions of the Act. Therefore, this was ruled to be a public right held in common and indivisible. The requisite financial injury was demonstrated as previously discussed and therefore the court concluded that the aggregation of plaintiffs' claims was proper. 356 F. Supp. at 297. Subsequent to this court's ruling on the issue of standing the Supreme Court in Zahn v. International Paper Co., 414 U.S. 291 (1973) ruled that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amounts of $10,000 in order for there to be a class action. It would seem that if this decision came down prior to the *Mathews* decision the court would have been compelled to reach a different conclusion on the issue of aggregation, for Judge Freeman states that "[i]t is . . . clear however, that no single member of the class will stand to suffer in the amount of $10,000." 356 F. Supp. at 297. In light of *Zahn* it is apparent that *Mathews* would not be maintainable today assuming plaintiffs chose the same course of action.

5. 356 F. Supp. at 302.

6. An Act to Provide Fiscal Assistance to State and Local Governments, to Authorize Federal Collection of State Individual Income Taxes and for Other Purposes, Pub. L. No. 92-512, 86 Stat. 919, 31 U.S.C.A. §§ 1221-63 (Supp. 1973) [hereinafter cited as Revenue Sharing Act].

troubles of state and local governments. The increasing demand for public services resulting from the substantial increase in urbanization and the inability of local governments to tax those persons availing themselves of services provided by the local governments spurred Congress to create a new and fundamentally different kind of federal aid for state and local governments.[7]

Prior to the passage of the Revenue Sharing Act, the federal government provided substantial aid to local governments in the form of categorical aid which generally had to be spent for narrowly prescribed purposes.[8] Litigation arising out of these categorical aid programs was characterized by broad judicial review of the acts of officials administering the program to insure compliance with the provisions of the legislation under which the programs operated. For instance, courts have reviewed the decision-making processes of an official administering a federally funded program[9] and the right of

7. *See* STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 93D CONG., 1ST SESS., GENERAL EXPLANATION OF THE STATE AND LOCAL FISCAL ASSISTANCE ACT AND THE FEDERAL-STATE TAX COLLECTION OF 1972 (Comm. Print 1973).

8. *Id.*

9. Brooks v. Volpe, 350 F. Supp. 269 (W.D. Wash. 1972). The court reviewed an order by the Secretary of Transportation authorizing the use of federal funds for a road building project without ascertaining if there was any prudent or feasible alternative for the use of the land. The court in reviewing the scope of defendant's authority, found that he exceeded his authority and abused his discretion in reaching a decision without the prescribed procedure for making such decisions. *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Petitioners, a group of private citizens and local and national conservation organizations, brought suit in a district court in Tennessee seeking to halt highway construction through a park. The district court, taking a narrow view of its power to review, had granted defendant's motion to dismiss. 309 F. Supp. 1189 (W.D. Tenn.), *aff'd*, 432 F.2d 1307 (6th Cir. 1970). The Supreme Court reversed and remanded with instructions to review the Secretary of Transportation's decision, stating in part: "Even though there is no *de novo* review in this case . . . the generally applicable standards . . . require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. . . . But that presumption is not to shield his action from a thorough, probing, in-depth review." 401 U.S. at 415 (citations omitted).

a director to dismantle a federally funded agency.[10] In addition, at least one court has required findings of fact to facilitate its review of an administrator's decision.[11]

One of the motivating forces of revenue sharing was the desire to provide state and local governments with federal funds which could be expended, within the broad categories of the Act,[12] for what local officials viewed as their most urgent needs. An analysis of the legislative history of the Revenue Sharing Act and the court's decision in *Mathews* reveals that the court has continued the policy of close judicial review of administrative decisions disbursing federal funds provided by revenue sharing.

The Revenue Sharing Act was designed to help state and local governments meet their financial burdens through aid from the federal government. The funds distributed to the state and local governments under the Act were to be used only for the priority expenditures defined in the Act.[13]

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10. Local 2677, AFGE v. Phillips, 358 F. Supp. 60 (D.D.C. 1973). A consolidated action by representatives of the employees of OEO against its Director. Plaintiff attempted to enjoin the defendant from effectively dismantling OEO by failing to include monies for its operation in the federal budget. The court reviewing the Director's exercise of discretion found that he had abused and exceeded his authority: "The OEO Director has been granted discretion in the disbursing of funds so as to effectuate the goals of the program. But discretion in the implementation of a program is not the freedom to ignore the standards for its implementation." *Id.* at 77 (citation omitted). The court ruled that all acts of the Director designed to dismantle OEO to be null and void. *Id.*

11. Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969). Plaintiff petitioned for a review of a HEW decision to cut off payment of federal funds under the Civil Rights Act of 1964, 42 U.S.C. § 2000(a) (1970), as a result of plaintiff's failure to comply with guidelines specifying an acceptable pace of desegregation. The court in vacating the HEW order remanded the case for further proceedings requiring HEW to present findings of fact indicating the grounds for the termination of federal funds. Clearly, the court wants to be acquainted with the facts on which HEW based its decision so as to facilitate a thorough judicial review of its decision.

12. Revenue Sharing Act § 103(a), 31 U.S.C.A. § 1222(a) (Supp. 1974).

13. The Act provides: "In general.—Funds received by units of local government under this subchapter may be used only for priority expenditures. For purposes of this chapter, the term 'priority expenditures' means

From the inception of the Act both houses of Congress recognized that it would be difficult to trace the federal revenue sharing funds to the state and local levels. After much debate on this issue, the Senate committee noted that since there was no requirement that the state and local governments maintain their prior levels of budget expenditures, no efficient way existed to determine if the federal funds were being spent on the priority items designated in the statute.[14] The committee concluded that federal, state and local funds would be untraceably commingled,[15] thus allowing circumvention of the restrictions imposed under the Act by shifting funds from one account to another.[16] As a result of these findings, the Senate bill provided that the state and local governments be given a free hand and be permitted to use their discretion[17] in allocating

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only—(1) ordinary and necessary maintenance and operating expenses for—(A) public safety (including law enforcement, fire protection, and building code enforcement), (B) environmental protection (including sewage disposal, sanitation, and pollution abatement), (C) public transportation (including transit systems and streets and roads), (D) health, (E) recreation, (F) libraries, (G) social services for the poor or aged, and (H) financial administration; and (2) ordinary and necessary capital expenditures authorized by law." *Id.*

14. S. REP. No. 1050, 92d Cong., 2d Sess. 16 (1972). "The committee believes that the State and local governments will be able to make the most efficient use of the aid funds if they are given the authority to determine how these funds are to be used. . . . [T]he adoption of high priority items in the House bill merely results in substantially complicating the mechanics of the aid program without any real substantive effect on spending by the local governments. A complicated and elaborate procedure would be required to determine that the local governments spend the aid funds only on the high priority items. However, since the local governments are not required to maintain the level of their own prior expenditures on the high priority items (i.e. expenditures financed out of their own revenue sources) as a practical matter, they could arrange to use the aid funds to increase their spending for other than high priority items. As a result, provision for the high priority categories, at best, is illusory." *Id.*

15. It is true that state and local governments are not required to maintain prior levels of budget expenditures under the Act thereby facilitating the commingling of federal, state and local funds. However, the defendants failed to foresee the vigor with which the court would enforce the purposes of the Revenue Sharing Act.

16. *See* note 14 *supra* and accompanying text.

17. *Id.*

the federal funds received under the Act. In effect, the Senate wanted to provide federal funds without directing how they should be allocated.

The House of Representatives,[18] felt it was essential to maintain some control over the disbursement and allocation of federal revenue sharing funds at the state and local levels. The House version of the Act[19] contained priorities for the allocation of federal funds disbursed under the Act.[20] The House indicated that these funds should be used for high priority social and economic needs. To insure such use, restrictions were placed on local allocation of the funds.[21]

The final bill was a compromise[22] of these conflicting views.[23] The Act as passed contained an expanded list of priority items for which federal funds could be allocated and included the accounting procedures recommended in the House version of the bill.[24] After its

18. H.R. REP. No. 1018, 92d Cong., 2d Sess., pt. 1, at 11 (1972).

19. *Id.* at 18.

20. *Id.*

21. *See* note 18 *supra.*

22. S. REP. No. 1229, 92d Cong., 2d Sess. (1972).

23. 118 CONG. REC. 9743 (daily ed. October 12, 1972) (remarks of Representative Mills). "The Senate bill contains no guidance as to how the local governments are to spend the amounts distributed to them under the bill. This is in marked contrast with the House bill which requires local governments to spend the aid funds on a specified list of high priority items. This, of course, is in accord with the principle that if the Federal Government is to provide aid to the local governments, it should provide guidance as to how the funds are to be spent. The objective is to insure that the funds shall be spent for socially useful puposes which have a high priority among the various public needs. In view of the importance of providing Federal guidance as to the spending of local aid funds your conferees were adamant that the bill should provide such guidance. As a result, the conference report contains a specified list of priority expenditures on which local governments can spend the aid funds. Under the conference report, the list of priority expenditures is expanded to include necessary maintenance and operating expenses for health, recreation, libraries, social services for the poor and aged and financial administration, which were not included in the House bill. In addition, under the conference bill, all ordinary and necessary capital expenditures authorized by law—and not just a limited group—are treated as priority expenditures or, in other words, as permissible expenditures for local government." *Id.*

24. 31 U.S.C. § 1224(a)(1) (Supp. 1972). *See* STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 92D CONG., 2D SESS., GENERAL EXPLANA-

passage, one commentator suggested that the restrictive provisions of the Act would be impossible to enforce[25] since federal revenue sharing funds would be hopelessly commingled with state and local funds,[26] thus making the priority list in the Revenue Sharing Act nothing more than a list of recommended uses for funds.[27]

Mathews presented the first test of the validity and enforceability of the restrictions placed on federal funds by the Revenue Sharing Act. The defendants contended that they had complied with the regulations[28] by applying the federal funds received toward the payment of firemen's salaries,[29] a priority item under the Act. Defendants also claimed that the general city budget funds freed as a result of receiving federal aid were not regulated[30] by the Act, and consequently could be allocated for any purpose the City deemed appropriate,[31] including the proposed water/sewer rebate.

TION OF THE STATE AND LOCAL FISCAL ASSISTANCE ACT AND THE FEDERAL-STATE TAX COLLECTION OF 1972 (Comm. Print 1973). The Act provides that each state and local government is to submit an annual report for each entitlement period to the Treasury Department. Each report is to set forth the purposes for which the amounts received during an entitlement period have been spent or obligated and the amount spent or obligated for each purpose. In addition, the proposed expenditures for forthcoming general funds must be submitted in order for a state or local government to receive funds for that period. Failure to comply with the accounting procedures of the Act could result in the withholding of funds. 31 U.S.C.A. § 1243(b) (Supp. 1973). The guidelines for the accounting procedure to be followed were promulgated by Secretary of the Treasury, George P. Schultz, at 31 C.F.R. § 51.10 (1973) which in addition to the certification requirements necessitates each recipient government to make public through the news media a copy of the report submitted to the Secretary of the Treasury. *Id.* § 51.11.

25. Comment, *The Revenue Sharing Act of 1972: United and Untraceable Dollars from Washington*, 10 HARV. J. LEGIS. 276 (1973).

26. "State and local governments can effectively avoid the restrictive provision by commingling the federal revenue sharing funds with their own revenues. Although Section 123(a)(1) provides for the deposit of all shared revenues in a locally established trust fund, funds are commingled in use, no matter how the books are kept." *Id.* at 284.

27. *Id.* at 286.

28. 356 F. Supp. at 299.

29. Revenue Sharing Act § 103(a)(1)(A), 31 U.S.C.A. § 1222(a)(1)(A) (Supp. 1973).

30. 356 F. Supp. at 299.

31. *Id.*

The court agreed that defendants had complied with the requirements of the Act by using federal funds for a priority item. The court also agreed that the released funds of the general city budget were not regulated by the statute.[32] However, in commenting on the unregulated freed funds and their relationship to the total city budget, the court noted that:

> There is a clear difference, however, between funds which are legitimately freed up by the designation of federal Revenue Sharing funds to provide municipal services which otherwise would have to have been paid for out of general City funds, and funds which are transferred from one account to another simply to avoid the restrictions imposed by § 103(a) of the Act.[33]

Even though the court acknowledged that the defendants complied with the letter of the law, it refused to sanction the attempted evasion of congressional intent by what it called "sham transactions."[34] The court noted that the judiciary had frequently looked to the substance of the transaction rather than its label to determine if the transaction in question fell within the scope of activities Congress was seeking to prevent.[35] It was only after much debate in Congress that the final version of the Revenue Sharing Act was passed with restrictions on the discretion a state or local government could exercise in the allocation of federal funds.[36]

The court's review of the legislative history of the Act placed special emphasis on the insistence[37] of the House of Representatives, in the face of Senate opposition,[38] that priorities be established for allocation of federal funds. This was interpreted as an indication that Congress never intended the priorities to serve merely as guide-

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32. *Id.* On its face, the court's acknowledgment of the defendants' compliance with the letter of the law would appear contrary to the court's holding in the case. What the court had conceded is that although the defendants' method of avoiding the restrictive provisions of the Act was not expressly prohibited, they were nonetheless evading the congressional intent evident in the creation of federal revenue sharing which clearly sought to prevent the spending of federal funds on what the Congress considered to be non-priority items.

33. *Id.*

34. *Id.*

35. *Id.* at 299-300.

36. *Id.* at 300.

37. *Id.*

38. *See* note 14 *supra.*

lines which state or local governments, in the exercise of their discretion, could disregard. The defendants' contention that the priorities were only suggested guidelines was inconsistent[39] with the time spent by Congress in debating the merits of establishing priorities for the allocation of federal funds and the resulting compromise on this issue.[40] This appears to be the correct view since the debates indicate that Congress was fully aware of the ease with which the restrictions could be circumvented, and in anticipation of attempted abuses enacted sanctions[41] and accounting procedures[42] to insure compliance with the guidelines. The legislative history of the Act makes it abundantly clear that Congress never intended the restrictive provisions of the Act to be interpreted in such a way as to lend support to the ruse of transferring funds from one account to another in order to evade the purposes of the statute.

The *Mathews* decision is the first judicial statement concerning the restrictive use of federal revenue sharing funds. However, it should be noted that the shifting of funds in *Mathews* was not a very sophisticated attempt by a local government to evade the purposes of the Act. The defendants never seriously disputed that they intended to allocate the freed city funds to a non-priority item,[43] and they in fact provided much of the evidence proving plaintiff's allegations.[44] Defendants contended that this was a permissible allocation of city funds since the Revenue Sharing Act did not impose any restrictions on these freed funds.[45] As a result, plaintiffs were not confronted with the difficult task of tracing the federal funds and the items for which they were expended.

Undoubtedly, the courts will encounter situations where the obstacle in enforcing the restrictive provisions of the Act will be in establishing that federal funds were, in fact, commingled with state or local funds. It has been suggested that extensive commingling of federal, state and local funds will successfully thwart any effort to identify the federal funds and the purposes for which they were

39. 356 F. Supp. at 301.
40. *See* note 23 *supra*.
41. *See* note 24 *supra* and 31 U.S.C.A. § 1243(b) (Supp. 1973).
42. *See* note 24 *supra*.
43. 356 F. Supp. at 299.
44. *Id.* at 302.
45. *Id.*

spent.[46] The court in *Mathews* was not confronted with a problem of proof, and this problem will present a substantial obstacle for future plaintiffs and courts. Nevertheless, the message to state and local government is clear: federal revenue sharing funds are to be allocated in accordance with the restrictive provisions of the Act and courts will not permit congressional intent to be ignored by means of sham transactions.[47]

46. *See* Comment, note 25 *supra*, at 284.
47. 356 F. Supp. at 299.

INCOME TAX—Franchising—Advertising and Promotional Costs in Market Development. *Briarcliff Candy Corp. v. Commissioner*, 475 F.2d 775 (2d Cir. 1973).

Since the latter part of the 19th century, the taxpayer,[1] Briarcliff Candy Corporation, manufactured and sold candy and confectionery products. Retail sales to customers in Briarcliff's stores (located in a number of northeastern cities) represented 80 percent of total sales, while sales to wholesale customers (primarily department stores) accounted for the remaining 20 percent. During the 1950's, a major demographic shift[2] from urban to suburban areas occurred, causing Briarcliff to lose its established clientele. The company's initial response to this loss was to open suburban branches of its retail operation, but this venture failed because of high operating costs and low margins of profit.

In the latter part of 1961, having failed in its suburban store venture, Briarcliff began soliciting independently operated retail outlets, such as pharmacies and card stores, to serve as franchisee-distributors of Briarcliff's products. To this end a franchise[3] division

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1. Taxpayer was previously the Loft Candy Corp. which, when purchased in 1971 by Barricini Stores, Inc., was renamed Briarcliff Candy Corp.

2. U.S. BUREAU OF THE CENSUS, POCKET DATA BOOK, USA 1971, at 41, Table 8 (1971). "Metropolitan area residents comprised 140 million in 1970, an increase of 17% from 1960, almost entirely in the suburbs." *Id.* at 5.

3. Franchising accounted for at least $131 billion in annual sales in 1971, "equal to 13% of the Gross National Product and 35% of retail sales." U.S. DEPT. OF COMMERCE, FRANCHISE OPPORTUNITIES HANDBOOK, at XIV (June 1972). For a discussion of the various aspects of franchising and its effects on various elements of law and society, see Caine, *Termination of Franchise Agreements: Some Remedies For Franchisees Under the Uniform Commercial Code*, 3 CUMBERLAND-SAMFORD L. REV. 347 (1972); Covey, *Franchising and the Antitrust Laws: Panacea or Problem?* 42 NOTRE DAME LAW. 605 (1967); Johnson, *The New Tax Treatment of Franchise Payments: The Proposed Regulations Under Section 1253*, 47 LOS ANGELES B. BULL. 222 (1972); H. KURSH, THE FRANCHISE BOOM 4 (1962); McGuire, *Labor Law Aspects of Franchising*, 13 B.C. IND. & COM. L. REV. 215 (1971); Zeidman, *Antitrust Aspects of Franchising*, 45 MICH. STATE B.J. 27 (1966); Note, *Antitrust Law—Tie-Ins—Chicken Delight "Per Se" Doctrine Extended to Distributorship Franchise*, 4 SETON HALL L. REV. 610 (1973); Comment, *Franchises and Founders' Contracts: Securities or Not?* 8 IDAHO

was established within the Briarcliff organization and an extensive advertising campaign, designed to promote franchise contracts,[4] was begun. The franchise contracts were to remain in effect for terms varying from one to five years and thereafter from year to year unless terminated by either party on thirty days notice.

Briarcliff deducted the cost of the advertising campaign as an ordinary business expense in computing its net operating loss.[5] This deduction was challenged by the IRS and disallowed by the Commissioner. The Commissioner held that the expenditures were capital invested for the purpose of acquiring franchise outlets, and thus were capital expenditures which are not deductible as ordinary business expenses.[6] Moreover, since the franchises were capital assets with an indefinite life, depreciation and amortization were not allowed.[7] The tax court agreed with the Commissioner,[8] holding that the advertising campaign was directed not at the promotion of a product for current sales, but rather at establishing new channels of distribution[9]—an asset which would be of benefit to the business

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L. REV. 146 (1971); Address by Jerome L. Fels, P.L.I. Conference in N.Y.C. on *Business and Legal Problems of the Franchise, Agency Problems of the Franchise Agreement,* Sept. 27, 1968; Address by Bernard Goodwin, P.L.I. Conference in N.Y.C. on *Business and Legal Problems of the Franchise, The Franchise as a Security,* Sept. 27, 1968; Address by T. Newman Lawler, P.L.I. *Conference on Business and Legal Problems of the Franchise, Tax Consequences of Franchise Agreements,* Sept. 27, 1968.

4. The retail store proprietor agreed to set aside a space in the store for refrigerating display and storage counters exclusively devoted to Loft's products, at his own expense, and to use his best efforts to sell these products to his customers. Taxpayer agreed to supply the retailer with its candies at a discount from retail prices and to assist the proprietor in setting up and operating the facility. It also agreed not to enfranchise a competing store within a specified area. The storeowner received a commission on his retail sales of the product.

5. INT. REV. CODE OF 1954, § 162(a).

6. *Id.* § 263.

7. Treas. Reg. § 1.167(a)-3.

8. Briarcliff Candy Corp., 41 P-H TAX CT. MEM. 179 (1972).

9. "Franchising basically is the granting by a company of a right to an individual to distribute the goods of that company often within a given territory. It is a method of distribution." Garlick, *Pure Franchising, Control and the Antitrust Laws: Friends or Foes?* 48 J. URBAN L. 835, 837 (1971). A more definitive analysis of the nature of a franchise is found in

in future years.[10] The tax court concluded that the contracts obtained represented those channels of distribution and were capital assets.[11] The taxpayer appealed this decision, and the second circuit reversed and remanded for modification in *Briarcliff v. Commissioner*.[12]

Advertising expenses generally qualify as allowable deductions under section 162(a) of the 1954 code.[13] In order to qualify the ex-

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the Franchise Competitive Practices Act of 1967. There are six basic elements: 1) there must be some type of contract or agreement, express or implied, oral or written; 2) this contract defines a commercial relationship either for a definite or an indefinite period of time; 3) there is a grant to the franchisee of the right to distribute the goods of the franchisor; 4) the franchisee operates an independent business while remaining a component in the franchisor's distributive system; 5) the franchisor's trademark or tradename permeates the whole franchise (note that this is lacking in the Briarcliff case); 6) the franchisee's operations are substantially dependent on the franchisor for the continued supply of goods or services. Garlick, *supra* at 838.

10. Briarcliff Candy Corp. v. Commissioner, 475 F.2d 775, 782 (2d Cir. 1973).

11. *See* Houston Natural Gas Corp. v. Commissioner, 90 F.2d 814 (4th Cir.), *cert. denied*, 302 U.S. 722 (1937); Gauley Mountain Coal Co. v. Commissioner, 23 F.2d 574 (4th Cir. 1928); Manhattan Co., 50 T.C. 78 (1968); X-Pando Corp., 7 T.C. 48 (1946) (advertising is ordinarily deductible under § 162, but may be a capital expenditure in nature when expended for development of business benefit in future years). Goodell-Pratt Co., 3 B.T.A. 30 (1925); Colonial Ice Cream Co., 7 B.T.A. 154 (1927) (new markets or channels of distribution give rise to a capital expenditure, however, court treated as ordinary expense because of lack of proof as to what part of expense should be capitalized). Northwestern Yeast Co., 5 B.T.A. 232, 238 (1926) (part of promotion expense gives a benefit beyond one year and is partially a capital expenditure, but once again, because of lack of evidence, court found no part could be segregated but said that segregation in a proper case is possible).

12. 475 F.2d 775 (2d Cir. 1973).

13. INT. REV. CODE OF 1954, § 162(a) provides for a deduction of all "ordinary and necessary expense paid or incurred during the taxable year in carrying on any trade or business, including—(1) a reasonable allowance for salaries or other compensation for personal services actually rendered; (2) travelling expenses . . . in the pursuit of a trade or business; and (3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity".

penditure must: (1) be paid or incurred during the taxable year;[14] (2) be for carrying on any trade or business;[15] (3) be an expense;[16] (4) be a necessary expense;[17] and (5) be an ordinary expense.[18] The fact that an advertising campaign[19] extends for more than a year does not change the rule that the cost is deductible.[20] However, when advertising is directed at *acquiring an asset* with a useful life of more than one year, the expenditure may not be deducted as an ordinary business expense—but rather must be capitalized.[21] Thus,

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14. Commissioner v. Lincoln Sav. & Loan Ass'n, 403 U.S. 345, 352 (1971), *rev'g* 422 F.2d 90 (9th Cir. 1970).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* For cases interpreting and utilizing these concepts see Welch v. Helvering, 290 U.S. 111, 114 (1933) ("ordinary . . . does not mean that the payments must be habitual or normal. . . . [t]hey may happen once in a lifetime."); Helvering v. Winmill, 305 U.S. 79 (1938) (taxpayer not considered in business of selling and buying securities); Commissioner v. Tellier, 383 U.S. 687, 689 (1966) (the term necessary imposes "only the minimal requirement that the expense be 'appropriate and helpful' for 'the development of the [taxpayer's] business.' "); Woodward v. Commissioner, 397 U.S. 572 (1970) (capital expense not ordinary expense); United States v. Hilton Hotels Corp., 397 U.S. 580 (1970) (court explains *Woodward* case), Hill v. Commissioner, 181 F.2d 906, 908 (4th Cir. 1950) (educational expenses of taxpayer treated as carrying on a trade or business and expenses were so vital as to be ordinary and necessary).

19. The tax court gave great emphasis to what it described an "intensive campaign to get new customers," citing Houston Natural Gas Corp. v. Commissioner, 90 F.2d 814 (4th Cir. 1937), for the proposition that such a campaign gives rise to a capital expenditure. However the court of appeals disagreed, declaring that the term "intensive campaign" was inexplicit, and that the court would not enforce such a concept against the taxpayer where Congress and the IRS had failed to furnish clear standards "as to what intangible assets are deductible under § 162 and what are not." 475 F.2d at 783.

20. For example, amounts paid in one year to an association of merchants for cooperative advertising over a period of five years were deductible in the year paid. Consolidated Apparel Co., 17 T.C. 1570 (1952). Where large advertising expense exists, it is usually spread over the period of the benefit, but due to the nebulous nature of future benefit, the tendency is to allow the deduction in the year incurred. Rev. Rul. 561, 1968-2 CUM. BULL. 117.

21. United Profit Sharing Corp. v. United States, 66 Ct. Cl. 171 (1928).

there is a distinction between general advertising designed to promote a product for current sale, which is deductible as an ordinary business expense, and advertising designed to produce new means of marketing a product, such as franchises and the like—which must be capitalized.

In order to determine whether an expenditure is an ordinary business expense or a capital expense, courts have generally looked to three criteria. First, will the benefit produced extend for more than one year. Second, will a business advantage extending for more than one year result. And lastly, was the expenditure made to acquire an income producing asset.[22] As one court has said:

> [t]o constitute invested capital there must be a laying out of money and the acquirement of something purposed to be of permanent use or value in the business. Where money is expended merely for the purpose of maintaining an existing asset the expenditure constitutes a current business expense, but where money is spent to increase an asset such expenditure constitutes a capital investment.[23]

Extensive newspaper advertising, distribution of catalogs and promotion of prize contests to obtain contacts on a new selling program had to be capitalized; E.H. Sheldon & Co. v. Commissioner, 214 F.2d 655 (6th Cir. 1954), *rev'g* 19 T.C. 481 (1952). Court allowed deduction for advertising on the ground that expense could not be capitalized in the absence showing with reasonable certainty the benefits resulting in later years from the expenditure. *But see* Levin v. Commissioner, 219 F.2d 588 (3d Cir. 1955), *aff'g* 21 T.C. 996 (1954). The IRS in Rev. Rul. 360, 1968-2 CUM. BULL. 197, refuses to follow the *Sheldon* case and Harper & McIntire Co. v. United States, 151 F. Supp. 588 (D. Iowa 1957), both of which held that the costs were ordinary and necessary business expenses.

22. Houston Natural Gas Corp. v. Commissioner, 90 F.2d 814 (4th Cir. 1937); United States v. Wehrli, 400 F.2d 686 (10th Cir. 1968) (one year rule of thumb is not absolute); Connecticut Light and Power Co. v. United States, 299 F.2d 259 (Ct. Cl. 1962) (disbursements made to acquire new assets, either tangible or intangible, are not deductible as ordinary and necessary expenses incurred in carrying on a trade or business); Schultz v. Commissioner, 420 F.2d 490 (3d Cir. 1970) (charges normally deductible as ordinary and necessary are not deductible when incurred as integral part of capital transaction). *See also* Willcuts v. Minnesota Tribune Co., 103 F.2d 947 (8th Cir.), *cert. denied*, 308 U.S. 577 (1939); United States v. Pfister, 205 F.2d 538 (8th Cir. 1953); E.H. Sheldon and Co. v. Commissioner, 214 F.2d 655 (6th Cir. 1954).

23. Peerless Stages, Inc. v. Commissioner, 125 F.2d 869, 871 (9th Cir. 1942) (citations omitted). *See also* United States v. Akin, 248 F.2d 742, 744

These criteria have been applied to cases similar to *Briarcliff*. In several cases involving expenditures made by newspapers to increase circulation, the courts have held that the circulation structure constituted an intangible asset of good will, and thus expenditures made to increase the circulation were capital expenses.[24] The court reached a similar conclusion in *Carl Reimers Co. v. Commissioner*.[25] Here an advertising agency had spent several thousand dollars expanding into newspaper advertising. Reimers attempted to deduct these expenditures as an ordinary business expense. The court disallowed the deduction and noted that in order to expand into newspaper advertising Reimers "was faced with the necessity of making certain non-recurrent payments to put itself in shape to do that. They were not made for the purpose of protecting or retaining what the petitioner already had, but to fulfill a prerequisite to the attainment of something new."[26] The same problem has arisen in the debtor-creditor situation. *Welch v. Helvering*[27] involved a commission agent who paid debts of a bankrupt corporation which had borne his name and of which he had been secretary. Although the debts had been discharged, the corporation's creditors were prospective customers of the agent. The court held that the

(10th Cir. 1957), *cert. denied*, 355 U.S. 956 (1958).

24. Meredith Publishing Co. v. Commissioner, 64 F.2d 890 (8th Cir. 1933) (magazine circulation is treated as an intangible capital asset. Court held that the cost of obtaining new magazine subscriptions was not ordinary and necessary expense); Gardner Printing Co., 4 B.T.A. 37, 39-40 (1926) (perhaps the most important asset of a news publishing business is its circulation structure); Public Opinion Publishing Co. v. Jensen, 76 F.2d 494 (8th Cir. 1935) (expense to *increase* subscriptions through contests and prizes held not deductible as ordinary and necessary expense). *Compare* Journal of Living Publishing Corp., 3 T.C. 1058 (1944), *with* Perkins Bros. Co. v. Commissioner, 78 F.2d 152 (8th Cir. 1935) (soliciting subscriptions to *maintain* circulation structure held to be deductible as ordinary and necessary expense). *See also* Newspaper Printing Co. v. Commissioner, 56 F.2d 125 (3d Cir. 1932) (cost of eliminating competition and acquiring goodwill).

25. 211 F.2d 66 (2d Cir. 1954).

26. *Id.* at 68. The court continued, saying, "[w]ithout the payments, the petitioner would have been unable to get credit and commissions, and it would have been unable to operate profitably in the new field." *Id.*

27. 290 U.S. 111 (1933).

payments were capital investments and not ordinary business promotion expense.

The appellate court in *Briarcliff*[28] followed these precedents[29] in holding that "where the taxpayer adds to its regular business of making and selling a product, a new branch or division designed to make and sell a different product," there is a capital expenditure.[30] However, the court departs from the earlier cases and draws a new distinction between tangible and intangible expenditures. Whereas courts previously talked of these two in the same breath, the court in *Briarcliff* takes great care to separate them: "[w]here . . . the contributing factor is intangible and it enhances an intangible capital asset of the new division of the same established company, the boundary line between a taxable capital asset and a deductible ordinary and necessary expense, incurred in carrying on a business, becomes imprecise."[31] According to the appeals court, where an in-

28. 475 F. 2d 775 (1973).

29. *See* notes 22-27 *supra* and accompanying text.

30. 475 F.2d at 781. The court in reviewing the facts found that the changes made in Loft's internal organization to spread its sales into a new territory were not comparable to the acquisition of a new branch or division to make and sell a different product, but rather only to "stimulate" its sales department. No deduction has been allowed for "pre-opening" expenses incurred between the decision to establish a business and the actual beginning of business operations, even when claimed as ordinary and necessary start-up expenses. Richmond Television Corp. v. United States, 345 F.2d 901, 905 (4th Cir. 1965). Expenses incurred prior to and for the purpose of reaching a decision whether to establish a business are indisputably capital expenditures. *See* Westervelt, 8 T.C. 1248 (1947); *accord,* Walet, 31 T.C. 461 (1958), *aff'd,* 272 F. 2d 694 (5th Cir. 1959) (per curiam). *See also,* Fleischer, *The Tax Treatment of Expenses Incurred in Investigation for a Business or Capital Investment,* 14 TAX L. REV. 567 (1959). The fact that an expenditure is imposed compulsorily by law upon a taxpayer does not in and of itself make that payment an ordinary and necessary expense within the meaning of section 162(a) of the 1954 Code. Commissioner v. Lincoln Sav. & Loan Ass'n, 403 U.S. 345, 359 (1971). Compulsory accounting rules do not control tax consequences. Old Colony R.R. v. Commissioner, 284 U.S. 552, 562 (1932).

31. 475 F.2d at 781. In the construction of a shopping center, part of the "overhead expenses, including officers salaries, other overhead salaries, depreciation, insurance, legal and audit expenses, office expenses. . .[must] be capitalized." *Id.* at 784, *citing* Ben Perlmutter, 44

tangible contribution is made to a tangible asset, for example, an engineer's supervision in the construction of a new building, his salary is a capital expenditure. But where there is an intangible contribution to an intangible asset, for example, a sales manager contributes "25% of his time to devising a new or different method of attracting customers,"[32] the deductibility rests upon whether or not "the new method is a 'capital' asset . . . ."[33] *Briarcliff* was viewed as presenting an intangible contribution to an intangible asset.

The fundamental question confronted by both the tax court and the second circuit was whether the franchise contracts in *Briarcliff* were ordinary or capital expenses. The Commissioner claimed that the contracts were capital expenses for they "provided the taxpayer with a certain suburban market for the duration of the contracts."[34] Moreover, the Commissioner claimed that the means employed[35] in obtaining the franchises and the five year term of the franchise agreements, when viewed in light of the three criteria discussed earlier, made the advertising expenditures a capital expense.

The court of appeals rejected this analysis[36] and applied the standard established by the Supreme Court in *Commissioner v. Lincoln Savings and Loan Association.*[37] At issue in *Lincoln Savings* was whether additional premiums paid under compulsion of federal law, which might result in a future benefit, were deductible as an ordi-

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T.C. 382 (1965), *aff'd*, 373 F.2d 45 (10th Cir. 1967). "It is obvious that the court is talking about intangible contributions to 'tangible' assets; not 'intangible' contributions to 'intangible' assets." *Id.*

32. 475 F.2d at 784.

33. *Id.*

34. *Id.* at 781.

35. These included: (1) Creation of a separate division to procure sales outlets in suburban areas; (2) Intensive campaign towards this end; (3) Advertising directed not at ultimate consumers but to potential distributors; (4) New outlets to stem the decline in operating profits. *But see* section 263(a)(2). This section states that no deduction shall be allowed for "any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made." INT. REV. CODE OF 1954, § 263 (a)(2).

36. "Prior to 1971 this was an often repeated and generally applied standard." 475 F.2d at 782.

37. 403 U.S. at 354.

nary expense. The Supreme Court held that the possibility of future benefit was not controlling—rather "[w]hat is important and controlling . . . is that the . . . payment serves to create or enhance . . . what is essentially a separate and distinct additional asset. . . ."[38] The court of appeals construed the "separate and distinct additional asset"[39] standard as meaning that the asset must be measurable in money's worth—that is, money or fair market value. An expense should not be capitalized if it merely creates a favorable expectancy or increases sales and produces income.[40] In reaching this conclusion the court reasoned that the franchise and agency contracts were nothing more than contracts of employment[41] for a term of years,[42] and that the cost of obtaining them was not a capital but rather an ordinary business expense.[43] Yet if this is the

38. *Id.*

39. *Id.*

40. 475 F.2d at 784. *Lincoln* does not extend specifically this far.

41. *But see* Jones v. Corbyn, 186 F.2d 450 (10th Cir. 1950).

42. Robert E. Foxe, 53 T.C. 21, 25 (1969) (payment for termination of employment was ordinary income and not a sale of a capital asset). *Compare* Commissioner v. Pittston Co., 252 F.2d 344 (2d Cir. 1958), *rev'g* 26 T.C. 967 (1956), and Aircraft Mechanics Inc., 30 T.C. 1227 (1958), where the court held that the payment for termination of an exclusive sales representative's contract, a one year contract renewable on a year to year basis was found not to be a sale or exchange of a capital asset, *with* Elliot v. United States, 431 F.2d 1149 (10th Cir. 1970) where the payment for termination of a general insurance agency contract was held to be a reimbursement for the loss of future earnings and was taxable as ordinary income.

43. While the regulations make no reference to franchises as depreciable items, they are treated as falling within the definition of intangibles referred to therein. Treas. Reg. § 1.167(a)-3 (1960); Jones v. Corbyn, 186 F.2d 450 (10th Cir.), *aff'g* 42 Am. Fed. T.R. 1199 (W.D. Okla. 1950). When used in a trade or business they may be depreciated over the term of the franchise or contract, Automatic Heating & Cooling Co., 11 P-H 1942 B.T.A. MEM. ¶ 42,561, at 1449, unless they have an indeterminate or indefinite life in which case no depreciation is permitted, Louise R. Jones, 12 CCH TAX CT. MEM. 1437 (1953). In the year they are abandoned or become totally worthless, their cost is deductible as a loss. An unlimited franchise, or one which may be renewed periodically at the option of the holder, cannot be depreciated because its duration is indefinite and unlimited. Rev. Rul. 520, 1956-2 CUM. BULL. 170. However, the rule should not be applied when the franchise can be terminated at a specified date

case, it is difficult to understand why the parties made the contracts

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by either party. *Automatic Heating and Cooling Co., supra.* In the case of *Jones v. Corbyn, supra*, the court was confronted with an exclusive insurance agency agreement. The court held that while the investment underlying the contract was slight, its principal value lay in expected future agent's commissions for services to be rendered and thus found the agreement to be a capital asset. In this case, the Commissioner contended that the contract was not a capital asset, but "nothing more than an employment contract to perform services . . . and granting to them the privilege of soliciting insurance for the company . . . it is not property which is susceptible of ownership for a length of time as is a share of stock or a bond; and upon termination of the contract all the company received and paid for in advance was a promise by the agency not to exercise this privilege [of soliciting insurance]." 186 F.2d at 452. However, the court found that the contract had substantial value because it was capable of producing income for its owners and could be bought and sold. "The implication of this decision is that the employee without a contract must be satisfied with ordinary income regardless of the disposition he makes with respect to future services, but if he can protect his future earnings with a contract then he is eligible for capital gains treatment." 3-B MERTEN'S LAW OF FEDERAL INCOME TAXATION § 22.34, at 310 (1973). To the extent that *Jones* is inconsistent with Wiseman v. Halliburton Oil Well Cementing Co., 301 F.2d 654 (10th Cir. 1962), it is overruled in the tenth circuit. *Accord*, Maryland Coal & Coke Co. v. McGinnes, 225 F. Supp. 854 (E.D. Pa. 1964), *aff'd*, 350 F.2d 293 (3d Cir. 1965). In Mansfield Journal Co. v. Commissioner, 31 T.C. 902, 910 (1959), it was stated that the doctrine of *Jones v. Corbyn* has been overruled by the Supreme Court in Corn Prod. Ref. Co. v. Commissioner, 350 U.S. 46 (1955). *See also*, Rev. Rul. 374, 1955-1 CUM. BULL. 370, in light of *Maryland Coal & Coke Co.* The fifth circuit in Bisbee-Baldwin Corp. v. Tomlinson, 320 F.2d 929, 934 (5th Cir. 1963), rejects the rationale of Weaver Realty v. Commissioner, 307 F.2d 897 (10th Cir. 1962) which had followed *Jones* and instead follows its earlier ruling in United States v. Eidson, 310 F.2d 111 (5th Cir. 1962). In Commissioner v. Starr Bros., 204 F.2d 673 (2d Cir. 1953), *rev'g* 18 T.C. 149 (1952), the court cites *Jones* and agrees with the dissenting opinion of Judge Phillips. In *Starr*, the tax court held that the agency was a capital asset, but the court of appeals followed Beals' Estate v. Commissioner, 82 F.2d 268 (2d Cir. 1936), which held that payment received for a covenant not to engage in a competitive business was ordinary income, not capital gain. 204 F.2d at 674. The courts when dealing with agency type cases under section 117 of the Internal Revenue Code of 1954, have generally followed the construction of a capital asset as set down in Corn Prod. Ref. Co. v. Commissioner, 350 U.S. 46, 52 (1955) which held that since section 117 "is an exception from the normal tax requirements of

for a period of five years, unless they wanted to receive a benefit for that period. Moreover, if, as the court of appeals states, Briarcliff's purpose was simply to obtain employees, the company could have paid commissions on sales as it did for its other sales personnel, rather than entering into franchise contracts.

The court cites *Queens City Printing Co. v. Commissioner,*[44] for the proposition that recruitment expenses are deductible. But *Queens City* involved travel by the taxpayer to hire employees, who could quit at any time. In *Briarcliff,* the travel was to solicit distributors, who were locked into agency agreements.[45] Moreover, Briarcliff was attempting to attain sources of income for at least five years.

An interesting parallel exists between *Briarcliff* and *Darlington-*

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the Internal Revenue Code, the definition [therein] of a capital asset must be narrowly applied" and the exclusions therein from the general definition of a capital asset "interpreted broadly" in order "to effectuate the basic congressional purpose." *See also* Commissioner v. Gilette Motor Transp. Inc., 364 U.S. 130, 134-135 (1960), which dealt with the temporary taking of a taxpayer's right to use his own transportation assets; and Commissioner v. P.G. Lake, Inc., 356 U.S. 260 (1958), dealing with the sale of oil payment rights. In both cases the Supreme Court found there was no sale or exchange of a capital asset. In General Artists Corp. v. Commissioner, 205 F.2d 360 (2d Cir. 1953), *aff'g* 17 T.C. 1517 (1952), *cert. denied,* 346 U.S. 866 (1953), a divided tax court (five judges dissented following the rationale of *Jones* at 17 T.C. 1524) when dealing with the narrow construction of a capital asset under section 117, refused to follow *Jones* and held that there was no capital asset where the taxpayer was a booking agency which had exclusive booking contracts to another booking agency for a consideration consisting of a percentage of the earnings to be derived from the bookings arranged by the latter. The court refused the example of a possible conversion of income from future services into capital gain. For a thorough case history of the principal authorities on both sides of the issue of whether a capital asset exists, see Commissioner v. Ferrer, 304 F.2d 125, 130-32 (2d Cir. 1962). As Judge Friendly noted in *Ferrer,* in all cases where a capital asset was found to exist, "the taxpayer had something more than an opportunity . . . by dealing with another . . . or by rendering services . . . or by virtue of ownership of a larger 'estate' . . . ." *Id.* at 130-31.

44. 6 B.T.A. 521 (1927).

45. It has been held that if Briarcliff had wished to terminate the agreement and paid the agents for such termination, the compensation to the agents would be extraordinary income under a theory of future income turned into present income and thus not the sale or exchange of a capital asset. Elliot v. United States, 431 F.2d 1149 (10th Cir. 1970).

Hartsville Coca-Cola Bottling Co. v. United States.[46] In *Darlington-Hartsville,* the district court held that an expenditure is a capital outlay if it brings about the acquisition of a business advantage extending into the indefinite future. *Darlington* involved payments by the franchisee bottling company to its franchisor, the Coca-Cola company. These payments were made in order to eliminate a middleman's contract, thereby permitting direct contracts with the franchise owner. The court held the expenditure to have been made for an intangible asset—a business advantage[47]—and therefore capitalization was required.

Briarcliff obtained at least two advantages through its franchise system. First, the channels of marketing distribution had a future publicity benefit. Second, although the court of appeals claims that Briarcliff's sales remained the same[48] after the contracts went into effect, the fact is that they would have declined were it not for these contracts.[49] Moreover, Briarcliff spent a great deal of money in es-

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46. 273 F.Supp 229 (D.S.C. 1967), *aff'd*, 393 F.2d 494 (4th Cir.), *cert. denied*, 393 U.S. 962 (1968).

47. 273 F. Supp at 231.

48. 475 F.2d at 779. "The entire expenditures for and efforts of the franchise division made very little change in net sales." *Id.*

49. *Id.*

Fiscal Year	Number of Agencies	Franchise Division	Other	Total	Percentage of Sales From Franchise Division	Other
1958			17,334,310	17,334,310		100
1959			17,690,409	17,690,409		100
1960			18,380,263	18,380,263		100
1961			17,601,868	17,601,868		100
1962	159[b]	400,729	17,061,929	17,462,658	2.3	97.7
1963	490	1,645,462	16,128,649	17,774,111	9.2	90.8
1964	846	2,692,244	15,143,061	17,835,305	15.1	84.9
1965	1186	3,516,812	14,459,572	17,976,384	19.5	80.5
1966	1380	3,855,340	14,503,729	18,359,069	20.9	79.1
1967	1360	3,507,244	14,824,558	18,331,802	19.1	80.9
1968	1465	3,432,995	14,009,960	17,442,955	19.7	80.3
1969	1640	2,901,799[c]	13,284,191	16,185,990	17.9	82.1
1970		3,301,616	15,257,689	18,559,305	17.7	82.1

a. June 30.

b. Of the original 159 agencies in 1962, 120 or 75% were still under contract in 1969.

c. By January 1, 1969 Briarcliff's management had decided to terminate the agency contracts.

tablishing its franchise program, which the company would not have done if it did not think that something of value would be obtained.[50] Briarcliff helped to ward off the threat of financial decline by entering into contracts which produced between 17 and 21 percent of its income, at a time when its urban sales were declining. In this respect Briarcliff is similar to *Nachman v. Commissioner*,[51] where the court held that an expenditure made to acquire an intangible asset, which was reasonably expected to serve the taxpayers through future years, was not deductible as ordinary income.

Because the court felt that the status of the law regarding intangible contributions to intangible assets was hopelessly confused,[52] it

50. In 1962 the Commissioner valued the franchise contracts at the value of the advertising campaign, $212,028. However, when Loft's was sold in 1971 to Barricini Stores, Loft's received $10,000 for a group of assets, to wit, "trademarks and tradenames, usable inventories, customer lists, agency contracts, manufacturing formulae, standards, guidelines and other production knowhow, and a portion of its plant equipment and machinery." 475 F.2d at 779. The court gave considerable weight to the $10,000, of which the agency contracts represented only a fraction, and criticized the Commissioner's 1962 capitalization of $212,028 to acquire the contracts. (The total expense of the franchise division in 1962 was $332,869 of which the Commissioner claimed $212,028 was for promotional expenses. 31 CCH TAX CT. MEM. 173 (1962). However, there is never any guarantee that an item will not depreciate in value from one year to the next, and even less of a guarantee when there is a lapse of eight years. The record does not indicate the total consideration paid by Barricini Stores to Loft's, but such information could pierce the $10,000 value assigned by the parties, at a time when various financial and tax considerations were paramount in the minds of the parties, and reveal a different consideration for the contracts. In addition, in 1970 while this case was pending Briarcliff could have expected, if an asset were finally determined to exist, to sell it, either recouping its investment or sustaining a loss. (An unlimited or renewable franchise at the option of the holder cannot be depreciated. Rev. Rul. 520, 1956-2 CUM. BULL. 170. However, this rule should not be applied when the franchise can be terminated at a specified date by either party. Automatic Heating & Cooling Co., *supra* note 43. P-Losses incurred upon the loss of useful value or abandonment of franchises are deductible in the year sustained. Rev. Rul. 581, 1954-2 Cum. Bull. 112.)

51. 191 F.2d 934 (5th Cir. 1951); *accord*, Shutler v. United States, 470 F.2d 1143 (10th Cir. 1972) (case focuses on acquisition of and renewal privileges in a lease).

52. 475 F.2d at 785.

castigated the IRS for resting many decisions in this area on "administrative fiat, fortified by the requirement that the taxpayer show clear error."[53] The IRS was put on notice that the nebulous standard regarding intangibles would not be accepted; "[t]he taxpayer, who may be exposed to interest and penalties for guessing wrong, is entitled to reasonably clear criteria or standards to let him know what his rights and duties are."[54]

However laudable this pronouncement, this language raises an important question—whether the burden of proof is shifted in this area from the taxpayer to the Commissioner,[55] obligating him to show the creation of the asset.[56] If the court is not totally shifting the burden of proof, it is at the very least holding the taxpayer to a minimal burden of rebutting the presumption that the Commissioner is correct.[57] The court of appeals found that the tax court could not have concluded that a capital asset was created if it had applied the appropriate body of law. However, taken as a whole, the evidence presented by the Commissioner created a question of fact, even in light of *Lincoln Savings*.[58] Since the tax court ignored the *Lincoln Savings* case, and failed to state clearly the measurement of the asset created, it left the door open to a more liberal view of the facts. Had the *Lincoln Savings* case been applied by the tax court, the court of appeals may have been barred from reversing the tax court's determination, by the holding of *Commissioner v.*

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53. *Id.*

54. *Id.*

55. The burden of proof has been held to be upon the taxpayer to prove that an item should be charged to expense if the Commissioner treats it as a capital expenditure. Dane County Title Co., 29 T.C. 625 (1957); Challenge Mfg. Co., 37 T.C. 650 (1962); Delores Bussabarger, 52 T.C. 819 (1969); Davee v. United States, 444 F.2d 557, 567 (Ct. Cl. 1971).

56. 475 F.2d at 785.

57. The cost of retaining old customers is a deductible business expense, but the burden of allocating the expenditures between retention and acquisition of new customers is upon the taxpayer, and in the absence of proof the whole amount is not deductible. 4-A Merten's *supra* note 43, § 25.23 (1973).

58. Speaking for the *Lincoln Savings* majority, Justice Blackmun implied that the "separate and distinct" asset rule should not be considered an absolute rule but should be applied in the absence of other factors. 403 U.S. at 354. The Court did not elaborate on what factors might alter the result.

Duberstein.[59] In this case the Supreme Court held that primary weight concerning issues of fact is to be given the conclusions reached by the trier of fact. The judge's findings, where the trial has been without a jury, must stand unless "clearly erroneous."[60]

None of the grounds offered by the court in support of its holdings are particularly compelling. Indeed, many cases have reached different conclusions in analagous situations. However, one analysis which may support the court's holding, and mentioned by the court in its conclusion, is that Briarcliff was not expanding into new markets but was merely following its old customers. As the court stated in *Peerless Stages Inc. v. Commissioner,*[61] the maintenance of old customers is an ordinary expense, but expenditures to acquire new customers is a capital expense.[62] Indeed, the court in *Briarcliff* made specific note of the flight from the cities and the demographic changes which have led to the growth of the suburbs. This implies, of course, that Briarcliff was selling to a somewhat identifiable class of customers, and expenditures made to maintain one's position among a given class of customers is an ordinary and necessary business expense.

The second circuit limited the effect of its decision to the urban relocation situation.[63] The court did not decide whether the result might be different if a company is seeking additional sales growth without the urban relocation factor. Thus, the door is still open for the IRS to distinguish *Briarcliff* on this ground. In *Briarcliff,* the courts have taken cognizance of the demographic trend of our society, and by indirect tax law subsidy, have helped the businessman follow his customers to the greener pastures of the suburbs.

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59. 363 U.S. 278 (1960).

60. *Id.* at 291. The Court further held that a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. FED. R. CIV. P. 52(a). *See also* E.H. Sheldon & Co. v. Commissioner, 214 F.2d 655, 658-659 (6th Cir. 1954) (since tax court drew conclusions from uncontradicted facts without any element of seeing or hearing the witnesses or judging their credibility, the court of appeals could thus make its own evaluation of the conclusions to be drawn).

61. 125 F.2d 869 (9th Cir. 1942).

62. Rev. Rul. 181, 1956-1 CUM. BULL. 96, where a new sales territory was entered but expense was allowed because the promotion expenses were so directly related to the carrying on of the corporation's business.

63. 475 F.2d at 787.

LANDLORD-TENANT LAW—Tort Liability—Elimination of Landlord Freedom from Liability. *Sargent v. Ross*, 308 A.2d 528 (N.H. 1973).

Defendant landlord appealed from a judgment holding him liable for the death of tenant's daughter as a result of a fall from an outdoor stairway at the leased premises. The Supreme Court of New Hampshire, affirming the jury verdict, concluded that "now is the time for the landlord's limited tort immunity to be relegated to the history books where it more properly belongs."[1]

The freedom of the landlord from responsibility for conditions existing at the time of the lease is based in early English common law. The lease was regarded as a sale of the demised premises for a term.[2] Consistent with the general approach taken in cases of sales of chattels and realty, courts imposed on the purchaser the duty to inspect the premises before purchasing his interest. Thus, the lessee was presumed to have taken the premises with knowledge of all discoverable defects. The landlord was held not liable for injuries resulting from such defects.[3] This rule of *caveat lessee* was not uniformly applied in all American jurisdictions. As early as 1896 the Supreme Court of Tennessee in *Hines v. Wilcox*[4] held a landlord liable in tort for injury to a tenant on the grounds that there is an affirmative duty on the part of the landlord to discover and remedy defects existing at the time of transfer of property to the tenant. This duty to inspect and repair arises out of a common law duty of care. As the Tennessee Supreme Court noted: "The ground of liability upon the part of the landlord when he demises dangerous prop-

1. Sargent v. Ross, 308 A.2d 528, 533 (N.H. 1973).

2. Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260, 261 (1928) [hereinafter cited as Harkrider].

3. Clarke v. Sharpe, 76 N.H. 446, 83 A. 1090 (1912); Finney v. Steele, 148 Ala. 197, 41 So. 976 (1906) (child of tenant); Valin v. Jewell, 88 Conn. 151, 90 A. 36 (1914); Bowe v. Hunking, 135 Mass. 380 (1893); Newman v. Sears Roebuck & Co., 77 N.D. 466, 43 N.W.2d 411 (1950); Campbell v. Elsie S. Holding Co., 251 N.Y. 446, 167 N.E. 582 (1929).

4. "We think the great weight of authority is that, if a landlord lease premises which are at the time in an unsafe and dangerous condition, he will be liable to his tenant for damages that may result, if he knows the fact and conceals it, or if, by reasonable care and diligence he could have known of such dangerous and unsafe condition." Hines v. Wilcox, 96 Tenn. 148, 160, 33 S.W. 914, 916 (1896).

erty has nothing to do with the special relationship of landlord-tenant. It is the ordinary case of liability for misfeasance which runs through all the relations of individuals to each other."[5]

Landlord freedom from responsibility in tort also extended to injuries caused by unsafe conditions that came into existence after the beginning of the term of the lease. At common law, in the absence of agreement to the contrary, the landlord had no duty to repair rented premises during the term of the lease.[6] As the landlord was under no duty to repair defective conditions that developed or were created by a tenant after he entered into possession, it was generally held that the landlord was not liable in tort for injuries proximately caused by them.[7]

Certain exceptions to this general rule of non-liability have become generally accepted by American courts. A landlord is held liable to the tenant, his family, guests and others who enter in the right of the tenant[8] for defective and dangerous conditions in the premises even after he has surrendered control to the tenant, if the injury results from a hidden defect unknown to the tenant, and the landlord is or should be aware of such defect.[9] The knowledge re-

5. Wilcox v. Hines, 100 Tenn. 538, 548-49, 46 S.W. 297, 299 (1898). For a look at present Tennessee law in light of the *Wilcox* cases, *see* Noel, *Landlord's Tort Liability in Tennessee*, 30 TENN. L. REV. 368 (1963).

6. Hunkins v. Amoskeag Mfg. Co., 86 N.H. 356, 169 A. 3 (1933).

7. Schafer v. Mascola, 163 Cal. App. 2d 53, 328 P.2d 796 (1958); Anderson v. Valley Feed Yards, Inc., 175 Neb. 719, 123 N.W.2d 839 (1963); Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397 (1931); Avron v. Plummer, 132 N.W.2d 198 (N.D. 1964); Kauffman v. First-Central Trust Co., 151 Ohio 298, 85 N.E.2d 796 (1949); W. PROSSER, LAW OF TORTS § 63, at 400 (4th. ed. 1971) [hereinafter referred to as PROSSER].

8. Kayler v. Magill, 181 F.2d 179 (6th Cir. 1950) (employee); Ames v. Brandvold, 119 Minn. 521, 138 N.W. 786 (1912) (guest); Anderson v. Hayes, 101 Wis. 538, 77 N.W. 891 (1899) (employee); RESTATEMENT (SECOND) OF TORTS 358 (1965). Recent cases in several jurisdictions have widened the category of those who enter in the right of the tenant by abolishing the common law categories of entrants onto real property. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972) (abolished all categories of entrants onto real property); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (abolished the distinctions between licensees-invitees and social guests).

9. Anderson v. Shuman, 257 Cal. App. 2d 272, 64 Cal. Rptr. 662 (1967); Miner v. McNamara, 81 Conn. 690, 72 A. 138 (1909); Smith v. Green, 358

quired before the landlord will be charged with responsibility for a latent defect varies from jurisdiction to jurisdiction.[10] The Tennessee cases are an extension of the latent defect exception to the rule of *caveat lessee* in that they place a positive duty on the landlord to inspect the premises for such defects at the beginning of the term.[11]

A second exception to the landlord's immunity exists where he has negligently repaired the premises and such negligent repair causes injury.[12] A landlord may also be subject to liability for defects existing at the time of transfer where the premises are leased for public use,[13] but this exception relates primarily to commercial premises and not to private dwellings.[14] In some states it is also essential to show that the premises have been rented to serve the public, or large numbers of persons,[15] and that the premises have been rented for consideration.[16]

Mass. 76, 260 N.E.2d 656 (1970); PROSSER § 63, at 401.

10. Comment, *Control by Landlord . . . How Much Is Necessary to Hold Him Liable?* 21 ALBANY L. REV. 86 (1957), Note, 35 IND. L.J. 361, 363 (1960).

11. Noel, *supra* note 5, at 375.

12. Finner v. Nichols, 175 Mo. App. 525, 157 S.W. 1023 (1913); Hunkins v. Ameskeag Mfg. Co., 86 N.H. 356, 169 A. 3 (1933); Rowan v. Ameskeag Mfg. Co., 79 N.H. 409, 109 A. 561 (1920); Barham v. Baca, 80 N.M. 502, 458 P.2d 228 (1969); "The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right." Marks v. Nambil Realty Co., 245 N.Y. 256, 259, 157 N.E. 129, 130 (1927); Szczepkowicz v. Khelshek Realty Corp., 280 App. Div. 524, 113 N.Y.S.2d 870 (1st Dep't 1952); 1 TIFFANY, REAL PROPERTY § 105 (3d ed. 1939); RESTATEMENT (SECOND) OF TORTS § 362 (1965); PROSSER § 63, at 410-12; Note, 35 IND. L.J. 361 (1960); Harkrider, *supra* note 2, at 268.

13. Colorado Mortgage Inv. Co. v. Giacomini, 55 Colo. 538, 136 P. 1039 (1913); Junkerman v. Tilyou Realty Co., 213 N.Y. 404, 108 N.E. 190 (1915); Fitchett v. Buchanan, 2 Wash. App. 965, 472 P.2d 623 (1970); RESTATEMENT (SECOND) OF TORTS § 359 (1965); PROSSER § 63, at 403-05.

14. Areal v. Home Owners Loan Corp., 43 N.Y.S.2d 538 (Sup. Ct. 1943); PROSSER § 63, at 403-05.

15. Campbell v. Elsie S. Holding Co., 251 N.Y. 446, 167 N.E. 582 (1929).

16. Junkerman v. Tilyou Realty Co., 213 N.Y. 404, 108 N.E. 190 (1915); Davis v. Schmitt Bros., 199 App. Div. 683, 192 N.Y.S. 15 (2d Dep't 1922).

If none of these limited exceptions applies, results turn on the basic assumption on which the landlord's freedom from responsibility is based, *i.e.* he has given up control over the area where the injury occurred.[17] For example, landlords have generally been held liable where an area is adjudged to be within their control as in the case of common stairways.[18]

The responsibility for the condition of the premises is also affected by statute in some jurisdictions. Certain statutes explicitly give the tenant a right to sue in tort;[19] others create a duty in the landlord to repair leased premises;[20] and a third group creates an obligation to repair but places the duty neither on the landlord nor the tenant.[21]

The New York Multiple Dwelling Law,[22] and the Tenement House Law[23] which it replaced, imposed a duty on the landlord to repair leased premises. In 1922 the court of appeals found a landlord liable

17. Black v. Fiandaca, 98 N.H. 33, 93 A.2d 663 (1953); Flanders v. New Hampshire Sav. Bank, 90 N.H. 285, 7 A.2d 233 (1939); Dick v. Sunbright Steam Laundry Corp., 307 N.Y. 422, 121 N.E.2d 399 (1954).

18. Chalfen v. Kraft, 324 Mass. 1, 84 N.E.2d 454 (1949); Menard v. Cashman, 94 N.H. 428, 55 A.2d 156 (1947); People v. Scott, 26 N.Y.2d 286, 258 N.E.2d 206, 309 N.Y.S.2d 919 (1970) (agreement of landlord to repair absent reservation of a right of entry does not result in landlord's control for purposes of finding him liable for defective conditions in the premises); Geesing v. Pendergrass, 417 P.2d 322 (Okla. 1966); PROSSER § 63, at 405-08.

19. GA. CODE. ANN. §§ 61-111, -112 (1935); LA. CIV. CODE. ANN. arts. 670, 2322, 2693, 2694, 2695 (West 1952). For a discussion of the Louisiana provisions, *see* Comment, *Responsibility of Landlord and Tenant for Damages from Defects in Leased Premises*, 20 LA. L. REV. 76 (1960).

20. MICH. COMP. LAWS ANN. § 125.471 (1967); N.Y. MULT. DWELL. LAW. § 78 (McKinney 1946); WIS. STAT. ANN. § 101.11 (1973). A discussion of the difficulties encountered in founding tort liability on the basis of landlord repair statutes is beyond the scope of this note. For a detailed summary, *see* Feuerstein and Shestack, *Landlord and Tenant—The Statutory Duty to Repair*, 45 ILL. L. REV. 205 (1950). *See also* Annot., 17 A.L.R.2d 704 (1951).

21. D.C. CODE ANN. §§ 5-101 *et seq.* (1956). Clark v. O'Connor, 435 F.2d 104 (D.C. Cir. 1970); Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960).

22. N.Y. MULT. DWELL. LAW § 78 (McKinney 1946).

23. Law of Apr. 12, 1901, ch. 334, [1901] N.Y. Laws 983.

for injury to a tenant resulting from a breach of this duty.[24] Justice Cardozo justified the result as follows:

> We may be sure that the framers of this statute, when regulating tenement life, had uppermost in thought the care of those who are unable to care for themselves. The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect.[25]

The right of the tenant to recover under the New York statute has been limited by two prerequisites. The tenant must show the landlord's actual or constructive knowledge of the defect that resulted in injury,[26] and the absence of contributory negligence or assumption of the risk.[27]

The trial in *Sargent* centered around the plaintiff's attempts to prove that the landlord retained control over a private stairway. In its affirmance, the Supreme Court of New Hampshire declined the invitation to strain the control test to its limit, recognizing that the landlord's control was never sufficiently established to justify a verdict in favor of the plaintiff.[28] The court also chose not to widen the repairs exception to include negligent construction of improvements to the premises.[29] It concluded that such decisions, while technically justifiable, would only tend to "perpetuate an artificial and illogical rule."[30] Instead the court eliminated the control test altogether com-

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24. Altz v. Lieberson, 233 N.Y. 16, 134 N.E. 703 (1922).

25. *Id.* at 19, 134 N.E. at 704.

26. *Id.*

27. Weiss v. Wallach, 256 App. Div. 354, 10 N.Y.S.2d 69 (1st Dep't 1939). The wisdom of applying the common law doctrines of contributory negligence and assumption of the risk without modification seems questionable since tenants often lack the freedom of choice the doctrines assume. Often compliance with the rule of care would require the tenant to vacate the defective leasehold. This seems an unreasonable burden to place on the tenant. Note, 62 HARV. L. REV. 669, 677 (1949).

28. "The plaintiff does not directly attack this rule of nonliability but instead attempts to show, rather futilely under the facts, defendant's control of the stairway." 308 A.2d at 530.

29. *Id.* at 533. The stairway in question had been added by the landlord to the premises some eight years prior to the accident. *Id.* at 531-32.

30. The rule the court is referring to is that of landlord tort immunity. *Id.* at 531.

menting that "the control test is insufficient since it substitutes a facile and conclusive test for a reasoned consideration of whether due care was exercised under all the circumstances."[31] Hence "the issue of control is relevant to the determination of liability only insofar as it bears on the question of what the landlord and tenant reasonably should have believed in regard to the division of responsibility for maintaining the premises in a safe condition."[32]

The court attempted to justify its departure from the existing common law on a number of grounds. First, it considered evidence of the need to change the present rule. Judge Hillsborough pointed out the injustice of landlord immunity and the inadequacy of the exceptions where strict application would result in a situation where no one would be liable for the death of the plaintiff's daughter.[33] Further, he argued that the state has a duty to safeguard the public from injury by assigning responsibility to some party for the care of structures capable of causing injury.[34] Finally, under the existing law a landlord was in fact discouraged from remedying dangerous conditions "since his repairs may be evidence of his control."[35]

In addition to citing a number of its own decisions eliminating or refusing to adopt certain tort immunities,[36] the court also referred

31. *Id.*

32. *Id.* at 532. One limitation on the landlord's liability is specifically noted. "A landlord, for example, cannot fairly be held responsible in most instances for an injury arising out of tenant's negligent maintenance of the leased premises." *Id.* at 531. The implications of this crucial sentence are not, however, further clarified in the decision.

33. *Id.* at 532. *See also* the dissent of Justice Bazelon in Bowles v. Mahoney, 202 F.2d 320, 326 (D.C. Cir. 1951) (Bazelon, J., dissenting).

34. Note, 7 CORNELL L.Q. 386, 388 (1922): "One has merely to consider at the present time the number of crowded tenement houses in cities, which are in many cases occupied by people who are so poor that they are unable to care for themselves, to see the desirability of the landlord's being obliged to keep such buildings from falling into such a state of decay and dilapidation." *See generally* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969).

35. 308 A.2d at 532.

36. Hurley v. Hudson, 112 N.H. 365, 296 A.2d 905 (1972) (sovereign tort immunity disapproved); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966) (parental tort immunity abolished); Welch v. Frisbie Memorial Hosp., 90 N.H. 377, 9 A.2d 761

to recent cases in other jurisdictions modifying the common law status of entrants onto real property.[37] The inference was drawn that the considerations which required changes in landlord immunity in those cases also apply "where there is foreseeability of substantial harm landowners, as well as other members of society, should generally be subjected to a reasonable duty of care to avoid it."[38]

The cases cited in *Sargent* that appear most clearly analogous are two Arizona decisions, *Cummings v. Prater*[39] and *Presson v. Mountain States Properties, Inc.*[40] *Cummings* involved a suit by a tenant for personal injuries caused by tripping over a concrete slab. The plaintiff claimed she had no knowledge of the condition at the time of the accident. The Arizona court stated that the question revolved around "whether the condition of the slab was of such a nature that in the exercise of ordinary care the defendant was under a duty to warn plaintiff of its existence or to repair the condition."[41] While the court imposed a duty on landlords to meet a standard of ordinary care by inspecting leased premises at the beginning of a term for conditions that may be unreasonably dangerous, it seemed to maintain the rule that disclosure of such defects fulfills the duty of the landlord to his lessee. In other words, the common law "warn or repair" rule was maintained in conjunction with a limited duty to inspect.[42]

(1939) (charitable tort immunity not adopted); Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915) (husband's tort immunity from wife declared abolished by married woman's act). 308 A.2d at 533. *Hurley* approves the retention of sovereign immunity for governmental functions.

37. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972) (abolished categories of entrants onto real property); Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973) (abolished licensee-invitee distinction). *See also* Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968) (abolished the previous distinctions between licensees-invitees and social guests).

38. 308 A.2d at 533. *See also* Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458, 479 (1970) in which the author suggests that *Rowland* may have imposed a liability of the landlord based in negligence for injury resulting to a tenant or third party from a latent defect in the premises.

39. 95 Ariz. 20, 386 P.2d 27 (1963).

40. 501 P.2d 17 (1972).

41. 95 Ariz. at 23, 386 P.2d at 31.

42. *Id.*

In *Presson*, an Arizona appellate court reversed a lower court decision denying a cause of action to a tenant's nine year old child who was severely burned due to a recurrently defective water heater. Explicitly reserving the possibility of recognizing a warranty of habitability theory, the court extended the logic of *Cummings* by making the landlord potentially liable for injuries caused by his failure to exercise a standard of care to maintain the premises free from " 'unreasonably dangerous' instrumentalities that could potentially cause injury."[43] The court clearly held that a landlord who has leased his premises for a short term has a common law duty to repair any unreasonably dangerous condition, and that he is liable in tort for his failure to do so.[44]

Sargent differs from the *Presson* case in several ways. First, by explicitly eliminating the special status of the landlord in regard to his liability in tort and by relying upon a negligence theory, Judge Hillsborough's opinion lays to rest any lingering doubts as to the basis of liability. Secondly, the *Sargent* decision is not limited in its application to short term leases as is the *Presson* ruling[45] which, in carving out an exception to the general rule of non-liability, uses traditional landlord-tenant law concepts.[46]

In recent years a number of state courts have adopted warranty of habitability theories.[47] Under these theories a covenant to repair

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43. 501 P.2d at 19.

44. *Id.* As the Arizona appellate court explicitly rejected the option of finding an implied warranty of habitability in short term leases *Presson* is apparently not based on a breach of warranty theory. *Id.* at 20.

45. *Id. Sargent* does not even consider the possibility that where a long term lease is involved the tenant may derive virtually all the benefit from the construction and maintenance of permanent improvements.

46. *Id.* at 19. The Supreme Court of Arizona used the term "unreasonably dangerous condition" in the *Cummings* case which was within the framework of the latent defect exception to the rule of *caveat lessee*. 95 Ariz. at 23, 386 P.2d at 31.

47. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Henson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (1971); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

on the part of the landlord is implied in the terms of each lease.[48] Recourse for any breach has been defined in terms of the familiar contract remedies of damages, rescission or reformation.[49] Courts have not, to this point, allowed damages for personal injury nor does it seem necessary or advisable that they do so. The use of the warranty theory is not necessary, as the difficulties that required extension of a contract theory[50] to allow for what traditionally had been considered tort recovery in the product liability field, do not seem present in the landlord-tenant relationship.[51] Perhaps the greatest tactical advantage available to a plaintiff under a warranty theory is that contributory negligence is not a bar to recovery as it is in those states that maintain a contributory negligence rule.[52] However, traditional concepts of contributory negligence and assumption of the risk should be modified in the landlord-tenant area. In any case, traditional interpretations of those doctrines could place unrealistic and inequitable burdens on tenants. Under a more appropriate test, a tenant would rarely be found contributorily negligent, thus this advantage to the use of a warranty theory would rarely come into play.[53] Additionally, it seems preferable, where possible, not to distort the traditional concepts of contract damages but to use the more appropriate negligence route since the resulting confusion of theories may have significant unforeseen ramifications.[54] Hence, it seems advisable to respect the distinction in reme-

48. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

49. Kline v. Burns, 111 N.H. 87, 91, 276 A.2d 248, 252. (1971).

50. Damages in contract have traditionally been limited to those foreseeable economic damages within the contemplation of the parties at the time the contract was made. *See* Hadley v. Baxendale, 156 Eng. Rep. 145 (1845); DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 12.1, at 803-12 (1973).

51. As leaseholds do not pass through a chain of distribution of wholesalers, retailers, etc. there is little difficulty in proving that the landlord's negligence resulted in the injury causing defect. *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1128 (1960) [hereinafter cited as *Citadel*].

52. *Id.* at 1147.

53. *See* notes 27 *supra* and 72 *infra*.

54. "If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask." *Citadel*

dies to the point that, in a proper case, a tort *and* a contract cause of action could be brought against the landlord.[55]

The court in *Sargent* suggested that its prior decision in *Kline v. Burns*[56] which adopted a warranty of habitability theory may have already created a basis for finding the present defendant liable in tort.[57] In *Kline*, the plaintiff sued for damages to recover rent paid to a landlord for premises that were in violation of the Portsmouth housing code.[58] After taking note of the public policy of New Hampshire to make certain that residential premises are kept in proper repair,[59] the court suggested that the landlord is in a better position to know the terms of existing housing standards and to make the

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1134. The implications of such modification of a common law theory can be far reaching. *See, e.g.*, Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969) (personal injury cause of action denied to a plaintiff who was injured more than 6 years after the sale of defective goods).

55. Implicit in a warranty approach is the possibility of imposing strict liability in tort on landlords in a further analogy to cases in the product liability area. There is substantial question as to whether casual lessors should be subjected to strict liability in tort. Hence, even if this rule were adopted a negligence theory would be necessary as a basis of liability for those not in the business of leasing property. *See* Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458, 467 (1970).

56. 111 N.H. 87, 276 A.2d 248 (1971).

57. 308 A.2d at 533-34. Evidently this decision would not bar a cause of action for personal injury resulting from a breach of an implied warranty of habitability.

58. PORTSMOUTH CODE OF ORDINANCES § 14 (1970), *adopted pursuant to* N.H. REV. STAT. ANN. § 48-A (1970).

59. N.H. REV. STAT. ANN. § 48-A:2 (1970) provides: "Whenever the governing body of any municipality finds that there exists in such municipality dwellings which are unfit for human habitation due to dilapidation, dangerous defects which are likely to result in fire, accident, or other calamities, unhealthful lack of ventilation or sanitary facilities or due to other unhealthy or hazardous or dilapidated conditions, including those set forth in section 4 hereof, power is hereby conferred upon such municipality to adopt ordinances, codes, or by-laws to cause the repair, closing, or demolition or removal of such dwellings in the manner herein provided." "Our legislature has recognized (RSA ch. 48-A) that the public welfare requires that dwellings offered for rental be at the beginning, and continue during the tenancy to be, in a safe condition and fit for human habitation." Kline v. Burns, 111 N.H. 87, 90, 276 A.2d 248, 251 (1971).

necessary repairs than the tenant.[60] It also stated that the owner of the reversionary interest in the property and its improvements is the appropriate person to charge with their repair.[61] Finally, the court recognized the superior bargaining position of the landlord in negotiating the terms of the contract.[62] Hence, on public policy grounds, sanctioned by indications of legislative concern, the court determined that "the above considerations demonstrate convincingly that in a rental of an apartment as a dwelling unit, whether a written or oral lease, for a specified time or at will, there is an implied warranty of habitability by the landlord that the apartment is habitable and fit for living."[63] As to the question of what standards are to be used to determine whether the premises are habitable or not the court concluded that "the existence of a breach is usually a question of fact to be determined by the circumstances of each case."[64]

Not content with basing the landlord's liability in tort on the implications derived from *Kline*[65] the New Hampshire Supreme Court in *Sargent* held that, "[T]o the extent that *Kline v. Burns* did not do so, we discard the rule of 'caveat lessee' and the doctrine of landlord non-liability in tort. . . . Henceforth landlords must exercise care not to subject others to unreasonable risk of harm."[66]

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60. 111 N.H. at 90, 276 A.2d at 251.

61. *Id.*

62. *Id.*

63. *Id.* at 92, 276 A.2d at 251-52.

64. *Id.* at 93, 276 A.2d at 252. *Kline* cites Reese v. Diamond Housing Corp., 259 A.2d 112, 113 (D.C. Ct. App. 1969). In this case the court determined that not all violations of the municipal housing code would necessarily result in a breach of the implied warranty of habitability. 111 N.H. at 93, 276 A.2d at 252.

65. The court never addressed itself to the question of whether the public policy considerations requiring the landlord to repair the premises or be liable for contract damages are identical with those mandating his liability in tort. The fact that insurance often covers the cost of tort injury would seem to be a valid consideration in allocating the cost of tort injury not present in most contract cases. *See* Bowles v. Mahoney, 202 F.2d 320, 325 (D.C. Cir. 1952); Eldridge, *Landlord's Tort Liability for Disrepair*, 84 U. PA. L. REV. 467, 490 (1936); Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458, 484-90 (1970); Note, 121 U. PA. L. REV. 378 (1972).

66. 308 A.2d at 534. Evidently, in the proper case, a tort and a contract

There are a number of questions left unanswered by the *Sargent* decision. The first involves the scope of the landlord's duty to repair. While the control doctrine is eliminated as determinative, the doctrine is not replaced with a specific formula for the division of responsibility. Offered in its place is "a reasoned consideration of whether due care was exercised under all the circumstances."[67] The court does not choose to adopt, as have other jurisdictions, a duty to repair co-extensive with applicable housing regulations.[68] Since the applicable New Hampshire standards may vary widely from community to community within the guidelines prescribed by the state enabling statute,[69] the court was probably wise in not limiting its discretion in this manner. Strict application of such a test might force a court to choose between opposite determinations on virtually identical fact patterns in adjacent communities or strained interpretations of the applicable ordinances in the interest of equitable uniformity.[70]

The decision leaves New Hampshire landlords and tenants in the unenviable position of not knowing the extent of their duty to repair until the court determines whether the parties acted as reasonable men under the circumstances.[71] While the decision is a significant departure from the existing law its impact will not be clear until further decisions implement this new rule. The decided cases do not, for example, tell us whether the landlord has a duty to inspect the premises for latent defects that have arisen after the beginning of the leasehold term.[72] Another important question left unanswered

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cause of action could be brought against a landlord.

67. *Id.* at 531.

68. *Id.* at 534. Clarke v. O'Connor, 435 F.2d 104 (D.C. Cir. 1970); Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960).

69. N.H. REV. STAT. ANN. § 48 A:12 (1970).

70. It is notable that even in jurisdictions with uniform housing regulations difficulties have arisen in the application of pre-determined standards. "Either the Housing Regulations were broadly interpreted . . . or, more likely, the implied warranty of habitability was not limited to the provisions of these regulations as it had been in *Javins*." Note, 45 N.Y.U. L. REV. 943, 952 (1970).

71. In some respects their position is no different from any defendant who does not know until a court decision whether his actions were "reasonable."

72. Assuming that the landlord has a right of entry to inspect for de-

is whether the court will bar or limit recovery of a plaintiff on the basis of contributory negligence or assumption of the risk. While the question was never reached in *Sargent*,[73] the court suggested that "the mere fact that a condition is open and obvious, as was the steepness of the steps in this case, does not preclude it from being unreasonably dangerous. . . ."[74]

Sargent represents an attempt to deal with fundamental questions of tort liability which are likely to be litigated in other jurisdictions.[75] The policy considerations enumerated are sound and the negligence theory advocated by the court might well be emulated by sister jurisdictions faced with similar questions. The disadvantages of using a negligence theory in cases involving personal injury to tenants arise primarily from introducing a standard of reasonable care into an area of the law where it has never been applied. On a practical level, considering the present popularity of the warranty of habitability theory, it may well be easier to convince precedent conscious state courts to extend the warranty theory to include damages for personal injury than to persuade them to repeal centuries of common law decisions by adopting a negligence theory.[76]

There are, however, several advantages to the negligence theory. The jury will no longer be confronted with a confusing set of technical exceptions[77] to a rule of limited liability that has long

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fects which he has a duty to repair, holding the landlord liable for his failure to correct discoverable defects would seem to provide a reasonable standard of care. *See* Note, 62 HARV. L. REV. 669, 676 (1949).

73. 308 A.2d at 529. The reason for this omission was apparently the age of the deceased child. *Id.*

74. *Id.* at 532. Perhaps the best standard to apply in such cases would be that "unless the danger is out of all proportion to the tenant's reasons for continuing to use the premises, the tenant should not be said to have voluntarily assumed the risk or to have been contributorily negligent." Note, 62 HARV. L. REV. at 678.

75. As noted earlier, such litigation might well arise in those jurisdictions recently adopting a warranty of habitability theory. *See* note 55 *supra*.

76. Smith v. A.B.C. Realty Co., 71 Misc. 2d 384, 336 N.Y.S.2d 104 (Sup. Ct. 1972).

77. "The emphasis on control and other exceptions to the rule of nonliability, both at trial and on appeal, unduly complicated the jury's task and diverted effort and attention from the central issue of the unreasonableness of the risk." 308 A.2d at 533.

outlived its time.[78] Rather, it will be faced with questions based upon the familiar concepts of negligence. Instead of determining questions of liability on the basis of a rigid system of established rules or predetermined standards, courts will be able to determine the duties of the parties in the light of all the facts peculiar to a particular case. While this decision may result in a period of uncertainty for those affected, general delineations of responsibility among those sharing interests in real property should become clear once a body of case law develops.

78. "Considerations of human safety within an urban community dictate that the landowner's relative immunity, which is primarily supported by values of the agrarian past, be modified in favor of negligence principles of landowner liability." Comment, *Torts—Abrogation of Common-Law Entrant Classes of Trespasser, Licensee, and Invitee*. 25 VAND. L. REV. 623, 640 (1972).

NEGLIGENCE—Intervening Criminal Act—Jury May Find that Retail Store Which Cooperated With Armed Robbers While Summoning Police by Automatic Silent Alarm Caused the Death of a Customer Killed by a Robber. *Kelly v. Kroger Company*, 484 F.2d 1362 (10th Cir. 1973).

Armed robbers entered a department store and forced the manager to open a safe. The employees followed store procedure and did not give any verbal alarm for fear of exciting the robbers. After the automatic activation of a silent alarm, the police arrived at the store. A customer was then taken hostage by a robber and subsequently killed.[1] Decedent's husband brought a wrongful death action, based on negligence, against the store. He claimed that the procedure adopted for use during a holdup, coupled with the use of an automatic silent alarm, caused the death of his wife. Plaintiff also claimed that the store should have had an armed guard on duty.[2]

The trial court held that plaintiff failed to state a claim upon which relief could be granted.[3] The court of appeals reversed and remanded for further proceedings, holding that a jury might properly find that actions of defendant during the holdup were negligent.[4] The jury would have to determine whether the danger to the decedent was evident to defendant's employees for a sufficient length of time during the holdup.[5] The court did not rule on the question of the effect of the store not providing an armed guard.[6]

In *Kimple v. Foster*,[7] a tavern owner was found liable for injuries inflicted on a patron by a gang of rowdies who had become drunk and boisterous during an afternoon of drinking at the defendant's establishment. The manager did not call the police before the attack commenced, although plaintiffs and other patrons repeatedly had told her to do so. The court in *Kelly v. Kroger*[8] cited *Kimple* for the proposition that a proprietor owes a duty of care to his invitees. This

1. Kelly v. Kroger, 484 F.2d 1362, 1363 (10th Cir. 1973).
2. *Id.*
3. *Id.*
4. *Id.* at 1364.
5. *Id.*
6. *Id.*
7. 205 Kan. 415, 469 P.2d 281 (1970).
8. 484 F.2d 1362 (10th Cir. 1973).

duty requires that the proprietor take affirmative steps to alleviate a dangerous situation.[9] Once the danger is apparent an unreasonable course of action by a defendant can subject him to liability.[10] The tavern manager in *Kimple* was confronted with unruly patrons who had entered as invitees and become drunk on the beer she sold them, threatening harm to other patrons. Although this situation is significantly distinguishable from the case where armed gunmen enter a store and eventually murder a patron, the court of appeals treated the situation in *Kelly* simply as a variation of the usual barroom drama.[11] In citing *Kimple*, the court merely observed that "[u]nder such circumstances, and as to business invitees, it should make no difference whether the establishment is a tavern or a store."[12]

The court also cited a New Mexico tavern case[13] to explain that a proprietor can be liable even for an unforeseen attack on his customer. If the proprietor has sufficient time to comprehend the danger once the incident is in progress, he has a duty to act for his patron's safety.[14] Since tavern cases involve unprovoked assaults on a fellow patron, the proprietor does not face a choice between giving the gunman what he wants or placing the customer in jeopardy by attempting to resist or by secretly calling the police. The only apparent risk in choosing to act for a patron's safety in a tavern is that the belligerent party will attack the proprietor instead of the customer. The aggressor does not present the overwhelming potential force of an armed gunman.

In *Kelly*, the jury may find that the store employees should have warned the customer or taken steps to protect her. To base liability on the failure to warn, presumably the jury must find that the decedent could not see for herself that a robbery was in progress; that an employee had adequate time and opportunity to warn her;

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9. *Id.* at 1364.

10. *Id.*

11. Fisher v. Robbins, 78 Wyo. 50, 319 P.2d 116 (1957); Greco v. Sumner Tavern, Inc., 333 Mass. 144, 128 N.E.2d 788 (1955); Winn v. Holmes, 143 Cal. App. 2d 501, 299 P.2d 994 (1956). *See* Annot., 70 A.L.R.2d 628 (1960).

12. 484 F.2d at 1364.

13. Coca v. Arceo, 71 N.M. 186, 376 P.2d 970 (1962).

14. 484 F.2d at 1364.

and that thus warned, the presence of the gunmen would not have prevented her from acting to save her life.[15]

After noting that "there are several significant Kansas decisions which . . . [consider] incidents which are somewhat similar,"[16] the court of appeals failed to analyze any cases in which the invitee of a bank or retail store was injured during the course of an armed robbery. In the leading bank robbery case, *Sinn v. Farmer's Deposit Savings Bank*,[17] a man handed a bank teller a note threatening to detonate dynamite that he carried unless given money. Although the bank officials had an opportunity to warn one of the bank's customers, they failed to do so. Eventually the robber set off the dynamite. The injured customer sued the bank and recovered on the basis of the failure of the proprietor to warn his invitee of a known hazard.[18]

Even though it was improbable that the store could have protected the customer in any meaningful way (due to the presence of armed gunmen), the court of appeals in *Kelly* concluded that the plaintiff should have had an opportunity to develop the facts, and that summary judgment should not have been granted.[19] Although the court held that a jury question may exist, it is not clear whether the possibility of recovery is limited to a finding that the employees could reasonably have aided the customer during the holdup.[20] If the plaintiff in *Kelly* cannot point to any negligent act once the robbery was in progress, the jury must find for the defendant. However, the court did accept the plaintiff's contention that liability will properly exist if the function of the automatic alarm during the holdup, coupled with the employees' co-operation with the robbers, increased the hazard and caused the injury. The court avoided any serious discussion of the foreseeability of the holdup by limiting

15. Sinn v. Farmers Deposit Sav. Bank, 300 Pa. 85, 150 A. 163 (1930).

16. 484 F.2d at 1363.

17. 300 Pa. 85, 150 A. 163 (1930), *noted*, 79 U. PA. L. REV. 368 (1931). *Cf.* Laidlaw v. Sage, 158 N.Y. 73, 52 N.E. 679 (1899).

18. 300 Pa. at 91, 150 A. at 165. Although the Supreme Court of Pennsylvania recognized that the explosion was a proximate cause of the plaintiff's injuries, it permitted a jury to find that the lack of warning was a concurrent cause, a cause not so remote that, as a matter of law, a finding for the plaintiff had to be reversed. *Id.*

19. 484 F.2d at 1364.

20. *Id.*

possible liability to actions taken during the holdup.[21]

In later bank cases, injured customers have attempted to predicate a claim on the basis of a failure to take sufficient precautions in anticipation of a robbery. Jurisdictions that have considered the question have held that a bank will not be liable for a failure to prevent a holdup from occurring.[22] The very jurisdiction that decided *Sinn* has said:

> It cannot seriously be contended that [the bank management] should have anticipated that the bank would be invaded by bandits and their customer subjected to the risk of being shot.[23]

A rule of law which states that banks cannot foresee holdups deprives a plaintiff of a chance to recover even if a bank's lack of visible security virtually invites robbery. The better-reasoned cases address the issue of the extent of a proprietor's duty of reasonable care to his invitee.

In *Burgess v. Chicopee Savings Bank*[24] plaintiff was present when a would-be robber shot a bank official. Plaintiff was shot when he attempted to chase the man. He alleged that the bank was the cause of his injury because it occupied an old building as temporary quarters and failed to provide guards or an adequate alarm system. The court conceded that bank robberies are not uncommon:

> But banks are not obliged to go to unreasonable lengths to prevent them. They are required to exercise reasonable care to protect those who are upon their premises to transact business. They are not insurers. . . . Unless the liability of a bank is to be virtually absolute—and we are not disposed to impose such liability—there is no basis for recovery. . . .[25]

The best discussion of the extent of the duty to exercise reasonable care[26] to an invitee in anticipation of a robbery, and of a proprie-

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21. *Id.*

22. Noll v. Marian, 347 Pa. 213, 215, 32 A.2d 18, 19 (1943); Nigido v. First Nat'l Bank, 264 Md. 702, 705, 288 A.2d 127, 128 (1972); Burgess v. Chicopee Sav. Bank, 336 Mass. 331, 333-34, 145 N.E.2d 688, 690 (1957); Altepeter v. Virgil State Bank, 345 Ill. App. 585, 104 N.E.2d 334 (1952).

23. Noll v. Marian, 347 Pa. 213, 215, 32 A.2d 18, 19 (1943).

24. 336 Mass. 331, 145 N.E.2d 688 (1957).

25. *Id.* at 333-34, 145 N.E.2d at 690. The failure to take precautions cannot be considered the cause of the plaintiff's injury if it is merely conjectural that the holdup could have been prevented. *Id. See* Nigido v. First Nat'l Bank, 264 Md. 702, 705, 288 A.2d 127, 129 (1972).

26. Just as the law does not make the proprietor the insurer of his

tor's liability for unreasonable conduct during a holdup, is found in *Genovay v. Fox*.[27] In the course of an armed robbery of a bowling alley, plaintiff customer was shot when he attempted to prevent a gunman from killing another customer. The court recognized that the plaintiff was not precluded from recovering simply because the harm was attributable to another's intentional act, and conceded that an armed holdup of the premises was a foreseeable possibility. The court observed that:

> The critical inquiry, however, is whether it is debatably unreasonable conduct for the proprietor of an ordinary business establishment which is . . . accessible to the general public . . . to fail to take security measures against the entry of an armed robber, in relation to the risk of injury to a business invitee. . . . The inconvenience and expense of such precautions . . . so far outweighs the probability of bodily harm to a business invitee from an armed robber as to make it unreasonable . . . to put the proprietor to the trouble, expense and business inconvenience of effective measures to keep the criminal out.[28]

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invitee's well-being, a plaintiff who tries to "waive the tort" and sue upon an implied contract in order to impose strict liability will not succeed. Altepeter v. Virgil State Bank, 345 Ill. App. 585, 593-94, 104 N.E.2d 334, 338 (1952).

27. 50 N.J. Super. 538, 143 A.2d 229 (App. Div. 1958), *rev'd on the particular facts*, 29 N.J. 436, 149 A.2d 212 (1959). The law of the case is still valid. In a principal New Jersey case the appellate division is cited to the effect that a landowner need not provide police protection in anticipation of the acts of criminal intruders. Goldberg v. Housing Auth., 38 N.J. 578, 585, 597, 186 A.2d 291, 294, 301 (1962). The duty of a proprietor can be discharged "either by using reasonable care to protect the business guests against the dangerous activity of the wrongdoers or, where such is possible, by giving them warning adequate to afford the opportunity on their part of assuming the risk of harm or protecting themselves by leaving or remaining away from the land. In the absence of an adequate warning, however, the possessor of the land may not only be under the duty of using such ability as he has at the time to protect his business visitors, but if he knows of the danger in advance, he must use reasonable care to be prepared to meet it when it becomes imminent." Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 903-04 (1934) (footnote omitted).

28. 50 N.J. Super. at 551-52, 143 A.2d at 236. The fact that alcohol was sold on the premises does not increase the defendant's duty in this situation. *Id.* at 549, 143 A.2d at 234. In dictum, the opinion notes: "There may . . . be kinds of businesses so attractive to armed gunmen, either because of their nature (banks, *etc.*) or because . . . [they present] good robbery

With respect to defendant's conduct once the robbery was in progress, the court stated that although the social value of self-defense or defense of property, coupled with the law's recognition of the need to act instinctively in an emergency, excuses a negligent attempt to resist an armed robber, liability could exist in the case of an intentional attempt to entrap the gunman, for

> [t]here cannot be said to have been any right on defendant's part . . . to take any measures he might choose to frustrate the gunman and secure his capture without regard to the effect of such actions on the safety of the others present. The social utility of such objectives was for the consideration of the jury. . . .[29]

In *Kelly* the sending of the alarm did not represent an act done on impulse in an emergency; the alarm was triggered automatically when the safe was opened. Assuming that the sending of the alarm was a proximate cause of the patron's death,[30] the court of appeals should have considered whether this effort to capture the gunmen[31] was privileged as a defense of property or as an effort to summon

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risks, as to reasonably require security measures for the protection of invitees." *Id.* at 552, 143 A.2d at 236. In the absence of a breach of a duty, the court found it unnecessary to consider whether the failure to take further precautions in advance of the robbery was a proximate cause of the plaintiff's injury. *Id.* at 555, 143 A.2d at 238.

29. *Id.* at 558, 143 A.2d at 239. *But see* Boyd v. Racine Currency Exch., Inc., ___ Ill.2d ___, 306 N.E.2d 39 (1973). *See also* notes 33-43 *infra* and accompanying text.

30. It plainly was a cause in the sense that but for the summoning of the police the decedent would not have been taken hostage and killed. Whether the chain of events made the installation of the automatic alarm so remote as to preclude recovery as a matter of law is more a question of policy than analysis. *See* Feezor & Favour, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635, 642 (1940). Kansas recognizes the foreseeability test as elucidated in Palsgraf v. Long Island R.R., 248 N.Y. 339, 344-45, 162 N.E. 99, 100-01 (1928). George v. Breising, 206 Kan. 221, 477 P.2d 983 (1970) (leaving car unlocked with keys in the ignition a remote cause of unforeseen injury to a pedestrian after the car is stolen); Cooper v. Eberly, 211 Kan. 657, 508 P.2d 943 (1973) (failing to lock gate a concurrent proximate cause of foreseeable harm when third party opened gate and released horse into the path of plaintiff's automobile); RESTATEMENT (SECOND) OF TORTS §§ 448, 449 (1965).

31. In the absence of notice to the robbers that an alarm was present, the potential deterrent effect of an alarm cannot be used as a justification.

the police so that they could aid the store's employees and customers. To hold, as the court in *Kelly* did,[32] that a jury might find that during the robbery the danger to the decedent was apparent and the wrong action was taken is probably correct, but the court's analysis is insufficient because the silent alarm was set before the robbery took place and was not activated by anything the store employees did during the robbery. The court's opinion does not establish whether a jury may base liability on the installation of the alarm. If this is not permitted, the only apparent questions for the jury are whether the employees should have warned the robbers of the presence of the alarm, or attempted to prevent the customer from being taken hostage.

In *Boyd v. Racine Currency Exchange, Inc.*,[33] a case decided after *Kelly*, the Supreme Court of Illinois affirmed the dismissal of a wrongful death action where defendant proprietor protected its assets from a robber at the expense of the life of a customer. The currency exchange had placed its teller behind a bullet-proof shield. A holdup man held a gun to a customer's head and threatened to kill him unless he was given money. When the teller refused to comply and ducked beneath the counter, the robber killed the customer.[34] Although the customer was exposed to an unreasonable risk of harm, *i.e.* imminent death, the court held that a business proprietor has no duty to accede to criminal demands.[35] The proprietor's duty to warn the customer did not arise because she could see the danger for herself once the holdup began.[36] Although the opinion purported to analyze several factors in reaching the decision,[37] the court stressed the harm that might occur if a proprietor faced civil liability for refusing to pay to save a customer's life.

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32. 484 F.2d at 1364.
33. ___ Ill.2d ___, 306 N.E.2d 39 (1973).
34. *Id.* at ___, 306 N.E.2d at 40.
35. *Id.* at ___, 306 N.E.2d at 42.
36. *Id.* at ___, 306 N.E.2d at 41.
37. *Id.* at ___, 306 N.E.2d at 41-42. Imposition of a duty requires not only foreseeability, but a consideration of "[t]he likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing the burden upon the defendant. . . ." *Id.* at ___, 306 N.E.2d at 42, *quoting* Lance v. Senior, 36 Ill. 2d 516, 224 N.E.2d 231 (1967). In addition, "whether acquiescence [to the robber] would have spared the decedent is, at best, speculative." ___ Ill. 2d at ___, 306 N.E.2d at 42.

> [To find a duty might] encourage the use of hostages for such purposes, thereby generally increasing the risk to invitees. . . . [The proprietor] would have little choice in determining whether to comply with the criminal demand and surrender the money or to refuse the demand and be held liable in a civil action for damages brought by . . . the hostage. The existence of this dilemma and knowledge of it by those who are disposed to commit such crimes will only grant to them additional leverage to enforce their criminal demands. The only persons who will clearly benefit from the imposition of such a duty are the criminals.[38]

The court thus finds a bank free of liability despite the unreasonable risk of harm faced by its invitee. It can be argued that defendant in *Kelly* also created an unreasonable risk by failing to honor the demands of the criminals. Although the employees were told *not* to resist, the installation of the automatic silent alarm was an act designed to thwart the robbery, and the sending of the alarm exposed the invitee to risk.[39] In any case, under the reasoning in *Boyd* plaintiff has no hope of recovery unless the facts are such that the customer could not see for herself that a robbery was in progress, and missed an opportunity to escape because defendant failed to warn her.[40]

In weighing the interests of proprietor and invitee in a robbery situation, another aspect favors the proprietor. The law recognizes a privilege of self-defense, and excuses the use of force likely to cause death or serious harm if reasonably needed to prevent the commission of a felony.[41] In a five to three decision an Indiana court reversed a jury finding that a tavern owner acted carelessly in attempting to grab the gun from a robber's hand.[42] The plaintiff in that case brought suit on behalf of a customer who was killed after he attempted to jump on the robber's gun in defense of himself and his wife as the robber and the proprietor scuffled for the gun. The court

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38. ___ Ill. 2d at ___, 306 N.E.2d at 42. Judge Goldenhersh in his dissent, sensibly states that: "The majority's polemic on the subject of the hazards which would be created by an application of established legal principles to this case finds little support in logic and none whatsoever in the legal authorities." *Id.*

39. The unreasonableness of the risk in *Kelly* is less compelling than that in *Boyd* because the police summoned by silent alarm come to aid the invitee as well as to aid the proprietor.

40. *See* notes 15-19 *supra* and accompanying text.

41. RESTATEMENT (SECOND) OF TORTS § 143(2) (1965).

42. Yingst v. Pratt, 139 Ind. App. 695, 220 N.E.2d 276 (1966).

characterized the tavern owner's actions as ordinary resistance, and held him "justified, excused, and privileged."[43]

Despite the privilege of self-defense, and the *Boyd* court's fear of encouraging criminals, there does not appear to be any justification for extending the self-defense privilege so that the installation of a security device, like a bullet-proof shield or a silent alarm, should be included if in fact it creates an unreasonable risk of harm to a customer. Even though many cities sponsor civilian anti-crime programs,[44] the public may be best served by requiring that an innocent customer's interest be weighed against the desirability of protection of property and the enforcement of the criminal law.

Unlike *Boyd, Kelly* creates a potential tort liability for a proprietor who acts unreasonably during a robbery in an attempt to preserve his property and thereby exposes a customer to harm. *Kelly* is admirable for cautioning the proprietor that he must exercise judgment even in summoning the police, but it fails to provide strong guidance in delineating the interests which need be considered in making such a decision.

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43. *Id.* at 699, 220 N.E.2d at 280. In Helms v. Harris, 281 S.W.2d 770 (Tex. Civ. App. 1955) (writ of error refused), the proprietor attempted to grab the robber's gun and the robber shot the customer. The court held that the proprietor could only be liable if the evidence were "clear and convincing . . . that such resistance . . . involved unreasonable risk of grave harm to innocent third persons. . . ." *Id.* at 773. *See also* Schubowsky v. Hearn Food Store, Inc., 247 So. 2d 484 (Fla. Dist. Ct. App. 1971) (armed resistance to violent crime justified and privileged).

44. A civilian anti-crime force in New York City will spend nearly $360,000 on fences, lights, locks, alarms, etc. N.Y. Times, Sept. 8, 1973, at 35, col. 1.