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Case Notes

CASE NOTES

Constitutional Law—State Tuition Payments to Denominational Schools Are Unconstitutional.—A Vermont statute[1] required school districts either to maintain a high school or to furnish secondary instruction at schools selected by the parents of the pupils. If the second alternative were followed, the district was authorized to pay tuition to the selected school.[2] Defendant school district did not maintain a secondary school but made tuition payments to denominational (Roman Catholic) high schools on behalf of the pupils. These schools were approved by the state board of education. Religious instruction was mandatory only for students of the Roman Catholic faith. Plaintiff, a resident taxpayer, obtained an injunction against further payments. The Supreme Court of Vermont affirmed. The payment of tuition to a denominational school by a public entity works a fusion of secular and sectarian education in violation of the first amendment to the United States Constitution. *Swart v. South Burlington School Dist.*, — Vt. —, 167 A.2d 514 (1961).

Prior to the framing of the Constitution, Thomas Paine wrote:

> As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which government has to do therewith.[3]

The framers of the first amendment accepted the proposition that religion was a nonpolitical, personal matter and provided that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[4] These guarantees became operative on the states through the due process clause of the fourteenth amendment.[5] Although the "establishment of religion" and "free exercise" clauses are historically distinguishable,[6] the Supreme Court has used them interchangeably in upholding or striking down statutes which touch on the delicate area of church-state relations.[7]

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1. Vt. Stat. Ann. tit. 16, § 793 (1958): "(a) Each town district shall maintain a high school or furnish secondary instruction, as hereinafter provided, for its advanced pupils at a high school . . . to be selected by the parents . . . of the pupil . . . . (b) Each . . . district shall pay tuition per pupil per school year . . . but not in excess of $325. . . ." A number of other states have substantially similar statutes. E.g., Conn. Gen. Stat. § 10-33 (1958); Me. Rev. Stat. Ann. ch. 41, § 107 (1954); Tex. Rev. Civ. Stat. art. 2678a (1951).

2. In Samson v. Town of Grand Isle, 78 Vt. 383, 63 Atl. 180 (1906), the court explained the operation of the statute: "[the district] cannot be compelled to select one course instead of the other, but only to select one course or the other. . . ." Id. at 391, 63 Atl. at 182.

3. Paine, Representative Selections 41 (Clark ed. 1944).

4. U.S. Const. amend. I.

5. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

6. See O'Neill, Nonpreferential Aid to Religion Is Not an Establishment of Religion, 2 Buffalo L. Rev. 242, 243 (1953).

7. See, e.g., Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952); Reynolds v. United States, 98 U.S. 145, 161-67 (1878).

While it is not possible to formulate any precise test by which the constitutionality of a statute may be judged, it is at least certain that neither the state nor federal government may participate in the affairs of any religious organization.[8] The government must be neutral with regard not only to competing religious sects, but also as between religious belief and disbelief.[9] The right to free exercise of religion is not absolute but rather it must yield when the competing interest of the state is greater.[10] It is this greater interest that allows the government to prohibit polygamy although it is the dogma of an organized church.[11] The state may compel persons, regardless of religious objections, to undergo vaccinations,[12] or it may compel objecting parents to allow transfusions for their children.[13]

The so-called principle of church-state separation has been subjected to severe tests in the area of education, especially with regard to the use of public funds to aid sectarian institutions. Two propositions are certain: (1) The state may not directly finance religious instruction;[14] and (2) the mere fact that the expenditure of public funds results in an aid to a religious institution does not violate the constitutional ban.[15] The court in the instant case, by narrowing the issue to place the tuition payments within the ambit of the first proposition,[16] ignored the second. The court based its decision solely on the rationale that since the Catholic Church was the source of the schools' support and control, an unconstitutional fusion of public and religious education resulted from the tuition payments. The holding of the court was that these payments were unconstitutional on their face. The court's holding is incorrect and its reasoning inadequate in light of *Cochran v. Louisiana*

8. United States v. Ballard, 322 U.S. 78, 85-88 (1944) (correctness of religious dogma not a judicial problem); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872) (federal courts have no jurisdiction to adjudicate religious schisms).

9. Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). The state may not require all children to attend public schools. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

10. For a discussion of the inherently restrictive nature of the first amendment freedoms generally, see Worthy v. Herter, 270 F.2d 905, 908 (D.C. Cir.), cert. denied, 361 U.S. 918 (1959), 28 Fordham L. Rev. 816 (1960).

11. Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

12. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

13. People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952). Religious services involving snake handling may be prohibited. State v. Massey, 229 N.C. 734, 51 S.E.2d 179, appeal dismissed sub nom. Bunn v. North Carolina, 336 U.S. 942 (1949).

14. People ex rel. McCollum v. Board of Educ., 333 U.S. 203, 210 (1948).

15. Everson v. Board of Educ., 330 U.S. 1, 5-8 (1947); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370, 374-75 (1930); Bradfield v. Roberts, 175 U.S. 291, 297-300 (1899).

16. "Does the payment of tuition to a religious denominational school by a public entity finance religious instruction, to work a fusion of secular and sectarian education?" Swart v. South Burlington School Dist., — Vt. at —, 167 A.2d at 520 (1961).

State Bd. of Educ.[17] and *Everson v. Board of Educ.*,[18] decided by the United States Supreme Court.

These cases demonstrate that the separation principle is not an absolute one; that the courts should look to the competing societal values and to whether the church is the direct or indirect beneficiary of the aid. The Court in *Cochran* held constitutional a statute authorizing state supply of nonreligious texts to denominational schools.

> The schools . . . are not the beneficiaries of these appropriations. . . . The school children and the state alone are the beneficiaries.[19]

The Court pointed out that the interest of the state in the education of its youth takes precedence over what might be, without that competing value, a violation of the first amendment.[20]

In *Everson,* the Court allowed state-financed bus transportation to children attending religious schools because of the competing value of child welfare. In both *Cochran* and *Everson,* the Court was careful to point out that the incidental benefit conferred upon the church schools would not make the aid unconstitutional.[21]

In the principal case, the children, their parents, and the state were the true beneficiaries of the payments; the payments were not for the purpose of financing a sectarian institution, but to discharge a duty to provide the children with suitable education. The court should have considered that the welfare of the children and the interest of the state in their education was more important than the indirect benefit which may[22] have been conferred upon the sectarian schools. The failure to take this approach in favor of the dogmatic, simple one selected, was incorrect. The court assumed to be absolute what the Supreme Court has declared is not, *i.e.,* that the mere giving of public funds to an enterprise operated by a religious organization is a support of that religion and violative of the first amendment. In 1955 a similar problem was presented to the highest court of New Hampshire.[23] The issue was the constitutionality

17. 281 U.S. 370 (1930).

18. 330 U.S. 1 (1947).

19. 281 U.S. at 375.

20. It is interesting to note that counsel for appellant in Cochran anticipated the Everson holding and indicated that the facts of the present case would give rise to a conclusion different from the one arrived at: "If the furnishing of text-books . . . is not considered an aid to . . . private schools . . . the tuition of the children . . . could be paid; their transportation . . . could be provided. . . ." Id. at 372.

21. Even direct aid in the form of tax relief has been held constitutional. Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1, appeal dismissed sub. nom. Heisey v. County of Alameda, 352 U.S. 921 (1956). Payment of salaries to nuns teaching in public schools has also been held constitutional, even where they have taken a vow of poverty. Rawlings v. Butler, 290 S.W.2d 801, 806 (Ky. 1956).

22. There is no indication that the schools would not continue to receive the same tuition payments without the state aid to the children.

23. Opinion of the Justices, 99 N.H. 519, 113 A.2d 114 (1955). The decision dealt with the provisions of the state constitution, which are more specific than the first amendment

of a statute giving state aid to denominational hospitals for the education of nurses. The court found that the payments would be proper.

> The purpose of the grant proposed . . . is neither to aid any particular sect or denomination, nor all denominations, but to further the teaching of the science of nursing.[24]

Likewise in the present case, the avowed and actual purpose of the aid was to educate the children. "The fundamental proposition that public moneys shall be used for a public purpose only has not prevented the use of private institutions as a conduit to accomplish the public objectives."[25]

The peculiar facts of the instant case suggest that not only were the tuition payments constitutional, but, what is more, the failure to provide them would violate the "free exercise" clause of the first amendment. The state assumed the duty to provide secondary education for children.[26] The legislature recognized the right of the parent to send a child to a school other than a public school. It could not do otherwise consistently with the fourteenth amendment.[27] The state commanded that all children within certain ages attend school.[28] The Vermont school district in question provided no public school facilities. Thus, in effect, the state commanded the children to attend private schools. Since Catholic children must, according to the dictates of their religion,[29] attend Catholic schools, the court's interpretation of the statute results in a refusal to them of the aid given to their contemporaries who attend private nondenominational schools. They are thus economically restrained from following the dictates of their conscience. By indirection they are forced to yield their constitutional right[30] and to abandon their selected school. The court justified this result by reference to the metaphorical wall of separation between church and state. What then becomes of the first amendment prohibition against preventing the free exercise of religion? A conflict is raised between what this court considered a violation of church-state separation and the childrens' right to free exercise of religion. The United States Supreme Court has never decided whether such a conflict can exist, and if it does, which principle would take precedence. It is submitted that the primary purpose of

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prohibitions. "[N]o money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination." N.H. Const. Part II, art. 83.

24. Opinion of the Justices, supra note 23, at 522, 113 A.2d at 116. The court went on to say, "If some denomination incidentally derives a benefit through the release of other funds for other uses, this result is immaterial." Ibid.

25. Id. at 523, 113 A.2d at 116.

26. A practical problem is also created by the decision. The court points out that a "substantial number" of the district children attend the denominational schools. — Vt. at —, 167 A.2d at 520. They may be unable to continue without state aid. Unless other private accommodations are adequate, these children will be unable to attend secondary school.

27. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

28. Vt. Stat. Ann. tit. 16, § 1121 (1958).

29. 2 Sacred Canons, Can. 1374 (Abbo & Hannan 2d rev. ed. 1960).

30. Pierce v. Society of Sisters, 268 U.S. 510, 533-35 (1925).

the first amendment is the free exercise of one's religion, and that the establishment clause was incorporated into the amendment not as an end in itself but as the principal means of guaranteeing the free exercise. If the means obstructs the attainment of the end, it must yield. One court has suggested this answer:

> The state is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all.[31]

Of course, where a public school system is provided, no conflict arises because of state refusal to give tuition payments to denominational schools. Here the overbearing expense of maintaining plural systems of education would require the religious convictions of the Catholic to yield. Where no such compelling reason is offered, but rather the so-called separation of church and state, justified as a means of attaining the end of free exercise, results only in thwarting that end, then the means must yield.[32]

The result of the instant decision is that students who choose to attend nondenominational private schools are given a financial advantage over those who choose to attend private denominational schools. This is a preference of the secular over the sectarian. The *McCollum*[33] Court stated that all religions cannot be preferred over no religion, but the Court in *Zorach v. Clauson*[34] recognized the limitations on this principle when it stated that "We cannot read into the Bill of Rights . . . a philosophy of hostility to religion."[35] The decree of the court in the present case results in precisely such a hostility. It is suggested that the Constitution does not require a person to be subjected to a financial burden merely because he has exercised his constitutional right to obtain his education at a church-operated school. Where the state chooses to educate its youth by using the facilities of private institutions, it should not be required to restrict the selection of schools to those that have no religious connections.

Evidence—Control of Subpoenaed Records Inferred From Witness' Failure To Deny Control.—Petitioner was subpoenaed to appear and produce certain records before a subcommittee of the House Committee on Un-American Activities. He appeared, but did not produce the records. Subsequently, he was indicted and tried for contempt of Congress.[1] At his trial, the Government introduced as proof of the contempt the purpose of the subcommittee's investi-

31. Chance v. Mississippi Text Book Rating Bd., 190 Miss. 453, 467-68, 200 So. 706, 710 (1941).

32. See generally Squires v. City of Augusta, 155 Me. 151, 153 A.2d 80 (1959) (dissenting opinion).

33. People ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948).

34. 343 U.S. 306 (1952).

35. Id. at 315.

1. 52 Stat. 942 (1938), 2 U.S.C. § 192 (1958).

gation,[2] and portions of the transcript of the subcommittee hearing evidencing petitioner's unexplained refusal to furnish the requested records of the Civil Rights Congress.[3] Petitioner offered no contravening evidence, but simply asserted that the Government had failed to show any connection between himself and the Civil Rights Congress or that he actually had possession or control of the documents in question. He was nevertheless convicted of contempt, and the conviction was upheld by the federal court of appeals.[4] On certiorari, the Supreme Court of the United States, four justices dissenting, affirmed. The Court held that the Government's evidence raised an inference of control and established a prima facie case which petitioner was then obligated to meet with refutative evidence. *McPhaul v. United States*, 364 U.S. 372 (1960).

Inherent in the judicial[5] and legislative[6] branches of the federal government is the power to punish recalcitrant witnesses for contempt. Although contempt may be an admixture of both civil and criminal elements,[7] a distinction is usually drawn between the two.[8] It is considered civil when the punishment is remedial, intended to compel action favorable to another party,[9] and may be avoided by obedience to the direction of the court.[10] Contempt is criminal when the punishment is punitive, used to remove an obstruction to the administration of justice[11] and vindicate the particular body's authority.[12] The power of a federal court to punish for contempt has been narrowed by statute to instances of misbehavior in the presence of a court or by its officers, or disobedience of a court mandate.[13] This limitation, which has been strictly

2. The investigation was probing the extent of Communist activities in industrial areas vital to the nation's defense effort. McPhaul v. United States, 364 U.S. 372, 374 (1960).

3. The subcommittee had on file a letter of the Civil Rights Congress, the letterhead of which described petitioner as Executive Secretary and which was subscribed with what was purportedly petitioner's signature. Id. at 374, 377 n.2.

4. McPhaul v. United States, 272 F.2d 627 (6th Cir. 1959).

5. Green v. United States, 356 U.S. 165, 170 (1958); Bessette v. W. B. Conkey Co., 194 U.S. 324, 326 (1904).

6. Watkins v. United States, 354 U.S. 178, 187 (1957). See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926).

7. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

8. See, e.g., McCrone v. United States, 307 U.S. 61, 64 (1939); Gompers v. Bucks Stove & Range Co., supra note 7, 441-46.

9. Imprisonment may be ordered for civil contempt only where a party disobeys an order to do an affirmative act. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-43 (1911). There is no jury trial for civil contempt. United States v. Onan, 190 F.2d 1, 9 (8th Cir.), cert. denied, 342 U.S. 869 (1951).

10. Gompers v. Bucks Stove & Range Co., supra note 9, at 442.

11. E.g., In the Matter of Michael, 326 U.S. 224 (1945); Farese v. United States, 209 F.2d 312, 315 (1st Cir. 1954).

12. Juneau Spruce Corp. v. International Longshoremen's Union, 131 F. Supp. 866, 873 (D. Hawaii 1955). See also Union Tool Co. v. Wilson, 259 U.S. 107, 110 (1922).

13. 18 U.S.C. § 401 (1958). See In the Matter of Michael, 326 U.S. 224, 227 (1945). As to punishment, see Green v. United States, 356 U.S. 165, 188 (1958); James v. United States, 275 F.2d 332, 337 (8th Cir. 1960).

adhered to by the courts,[14] rests in the particular qualities of the contempt power, which is said to be beyond the protective reach of the Constitution, arbitrary in nature, and easily abused.[15] Moreover, there is no absolute right to a trial by jury.[16]

The power of Congress to punish a contumacious witness for contempt may be enforced by Congress itself[17] or by the federal judiciary pursuant to a congressional act.[18] This act exposes to criminal contempt any person who refuses to answer a pertinent question[19] or who willfully[20] makes default[21] in producing papers before a congressional committee. When enforced by the

14. Offutt v. United States, 348 U.S. 11, 14 (1954); Matusow v. United States, 229 F.2d 335, 342 (5th Cir. 1956); Cammer v. United States, 223 F.2d 322 (D.D.C. 1955), rev'd on other grounds, 350 U.S. 399 (1956). But see Green v. United States, 356 U.S. 165, 172-73 (1958). Constitutional safeguards, including the requirement of proof beyond a reasonable doubt, have been extended by the courts. Green v. United States, supra at 173-79. See also Gompers v. United States, 233 U.S. 604, 611-12 (1914); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911). But see James v. United States, 275 F.2d 332, 335 (8th Cir.), cert. denied, 362 U.S. 989 (1960); United States v. Schine, 125 F. Supp. 734 (W.D.N.Y. 1954).

15. Green v. United States, supra note 14, at 168-73.

16. Green v. United States, 356 U.S. 165, 183, 186 (1958); Eilenbecker v. District Court, 134 U.S. 31, 36 (1890). 18 U.S.C. § 3691 (1958) entitles one accused of criminal contempt to a jury trial if "the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted." Fed. R. Crim. P. 42(a) allows summary punishment for criminal contempts committed within the presence of the court. Fed. R. Crim. P. 42(b) allows trial by the court on notice for all other such contempts unless a statute expressly grants the right to trial by jury.

17. Because imprisonment for contempt conviction by Congress could last only as long as the session of Congress, Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821) (dictum), the statute was passed "'to inflict a greater punishment than the committee believe the House possesses the power to inflict.'" Watkins v. United States, 354 U.S. 178, 207-08 n.45 (1957), citing Cong. Globe, 34th Cong., 3d Sess. 405 (1856).

18. 52 Stat. 942 (1938), 2 U.S.C. § 194 (1958). See United States v. Lamont, 18 F.R.D. 27 (S.D.N.Y. 1955), aff'd, 236 F.2d 312 (2d Cir. 1956).

19. See United States v. Orman, 207 F.2d 148, 153 (3d Cir. 1953); Comment, 29 Fordham L. Rev. 357, 371-73 (1960).

20. To be willful the refusal must be intentional and deliberate. Flaxer v. United States, 358 U.S. 147, 151 (1958); Quinn v. United States, 349 U.S. 155, 165 (1955). Willfulness as here used does not require an evil purpose, Fields v. United States, 164 F.2d 97, 100 (D.C. Cir. 1947), cert. denied, 332 U.S. 851 (1948), as in a statute involving a crime of moral turpitude, United States v. Illinois Cent. R.R., 303 U.S. 239, 242-43 (1938). A specific criminal intent need not be shown. Barsky v. United States, 167 F.2d 241, 251 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948).

21. Refusal to appear constitutes contempt. International Union of Operating Eng'rs v. Bryan, 255 S.W.2d 471 (Ky. 1953). The default is "a failure to comply with the summons." United States v. Bryan, 339 U.S. 323, 327 (1950). There must be a reasonable basis for Congress' belief that one is able to comply. United States v. Shelton, 148 F. Supp. 926, 933 (D.D.C. 1957).

judiciary, the individual must be accorded "every right which is guaranteed to defendants in all other criminal cases."[22] This includes proof of guilt beyond a reasonable doubt[23] and trial by jury.[24] Although there is no explicit mention in the statute, the Government does not make out a prima facie case of contempt for failing to produce records without showing the contemnor's control over the requested documents.[25] However, control can be inferred from other evidence, such as an executive position in the organization whose records are subpoenaed.[26]

In finding that the Government had satisfied its burden of proof, the instant Court found sufficient evidence of control solely from the subcommittee's "reasonable basis" in issuing the subpoena and from the fact that petitioner had failed to raise the issue of noncontrol before the committee.[27] Heavy but seemingly undue emphasis was placed by the Court on its language in *United States v. Bryan*.[28] Yet, unlike the instant case, no question existed in *Bryan* as to whether the witness had control of the subpoenaed documents. She admittedly had such control.[29] The main question was whether the Government was required to show the presence of a committee quorum to establish a prima facie case of willful default. The *Bryan* Court answered this in the negative, and also held that lack of a committee quorum was not an available defense because the witness had never raised it at the hearing.[30] Consequently, that case affords no authority on the necessity of proving control where that element is clearly part of the Government's affirmative case.

The dissent took exception to the majority finding of sufficient proof of control, and argued that there was an improper shifting of the burden of proof on this issue because the only admissible evidence of control was an inference from petitioner's unexplained refusal to produce the records. A letterhead of the Civil Rights Congress over petitioner's name, identifying him as executive secretary of that organization, was unsuccessfully sought to be introduced as evidence. It was considered by the trial court, but apparently on the question of pertinency rather than control.[31] Therefore, absence of any independent

22. Watkins v. United States, 354 U.S. 178, 208 (1957). See the dissent of Mr. Justice Frankfurter in United States v. Fleischman, 339 U.S. 349 (1950).

23. See, e.g., Bowers v. United States, 202 F.2d 447, 452 (D.C. Cir. 1953).

24. U.S. Const. amend. VI. See Dennis v. United States, 339 U.S. 162, 168 (1950).

25. Nilva v. United States, 352 U.S. 385, 392 (1957); United States v. Fleischman, 339 U.S. 349, 358-59 (1950). See United States v. Kamp, 102 F. Supp. 757, 759 (D.D.C. 1952). But see the reasoning of London Guarantee & Acc. Co. v. Doyle, 134 Fed. 125, 128 (C.C.E.D. Penn. 1905), rev'd on other grounds, 204 U.S. 599 (1907).

26. Nilva v. United States, supra note 25, at 392-94; Lopiparo v. United States, 216 F.2d 87, 91 (8th Cir. 1954); United States v. Goldstein, 105 F.2d 150, 152 (2d Cir. 1939). But see United States v. Patterson, 219 F.2d 659 (2d Cir. 1955).

27. 364 U.S. 372, 379 (1960).

28. 339 U.S. 323 (1950). The Court placed emphasis on the fact that Bryan would not have produced the records even if a quorum had been present.

29. Id. at 325.

30. Id. at 335.

31. 364 U.S. 372, 377 n.4 (1960).

proof by the Government on the element of control was tantamount, reasoned the dissent, to an overturning of the traditional presumption of innocence accorded a defendant in a criminal case.

The position of the dissent would not appear to be entirely sound, because it overlooks the fact that petitioner ignored every opportunity to explain to the committee the reasons for his noncompliance with the subpoena. Respect for the authority of a congressional committee should have made it incumbent upon him to do so. A failure to offer any defense should properly be treated as some evidence that he did enjoy control over the subpoenaed records. However, since petitioner was on trial for the statutory crime of willful default and since control was a requisite in the Government's case, petitioner had a right, as any other defendant, to have the Government establish his guilt beyond a reasonable doubt. It is questionable whether the Government here did so. While an unexplained refusal may be some evidence of control, it bears more properly upon the elements of intention and deliberation. There can be no willfulness if these elements are not present.[32] Furthermore, it is difficult to see how there can be a willful default if there are no papers in existence or under the control of petitioner. It is submitted that the Government should be compelled to produce clear evidence that there actually are papers being withheld. Unquestioned acceptance by the trial court of a subcommittee's "reasonable basis" in issuing a subpoena and mere reliance on a witness' unexplained refusal is not such evidence.

The present case, besides lessening the amount of proof required of the Government in a contempt case, can be viewed in the over-all setting as another decision[33] where a majority of the Supreme Court has recognized the importance of the investigatory process and has demonstrated a willingness to sustain convictions of witnesses hampering that process. This is particularly so when communism, its tenets and subversive manifestations are the subjects of investigation. It is suggested, however, that whenever contempt of Congress devolves upon the federal courts, every precaution should be taken to assure the recalcitrant witness the traditional safeguards and guarantees accorded any other defendant on trial for violating a criminal statute. That the defendant is a witness before a congressional committee is no reason for any change.[34]

Evidence—Federal Injunction To Enjoin State Officers From Introducing Wiretap Evidence in State Court Denied.—Petitioner was indicted by the State of New York for burglary, maiming, assault, and conspiracy. Two weeks before trial, he sued in the United States District Court for the Southern District of New York to enjoin the Bronx District Attorney and other state officers from introducing at the trial evidence obtained by tapping petitioner's

32. See note 20 supra.

33. See Braden v. United States, 81 Sup. Ct. 584 (1961); Wilkinson v. United States, 81 Sup. Ct. 567 (1961); Barenblatt v. United States, 360 U.S. 109 (1959), 28 Fordham L. Rev. 522.

34. United States v. Fleischman, 339 U.S. 349, 380 (1950) (Frankfurter, J., dissenting).

telephone. The basis alleged for relief was that divulgence would constitute a violation of Section 605 of the Federal Communications Act,[1] even though the tap had been made pursuant to court order in accordance with state law.[2] The District Attorney did not deny that he had introduced the wiretap evidence before the grand jury, nor that he intended to use such evidence upon trial. Injunctive relief was denied by the district court.[3] The United States court of appeals affirmed.[4] The Supreme Court, in a one sentence memorandum decision, also affirmed, two justices dissenting. *Pugach v. Dollinger*, 81 Sup. Ct. 650 (1961).

The construction of Section 605 of the Federal Communications Act has closely paralleled that of federal prohibitions against the use of evidence obtained by an illegal search or seizure.[5] Proscription of the latter evidence has not been extended to state criminal trials[6] with the exception that federal officers have been prohibited from presenting such evidence in a state court.[7] Similarly, although section 605 prohibits admission of wiretap evidence in a federal court, whether obtained by federal[8] or state[9] officers, and although

1. 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958), which provides: "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ." Section 501 of the act, 48 Stat. 1100 (1934), as amended, 47 U.S.C. § 501 (1958), makes a violation of § 605 a misdemeanor. See, e.g., United States v. Gris, 247 F.2d 860 (2d Cir. 1957) (conviction upheld).

2. N.Y. Const. art. I, § 12, provides: "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

3. Pugach v. Sullivan, 180 F. Supp. 66 (S.D.N.Y. 1960).

4. Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960). Although the permanent injunction was denied, a temporary stay pending appeal to the Supreme Court was granted, with respect to the fruits of the wiretap evidence as well as the evidence itself. Pugach v. Dollinger, 280 F.2d 521 (2d Cir. 1960).

5. For a chronological development, see Weeks v. United States, 232 U.S. 383 (1914) (evidence obtained by federal officers as result of illegal search and seizure inadmissible in federal court); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (indirect use of such evidence prohibited by fourth amendment; "fruit-of-poisonous tree doctrine"); Elkins v. United States, 364 U.S. 206 (1960) (federal criteria of unlawful search and seizure applied to state officers to exclude evidence from federal court). See Bradley & Hogan, Wiretapping: From Nardone to Benanti and Rathbun, 46 Geo. L.J. 418, 430-31 (1958).

6. Wolf v. Colorado, 338 U.S. 25 (1949) (exclusion of evidence obtained by unreasonable police intrusion not demanded by due process).

7. Rea v. United States, 350 U.S. 214 (1956).

8. Nardone v. United States, 302 U.S. 379 (1937). See also Nardone v. United States, 308 U.S. 338, 340 (1939) (derivative use of wiretap evidence prescribed by § 605); Weiss v. United States, 308 U.S. 321 (1939) (§ 605 applicable to intrastate as well as interstate communications).

9. Benanti v. United States, 355 U.S. 96 (1957).

divulgence[10] in any court constitutes a federal crime,[11] the statute has not proven a bar to admission of state-gathered wiretap evidence in state courts.[12] In the only previous Supreme Court decision to treat the question, *Schwartz v. Texas*,[13] the Court found no clear congressional intent to pre-empt state rules of evidence.[14] This specious reasoning, exempting state admission of wiretap evidence from the prohibition of section 605 while holding divulgence of such evidence a violation in itself, has survived without modification.[15]

In its disappointingly curt opinion, the instant Court merely cited the authority of *Stefanelli v. Minard*[16] and *Schwartz v. Texas*.[17] In the former decision the Court refused to enjoin the use in a state criminal trial of evidence alleged to have been illegally seized by state officers. The reason for denying injunctive relief was a due regard for federal-state relations, *i.e.*, a reluctance

10. Section 605 of the Federal Communications Act, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958), provides: "[N]o person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . ."

11. 48 Stat. 1100 (1934), as amended, 47 U.S.C. § 501 (1958).

12. Many states admit wiretap evidence; some authorize limited law-enforcement wiretapping by statute. E.g., La. Rev. Stat. Ann. § 14:322 (West 1951); Mass. Gen. Laws Ann. ch. 272, § 99 (Supp. 1959); N.Y. Const. art. I, § 12; N.Y. Code Crim. Proc. § 813-a; see Hearings on Wiretapping, Eavesdropping, and the Bill of Rights Before a Subcommittee of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., pt. 1 App., at 35-39 (1958); Hennings, The Wiretapping-Eavesdropping Problem: A Legislator's View, 44 Minn. L. Rev. 813, 817 (1960). See also Rosenzweig, The Law of Wiretapping, 32 Cornell L.Q. 514, 525-27 (1947); Westin, The Wiretapping Problem: An Analysis and a Legislative Proposal, 52 Colum. L. Rev. 165, 181-86 (1952).

13. 344 U.S. 199 (1952).

14. "[T]he introduction of the intercepted communications would itself be a violation of the statute, but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts." Id. at 201. See Savarese, Eavesdropping and the Law, 46 A.B.A.J. 263, 334-36 (1960).

15. The state rule of evidence doctrine enunciated in Schwartz was not directly questioned by the Court in Benanti v. United States, 355 U.S. 92, 101 (1957), nor had its validity been otherwise reviewed by the Court prior to the instant appeal. See People v. Variano, 5 N.Y.2d 391, 157 N.E.2d 857, 185 N.Y.S.2d 1 (1959); People v. Dinan, 7 App. Div. 2d 119, 181 N.Y.S.2d 122 (2d Dep't 1958), aff'd mem., 6 N.Y.2d 715, 158 N.E.2d 501, 185 N.Y.S.2d 806, cert. denied, 361 U.S. 839 (1959); Commonwealth v. Voci, 393 Pa. 404, 143 A.2d 652, cert. denied, 358 U.S. 885 (1958). Cf. Savarese, Eavesdropping and the Law, supra note 14. State admission of wiretap evidence is based on the common law rule that evidence illegally obtained is admissible if relevant. See 8 Wigmore, Evidence §§ 2183-84b (3d ed. 1940). Compare People v. Defore, 242 N.Y. 13, 150 N.E. 585, cert. denied, 270 U.S. 657 (1926), with In re Tel. Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958).

16. 342 U.S. 117 (1951).

17. 344 U.S. 199 (1952).

by the Court to intervene piecemeal in a state's administration of its criminal law.[18] Specifically, the restraint doctrine was invoked on the ground that federal intrusion would have involved resolution of the collateral issue of an alleged violation of due process. In effect, the Court would have been compelled to interrupt a state criminal proceeding in order to measure the conduct of state officers against the undefined criteria of procedural due process:

> If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum. . . .[19]

However, the restraint doctrine did not prevent the federal judiciary from enforcing federal law via injunction in barring a federal officer from introducing illegally seized evidence in a state criminal trial.[20] It would appear, therefore, that where federal law has provided a clear and definite standard of conduct for law enforcement officers owing obedience to that law, the *Stefanelli* doctrine would not militate against federal intervention in state prosecutions to insure compliance with that law. Considered in that posture, the present suit did not necessitate federal determination of a collateral issue. The Court's construction of section 605 has certainly been unambiguous.[21] Both federal and state officers are prohibited from using wiretap evidence. The propriety of federal action to enforce that prohibition, prior to the instant case, appeared unaffected by the restraint doctrine. Nevertheless, the Court's extension of that policy to bar injunctive relief in the present case has rendered federal equity even more inaccessible as a discretionary remedy to protect federal rights threatened in state proceedings.

Moreover, even though considerations of federal restraint be proper in a particular case, *Stefanelli* clearly accepted the traditional rule that federal equity might grant relief where irreparable injury would otherwise ensue.[22] This requisite certainly existed in the instant case. Neither remedy by way of damages[23] nor vindication through federal prosecution[24] have proven ade-

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18. The policy of federal restraint evoked in Stefanelli is a derivative of the general rule that federal equitable power will not be exercised to restrain in toto state prosecutions based on state laws suspected to be unconstitutional. See Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943); Beal v. Missouri Pac. R.R., 312 U.S. 45, 49 (1941); Spielman Motor Sales Co. v. Dodge, 285 U.S. 89, 95-96 (1935). But see Rea v. United States, 350 U.S. 214 (1956) (federal officer restrained from turning over to state officers evidence illegally obtained).

19. 342 U.S. at 123.

20. Rea v. United States, 350 U.S. 214 (1956). But see Voci v. Storb, 235 F.2d 48, 49 (3d Cir. 1956).

21. "Section 605 contains an express, absolute prohibition against the divulgence of intercepted communications." Benanti v. United States, 355 U.S. 92, 102 (1957).

22. 342 U.S. at 122. See Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943).

23. Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947) (dictum) (§ 605 creates a private right to civil action). See Restatement, Torts § 286 (1938).

24. 48 Stat. 1100 (1934), as amended, 47 U.S.C. § 501 (1958).

quate in the light of experience,[25] and alternative relief by way of appeal is illusory, especially in view of the Court's reaffirmation of *Schwartz*.[26] On the other hand, the Court in *Stefanelli* did state that a conviction would not constitute irreparable harm.[27] That conclusion rested on the Court's adherence to the rule of *Wolf v. Colorado*[28] that introduction of illegally seized evidence did not, in fact, violate due process. In the instant case, the Court, in relying on *Schwartz,* may well have been applying the same rationale in that *admission* of wiretap evidence does not violate federal law so as to invalidate a subsequent conviction. But, unlike *Wolf,* the divulgence of wiretap evidence in a state court *does* violate federal law. The circumstance that admission of such evidence does not warrant reversal does not exempt the divulgence from the prohibition of section 605. On the contrary, it points up the impossibility of remedying petitioner's injury once the criminally offered evidence is admitted.[29] In view of these considerations, the present Court's unattended reference to *Stefanelli* would indicate an amplification of the restraint doctrine to preclude collateral intervention by federal equity on any grounds in state criminal proceedings, without regard to the danger of irreparable injury.

The Court's reliance on *Schwartz* appears wholly unnecessary to this decision.[30] That case was not concerned with the propriety of federal inter-

25. There have been no prosecutions of law-enforcement officers under § 501, and only one successful prosecution in any instance. See United States v. Gris, 247 F.2d 860 (2d Cir. 1957); Savarese, Eavesdropping and the Law, supra note 14, at 266.

26. A state conviction based on wiretap evidence will not be reversed under federal law, Schwartz v. Texas, 344 U.S. 199 (1952), or New York law, People v. Variano, 5 N.Y.2d 391, 157 N.E.2d 857, 185 N.Y.S.2d 1 (1959).

27. 342 U.S. at 122.

28. 338 U.S. 25 (1949).

29. "If the federal question is not now protected, it can never become the basis for relief." Pugach v. Dollinger, 81 Sup. Ct. at 652 (Douglas, J., dissenting). With respect to petitioner's right to equitable relief under § 605, the construction of that section in Nardone v. United States, 302 U.S. 379, 383 (1937), indicated that the individual's right of privacy was the gravamen of the congressional intent manifested in the statute. The language of the Court condemning wiretapping as "inconsistent with ethical standards and destructive of personal liberty," points up that individual rights created by § 605 are of a more serious nature than a mere right to a civil action in tort. The Court continued: "The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution." Ibid. This language was adopted by the Court in Benanti v. United States, 355 U.S. 92, 103 (1957).

The language in Nardone v. United States, supra, shows that § 605 might well have been termed an "Act of Congress providing for equal rights of citizens," within the meaning of the Civil Rights Act, 28 U.S.C. § 1343(3) (1958), which gave district courts original jurisdiction in a civil action by any person "to redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured . . . by any Act of Congress providing for equal rights of citizens. . . ." But see McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951) (jurisdiction under Civil Rights Act denied on facts similar to Pugach).

30. Mr. Justice Brennan based his concurring opinion solely upon the authority of Stefanelli and refused to join the majority in its reliance upon Schwartz.

vention to prohibit criminal divulgence of wiretap evidence. The sole consideration there was the propriety of admitting such evidence in a state court. Obviously, the present Court, in citing *Schwartz*, intended no more than a reaffirmation of the state's right to formulate its own rules of evidence with respect to wiretapping. Curiously and conspicuously absent in this regard is any reference to *Benanti v. United States*,[31] where the Court denounced New York's system of law enforcement wiretapping as illegal and violative of section 605.[32] The present decision appears totally inconsistent with the implications in *Benanti* regarding federal supremacy.[33] By virtue of the supremacy clause there is imposed upon the state judiciary an obligation no less compelling than the duty of the federal judiciary to effectuate, and not frustrate, applicable federal law. The instant decision, in effect, grants a license to state officers to use wiretap evidence, but exposes them to the risk of federal prosecution for doing so.

The Court has not clarified the problems of wiretapping. It has compounded them. Furthermore, the absence of any mention of the pre-emptive scope of section 605, enunciated in *Benanti*, appears to signal a reversal in trend and a new policy of federal tolerance toward continued police wiretapping. The practical effect on persons threatened in state proceedings with the criminal use of wiretap evidence is complete federal foreclosure of relief, either by way of appeal from the conviction or by application for injunction, the only possible alternatives.[34]

In *Olmstead v. United States*,[35] in a five-to-four decision, the Supreme Court held that wiretapping was not properly a search or seizure within the meaning of the fourth amendment. A less technical appraisal of the purpose of the amendment, however, would certainly indicate that the spirit of its provisions

31. 355 U.S. 92 (1957).

32. Id. at 105-06: "We find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy." The Court cited Pennsylvania v. Nelson, 350 U.S. 497 (1956) (Pennsylvania law against subversion held invalid because of congressional pre-emption). Compare discussion in People v. Broady, 5 N.Y.2d 500, 153 N.E.2d 817, 186 N.Y.S.2d 230 (1959). See Savarese, Eavesdropping and the Law, 46 A.B.A.J. 263, 334-36 (1960).

A related problem, whether both an interception and a divulgence are required to constitute a violation of § 605, was reserved by the Court in Benanti, 355 U.S. 92, 100 n.5 (1957). Actually this point was rendered moot by the second Nardone decision, 308 U.S. 338 (1939), since it is impossible to conceive of a situation where a law-enforcement agency would not make some use of the wiretap evidence at least indirectly and thereby violate the statute. See Donnelly, Comments and Caveats on the Wiretapping Controversy, 63 Yale L.J. 799, 801-02 (1954).

33. 355 U.S. at 105-06.

34. People v. Dinan, 7 App. Div. 2d 119, 181 N.Y.S.2d 122 (2d Dep't 1958), aff'd mem., 6 N.Y.2d 715, 158 N.E.2d 501, 185 N.Y.S.2d 806, cert denied, 361 U.S. 839 (1959). See United States ex rel. Graziano v. McMann, 275 F.2d 284 (2d Cir. 1960) (writ of habeas corpus on ground that state-obtained wiretap evidence had been admitted at state trial denied). Judge Medina expressed reluctance in having to acquiesce in the Schwartz doctrine. Id. at 286 (concurring opinion).

35. 277 U.S. 438, 464-65 (1928).

had been violated, if not its strict denotation.[36] This constitutional question has unfortunately never been reconsidered by the Court.[37] The Court has, however, used section 605 to secure this protection of the right of privacy,[38] despite sporadic doubts as to its precise scope.[39] The present retirement of the federal judiciary from control over state wiretapping indicates that the Court has now conceded this area to the Congress. In view of past legislative inertia with respect to amending section 605,[40] however, the probable result would appear to be continued federal acquiescence in the state practice of obtaining evidence by wiretapping. However, the confusion and inconsistency perpetuated by the instant decision make it imperative that Congress clearly and unequivocally define the duty of the state judiciary in relation to the federal ban on use of wiretap evidence.

In this regard, there do exist certain areas, such as national security, which suggest the exigency of striking a proper balance between the individual's right to privacy and the necessity of meeting major crimes by the most expeditious means. Solution of this problem must of its nature be accomplished by specific legislation. In order to maintain adequate protection of individual privacy, modification of section 605 to authorize limited law-enforcement wiretapping in these areas should provide a procedure analogous to the fourth amendment search warrant. Appropriate judicial authority would thereby be interposed to safeguard individual privacy of communication from the danger of arbitrary police activity. In addition, to guarantee uniformity of protection, any legislation aimed at liberalizing section 605 should be applied to federal as well as state law enforcement agencies, consonant with their respective spheres of activity.

Grand Jury—Report Censuring Noncriminal Misconduct of Public Officials Unauthorized.—A Schenectady County grand jury investigated charges against the county highway department, without discovering any evidence on

36. "Clauses of the Constitution guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity of adaptation to a changing world." Id. at 472 (Brandeis, J., dissenting).

37. See generally Bradley & Hogan, Wiretapping from Nardone to Benanti and Rathbun, supra note 5. See Pugach v. Dollinger, 81 Sup. Ct. 650 (1961) (Douglas, J., dissenting).

38. See Bradley & Hogan, Wiretapping from Nardone to Benanti and Rathbun, supra note 5.

39. E.g., Rathbun v. United States, 355 U.S. 107 (1957) (use of existing telephone extension with receiver's permission not prohibited by § 605); Goldman v. United States, 316 U.S. 129, 133 (1942) (dictum) (protection of § 605 is of the means of communication, not secrecy of conversation); Goldstein v. United States, 316 U.S. 114 (1942). See generally Brownell, The Public Security and Wiretapping, 39 Cornell L.Q. 195 (1954).

40. See Hearings on Wiretapping, Eavesdropping, and the Bill of Rights Before a Subcommittee of the Senate Committee on the Judiciary, 86th Cong., 1st Sess., pt. 4, at 781-1031 (1959). See Keating-Celler bill to exempt state procedure of limited law enforcement wiretapping from the provisions of § 605, S.3340, H.R. 11589, 86th Cong., 2d Sess. § 3561 (1960).

which to base a criminal indictment. In lieu thereof, it sought to file a report of its findings criticizing department practices as contrary to public interest.[1] The impaneling court, to which the report was returned, accepted it for filing but ordered the contents sealed except for a minor portion.[2] The foreman of the panel thereupon instituted an Article 78[3] proceeding to compel publication of the report. This petition was dismissed by the appellate division,[4] and the court of appeals, because of the importance of the question in the administration of justice, granted leave to appeal. The court affirmed the actions of the lower courts, dividing four-to-three.[5] Since the common law powers of the grand jury have been supplanted by the New York Code of Criminal Procedure, and no such power is conferred on the grand jury by constitutional provision or statute, there is no authority for the grand jury to make a report censuring public officials for noncriminal misconduct. Wood v. Hughes, 8 N.Y.2d 709, — N.E.2d —, — N.Y.S.2d — (1961).

At the common law, the grand jury traditionally performed a dual function, one judicial and the other quasi-administrative. Its judicial function was to inquire into the commission of all crimes triable within the county, to indict and present for trial those persons believed guilty of crime, and to protect innocent persons from unwarranted prosecution.[6] The innocent were further

1. The grand jury report, sometimes called a presentment, is a written statement to the impaneling court concerning matters discovered during the course of a grand jury investigation. The instant court distinguished between the presentment and the report, defining a presentment as a criminal accusation made at the grand jury's instance, similar in nature to the indictment of a public prosecutor, and a report as a moral accusation without any forum being provided for explanation or defense. Wood v. Hughes, 8 N.Y.2d 709 n.1, — N.E.2d — n.1, — N.Y.S.2d — n.1 (1961). The distinction between the now obsolete form of presentment and the present-day report does not lie in its being essentially a moral accusation, although some reports filed in the past have been guilty of this abuse. The report is rather, as outlined above, a statement covering matters investigated by the panel which are sufficiently important to the community to warrant public attention. Its primary purpose is not to accuse but to focus public attention on matters requiring remedial action. It may accuse and censure incidentally, but that is not its purpose, and such evils, if they be considered such, may be regulated by expunging or sealing the objectionable matter prior to filing as a public record. See Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 Colum. L. Rev. 1103 (1955). See also In the Matter of Presentment by Camden County Grand Jury, 10 N.J. 23, 89 A.2d 416 (1952).

2. In the Matter of May 1959 Grand Jury, 22 Misc. 2d 958, 196 N.Y.S.2d 10 (Sup. Ct. 1959). That portion of the report which the court made public had to do with the condition of windows in the county jail.

3. N.Y. Civ. Prac. Act §§ 1283-1306 authorize a special proceeding for the review of discretionary acts by public officers, in this instance a justice of the supreme court. Ordinarily the petition is made in the supreme court, but where, as here, the proceeding is against a justice of that court, the proper forum is the appellate division. N.Y. Civ. Prac. Act § 1287.

4. Wood v. Hughes, 11 App. Div. 2d 893, 203 N.Y.S.2d 460 (3d Dep't 1960).

5. Judge Fuld wrote the majority opinion. Separate dissenting opinions were written by Chief Judge Desmond and Judge Froessel, in both of which Judge Burke concurred.

6. Kuh, supra note 1, at 1105-06.

protected in their reputation by a requirement of strict secrecy as to grand jury proceedings.[7] Its quasi-administrative function was to inquire into and report upon matters of public concern, especially misconduct of public officials.[8]

In America, the grand jury is a creature of statute in practically every state, and in New York it is regulated by the provisions of the Code of Criminal Procedure.[9] Prior to the instant decision, it had been a matter of practice for grand juries acting under the code to exercise this quasi-administrative function along with their judicial function. Commanded by statute to inquire into the wilful and corrupt misconduct of public officials,[10] New York grand juries would indict the guilty parties where their investigations uncovered criminal misconduct, and, where such misconduct was not criminal but warranted public knowledge, would focus attention upon it by means of a report or presentment embodying their findings.

The legality of the report, however, has been disputed since the turn of the century, and the lower courts of New York have been in conflict up to the present time.[11] The conflict has not been confined to New York, though the number of states presently allowing the report are a dwindling minority.[12] The dispute in New York was engendered by doubt as to whether the common law grand jury function of reporting had been continued because not explicitly abrogated by subsequent constitutional or statutory provisions, or whether it had been abrogated because not explicitly authorized by such provisions. The legislature in effect was silent on this point.

Jones v. People[13] considered the question of whether the statute authorizing inquiry into misconduct of public officials was also an implicit grant of the power to report. Here, the only appellate authority in New York to touch upon

7. Kaufman, The Grand Jury—Its Role and Its Powers, 17 F.R.D. 331, 333 (1955).

8. For an excellent discussion of the general function of the common law grand jury, see 10 Holdsworth, A History of English Law 146-51 (1938). See also Kuh, supra note 1; Note, 74 Harv. L. Rev. 590 (1961).

9. N.Y. Code Crim. Proc. §§ 223-60. For a current compilation of statutes, see Comment, 29 Fordham L. Rev. 152 (1960), which sets forth statutes dealing with inquisitorial powers.

10. N.Y. Code Crim. Proc. § 253(2).

11. Leading New York decisions allowing the report censuring public officials include Jones v. People, 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dep't), appeal dismissed, 181 N.Y. 389, 74 N.E. 226 (1905); In the Matter of Quinn, 5 Misc. 2d 466, 166 N.Y.S.2d 418 (Ct. Gen. Sess. 1957). Contra, dissent of Justice Woodward in Jones v. People, supra at 59, 92 N.Y. Supp. at 277; In the Matter of Wilcox, 153 Misc. 761, 276 N.Y. Supp. 117 (Sup. Ct. 1934); Matter of Osborne, 68 Misc. 597, 125 N.Y. Supp. 313 (Sup. Ct. 1910).

12. California and Florida still permit the report by case law. See Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (Dist. Ct. App. 1933); Ryon v. Shaw, 77 So. 2d 455 (Fla. 1955). New Jersey has recently modified its rule so that reports may not be used to rebuke individuals in the absence of conclusive proof of wrongdoing. In the Matter of Presentment by Camden County Grand Jury, — N.J. —, — A.2d — (1961). For states which prohibit the report by decisional law, see Comment, 29 Fordham L. Rev. 152, 157 n.45 (1960).

13. 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dep't), appeal dismissed, 181 N.Y. 389, 74 N.E. 226 (1905).

the subject for a period of over fifty years, held, by a divided court, that the statute *was* implicit authority for the report. In *In the Matter of Quinn*[14] another basis was relied upon, *i.e.*, the allegedly unaltered common law as continued in force by the New York State Constitution.[15] *Quinn* attempted to resolve the doubt in favor of preservation of the common law grand jury reportorial function. The court found no express abrogation of that power by the legislature. The court of appeals, however, in passing upon the question for the first time in the instant case, reached the opposite conclusion on both arguments. Section 253 (2) of the Code of Criminal Procedure does not authorize explicitly or implicitly the grand jury report, nor does the constitutional provision adopted in 1938.[16] The majority further found that any common law function which might have been continued by the original constitution had been supplanted by the enactment of the original Code of Criminal Procedure in 1849, which was silent as to the reportorial powers of the grand jury. The effect of the majority ruling is to deny this quasi-administrative function to our present-day grand jury.

The soundness and propriety of both the majority and dissenting opinions are points upon which reasonable men may disagree. However, the submission of a controversy to a court must necessarily result in a decision one way or the other, and it is for those who would change the rule to resort to the legislature.

Analysis of the majority and both dissenting opinions reveals that all three accepted the same major premise, *i.e.*, if the present grand jury has the power to report, it must be derived from the unaltered common law continued in force by the constitution, from the constitution itself, or from statute. It is in their minor premises and proof that the opinions differ and logically reach opposite conclusions.

The majority's first minor premise is that whatever powers the grand jury derived from the common law were supplanted, and those not conferred were abrogated by the enactment of the Code of Criminal Procedure. In the majority's opinion, the detail and comprehensiveness of that act, together with the avowed purpose of the Commissioners on Practice and Pleading on the Code of Criminal Procedure to supply "a clear and well understood definition of [the grand jury's] powers,"[17] amounted to an abrogation by silence of the common law

14. 5 Misc. 2d 466, 166 N.Y.S.2d 418 (Ct. Gen. Sess. 1957).

15. Id. at 468-70, 166 N.Y.S.2d at 420-22.

16. N.Y. Const. art. I, § 6.

17. 8 N.Y.2d at —, — N.E.2d at —, — N.Y.S.2d at —. The majority cited the Fourth Report of New York Commissioners on Practice & Pleading 115-29 (1849), as authority for its argument that the legislature intended in 1849 to abrogate any reportorial function of the grand jury. A reading of this report, however, reveals that nowhere was there any actual discussion of this function. It appears that the majority has quoted out of context and in so doing has distorted the meaning of the commissioners. When the remarks quoted by the majority are read in context, it is clear that they refer only to the then vague status of the law as regards criminal prosecution by indictment and not to any quasi-administrative function of reporting on matters of public concern. It is significant to note also that no comment was made by the commissioners on § 277(3), which is the present N.Y. Code Crim. Proc. § 253(2).

power to report. On the other hand, Chief Judge Desmond, in his dissent, failed to find such an abrogation, insisting that "in the absence of a clear constitutional or legislative expression, the grand jury's powers may not be curtailed."[18] It seems that on this point Judge Desmond's argument exposes a fallacy in the majority's argument in as much as an abrogation by silence falls far short of a clear legislative expression of curtailment.

The majority's next two arguments are based on the assumption of the validity of its first, and, consequently, those who would accept them must make a similar assumption. Those arguments run: the common law basis for the power to report having terminated, the power must be found to exist either in (1) the constitution, or (2) statute. Since it can be found in neither of these, there is no power to report. The grand jury's function is limited to indictment, and when it cannot do this, its function ceases.

In order to establish these two arguments, it was necessary for the majority to clear away the obstacles placed in its path by the decision and reasoning of the *Jones* case. For the *Jones* decision established that the statutory command to inquire into the wilful and corrupt misconduct of public officials was also an implicit authorization to render the report. The rationale of the *Jones* court was that official inquiry tends to official action, and the grand jury, not being clothed with executive authority, can only report. The *Jones* rationale is equally applicable to the subsequently adopted constitutional provisions guaranteeing that the right to inquire into wilful and corrupt misconduct of public officials shall never be impaired.[19] The majority in the instant case dispensed with the *Jones* decision by a statutory construction of sections 245 and 253 of the Code of Criminal Procedure which seems somewhat strained and less than satisfactory, even assuming that the common law function of the report had been abrogated. The "wilful and corrupt misconduct" which is the subject of inquiry is limited to criminal acts only. Section 253 is reduced to a mere clarification by enumeration of the command of section 245 to inquire into all crimes triable within the county, and not, as both dissents argue, a separate mandate to inquire into wilful and corrupt misconduct whether criminal or not.[20] For the majority, the acts of public officials made criminal by sections

18. 8 N.Y.2d at —, — N.E.2d at —, — N.Y.S.2d at —.

19. The majority, in reaching its conclusion that N.Y. Const. art. I, § 6, does not contain an implicit grant of power to report, referred to the discussion of § 6 during the hearings of the Constitutional Convention of 1938. 3 Revised Record of the Constitutional Convention of the State of New York 2570-73 (1938). This position would be valid if one assumed that the common law function of reporting had been abrogated by prior legislation. But if, as contended by the dissent, the common law power remained unaltered, then the majority's argument becomes at best equivocal. For, as delegate Halpern stated, the constitutional provision was drafted "very carefully to avoid the question. . . ." Id. at 2573. While the majority may be correct in saying that this provision alone does not authorize the report, the dissenting view, that the common law plus this provision affords a constitutional basis for the report, appears equally arguable.

20. The majority further argued, by way of a reductio ad absurdum, that if § 253, authorizing inquiry into official misconduct, is an implicit grant of the power to report, then § 245, authorizing inquiry into all crimes, is also an implicit grant of power to report

1820-78 of the Penal Law constitute an all-inclusive list of acts which amount to "wilful and corrupt misconduct,"[21] and the concept of "wilful and corrupt official misconduct which does not amount to crime is self-contradictory and meaningless."[22]

Chief Judge Desmond and Judge Froessel in their separate dissents argued on the other hand that the common law function to inquire and report on official misconduct had been preserved and maintained by the statute. While Judge Desmond based his view on the legislative history[23] and decisional law, Judge Froessel came to grips with the statutory construction indulged in by the majority. In his view, section 253 is rendered meaningless unless it serves some purpose other than section 245. That purpose must be to continue to authorize the grand jury to investigate such matters and report thereon for the public information after its inquiry.

It is not necessary to consider the policy arguments for and against the report, as they have been treated at length elsewhere.[24] In the last analysis, they remain policy arguments. The narrow question which the court has answered is whether the grand jury has the power to report, and not should it have that power. However, by thus answering this question, the larger issue of whether New York grand juries should be endowed with and exercise the reportorial power has, in effect, also been determined. Yet, this is a political question which logically ought to be determined by legislative expression after due consideration of the public interests. On the other hand, the instant decision settles the

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in any and every case, whether touching on the conduct of public officers or the behavior of private citizens. It is true that if such were the case it would be beyond the intendment of the statute as well as common law. See In the Matter of Healy, 161 Misc. 582, 293 N.Y. Supp. 584 (Queens County Ct. 1937); In the Matter of Third Sept. 1958 Grand Jury, 19 Misc. 2d 682, 193 N.Y.S.2d 553 (Ct. Gen. Sess. 1959). However, the majority failed to see the distinction between the functions exercised by the grand jury under § 253(2) and § 245. The argument of the dissent, which the majority assumed hypothetically for the purpose of the reductio, required that this distinction be made, namely, that in inquiring and reporting under § 253(2), the grand jury's function is administrative and not necessarily judicial, whereas under § 245 the grand jury exercises a purely judicial function.

21. — N.Y.2d at —, — N.E.2d at —, — N.Y.S.2d at —.

22. Id. at —, — N.E.2d at —, — N.Y.S.2d at —.

23. Chief Judge Desmond makes a forceful argument from the legislative history of a bill passed by the legislature in 1946 but vetoed by Governor Dewey. N.Y. Senate. Int. No. 509 (1946). The majority neither meets nor considers its significance. The bill would have forbidden a grand jury report censuring or reflecting upon the integrity of any person for alleged misconduct not constituting a crime. Judge Desmond argues that the very passage of the bill was legislative recognition of the existence of the power to report, and from the Governor's veto he further argued that the power had not been limited in any way. While the argument carried weight, it may perhaps be questioned on the ground that this was perhaps an attempt by the legislature to confer a limited power to report where before there was none. But the majority failed to urge this view.

24. See generally Jones v. People, 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dep't), appeal dismissed, 181 N.Y. 389, 74 N.E. 226 (1905); In the Matter of Wilcox, 153 Misc. 761, 276 N.Y. Supp. 117 (Sup. Ct. 1934); Kuh, supra note 1.

law where before there was conflict. For this reason alone the decision is important. Certainty, at least, has been obtained on this narrow but troublesome point. Also to be determined by the legislature is the question whether the grand jury should have the power to make reports on general conditions meriting public attention which criticize no one. The rationale of the instant court appears to preclude any report no matter what its contents happen to be. Let the legislature now change the rule if it should be so advised.

Interstate Commerce—Segregation in Terminal Restaurant Violative of the Interstate Commerce Act.—Petitioner, a Negro traveling between Washington, D.C., and Montgomery, Alabama, sought to obtain a meal at a bus terminal restaurant during a scheduled stopover at Richmond, Virginia. Disregarding the restaurant's segregated facilities, he sat in and ordered from the white section. The management twice requested that petitioner move to the negro area, but he refused, asserting that he was an interstate traveler. Petitioner was thereupon arrested and fined ten dollars for violating a statute forbidding a person to remain on the premises of another "without authority of law" after being asked to leave.[1] The intermediate appellate court and the Supreme Court of Virginia affirmed the conviction. The assignments of error in the Virginia Supreme Court had not charged any violation of the Interstate Commerce Act,[2] but had been confined solely to the constitutional questions raised below.[3] In his petition for certiorari and in his brief on the merits, petitioner again challenged only the constitutional aspects of his conviction. The Supreme Court of the United States, with two justices dissenting, found a violation of the Interstate Commerce Act.[4] Where a terminal and restaurant operate

1. Va. Code Ann. § 18.1-173 (1960). "If any person shall without authority of law go upon or remain upon the lands . . . of another, after having been forbidden to do so . . . by the owner, lessee, custodian or other person lawfully in charge thereof . . . he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine . . . or by confinement in jail . . . ."

2. 49 Stat. 558 (1935), 49 U.S.C. § 316(d) (1958). Petitioner had initially charged in the intermediate appellate court that he had a right under the act to be free of any unjust discrimination or any unreasonable prejudice in the course of his interstate passage.

3. Petitioner had also argued at the district court level that his conviction was obtained in violation of the commerce clause, and the due process and equal protection clauses of the fourteenth amendment.

4. Despite strong objection by the dissent that petitioner had not challenged his conviction on the statutory grounds, Boynton v. Virginia, 364 U.S. 454, 464 (1960), the Court approached the case solely on that basis. Though somewhat unusual, it would appear that the Court's action was proper. By virtue of the Supreme Court's Revised Rules, the discretionary nature of certiorari has been expanded. Under prior rules, "only the questions specifically brought forward by the petition for writ of certiorari will be considered." U.S. Sup. Ct. R. 38(2) (1939). The present rules, however, provide that "only the questions set forth in the petition or fairly comprised therein will be considered . . . ." U.S. Sup. Ct. R. 23(1)(c) (1954). Deletion of "specifically" from the old rule and the addition of "or fairly comprised therein" to the new, clearly carries the discretionary

as an integral part of a carrier's transportation service for its interstate passengers, such passengers have a right under the Interstate Commerce Act not to be discriminated against. *Boynton v. Virginia*, 364 U.S. 454 (1960).

Since the landmark decision in *Henderson v. United States*,[5] there is no longer any doubt that racial discrimination on board interstate carriers is violative of the Interstate Commerce Act. In *Henderson*, a railroad operated dining car facilities on a segregated basis, and the United States Supreme Court found that segregation, as such, constituted an unreasonable prejudice within the compass of the act.[6] Although the Court relied specifically upon section 3(1)[7] of the act, sections 216(d)[8] and 404(b)[9] impose similar restrictions upon motor and airplane carriers.[10] These antidiscrimination requirements are, of course, not

element of certiorari beyond its original grant, permitting a consideration of issues not specifically presented but fairly comprised in those actually brought before the Court. The majority, in exercising its discretion, pointed out the fact that racial discrimination was the crux of both the constitutional and statutory questions: "Discrimination because of color is the core of the two broad constitutional questions presented to us by petitioner, just as it is the core of the Interstate Commerce Act question . . . ." 364 U.S. at 457.

Objection was also raised on the ground that the statutory issue had not been considered by the Supreme Court of Virginia. Although the general rule is that questions not raised in the court below will not be considered by the Supreme Court, Magruder v. Drury, 235 U.S. 106, 112-13 (1914), the Court has recognized exceptions where the error posed is fundamental, Gila Valley, Globe & No. Ry. v. Hall, 232 U.S. 94, 98-99 (1914), or where the case itself is an unusual or exceptional one, Lawn v. United States, 355 U.S. 339, 362 n.16 (1958); Duignan v. United States, 274 U.S. 195, 200 (1927). It has also been argued that the applicability of a statute cannot be avoided even in the absence of its presentation to a Court, "for . . . [the court is] bound by the law of the land, whether cited to us by counsel or not." Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 546 (2d Cir. 1956) (concurring opinion). For a criticism of this practice, see the partial dissents of Justices Frankfurter and Harlan in NLRB v. Lion Oil Co., 352 U.S. 282, 294, 303 (1957). Although the more thorny constitutional issues were thereby avoided, the Court's application of the Interstate Commerce Act to the instant situation seems justified.

5. 339 U.S. 816 (1950).

6. Id. at 825. Initially, the Interstate Commerce Commission ruled that even though Henderson had been subjected to undue prejudice, the discriminatory act was merely an isolated incident resulting from poor judgment on the part of a railroad employee and that segregation on interstate carriers was not of itself violative of the act. Henderson v. Southern Ry., 258 I.C.C. 413, 419 (1944). This view was rejected by the Supreme Court. See also Mitchell v. United States, 313 U.S. 80 (1941) (segregation on Pullman car violative of the Interstate Commerce Act).

7. 54 Stat. 902 (1940), 49 U.S.C. § 3(1) (1958). "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ."

8. 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(d) (1958).

9. 72 Stat. 760 (1958), 49 U.S.C. § 1374(b) (1958).

10. With regard to motor carriers, the question has been resolved formally on the basis that segregation on board an interstate carrier constitutes an undue burden on interstate

limited to on-board activity.[11] Railroad and bus terminals have likewise been brought within the act's restrictions,[12] the former by section 1(3)(a),[13] which expressly classifies railroad terminals as carriers, and the latter by section 203(a)(19),[14] which delimits the "services" to which the act applies. Section 203(a)(19) includes facilities "used in the transportation of passengers . . . or in the performance of any service in connection therewith."[15] However, this section also requires that the facility be "controlled" or "operated" by the carrier in question. As the dissent stressed[16] and as the majority noted,[17] the restaurant in the present case was neither directly controlled nor operated by the carrier. The dissent construed section 203(a)(19) literally and discharged both restaurant and carrier from any liability under the act.[18] The majority emphasized the circumstantial relationship existing between restaurant and carrier,[19] the latter by providing dining facilities to its interstate passengers and the former by co-operating in the undertaking. Assumption of this dual relationship led the Court to fasten upon the restaurant the same restrictions against discrimination as were imposed upon the carrier itself.[20] By its refusal to adopt a narrow construction of section 203(a)(19), practical effect was given to the act's primary purpose, *i.e.*, the abolition of discriminations touching upon interstate commerce.[21] The Court's conclusion clearly accords with the broad

commerce in violation of U.S. Const. art. I, § 8, cl. 3 (commerce clause). Morgan v. Virginia, 328 U.S. 373 (1946).

11. This is spelled out generally by § 202(b) of the act: "The provisions of this chapter apply . . . to the procurement of and the provision of facilities for . . . transportation . . . [by an interstate carrier]." 49 Stat. 543 (1935), as amended, 49 U.S.C. § 302(a) (1958).

12. See the dicta of both the majority and the dissent in the instant case, to the effect that discrimination in transportation services in terminals and terminal restaurants actually owned, operated or controlled by interstate carriers is unlawful. Boynton v. Virginia, 364 U.S. 454, 459 (1960) (majority); Id. at 465 (dissent). This is so even though there be an incidental use by the general public. See Atchison, T. & S.F. Ry., 127 I.C.C. 1, 48-53 (1927).

13. 41 Stat. 474 (1920), as amended, 49 U.S.C. § 1(3)(a) (1958).

14. 49 Stat. 545 (1935), 49 U.S.C. § 303(a)(19) (1958).

15. Ibid.

16. Boynton v. Virginia, 364 U.S. 454, 465-66 (1960).

17. Id. at 460.

18. Id. at 468.

19. Id. at 460-61.

20. Ibid.

21. See, e.g., New York v. United States, 331 U.S. 284, 300 (1947); Mitchell v. United States, 313 U.S. 80, 94 (1941); Louisville & N. R.R. v. United States, 282 U.S. 740, 749 (1931).

It was early advised in interpreting the act that "the general purpose of the act and the evils sought to be remedied must be always kept in mind, and . . . parts of the act are not to be so construed as to defeat other important features of the same; nor is such a construction to be given to the act, in whole or in part, as may tend to prevent the proper enforcement of the legislative purpose." Van Patten v. Chicago, M. & St. P. Ry., 81 Fed. 545, 547 (N.D. Iowa 1897); cf. Smith v. Townsend, 148 U.S. 490, 494 (1893). It

construction traditionally given the act.[22]

Application of this fairly clear principle was somewhat clouded, however, by a caveat of the Court. The instant opinion specifically avoided questions relating to carrier stops at restaurants along interstate routes.[23] While the Court spoke in terms of the terminal building constituting one project for a single purpose, with facilities geared primarily to the service of bus companies and their interstate passengers, it would appear that the rationale advanced by the Court admits of application beyond the terminal type situation.

It is not uncommon for interstate carriers to schedule stops at predesignated restaurants along their routes. If the Court be correct in reasoning that direct control is not necessary to fasten responsibility upon a restaurant, but only active co-operation in the undertaking, there would seem to be no substantial basis for distinguishing between roadside and terminal situations. Only slight stress was placed on the restaurant's permanent terminal location, indicating that the Court relied more on the voluntary relationship flowing between carrier and facility. In the ordinary roadside situation the two essential elements of the Court's test are equally present. The carrier, in stopping, obviously offers dining accommodations to its passengers, and the restaurant, in accepting carrier patronage, effects the necessary acquiescence or co-operation of which the Court spoke. This, of course, does not mean that a proprietor is under any statutory obligation to accept the carrier's trade. If, however, he willingly benefits from this trade as a matter of customary practice,[24] it is not unreasonable to find a dual relationship existing.

More difficult of solution are instances where the carrier makes an unscheduled stop at or near a roadside restaurant. The basic test, however, would remain the same—have the two elements of the basic relationship been assumed? It is suggested that the carrier's intention to furnish dining facilities as part of its regular transportation services may reasonably be inferred from the very nature of interstate passages covering relatively long distances; the restaurant's acquiescence may be implied from its serving those whom it knows or ought to know are traveling in interstate commerce.[25]

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has been further suggested that the act was not for the benefit of carriers but to protect passengers against unreasonable discriminations. See Central R.R. v. Anchor Line, 219 Fed. 716, 718 (2d Cir. 1914).

22. See, e.g., Texas & P. Ry. v. I.C.C., 162 U.S. 197, 218-20 (1896). Cf. Western Union Tel. Co. v. Boegli, 251 U.S. 315, 316 (1920).

23. Boyton v. Virginia, 364 U.S. 454, 463-64 (1960). The Court also left open the question whether a terminal lunchroom would be permitted to discriminate where the concession did not constitute an integral part of the passenger service performed by the carrier. Id. at 463 n.4.

24. Cf. Marsh v. Alabama, 326 U.S. 501 (1946). In treating an analogous problem, an attempt by a private individual to curtail the exercise of free speech on his property, the Court underscored the preference to be accorded individual rights conflicting with property rights: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Id. at 506 (dictum).

25. These situations are not to be confused with a fact pattern found in Williams v.

Even though the instant rule provides another means for eliminating discrimination, the statutory problem could be rendered moot should the Court choose to resolve the constitutional questions posed in this case. By adherence to its traditional policy of avoiding constitutional issues unless absolutely required to resolve them,[26] the Court has, perhaps unfortunately, retreated from further clarifying the constitutional aspects of racial discrimination latent in its recent segregation decisions. Classifications or exclusions based solely on color have been recognized as constitutionally suspect.[27] Such artificial conduct has been condemned as inherently unreasonable in both public education[28] and public recreation.[29] But since the protections of the fourteenth amendment run against state action as distinguished from purely private action,[30] the reach of the amendment remains a major question.[31] General toleration of private

Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959), where an interstate traveler by private motor vehicle sought to invoke the act's protection. The Fourth Circuit held that an independent restaurant along an interstate route violated neither the Constitution nor the Interstate Commerce Act when it refused to serve a person on racial grounds. Id. at 848. With respect to the statutory question, the court pointed out that no carrier or carrier facility was involved. Regarding the alleged violation of the fourteenth amendment, the court found no state activity within the meaning of the amendment. Mere licensing of the restaurant by the state was held insufficient to create the necessary nexus with the private activity.

26. See Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). See also 1 Cooley, Constitutional Limitations 332 (8th ed. 1927). "It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." Ibid.

27. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). See also Korematsu v. United States, 323 U.S. 214 (1944), where the Court said: "Pressing public necessity may sometimes justify the existence of such . . . [classifications]; racial antagonism never can." Id. at 216. And see Hirabayashi v. United States, 320 U.S. 81 (1943), which sets out the rationale of the rule: "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Id. at 100.

28. Brown v. Board of Educ., 347 U.S. 483 (1954) (segregation unreasonable as fostering sense of inferiority in Negro); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (established Negro law school unreasonably inhibits ability to adequately learn legal profession); Sweatt v. Painter, 339 U.S. 629 (1950) (specially created law school lacks intangible advantages of established school).

29. Dawson v. Mayor & City Council of Baltimore City, 220 F.2d 386 (4th Cir.), aff'd per curiam, 350 U.S. 877 (1955) (same as Brown and Bolling rationales); Fayson v. Beard, 134 F. Supp. 379 (E.D. Tex. 1955) (segregation psychologically unreasonable).

30. Civil Rights Cases, 109 U.S. 3 (1883). Nowhere, however, was it suggested that racial discrimination, as such, is reasonable. In fact the contrary may be inferred by reason of the constitutional ban on state discrimination.

31. Petitioner also argued that his conviction was obtained in violation of art. I, § 8, cl. 3 of the Constitution. Although the vast majority of cases respecting the application of the commerce clause concern state statutes (see, e.g., Morgan v. Virginia, 328 U.S. 373 (1946) (segregated seating on board interstate motor carriers)), it is generally recognized

discrimination was sharply curtailed by the Supreme Court in *Shelley v. Kraemer*,[32] where a private discriminatory covenant was sought to be enforced through the state courts. The state court action was found to be an adoption of the individual bias. The Supreme Court reasoned that but for the judicial intervention, the private discrimination would not have been as successfully effectuated.[33] The instant situation advances a half step further, posing the interesting query whether state prosecution for trespass, occasioned by racial motives, also is sufficient to constitute a prohibited adoption of individual discrimination. In *Shelley*, the racially restrictive covenant operated to interfere with the possessory rights of the Negro landowner. His property rights were in issue. In the trespass situation, on the other hand, the property rights of the one who discriminates are in issue. This latter situation, therefore, must involve a balancing of conflicting interests—of an individual's constitutional right not to have the state adopt arbitrary racial discriminations against him with a landowner's allegedly absolute right to exclude others from his land. If a proprietor demands that an individual leave his premises because of a racial motive, and the Negro refuses, the proprietor will be forced to eject the Negro himself if police assistance is unavailable. Yet, to permit police enforcement of clearly arbitrary conduct runs dangerously close to the conduct condemned in *Shelley*. The problem for the Court to determine is whether this property right is to take precedence over the deprivation of liberty resulting from a trespass conviction. The question was recently sidestepped when the Court declined to review a disorderly conduct conviction based on a refusal to leave a lunch counter at the city mayor's request. The Court, however, refused consideration because the petitioner's state remedies had not been exhausted.[34] One source has suggested that the Supreme Court is not ready to interfere with a revered property right in light of the "moderate statutory fine or jail sentence" attending a trespass conviction.[35] This reasoning, however, completely overlooks the less

that prohibitions against burdening commerce are not limited to state obstruction. See In re Debs, 158 U.S. 564, 581 (1895) (union activity obstructing commerce and the mails); Chance v. Lambeth, 186 F.2d 879, 880, 883 (4th Cir.), cert. denied, 341 U.S. 941 (1951) (private company regulations a burden on commerce). In Whiteside v. Southern Bus Lines, Inc., 177 F.2d 949, 953 (6th Cir. 1949), the court, after holding a private carrier's segregation on board the carrier an undue burden on commerce, suggested that, if it be required that there be state action before the court will invalidate the practice, it was present by reason of a state police officer's ejection of the Negro. Except for the stationary nature of the restaurant in the instant case, the two fact patterns are strikingly similar. An objection based on this distinction is obviated by Supreme Court holdings that have declared certain stationary accommodations within the federal domain. See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (warehouse used for grain storage).

32. 334 U.S. 1 (1948).

33. Id. at 19.

34. Steele v. City of Tallahassee, 29 U.S.L. Week 3261 (U.S. March 6, 1961).

35. 57 Mich. L. Rev. 122 (1958), commenting on a decision by the Supreme Court of North Carolina which held that defendants in a racially provoked trespass prosecution have no constitutionally protected right not to be discriminated against by an operator of a private enterprise. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

tangible, but more devastating consequences following a criminal conviction of any sort. Where race is used as the basis for determining the right of occupancy of public or quasi-public areas, and state power, either police or judicial, is exercised to give practical effect to such exclusions, it would appear that such action falls within the proscription of the fourteenth amendment.

The problems, therefore, are clear. The method of solution is available. The time would seem proper for the Court to shed light on an area of recurring legal uncertainty.

Labor Law—Federal Pre-emption of State Court's Jurisdiction Over Labor Dispute.—Plaintiff employer sought injunctive relief against recognitional picketing by two minority unions. Previously, plaintiff had recognized and contracted with a different and independent union which represented a majority of his employees. The granting of an injunction by the New York Supreme Court, Special Term, was affirmed by the appellate division.[1] The New York Court of Appeals reversed. The court held (1) that state court jurisdiction had been pre-empted because the employer's business activities were arguably subject to Section 7 of the National Labor Relations Act[2] and (2) that the question of state jurisdiction had been rendered moot by the recently enacted Section (8)(b)(7) of the Labor-Management Reporting and Disclosure Act.[3] *Dooley v. Anton*, 8 N.Y.2d 91, 168 N.E.2d 356, 202 N.Y.S.2d 273 (1960).

The National Labor Relations Board has jurisdiction over all labor disputes affecting interstate commerce.[4] The Board's authority, however, is discretionary,[5] and, pressed by an ever-increasing caseload and budgetary problems, it has never exercised its jurisdiction to the fullest extent. Rather, it has acted in accordance with certain yardsticks[6] and general policies.[7] Cases failing to meet these self-imposed limitations were left without a federal forum even though technically falling within the ambit of the act. Of necessity, complainants

1. Dooley v. Anton, 7 App. Div. 2d 880, 182 N.Y.S.2d 314 (4th Dep't 1959) (memorandum decision).

2. 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 157 (1958).

3. 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7) (Supp. I, 1959). Section 8(b)(7) of the act expressly made recognitional or organizational picketing an unfair labor practice where the employer has already lawfully recognized another union and a question concerning representation may not be raised under § 9(c). National Labor Relations Act, 49 Stat. 453 (1935), amended by 61 Stat. 144 (1947), as amended, 29 U.S.C. § 159(c) (1958); 29 U.S.C. § 159(c) (Supp. I, 1959).

4. Labor Management Relations Act § 10(a), 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(a) (1958).

5. Labor-Management Reporting and Disclosure Act of 1959 § 701(a), 73 Stat. 541, 29 U.S.C. § 164(c)(1) (Supp. I, 1959).

6. For a detailed enumeration of these standards, see Comment, 28 Fordham L. Rev. 737, 747-48 (1960).

7. See CCH Lab. L. Rep. ¶ 1610 (1 Lab. Rel.) (1960).

turned to state courts and agencies for relief.[8] The availability of these forums, however, was rejected by the Supreme Court of the United States in *Guss v. Utah Labor Relations Bd.*[9] There a state agency had granted relief from an unfair labor practice in a case over which the Board had declined jurisdiction.[10] The Supreme Court set aside the state board judgment on the ground that the NLRB had been vested with exclusive jurisdiction by Congress. In effect, the Court held that the National Labor Relations Act displaced state power in cases where jurisdiction had actually been declined, or would in all likelihood be declined, by the NLRB under its jurisdictional limitations. The result of the decision was that many complainants found themselves in a "no man's land," *i.e.*, without any forum for their cases.

Despite the *Guss* ruling, the New York Court of Appeals subsequently held in *Pleasant Valley Packing Co. v. Talarico*[11] that recognitional picketing by a stranger union, where another union had been certified as the exclusive bargaining agent of the employees, was neither a protected[12] nor prohibited activity[13] under the act, and therefore state courts could assume jurisdiction. After *Pleasant Valley*, however, and subsequent to the time the instant case was decided in the lower courts, the Supreme Court decided *San Diego Bldg. Trades Council v. Garmon*.[14] In that case a union was engaged in peaceful picketing for the purpose of forcing an employer to sign a union shop agreement. In reversing a judgment of the California Supreme Court[15] which granted the employer tort damages for injuries caused by the union's activities, the Supreme Court held that when an activity is *arguably* subject to either section 7 or section 8 of the act,[16] only the NLRB has jurisdiction.[17] In effect, whereas

8. For a detailed discussion of the case history, see Fleming, Title VII: The Taft-Hartley Amendments, 54 Nw. U.L. Rev. 666 (1960); Isaacson, Federal Pre-emption Under the Taft-Hartley Act, 11 Ind. & Lab. Rel. Rev. 391 (1958); Meltzer, The Supreme Court, Congress, and State Jurisdiction Over Labor Relations (pts. 1-2), 59 Colum. L. Rev. 6, 269 (1959); Comment, 28 Fordham L. Rev. 737 (1960).

9. 353 U.S. 1 (1957), 26 Fordham L. Rev. 349.

10. Appellant corporation was charged by the United Steel Workers of America, the certified bargaining representative, with violations of the Taft-Hartley Act, after the regional director of the NLRB declined to issue a complaint because the company's business was of a local character.

11. 5 N.Y.2d 40, 152 N.E.2d 505, 177 N.Y.S.2d 473 (1958).

12. Section 7 of the National Labor Relations Act gives unions the right to engage in certain activities such as the right to self-organization and collective bargaining. 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 157 (1958).

13. Section 8 of the National Labor Relations Act sets forth those activities forbidden as unfair labor practices. 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (1958); 29 U.S.C. § 158 (Supp. I, 1959).

14. 359 U.S. 236 (1959). This is the second case of the same name. For the first, see 353 U.S. 26 (1957).

15. Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958).

16. 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (1958). The most recent amendment to § 8 occurred in the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 542 (1959), 29 U.S.C. § 158 (Supp. I, 1959).

17. 359 U.S. at 245. The Court pointed out, however, that where the activity is of a

Pleasant Valley had held that any doubt was to be resolved in favor of state jurisdiction, *Garmon* required such doubt to be determined in the first instance by the NLRB. *Garmon* was subsequently found to be controlling in New York in *Columbia Broadcasting Sys. v. McDonough.*[18] There a union commenced secondary picketing of CBS with the declared purpose of preventing CBS from doing business with two suppliers against whom the union was striking. On the ground that it was *arguable*[19] whether the secondary picketing constituted an unfair labor practice under section 8 of the act, the New York Court of Appeals unanimously affirmed the appellate division's finding that the state courts were not primary tribunals to adjudicate such issues.

In an attempt to narrow this perplexing "no man's land"[20] area, Congress enacted a provision in 1959 that "nothing . . . shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."[21] In ascertaining the effect of this amendment, it is necessary to keep in mind its limited scope. The amendment is confined strictly to cases which fail to meet the limitations of the Board.[22] State courts and agencies are allowed to assert jurisdiction over these cases, but not over cases which do meet the Board standards.[23]

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violent nature, the state's power to grant compensation or to enjoin would not be pre-empted. Id. at 247-48.

18. 6 N.Y.2d 962, 161 N.E.2d 389, 191 N.Y.S.2d 162 (1959) (memorandum decision).

19. The question of when an activity is "arguably" subject to § 7 or § 8 of the act is clearly destined for continued court interpretation. Presently it suggests a continued narrowing of state jurisdiction, since the act has been amended to include a number of other types of conduct which in any given case will present a greater possibility of the act applying. See Grunwald-Marx, Inc. v. Los Angeles Clothing Workers, 52 Cal. 2d 568, —, 343 P.2d 23, 32 (1959).

20. As introduced in the Senate, the Kennedy-Ervin bill contemplated the universal application of federal law. S. 1555, 86th Cong., 1st Sess. § 701 (1959). On the other hand, the Landrum-Griffin bill, introduced in the House, contemplated use of state law by state courts. H.R. 8400, 86th Cong., 1st Sess. § 701 (1959). When the compromise was worked out, Senator Kennedy stated: "[It] was agreed that the State law could prevail." 105 Cong. Rec. 16255 (daily ed. Sept. 2, 1959). Senator Goldwater, a member of the conference committee, also reported to the Senate that the conference agreement authorized "State labor boards and courts to assume jurisdiction and to apply State law in cases over which the NLRB declines to assert jurisdiction." 105 Cong. Rec. 16419 (daily ed. Sept. 3, 1959).

21. Labor-Management Reporting and Disclosure Act of 1959 § 701(a), 73 Stat. 542, 29 U.S.C. § 164(c) (2) (Supp. I, 1959).

22. A complainant seeking relief before a state labor agency is initially faced with the problem of discerning whether the amendment applies to cases actually declined by the Board or those which in all likelihood would be declined. It is probable that Congress meant the act to cover both types of situations. See Analysis of the Landrum-Griffin Reform Bill, 105 Cong. Rec. 13091 (daily ed. July 27, 1959). But see 105 Cong. Rec. 16393 (daily ed. Sept. 3, 1959) (remarks of Senator Morse).

23. It is not clear who is to make the initial determination as to whether or not a case meets the Board's standards. To ease problems in this area the board has innovated

In the principal decision, the court seems to say that all cases coming within the purview of the National Labor Relations Act must be adjudicated by the NLRB. As noted above, this is true only of cases meeting the Board's standards. The concurring opinion of Judge Van Voorhis is more ambiguous on this point. It emphasizes the problem inherent in the "no man's land" as it existed prior to the 1959 amendments and adverts to section 10(a)[24] as an ineffectual solution to the problem, but nowhere is there any mention of section 14(c).[25] A consideration of this section would not support the unqualified language that

> regardless of whether the National Labor Relations Board assumes or declines to exercise jurisdiction to take steps to stop this illegal behavior, the States have been relieved from responsibility in this kind of case.[26]

The instant court found that the peaceful recognitional picketing involved was not violative of section 8 of the act at the time the injunction was issued by the lower court. However, the court did find, on the basis of the *Curtis Bros.*[27] decision, that it could reasonably be argued that picketing not banned by section 8 may be protected by section 7.[28] Therefore, the state court never had jurisdiction to issue the injunction. A further compelling reason for the court's position was found in the 1959 Landrum-Griffin amendments.[29]

Although the basic reasoning of the court is sound, practical problems still remain. When a complainant errs in selecting a state forum, he is likely to find no federal forum available to him because of the running of the six-month statute of limitations.[30] This situation could probably be eliminated by expanding the statutory period of limitations, or by requiring the NLRB to make the initial determination as to whether or not it will assert jurisdiction. Perhaps a rule that the statute of limitations be tolled during the period a party is innocently

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advisory opinions. These opinions are available only if a proceeding is pending before a state agency, or court, and they may be secured by a party to the proceeding, the court, or the agency. The opinion is limited solely to whether the NLRB would assert jurisdiction. 29 C.F.R. § 101.39 (Supp. 1960). Informal opinions may be obtained from regional office personnel. 29 C.F.R. § 101.41 (Supp. 1960).

24. Section 10(a) of the Taft-Hartley Act gave the NLRB limited power to cede jurisdiction to a state agency. 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(a) (1958). However, because of the requirement of consistency between the federal act and state statutes which would become applicable in the event of a cession agreement, this provision has proved of little value. In the few states which do have labor relations statutes, most are not sufficiently consistent with federal legislation to authorize cession. For an outline of the different types of statutory provisions in the fifty states, see Comment, 28 Fordham L. Rev. 737, 743-47 (1960).

25. Labor-Management Reporting and Disclosure Act of 1959 § 701(a), 73 Stat. 542, 29 U.S.C. § 164(c) (2) (Supp. I, 1959).

26. 8 N.Y.2d 91, 99, 168 N.E.2d 356, 360, 202 N.Y.S.2d 273, 278 (1960).

27. NLRB v. Drivers Union, 362 U.S. 274 (1960).

28. 8 N.Y.2d at 98, 168 N.E.2d at 359, 202 N.Y.S.2d at 277.

29. 73 Stat. 541, 29 U.S.C. §§ 153, 158, 159-60, 186-87 (Supp. I, 1959). See 8 N.Y.2d at 98, 168 N.E.2d at 359, 202 N.Y.S.2d at 277.

30. Labor Management Relations Act § 10(b), 61 Stat. 146 (1957), as amended, 29 U.S.C. § 160(b) (1958).

but mistakenly before a state forum would eliminate the difficulty. Another dilemma facing complainants before state forums also demands resolution. Assuming that a party is properly before such forum, *i.e.*, there is state jurisdiction, he may still find himself without an adequate remedy because the vast majority of states are without labor relations statutes.[31] Solution of this problem now rests squarely upon the states.

Labor Law—Taft-Hartley Act Does Not Pre-empt State Court of Jurisdiction Over a Labor Dispute Involving American Union and Foreign Shipping Corporation.—Plaintiff, a Liberian corporation owned and controlled by Italian nationals, owns two cruise ships which fly the Liberian flag and claim Monrovia, Liberia as their home port.[1] Defendant union was formed in 1959 by two American maritime unions. Its purpose was to organize foreign seamen employed on ships flying flags of convenience. Defendant union organized the crews of plaintiff's vessels and picketed the two vessels when they arrived in New York, with the result that the crews refused to sail, and scheduled cruises were cancelled.[2] The New York Supreme Court permanently enjoined the defendant from interfering in any way with the operation and management of the ships and from picketing them for any purpose. The appellate division substantially affirmed,[3] two justices dissenting. The Taft-Hartley Act[4] does not deprive a state court of jurisdiction to enjoin an American union from picketing a foreign ship while the ship is in an American port. *Incres S.S. Co. v. International Maritime Workers Union*, 11 App. Div. 2d 177, 202 N.Y.S.2d 692 (1st Dep't 1960).

31. See Comment, 28 Fordham L. Rev. 737, 743-47 (1960).

1. Although both vessels claim Monrovia as their home port, neither have ever been in Liberian waters. Brief for Appellant, p. 3, Incres S.S. Co. v. International Maritime Workers Union, 11 App. Div. 2d 177, 202 N.Y.S.2d 692 (1st Dep't 1960). All of the cruises commence from New York City, but the crews take their leave in Genoa, Italy, where the ships are refitted and repaired. The crews of both vessels are of Italian nationality and they are hired under Italian articles. Plaintiff shares a common office with its agency, a New York corporation, which either alone or jointly with plaintiff, provisions the ships, books passengers, and attends to some of the ships' repairs out of its New York office. Plaintiff's president is also an officer and director of the agency.

2. Defendant's claim that the picketing was done at all times for the twofold purpose of improving the wages and conditions of Incres seamen by attempting to become their collective bargaining agent and of protecting the gains won by American seamen by shortening the gap between wages and conditions on foreign ships and those on American ships.

3. The order of the supreme court enjoined the union "from picketing said vessels for any purpose." 11 App. Div. 2d 177, 185, 202 N.Y.S.2d 692, 700 (1st Dep't 1960). The appellate division modified the order so that it reads "from picketing said vessels for any such purpose." Ibid. Its reason for doing so was to limit the injunction to the condemned activity as presented in the instant case.

4. Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. § 141 (1958); 29 U.S.C. §§ 158-60, 164, 186-87 (Supp. I, 1959).

The doctrine of pre-emption in the field of labor relations was enunciated by the Supreme Court in *Garner v. Teamsters Union*.[5] There it was held that although the union's conduct violated a state labor act, the state court did not have jurisdiction to issue an injunction because the conduct was an unfair labor practice under Section 8 of the Taft-Hartley Act.[6] The recent case of *San Diego Bldg. Trades Council v. Garmon*[7] further expanded the concept of federal pre-emption so that if certain conduct is "arguably" protected under section 7,[8] or is "arguably" an unfair labor practice under section 8, the courts must yield to the exclusive jurisdiction of the National Labor Relations Board. The decisions reflect the intent of Congress to have a uniform federal labor policy.

Before the *Garmon* decision, the Court had held in *Benz v. Compania Naviera Hidalgo, S.A.*[9] that the Taft-Hartley Act did not apply to a damage suit against an American union resulting from the picketing of a foreign ship

5. 346 U.S. 485 (1953).

6. 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (1958), 29 U.S.C. § 158 (Supp. I, 1959).

7. 359 U.S. 236 (1959). This is the second case of the same name. For the first, see 353 U.S. 26 (1957). The result of the second Garmon decision and those that preceded it, particularly the Garner case, is to allow the Board to make the primary determination of whether or not it will handle a specific case. Although in NLRB v. Fainblatt, 306 U.S. 601 (1939), the Supreme Court declared that the Board's power is coextensive with the scope of the commerce clause, the Board has refused to exercise its jurisdiction to the fullest extent. Instead, it takes jurisdiction in accordance with certain published monetary standards. See Comment, 28 Fordham L. Rev. 737, 747-48 (1960). As a result of the Board's attitude and the decision of the Supreme Court in Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957), 26 Fordham L. Rev. 349, where it was held that the Board's determination not to handle a particular case did not give the state authority to do so, a "no man's land" developed. Section 701 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U.S.C. § 164 (Supp. I, 1959), was enacted to remedy this situation, allowing state courts and boards to assert jurisdiction over matters where the Board has declined, or would likely decline, to do so.

The Garmon decision pointed out that the federal statute would not pre-empt the state of jurisdiction if the case involved violence. 359 U.S. at 247-48.

8. National Labor Relations Act, 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 157 (1958).

9. 353 U.S. 138 (1957). This case involved the picketing of a ship owned by a Panamanian corporation and sailed under a Liberian flag. None of the crew was American and the articles were prescribed by the British Maritime Board. Several days after the ship had sailed into an American port the crew "went on strike on board the vessel and refused to obey the orders of the Master. They demanded that their term of service be reduced, their wages be increased, and more favorable conditions of employment be granted." Id. at 139-40. The Master ordered the striking members of the crew off the ship. Three different unions then picketed the ships to compel, as the trial court found, the corporation to rehire the crew at more favorable rates and conditions for a shorter term than that provided for in the articles. The district court granted the injunctions but shortly thereafter the ship sailed from the American port and has not returned since. Because of this fact, the court of appeals dismissed the question of an injunction as being moot, Benz v. Compania Naviera Hidalgo, S.A., 205 F.2d 944 (9th Cir. 1953), and therefore the question was never decided by the Supreme Court.

operated entirely by foreign seamen while the vessel was temporarily in an American port. In *Benz*, the dispute arose on board ship. After a strike was called by the crew, which picketed in its own behalf, the American unions picketed in sympathy. The rationale of the decision was that Congress did not intend the Taft-Hartley Act to apply to labor disputes between foreign crews and their employers.[10] Both prior to and after *Benz*, the National Labor Relations Board has consistently refused to take jurisdiction of certain foreign shipping disputes.[11] The Board, however, has based its decisions on the nationality of the employers, while the *Benz* Court looked to the nationality of the crew.[12] The *Benz* test of nationality was apparently disregarded in *Afran*

10. 353 U.S. at 143-44.

11. In Compania Maritima Sansoc Limitada, CCH Lab. L. Rep. ¶ 1610 (.172) (1 Lab. Rel.) (1950), the Board dismissed a petition to represent the alien crew of a vessel which was registered under the laws of Panama, owned by a Panamanian corporation, a majority of whose stockholders were of foreign countries. The Board did so because the internal economy of a vessel of foreign registry and ownership was involved. Immediately following this decision, the Board refused to assert jurisdiction in a case involving picketing. Sailor's Union, 92 N.L.R.B. 547 (1950). There, one-third of the stock in the Panamanian corporation was owned by American citizens. The union asked to become bargaining agent for the foreign crew but the corporation refused to recognize them as such. The union then proceeded to picket the ship while it was in dry dock. Sometime after the picketing began, a majority of the crew petitioned the union to bargain for them collectively. The union's petition to be certified as the bargaining agent of the crew was dismissed by the board's regional director. The NLRB affirmed on the ground that the corporation was not an employer within the meaning of the act and hence it could not assert judisdiction. Subsequently, in an administrative ruling, the General Counsel of the Board refused to issue a complaint on the union's charge of unfair labor practices under § 8 of the act. 44 L.R.R.M. 1363 (July 13, 1959). The General Counsel stated that the Board could not assert jurisdiction because none of the essential aspects of the employer-employee relationship were domestic in origin. The Board distinguished Peninsular & Occidental S.S. Co., 120 N.L.R.B. 1097 (1958), on the ground that there all of the stock in the corporation was owned by foreign nations, its offices were abroad, the crew was entirely foreign, and the articles were executed abroad.

In Peninsular, the Board asserted jurisdiction in a representation proceeding. The Board distinguished the Benz case because in that case the true owners of the ship were foreigners, while here the beneficial owners were American and the crew signed American articles. However, the Board seemed to be aware of the larger problem before them—the harmful effect that all the flag of convenience ships have upon American labor conditions. In the opinion it said that the crews on board these ships are "in direct competition with American seamen for employment opportunities aboard the vessels, and that the organization of the vessels' crews with a view to improving their working conditions is, therefore, a matter of concern to American seamen." Id. at 1102. In another representation proceeding, Eastern Shipping Corp., 44 L.R.R.M. 1571 (Sept. 21, 1959), the Board reversed the regional director's ruling dismissing the representation petition, and asserted jurisdiction. Unlike the Peninsular case, here the American ownership of the corporation was nominal.

12. 353 U.S. at 143-44. The Court relies heavily on Representative Hartley's remarks that "the bill . . . has been formulated as a bill of rights both for American working men and for their employers"; and again that "the American workingman has been deprived of his dignity as an individual." H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947).

Trans. Co. v. National Maritime Union,[13] where a district court, without determining whether the corporation was foreign-owned, distinguished *Benz* because the suit at bar was for an injunction and not for damages. The problem of whether to look to the nationality of crew or owner is not present in the instant case, since both are foreign.[14]

Recently the Supreme Court distinguished between the applicability of the Taft-Hartley Act and the Norris-LaGuardia Act[15] in such disputes. In *Marine Cooks, AFL v. Panama S.S. Co.*,[16] the Court skirted the *Benz* decision by holding that the Norris-LaGuardia Act deprived federal district courts of jurisdiction to enjoin an American union from picketing a foreign vessel while the vessel was temporarily in an American port. In effect, the Court has indicated that the Norris-LaGuardia Act is broader in its application than the Taft-Hartley Act,[17] *i.e.*, that while Taft-Hartley will not operate to pre-empt

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These statements appear to indicate that the primary reason that the act was held not to apply in the Benz case was that the crew in Benz was composed of foreign workingmen, not American workingmen. Apparently, the Board has used a different criteria in determining whether or not to assert jurisdiction, namely, whether the employers are American or foreign. See note 11 supra.

13. 169 F. Supp. 416 (S.D.N.Y. 1958). The court held that since the plaintiff employer's exclusive remedy for unfair labor practices under the Taft-Hartley Act was through the Board, and the plaintiff had not availed itself of this procedure, the plaintiff could not petition the court for an injunction because any other form of injunctive relief was prohibited by the Norris-LaGuardia Act. But see Fianza Cia Nav. S.A. v. Benz, 178 F. Supp. 243 (D. Ore. 1958).

14. 11 App. Div. 2d 177, 179-80, 202 N.Y.S.2d 692, 694-95 (1st Dep't 1960).

15. 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958), provides that "no court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts. . . ." The same section then goes on to list nine specific types of activities against which injunctions may not be issued if a "labor dispute" is involved. See also CCH Lab. L. Rep. ¶ 6430 (3 Lab. Rel.) (1960).

16. 362 U.S. 365 (1960). "The question in the Benz case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The Benz case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon law. Nothing was said or intimated in Benz that would justify an inference that because a United States District Court has power to award damages in state cases growing out of labor disputes it also has the power to issue injunctions in like situations. That question—United States courts' jurisdiction to issue injunctions in cases like this—is to be controlled by the Norris-LaGuardia Act." Id. at 369.

17. In a case decided subsequent to the instant case, the United States Court of Appeals for the Third Circuit availed itself of the reasoning employed in Marine Cooks, supra. The court held that the Norris-LaGuardia Act precluded the issuance of an injunction, and at the same time expressly declared that it would not decide whether the Labor Management Relations Act applied to the controversy. The fact situation was very much

the dispute, Norris-LaGuardia will operate to prevent a court from enjoining it. The majority in the instant case appears to have adopted this view.[18]

This distinction appears valid. "Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of courts, not, as it passed the Taft-Hartley Act, to regulate the conduct of people engaged in labor disputes."[19] However, the two acts are not so far apart in their objectives and purposes that the one can be applied in a dispute between a foreign-owned ship and an American union, while the other cannot.[20] To determine whether the Taft-Hartley Act is applicable the courts and Board have usually looked to the nationality of the parties. A more realistic test would concern the subject matter of the dispute. There can be no pre-emption by the federal labor statutes unless a *dispute* between an American union and a foreign shipping corporation comes within the scope[21] of the act.[22] The Supreme Court has declared that the power given to the Board under the act is coextensive with the scope of the commerce clause.[23] It is a "well-settled principle that it is the

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like the instant case except that 51% of the stockholders were American citizens. However, the latter fact did not seem to influence the court in reaching its conclusion. Madison Shipping Corp. v. National Maritime Union, 282 F.2d 377 (3d Cir. 1960).

18. 11 App. Div. 2d at 184, 202 N.Y.S.2d at 698.

19. Marine Cooks, AFL v. Panama S.S. Co., 362 U.S. 365, 372 (1960).

20. The Norris-LaGuardia Act § 2, 47 Stat. 70 (1932), 29 U.S.C. § 102 (1958), states as a declaration of public policy that the "individual unorganized worker . . . [should] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment. . . ." The National Labor Relations Act § 1, 49 Stat. 449 (1935), amended by 61 Stat. 136 (1947), as amended, 29 U.S.C. § 151 (1958), states that "it is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

21. National Labor Relations Act § 2(7), 49 Stat. 450 (1935), amended by 61 Stat. 137 (1947), as amended, 29 U.S.C. § 152(7) (1958). Subsection 7 of § 2 states that "the term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

22. The term "act" refers to the National Labor Relations Act of 1935 (Wagner Act), as amended by the Labor Management Relations Act of 1947 (Taft-Hartley Act) and the Labor-Management Reporting and Disclosure Act of 1959. At times, the text refers to the Taft-Hartley Act instead of the National Labor Relations Act and all the amendments.

23. NLRB v. Fainblatt, 306 U.S. 601 (1939). The act defines "commerce" to mean "trade, traffic, commerce, transportation, or communication among the several States . . . or between any foreign country and any State, Territory, or the District of Columbia . . . or between points in the same State but through . . . any foreign country." National Labor Relations Act, 49 Stat. 450 (1935), amended by 61 Stat. 137 (1947), as amended, 28 U.S.C. § 152(6) (1958).

effect upon interstate or foreign commerce, not the source of the injury which is the criterion" determining whether the Board can assert jurisdiction under the act.[24] Also, Congress and the courts have been long aware of the harmful effect that the substandard wages and conditions on board these foreign vessels have had upon American interstate and foreign commerce.[25]

The instant court, in deciding on the basis of *Benz* that there was no pre-emption, failed to distinguish between the nature of the disputes in the two cases. In the instant case the American union had a valid and vital interest in the wages and conditions that existed on the two Incres steamships, notwithstanding that they were owned by foreign nationals. Both ships were constantly plying in and out of New York harbor. If the wages of the crew and the working conditions were substandard, it presented a recurring threat to the status achieved by American labor unions. Here it was the union which organized the crew, and which first claimed injury by reason of the substandard wages and working conditions. The union thus became a party genuinely interested in the dispute. In *Benz*, on the other hand, the American union did not have an interest in the original subject matter of the dispute. It picketed the ship out of sympathy for the already picketing crew, which had been dismissed because of a shipboard dispute that arose while the ship was making its one and only appearance in American waters.

Conceding that *Benz* was properly decided, it should be limited to its facts. It is submitted that in determining whether or not to apply the Taft-Hartley Act the courts and the Board should look beyond the identity of the parties to the origins and subject matter of the dispute and to its effect upon interstate and foreign commerce. The instant case presents a situation that at least satisfies the test of being arguably within the jurisdiction of the NLRB.[26]

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24. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 222 (1938). See Continental Oil Co. v. NLRB, 113 F.2d 473, 477 (10th Cir. 1940). Accord, NLRB v. Vulcan Forging Co., 188 F.2d 927 (6th Cir. 1951); NLRB v. Gulf Public Serv. Co., 116 F.2d 852 (5th Cir. 1941).

25. For two excellent discussions of the problems created by the "flag-of-convenience ships," see Harolds, Some Legal Problems Arising Out of Foreign Flag Operations, 28 Fordham L. Rev. 295 (1959); Comment, 69 Yale L.J. 498 (1960).

26. On February 15, 1961, the NLRB, ruling on an unfair labor practice charge brought by Seafarers International Union of North America against West India Fruit & S.S. Co., decided that the National Labor Relations Act "applied to ships under foreign registry manned by non-resident aliens but owned by American interests and 'operating regularly from United States harbors.'" N.Y. Times, Feb. 17, 1961, p. 53, col. 6. The Board held that the application of the act "was not barred 'by the foreign registry of the vessels nor by the non-resident alien status of the crew.'" Ibid. The basis of the decision was the American citizenship of the vessel's owners. This is in accord with earlier decisions of the Board. See note 10 supra. The Board, however, emphasized the fact that the ship had significant contacts with American commerce. N.Y. Times, Feb. 17, 1961, p. 53, cols. 6-7. See Navcos Corp. v. National Maritime Union, — Pa. —, 166 A.2d 625 (1960).

Master and Servant—Serviceman Proceeding to Next Duty Assignment in Private Vehicle Within the Scope of His Employment.—An Army officer driving his private vehicle en route from one duty station to another collided with plaintiff's automobile in New York State. Plaintiffs brought an action against the United States under the Federal Tort Claims Act[1] for death and injuries sustained in the accident. The United States District Court for the Eastern District of South Carolina granted a Government motion for summary judgment. The United States Court of Appeals for the Fourth Circuit reversed, one judge dissenting. Under applicable New York law if the work of the employee has created the necessity for the travel, the servant is acting within the scope of his employment even though he is also serving at the same time a purpose of his own. To hold the master liable it is not necessary for him to retain control of the details of driving as long as the vehicle is being operated with his consent and in furtherance of his business. *Cooner v. United States*, 276 F.2d 220 (4th Cir. 1960).

Suits against the United States arising out of the negligence of its employees acting within the scope of their employment are under the exclusive jurisdiction of the federal district courts.[2] The district courts are required to apply the law of the state where the accident occurred in determining liability of the Government under the doctrine of *respondeat superior*.[3] Federal court decisions form a confusing pattern,[4] reflecting the divergence in the application of *respondeat superior* by the various states. Generally, courts finding an employer not liable for the negligent driving of his employee where the travel is in furtherance of the former's business and the use of the automobile is at least impliedly authorized have done so on the theory that the employer has not retained control or the right to control the instrumentality.[5] This so-called particular instrumentality rule[6] has been rejected by a substantial

1. 28 U.S.C. § 2674 (1958): "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

2. 28 U.S.C. § 1346(b) (1958).

3. Williams v. United States, 350 U.S. 857 (1955) (per curiam).

4. Compare Chapin v. United States, 258 F.2d 465 (9th Cir. 1958); United States v. Sharpe, 189 F.2d 239 (4th Cir. 1951); United States v. Eleazer, 177 F.2d 914 (4th Cir. 1949), and Paly v. United States, 125 F. Supp. 798 (D. Md. 1954), aff'd per curiam, 221 F.2d 958 (4th Cir. 1955), with Hinson v. United States, 257 F.2d 178 (5th Cir. 1958); United States v. Mraz, 255 F.2d 115 (10th Cir. 1958); United States v. Kennedy, 230 F.2d 674 (9th Cir. 1956), and Hopper v. United States, 122 F. Supp. 181 (E.D. Tenn. 1953), aff'd, 214 F.2d 129 (6th Cir. 1954). See also Sample v. United States, 178 F. Supp. 259 (D. Minn. 1959). The problem is discussed in Note, 19 Fed. B.J. 215 (1959).

5. See, e.g., United States v. Eleazer, supra note 4; Henkelmann v. Metropolitan Life Ins. Co., 180 Md. 591, 26 A.2d 418 (1942); Wesolowski v. John Hancock Mut. Life Ins. Co., 308 Pa. 117, 162 Atl. 166 (1932); Kennedy v. American Nat'l Ins. Co., 130 Tex. 155, 107 S.W.2d 364 (1937). See also Note, 52 Dick. L. Rev. 61 (1947).

6. See Restatement (Second), Agency § 239(b) (1958); Cooner v. United States, 276 F.2d at 234.

number of jurisdictions, which require only that the servant be engaged in the furtherance of his master's business in an authorized manner.[7]

New York has not adopted a conclusive rule for determining liability. There are holdings which would seem to support both the majority and the dissenting opinions in the instant case. The majority accepted the language of Judge Andrews in the leading case of *Riley v. Standard Oil Co.*[8] that there is no single, all-inclusive test to determine when a servant is or is not engaged in his master's business. Where the travel of the employee involves a dual purpose, the majority would, however, accept the rule enunciated by Chief Judge Cardozo in *Marks' Dependents v. Gray*[9] that "if the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own."[10] This test is broad enough to encompass the facts of the principal case because here the travel was directed by the Government and was in furtherance of the Government's business, though the means employed were in the discretion of the officer.[11] The majority rejected the Government's contention that the New York cases require a showing that the details of driving were subject to the employer's control.[12]

Since *Marks' Dependents,* a number of New York cases have considered

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7. E.g., United States v. Mraz, 255 F.2d 115 (10th Cir. 1958); Kohl v. Albert Lifson & Sons, 128 N.J.L. 373, 25 A.2d 925 (1942); Carmin v. Port of Seattle, 10 Wash. 2d 139, 116 P.2d 338 (1941).

8. 231 N.Y. 301, 304, 132 N.E. 97-98 (1921): "No formula can be stated that will enable us to solve the problem whether at a particular moment a particular servant is engaged in his master's business. We recognize that the precise facts before the court will vary the result. . . . But whatever the facts, the answer depends upon a consideration of what the servant was doing, and why, when, where and how he was doing it."

In the Riley case the court had before it the question of whether a servant who had been on a frolic of his own had re-entered his master's business at the time of the accident.

9. 251 N.Y. 90, 167 N.E. 181 (1929). This was a workmen's compensation case which did not involve respondeat superior. In New York, however, workmen's compensation decisions and respondeat superior cases have been cited interchangeably, though, of course, there are obvious differences between the two. See Cooner v. United States, 276 F.2d at 230 n.10.

10. 251 N.Y. at 93-94, 167 N.E. at 183.

11. Major Miller, who was at the time of the accident in a travel status, proceeding by a direct route to his next permanent duty station, was authorized but not required to use his private automobile, and was reimbursed for travel regardless of the mode of transportation used. As a member of the armed services he was subject, under the Uniform Code of Military Justice, 10 U.S.C. § 911 (1958), to military discipline for reckless driving. 276 F.2d at 223 n.2.

12. 276 F.2d at 228, 232. The dissent took the opposite view: "The real question which I think should be answered, under . . . New York cases excepting the use of a particular instrumentality from the employer's control and responsibility, is the relation of the particular instrumentality, Major Miller's automobile, to the employment. This involves the right of the Army, in its role of employer, to control its operation on this particular trip." Id. at 238.

the question of control to determine the liability of an employer for the negligent use by the employee of the latter's own vehicle in connection with the employer's business. The majority in the present case reasoned that New York's concern with control pertained only to the establishment of the master-servant relationship.[13] Several of these cases, in stressing the lack of control over the use of the private vehicle, however, would appear to have adopted the particular instrumentality rule.[14] Since these cases were involved with the dual purpose situation and the use of the private vehicle was at least impliedly authorized, the issue could have been resolved, no doubt, on the authority of *Marks' Dependents,* without resolving the further question of control of the instrumentality involved.

The dissent put particular reliance on *Cooke v. Drigant.*[15] There the court of appeals noted that the employer had "effectively regimented the activities of [its collection agent] . . . into a pattern of minute and detailed control so as to disprove the existence of any relationship other than that of employer and employee."[16] From this and from the fact that the employee had been made to procure liability insurance the court found an implied requirement for the use of an automobile, a requirement which would place it within the scope of employment.[17]

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13. 276 F.2d at 232. As to the application of the control factor, see Leidy, Salesmen as Independent Contractors, 28 Mich. L. Rev. 365 (1930); Note, 37 Ore. L. Rev. 88 (1957).

14. Braice v. Saunders, 262 App. Div. 968, 30 N.Y.S.2d 223 (2d Dep't 1941) (memorandum decision); Dunne v. Contenti, 256 App. Div. 833, 9 N.Y.S.2d 248 (2d Dep't 1939) (memorandum decision); Malloy v. Scott, 248 App. Div. 882, 291 N.Y. Supp. 14 (2d Dep't 1936) (per curiam), aff'd per curiam, 275 N.Y. 496, 11 N.E.2d 313 (1937) (employer had no control over employee with respect to the use of his automobile); Haykl, v. Drees, 247 App. Div. 90, 286 N.Y. Supp. 38 (4th Dep't 1936) (employer knew of car's use but company had no right to control the material details of the work); Baumer v. Gottlieb, 160 Misc. 924, 291 N.Y. Supp. 16 (Sup. Ct. 1936); Fritz v. Krasne, 161 Misc. 442, 291 N.Y. Supp. 10 (Sup. Ct. 1935), aff'd mem., 273 N.Y. 649, 8 N.E.2d 330 (1936). In Fritz the court said: "The partnership did not ever control or direct in any way the operation of the car, nor. . . . ever gave, or reserved the right to give, the operator any directions with reference to the manner in which he was to do his work." 161 Misc. at 444-45, 291 N.Y. Supp. at 13-14.

15. 289 N.Y. 313, 45 N.E.2d 815 (1942). The employee here was an insurance agent, which is the typical situation in cases of this kind in the state courts. For a discussion of the status of insurance agents, see Note, 2 Wyo. L.J. 130 (1948).

16. 289 N.Y. at 316-17, 45 N.E.2d at 817. The majority of the court in the present case interpreted this concern with control by the court as relating to whether the agent was a servant or an independent contractor, not to the question of control of the particular instrumentality involved. 276 F.2d at 232.

17. See 276 F.2d at 237 n.10. Another case relied on by the dissent was Natell v. Taylor-Fichter Steel Constr. Co., 257 App. Div. 764, 15 N.Y.S.2d 327 (2d Dep't 1939), aff'd mem., 283 N.Y. 737, 28 N.E.2d 966 (1940). Here the facts were similar to those of the instant case, except that the question of an unauthorized passenger was also involved. This case appeared to adopt the particular instrumentality rule, though the majority in the present case felt that the chief factor in the case was the unauthorized passenger. 276 F.2d at 233 n.13.

Although no New York case has explicitly rejected the particular instrumentality test, several have indicated that it is not a controlling test but only a relevant consideration. In *Gutov v. Krasne*,[18] applying New Jersey law, but remarking that there was no difference between the New York and New Jersey rules, the court said:

> In effect, what the trial court told the jury was that liability of defendant for the driver's acts depended upon his right to control the driver's physical operation of the automobile at the time and place of the accident. This definition was too narrow. The test rather is whether the defendant had the right of general control over the driver as to how the business . . . should be done.[19]

In *Burdo v. Metropolitan Life Ins. Co.*,[20] the dissent of two justices in the appellate division had stressed the particular instrumentality rule. The court of appeals' affirmance without opinion is, at least, some evidence of its rejection of the rule. Similarly, in *Brown v. John Hancock Mut. Life Ins. Co.*,[21] the court declined an opportunity to approve the particular instrumentality rule. In reversing on the authority of *Cooke v. Drigant*, the court of appeals indicated that liability will be found when the employee is closely supervised by the employer. The decision did not make a reservation of control over the operation of the particular instrumentality a necessary norm of liability.

There has been no conclusive holding by the court of appeals on the exact question involved. The courts have meandered from the more liberal[22] rule as set out in *Marks' Dependents* to the narrower requirement of control of the particular activity.[23] In dealing with the question of control, moreover, it has not been made clear whether the reference is to the establishment of the master-servant relationship, as the majority opinion in the principal case finds, or whether it is to the particular instrumentality rule, as the dissent contends.[24]

Besides being one factor, among others, to be weighed in ascertaining the relationship between the parties, the value of this rule other than as a device to restrict liability is questionable. Just as various reasons,[25] none of them

18. 266 App. Div. 302, 42 N.Y.S.2d 20 (1st Dep't 1943), aff'd mem., 292 N.Y. 602, 55 N.E.2d 372 (1944).

19. 266 App. Div. at 305, 42 N.Y.S.2d at 22.

20. 254 App. Div. 26, 28, 4 N.Y.S.2d 819, 821 (3d Dep't), aff'd mem., 279 N.Y. 648, 18 N.E.2d 42 (1938).

21. 263 App. Div. 872, 32 N.Y.S.2d 171 (2d Dep't 1942) (memorandum decision), rev'd mem., 289 N.Y. 821, 47 N.E.2d 432 (1943).

22. See 276 F.2d at 228-29.

23. See Murphy v. United States, 113 F. Supp. 345 (W.D.N.Y. 1953), dealing with a soldier driving his own car from his duty station to his off-post living quarters. In holding the Government not liable under New York respondeat superior law, the district court cited Standard Oil Co. v. Parkinson, 152 Fed. 681 (8th Cir. 1907), and Restatement, Agency § 239(b) (1933), both of which set forth the particular instrumentality rule. See also the cases cited in note 14 supra.

24. 276 F.2d at 232, 235.

25. Holmes, History of Agency (pts. 1-2), 4 Harv. L. Rev. 345 (1891), 5 Harv. L. Rev. 1 (1891); Laski, The Basis of Vicarious Liability, 26 Yale L.J. 105 (1916); Mechem, Employer's Liability, 4 Ill. L. Rev. 243, 246-50 (1909); Comment, 24 Tenn. L. Rev. 241 (1956).

conclusive,[26] have been advanced for the origin and in justification of the doctrine of *respondeat superior*, so have a number of tests been used in its application,[27] though none of these has provided a suitable, all-inclusive solution to the problem presented. Whether one is a servant, an agent, or an independent contractor, and whether he is acting within the scope of his employment at a given time and place, are questions which are not adequately answered by resorting to mechanical formulae intended to be rigidly applied to pertinent situations. To employ inflexibly a test such as the particular instrumentality rule as a prerequisite to liability is to impose an artificial standard for determining a relationship which is not conducive to categorization.

In ascertaining when the master-servant relationship exists, control is the criterion most often mentioned.[28] The problem posed in the instant case, however, is whether, the master-servant relationship having been established, control will yet have to be found in respect to the very transaction or instrumentality involved. To insist that it must, unduly emphasizes the requirement of control in a situation where some other rule might be better utilized. Stressing control may well be justified in the borrowed-servant situation.[29] Cases involving that question and emphasizing the control requirement[30] lend themselves, unfortunately, as authority for the particular instrumentality rule under entirely different and irrelevant circumstances.[31]

It was pointed out several decades ago[32] that the arrival of the automobile created a situation where a rigid application of the control test would be unreasonable. It is too easy to find that there was no control by the employer of the automobile involved. To impose liability where control of the instru-

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26. "From whence came the rule and a complete exposition of its pedigree are problems as yet unanswered. The learned attempts made are admittedly ineffectual." Douglas, Vicarious Liability and Administration of Risk I, 38 Yale L.J. 584 (1929).

27. See Note, 27 Neb. L. Rev. 110, 111 (1948); Restatement (Second), Agency §§ 228, 229(2), 236, 239 (1958).

28. Leidy, Salesmen as Independent Contractors, 28 Mich. L. Rev. 365, 367 (1930).

29. E.g., Standard Oil Co. v. Parkinson, 152 Fed. 681 (8th Cir. 1907); Brady v. Chicago & G.W. Ry., 114 Fed. 100 (8th Cir. 1902); Byrne v. Kansas City, Ft. S. & M.R.R., 61 Fed. 605 (6th Cir. 1894); Donovan v. Construction Syndicate, [1893] 1 Q.B. 629.

30. Standard Oil Co. v. Parkinson, supra note 29, at 682; Hilsdorf v. City of St. Louis, 45 Mo. 94, 98 (1869). See also Wyllie v. Palmer, 137 N.Y. 248, 33 N.E. 381 (1893), which is relied on by the Government in the instant case. Brief for Appellee, p. 10.

31. Murphy v. United States, 113 F. Supp. 345 (W.D.N.Y. 1953); Howitt v. Hopkins, 219 App. Div. 653, 220 N.Y. Supp. 462 (3d Dep't), aff'd mem., 246 N.Y. 604, 159 N.E. 669 (1927).

32. "In the modern cases, involving automobile accidents, the automobile itself injects a new element; one which makes the control test difficult of proper application. The car can be sent hither and yon; and its speed and direction are actually determined by the driver. It is easy to construe the right to control in such a way as to make it appear that the owner no longer has it." Leidy, Salesmen as Independent Contractors, 28 Mich. L. Rev. 365, 375-76 (1930).

mentality itself could not, as a practical matter, be established, some courts found a general right to control sufficient.[33] Others found, as a substitute for control of the automobile, control over the driver with respect to his route and activities.[34]

Under the broad test laid down by the majority in the present case, such attempts to satisfy a requirement of control, or to circumvent it, would be unnecessary. The basic question to be answered is whose business was primarily being furthered by the trip, considering all the elements involved.[35] Control then becomes but one of the factors to be weighed, rather than a prerequisite to liability.

Taxation—Paid but Contested Local Real Estate Tax Accrues as a Deduction for Federal Income Tax Purposes in Year of Settlement.—The taxpayer, a public utility company, owned considerable real estate on which it paid local property taxes. From 1938-1950,[1] the taxpayer contested[2] its liability for a part of the tax so imposed, but paid the full amount of the assessment under protest.[3] Proceedings with respect to the years 1946-1950

33. Quigley v. Wilson Line, 338 Mass. 125, 154 N.E.2d 77 (1958).

34. Cooke v. Drigant, 289 N.Y. 313, 45 N.E.2d 815 (1942).

35. See 276 F.2d at 223, 234; Brief for Appellant, p. 15. Major Miller had no personal interest in travelling from Washington to Ottawa, though in utilizing a private automobile he was serving a purpose of his own, i.e., personal convenience. Although he could choose the particular means of travel, route and departure time, his choice was necessarily restricted by the time allotted for the trip. See note 11 supra.

Under appropriate travel regulations, the Army could specify the mode of travel where the duty to be performed required a particular form of transportation, but in no case could it direct the use of a privately owned conveyance. Under the circumstances in this case, the Government did not reserve the right to control the mode of travel. Brief for Appellee, pp. 15, 25.

1. Except for the years 1942 and 1943.

2. N.Y. Real Prop. Tax Law §§ 700-20 provides for proceedings to review an assessment of real property. In New York City, such proceedings are governed by the N.Y.C. Charter §§ 163-66, and the N.Y.C. Adm. Code § 166-1.0.

3. See N.Y.C. Adm. Code § 173-1.0 (penalty of interest); N.Y.C. Charter § 172 (tax lien); N.Y. Real Prop. Tax Law §§ 1110-16 (foreclosure of tax lien). The United States Court of Claims summarized the situation thus: "The institution or pendency of litigation for the correction of an assessment did not postpone the dates the bills for the real estate taxes became due and payable. Failure to pay the tax bills when due subjected the property involved to a tax lien which had the effect of a judgment lien which could have been foreclosed and the property sold. In addition, a penalty of interest at 7 percent per annum was incurred. There was no provision in the New York law for suspending or removing the tax lien, whether by injunction, bond or otherwise, other than by payment of the taxes thereon, as billed. Thus an aggrieved property owner had to first pay the real estate taxes and then seek to rectify the error by the exclusive remedy or run the risk, in addition to incurring 7 percent interest, of having the tax lien foreclosed and the property sold." Consolidated Edison Co. v. United States, 133 Ct. Cl. 376, 135 F. Supp. 881, 882 (1955).

were concluded in 1951 by a settlement which fixed the tax at a somewhat lower figure than the amount theretofore paid. The difference, an amount less than the total amount which had been contested, was refunded. The taxpayer brought the present suit in the United States District Court for the Southern District of New York[4] to recover the alleged overpayment of federal income taxes for 1951. The taxpayer contended that it should be permitted to deduct, in 1951, that part of the disputed local property taxes which was determined to be properly assessed, and argued that it was required to deduct in the years of payment only that portion of the property taxes which were uncontested. The Government contended that the taxpayer was required to deduct the entire amount of the local property taxes in the year of payment, and that it was required to include in its gross income for 1951 the partial refund which it received under the settlement reached in that year. The district court granted the Government's motion for summary judgment. The United States Court of Appeals for the Second Circuit reversed, Judge Clark dissenting, and held that "when the exact nature of the payment is not immediately ascertainable because it depends on some future event, such as the outcome of litigation, its treatment for income tax purposes must await that event." *Consolidated Edison Co. v. United States,* 279 F.2d 152, 156 (2d Cir.), *cert. granted,* 364 U.S. 890 (1960) (No. 357, 1960 Term).

When a taxpayer maintains its books according to the accrual method of accounting, a deduction for federal income tax purposes is generally allowed in the year in which all events occur to fix the amount of the expense and determine the liability.[5] This "all events" rule was established in *United States v. Anderson.*[6] Although a taxpayer paid an expense item in 1917, the Court held that the expense properly accrued in 1916 and was deductible only in that year.[7] The year in which a tax expense may be taken as a deduction is

4. Consolidated Edison Co. v. United States, 162 F. Supp. 854 (S.D.N.Y. 1958). In addition to the United States Tax Court, the other courts of original jurisdiction are the United States district courts and the United States Court of Claims. See generally 10 Mertens, Federal Income Taxation §§ 58A.19, 58A.24 (Zimet rev. 1958). Suits in the latter two courts are known as refund suits, since the taxpayer is seeking a refund of an amount he has already paid.

5. Int. Rev. Code of 1939, ch. 1, § 23(c), 53 Stat. 12 (now Int. Rev. Code of 1954, § 164(a)), provides for deductions from gross income of taxes paid or accrued within the taxable year. Int. Rev. Code of 1939, ch. 1, § 41, 53 Stat. 24 (now Int. Rev. Code of 1954, §§ 441, 446), provides that net income shall be computed upon the basis of the taxpayer's annual accounting period and in accordance with the method of accounting regularly employed in keeping the books of such taxpayer. Int. Rev. Code of 1939, ch. 1, § 42, 53 Stat. 24 (now Int. Rev. Code of 1954, § 451), provides that the amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under § 41, any such amounts are to be properly accounted for as of a different period. Int. Rev. Code of 1939, ch. 1, § 48, 53 Stat. 26 (now Int. Rev. Code of 1954, § 7701(a)(25)), provides that the terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed.

6. 269 U.S. 422 (1926).

7. Id. at 442.

determined not merely by the fact of assessment or payment; it depends on whether the amount of the tax expense is fixed and whether the liability of the taxpayer to pay is definite.[8]

Frequently a tax expense is assessed for a particular year, but the taxpayer, denying liability, refuses to pay and begins an action in which he hopes to avoid the expense through administrative or court decision in his favor. When may this contested tax expense be taken as a deduction on the federal income tax return?[9] The Supreme Court in *Security Flour Mills Co. v. Commissioner*[10] stated:

It is settled by many decisions that a taxpayer may not accrue an expense the amount of which is unsettled or the liability for which is contingent, and this principle is fully applicable to a tax, liability for which the taxpayer denies, and payment whereof he is contesting.[11]

This principle was applied to a situation where the taxpayer contested liability for an Agricultural Adjustment Act tax.[12] The Court held that the tax could not be deducted as an accrued liability. In dictum, it said:

"It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting assessment, and collection capable of practical operation." [citing *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 365 (1931).]

This legal principle has often been stated and applied. The uniform result has been denial both to Government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying the

8. These subsidiary questions were decided in Continental Tie & Lumber Co. v. United States, 286 U.S. 290, 297-98 (1932) (fixing the amount of the tax), and Lucas v. American Code Co., 280 U.S. 445 (1930) (determination of the liability).

9. "For cash basis taxpayers life is . . . simple. . . . Generally speaking, they have income when they receive cash or what the courts have considered the 'equivalent of cash' . . . and they have deductions when they actually pay their expenses. . . . The accrual method is supposedly more sophisticated. The timing of income and deductions does not turn on the accident of receipt or payment of money. Instead, income is supposedly based on the right to payment and deductions on the duty to pay."
Lyon, Federal Income Taxation, 35 N.Y.U.L. Rev. 697, 716 (1960).

10. 321 U.S. 281 (1944). When a taxpayer does not pay an asserted liability and brings suit contesting it, the deductions can be taken only in the year in which the contest is finally settled. Dixie Pine Prods. Co. v. Commissioner, 320 U.S. 516 (1944). The taxpayer had accrued on its books and deducted on its federal income tax return the full amount of Mississippi state gasoline taxes which had been assessed for its use of a solvent during 1936. It did not pay the tax and was contesting its validity under state law. The Supreme Court of Mississippi ultimately held that the taxpayer was not liable for the tax. Dyer v. Dixie Pine Prods. Co., 186 Miss. 567, 191 So. 429 (1939). The taxpayer then included in its 1938 income the gasoline tax amount which had been deducted for 1937. The Commissioner disallowed the 1937 deduction and was upheld by the Supreme Court of the United States.

11. 321 U.S. at 284.

12. Ch. 25, 48 Stat. 31 (1933). The imposition of this tax was declared unconstitutional in United States v. Butler, 297 U.S. 1 (1936).

accrual basis, the year in which the right to receive, or the obligation to pay, has become final and definite in amount.[13]

In two companion cases[14] decided in 1955, the Supreme Court adhered to the principle that an accrual basis taxpayer must take deductions in the year of accrual, not in the year of payment.

Two principles may be derived from this line of Supreme Court decisions: (1) When payment of an expense is made after "all events" have occurred to fix liability and determine amount, the fact of payment is a neutral circumstance in determining the time a deduction must be taken, and (2) when payment is not made and liability is contested, the deduction must await the final determination of liability and amount.

When payment *is* made and the taxpayer contests his liability by suing for a refund, neither principle is in point. Yet, in practice, there are situations where the only way to contest a local tax is to pay the amount required and then sue for a refund.[15] The courts are in disagreement as to whether the deduction must be taken in the year of payment or in the year the liability is determined.

The Court of Claims has held that the amount paid must be deducted in the year in which payment was made,[16] stating that "accrual, from the debtor's standpoint, precedes payment, and does not survive it."[17] This proposition was followed in *Consolidated Edison v. United States*,[18] a case which, aside from the tax years involved, was tried on a stipulation of facts identical to those in the instant case. While the former action was pending in the Court of Claims, Consolidated Edison brought the present suit for refund. The district court adopted the position taken by the Court of Claims. The court of appeals reversed[19] and held that an accrual basis taxpayer cannot deduct a contested tax which has been paid until the liability is settled.[20]

The Second Circuit view is logically correct.[21] By its very nature accrual accounting endeavors to match expenses with the time period in which they are actually incurred.[22] The date of payment is not relevant in determining how an

13. 321 U.S. at 286-87.

14. United States v. Olympic Radio & Television, Inc., 349 U.S. 232 (1955); Lewyt Corp. v. Commissioner, 349 U.S. 237 (1955). Both cases involved the same point—whether a taxpayer on the accrual basis can, in computing its net operating loss for one year, deduct the amount of excess profits taxes which were paid in that year but had accrued in an earlier year.

15. See note 3 supra.

16. Chestnut Securities Co. v. United States, 104 Ct. Cl. 489, 62 F. Supp. 574 (1945).

17. Id. at 495, 62 F. Supp. at 576.

18. This prior refund suit covered the years 1938-1940. 133 Ct. Cl. 376, 135 F. Supp. 881 (1955), cert. denied, 351 U.S. 909 (1956), motion for rehearing denied, 364 U.S. 898 (1960).

19. Consolidated Edison Co. v. United States, 279 F.2d 152 (2d Cir. 1960).

20. A more striking conflict between courts could hardly be imagined. The appeal from each is to the United States Supreme Court. The parties, statement of facts and legal issues are the same. The decisions are contrary.

21. Note, 1960 U. Ill. L. F. 461.

22. See Finney, General Accounting 152 (1941).

expense will be allocated. This is the prevailing accounting view now adopted by the court. It is the ultimate extension of the "all events" rule to every contested expense, paid or unpaid.

The same or allied reasoning was expressed in *United States v. Texas M. Ry.*,[23] wherein the Fifth Circuit held that the taxpayer could not deduct the amount of a judgment before litigation ended, although it had deposited in escrow an amount equal to that judgment. An example given in the Federal Tax Regulations[24] lends weight to "determination of liability" as the fact which establishes the time for a deduction. And Judge Jones, in *Standard Oil Co. v. United States*,[25] concluded that "the rule to be uniform should follow the straight rule laid down in *Dixie Pine* and *Security Flour* that all events do not occur within the taxable year that fix the amount and the fact of tax liability until litigation is ended."[26]

Since 1954, there has been a trend to conform "the rules of tax accounting to commercial practice."[27] The trend has been limited to prepaid income cases,[28] but recognition that under certain circumstances prepaid income may be deferred and taxed as it is earned rather than as it is received, is but another way of saying that the fact of payment does not determine the time of accrual.

Admitting that this view is logically correct, and that it is supported by a trend in analogous cases, inquiry should then be focused on the desirability of the principle. A basic policy question is then involved: Should the system of tax accounting rules and commercial accounting rules be uniform and identical? The view proposed by the instant court is another step in this direction. Simplicity and uniformity are certainly desirable goals in this area, but the advisability of introducing purely technical accounting refinements into the federal tax system under the aegis of following a current trend toward uniform accounting practice is questionable. Before a rule is adopted by the courts, serious consideration should be given to the effect it may have on the business community, the taxpayers to be affected. This seems to have been overlooked in the analysis made by both courts.

What is the effect of applying each rule to a series of tax years? As the

23. 263 F.2d 31 (5th Cir. 1959).

24. Treas. Reg. § 1.461-1(2) (1959). If a taxpayer conceded part of a claim, the admitted liability accrues while the contested amount is held in abeyance until the contest is settled. Thus: A renders services to B and claims $10,000. B admits liability for $5,000 but contests the remainder. B can accrue $5,000 as an expense in the year the services are rendered.

25. 56-2 U.S. Tax Cas. ¶ 10051, 51 Am. Fed. Tax R. 1688 (N.D. Ohio 1956).

26. Id. at ¶ 10051, 51 Am. Fed. Tax R. at 1690.

27. See Behren, Prepaid Income—Accounting Concepts and the Tax Law, 15 Tax L. Rev. 343, 366 (1960), and cases cited therein.

28. For a comprehensive review of tax law as applied to prepaid income, see Behren, supra note 27; Lyon, supra note 9; Shapiro, Tax Accounting for Prepaid Income and Reserves for Future Expenses, in House Comm. on Ways & Means, in 2 Compendium of Papers on Broadening the Tax Base, 86th Cong., 1st Sess. 1133 (Comm. Print 1959).

example[29] indicates, the net effect both to government and to taxpayer is the same. It may be argued that changing tax rates, recession or special tax impositions may alter the net result. But the equal probability that such changes woud be favorable or unfavorable to the taxpayer serves to answer such criticism. The real difference is in the apportionment between the early and later year, *i.e.*, how tax payments to the federal government would be affected in the year the local tax was first assessed, and in the year the litigation was finally settled.

In the early year the taxpayer has parted with cash in order to pay the local tax assessment. Under the Court of Claims rule, the taxpayer is allowed a federal deduction of this amount, thereby mitigating the effect of the local tax payment. In the later year, if successful in his suit for a refund, the taxpayer has a local tax rebate to offset the federal tax payment necessitated by treating the refunded amount as income.

Under the Second Circuit rule, the taxpayer would also pay the local tax assessment in the early year, but a deduction of this amount is not to be allowed on the federal tax return. The result is a higher federal tax payment in the very year that the cash flow was already adversely affected by the local tax payment. In the later year, if successful in his suit for a refund, the taxpayer has a local tax rebate and the benefit of a federal deduction for any proper local assessment. The rule brings about lush and lean years.[30]

29. Assume the following facts: a) A local tax assessment of $1,000 is paid under protest in 1960; b) Income for federal tax purposes is $50,000 in 1960 and $50,000 in 1961; c) The federal tax rate is 50% for both years; d) The taxpayer contests the local tax assessment and wins a reduction of $300 in 1961.

The Court of Claims position is that the taxpayer must take a deduction of the total amount in the year of payment, and take the refund as income in the year the litigation is settled. In 1960, taxpayer deducts $1,000 from his income of $50,000 and shows $49,000 as taxable at 50%. His federal tax is $24,500 in the first year. In 1961, the taxpayer adds the $300 refunded to his $50,000 income and shows $50,300 as taxable at 50%. His federal tax is $25,150 for the second year. The total tax paid during both years is $49,650.

The Second Circuit holds that the taxpayer may not deduct the local tax during the year of payment. He must wait until the contest is determined. Then, the amount of the final assessment becomes a deduction, and the refunded amount is not income, but rather represents a return of an asset which was on deposit. In 1960, the taxpayer does not deduct $1,000 from his income, but shows $50,000 as taxable at 50%. His federal tax is $25,000 for the first year. In 1961, the taxpayer deducts the $700 as properly assessed, and shows $49,300 as taxable at 50%. His federal tax is $24,650 for the second year. The total tax paid during both years is $49,650.

30. Effect on Cash Flow:

Applying the Rule of the Court of Claims—

	1960	1961
Cash before local assessment	$50,000	$50,000
Payment/Credit	1,000	300
Leaving	49,000	50,300
Less federal tax payment	24,500	25,150
Net remaining	24,500	25,150

The problem of meeting tax payments and adjusting cash flow is serious to many businesses. The practical effect of this decision should have been considered before formulating a new and basic tax rule.

Fairly considered, the Court of Claims rule[31] results in a more balanced cash flow by matching payment and rebate against one another. It is unwise to adhere to an old rule simply because it is old, but it is at least worthy of mention that few of the taxpayers affected by the rule have thus far sought to contest its application.

The "all events" rule has been correctly applied to limit deductions on the federal tax return where the taxpayer has not paid an expense item and is contesting his liability. The rule has been extended to limit deduction in cases where payment of an expense has been made under circumstances which indicate that the payment was voluntary or conditional pending the determination of liability.[32]

The Second Circuit, however, has gone beyond these criteria and extended the rule to all cases of contested liability, including those which involve unconditional payment of the controverted item. A disallowance of the federal tax deduction might well dissuade a business man from initiating such suits altogether. The extension of this rule can serve no more useful purpose than to penalize a taxpayer for exercising his right to contest a local assessment or tax liability.

Applying the Rule of the Second Circuit—	1960	1961
Cash before local assessment	$50,000	$50,000
Payment/Credit	1,000	300
Leaving	49,000	50,300
Less federal tax payment	25,000	24,650
Net remaining	24,000	25,650

Int. Rev. Code of 1954, § 11, provides current corporate tax rates.

31. Chestnut Securities Co. v. United States, 104 Ct. Cl. 489, 495, 62 F. Supp. 574, 576 (1945).

32. United States v. Texas M. Ry., 263 F.2d 31 (5th Cir. 1959).