

1966

Case Notes

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Case Notes, 34 Fordham L. Rev. 711 (1966).

Available at: <https://ir.lawnet.fordham.edu/flr/vol34/iss4/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

CASE NOTES

Conflict of Laws—Babcock Rule Applied To Deny Application of New York Law in Guest-Passenger Action.—Plaintiff and defendant, both New York domiciliaries, separately and without prior arrangements, left New York to attend summer school in Colorado. While both parties were temporarily residing in Colorado, plaintiff, a guest in defendant's automobile, was injured as a result of defendant's conceded ordinary negligence. The trip had originated in and was to terminate in Colorado. Plaintiff sued in New York. Defendant answered that under Colorado law a host-driver is liable to his guest-passenger only if he is proven to have been grossly negligent or intoxicated.¹ The trial court found that New York law was applicable,² but the appellate division reversed, holding that Colorado law applied.³ The narrowly divided court of appeals affirmed the appellate division. *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

Until recently, tort cases in New York were decided under the *lex loci delicti* theory,⁴ although, for contract actions, *Auten v. Auten*⁵ had introduced a "center of gravity" approach.⁶ *Kilberg v. Northeast Airlines, Inc.*⁷ modified the tort rule by refusing to apply the foreign law's limit of liability.⁸ It was

1. Colo. Rev. Stat. Ann. § 13-9-1 (1953).

2. *Dym v. Gordon*, 41 Misc. 2d 657, 245 N.Y.S.2d 656 (Sup. Ct. 1963).

3. *Dym v. Gordon*, 22 App. Div. 2d 702, 253 N.Y.S.2d 502 (2d Dep't 1964) (memorandum decision).

4. See, e.g., *Poplar v. Bourjois, Inc.*, 298 N.Y. 62, 80 N.E.2d 334 (1948); *Kaufman v. American Youth Hostels, Inc.*, 6 App. Div. 2d 223, 177 N.Y.S.2d 537 (2d Dep't 1958), modified mem. on other grounds, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 263 (1959).

5. 308 N.Y. 155, 124 N.E.2d 99 (1954).

6. Under this approach, a court should apply the law of the state "which has the most significant contacts with the matter in dispute," rather than conclusively finding to be applicable the law of the place of formation or performance of the contract, or even the law that the parties intended to be applied. *Id.* at 160, 124 N.E.2d at 102.

7. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

8. Plaintiff's intestate was killed in the crash of a commercial airliner in Massachusetts. The ticket was purchased in, and the flight originated from, New York. Massachusetts had a wrongful death statute limiting liability to \$15,000. Plaintiff sued for wrongful death and breach of contract in New York, alleging that the contract was governed by New York law, which has no such limitation to liability. The court of appeals dismissed the contract cause of action, but refused to enforce the Massachusetts limitation of liability since enforcement of such limitation of liability violated New York's public policy. *Id.* at 39-40, 172 N.E.2d at 527-28, 211 N.Y.S.2d at 135-36. Thus, the cause of action under the Massachusetts wrongful death statute was permitted without regard to the limitation contained therein. The question whether this dictum was acceptable law in New York was answered by the sister case, resulting from the same accident, of *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir.), reversing on rehearing en banc 307 F.2d 131 (2d Cir. 1962), cert. denied, 372 U.S. 912 (1963). *Pearson* held that refusal to apply the Massachusetts statutory limitation was both the law of New York and a constitutionally "proper exercise" of a state's power to develop a conflicts of laws doctrine. 309 F.2d at 556. See *Currie, Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1.

*Babcock v. Jackson's*⁹ adoption of the "center of gravity" or "grouping of contacts"¹⁰ doctrine in tort litigation, however, that finally discarded the rule of *lex loci delicti*.¹¹ The *Babcock* court reasoned that the "center of gravity" approach would promote the policies and interests of the jurisdiction most concerned with the particular issue.¹² Since, in *Babcock*, all contacts were with New York, while Ontario, where the tort occurred, had no contact other than the transitory presence of the parties at the time of the mishap¹³ and no interest other than the general application of its guest-passenger statute,¹⁴ it was unnecessary to weigh¹⁵ or even define¹⁶ the material contacts and interests.

9. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), 32 Fordham L. Rev. 158. See generally Comments on *Babcock v. Jackson*, A Recent Development in Conflict of Laws, 63 Colum. L. Rev. 1212 (1963).

10. 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. The court, however, did not define the terms "contacts" and "interests." If the two words are not synonymous, it is submitted that the former must mean relationships with the jurisdiction, while the latter would be policies of the state affecting or affected by those relationships.

11. Nevertheless, one department of the appellate division has held that the *Babcock* rule does not apply where New York is merely the disinterested forum—i.e., although suit was brought in New York, it was not one of the states whose contacts and interests were being primarily considered in the selection of the appropriate law. *Long v. Pan Am. World Airways, Inc.*, 23 App. Div. 2d 386, 260 N.Y.S.2d 750 (1st Dep't 1965). The court of appeals unanimously reversed this holding. *Long v. Pan Am. World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965). See generally Comment, 65 Colum. L. Rev. 1448 (1965), discussing the *Long* case, as decided by the appellate division, and the instant case.

Other states have considered the application of the *Babcock* rule. Wisconsin had previously allowed suit between related domiciliaries resulting from a tort in a jurisdiction which adhered to the doctrine of intra-family immunity. It did so by severing the issue of immunity from the cause of action and holding that the intra-family relationship, and, therefore, the right of immunity, was subject to Wisconsin law. *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959). The same result was achieved later by applying the *Babcock* rule to find that Wisconsin had the most significant contacts and interests with the issue of intra-family liability and immunity. *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). Accord, *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); cf. *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1955).

12. 12 N.Y.2d at 481-82, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

13. Plaintiff and defendant were both New York domiciliaries. They left New York on a weekend trip in defendant's automobile, which was registered, garaged, and insured in New York; the parties were to return to New York. The accident occurred while the parties were passing through Ontario.

14. Ont. Rev. Stat., ch. 172, § 105(2) (1960).

15. See Currie, Comments on *Babcock v. Jackson*, A Recent Development in Conflict of Laws, 63 Colum. L. Rev. 1212, 1233 (1963), where the author states: "When . . . we find that the interests of two or more states are in conflict, a court has no means of determining which state has 'the most significant relationship,'" *id.* at 1235, except when one state has no interest, *id.* at 1242.

16. Judge Van Voorhis, dissenting in *Babcock*, noted that "the expressions 'center of gravity,' 'grouping of contacts,' and 'significant contacts' are catchwords which were not employed to define and are inadequate to define a principle of law, and were neither applied to nor are they applicable in the realm of torts." 12 N.Y.2d at 486, 191 N.E.2d at 286, 240

In the instant case, however, the contacts with the *locus delicti* were more than merely the parties' transitory presence within the state or the fortuitous circumstances which had brought them there. Nevertheless, both parties had remained New York domiciliaries; suit was brought in New York; if denial of recovery were to make plaintiff a public charge, she would be a charge of New York and not of Colorado; the automobile was registered and insured in New York; and New York had an enunciated policy to permit a guest-passenger to recover from his negligent host-driver.¹⁷ Thus, the issue before the court was the materiality of the opposing facts that the *locus delicti* was also the temporary residence of the parties and the place where the host-guest relationship was formed.¹⁸

To the majority of the court, the crucial consideration was that the parties had voluntarily elected to reside "under the protective arm of Colorado law," where the tort-producing relationship was formed.¹⁹ That state had acquired such "contacts with the *relationship itself* and the *basis of its formation*"²⁰ so as to warrant the application of its "underlying policy."²¹ The three aspects of that policy were: the protection of Colorado insurance carriers from fraudulent claims; the prevention of suits by "ungrateful guests"; and the protection of the priority of the rights of injured parties in other cars.²² The court, diminishing the weight afforded the factor that enforcement of the *lex loci delicti* would be contrary to New York's expressed public policy,²³ found domicile to be the only competing contact. It then rejected the sufficiency of domicile alone as threatening to instill a rule as rigid as the one repudiated by *Babcock*.²⁴

N.Y.S.2d at 753. In *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964), Pennsylvania discarded the *lex loci delicti* for a center of gravity doctrine. In a strong dissent, Chief Justice Bell commented that the majority opinion "substitutes for a clear and definite and well settled rule with its certainty and stability, a new nebulous and obviously tentative rule which is so indefinite and flexible and is capable of so many different interpretations and applications that it will undoubtedly produce uncertainty, confusion, conflicts between States, and increased litigation." *Id.* at 25-26, 203 A.2d at 807.

Thus, in *White v. Motor Vehicle Acc. Indem. Corp.*, 39 Misc. 2d 678, 241 N.Y.S.2d 566 (Sup. Ct. 1963), with facts the converse of those in *Babcock*, except that suit was brought in New York, the court denied relief to the plaintiff because he could not bring suit in Ontario; but the court declined to apply *Babcock* to reach that end. However, in *Kell v. Henderson*, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), under facts substantially identical to those in *White*, the suit was entertained and New York law was held applicable on the issue of host-guest liability.

17. *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

18. 16 N.Y.2d at 123, 209 N.E.2d at 793, 262 N.Y.S.2d at 465.

19. *Id.* at 125, 209 N.E.2d at 795, 262 N.Y.S.2d at 467.

20. *Id.* at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467.

21. *Ibid.*

22. *Id.* at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

23. *Id.* at 128, 209 N.E.2d at 796, 262 N.Y.S.2d at 469.

24. *Id.* at 127, 209 N.E.2d at 796, 262 N.Y.S.2d at 468-69.

Judge Fuld, dissenting, reasoned that Colorado had no real interest in this suit since neither Colorado defendants or insurers were involved,²⁵ nor were there any Colorado legislative intimations of hostility toward guest suits or of the desire to preserve priorities.²⁶ Thus, according to his reasoning, it was immaterial that the relationship was formed in Colorado,²⁷ and, as in *Babcock*, New York law was applicable.²⁸ New York, on the other hand, had a definite interest in these factors. Since the defendant's automobile was registered and insured in New York,²⁹ and since the "ungrateful guest" suit was brought against a New York domiciliary in a New York court, the state had a two-fold interest: a specific interest in this suit as well as a general interest in whether it should entertain host-guest suits in its courts.

The fact that Judge Fuld, who wrote for the *Babcock* majority, dissented in the present case is some intimation that the present decision is a modification or limitation, rather than a mere application, of the *Babcock* rule.³⁰ Judge Fuld's majority opinion in *Babcock*³¹ and his dissenting opinion here³² considered each state's broad interest in the parties and the occurrence. The instant majority has restricted the scope of the inquiry of the states' relevant interests

25. *Id.* at 131, 209 N.E.2d at 799, 262 N.Y.S.2d at 472 (dissenting opinion).

26. *Id.* at 132, 209 N.E.2d at 799, 262 N.Y.S.2d at 472-73 (dissenting opinion); see *Dobbs v. Sugioka*, 117 Colo. 218, 220, 185 P.2d 784, 785 (1947), where the Colorado Supreme Court declared that the policy of the statute was to prevent bums, hitchhikers, and those who had no "moral right to recompense" from profiting from the mishap. Accord, *American Smelting & Ref. Co. v. Sutyak*, 175 F.2d 123, 126 (10th Cir. 1949). But both cases evolved around whether the plaintiffs were "guests," and both found a mutually beneficial business purpose negating the plaintiffs as "guests." Plaintiff in the instant case was a guest, and the purpose of the statute would seem to include the prevention of similar suits. See *Vogts v. Guerrette*, 142 Colo. 527, 351 P.2d 851 (1960). Thus, there is a true conflict between the policy of Colorado and that of New York. See text accompanying note 17 *supra*.

27. 16 N.Y.2d at 131, 209 N.E.2d at 798, 262 N.Y.S.2d at 472 (dissenting opinion).

28. *Ibid.*

29. *Dym v. Gordon*, 41 Misc. 2d 657, 658, 245 N.Y.S.2d 656, 657 (Sup. Ct. 1963).

30. "The view expressed by the majority is inconsistent not only with the rationale underlying *Babcock* but with the rule there explicitly stated . . ." 16 N.Y.2d at 129, 209 N.E.2d at 797, 262 N.Y.S.2d at 470 (dissenting opinion).

31. The best result "may . . . be achieved by giving controlling effect to the law of the jurisdiction which, because of its [interest in] . . . or contact with the occurrence or the parties, has the greatest concern with the specific issue raised . . ." 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. This does not limit the parties' status with the jurisdiction to that existing at the time that the parties formed the tort-producing relationship.

32. "New York [was] . . . the permanent residence of the plaintiff and the defendant [the place from which they came] and the place to which they returned to live shortly after the accident If a plaintiff who returns to live here after sustaining injuries . . . becomes a public charge, it is . . . New York [that] . . . will feel the repercussions . . . and not the distant and unconcerned . . . state of injury, [or the distant unconcerned state] where a guest-host relationship between the New York parties may have been formed." 16 N.Y.2d at 132-33, 209 N.E.2d at 799, 262 N.Y.S.2d at 473 (dissenting opinion). (Citations omitted.)

to those more directly related to the tort.³³ Only to this extent has the majority modified *Babcock*. However, by so doing, the court has found to be controlling Colorado "interests"³⁴ of such dubious nature³⁵ that the "interests" appear to be no more than the result of a mere finding of "contacts."³⁶ As an end result, *Babcock* has been further restricted to the extent that now the more relevant contacts occur closer in time to the formation of the relationship leading to the tort, and that from these contacts the court will infer that interests arise.

If this modification intimated a return of some substantial part of the certainty lost in adopting the *Babcock* rule, without sacrificing its characteristic flexibility,³⁷ the decision would have been welcome relief. But the court's finding that the entirety of all relevant factors tended toward Colorado law³⁸ when weighed against various contacts grouped by the court under the heading "domicile"³⁹ does not suggest the restoration of certainty. From this holding, it cannot be determined with any certainty what would result *if*, at the time of the formation of the relationship, the parties, while not merely passing through Colorado, were less than six week residents; or *if* the relationship between these temporary residents of Colorado were formed outside that state; or *if* the relationship formed by temporary residents of Colorado were intended to begin, end, or pass through some third state; or *if* any other factor were varied.

Where multiple jurisdictional contacts and interests conflict, courts adopting the *Babcock* rule must quantitatively⁴⁰ or qualitatively⁴¹ analyze each fact

33. See text accompanying notes 19-21 *supra*.

34. See text accompanying notes 19-24 *supra*.

35. See text accompanying notes 25 & 26 *supra*.

36. Although Colorado has a policy concerning the host-guest relationship, it does not have a significant interest since that policy was not affected by the outcome of the suit.

37. See note 16 *supra*.

38. 16 N.Y.S.2d at 128, 209 N.E.2d at 797, 262 N.Y.S.2d at 469-70.

39. *Id.* at 126, 209 N.E.2d at 795, 262 N.Y.S.2d at 468.

40. See O'Rourke, A Numerical Evaluation of *Babcock*, 22 N.Y. County B. Bull. 220 (1965), where the author lists seven contacts: place of accident, residence of plaintiff, residence of defendant, where trip originated, terminal point of the trip, where the relationship arose, and where the beneficiary resided. A table was used to point out that the law of the state with the greatest number of such contacts was applied not only in *Babcock*, but also in *Long v. Pan Am. World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965); and *Fornaro v. Jill Bros., Inc.*, 15 N.Y.2d 819, 205 N.E.2d 862, 257 N.Y.S.2d 938 (1965) (memorandum decision). The author finds, therefore, that courts will apply the law of the state having a numerical majority—four of the seven—of the contacts. O'Rourke, *supra* at 223.

Professor Ehrenzweig criticizes the adoption of a formula for determining the jurisdiction having the "most significant relationship" on the very ground that it would become mere "contact-counting," and, thus, the courts would not purposefully consider the facts and policies involved. Ehrenzweig, *Conflicts in a Nutshell* § 76, at 199-200 (1965).

41. See Leflar, Comments on *Babcock v. Jackson*, A Recent Development in Conflict of Laws, 63 Colum. L. Rev. 1212, 1247 (1963), where the author states that, "on the basis of the *Babcock* case, it may be assumed that 'grouping of contacts' does not mean mere

pattern to determine the comparative merits of the claims of each state involved. Some of the uncertainty lost by applying this rule instead of the rigid *lex loci delicti* doctrine would be restored if one contact, such as domicile, were regarded as a sufficient contact to convey the strongest interest and to require the application of that state's law.⁴² Although this approach, adopted by Chief Judge Desmond, might restore certainty, it presents a rigid rule which is quite clearly contrary to the basic approach fostered by *Babcock*.

Under the Desmond reasoning, a balance of certainty and flexibility would be achieved only when all the parties were permanent residents of the same state. By accepting domicile and permanent residence as the determinable contacts, the court would best be able to effect the policy of the state with respect to persons with whom it is most concerned. But the application of that state's law should be only presumed proper, and that presumption can be rebutted by showing that some other state has such an interest that "justice, fairness and 'the best practical result'"⁴³ require the application of that other state's law. This would require a showing that the non-domiciliary state's interest or policies would *probably be affected by the suit*. If neither that state nor any of its residents is a party to the litigation, and if neither the state, its residents, nor any property subject to its jurisdiction would be affected by the outcome, then that state would have no interest *in this suit*.

But if the non-domicile state does have an interest in this suit, then the forum should weigh that interest against that of the domicile state. The non-domicile state's interest must be clearly superior, and any doubt should be resolved in favor of the domicile state,⁴⁴ since it *generally* has clear interest in the parties and the litigation.⁴⁵ These general interests are exemplified by

counting of contacts, that qualitative rather than quantitative evaluation determines "the most significant relationship." *Id.* at 1248. (Footnotes omitted.)

42. Although the court of appeals had refused previously to hinge its holding on domicile, Chief Judge Desmond took this approach. His position is clear: "[N]o state can have any discoverable 'interest' in the application of its own special public policies as to liability and compensation in tort litigations in another state between two persons, both resident of that other state." 16 N.Y.2d at 135, 209 N.E.2d at 801, 262 N.Y.S.2d at 475-76 (dissenting opinion).

43. *Babcock v. Jackson*, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963), quoting from *Swift & Co. v. Bankers Trust Co.*, 280 N.Y. 135, 141, 19 N.E.2d 992, 995 (1939). Cf. Restatement (Second), Conflict of Laws § 379a (Tent. Draft No. 9, 1964).

44. A similar approach was taken in *Freund v. Spencer*, 46 Misc. 2d 472, 260 N.Y.S.2d 149 (Sup. Ct. 1965), where three states were involved. Vermont was the place of the tort; Massachusetts was the temporary residence of the parties, the point of origin and return, and the place where the host-guest relationship arose; New York was the domicile and permanent residence of the parties. The court found that, since there was no concentration of contacts and interests, permanent residence was qualitatively the most significant element, and so New York law was applied. *Id.* at 473-74, 260 N.Y.S.2d at 151-52.

45. Professor Ehrenzweig arrived at the same result for automobile accidents where suit is brought in the common domicile. He noted that, since there are many "guest statute" states, this approach would also prevent a defendant from being "caught" in a host-guest liability state. Ehrenzweig, Conflict of Laws § 220, at 580 (1962).

a host-guest suit. If there were fraud or collusion, or simply the mere existence of a host-guest suit, the carrier insuring the car—the party to suffer the loss—will generally come from the domicile state.⁴⁶ If an “ungrateful guest” sues his host, the forum where the action will be brought generally will be the court of the domicile state. And, if the litigation results with a non-suited plaintiff or unsuccessful defendant becoming an unproductive resident or public charge, generally the domicile state will suffer the loss or bear the burden.

In the instant case, no Colorado plaintiffs, defendants, insurance carriers, or beneficiaries were involved; no Colorado property was involved; and the state of Colorado was in no way affected by the outcome of the litigation. The majority should have found that Colorado had no genuine interest in the suit and that New York law, therefore, should have been applied.

Constitutional Law—First Amendment Held Not To Protect Burning of a Draft Card at a Public Rally.—Defendant was convicted of violating Section 462(b)(3) of the Universal Military Training and Service Act,¹ which makes it a crime knowingly to mutilate or destroy any certificate issued pursuant to or prescribed by the act. Defendant contended that burning his draft card was “an act of symbolic speech protected in full by the First Amendment to the Constitution.”² In his decision, Judge Tyler indicated that defendant’s conduct was not an exercise of symbolic speech,³ and that, even if it were, it could be prohibited constitutionally, since more normal forms of communication were available,⁴ and freedom of speech must often be subordinated to public or governmental interests.⁵ *United States v. Miller*, Dkt. No. 65 Cr. 937, S.D.N.Y., March 8, 1966.

The basis upon which the instant decision rebutted defendant’s claim that his conduct was symbolic speech was by reference to an earlier opinion of the same court, in which it passed upon defendant’s various pre-trial motions.⁶

46. Professor Ehrenzweig notes further that insurers might take into account, in calculating premiums, the degree of fault required for liability in the jurisdiction where the car is kept. *Id.* § 220, at 580-81.

1. 79 Stat. 586, 50 U.S.C.A. App. § 462(b)(3) (Supp. 1965).

2. *United States v. Miller*, Dkt. No. 65 Cr. 937, S.D.N.Y., March 8, 1966, at 3.

3. *Id.* at 5-6.

4. *Id.* at 6.

5. *Id.* at 7.

6. *United States v. Miller*, 249 F. Supp. 59 (S.D.N.Y. 1965). Here, the court ruled on defendant’s motion to dismiss the indictment or, in the alternative, to receive a bill of particulars with regard to the charge, and to discover and inspect various documents and effects, including the charred remains of his notice of classification. *Id.* at 61.

The grounds upon which defendant sought a dismissal were: (1) the indictment failed to charge a crime against the United States; (2) the indictment abridged his freedom of speech; (3) the indictment denied him due process; and, (4) the indictment would result in a deprivation of his right to be free from cruel and unusual punishment. *Ibid.*

The second and third grounds stated above will be discussed at length in this note. The

In the earlier decision, the court distinguished the symbolic speech cases presented by the defendant, reasoning that they were "cases involving statutes which, *largely by their terms*, proscribed 'symbolic speech' . . . in dereliction of First Amendment protections—something which Section 462(b)(3) *on its face* does not appear to do."⁷

It is submitted that the present court was in error in relying upon its pre-trial opinion as the basis for asserting that no speech issue was involved at the trial. The decision on the motion finds its justification in the fact that, in deciding a motion to dismiss based on a contention of unconstitutionality, the court may not look beyond the face of the challenged statute or indictment.⁸ But in determining whether a particular *application* of a statute does or does not affect speech, the purview of the court's investigation is not so restricted. Thus, the court's pre-trial finding that the face of the statute before it raised no speech issue is, in no manner, a refutation of defendant's trial contention that his conduct was in fact symbolic speech.

The case of *Stromberg v. California*⁹ provides a helpful basis for analogy in determining whether the present defendant's conduct was symbolic speech. In *Stromberg*, the Supreme Court declared invalid upon its face a state statute that made it a crime to display a red flag in any public place as a symbol of opposition to Government.¹⁰ The Court reasoned that, since the language of the statute was so general as to permit punishment for displaying a flag as a symbol of *peaceful* opposition to Government,¹¹ an activity that was "'within constitutional limitations,'"¹² it was repugnant to the free *speech* guarantee of the first amendment.¹³ It seems clear that the *Stromberg* Court deemed the act of publicly displaying a flag as a symbol of opposition to be an act of speech. But, just as one might display a flag as a symbol of opposition, he might display the destruction of his draft card for a similar purpose.¹⁴ It cannot be asserted

first ground rested on the contention that a notice of classification is not a "certificate" within the meaning of the act, and the act only proscribed destruction of a "certificate." The court, relying on *United States v. Turner*, 246 F.2d 228 (2d Cir. 1957), pointed out that "certificate" was certainly intended to include a notice of classification. 249 F. Supp. at 61.

The fourth ground was readily repudiated when the court noted that it was prematurely raised, since no punishment had yet been imposed "and none may ever be imposed." *Id.* at 65. The validity of the court's reasoning in this respect was underscored when, after defendant's ultimate conviction, it suspended his sentence.

7. *Id.* at 62. (Emphasis added.)

8. See, e.g., *United States v. Foster*, 80 F. Supp. 479, 484 (S.D.N.Y. 1948).

9. 283 U.S. 359 (1931).

10. *Id.* at 360-61.

11. *Id.* at 366.

12. *Ibid.*

13. As the statute in *Stromberg* was a state statute, the actual holding of the case was based upon the fourteenth amendment. *Id.* at 369-70. But it is clear that the Court's objection to the statute was that it was an unconstitutional abridgment of speech. See *id.* at 368.

14. This is not to say that the *Miller* and *Stromberg* statutes are similar; indeed, they

logically that displaying the flag might be speech, but displaying the destruction of the card could not be. Yet, the present court's reliance on its pre-trial opinion as the basis for refuting defendant's symbolic speech contention at the trial, amounts to just such an assertion.

As previously noted,¹⁵ the instant court did not rest its decision solely on the contention that defendant's conduct was not symbolic speech. Rather, the court said that the defendant "could have spoken against all of the things he desired without burning his notice of classification,"¹⁶ and rejected defendant's argument that "the First Amendment would permit [him] . . . to make the most dramatic and compelling speech possible . . ."¹⁷ Judge Tyler stated that "neither the authorities cited by the defense counsel nor any case that I have been able to find support the proposition that the First Amendment entitles one to full protection of the most dramatic form of speech available, especially where other adequate but less dramatic means are at hand to be used . . ."¹⁸ This statement should not be interpreted as suggesting that the first amendment would allow *arbitrary* restrictions on particular means of communication, so long as other means were available. Such a suggestion would be untenable. It could hardly be supposed, for example, that a general ban on poetry would be upheld simply because any ideas conveyed might have been conveyed through the use of prose.¹⁹

What the court apparently meant to suggest was that, in considering "the balance between the individual and the governmental interests,"²⁰ as courts should do when a regulation is challenged as an unconstitutional abridgment of free speech,²¹ a partial, rather than a total, abridgment of the individual's

are not. Whereas the instant statute proscribes conduct that need not be speech, the Stromberg statute proscribed speech. But it is not the instant statute, of itself, that is here being examined; rather, it is the application of the statute to the defendant. The first critical question is whether defendant's conduct was speech, and it is for the purpose of answering this question that Stromberg is here being employed. The present defendant publicly displayed the burning of his draft card for the purpose of symbolizing his opposition to certain Government activities. Had he displayed a red flag for the same purpose, his conduct would practically have come within the literal application of the Stromberg statute. As the Stromberg Court deemed displaying the flag to be speech, it is doubtful that it would not have deemed displaying the destruction of the card to be speech. See note 33 *infra*.

15. See text accompanying note 4 *supra*.

16. Dkt. No. 65 Cr. 937, at 6.

17. *Id.* at 5.

18. *Id.* at 5-6. Significantly, "most of the witnesses at trial agreed that David Miller got the largest proportion of cheers (and boos as well) . . ." of all the speakers at the rally. *Id.* at 8.

19. It may also be noted that the Stromberg court nowhere thought it relevant to suggest that the defendant there might have communicated his opposition to the Government by means other than waving a flag in public.

20. *Barenblatt v. United States*, 360 U.S. 109, 134 (1959). It should be noted, of course, that "there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights . . ." *United States v. Raines*, 362 U.S. 17, 27 (1960).

21. *Barenblatt v. United States*, 360 U.S. 109, 126 (1959); accord, e.g., *American Com-*

interest should weigh in the Government's favor.²² That is, the fact that the individual's interest is only partially abridged would mean that the governmental interest necessary to weigh the balance in favor of the restriction may be less than might be required were the individual's interest totally abridged by the restriction. The reason for the court's lack of clarity in enunciating this rule stems from its apparent failure to explicitly state that it applied the balancing test.

In the pre-trial decision, it was not necessary for the court to balance interests, as it properly refused to rule on defendant's free speech contention.²³ Yet, the earlier decision did take note of the balancing test. Specifically, after concluding that the present statute satisfied the "rational basis" test of due process,²⁴ the court, in its decision on the motion, stated that "it is . . . possible that legislation, valid enough upon grounds of purpose and rationality, may unnecessarily impinge upon Bill of Rights protections."²⁵ But thus having recognized the balancing test,²⁶ the pre-trial court quickly discarded it from any application to the case before it. Quoting from *Giboney v. Empire Storage & Ice Co.*,²⁷ which is also cited in the present decision,²⁸ Judge Tyler stated that speech is not protected when it is used as an "integral part of conduct in violation of a *valid* criminal statute."²⁹ Then, in a statement that forecast the present decision, the judge stated that "it can be well understood why the government here argues . . . that upon no conceivable set of circumstances can Miller ever effectively establish infringement of his First Amendment privileges."³⁰

It is submitted that the court would have done well not to rely on *Giboney*.

munications Ass'n v. Douds, 339 U.S. 382, 399 (1950); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 95-96 (1940); *Schneider v. State*, 308 U.S. 147, 161 (1939).

22. A "partial abridgment," under this interpretation, would be a restriction on a particular means of speech, rather than a restriction on any speech made for a particular purpose. Specifically, the present defendant would not have been subject to indictment if he had orally expressed his opposition to the war in Viet Nam. See note 59 *infra*.

23. See text accompanying notes 7 & 8 *supra*.

24. 249 F. Supp. at 63-64. Under the rational basis test of due process, courts "can only be properly concerned with whether or not the statute under attack serves purposes reasonably related to legitimate powers of Congress under the Constitution—and that it so serves without discrimination or caprice." *Id.* at 63. Applying this test, the pre-trial court found that the amendment to § 462(b) is a reasonable extension of the requirement that registrants carry their draft certificates upon their person, 32 C.F.R. §§ 1617.1, 1623.5 (1962), and, consequently, "a reasonable exercise of the powers of Congress to raise armies in the defense of the United States." 249 F. Supp. at 64.

25. *Id.* at 63.

26. See notes 21 & 22 *supra* and accompanying text.

27. 336 U.S. 490 (1949).

28. Dkt. No. 65 Cr. 937, at 8.

29. 249 F. Supp. at 63, quoting from *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1948). (Emphasis added.)

30. 249 F. Supp. at 63.

The relevant principle of that case would appear to be that "conduct *otherwise unlawful*"³¹ is not "immune from . . . regulation because an integral part of that conduct . . ." ³² is achieved through speech. However, conduct is not "unlawful" if the law that prohibits it is itself unconstitutional; and the constitutionality of the application of a law that, as applied, restricts speech, should depend upon the outcome of the balancing test. The court's reliance on *Giboney* served only to create the impression that it did not balance, but erroneously presupposed that the prohibition—the application of the statute—was a means "not prohibited, but consist with the letter and spirit of the constitution . . ." ³³

31. 336 U.S. at 498. (Emphasis added.)

32. *Id.* at 498.

33. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 421 (1819). Since it is almost certain that the court did balance, see text accompanying note 34 *infra*, its reliance on *Giboney* (a case in which, incidentally, the balancing test was applied, 336 U.S. at 501) would appear to be both unnecessary and confusing. But if it is assumed that the court did not balance, an unlikely supposition, then its reliance on *Giboney* merits further examination. Clearly, when the pre-trial decision cited *Giboney*, it had conceded, for the moment, that defendant's conduct was speech (see 249 F. Supp. at 63), and was intimating that this conduct was nonetheless not within the ambit of first amendment protection. Perhaps it is this very idea that Judge Tyler meant to convey in the trial opinion when he stated that no "authorities that I have been able to find support the proposition that the First Amendment entitles one to full protection of the most dramatic form of speech available, especially where other adequate but less dramatic means are at hand to be used by the speaker . . ." Dkt. No. 65 Cr. 937, at 5-6.

Perhaps the court was suggesting that a statute not patently aimed at restricting speech, and patently valid, is not amenable to a first amendment oriented attack simply because, in a particular application, it does in fact restrict conduct that is technically speech. Such a view has the apparent advantage of avoiding frivolous "speech" cries by a multitude of defendants. Theoretically, any criminal could assert that his illegal conduct was a symbolic protest of the very enactment that defined it as a crime. But if the enactment were patently free of any speech issue, and especially if other forms of protest were available, then, under the view here suggested, courts would be free to acknowledge that the conduct was speech, and yet categorize it as speech that is not entitled to the protection of the first amendment.

Such a view is logically unsound and, practically, unnecessary. It is speech, and not speech in relation to a statute, that is protected by the first amendment; if a statute, in its application, restricts speech, the balancing test should always be applied. The fact that the "speaker" had other means available should not go to the issue of whether or not to balance, but, rather, should weigh in the Government's favor when the balance is measured.

On a practical level, it is not true that courts would be compelled to apply the balancing test whenever a defense counsel decided to argue that his client's conduct was a symbolic protest of the law proscribing that conduct. Whether or not conduct is speech depends upon objective and subjective circumstances. Objectively, it would have to appear that an audience was present to observe the conduct. Subjectively, it would have to be shown that the actor's intention was to convey his idea(s) to this audience. Here is where the captured criminal would fail in his claim of "speech," but where the present defendant does not so fail.

Furthermore, even if a particular form of conduct did qualify as speech, if the "speaker's" sole purpose was to protest the statute proscribing his conduct, his interest in so doing would probably be of little weight on the individual's side of the balance. In this regard,

That the court did balance is evidenced by its statement that "to strike the balance in favor of Miller would be virtually to license him and others so inclined to ignore their responsibilities to the national defense requirements of this nation."³⁴ Accepting this as a sufficient indication that the balancing test was applied, it remains to be considered, first, what interests the court placed on each side of the scale; and, secondly, how accurately it read the scale. As for what interests were weighed on the side of the individual, the answer is clear; the right to communicate freely, and how significantly this right is abridged by restricting particular means through which it might be exercised.³⁵

However, it is unclear exactly what governmental interests the court might have weighed. It is true that the present decision mentioned "an effective means of drafting,"³⁶ and "responsibilities to the national defense."³⁷ But it also made explicit reference³⁸ to the statutory purpose that was considered in its opinion on the motion, so that the statutory purpose recognized in the earlier opinion is clearly relevant to a determination of what governmental interests were balanced in the present decision. The only instance in which the pre-trial opinion considered congressional purpose was when it discussed the issue of the statute's compliance with the "rational basis" test of due process.³⁹ There, the pre-trial court stated that

it is by no means irrational for Congress to . . . underscore the long-established duty of a registrant to maintain continuous possession [of his notice of classification] Nor does it require unusual imagination to conceive of the several desirable . . . administrative advantages to the . . . draft boards in a system of personal retention of classification information by each potential draftee.⁴⁰

Ironically, whereas the court relied upon this analogy between the present section and the requirements for personal retention of draft certificates, defendant felt that the analogy should work in his favor. He logically reasoned that the "duplicative" nature of the present section rendered it clear that it "was designed for no other purpose than to discourage critics of the government's war policies and objectives in Southeast Asia."⁴¹ But, as already indicated,⁴² the earlier opinion refused to consider the reasons for the statute, except to find that it did have a "rational basis." Indeed, the pre-trial court stated that

it should be realized that, in reality, the present statute was aimed not at draft card burning per se, but, rather, at draft card burning as a means of protesting the war in Viet Nam. See text accompanying notes 53 & 54 *infra*. This fact serves to underscore the importance of the present defendant's contention that his protest was not only against the statute, but against conscription and the war in Viet Nam as well. Dkt. No. 65 Cr. 937, at 2.

34. *Id.* at 9.

35. See note 22 *supra* and following text.

36. Dkt. No. 65 Cr. 937, at 9.

37. *Ibid.*

38. *Id.* at 3-4.

39. See note 24 *supra*.

40. 249 F. Supp. at 63; see note 24 *supra*.

41. 249 F. Supp. at 63.

42. See text accompanying note 39 *supra*.

"what motivated members of Congress in enacting the amended provisions . . . is irrelevant."⁴³

It is submitted that the present court unduly extended its pre-trial refusal to consider the possible motives of individual legislators into a blanket refusal to realistically consider the actual reasons behind the present enactment. The most comprehensive case cited in the pre-trial opinion⁴⁴ in support of the court's contention that legislative motive is beyond the scope of a proper court investigation was *McCray v. United States*.⁴⁵ There, the Supreme Court did state that "the motive or purpose of Congress in adopting the *acts in question* may not be inquired into . . ."⁴⁶ Nonetheless, *McCray* is not inconsistent with the balancing principle that, "when [freedom of speech] . . . is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the *reasons* advanced' in support of the challenged regulations."⁴⁷

In *McCray*, the defendant challenged a federal tax on the premise that it was "of such an onerous character as to make it manifest that the *purpose* of Congress in levying it was not to raise revenue but to suppress the manufacture of the taxed article."⁴⁸ The Supreme Court, rejecting this challenge, stated that, where a *lawful exercise* of legislative power was impelled for a wrong purpose or motive, the remedy lies "not in the abuse by the judicial authority of its functions, but in the people . . ."⁴⁹

An important distinction to be recognized is the one between abuse of, and absence of, a power. The *McCray* dictum conceded that, if a power were invoked "solely for the *purpose* of destroying rights which could not be rightfully destroyed consistently with the principles of freedom . . . it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."⁵⁰ It would appear, therefore, that *McCray* said simply that, if "the acts in question" constitute a "lawful exercise" of power, courts should not consider that these acts may have been inappropriately motivated. Thus interpreted, *McCray* is not at odds with the balancing principle that courts should appraise the substantiality of the reasons for a statute that abridges speech; for only when "the balance between the individual and the governmental interests" is struck in favor of the government is a restriction on speech a "lawful exercise" of power.

Since the only governmental interest that was considered in the pre-trial opinion was the "administrative advantages" to be derived from requiring

43. 249 F. Supp. at 64.

44. *Ibid.*

45. 195 U.S. 27 (1904).

46. *Id.* at 59. (Emphasis added.)

47. *Thornhill v. Alabama*, 310 U.S. 83, 96 (1940). (Emphasis added.)

48. 195 U.S. at 51. (Emphasis added.) The tax was on oleomargarine. If it was colored so as to look like butter, the tax was ten cents per pound. If it was not so colored, the tax was only one-fourth of one cent per pound. *Id.* at 45.

49. *Id.* at 55.

50. *Id.* at 64. (Emphasis added.)

personal retention of draft certificates, it may well be that the present court, in referring to its earlier decision for the governmental purpose of the amendment, meant to suggest that this administrative interest was sufficient to weigh the balance in the Government's favor. If this is in fact the case, it is submitted that the court's reading of the scale was erroneous. The governmental interest in having registrants carry their draft cards would not appear to be very significant, for it seems likely that "the crucial factor in draft evasion is not the presence or absence of a card but the record of a name—or the absence of a record—in the files of a local draft board."⁵¹ Furthermore, the redundancy of the amendment⁵² reveals that the Government's interest in its passage, insofar as its purely administrative aspect is concerned, was slight.

It seems clear that the true reason for the passage of the amendment was not to "underscore" the personal retention requirement. In its explanation of the amendment, the Armed Services Committee stated that, "in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such . . . acts should be punished."⁵³ Presumably, the threat that the Committee had in mind was posed not by any specific obstruction to the post-registration induction process that might result from the fact that certain registrants failed to have their notice of classification on their person but, rather, by the general obstruction to the registration effort that might result from widespread opposition to the draft.⁵⁴

There is no doubt that the prevention of obstruction to the *registration of manpower* is a governmental interest substantial enough to warrant a restriction on speech,⁵⁵ especially when this restriction is only a partial one.⁵⁶ Such an obstruction certainly poses "a grave threat to the security of the Nation," and to the extent that the present defendant's conduct tended⁵⁷ to create such an obstruction, it was properly prohibited. But it would appear that non-possession

51. 201 *The Nation* 374 (Nov. 22, 1965).

52. See text accompanying notes 40 & 41 *supra*.

53. H.R. Rep. No. 747, 89th Cong., 1st Sess. (1965).

54. In its report, the Armed Services Committee expressed "deep concern . . . over the . . . incidences in which individuals . . . openly defy and encourage others to defy the authority of their Government by destroying . . . their draft cards." *Ibid.* It is submitted that "and encourage others" is a key phrase, indicative of the fact that the act "is designed to discourage a form of unorthodox and hence publicity-generating protest." 201 *The Nation* 374 (Nov. 22, 1965).

55. E.g., *Schenck v. United States*, 249 U.S. 47 (1919); *United States v. Miller*, 233 F.2d 171 (2d Cir. 1956) (*per curiam*); *Gara v. United States*, 178 F.2d 38 (6th Cir. 1949), *aff'd per curiam*, 340 U.S. 857 (1950), 12 Ohio St. L.J. 288 (1951); *Warren v. United States*, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950).

56. See note 22 *supra* and following text.

57. There is "no ground for saying that success alone warrants making the act a crime." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Accord, e.g., *Dennis v. United States*, 341 U.S. 494, 510 (1951); *Gara v. United States*, 178 F.2d 38, 40 (6th Cir. 1949), *aff'd per curiam*, 340 U.S. 857 (1950).

of a draft card, per se, poses no obstruction to the *registration of manpower*, and no hindrance to the cooperation that potential soldiers will manifest towards the selective service and military authorities; and, consequently, no threat serious enough to warrant a restriction on speech.

It is therefore submitted that the instant court, in refusing to acknowledge defendant's contention that the purpose of the amendment under which he was indicted was to discourage criticism of the Government's policies in Viet Nam, ignored the only ground upon which it might have properly based its decision. The present defendant's conduct was a "visible method of communication," and, as such, "speech."⁵⁸ The aspect of this speech that might justify its restriction was not that defendant would no longer be able to carry his notice of classification on his person. Rather, it was the effect that the speech tended to have on the audience, or, more specifically, the reactions that this audience might manifest towards the Government's war effort.⁵⁹

Constitutional Law—Right to Counsel—Indigent Defendant Not Deprived of Effective Assistance of Counsel Where He Is Not Represented by the Same Attorney Throughout Criminal Proceedings.—Defendant pleaded guilty to, and was convicted of, attempted robbery in the second degree. The appellate division affirmed the conviction.¹ On appeal, the New York Court of Appeals affirmed, holding that the mere showing by defendant that he was not represented by the same appointed attorney throughout the criminal proceedings was, in and of itself, insufficient to reverse the conviction on the ground that defendant was deprived of the effective assistance of counsel. *People v. Camacho*, 16 N.Y.2d 1064, 212 N.E.2d 464, 266 N.Y.S.2d 135 (1965) (memorandum decision).

58. Funk & Wagnalls, *New Practical Standard Dictionary* (1954).

59. It is, of course, true that any speech directed against the Government's Viet Nam war policies might persuade portions of its audience to adopt views that would hinder the country's registration efforts. That the Government has chosen not to bar all such speeches does not mean that it may not bar particular means of speech, especially where they are apt to have a greater effect than more orthodox means. See note 18 *supra*. But no conduct or oral speech is prohibited until there is a statute prohibiting it. Thus, for example, in *Gara v. United States*, 178 F.2d 38 (6th Cir. 1949), *aff'd per curiam*, 340 U.S. 857 (1950), a case involving a conviction under § 462(a) of the act (which proscribes counseling another to evade the draft), the court noted that defendant "may attack the Selective Service Act . . . from every platform in America with impunity, but he cannot, under the guise of free speech, nullify it by disobedience to its express provisions." 178 F.2d at 41-42. This statement does not mean that to attack the Selective Service Act is an irrevocable right, but, rather, that the right exists so long as no "express provisions" of law—upheld as constitutional—prohibit it. Clearly then, the present defendant was free to attack orally the Government's Viet Nam policies and the draft in general, because no statute proscribes such an attack.

1. *People v. Camacho*, 22 App. Div. 2d 853, 254 N.Y.S.2d 1003 (2d Dep't 1964) (memorandum decision).

Although vigorously litigated during the past quarter century,² it is now settled that the right to the assistance of counsel of one charged with a crime is fundamental and essential to a fair trial.³ Without this right to the assistance of counsel, "the right to be heard would be, in many cases, of little avail . . ."⁴ since the complexities of the trial and of our sentencing procedures far exceed the understanding of even the most intelligent and well-educated criminal defendant.⁵

In order that the right to the assistance of counsel be one of substance rather than form, it has been held that the mere appearance of counsel in the courtroom will not satisfy the constitutional requirement.⁶ Counsel must be afforded the opportunity to confer with his client and to prepare the case,⁷ and should make an inquiry into the surrounding facts.⁸ The reputation and prior experience of the assigned counsel are not of paramount importance in this matter; the quality of the representation is the primary consideration of the courts.⁹

In a recent appellate term case, *People v. Thompson*,¹⁰ the defendant was represented by the Queens Bar Association, and, in particular, by that member of the bar present in the Criminal Court of the City of New York, Queens County,¹¹ on the date upon which each proceeding took place. In all, he was

2. For a listing of the important Supreme Court cases, beginning with *Betts v. Brady*, 316 U.S. 455 (1942), and ending with *Gideon v. Wainwright*, 372 U.S. 335 (1963), see Annot., 93 A.L.R.2d 747 (1964).

3. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

4. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

5. Perhaps the classic statement illustrating the need for the assistance of counsel during a criminal proceeding was made by Mr. Justice Sutherland. Speaking for the Powell majority, he stated: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.* at 69.

6. See, e.g., *id.* at 71 (1932); *Jones v. Cunningham*, 313 F.2d 347, 352 (4th Cir.), cert. denied, 375 U.S. 832 (1963); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (dictum).

7. *People v. McLaughlin*, 291 N.Y. 480, 53 N.E.2d 356 (1944); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (dictum).

8. See *Powell v. Alabama*, 287 U.S. 45, 58 (1932).

9. See *Jones v. Cunningham*, 313 F.2d 347, 353 (4th Cir.), cert. denied, 375 U.S. 832 (1963). But see *People v. Tomaselli*, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960), where the court refused to look beyond the fact that the counsel assigned was of good standing and the court had no actual notice that the counsel's representation was not adequate.

10. 47 Misc. 2d 893, 263 N.Y.S.2d 440 (App. T. 1965) (per curiam).

11. The New York City Legal Aid Society currently represents all indigents charged with felonies in the criminal terms of the supreme court. However, the Society does not appear

represented by four different attorneys, from the time that he was charged through sentencing.¹² Defendant claimed that, since each of these attorneys worked separately and independently of one another, he was inadequately represented in that none of his assigned attorneys possessed knowledge of what had occurred during the prior proceedings.¹³ The court, in dictum, intimated that this method of assigning counsel does not meet the constitutional requirements of effective assistance of counsel.¹⁴

in the criminal courts of Queens County, where misdemeanors are tried and felony defendants are arraigned. Therefore, privately assigned counsel represent indigent defendants in the Queens County Criminal Court. See 3 Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* 533 (1965) [hereinafter cited as Silverstein].

12. Brief for Appellant, pp. 2-10, *People v. Thompson*, 47 Misc. 2d 893, 263 N.Y.S.2d 440 (App. T. 1965) (per curiam).

13. To substantiate this claim, Thompson cited several instances from the trial record. In one such instance, defendant claimed that the attorney's lack of knowledge that his client had pleaded innocent and had been convicted "prevented him [counsel] from making a motion in arrest of judgment . . . on the vagrancy conviction prior to imposition of sentence," since the attorney thought that his client had pleaded guilty to the charge. *Id.* at 23. In another instance, defendant claimed that his second assigned counsel asked for a single-judge court without any knowledge as to why a three-judge panel had been requested by the preceding attorney, and that this amounted to an uninformed waiver of a right. *Id.* at 22. The choice of panel, however, is one of many possible alternative choices that an attorney makes during a trial. Normally, a bad choice by counsel, standing by itself, is not sufficient to sustain a finding that defendant was not afforded effective assistance of counsel. See *People v. Brown*, 7 N.Y.2d 359, 165 N.E.2d 557, 197 N.Y.S.2d 705 (1960), cert. denied, 365 U.S. 821 (1961); *People v. Fryson*, 36 Misc. 2d 73, 232 N.Y.S.2d 224 (Sup. Ct. 1962), *aff'd mem.*, 23 App. Div. 2d 722, 258 N.Y.S.2d 347 (2d Dep't 1965). But see *Johnson v. United States*, 110 F.2d 562 (D.C. Cir. 1940) (reversal for failure to call a certain witness).

Thompson also claimed that his attorney's lack of knowledge regarding the occurrences at prior proceedings prevented him from effectively cross-examining witnesses with respect to contradictions in testimony given at different proceedings. Brief for Appellant, p. 24, *People v. Thompson*, *supra* note 12. It would seem that this is a strong contention. What is being challenged here is the inherent defect in the method of fragmented assignments, which seems to preclude the assigned attorney from intelligently weighing the testimony of a witness against the entire record.

14. Although disapproving of the method of assigning different counsel to a defendant each time that he appears in court, and while stating that "the requirements of due process are not met if a defendant is deprived of his constitutional right to the effective aid of counsel in preparing his defense . . ." 47 Misc. 2d at 893, 263 N.Y.S.2d at 441 (dictum), nevertheless, the appellate term affirmed the petit larceny conviction, and reversed the vagrancy conviction on other grounds. Although this could be interpreted as a finding that the accused received effective assistance of counsel despite the fragmentation, this does not appear to be the correct interpretation. Upon applying the facts of Thompson to the principles of law expounded in *Glasser v. United States*, 315 U.S. 60 (1942); *Powell v. Alabama*, 287 U.S. 45 (1932); and *Jones v. Cunningham*, 313 F.2d 347 (4th Cir.), cert. denied, 375 U.S. 832 (1963), it would appear that the appellate term felt that fragmented appointment of counsel deprived the defendant of the effective assistance of counsel, but was leaving it to a higher appellate court to so hold.

Thompson marks the second attempt by the Legal Aid Society, appellate counsel for de-

The *Thompson* court based its dictum on three cases:¹⁵ *Glasser v. United States*,¹⁶ *Jones v. Cunningham*,¹⁷ and *Powell v. Alabama*.¹⁸ The relevant holding in *Glasser* was that the trial judge had a duty to "protect the right of an accused to have the assistance of counsel."¹⁹ In *Jones*, there was a last minute assignment of counsel to the accused, and, during the twenty-four hour period between the assignment and the trial, counsel spoke only a few words to his client, discussing nothing of the circumstances under which his client had confessed his guilt.²⁰ The Court of Appeals for the Fourth Circuit, holding that the appointed counsel had an "affirmative obligation"²¹ to make an inquiry into the possibility of existing valid defenses, stated:

[T]he ill-timed appointment of counsel was merely "an empty gesture and not a true satisfaction of the defendant's constitutional rights." It was no more than a

defendant, to have fragmentation of counsel declared inadequate assistance of counsel. In the first instance, *People v. Walsh* (App. T.) in N.Y.L.J., Jan. 29, 1965, p. 18, col. 4, also decided by the appellate term, second department, the assigned counsel had requested an adjournment for the purpose of getting a defense witness. At the trial four days later, a different counsel, assigned for that proceeding, stated that the first counsel failed to contact the witness and that defendant was in jail, thereby unable to serve the subpoena himself. Briefs for Appellant, p. 2, *People v. Walsh*, supra. The trial judge did not instruct the assigned counsel to serve the subpoena, considering it to be "an imposition" on them. *Id.* at 8. However, on appeal, the defendant pointed out that "his attorney, whether retained or assigned, or whether from Legal Aid or the Bar Association had the affirmative obligation to seek out, and determine whether a defense was available." *Id.* at 9. Accord, *Jones v. Cunningham*, 313 F.2d 347, 353 (4th Cir.), cert. denied, 375 U.S. 832 (1963). Defendant also raised the "fragmentation of counsel" argument, stating that the trial court did not consider any individual responsible for the preparation of the defendant's case. Brief for Appellant, pp. 11-12, *People v. Walsh*, supra. He analogized to *Powell*, where the trial judge had assigned "all the members of the bar" to defend the accused, and the Supreme Court found that no single attorney was impressed with an individual sense of duty. *Powell v. Alabama*, supra at 56. The appellate term reversed *Walsh's* conviction, holding that "defendant was deprived of his constitutional right to the effective aid of counsel in preparing his defense . . ." *People v. Walsh*, supra. (Citations omitted.) Counsel for defendant cited this case as precedent for the fragmentation proposition. Brief for Appellant, p. 26, *People v. Thompson*, 47 Misc. 2d 893, 263 N.Y.S.2d 440 (App. T. 1965) (per curiam). However, nowhere in the *Walsh* decision is there any mention of the issue of fragmentation, and it is more likely that the court based its decision on the fact that the trial judge failed to protect defendant's right to counsel, as required by *Glasser v. United States*, supra.

15. 47 Misc. 2d at 893, 263 N.Y.S.2d at 441.

16. 315 U.S. 60 (1942).

17. 313 F.2d 347 (4th Cir.), cert. denied, 375 U.S. 382 (1963).

18. 287 U.S. 45 (1932).

19. 315 U.S. at 71. The Supreme Court held that a defendant is deprived of the assistance of counsel where, over his objections, the court appoints his counsel to represent a codefendant, where the court had knowledge that a conflict of interests might arise therefrom, and where the defense put forward by the attorney becomes less effective because of such appointment. *Id.* at 76.

20. 313 F.2d at 349-50.

21. *Id.* at 353. (Emphasis added.)

gesture to equip Jones for his day in court with a lawyer of excellent reputation who sought no more than the fleeting opportunity to consult with the accused and made no effort to map out possible defenses.²²

In *Powell*, the trial judge had appointed "all the members of the bar"²³ to aid defendants during the arraignment proceedings. However, it was unclear whether or not that appointment was meant to extend into the trial.²⁴ At the trial itself, the defendants were "represented" by the members of the bar, aided by another attorney from outside of the state, admittedly unfamiliar with Alabama procedure.²⁵ In reversing the conviction, the Supreme Court commented that it was not enough that counsel thought there was no defense. A "thoroughgoing investigation"²⁶ was necessary to insure that all relevant facts in the case were brought out.²⁷

At first glance, the facts of the instant case appear to closely parallel those of *Thompson*.²⁸ The defendant was represented by the Bar Association Legal Aid Committee during the pre-indictment proceedings.²⁹ At the arraignment, a Legal Aid Society attorney was assigned by the court to represent the defendant. This same attorney represented the defendant when he withdrew his original plea of not guilty.³⁰ However, defendant was represented by a different attorney from the Legal Aid Society at a prior felony hearing,³¹ and was counseled by yet a third Legal Aid Society attorney at sentencing.³² Defendant argued that he

22. *Id.* at 352. Court-appointed counsel failed to look into the circumstances of the confession, failed to object to an illegal sentence, and failed to preserve defendant's right to appeal. In a New York Court of Appeals case, *People v. McLaughlin*, 291 N.Y. 480, 53 N.E.2d 356 (1944), the trial court appointed counsel one-and-one-half hours before the trial actually commenced. There was no evidence that counsel even interviewed his client before trial, and the court held that the last minute assignment was inadequate since it precluded both counsel and accused from effectively aiding each other in preparing the case. The court also stated that the counsel needed a record of all relevant past proceedings "so that intelligent review may be had." *Id.* at 483, 53 N.E.2d at 357.

23. 287 U.S. at 56.

24. See *id.* at 53-56.

25. *Id.* at 55.

26. *Id.* at 58.

27. See *ibid.* In *Thompson*, an analogy was made by the defendant between the lack of knowledge of the occurrences at a prior proceeding, and a counsel's failure to have full information relating to the circumstances of the crime of which his client was accused, which was held to be a requisite of effective assistance of counsel in *Powell*. Brief for Appellant, p. 21, *People v. Thompson*, 47 Misc. 2d 893, 263 N.Y.S.2d 440 (App. T. 1965) (*per curiam*).

28. See text accompanying notes 10-14 *supra*.

29. Brief for Appellant, p. 3, *People v. Camacho*, 16 N.Y.2d 1064, 213 N.E.2d 464, 266 N.Y.S.2d 135 (1965) (memorandum decision).

30. Appellant had originally pleaded not guilty to an indictment for robbery in the first degree, grand larceny in the second degree, assault in the second degree, and carrying a dangerous weapon. *Ibid.*

31. Approximately one month after pleading guilty to attempted robbery in the second degree, appellant was re-arraigned on an information charging that he had been convicted of a prior felony. *Ibid.*

32. *Id.* at 4.

was not given "the meticulous devotion and circumspection required of counsel . . ." ³³ and that "the assignment of different counsel to appellant at different stages of [the] . . . proceeding [was] . . . not the type of representation alluded to in the Federal and State Constitutions . . ." ³⁴

A close examination, however, reveals one major difference between *Thompson* and the instant decision. In *Thompson*, the major contention of the defendant was that no one of his several appointed attorneys had any significant contact with any of the other attorneys, and, therefore, lacked knowledge of the occurrences at the prior proceedings. ³⁵ In the instant case, although defendant was represented by different attorneys at the several stages of the criminal proceedings, each attorney was working for the Legal Aid Society. While it is true that there was a lack of a personal relationship in the traditional attorney-client sense, ³⁶ there was a relationship between the attorneys that allowed each to communicate his knowledge and experience already obtained to the next attorney. In essence, therefore, the defendant was really being represented by the Legal Aid Society, an organization with centralized investigative facilities and financial resources. ³⁷ In *Thompson*, although the Queens Bar Association had technically been assigned to the defense of the accused, the defense was conducted totally through the individually assigned attorneys, with the Queens Bar Association making no contribution as a separate entity. ³⁸

Where an indigent accused appears before a judge and it is determined that he cannot afford counsel, the judge will appoint an attorney to represent him, either from the Legal Aid Society, or, in those courts not covered by legal aid, by a private attorney. Due largely to the overcrowding of the court calendars, ³⁹

33. *Id.* at 5.

34. *Ibid.* U.S. Const. amend. VI states that, "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." N.Y. Const. art. I, § 6 states that "in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . ."

35. See note 13 *supra* and accompanying text.

36. This was appellant's main contention. Brief for Appellant, p. 5, *People v. Camacho*, 16 N.Y.2d 1064, 213 N.E.2d 464, 266 N.Y.S.2d 135 (1965) (memorandum decision).

37. See Special Comm. of the Ass'n of the Bar of the City of New York & National Legal Aid and Defender Ass'n, *Equal Justice for the Accused* 51, 68-72 (1959); Letter from Anthony F. Marra, Attorney-in-Charge, Legal Aid Society, Criminal Court Branch, to the *Fordham Law Review*, March 31, 1966, on file in the *Fordham Law Review Office*. One commentator has likened the Legal Aid Society to a "law office." Special Comm. of the Ass'n of the Bar of the City of New York & National Legal Aid and Defender Ass'n, *Equal Justice for the Accused* 51 (1959). This was the argument put forward by the district attorney. Brief for Respondent, p. 9, *People v. Camacho*, *supra* note 36.

38. Each private attorney is expected to use his own personal resources to investigate and to prepare the assigned case. Unlike a defender association, the Queens Bar Association provides the assigned counsel with neither financial resources nor investigatory facilities. Note, however, that a recent statutory enactment allows the assigned counsel to be reimbursed for reasonable expenses. N.Y. County Law § 722-b.

39. In New York City, for example, it has been recently estimated that cases where the defendant faces serious criminal charges are running upwards of 100,000 per year, and in

especially in large cities, counsel appointed in such manner will usually have only minutes to confer with his "client" and, for the most part, these few minutes are insufficient to ascertain with clarity all of the relevant facts surrounding the crime charged and the occurrences at prior proceedings.⁴⁰ The attorney is faced with the unenviable choice of either proceeding despite his inadequate preparation, or asking for a continuance. If he chooses the latter course, and the postponement is granted, it is often a long one, during which time his indigent client usually remains in jail due to his inability to post bail.⁴¹ When the accused again appears before the court, he often finds himself represented by a different counsel who, if a private attorney, usually has had no contact with the attorney originally assigned to the case.⁴² Often, in the case of privately assigned counsel, little or nothing has been done to aid the accused during this interim period.⁴³ If there are witnesses to be sought out and subpoenaed, and they prove difficult to locate, the assigned attorney seldom devotes any extra time to an extended search for the witnesses,⁴⁴ especially when the attorney realizes that the next

some courts up to 80% of these defendants cannot afford counsel. Carr, *The New York City Defender*, 22 *Legal Aid Brief Case* 15 (1963).

40. There is little question that the great volume of cases involving indigents in the New York City criminal courts places almost unmanageable burdens on the assigned attorneys, whether from the Legal Aid Society or from private practice. It is virtually impossible to prepare thoroughly each case under such conditions. Undoubtedly, this is a large factor in the great number of pleas made to lesser offenses in New York City each year. (In 1962, 63% of all felony cases ended in pleas to lesser offenses. 3 Silverstein 542.) However, this evil is due to the overcrowded conditions of our criminal courts, and in no way is a by-product of fragmented counsel.

41. The connection between the inability to meet bail and indigency is pointed out in 1 Silverstein 7-8. Recently, the Vera Foundation's Manhattan Bail Project released approximately 3,300 defendants charged with felonies on their own recognizance, without bail. The rate of bail-jumping was a low 1%, as compared with approximately 4-7% of those actually released on bail. Address by Professor Charles E. Ares, National Conference of State Trial Judges Annual Meeting, Aug. 9, 1964, in 7th Annual Meeting of the National Conference of State Trial Judges 103 (1964). It is hoped that this experiment will eventually lead to the abolition of the inequities in our present bail system. For a commentary on the procedure of the Manhattan Bail Project, see Address by Herbert Sturz, Executive Director, Vera Foundation, Annual Conference of the National Legal Aid and Defender Ass'n, Oct. 23-25, 1963, in Summary of Proceedings of the 41st Annual Conference of the National Legal Aid and Defender Ass'n 111-15 (1963).

42. This failure of contact is due largely to the lack of any cohesive force between any of the various private attorneys. See text accompanying note 38 *supra*.

43. This is largely due to the lack of time that the assigned attorney has available to devote to his assignment. His primary function is still that of private attorney, and he rarely has the time to take from his private practice to spend on a thorough investigation of the indigent's case.

On the other hand, a private defender organization such as the New York City Legal Aid Society has central investigatory facilities, of which each of its attorneys can take full advantage. This is a cohesive force between several attorneys handling the same defendant's case, a force that is conspicuously absent in the "fragmented-appointive" system.

44. See Brief for Appellant, p. 2, *People v. Walsh* (App. T.) in *N.Y.L.J.*, p. 18, col. 4 (Jan. 29, 1965); note 43 *supra* and accompanying text.

assigned attorney might totally disregard any work that the original attorney put into the case.⁴⁵ These inadequacies are inherent in the fragmented-appointive method of assigning private attorneys to defend indigents.

The system used to defend the accused in the instant case is free from the defects inherent in the "fragmented-appointive" system.⁴⁶ The fact that defendant was represented by different attorneys at the several stages of his criminal proceedings should not be decisive, in and of itself, in determining the effectiveness of the representation afforded a defendant under that system. Although, as appellant argued, such a system of multiple attorneys defending an indigent accused can create "a lack of personal communication"⁴⁷ between attorney and client, it does not follow that "the frequent change of counsel negated the effectiveness of any assignment of attorneys."⁴⁸ The most important factor to be considered is whether the assigned counsel has prepared a competent defense for his client.⁴⁹ The indigent accused, noting that he was represented by a different attorney at every stage of the proceedings, might be justified in feeling that his assigned attorneys were indifferent to his cause,⁵⁰ and even in feeling that each attorney lacked the "individual sense of duty"⁵¹ which has traditionally been an underlying factor in the attorney-client relationship. This lack of trust and confidence is regrettable and should be remedied by each individual attorney wherever possible.⁵² Nevertheless, if the different attorneys are all employed by one organization, such as the Legal Aid Society, which provides an *integrated* defense for indigents accused of a crime,⁵³ the defendant should not be heard to

45. This defect was evidenced in both the Thompson and Walsh cases. See notes 13 & 14 *supra*.

46. See note 53 *infra*.

47. Brief for Appellant, p. 5, *People v. Camacho*, 16 N.Y.2d 1064, 213 N.E.2d 464, 266 N.Y.S.2d 135 (1965) (memorandum decision).

48. *Id.* at 6.

49. See note 9 *supra* and accompanying text. That the defense provided by the New York City Legal Aid Society is competent is pointed up by a recent study stating that "all of the judges and district attorneys interviewed in New York and Queens Counties were of the opinion that the representation offered indigent defendants by the Legal Aid Society was equal to that offered by privately retained counsel and that the work and professional performance of the society's lawyers were on a par with that of the district attorneys. Indeed, in several instances, the work of the society's lawyers was rated higher than that of usually retained counsel or the district attorney's office, and in no instances did any of the respondents find the work of the society's lawyers below the level of the district attorney or average retained counsel." 3 Silverstein 533.

50. This was a contention of the defendant. Brief for Appellant, p. 5, *People v. Camacho*, 16 N.Y.2d 1064, 213 N.E.2d 464, 266 N.Y.S.2d 135 (1965) (memorandum decision).

51. *Powell v. Alabama*, 287 U.S. 45, 56 (1932).

52. Neighborhood law offices have been established by Mobilization For Youth in several depressed areas of New York City. A major purpose of this "neighborhood approach" is to overcome the fear and distrust that many poor people have of "impersonal" organizations such as the Legal Aid Society. See Wald, *Law and Poverty*: 1965, at 45, 69-72 (1965).

53. Although an indigent defendant remains in jail for the period between two stages of his criminal proceedings, and although he is represented by a different attorney at the second proceeding than at the first, the fact remains that the Legal Aid Society, as would any law office, conducts a continuous investigation of the defendant's case, wherever one is necessary.

complain merely because the organization, due to the large volume of cases it handles and its comparatively small staff of attorneys,⁵⁴ cannot afford to spare the same attorney to handle each aspect of the defendant's case.⁵⁵

The court of appeals was correct in its refusal to reverse the conviction against defendant in the instant case merely because he was represented by different attorneys at the several stages of his criminal proceedings.⁵⁶ However, it is unfortunate that the court chose to decide the issue in a memorandum decision, there being no comment by the court differentiating the facts of the instant case from those of *Thompson*. It would appear possible, therefore, that the holding in the instant case could be interpreted as sanctioning the "fragmented-appointive" system. This would be an undesirable result, since it would perpetuate and perhaps encourage the expansion of an inherently defective method of providing counsel to indigents.⁵⁷ Rather, it is hoped that, when the court of appeals is presented with a fact situation similar to *Thompson*, it will not ignore the inherent unfairness of that system.⁵⁸ Although the immediate impact of such a

This investigation is conducted whether the indigent is defended by the same attorney at each proceeding, or several attorneys handle the various aspects of the defendant's case. Unlike the situation of a private attorney who might feel that, so long as another attorney will handle the defendant's case at the next proceeding, he will leave the investigation to that latter counsel, the Legal Aid Society realizes that the Society itself is charged with the defense of the defendant and, therefore, undertakes an investigation regardless of which attorney will handle the next aspect of the case. If this were not true, and the various Society attorneys failed to confer with one another and to make use of the investigatory facilities, it would be difficult to justify the high regard which both prosecutors and judges hold for the quality of Legal Aid Society representation. See note 49 supra.

54. In New York City, the Legal Aid Society handles about 80,000 criminal cases each year. Their staff includes 120 full-time attorneys and 15 investigators. However, these attorneys and investigators also work on civil and juvenile cases, amounting to an additional 53,000 cases each year. Carr & Tarcher, In Perspective—Legal Aid in the United States, 63 Legal Aid Rev. 20, 21-23 (1965).

With regard to the sufficiency of the present staff, it has been stated in one commentary: "During the past six years, the New York Legal Aid staff has grown by 120% to meet an increase in caseload of about 85%. No member of the Legal Aid board or staff would contend that this growth has been enough, and the Society now is seeking . . . a more than one-third planned increase in strength for the next year." *Id.* at 23.

55. The New York City Legal Aid Society assigns its attorneys to specific courts, rather than to specific clients. It is for this reason, primarily, that a defendant might be represented by a different Legal Aid attorney during the several stages of his criminal proceedings.

56. See notes 49 & 53 supra. It should be noted here that defendant in the instant case also argued that he was denied effective assistance of counsel because one of his codefendants had been represented by the same assigned attorney. Brief for Appellant, pp. 6-8, *People v. Camacho*, 16 N.Y.2d 1064, 213 N.E.2d 464, 266 N.Y.S.2d 135 (1965) (memorandum decision). The court of appeals rejected this contention. 16 N.Y.2d at 1065, 213 N.E.2d at 465, 266 N.Y.S.2d at 136. Whether it was correct in so doing in light of the Supreme Court's holding in *Glasser v. United States*, 315 U.S. 60 (1942), is beyond the scope of this note. See note 19 supra.

57. See notes 42-45 supra and accompanying text.

58. A recent addition to the N.Y. County Law requires each county to put into operation by December 1, 1965, a plan for providing counsel to indigent defendants. The choice is

finding would be the creation of a gap in the available means of defending indigent defendants, such a gap and its attendant hardship on indigents would be more than compensated for were that gap to be filled by the institution of newer and better systems⁵⁹ for defending indigents in those counties now using the "fragmented-appointive" system.

The instant case serves as a reminder that *Gideon v. Wainwright*,⁶⁰ while guaranteeing that a state will provide counsel for indigents, left unanswered the question of *how* those defendants shall be provided with counsel. The failure of the Supreme Court to set up guideposts in this area has led to a wide variety in the methods employed to provide counsel to indigent defendants.⁶¹ Recent studies of these various methods have led to severe criticism of some of the prevailing systems,⁶² and many recommendations for improving the quality of the representation with which indigents are provided.⁶³ It is to be hoped that cases like the instant decision and *Thompson* will force still a further re-evaluation of our "aid to indigent" practices.

between a public defender, a private legal aid society, a rotation system of private attorneys, or a combination of the above plans. N.Y. County Law § 722. It is almost certain that New York City will choose the Legal Aid Society as its means of providing indigents with counsel, especially in light of the growth of the Society's staff, funds, and services during the past several years. See 3 Silverstein 533; note 54 supra. This means that the Legal Aid Society will eventually defend all indigents accused of felonies and misdemeanors in New York City, and, therefore, there will be no need to assign private attorneys to defend indigents in the criminal courts, except in cases of possible conflict of interests. 3 Silverstein 532. However, as of March, 1966, the New York City Council had not yet implemented any system under § 722, due largely to its failure to agree on the size of the appropriations for the defender organization. Therefore, the "fragmented-appointive" system is still used in parts of New York City (the criminal courts in each county other than New York County) to defend indigents accused of crimes, and, thus, it is still possible for a case regarding the "fragmented-appointive" system to reach the court of appeals.

59. At least two studies have approved of public or private defender systems for localities with large populations (greater than 400,000 inhabitants). See 1 Silverstein 151; Special Comm. of the Ass'n of the Bar of the City of New York & National Legal Aid and Defender Ass'n, Equal Justice for the Accused 80 (1959).

60. 372 U.S. 335 (1963).

61. The four most prevalent systems are those of "assigned counsel, public defender, private defender, and a mixed private-public system." Silverstein, *Defense of the Poor in Criminal Cases in American State Courts—A Preliminary Summary* 5 (1964).

62. The system that has come under the most criticism is the assignment system. Special Comm. of the Ass'n of the Bar of the City of New York & National Legal Aid and Defender Ass'n, Equal Justice for the Accused 62-68 (1959). One of the strongest outcries against the assigned counsel system has been based on the fact that most assigned attorneys in non-capital cases received no compensation for their services. 1 Silverstein 32-33. To help remedy this defect, the New York Legislature recently passed a bill providing assigned counsel with compensation amounting to \$15 per hour of court work, and \$10 per hour for out-of-court preparation. The ceiling for felonies is \$500, and for misdemeanors, \$300. N.Y. County Law § 722-b.

63. See 1 Silverstein 147-52; Special Comm. of the Ass'n of the Bar of the City of New York & National Legal Aid and Defender Ass'n, Equal Justice for the Accused 78-94 (1959).

Constitutional Law—Section 4(e) of the Voting Rights Act of 1965 Held Unconstitutional.—Plaintiffs, residents of New York, brought suit in the district court for the District of Columbia¹ to enjoin the Attorney General of the United States and the Board of Elections of New York City from enforcing Section 4(e) of the Voting Rights Act of 1965.² This section states that no person educated in an American-flag foreign-language³ school shall be denied the right to vote for failure to pass a state imposed English literacy test.⁴ Such a test is imposed by the New York State Constitution⁵ and the New York Election Law.⁶ The district court majority⁷ held that, under the United States Constitution, the states have the power to determine voter qualifications, and, therefore, the act of Congress is unconstitutional. *Morgan v. Katzenbach*, 247 F. Supp. 196 (D.D.C. 1965), prob. juris. noted, 86 Sup. Ct. 614 (1966).

If section 4(e) is to be declared constitutional as a valid exercise of the power granted under subsection five of the fourteenth amendment,⁸ it first must be shown that the New York English literacy test is somehow violative of that amendment.⁹ Article I, section 2 of the Constitution implicitly gives to the states

1. The present suit was brought pursuant to Voting Rights Act of 1965, § 14(b), 79 Stat. 445, 42 U.S.C.A. § 19731(b) (Supp. 1965), which gives the district court for the District of Columbia exclusive jurisdiction to issue permanent or temporary injunctions against the enforcement of the Voting Rights Act. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *McCann v. Paris*, 244 F. Supp. 870 (W.D. Va. 1965).

2. Voting Rights Act of 1965, § 4(e), 79 Stat. 438, 42 U.S.C.A. § 1973b(e) (Supp. 1965).

3. Senators Javits and Kennedy of New York, in sponsoring this section, intended to make the voting franchise available to a greater number of Puerto Ricans. See 111 Cong. Rec. 18634 (daily ed. Aug. 4, 1965) (remarks of Senator Javits); *id.* at 10575 (daily ed. May 20, 1965) (remarks of Senator Kennedy). Another member of the New York congressional delegation voiced similar sentiments. See *id.* at 15666 (daily ed. July 9, 1965) (remarks of Representative Gilbert).

4. "(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

"(2) No person who demonstrates that he has successfully completed the sixth primary grade in a . . . school . . . in which the predominant classroom language was other than English, shall be denied the right to vote in any . . . election because of his inability to read, write, understand, or interpret any matter in the English language" Voting Rights Act of 1965, § 4(e), 79 Stat. 438, 42 U.S.C.A. § 1973b(e) (Supp. 1965).

5. N.Y. Const. art. II, § 1.

6. N.Y. Election Law § 150.

7. A three-judge court was convened pursuant to 62 Stat. 968 (1948), as amended, 28 U.S.C. §§ 2282, 2284 (1964).

8. Section 4(e) itself purports to have been enacted pursuant to the fourteenth amendment. See note 4 *supra*. U.S. Const. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." All of the other provisions of the Voting Rights Act of 1965 are based on the fifteenth amendment.

9. "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be

the power to determine voter qualifications in elections for the House of Representatives.¹⁰ However, in several Supreme Court cases, appellants have contended that the fourteenth amendment operates to limit the power of the states to determine such qualifications.¹¹ Nonetheless, it is now clear that voting is not a privilege or immunity of United States citizenship,¹² and, therefore, the privilege and immunities clause in no way affects the power of the states to regulate suffrage. The equal protection clause of the fourteenth amendment, however, does limit this power.¹³

In *Lassiter v. Board of Elections*,¹⁴ the Supreme Court recognized that the equal protection clause is applicable to suffrage rights, but unanimously held that a North Carolina constitutional provision which required that a prospective voter "be able to read and write any section of the Constitution *in the English language*"¹⁵ was valid. The Court reasoned that, "in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise."¹⁶ Apparently, the Court felt that, under the facts in the case, the North Carolina constitutional provision was neither unreasonable nor arbitrary. Mr. Justice Douglas, writing for the Court, added that, although the

such as Congress, in the legitimate exercise of its legislative discretion, shall provide." *United States v. Reese*, 92 U.S. 214, 217 (1875) (dictum). In *United States v. Board of Elections*, 248 F. Supp. 316 (W.D.N.Y. 1965), the State of New York argued that the power of Congress to legislate under authority granted by the fourteenth amendment is limited to situations where the judiciary has already found a violation of this amendment. The court rejected this contention on the theory that, if followed, the argument would make § 5 of the amendment superfluous. *Id.* at 322. Mr. Justice Harlan, in his dissenting opinion in *Reynolds v. Sims*, 377 U.S. 533, 593-94 (1964), expressed the view that the only constitutional remedy available to Congress in the event that a state denied or in any way abridged the right to vote to a citizen, was to reduce that state's representation in Congress under § 2 of the amendment.

10. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art 1, § 2. See *Ex parte Yarbrough*, 110 U.S. 651, 663 (1884). Even if article 1, § 2 were not interpreted as implicitly giving the states the power to regulate suffrage, the power would be reserved to the states by the tenth amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

11. E.g., *Pope v. Williams*, 193 U.S. 621, 624 (1904); *Mason v. Missouri*, 179 U.S. 328, 332 (1900); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165 (1874).

12. E.g., *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937) (upholding the validity of a Georgia poll tax statute); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 170-78 (1874) (upholding the authority of states to deny women suffrage); cf. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

13. E.g., *Carrington v. Rash*, 380 U.S. 89 (1965); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Pope v. Williams*, 193 U.S. 621, 634 (1904) (dictum).

14. 360 U.S. 45 (1959).

15. N.C. Const. art. VI, § 4. (Emphasis added.)

16. 360 U.S. at 52.

states do have broad powers in this area, not every standard that a state might wish to apply would be acceptable.¹⁷

In *Carrington v. Rash*,¹⁸ the Court invalidated a Texas constitutional provision which provided that a member of the armed services could vote only in the county in which he resided at the time that he entered the armed forces.¹⁹ This requirement effectively denied suffrage to members of the armed forces who were not residents of Texas when they entered the service but who later had become residents. The Court recognized that a state "has unquestioned power to impose reasonable residence restrictions on the availability of the ballot";²⁰ however, the Court felt that Texas was unreasonable in saying that "no serviceman may ever acquire a voting residence in the State so long as he remains in service,"²¹ and, therefore, held that the state, by treating servicemen differently from civilians, created an arbitrary classification, and thus violated the Constitution.²²

In the present case, the majority decided, on the authority of *Lassiter*, that the New York English literacy test is reasonable and non-discriminatory,²³ and, thus, that section 4(e) is not a valid exercise of the power granted to Congress by the Constitution. Judge Holtzoff argued that Congress cannot, through legislative action, limit the power of states to determine voter qualifications. He noted that, if Congress does have such power, the fifteenth,²⁴ nineteenth,²⁵ and twenty-fourth²⁶ amendments were unnecessary since the much simpler procedure of a congressional enactment could have achieved the same result.²⁷ This argument overlooks two important considerations. Mr. Justice Harlan, dissenting in *Reynolds v. Sims*,²⁸ observed that the historical background of section one of the fourteenth amendment indicates that this section was not intended to apply

17. *Id.* at 51.

18. 380 U.S. 89 (1965), 79 Harv. L. Rev. 141.

19. Tex. Const. art. 6, § 2.

20. 380 U.S. at 91.

21. *Id.* at 91-92.

22. *Id.* at 96. "[T]he fact that a State is dealing with a distinct class and treats the members of that class equally does not end the judicial inquiry. 'The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.'" *Id.* at 93, quoting from *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

23. 247 F. Supp. at 203. The court also noted that the constitutionality of the New York law was not even in question. *Ibid.* Twice, the New York court of appeals has upheld the constitutionality of the New York English literacy test. *Cardona v. Power*, 16 N.Y.2d 639, 209 N.E.2d 119, 261 N.Y.S.2d 78 (1965) (memorandum decision), prob. juris. noted, 85 Sup. Ct. 614 (1966); *Camacho v. Doe*, 7 N.Y.2d 762, 163 N.E.2d 140, 194 N.Y.S.2d 33 (1959) (memorandum decision). Both of these cases were decided prior to the enactment of the Voting Rights Act of 1965.

24. U.S. Const. amend. XV prohibits the United States and the several states from denying a citizen the right to vote "on account of race, color, or previous condition of servitude."

25. U.S. Const. amend. XIX grants suffrage to women.

26. U.S. Const. amend. XXIV abolishes poll taxes for federal elections.

27. 247 F. Supp. at 202-03.

28. 377 U.S. 533 (1964).

to voting.²⁹ Further, the fifteenth and nineteenth amendments were ratified before the Supreme Court had ever expressly held that the equal protection clause was so applicable.³⁰ Thus, it may have been thought that constitutional amendments were necessary to grant voting rights to Negroes and women. Secondly, even if it had been certain that the equal protection clause was applicable, it is possible that the denial of the franchise to Negroes or women, in light of the prevailing social attitudes in 1870 or 1920, respectively, would not have been considered unreasonable. As for the twenty-fourth amendment, since the Supreme Court has recently held poll taxes to be violative of the equal protection clause,³¹ the amendment was apparently unnecessary. Thus, the problems of women's suffrage, Negro suffrage, and poll taxes can be distinguished from English literacy tests, and doubt is cast upon Judge Holtzoff's analogy.

Subsequent to the present decision, a unanimous three-judge district court, in *United States v. Board of Elections*,³² held section 4(e) to be constitutional. Judge Kaufman³³ noted that, in *Lassiter*, "the English-language aspect of the law was not before the Court since no claim was made that the plaintiff was literate in a foreign language."³⁴ He thus concluded that *Lassiter* is not binding precedent in cases where the plaintiff is literate in a foreign language.

Judge Kaufman also argued that, since congressional policy determined that Puerto Ricans should be educated in Spanish rather than in English, "Congress pursuant to the Fourteenth Amendment was empowered to correct what it reasonably believed to be an arbitrary state-created distinction."³⁵ The court noted that an alternative source of congressional authority for enacting this legislation could be found in the territorial powers granted by section 3 of article IV of the Constitution.³⁶ The rationale behind this theory is that, since this section empowers Congress to enact all rules and regulations respecting the territories of the United States, section 4(e), if interpreted as a corollary to

29. Justice Harlan, in a lengthy dissent, analyzed the congressional debates concerning the proposal and ratification of the fourteenth amendment. *Id.* at 595-608. He concluded that, "in the Senate, it was fully understood by everyone that neither the first nor the second section interfered with the right of the States to regulate the elective franchise." *Id.* at 601-02. Furthermore, in the House, "speakers stated repeatedly, in express terms or by unmistakable implication, that the States retained the power to regulate suffrage within their borders." *Id.* at 599.

30. The Supreme Court first held that the equal protection clause is applicable to voting in *Nixon v. Herndon*, 273 U.S. 536 (1927), where the Court declared unconstitutional a state statute which prevented Negroes from voting in primaries.

31. *Harper v. Board of Elections*, 86 Sup. Ct. 1079 (1966).

32. 248 F. Supp. 316 (W.D.N.Y. 1965).

33. Judge Kaufman, a court of appeals judge for the Second Circuit, was sitting with the three-judge district court. See note 7 *supra*.

34. 248 F. Supp. at 322.

35. *Id.* at 321. (Footnotes omitted.)

36. *Id.* at 323 n.14. U.S. Const. art. IV, § 3 provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." This theory was forcefully advanced by Judge McGowan in his dissenting opinion in the instant case. 247 F. Supp. at 204.

congressional administration of Puerto Rico, is an appropriate exercise of federal legislative power.³⁷

Actually, Judge Kaufman's principal argument is, on analysis, quite similar to his alternative, although both assert different constitutional bases for the congressional action. The latter argument proposes that section 3 of article IV alone provides Congress with the necessary authority, while the former concludes that congressional policy towards Puerto Rico, lawfully decreed and executed pursuant to the territorial powers granted by section 3 of article IV, has made New York's law unreasonable and, thus, violative of the fourteenth amendment. The unsoundness of either procedure can be illustrated by way of a simple hypothetical. Assume that New York required all potential voters to be literate in *some* language. Surely, in view of *Lassiter*, New York, in an attempt to ensure an informed electorate, could set such a requirement. Suppose further that the United States had acquired a possession where the majority of the inhabitants was illiterate, and failed to provide for their education. For Congress then to declare that the states could not deny suffrage to any person because he is illiterate would appear to be clearly an encroachment on the states' right to set reasonable voter qualifications.³⁸

It should be noted that this hypothetical differs on one significant point from the present case in that, with the latter, it is arguable that the *English* literacy test itself is unreasonable and arbitrary.³⁹ It would appear that the only legiti-

37. *Id.* at 208-09 (dissenting opinion). Judge McGowan mentioned, but did not rely on, another interesting argument in favor of the constitutionality of section 4(e). Congress was given the power to determine the civil rights and political status of the inhabitants of Puerto Rico by the Treaty With the Kingdom of Spain, Dec. 10, 1898, art. IX, 30 Stat. 1759. Further, U.N. Charter art. 55 binds the United States to seek promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . language . . ." It has been suggested that § 4(e) could be regarded as legislation in furtherance of either of these valid treaties. 247 F. Supp. at 204 n.1. However, the Treaty With the Kingdom of Spain, Dec. 10, 1898, art. IX, 30 Stat. 1759, certainly seems to be limited by its own terms to the "native inhabitants" of Puerto Rico. As for U.N. Charter art. 55, *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961), held that the Charter is not part of "the supreme law of the land" under U.S. Const. art. VI, because it is not self-executing. 199 F. Supp. at 158.

38. Furthermore, to hold that it is only in light of the congressional policy towards Puerto Rico that the New York law is unreasonable with respect to a certain group would create different classes of citizenship in regard to voting. A majority of citizens would be able to vote only if they were literate in English, while a minority group would be permitted to vote even though it was literate only in Spanish. Still other minority groups would be denied the franchise even though they were literate in other foreign languages. Of course, the number of persons in this last group would be very small. See note 41 *infra*. This problem concerning the creation of different classes of citizenship was noted by the majority in the instant case. 247 F. Supp. at 204. Judge Kaufman also recognized it, but he said that it in no way prohibited the present congressional action. *United States v. Board of Elections*, 248 F. Supp. 316, 323 (W.D.N.Y. 1965).

39. In the states other than New York that have large non-English speaking populations, English literacy is not a prerequisite to voting. E.g., La. Const. art. VIII, § 1(c); Hawaii Rev. Laws § 11-8 (Supp. 1963); N.M. Stat. Ann. § 3-3-12 (Supp. 1965).

mate purpose of literacy tests is to ensure that there is an informed electorate.⁴⁰ Since a citizen literate in a foreign language could become, through the use of newspapers and other publications written in that foreign language, just as well-informed as a citizen literate in English, it could be concluded that any classification based on a distinction between literacy in English and literacy in a foreign language is unreasonable and arbitrary, and that all *English* literacy tests are thus violative of the equal protection clause.⁴¹ This alone would sustain the right of the literate Puerto Rican to vote, but it does so by invalidating the state law and making the congressional enactment superfluous.

Criminal Law—Defendant's Right To Controvert A Warrant Valid on Its Face.—Defendant, charged with violating Sections 974, 974-a, and 975 of the New York Penal Law, which prohibit policy gambling, made a pre-trial motion under Section 813-c of the New York Code of Criminal Procedure to suppress evidence seized pursuant to a search warrant valid on its face. At the hearing, the defendant alleged that the warrant was invalid and the resultant search unlawful because the factual statements in the supporting affidavit were false. Defendant's wife and another witness gave testimony to support his allegations, and a police officer testified in support of the warrant. The criminal court, granting defendant's motion because of this "sharp conflict of testimony," resolved the doubt in the defendant's favor. The appellate term reversed and directed a new hearing on the ground that findings of fact must be made. The court of appeals, in holding that section 813-c permits "an inquiry as to whether the affidavit's statements were perjurious,"¹ directed a new hearing to determine the underlying issue of fact,² and set up evidentiary rules to guide future courts in the determination of this motion. *People v. Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

In the absence of statute, the rule in most jurisdictions is that the defendant

40. See *Lassiter v. Board of Elections*, 360 U.S. 45, 51-53 (1959); *Stone v. Smith*, 159 Mass. 413, 34 N.E. 521 (1893).

41. This would, of course, make the franchise available to Americans who are literate in any language. However, Representative McCulloch, during congressional discussion prior to the passage of § 4(e), questioned the constitutionality of the section. He pointed out that English literacy is required to become a naturalized citizen of the United States under the Immigration and Nationality Act § 312(1), 66 Stat. 239 (1952), 8 U.S.C. § 1423(1) (1964). 111 Cong. Rec. 18491 (daily ed. Aug. 3, 1965). Therefore, the only beneficiaries of a Supreme Court holding which abolishes English literacy tests would be those persons who were born as American citizens, but who are literate only in a language other than English. This portion of the population is no doubt very small.

1. *People v. Alfinito*, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965).

2. The court pointed out that new findings of fact, ordered by the appellate term, are not an absolute requirement in the determination of the motion. *Ibid.* In the instant case, the simple determination of the motion would "sufficiently [imply] . . . the findings." *Ibid.*

may not go behind the face of the warrant and challenge the truth of the facts in the underlying affidavit.³ In New York, this specific issue had not been determined prior to the enactment of section 813-c,⁴ and, in fact, there was some question whether a defendant could attack a warrant even when it was insufficient on its face.⁵ Section 807 of the New York Code of Criminal Procedure, as enacted in 1881, provided that, "if the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto";⁶ but the courts have generally applied this section quite rigidly,⁷ holding that it does not permit a *motion* attacking either the sufficiency or the veracity of the facts in the underlying affidavit.⁸

3. E.g., *Burrell v. State*, 207 Md. 278, 113 A.2d 884 (1955); *Armstrong v. State*, 195 Miss. 300, 15 So. 2d 438 (1943); *Southard v. State*, 297 P.2d 585 (Okla. Crim. App. 1956); *Griffey v. State*, 168 Tex. Crim. 338, 327 S.W.2d 585 (1959). In *Southard v. State*, supra at 588, the court noted that the examining magistrate is "something more than an automaton" and that his adjudication on the facts is conclusive. In *Griffey v. State*, supra, the court held that the trial court could not go behind the affidavit even when the affiant's testimony at the trial directly contradicted the affidavit. In *Armstrong v. State*, supra, the highest court of Mississippi went even further and held that the finding of probable cause on the face of a warrant is conclusive and cannot be contested. Other cases from various jurisdictions are collected in Annot., 5 A.L.R.2d 394 (1949).

4. N.Y. Code Crim. Proc. § 813-c was enacted by N.Y. Sess. Laws 1962, ch. 954, § 1. In New York, prior to *Mapp v. Ohio*, 367 U.S. 643 (1961), a motion attacking a warrant had little practical effect because even unlawfully seized evidence was admissible at the trial. *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, cert. denied, 270 U.S. 657 (1926).

5. A valid search warrant may be issued only after a showing of probable cause supported by oath or affirmation. U.S. Const. amend. IV; N.Y. Const. art. I, § 12; N.Y. Code Crim. Proc. §§ 793, 795. A challenge of probable cause on the face of a warrant presumes that the facts in the supporting affidavit are true and merely attacks the sufficiency of them. If the allegations in the affidavit are not sufficient, the warrant is invalid and, in the ordinary case where a warrant is required, the resultant search is unconstitutional. E.g., *Aguilar v. Texas*, 378 U.S. 108, 115-16 (1964). It follows that, if New York did not provide a means to attack the sufficiency of the allegations, it also would not permit an attack on the veracity of those allegations. See text accompanying notes 6-8 infra.

6. N.Y. Code Crim. Proc. § 807, amended in 1962, N.Y. Sess. Laws 1962, ch. 542, § 12, is substantially the same today as it was when enacted in 1881.

7. *People ex rel. Robert Simpson Co. v. Kempner*, 208 N.Y. 16, 101 N.E. 794 (1913), seemed to suggest that the magistrate could entertain a motion attacking the warrant pursuant to § 807 and take testimony to determine the relevant issues, id. at 23, 101 N.E. at 796-97 (dictum), but lower courts have not applied this dictum. See cases cited note 8 infra.

8. In *Police Benevolent Ass'n v. Gagliardi*, 9 App. Div. 2d 929, 195 N.Y.S.2d 169, 110 (2d Dep't 1959) (memorandum decision), aff'd mem., 9 N.Y.2d 803, 175 N.E.2d 170, 215 N.Y.S.2d 513, cert. denied, 368 U.S. 929 (1961), the court stated: "We do not find in the Code of Criminal Procedure any provision for a proceeding to vacate a search warrant or for an appeal in such a proceeding from an order denying the application to vacate." Accord, *People v. Brown*, 40 Misc. 2d 35, 36-37, 242 N.Y.S.2d 555, 557-58 (N.Y. Crim. Ct. 1963). However, *People v. Politano*, 17 App. Div. 2d 503, 235 N.Y.S.2d 712 (3d Dep't 1962), aff'd mem., 13 N.Y.2d 852, 192 N.E.2d 271, 242 N.Y.S.2d 491 (1963), while agreeing with *Gagliardi* that there was no procedure to appeal such a motion, nevertheless held that "where

Section 813-c, a statutory aftermath to *Mapp v. Ohio*,⁹ provides that a party "aggrieved by an unlawful search and seizure . . . may move for the return of [unlawfully obtained] . . . property or for the suppression of its use as evidence . . . [and that] the court shall hear evidence upon any issue of fact necessary to determination of the motion."¹⁰ This statute sets up, for the first time in New York,¹¹ a general procedure through which a defendant may produce evidence to show that he has been the victim of an unlawful search; but the statute does not specify what is meant by an "unlawful search and seizure," or when property is "unlawfully obtained."

Rule 41(e) of the Federal Rules of Criminal Procedure poses a similar constitutional rights are involved the failure of the statute to provide an effective procedure to reach the question is not a bar; and the court is deemed possessed of sufficient inherent power" to act upon the motion. 17 App. Div. 2d at 508, 235 N.Y.S.2d at 717. The court, in this pre-§ 813-c decision, remained neutral on whether it would permit an attack on a warrant sufficient on its face. *Id.* at 509, 235 N.Y.S.2d at 717-18.

Strictly speaking, even § 813-c does not provide for a direct attack on a warrant. *People v. Brown*, supra at 37, 242 N.Y.S.2d at 558, held that the true procedure was to bring a motion to suppress under § 813-c, and in that motion the aggrieved party could "challenge the grounds, legal and factual, [pursuant to § 807] on which the warrant was issued" By this strict interpretation, § 813-c must be combined with § 807 to permit any direct attack on a warrant. This court viewed the issue as purely a question of procedure and attacked the "inherent power" theory used in the *Politano* case. *Id.* at 38, 242 N.Y.S.2d at 559-60. The criticism, however, was apparently rendered without knowledge that *Politano* had been affirmed by the court of appeals one week earlier. Also, it is interesting to note that California, with the same relevant statutory procedure as that of New York prior to the enactment of § 813-c, would permit a motion attacking both the sufficiency and the truth of the allegations in the supporting affidavit. See *People v. Keener*, 55 Cal. 2d 714, 361 P.2d 587, 12 Cal. Rptr. 859 (1961); *Williams v. Justice Court*, 230 Cal. App. 2d 87, 98, 40 Cal. Rptr. 724, 732 (Dist. Ct. App. 1964); *Arata v. Superior Court*, 153 Cal. App. 2d 767, 315 P.2d 473 (Dist. Ct. App. 1957). This same liberal approach has been used under similar federal procedure. See note 13 *infra*.

9. 367 U.S. 643 (1961). Prior to the enactment of § 813-c, the Temporary Commission on Revision of the Penal Law and Criminal Code commented: "The Federal and other 'exclusionary rule' jurisdictions necessarily possess procedure, statutory and otherwise, for attacking the admissibility of unlawfully seized evidence Upon the *Mapp* mandate [New York] . . . suddenly found itself operating under the exclusionary rule, but with no procedural machinery for handling the situation. This resulted in considerable confusion for all concerned, including the judiciary, and the creation of statutory procedure in this field is generally regarded as one of New York's most urgent legislative needs." N.Y. Leg. Doc. No. 41, p. 19 (1962). See Messages of the Governor, N.Y. Sess. Laws 3673 (McKinney 1962).

10. N.Y. Code Crim. Proc. § 813-c. In addition, § 813-d specifies that such motion must be made with "reasonable diligence prior to the commencement of any trial" unless certain special circumstances exist. N.Y. Code Crim. Proc. § 813-d. If the defendant fails to make this pre-trial motion and if there are no special circumstances, the defendant is "deemed to have waived" his right to object to the admission of the evidence at the trial. *Ibid.* A constitutional right cannot be waived for a mere technical reason, *Jones v. United States*, 362 U.S. 257, 264 (1960); *Gould v. United States*, 255 U.S. 298, 313 (1921), but the exceptions in § 813-d provide for possible injustice, and the waiver, therefore, would be effective.

11. See note 9 *supra*.

dilemma. This federal rule provides that a motion to suppress may be made by "a person aggrieved by an unlawful search and seizure . . . on the ground that . . . there was not probable cause for believing the existence of the grounds on which the warrant was issued . . ." ¹² Even with this type of procedural base,¹³ federal courts have been split on the defendant's right to controvert the truth of the allegations in the underlying affidavit. One line of cases has refused to allow inquiry into the truthfulness of the supporting affidavit, holding that it is "sufficient that the affidavit showed probable cause at the time the warrant was issued."¹⁴ Another line of cases supports a contrary view, suggesting that the affiant must in fact have had probable cause at the time that the affidavit was made.¹⁵

The Supreme Court has never passed directly on the extent to which the supporting allegation of a search warrant, valid on its face, may be examined.¹⁶ It might be inferred, however, that such an attack could be made, because the Court, in *Rugendorf v. United States*,¹⁷ did take the opportunity to distinguish the case then before it from one in which an attack might be successful. The Court dismissed the attack on the supporting affidavit because the disputed facts were "of only peripheral relevancy to the showing of probable cause, and . . . did not go to the integrity of the affidavit."¹⁸

Rugendorf does not give any indication whether the defendant's right to

12. Fed. R. Crim. P. 41(e)4.

13. Federal Rule 41(e) became effective in 1949. Prior federal procedure, Espionage Act of 1917, ch. 30, tit. xi, §§ 15-16, 40 Stat. 229, was substantially similar to N.Y. Code Crim. Proc. §§ 807, 809, but the federal courts that took a liberal view had allowed an attack on the truth of the facts in the underlying affidavit even under this procedure. See, e.g., *United States v. Napela*, 28 F.2d 898 (N.D.N.Y. 1928). Other federal courts, which took a strict view and allowed an attack only if the affidavit were insufficient on its face, did not distinguish between the new and the old federal procedure. E.g., cases cited note 14 *infra*.

14. *Kenney v. United States*, 157 F.2d 442 (D.C. Cir. 1946) (*per curiam*). Accord, *Gracie v. United States*, 15 F.2d 644 (1st Cir. 1926), cert. denied, 273 U.S. 743 (1927); *United States v. Gianaris*, 25 F.R.D. 194 (D.D.C. 1960); *United States v. Doe*, 19 F.R.D. 1 (E.D. Tenn. 1956); *United States v. Brunett*, 53 F.2d 219 (W.D. Mo. 1931). The strongest language against such an attack on a warrant appears in *United States v. Brunett*, *supra*, where the court stated that the Commissioner's "determination of probable cause, unless arbitrary, was conclusive. . . . The 'probable cause' required by the Fourth Amendment is that shown by an affidavit. The commissioner is not required to conduct an investigation for determining whether the affidavit is true, and a subsequent showing of its falsity cannot have the effect of retrospectively invalidating a warrant valid when issued." *Id.* at 225.

15. See *Chin Kay v. United States*, 311 F.2d 317, 321 (9th Cir. 1962); *United States v. Clancy*, 276 F.2d 617, 628 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961). *United States v. Pearce*, 275 F.2d 318, 321-22 (7th Cir. 1960); *Clay v. United States*, 246 F.2d 298, 303 (5th Cir.), cert. denied, 355 U.S. 863 (1957); *Aderhold v. United States*, 132 F.2d 858 (5th Cir. 1943); *United States v. Nagle*, 34 F.2d 952 (N.D.N.Y. 1929); *King v. United States*, 282 F.2d 398, 400 n.4 (4th Cir. 1960) (*dictum*).

16. *Rugendorf v. United States*, 376 U.S. 528, 531-32 (1964).

17. 376 U.S. 528 (1964).

18. *Id.* at 532.

inquire into the falsity of the supporting affidavit is a constitutional right,¹⁹ or simply a statutory one.²⁰ In *Dumbra v. United States*,²¹ however, the Court, in discussing the test for probable cause under the fourth amendment, did not make a distinction between false and insufficient statements in the underlying affidavit. The Court stated:

In determining . . . probable cause . . . we are concerned only with the question whether the *affiant had reasonable grounds at the time of his affidavit* and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.²²

This language appears to set up the double test that not only must the affidavit state sufficient facts on its face, but also the officer must in fact have reasonable grounds to ask for the search.²³ Clearly, the officer who must falsify

19. When the defendant's constitutional rights are violated, he should have the right to attack the warrant even without specific statutory procedure. *United States v. Napela*, 28 F.2d 898, 903 (N.D.N.Y. 1928); *People v. Politano*, 17 App. Div. 2d 503, 508, 235 N.Y.S.2d 712, 717 (3d Dep't 1962), *aff'd mem.*, 13 N.Y.2d 852, 192 N.E.2d 271, 242 N.Y.S.2d 491 (1963); *cf. Gouled v. United States*, 255 U.S. 298, 313 (1921); *Weeks v. United States*, 232 U.S. 383, 392 (1914).

20. If the right to attack the facts stated in the supporting affidavit is dependent upon statute, the states would be free to refuse such attacks. See note 3 *supra* and accompanying text.

21. 268 U.S. 435 (1925).

22. *Id.* at 441. (Emphasis added.)

23. *Stacey v. Emery*, 97 U.S. 642 (1878), *Carroll v. United States*, 267 U.S. 132 (1925), and *Steele v. United States*, No. 1, 267 U.S. 498 (1925), cited by the Court in *Dumbra*, 268 U.S. at 437, 439, 441, used this same type of language. Although *Stacey* involved a civil suit in trespass, the Court used the test of probable cause in fact, stating that the certificate issued by the magistrate would be sufficient to meet the requirement of probable cause and would be effective as a bar to trespass liability only "if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed . . ." *Stacey v. Emery*, *supra* at 645. In *Carroll*, where the issue was probable cause for seizure without a warrant, the Court quoted this identical language from *Stacey*. *Carroll v. United States*, *supra* at 161. Moreover, in *Steele*, a case involving probable cause for issuance of a warrant, the Court, quoting from *Carroll*, used the same language. *Steele v. United States*, *supra* at 504-05. It appears, therefore, that the Supreme Court has not drawn any distinction between probable cause with or without a warrant in that the warrant does not insulate the officer from a constitutional requirement of probable cause in fact, regardless of the judicial determination by the issuing magistrate. See also the broad language of the New York Court of Appeals in *People v. Marshall*, 13 N.Y.2d 28, 34-35, 191 N.E.2d 798, 801, 241 N.Y.S.2d 417, 421-22 (1963). In doubtful cases, however, the warrant does act as a partial insulation because, "when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant . . ." *Aguilar v. Texas*, 378 U.S. 108, 111 (1964), quoting from *Jones v. United States*, 362 U.S. 257, 270 (1960).

basic relevant facts in order to make a sufficient affidavit would not in fact have reasonable grounds for the search.²⁴ If this be the test, then a defendant's constitutional rights are just as clearly violated when the affidavit is falsified as when the affidavit is insufficient.²⁵

Since probable cause must be determined from the facts and circumstances as they existed when the warrant was issued,²⁶ it readily follows that facts shown to be perjured should not be given any weight in that determination. But, when there is an honest mistake, the result could be different. In *Brinegar v. United States*,²⁷ the Court pointed out that "room must be allowed for some mistakes But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."²⁸ Although *Brinegar* was considering a situation where a warrant was not used, the same reasoning should apply to situations involving warrants, and a reasonable mistake in the affidavit would not necessarily invalidate it.²⁹

In the instant case, the court of appeals avoided a direct discussion of the constitutional implications of a warrant supported by a perjured affidavit. Chief Judge Desmond, speaking for a unanimous court, reasoned that "modern thought which produced the decision in *Mapp v. Ohio* . . . would make incongruous any holding that a search warrant is beyond attack even on proof that the allegations on which it was based were perjured";³⁰ and, on this basis, the court construed section 813-c so as to permit an attack on a perjured affidavit. Implicit in this process, however, is a holding that the search pursuant to the warrant here in question was an "unlawful search," since section 813-c specifically states that a motion to suppress must allege that there was an "unlawful search" and that the property was "unlawfully obtained."³¹

The search in the instant case was, in form, reasonable and valid; that is, the warrant showed probable cause on its face, and both the premises searched and the property seized were specifically described.³² Nevertheless, since no specific statutes were violated, the search could be "unlawful" only if the perjured affidavit rendered the search "unreasonable" within the meaning of the fourth

24. "[A] search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. Di Re*, 332 U.S. 581, 595 (1948). (Footnote omitted.)

25. The exclusionary rule was read into the fourth amendment to deter police from making unreasonable searches. *Linkletter v. Walker*, 381 U.S. 618, 636 (1965); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Ordinary civil remedies were found to be inadequate. *Ibid.* Accordingly, police should not be allowed to falsify affidavits with impunity. There should be no difference between a perjured affidavit and an insufficient one—neither should be protected.

26. See note 24 *supra*.

27. 338 U.S. 160 (1949).

28. *Id.* at 176.

29. See *Lerner v. United States*, 151 A.2d 184, 187 (D.C. Munic. Ct. App. 1959). But see *United States v. Henderson*, 17 F.R.D. 1 (D.D.C. 1954).

30. 16 N.Y.2d at 185, 211 N.E.2d at 646, 264 N.Y.S.2d at 246.

31. See text accompanying note 10 *supra*.

32. U.S. Const. amend. IV.

amendment.³³ Therefore, it seems, although the court did not explicitly so hold,³⁴ that the construction given to section 813-c was derived from a constitutional standard.

Having thus determined that the defendant in the instant case may introduce evidence to controvert the allegations in the underlying affidavit, the court of appeals went on to "fashion a rule" to determine the ultimate weight and effect of that evidence.³⁵ The court wisely followed a line of federal cases holding that the burden of proof is on the defendant attacking the warrant,³⁶ thus protecting citizens' rights while avoiding "overstrict rules" which would invalidate a warrant whenever there is a conflict of testimony.³⁷

The court also held that any "fair doubt" should be resolved in favor of the warrant.³⁸ There are no cases using this test, but it seems that the defendant must show more than a preponderance of evidence and yet somewhat less than proof beyond a reasonable doubt.³⁹ In any event, the court will vacate a warrant if it is clear that the officer made a false affidavit;⁴⁰ a mere conflict of testimony ordinarily would not be sufficient.⁴¹

Evidence—Search and Seizure—Evidence Seized for Its Inculpatory Value Alone Held To Be Admissible.—Pursuant to a search warrant, a police officer searched defendant's premises and seized a pair of shoes for comparison with a cast of footprints found at the scene of a robbery. Defendant contended that, since the purpose of the search was to obtain mere evidence, it was an unreasonable search and seizure within the meaning of the fourth amendment and, therefore, that the evidence was inadmissible. In ruling that the shoes were admissible into evidence, the court held that articles may be seized for their inculpatory value alone and that a search to that end is valid. *State v. Bisaccia*, 45 N.J. 504, 213 A.2d 185 (1965).

33. The United States Constitution forbids only unreasonable searches, *Carroll v. United States*, 267 U.S. 132, 147 (1925), and the standard of reasonableness is the same for both the states and the federal government, *Ker v. California*, 374 U.S. 23, 33 (1963).

34. The court avoided any discussion of the requirements of probable cause under the fourth amendment. Compare text accompanying note 30 *supra* with note 23 *supra* and accompanying text and the broad language used in *People v. Marshall*, 13 N.Y.2d 28, 34-35, 191 N.E.2d 798, 801, 241 N.Y.S.2d 417, 421-22 (1963).

35. 16 N.Y.2d at 185-86, 211 N.E.2d at 646, 264 N.Y.S.2d at 246.

36. *United States v. Napela*, 28 F.2d 898, 904 (N.D.N.Y. 1928); *United States v. Goodwin*, 1 F.2d 36 (S.D. Cal. 1924). This same rule was also applied in *Chin Kay v. United States*, 311 F.2d 317, 321 (9th Cir. 1962); and *United States v. Nagle*, 34 F.2d 952, 954 (N.D.N.Y. 1929).

37. 16 N.Y.2d at 186, 211 N.E.2d at 646, 264 N.Y.S.2d at 246.

38. *Ibid.*

39. The requirement of proof beyond a "fair doubt" seems quite similar to the requirement of proof by "clear and convincing evidence," used in certain civil trials. See *Richardson*, *Evidence* § 97, at 73-74 (Prince 9th ed. 1964).

40. *United States v. Nagle*, 34 F.2d 952 (N.D.N.Y. 1929).

41. 16 N.Y.2d at 185, 211 N.E.2d at 645, 264 N.Y.S.2d at 245.

The principle that search warrants may not be used solely for the purpose of securing inculpatory evidence to be used against an accused had its inception in *Boyd v. United States*.¹ In that case, a court order had directed the defendant to produce his private books and papers under penalty of admitting all allegations pertaining to those documents. In holding the order unconstitutional, the Supreme Court reasoned that to compel a defendant to produce self-incriminating evidence was prohibited by the fifth amendment.² The Court went even further, however, and stated that, when that which is forbidden by the fifth amendment is the object of a search and seizure, namely, seizing papers for their inculpatory value alone, it is an unreasonable search and seizure within the meaning of the fourth amendment.³

Since *Boyd*, the Supreme Court⁴ and lower federal courts⁵ have consistently stated that mere evidence may not be the proper subject of a search warrant. In the present case, the court justified its departure from the mere evidence rule by rejecting the right to possession theory under which fruits and instrumentalities of a crime and contraband are permitted to be seized⁶ while other types of incriminating evidence are held inviolate. Under that theory, when the Government searches for the former items, it is pursuing a possessory right either of its own or of the victim of the crime.⁷ The instant court argued, however, that officers seize the articles within these categories not to satisfy any proprietary interest, but primarily to use them against the defendant, and, therefore, in view of the *Boyd* doctrine, there is no valid justification for allowing these articles to be seized.⁸ The court concluded that, since these articles are permitted to be seized, ultimately for their inculpatory value, it

1. 116 U.S. 616 (1886).

2. *Id.* at 634-35.

3. *Id.* at 634-35 (dictum).

4. *Abel v. United States*, 362 U.S. 217 (1960); *Harris v. United States*, 331 U.S. 145 (1947); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Byars v. United States*, 273 U.S. 28, 29-30 (1927) (dictum); see *Davis v. United States*, 328 U.S. 582 (1946); *Marron v. United States*, 275 U.S. 192 (1927); *Agnello v. United States*, 269 U.S. 20 (1925); *Gould v. United States*, 255 U.S. 298 (1921). The Supreme Court, in *Ker v. California*, 374 U.S. 23 (1963), and in *Mapp v. Ohio*, 367 U.S. 643 (1961), expressly upheld the *Boyd* holding, but did not discuss its mere evidence doctrine.

5. *Johnson v. United States*, 293 F.2d 539 (D.C. Cir. 1961), cert. denied, 375 U.S. 838 (1963); *United States v. Clancy*, 276 F.2d 617 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961); *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958); *United States v. Kirschenblatt*, 16 F.2d 202 (2d Cir. 1926); *United States v. Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951); *United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870 (W.D.N.Y. 1943).

6. 45 N.J. at 508-09, 213 A.2d at 187. The state may seize these articles under the theory that the defendant is not entitled to possess them. The fruits of a crime may be seized since they belong to the victim; the instrumentalities of a crime, since the defendant has forfeited his property right to them by using them for an illegal purpose; and contraband, since an individual can have no private right in property the possession of which is a crime. See, e.g., *Harris v. United States*, 331 U.S. 145, 154-55 (1947); *Gould v. United States*, 255 U.S. 298, 309 (1921); *Boyd v. United States*, 116 U.S. 616, 623-24 (1886).

7. E.g., *Harris v. United States*, 331 U.S. 145, 154-55 (1947); *United States v. Lefkowitz*, 285 U.S. 452, 465-66 (1932); *Carroll v. United States*, 267 U.S. 132, 149-50 (1925).

8. 45 N.J. at 508-09, 213 A.2d at 187.

must be that the fourth amendment does allow the search for and seizure of all articles for their evidentiary worth.⁹

Boyd stated that, when the object of a search is violative of the fifth amendment, the search is unreasonable within the meaning of the fourth amendment. However, the use of incriminating evidence in which the defendant has no possessory right, although it was previously in his possession, cannot be considered as compelling him to be a witness against himself. When the object of a search is to seize incriminating evidence which belongs to the state or to a third party, the fifth amendment is not violated. However, when articles in which the defendant has a proprietary interest are seized and used as evidence, the accused is, in effect, being compelled to be a witness against himself. Thus, a seizure of fruits or instrumentalities of a crime or contraband is justified and consistent with the *Boyd* doctrine.

The present court based its holding on the fact that the mere evidence doctrine has never been applied by the Supreme Court to tangibles other than private papers.¹⁰ The court reasoned that *Boyd* sought to eliminate the exploratory search authorized by the general warrant under which emissaries of the Crown were ordered to seize a man's private papers in the hope that incriminating evidence would be uncovered.¹¹ The court concluded that *Boyd* and *Entick v. Carrington*,¹² a case upon which the court relied heavily, did not infer that

the use against a man of any and everything seized in a search would violate the privilege against self-incrimination or that a search could not be maintained to that very end. What they denounced in those terms was a search among private papers, and this because of the extraordinary regard the law has for the privacy that reposes in them.¹³

Certainly, in view of the premise under which the *Boyd* Court was operating, it would be incongruous to limit the application of the rule to private papers. *Boyd* stated that the compelling of a man to present evidence against himself, which is condemned in the fifth amendment, "throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."¹⁴ There is no difference, so far as the requirements of the fifth amendment are concerned, whether the incriminating evidence is in the form of a paper or other personal effect since, in either case, the defendant is being compelled to present evidence against himself. Under this reasoning, the search for and seizure of any inculpatory evidence, regardless of its form, is prohibited by the fourth amendment.

However, the instant court questioned *Boyd's* interpretation of the relationship between the fourth and fifth amendments, and found that the two

9. *Ibid.*

10. *Id.* at 515, 213 A.2d at 191.

11. *Id.* at 511, 213 A.2d at 188-89.

12. 19 Howell St. Tr. 1029 (1765).

13. 45 N.J. at 514, 213 A.2d at 190.

14. 116 U.S. at 633 (1886).

amendments were "incompatible in their immediate operative effect."¹⁵ The fifth amendment shields the individual from compulsory testimony, while the fourth, recognizing that possessions may be seized, seeks to balance the Government's duty to protect its citizens and the individual's right to privacy.¹⁶

Although this criticism has been reiterated in writings on the subject,¹⁷ it has not found favor with the Supreme Court. Justice Black, in his concurring opinion in *Mapp v. Ohio*,¹⁸ wrote:

The close interrelationship between the Fourth and Fifth Amendments . . . has long been recognized . . . [I]t seems to me that the *Boyd* doctrine, though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint, soundly based in reason, and entirely consistent with [the] . . . interpretation of our Bill of Rights . . .¹⁹

Furthermore, the language used by the Supreme Court is much broader than its holdings. In *Harris v. United States*,²⁰ the Supreme Court stated that "this Court has frequently recognized [that] . . . merely evidentiary materials . . . may not be seized . . ." ²¹ Professor Corwin said of *Gouled v. United States*:²² "While under the facts of the case this particular statement of the rule limits it to papers, the court clearly regards it as extending to chattels generally . . ." ²³ In addition, there have been numerous federal²⁴ and state court cases,²⁵ as

15. 45 N.J. at 509, 213 A.2d at 187.

16. *Id.* at 509, 213 A.2d at 187-88.

17. 8 Wigmore, Evidence § 2184a (McNaughton rev. ed. 1961); Note, 28 U. Chi. L. Rev. 664, 692-701 (1961).

18. 367 U.S. 643, 661 (1961).

19. *Id.* at 662-63 (Black, J., concurring). Accord, *Abel v. United States*, 362 U.S. 217, 255 (1960) (dissenting opinion); *United States v. Lefkowitz*, 285 U.S. 452, 466-67 (1932); *Agnello v. United States*, 269 U.S. 20, 33-34 (1925); *Gouled v. United States*, 255 U.S. 293, 306 (1921).

20. 331 U.S. 145 (1947).

21. *Id.* at 154. (Emphasis added.) Search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him . . ." *Gouled v. United States*, 255 U.S. 293, 309 (1921).

22. 255 U.S. 298 (1921).

23. Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 18 (1930).

24. E.g., *United States v. Peisner*, 311 F.2d 94 (4th Cir. 1962); *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958); *In re Ginsburg*, 147 F.2d 749 (2d Cir. 1945). In *Morrison v. United States*, *supra*, the officers searched defendant's residence and seized a handkerchief which allegedly bore some tangible evidence of the crime charged. The court held that the handkerchief was mere evidence of the offense, not an instrument or fruit of the crime, and, therefore, was seized illegally and was inadmissible into evidence. In *In re Ginsburg*, *supra*, where defendant was charged with accepting a bribe, a search of his residence and subsequent seizure of the alleged bribe money was held to be an unreasonable search and seizure since the money could be used only as mere evidentiary material.

25. E.g., *Tucker v. State*, 128 Miss. 211, 90 So. 845 (1922); *La Rue v. State*, 149 Tex. Crim. 598, 197 S.W.2d 570 (1946). It appears that, prior to the instant decision, New

well as other authorities,²⁶ which have held that the mere evidence rule is not restricted to private papers.

In the past, state courts attempted to justify their avoidance of the application of the rule on the theory that neither the fifth nor the fourth amendment was binding upon them.²⁷ This is no longer a justification for rejecting the rule, since the Supreme Court made the fifth amendment applicable to the states in *Malloy v. Hogan*.²⁸ The fourth amendment's requirements were made binding upon the states in *Mapp v. Ohio*.²⁹ The *Mapp* holding was made explicit in *Ker v. California*,³⁰ where the Court stipulated that the same fundamental criteria be applied in determining the reasonableness of a search by state standards as are required by federal standards of constitutional derivation.³¹ The mere evidence rule sets forth the federal standards of constitutional derivation as to what categories of objects may be seized.³²

It should be noted, however, that the instant court does not stand alone in its holding that articles may be seized for their inculpatory value. New York, as a result of a recently enacted statute, authorizes the seizure of "property constituting evidence of crime or tending to show that a particular person committed a crime."³³ A year after the provision was enacted, its constitutionality was upheld in *People v. Carroll*.³⁴ Even though that court ex-

Jersey adhered to the mere evidence doctrine. In *State v. Naturile*, 83 N.J. Super. 563, 200 A.2d 617 (App. Div. 1964), the court stated: "It is instructive that the controlling decisions seem uniformly to the effect that the . . . police objective of a search for the purpose of obtaining articles which are evidence of commission of crime but do not fall within the category of permissible objects of search . . . would offend the Fourth and Fifth Amendments." *Id.* at 576, 200 A.2d at 624. (Emphasis omitted.)

26. 8 Wigmore, *Evidence* § 2184(a), at 45-46 (McNaughton rev. ed. 1961); Corwin, *supra* note 23, at 16; Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 Marq. L. Rev. 172 (1964); Comment, 9 St. Louis U.L.J. 549, 559 (1965); Comment, 20 U. Chi. L. Rev. 319 (1953); Comment, 5 Wm. & Mary L. Rev. 101 (1964). "[E]vidence . . . which consists of private documents or other chattels of the defendant wanted by the government solely for its evidential value . . . has been held not to be subject to search and seizure." 8 Wigmore, *op. cit. supra* § 2184(a), at 45. (Footnote omitted.) "The rule states that objects of only evidentiary value may not be seized . . . and that when such objects are seized, they must be suppressed." Shellow, *supra* at 172.

27. See Shellow, *supra* note 26, at 180.

28. 378 U.S. 1 (1964). See *Griffin v. California*, 380 U.S. 609, 611 (1965), 34 Fordham L. Rev. 134.

29. 367 U.S. 643 (1961). Although the *Mapp* Court held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . ." *id.* at 657, it did not expressly stipulate that the states were bound by the federal court's interpretation of the exclusionary rule, nor did it expressly set down standards of reasonableness to be applied by the state courts.

30. 374 U.S. 23, 30-34 (1963).

31. *Id.* at 33-34.

32. For an analysis of *Ker*, see Sobel, *Current Problems in the Law of Search & Seizure* 7-11 (1964).

33. N.Y. Code Crim. Proc. § 792(4).

34. 38 Misc. 2d 630, 238 N.Y.S.2d 640 (Sup. Ct. 1963).

pressly stated that the United States Supreme Court, in *Gouled v. United States*³⁵ and *Harris v. United States*,³⁶ held that "property evidentiary in character may not be seized . . ." ³⁷ it concluded that the Supreme Court, in *Abel v. United States*,³⁸ departed from adherence to this principle.³⁹

The New York court misconstrued the *Abel* holding, which did not depart from the mere evidence doctrine but, rather, expressly upheld the *Gouled*⁴⁰ and *Harris* decisions.⁴¹ The *Abel* Court stated that "the only things sought here, in addition to weapons, were documents connected with petitioner's status as an alien. These may well be considered as instruments or means for accomplishing his illegal status, and thus proper objects of search under *Harris* . . ." ⁴²

California,⁴³ Oregon,⁴⁴ and Nebraska⁴⁵ have provisions, similar to New York's, which allow the search for and seizure of mere evidence. Although the constitutionality of the California provision was recently upheld by the California Supreme Court,⁴⁶ other authorities have stated that such statutes are unconstitutional.⁴⁷

35. 255 U.S. 298 (1921).

36. 331 U.S. 145 (1947).

37. 38 Misc. 2d at 632, 238 N.Y.S.2d at 643.

38. 362 U.S. 217 (1960).

39. 38 Misc. 2d at 632-33, 238 N.Y.S.2d at 643.

40. 362 U.S. at 234-35.

41. *Id.* at 238-39.

42. *Id.* at 237. (Citation omitted.)

43. Cal. Pen. Code § 1524(4).

44. Ore. Rev. Stat. § 141.010(2) (Supp. 1963).

45. Neb. Rev. Stat. § 29-813 (1964).

46. *People v. Thayer*, — Cal. 2d —, 408 P.2d 108, 47 Cal. Rptr. 780 (1965). The court held that the mere evidence rule was not a constitutional standard and therefore not binding on the states. The court reasoned that, although the *Gouled* Court rested its holding on the fourth and fifth amendments, "its adoption of the mere evidence rule as a constitutional standard was not necessary to the result in the case" since the issuance of the search warrant in question was invalid by federal statute. *Id.* at —, 408 P.2d 110-11, 47 Cal. Rptr. 782-83. However, *Gouled* expressly stated that the "taking . . . of a paper writing of evidential value only belonging to one suspected of crime [is] . . . a violation of the 4th amendment," 255 U.S. at 305, and that "the admission of such paper in evidence [is] . . . a violation of the 5th amendment," *id.* at 306. This was not dictum, but the constitutional holding of the *Gouled* Court.

47. Sobel, *op. cit. supra* note 32, at 95; Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 952 n.117 (1965); *Legislation, A Legislative Approach to the Fourth Amendment*, 45 Neb. L. Rev. 148, 151-54 (1966); *Comment*, 43 Ore. L. Rev. 333 (1964). "Oregon cannot constitutionally authorize the seizure of items by the authority of a search warrant solely for the purpose of using these items against the defendant . . ." *Id.* at 348. With regard to the New York provision, Judge Sobel wrote that "it is a holding by the Supreme Court . . . that 'mere evidence' is constitutionally protected . . ." and therefore section 792(4), to the extent that it contravenes the *Boyd* rule, is unconstitutional. Sobel, *op. cit. supra* note 32, at 95. But see Prince, *Evidence*, 14 Syracuse L. Rev. 377 (1962), who felt that the New York statute was constitutional, *id.* at 383, but stated that the provision's constitutionality remains to be

Since the mere evidence rule had its inception in 1886, the Supreme Court has neither retracted from it nor limited its application. However, there appears to be an attempt by some of the states to avoid the application of the rule. While a few state statutes have provisions allowing the search for and seizure of mere evidence, there have been many state decisions which have attempted to render the rule ineffective by expanding the scope of the term "instrumentality of a crime" to a point bordering on the absurd.⁴⁸ Redefinition of the rule by the Supreme Court would certainly be in order.

Labor Law—Arbitration or Enforcement of Alleged "Hot Cargo" Agreement Enjoined Over the Objection of a Regional Director of the NLRB.

—The regional director twice petitioned for an injunction under Section 10(1) of the Taft-Hartley Act;¹ first against the enforcement, and then against the arbitration of aspects of a collective bargaining agreement, which he had reasonable cause to believe violated Section 8(e) of the amended Taft-Hartley Act.² Subsequently, he altered his position and sought approval of a stipulation between the charged parties that the alleged "hot cargo" provisions of the collective bargaining agreement would not be arbitrated or enforced. Approval was denied, and, over the objection of the regional director, the district court issued a temporary injunction against arbitration or enforcement of those parts of the collective bargaining agreement which were in dispute before the Board. The court of appeals affirmed. *Retail Clerks Union v. Food Employers Council, Inc.*, 351 F.2d 525 (9th Cir. 1965).

The charging parties,³ by filing an unfair labor practice charge with a determined: "The Supreme Court has not yet formulated standards to determine when a search and seizure by a state officer violates the due process clause of the fourteenth amendment." *Id.* at 383 n.42. Dean Prince, however, wrote this prior to *Ker v. California*, 374 U.S. 23 (1963), where the Supreme Court explicitly reiterated the principle that was implied in *Mapp*, by requiring that the criteria used in determining the reasonableness of a search be the federal standards of constitutional derivation. It can be assumed that Dean Prince would not reach the same conclusion today as he did in 1962.

48. E.g., *Boles v. Commonwealth*, 304 Ky. 216, 200 S.W.2d 467 (1947) (clothing found to be an instrument of the crime); *State v. Chinn*, 231 Ore. 259, 373 P.2d 392 (1962) (bed sheets, a camera, and beer bottles found to be used as a means for the commission of rape).

1. Labor Management Relations Act (Taft-Hartley Act) § 10(1), 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160(1) (1964).

2. Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) § 704(b), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (1964), amending Labor Management Relations Act (Taft-Hartley Act) § 8, 61 Stat. 140 (1947). Section 8(e) makes it an unfair labor practice on the part of both unions and employers to agree to cease or to refrain from handling the goods of another employer or from doing business with another person.

3. A charging party is a person who files a charge with a regional director of the NLRB alleging that an unfair labor practice has occurred or is occurring. He has been characterized as something more than the complaining witness in a criminal case, yet a person entitled to less rights than the ordinary plaintiff in a lawsuit. *Marine Eng'rs' Beneficial Ass'n v. NLRB*, 202 F.2d 546, 549 (3d Cir.), cert. denied, 346 U.S. 819 (1953).

regional director of the National Labor Relations Board, requested him to petition for relief under the "mandatory injunction" section of the Taft-Hartley Act. Section 10(l) provides that, if certain enumerated unfair labor practices⁴ are brought to the attention of a regional director, and the director, after investigation, finds "reasonable cause to believe such charge is true and that a complaint should issue . . ."⁵ then the director *must* petition for an injunction.⁶ The appropriate district court does not pass upon the merits of the controversy,⁷ but rather weighs the possibility that the charged practice has or has not occurred.⁸ The injunction, once issued, remains in force until final disposition by the NLRB of the alleged unfair labor practice.⁹

The charging parties in the instant case¹⁰ alleged that the Retail Clerks Union and the Food Employers Council had entered into a collective bargaining agreement which contained clauses requiring the employers to cease doing business with or handling the products of third persons unless those persons became bound under the collective bargaining agreement.¹¹ The charging parties alleged violation of section 8(e), which declares unenforceable and void "hot cargo" agreements—agreements wherein an employer promises a union that he will cease or refrain from doing business with third persons whose practices are objectionable to the union.¹²

The "hot cargo" agreement prohibition was passed as part of the 1959 Landrum-Griffin Amendments to the Taft-Hartley Act in an effort to close the loopholes found in section 8(b) (4) (ii) (A),¹³ which forbade a labor organization from inducing employees to strike or engage in a concerted refusal to handle goods, with the purpose of forcing the employer to refrain from doing business

4. In general, secondary boycotts are proscribed, as are strikes which are aimed at coercing an employer to disregard his duty to recognize a certified union.

5. Labor Management Relations Act (Taft-Hartley Act) § 10(l), 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160(l) (1964).

6. *Ibid.* Compare §§ 10(e), (j), which are permissive, stating that the NLRB "shall have power" to petition for an injunction. Labor Management Relations Act (Taft-Hartley Act) §§ 10(e), (j), 61 Stat. 147, 149 (1947), 29 U.S.C. §§ 160(e), (j) (1964). However, § 10(l) states that the regional attorney "shall . . . petition" for injunctive relief.

7. *Douds v. Local 294, Int'l Bhd. of Teamsters*, 75 F. Supp. 414, 418 (N.D.N.Y. 1947).

8. *Ibid.*; cf. *Garner v. Teamsters Union*, 346 U.S. 485, 489 (1953) (construing a § 10(j) petition). A § 10(j) injunction may be sought in the discretion of the Board for any unfair labor practice for which a complaint has issued. Labor Management Relations Act (Taft-Hartley Act) § 10(j), 61 Stat. 149 (1947), 29 U.S.C. § 160(j) (1964).

9. Labor Management Relations Act (Taft-Hartley Act) § 10(l), 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160(l) (1964). If a circuit court stays the legal effect of a Board decision, the practical result is a lengthening of the life of a § 10(l) injunction until the Board's order is enforced by the circuit court. *Houston Insulation Contractors Ass'n v. NLRB*, 339 F.2d 868, 870-71 (5th Cir. 1964).

10. The charging parties were the Joint Council of Teamsters No. 42, American Research Merchandising Institute, U.S. Servateria Corp., and Wesco Merchandising Co.

11. 351 F.2d at 527.

12. See generally Comment, 38 N.Y.U.L. Rev. 97 (1963).

13. Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) § 704(a), 73 Stat. 542 (1959), 29 U.S.C. § 158(b) (4) (ii) (A)-(B) (1964).

with a third party. This section had been held by the NLRB not to be violated if the employer voluntarily agreed to refrain from doing business,¹⁴ that is, if the employer subscribed to a "hot cargo" agreement. Later, the Board altered its position respecting such agreements,¹⁵ and the controversy finally reached the Supreme Court. In *Local 1976, United Bhd. of Carpenters v. NLRB (Sand Door)*,¹⁶ the Supreme Court held that, although "hot cargo" agreements are not per se illegal,¹⁷ if the neutral employers did not abide by the agreement when a particular dispute arose, then union coercion to enforce the "hot cargo" agreement amounted to an unfair labor practice. Under this decision, voluntary observance by the secondary employer of a "hot cargo" clause would not be prohibited since only active union interference would violate section 8(b)(4)(ii)(A).

Since it was possible to avoid violating section 8(b)(4)(ii)(A) and still cause cessation of business between employers,¹⁸ and because "hot cargo" agreements had a history of being abused in certain industries,¹⁹ Congress amended Section 8 of the Taft-Hartley Act which, now, with two narrow exceptions,²⁰ makes it

14. *Chauffeurs Union*, 105 N.L.R.B. 740, 743-45 (1953); *International Bhd. of Teamsters*, 87 N.L.R.B. 972, 981-83 (1949), *aff'd sub nom. Rabouin v. NLRB*, 195 F.2d 906, 912 (2d Cir. 1952).

15. In *International Bhd. of Teamsters*, 110 N.L.R.B. 1769, 1777-86 (1954), the Board reasoned that the Taft-Hartley Act prohibited all secondary boycotts in order to protect the general public, primary and secondary employers, and their employees. Consequently, it would violate the congressional purpose to allow secondary employers and labor organizations to contractually waive this protection.

16. 357 U.S. 93 (1958), 27 *Fordham L. Rev.* 446. In this decision, a carpenters' union sought to coerce construction workers to stop using non-union doors. In a companion case, truck drivers were being induced by a union not to handle goods which came from a manufacturer who was being struck. In both situations, the induced employees were under contract not to handle non-union goods. The neutral employers complained of unlawful secondary pressure in violation of § 8(b)(4)(ii)(A).

17. 357 U.S. at 107.

18. Prior to the Landrum-Griffin Amendments, § 8(b)(4)(ii)(A) forbade inducement of "concerted" refusals; hence, a union's ordering of but a single employee of the neutral employer to strike or cease handling "hot goods" with the object of forcing a secondary employer to cease doing business with the primary employer was not unlawful. *Joliet Contractors Ass'n v. NLRB*, 202 F.2d 606, 612 (7th Cir.), *cert. denied*, 346 U.S. 824 (1953). Also, definitions of "employees" excluded railroad workers, public employees, farm workers, and supervisors. See *International Bhd. of Elec. Workers*, 104 N.L.R.B. 1128 (1953) (strike to force government agency to cease dealing with another held lawful); *Comment*, 38 *N.Y.U.L. Rev.* 97, 104 (1963), listing areas of secondary activity which could have been engaged in without violating 8(b)(4)(ii)(A).

19. The Senate bill outlawed "hot cargo" agreements only in the trucking industry. See S. 1555, 86th Cong., 1st Sess. § 707(a) (1959), in 1 *NLRB, Legislature History of the Landrum-Griffin Reporting and Disclosure Act of 1959*, at 582 (1959).

20. Agreements between labor and employers in the construction industry which relate to contracting or subcontracting of work at the construction site, or alteration, repair, or painting of existing structures are not made unlawful under § 8(e). See, e.g., *Suburban Tile Center, Inc. v. Rockford Bldg. Trades Council*, 354 F.2d 1, 3 (7th Cir. 1965). However, even

an unfair labor practice on the part of both unions and employers to enter into a "hot cargo" agreement.²¹ At the same time, section 10(l) was amended so as to include a violation of section 8(e) among the enumerated unfair labor practices which are to be enjoined pending Board adjudication.²²

The present court, in its affirmance of the grant of injunctive relief over the regional director's objection,²³ placed emphasis upon two factors: first, section 10(l) "requires the Regional Director to seek injunctive relief when he has reasonable cause to believe that a Section 8(e) [unfair labor practice] . . . has occurred";²⁴ and, second, the statutory language of section 10(l) allows the district court to grant injunctive relief when "it deems just and proper."²⁵

though the "hot cargo" agreements may be lawful and an employer may voluntarily observe such agreement, attempts by a union to picket to enforce the agreement violate § 8(b) (4) (ii) (B). *NLRB v. International Union of Operating Eng'rs*, 293 F.2d 319, 322-23 (9th Cir. 1961). It would appear that the union's remedy would be in suing for judicial enforcement of the contract or suing for damages for breach of contract. See *Local 48, Sheet Metal Workers v. Hardy Corp.*, 332 F.2d 682, 687-88 (5th Cir. 1964) (rejecting contention that judicial enforcement would violate § 8(b) (4) (ii) (B)). The other exception under § 8(e) makes lawful "hot cargo" agreements between members of the garment industry. Unlike the construction industry exception, however, the garment industry "hot cargo" agreements are specifically exempt from the prohibitions of § 8(b) (4) (ii) (B). See generally *Smith, The Labor-Management Reporting and Disclosure Act of 1959*, 46 Va. L. Rev. 195, 245 (1960).

21. Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) § 704(b), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (1964). Similarly, it is an unfair labor practice for a union to force any employer to enter into an agreement prohibited by § 8(e). Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) § 704(a), 73 Stat. 542 (1959), 29 U.S.C. § 158(b) (4) (ii) (A) (1964). If the "hot cargo" agreement is not prohibited by § 8(e), then no violation of § 8(b) (4) (ii) (A) occurs. *Essex County Dist. Council of Carpenters v. NLRB*, 332 F.2d 636, 641 (3d Cir. 1964) (construction industry exception); *Construction Union v. NLRB*, 323 F.2d 422 (9th Cir. 1963) (same).

22. Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) § 704(d), 73 Stat. 544 (1959), 29 U.S.C. § 160(l) (1964), amending Labor Management Relations Act (Taft-Hartley Act) § 10(l), 61 Stat. 149 (1947).

23. The regional director protested that the giving of injunctive relief violated the Norris-La Guardia Act's virtual prohibition of granting an injunction to an individual in a labor dispute. National Labor Relations Act (Norris-La Guardia Act), §§ 1, 4, 7, 47 Stat. 70, 71 (1932), 29 U.S.C. §§ 101, 104, 107 (1964). The Taft-Hartley amendments to the NLRA did not alter the rights of private parties in so far as allowing them to bring suit for injunctions. *Bakery Sales Drivers Union v. Wagshal*, 333 U.S. 437, 442 (1948). For examples of cases where § 10(l) injunctive relief was denied at the suit of private parties, see cases cited note 46 *infra*.

24. 351 F.2d at 528. (Footnote omitted.)

25. *Id.* at 530. The requirement of a finding of "irreparable injury" to the charging party found in § 10(l) is confined to the issuance of an injunction without notice to the charged party.

Reliance was also placed by the court upon the per se injurious character of the enumerated unfair labor practices. The court stated that Congress felt certain practices were of such a harmful nature that the regional director must seek an injunction without attempting to substitute his opinion for that established by Congress. *Id.* at 531. Accord, *Schauffler v. Local 1291, Int'l Longshoremen's Ass'n*, 292 F.2d 182, 187 (3d Cir. 1961). The present court

Therefore, notwithstanding opposition of the NLRB and the respondents, the district court had the discretion to prescribe the relief which it felt the situation merited. In the court's view, the regional director amounts to an automaton as to section 10(1) petitions²⁶ after he has reasonable cause to believe the charging party's accusations.²⁷ Once the section 10(1) petition is filed, the court molds the remedies in its discretion.²⁸ The court is certainly correct in its interpretation of the obligatory nature of section 10(1) in light of legislative history²⁹ and judicial interpretation.³⁰

also noted that the requirement of demonstration of "reasonable cause to believe" that an unfair labor practice has occurred or is occurring exists with the added element of discretion to ascertain whether or not "the threatened harm or disruption can best be avoided through an injunction." 351 F.2d at 531.

26. In contrast are the roles of the regional director and the General Counsel with regard to the issuance of a complaint. After a charging party has made a formal charge and the field examiner has ascertained probable jurisdiction of the NLRB and investigated the merits of the charge, the regional director may dismiss the charge or settle the controversy before a complaint is issued. 29 C.F.R. §§ 101.6, .7 (1965). If such dismissal or settlement is made without the consent of the charging party, that party has a right to appeal to the Office of the General Counsel, 29 C.F.R. §§ 101.6, .7, 102.19 (1965), upon whom rests the responsibility for investigating and prosecuting unfair labor practices. Labor Management Relations Act (Taft-Hartley Act) § 3(d), 61 Stat. 139 (1947), as amended, 29 U.S.C. § 153(d) (1964). See *McLeod v. Local 239, Int'l Bhd. of Teamsters*, 330 F.2d 108, 110-12 (2d Cir. 1964). If he does not sustain the appeal and issue a complaint, then the charging party has no further appeal. *Linn v. United Plant Guard Workers*, 337 F.2d 68, 72 (6th Cir. 1964), *rev'd* on other grounds, 86 Sup. Ct. 657 (1966); *NLRB v. Lewis*, 310 F.2d 364, 366 (7th Cir. 1962); *Dunn v. Retail Clerks Int'l Ass'n*, 307 F.2d 285, 288 (6th Cir. 1962); *Hourihan v. NLRB*, 201 F.2d 187, 188 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 930 (1953). A possible exception may exist if the complainant could amass strong facts tending to prove that the General Counsel abused his discretion in not issuing a complaint. See *Hourihan v. NLRB*, *supra* at 188 n.4 (dictum). But see *NLRB v. Local 182, Int'l Bhd. of Teamsters*, 314 F.2d 53, 60 (2d Cir. 1963); *NLRB v. Lewis*, *supra* at 366-67. Since responsibility for prosecuting alleged unfair labor practices rests upon the General Counsel, a complaint cannot be amended against his wishes. *International Union of Elec. Workers v. NLRB*, 289 F.2d 757, 761-62 (D.C. Cir. 1960) (charging party requested inclusion of racial discrimination issue). Nor can excluded issues be raised on review of the NLRB's final adjudication. *Wellington Mill Div., West Point Mfg. Co. v. NLRB*, 330 F.2d 579, 590-91 (4th Cir.), *cert. denied*, 379 U.S. 882 (1964).

27. However, this does not mean that for every charge there is automatically a request for an injunction. For example, in 1960, out of the 1,003 charges received, only 219 petitions were issued after investigation had been made. McCulloch, *New Problems in the Administration of the Labor Management Relations Act: The Taft-Hartley Injunction*, 16 Sw. L.J. 82, 92 (1962).

28. In addition to affirming the district court's power to order relief contrary to the wishes of the regional director, the instant court noted that the very relief granted was identical to the relief originally requested by the regional director. 351 F.2d at 532. If the relief ordered had been broader than that requested by the regional director, the court probably still would have sustained the lower court in light of the emphasis placed upon discretion. *Id.* at 530.

29. 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 905 (1948) (remarks of Representative Landis) [hereinafter cited as *NLRB, Legislative History*]; 1 *id.* at 913 (remarks of Representative Lesinski); 1 *id.* at 920 (veto message of President

At the time of enactment of section 10(1), some legislators felt that discretion should remain lodged in the NLRB because its expertise could better discern solutions for labor disputes.³¹ Similarly, it was objected that legislative wisdom could not foresee circumstances "in which the Government should withhold its hand"³² and, therefore, discretion should be left with the Board. Conversely, it was argued that private parties should avoid altogether the bureaucracy and possible irreparable harm caused by delay in the investigation of "reasonable cause" by the regional director.³³ Notwithstanding such objections, Congress apparently agreed with the Senate report that practices such as secondary boycotts should be subject to federal regulation in order to protect the public, individual employees, and employers.³⁴ Since NLRB procedures are quite protracted and time consuming, particularly harmful labor practices should be enjoined pending Board adjudication.³⁵ As a result, the regional director is required to petition for an injunction in certain instances.³⁶

Little was said during the course of congressional debate about the discretion of the courts to be exercised under section 10(1).³⁷ However, in one of the major arguments against H.R. 3020,³⁸ Senator Morse stated that the courts were

Truman); 2 *id.* at 1046-47 (remarks of Senator Murray); 2 *id.* at 1109-10, 1180, 1350 (remarks of Senator Pepper); 2 *id.* at 1350, 1369 (remarks of Senator Ball); 2 *id.* at 1360 (remarks of Senator Morse).

30. *Herzog v. Parsons*, 181 F.2d 781, 784-86 (D.C. Cir.), cert. denied, 340 U.S. 810 (1950); *Schauffler v. Local 1291, Int'l Longshoremen's Ass'n*, 188 F. Supp. 203, 211 (E.D. Pa. 1960), aff'd, 292 F.2d 182 (3d Cir. 1961); *Douds v. Wine Workers*, 75 F. Supp. 447, 449 (S.D.N.Y. 1948); *Douds v. Local 294, Int'l Bhd. of Teamsters*, 75 F. Supp. 414, 417 (N.D.N.Y. 1947).

31. 2 NLRB, Legislative History 1046-47 (remarks of Senator Murray).

32. *Id.* at 1585 (remarks of Senator Murray).

33. 2 *id.* at 1350-51, 1353-55 (remarks of Senator Ball).

34. S. Rep. No. 105, 80th Cong., 1st Sess. 7-8 (1947), in 1 NLRB, Legislative History 413-14.

35. S. Rep. No. 105, 80th Cong., 1st Sess. 7-8, 27 (1947), in 1 NLRB, Legislative History 413-14, 433. Concerning delay in NLRB procedures, it has been noted that it takes "approximately 400 days to process an unfair labor practice case." McCulloch, *supra* note 27, at 83. See also 105 Cong. Rec. 6665 (1959) (remarks of Senator Goldwater).

36. A major study of the administration of the § 10(1) proviso, the Pucinski Report, has called for an amendment to allow for discretion in petitioning for injunctive relief, Subcomm. of the House Comm. on Education and Labor, 87th Cong., 1st Sess., Administration of the Labor Management Relations Act by the NLRB 3, 49 (Comm. Print 1961). Representative Griffin, a member of the Pucinski Committee, dissented on this issue. *Id.* at 83. Almost no reason was given for the Committee's recommendation except that the automatic § 10(1) proviso "has resulted in hardship in many situations." *Id.* at 49. The earlier Cox Panel recommended "that section 10(j) and (l) . . . be rewritten so as to provide such temporary relief as may be appropriate, whenever the Administrator [the Cox Panel substitute for the General Counsel] finds . . . reasonable cause to believe that an unfair labor practice is being committed and . . . causing irreparable injury . . ." S. Doc. No. 81, 86th Cong., 2d Sess. 12 (1960).

37. But cf. 2 NLRB, Legislative History 1359 (remarks of Senator Morse).

38. H.R. 3020, 80th Cong., 1st Sess. §§ 12(b),(c) (1947). See S. Rep. No. 105, 80th Cong.,

capable of maintaining the status quo pending the determination of an unfair labor practice controversy before the NLRB, but the courts should not be forced to finally decide all the injunctive petitions that would surely arise from private parties if the Board's investigatory and decision making procedure were not used.³⁹ To so greatly burden the courts might bring back "many of those unfortunate decisions which made the Norris-La Guardia Act"⁴⁰ necessary because of federal judiciary ignorance concerning labor matters.

In its reliance on discretion, the instant court is in agreement with similar cases which held that discretion to grant or to deny relief exists even after reasonable cause has been shown.⁴¹ The court's view is opposed to that of other courts which have deemed themselves mandated to grant injunctive relief once reasonable cause has been demonstrated.⁴²

The court also, in dictum, expressed sympathy for the rights of charging parties.⁴³ Although the right to intervene was not granted,⁴⁴ the court stated that it would not necessarily have been reversible error if the lower court had granted injunctive relief at the instigation of the charging parties after the regional director had commenced proceedings.⁴⁵ That is not to say that the charging parties may request a section 10(l) injunction without filing a charge with the regional director.⁴⁶ Rather, a district court is entitled to give weight to

1st Sess. 54 (1947). This major amendment called for direct appeal to the courts for those injured by secondary boycotts. See 2 NLRB, Legislative History 1347-70.

39. *Id.* at 1360-61.

40. *Id.* at 1361.

41. See, e.g., *United Bhd. of Carpenters v. Sperry*, 170 F.2d 863, 869 (10th Cir. 1948); *Vincent v. Local 106, Int'l Union of Operating Eng'rs*, 207 F. Supp. 414, 417 (N.D.N.Y. 1962); *Alpert v. Truck Drivers*, 161 F. Supp. 86, 90-91 (D. Me. 1958); *Le Baron v. Los Angeles Bldg. Trades Council*, 84 F. Supp. 629, 634 (S.D. Cal. 1949), *aff'd per curiam*, 185 F.2d 405 (9th Cir. 1950), vacated as moot *per curiam*, 342 U.S. 802 (1951). For example, the alleged unfair labor practice may have apparently ceased and, therefore, no longer threatens to alter the status quo. *Douds v. Wine Workers*, 75 F. Supp. 447 (S.D.N.Y. 1948). On the other hand, the alleged unlawful activity may have ceased but the district court still may issue the injunction in its discretion. *Samoff v. Building Trades Council*, 244 F. Supp. 332 (E.D. Pa. 1965). See generally Comment, 56 *Mich. L. Rev.* 102, 109-14 (1957).

42. *McLeod v. Local 25, Int'l Bhd. of Elec. Workers*, 236 F. Supp. 214 (E.D.N.Y. 1964), *aff'd*, 344 F.2d 634 (2d Cir. 1965). See *Le Bus v. Local 406, Int'l Union of Operating Eng'rs*, 145 F. Supp. 316, 321-22 (E.D. La. 1956); *Styles v. Local 760, Int'l Bhd. of Elec. Workers*, 80 F. Supp. 119, 122 (E.D. Tenn. 1948). The error of reasoning in these cases is that, although the regional director need only find "reasonable cause" before he is mandated to petition for § 10(l) injunctive relief, the district courts should follow a two-step process. In addition to finding "reasonable cause," the courts must be certain in their discretion that the injunction should issue in the particular controversy. See Comment, 56 *Mich. L. Rev.* 102, 106-09 (1957).

43. 351 F.2d at 529 n.2.

44. *Id.* at 528. The charging parties appeared as *amici curiae*.

45. *Id.* at 529 n.2.

46. Only the regional director or the General Counsel is allowed to petition for relief under § 10(l). *Bruno v. O'Rourke*, 222 F. Supp. 612, 614 (E.D.N.Y. 1963); see *International Longshoremen's Union v. Sunset Line & Twine Co.*, 77 F. Supp. 119, 122 (N.D. Cal. 1948); cf. *Amalgamated Ass'n of St., Elec. Ry. Employees v. Dixie Motor Coach Corp.*, 170 F.2d 902,

the requests and arguments of the charging parties.⁴⁷ The Ninth Circuit stated: "We . . . find no inconsistency in allowing the 'public' interest to be represented by the 'private' charging parties when the representative of the NLRB is either unable or unwilling to do so."⁴⁸

Although the court was not passing upon rights of charging parties before the NLRB, it gave the impression that it would align itself with the Third Circuit view of allowing the charging party a right to be heard.⁴⁹ In the instant case, the regional director and the charged parties attempted to enter into an informal settlement before the issuance of a complaint, without the consent of the charging parties. The settlement was a stipulation whereby the union and the employer would only arbitrate aspects of the collective bargaining agreement which did not violate section 8(e) and that any agreement would be submitted for the approval of the regional director. The district court refused to approve the settlement and the circuit court indicated that the district court could have issued the injunction at the instance of the charging parties after the director had commenced the proceedings.⁵⁰ The situation is analogous to a formal settlement after the issuance of a complaint. If the charging party objects to the granting of a motion by the trial examiner dismissing a complaint, he is entitled to request a hearing before the NLRB.⁵¹ If such request is denied, the Third Circuit has held that, once a complaint issues, the charging party has a right to be heard; that is, the Board may not approve the proposed settlement of a controversy over the objection of the charging party without according that party a hearing.⁵²

907 (8th Cir. 1948); *Amazon Cotton Mill Co. v. Textile Workers*, 167 F.2d 183 (4th Cir. 1948). Recently, a suit to enjoin a regional director from refusing to petition for a § 10(l) injunction was dismissed for failure to exhaust administrative remedies. *Meekins, Inc. v. Beire*, 320 F.2d 445, 449-51 (5th Cir. 1963). Compare *Monique, Inc. v. Beire*, 344 F.2d 1017 (5th Cir. 1965) (per curiam), affirming (because the issues had become moot) the denial of a charging party's motion which sought an order to direct the same regional director to move forward in requesting relief under an existing § 10(l) petition.

47. Compare *McLeod v. Business Mach. & Office Conference Bd.*, 300 F.2d 237 (2d Cir. 1962), wherein the charging party, Remington Rand, complained of handbills appealing to the public not to purchase products of Rand because strike breakers were being employed to service Rand's equipment. The charging party contended that the handbills were untruthful and, therefore, not within the publicity exception to the secondary boycott prohibition of § 8(b)(4)(ii)(B). The Second Circuit refused to consider this issue because it had not been raised by the regional director in his petition for § 10(l) relief. *Id.* at 242-43.

48. 351 F.2d at 529 n.2. The Supreme Court has favorably noted the Ninth Circuit's disapproval of "public" rights being represented solely by public officials. *International Union, UAW v. Scofield*, 382 U.S. 205, 220 (1965).

49. *Marine Eng'rs' Beneficial Ass'n v. NLRB*, 202 F.2d 546 (3d Cir.), cert. denied, 346 U.S. 819 (1953), 102 U. Pa. L. Rev. 684 (1954).

50. 351 F.2d at 529 n.2.

51. 29 C.F.R. § 102.27 (1965).

52. *Marine Eng'rs' Beneficial Ass'n v. NLRB*, 202 F.2d 546, (3d Cir.), cert. denied, 346 U.S. 819 (1953). In contrast to the Third Circuit view, the Second and District of Columbia Circuits have held that the charging party is without standing to challenge or to be heard

Concerning the issue of arbitration, the instant court affirmed an injunction which restrained the charged parties from arbitrating issues allegedly violative of section 8(e). District courts have similarly refused to order arbitration⁵³ or enforce an existing arbitration award⁵⁴ when NLRB proceedings were pending which quite possibly would have terminated the controversy. However, arbitration has been allowed when the alleged unfair labor practice violates both contractual provisions between unions and employers and the Taft-Hartley Act.⁵⁵ Board action and arbitration can go forward contemporaneously since a violation of a collective bargaining agreement is not necessarily a violation of the Taft-Hartley Act. Moreover, even if there exist both a statutory violation and a contractual breach, there is no inconsistency in allowing the public interest to be protected by the Board and private controversies being settled by arbitration.⁵⁶

However, a different result should obtain if the alleged unfair labor practice consists of a clause of the collective bargaining agreement itself. As pointed out in *McLeod v. American Fed'n of Television & Radio Artists*,⁵⁷ a "hot cargo" agreement could never be the basis of an arbitration award, if the NLRB finds that a violation of section 8(e) has occurred. Such agreements, if violative of section 8(e), are void as of the date of their inception and are completely unenforceable. Moreover, the act of arbitration itself would compound the statutory violation.⁵⁸

when a settlement is made or approved by the Board. *Local 282, Int'l Bhd. of Teamsters v. NLRB*, 339 F.2d 795 (2d Cir. 1964); *Textile Workers v. NLRB*, 294 F.2d 738 (D.C. Cir. 1961). However, if the Board refuses to allow the charging party a right to be heard, it must, in the alternative, state reasons for accepting the stipulation giving rise to the settlement and for denial of a hearing. *Ibid.*; see *Local 112, Int'l Allied Industrial Workers v. Rothman*, 209 F. Supp. 295 (D.D.C. 1962) (approval of the General Counsel rather than of the Board). For criticism of the Second and District of Columbia Circuit Courts' views, see Comment, 32 U. Chi. L. Rev. 786 (1965).

53. E.g., *Kentile, Inc. v. Local 457, United Rubber Workers*, 228 F. Supp. 541, 544 (E.D.N.Y. 1964). But cf. *International Tel. & Tel. Corp. v. Local 400, Int'l Union of Elec. Workers*, 248 F. Supp. 949 (D.N.J. 1965).

54. *Belsinger Signs, Inc. v. International Bhd. of Elec. Workers*, 231 F. Supp. 741 (D.D.C.), *aff'd per curiam*, 339 F.2d 742 (D.C. Cir. 1964).

55. *Trailways of New England, Inc. v. Amalgamated Ass'n of St., Elec. Ry. Employees*, 343 F.2d 815 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965); *United Steelworkers v. American Int'l Aluminum Corp.*, 334 F.2d 147 (5th Cir. 1964), *cert. denied*, 379 U.S. 991 (1965); *Local 702, Int'l Bhd. of Elec. Workers v. Central Ill. Pub. Serv. Co.*, 324 F.2d 920 (7th Cir. 1963).

56. See *United Steelworkers v. American Int'l Aluminum Corp.*, 334 F.2d 147, 151-53 (5th Cir. 1964), *cert. denied*, 379 U.S. 991 (1965).

57. 234 F. Supp. 832 (S.D.N.Y. 1964), *aff'd per curiam*, 351 F.2d 310 (2d Cir. 1965) (§ 10(l) injunction issued against arbitration of alleged "hot cargo" agreement). Compare *Todd Shipyards Corp. v. Industrial Union of Marine Workers*, 232 F. Supp. 589 (E.D.N.Y. 1964), *aff'd*, 344 F.2d 107 (2d Cir. 1965), in which it was held that an alleged "hot cargo" subcontracting agreement did not violate § 8(e), and the petition to stay arbitration was denied.

58. 234 F. Supp. at 840-42.

Earlier section 10(1) cases have refused to grant injunctive relief at the request of a regional director because of either a lack of reasonable cause to believe that an unfair labor practice has occurred or is occurring,⁵⁹ or because, in the exercise of discretion vested in the federal judiciary by section 10(1), relief was found not to be appropriate.⁶⁰ The instant decision goes beyond these cases in granting relief which, in the final analysis, was requested but not desired by the regional director. The court appears to be correct in its determination in light of congressional intent to cause the automatic triggering of the section 10(1) petition process whenever unfair labor practices such as "hot cargo" agreements are found to be in existence.⁶¹ The decision in the instant case does not unduly fetter the prosecution arm of the NLRB, since the initial role of determining probable jurisdiction of the Board and the probable existence of an unfair labor practice still lies within the competence of the regional director,⁶² with, of course, safeguards of review by the appeals section of the General Counsel's Office.⁶³ Furthermore, the regional director retains the sole power to petition for section 10(1) relief.⁶⁴

Libel—"New York Times" Privilege of Fair Comment—Supreme Court Fails To Draw Precise Lines for "Public Official" Rule.—Plaintiff had served for over nine years as manager of a ski recreation area owned and operated by the county. He had been hired as manager by three elected county commissioners and was directly responsible to them in his supervision of the area's finances. In 1959, a commission was established to operate the area, and plaintiff was replaced. Defendant, an unpaid daily columnist in the local paper, had campaigned for a change in the administration of the ski area. In a discussion of the difference in income under the new operators,¹ the column which served as a basis for this action posed the question: "What happened to all the money last year? and every other year?" The Supreme Court of New Hampshire granted judgment on the verdict awarding damages to the plaintiff in his libel

59. *Douds v. Local 50, Bakery Workers*, 224 F.2d 49 (2d Cir. 1955); *Penello v. Baltimore Lithographers Union*, 244 F. Supp. 279 (D. Md. 1965); *Knapp v. International Bhd. of Elec. Workers*, 237 F. Supp. 813 (W.D. Wis. 1964); *Vincent v. International Bhd. of Teamsters*, 215 F. Supp. 246 (S.D.N.Y. 1963).

60. *Penello v. Warehouses Employees Union*, 230 F. Supp. 500, 505 (D. Md. 1964) (reasonable cause found but injunction not just and proper); *Samoff v. Building Trades Council*, 236 F. Supp. 120, 122-23 (E.D. Pa. 1963) (requested relief partially denied); *Douds v. Wine Workers*, 75 F. Supp. 447, 450-52 (S.D.N.Y. 1948).

61. See notes 29 & 35 supra.

62. 29 C.F.R. §§ 101.4, .5, .8, 102.15 (1965).

63. 29 C.F.R. §§ 101.6, .7, 102.19 (1965).

64. See note 46 supra.

1. In the column, the defendant had stated that, "on any sort of comparative basis, the Area this year is doing literally hundreds of per cent Better than last year." The factual error involved in this statement was pointed out by the New Hampshire court. *Baer v. Rosenblatt*, 106 N.H. 26, —, 203 A.2d 773, 778 (1964).

action.² The Supreme Court of the United States reversed and remanded the case to the state court for further proceedings consistent with its opinion, finding that the record was insufficient to indicate whether plaintiff was a "public official" within *New York Times Co. v. Sullivan*;³ or, if he were, whether malice sufficient to negate the privilege was present.⁴ *Rosenblatt v. Baer*, 86 Sup. Ct. 669 (1966).

The law of defamation has never been free of anomalies and contradictions.⁵ However, it was cast deeper into a judicial maelstrom⁶ by the Supreme Court's decision in *New York Times Co. v. Sullivan*.⁷ Regrettably, the instant case, with all its promise,⁸ has done little to resolve this quandary.

The *Times* opinion flew in the face of the great weight of authority as to the privilege⁹ of fair comment.¹⁰ Applying the first and fourteenth amendments

2. *Baer v. Rosenblatt*, 106 N.H. 26, 203 A.2d 773 (1964).

3. 376 U.S. 254 (1964).

4. The Court remanded the case "because trial here was had before *New York Times*, [and] we have concluded that we should not foreclose [plaintiff] . . . from attempting retrial of his action." *Rosenblatt v. Baer*, 86 Sup. Ct. 669, 677 (1966).

5. See generally Courtney, Absurdities of the Law of Slander and Libel, 36 Am. L. Rev. 552 (1902); Donnelly, The Law of Defamation: Proposals for Reform, 33 Minn. L. Rev. 609 (1949).

6. See *Figrole v. Curtis Publishing Co.*, 247 F. Supp. 595, 597 (S.D.N.Y. 1965); Note, 51 Va. L. Rev. 106 (1965).

7. 376 U.S. 254 (1964), 38 So. Cal. L. Rev. 349 (1965), 16 Syracuse L. Rev. 132 (1964).

8. A typical remark in regard to the instant case was: "The law in this area is in a state of flux. Perhaps it will be clarified when the Supreme Court decides *Baer v. Rosenblatt* . . ." *Figrole v. Curtis Publishing Co.*, 247 F. Supp. 595, 597 (S.D.N.Y. 1965). This case offered the Supreme Court an opportunity to clarify its decision in the *Times* case which opened the door to much inquiry and expansion. See Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va. L. Rev. 1, 4 (1965); Kalven, the *New York Times* Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191; Comment, 60 Nw. U.L. Rev. 95 (1965).

9. Fair comment was viewed by most commentators as a qualified privilege. See, e.g., Prosser, Torts § 110, at 812-16 (3d ed. 1964) [hereinafter cited as Prosser]; Noel, Defamation of Public Officers and Candidates, 49 Colum. L. Rev. 875, 877-78 & n.17 (1949). However, there is another view of fair comment which would not regard it as a privilege, but rather as not libelous at all. See 1 Harper & James, Torts § 5.28, at 457 & n.6 (1956) [hereinafter cited as Harper & James]; Salmond, Torts § 113 (Heuston 12th ed. 1957).

10. See Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L.Q. 581, 583-87 (1964). The majority view was that "the privilege of comment and criticism on matters of public interest . . . does not extend to false statements." *Haynes v. Clinton Printing Co.*, 169 Mass. 512, 515, 48 N.E. 275, 276 (1897) (Holmes, J.). Accord, e.g., *Post Publishing Co. v. Hallam*, 59 Fed. 530, 539-42 (6th Cir. 1893); *Toomey v. Farley*, 2 N.Y.2d 71, 78, 138 N.E.2d 221, 225, 156 N.Y.S.2d 840, 845 (1956). In 1949, approximately 30 states adhered to this majority view. See Noel, *supra* note 9, at 896-97 & nn.101-06. As Professor Noel pointed out, the trend was then toward the majority view. *Id.* at 897 & nn.107-09. However, during the ensuing years, this trend had apparently reversed itself. See Berney, *supra* note 8, at 9 n.40. The majority position has been adopted by the Restatement, Torts § 606, comment b (1938). Nonetheless, a

to the law of defamation,¹¹ the Court concluded that a "public official" was precluded from recovery for libelous criticism of his "official conduct,"¹² regardless of its fallacious factual basis,¹³ absent a showing of "actual

minority of the courts had viewed fair comment as extending to misstatements of fact. 1 Harper & James § 5.27, at 449-50; Prosser § 110, at §15. The traditional statement of the liberal rule is that the privilege of fair comment "extends to misstatements of fact if made in good faith, without malice and under the honest belief that they are true." Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 616, 116 A.2d 440, 445 (1955). Accord, e.g., Maher v. Devlin, 203 Cal. 270, 263 Pac. 812 (1928); Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908). However, both views were agreed that the privilege was defeated by a showing of malice. See Prosser § 110, at §12. The pros and cons of this privilege had been the subject of much discussion prior to the Times decision. See, e.g., Boyer, Fair Comment, 15 Ohio St. L.J. 280 (1954); Riesman, Democracy and Defamation: Fair Game and Fair Comment, 42 Colum. L. Rev. 1085, 1282 (1942); Thayer, Fair Comment as a Defense, 1950 Wis. L. Rev. 288; Veeder, Freedom of Public Discussion, 23 Harv. L. Rev. 413 (1910).

In addition to these two rules, there was the "public official" rule adopted in New York and Texas. See Berney, *supra* note 8, at 13-15; Note, 51 Yale L.J. 693, 694-95 (1942). This rule maintained that statements about public officials were not libelous unless the charges were of a particularly serious nature. The New York form of this rule is that "outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel." Tanzer v. Crowley Publishing Corp., 240 App. Div. 203, 205, 268 N.Y. Supp. 620, 622 (4th Dep't 1934). In Texas, however, invocation of the rule is dependent upon whether "the charge is of such nature as to be grounds for removal from office." Rawlins v. McKee, 327 S.W.2d 633, 637 (Tex. Civ. App. 1959) (*per curiam*). The "public official" rule went further than both the "fair comment" rule and the qualified privilege inasmuch as, under it, the statements were not libelous at all. Tanzer v. Crowley Publishing Corp., 240 App. Div. 203, 268 N.Y. Supp. 620 (4th Dep't 1934); Rawlins v. McKee, 327 S.W.2d 633 (Tex. Civ. App. 1959) (*per curiam*). But see Panhandle Publishing Co. v. Fitzjarrald, 223 S.W.2d 635, 643 (Tex. Civ. App. 1949), where the court viewed defamatory criticism of public officials and candidates as libelous but privileged. Since the Times decision, at least two courts have viewed the rule there established as rendering criticism of public officials non-libelous, much the same as does the "public official" rule. See Wade v. Sterling Gazette Co., 56 Ill. App. 2d 101, 205 N.E.2d 44 (1965); Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964). This would appear to be a misapplication of the Times decision. See Note, 51 Va. L. Rev. 106, 109-10 (1965).

11. 376 U.S. at 283. The Court, in stating that "libel can claim no talismanic immunity from constitutional limitations," *id.* at 269, rejected the widely held view that the constitutional guarantees of free speech and of free press did not protect the defamer from civil liability. Konvitz, Fundamental Liberties of a Free People 138 (1957); see Berney, *supra* note 8, at 1; Pedrick, *supra* note 10, at 586-87 & n.20. But see Kalven, *supra* note 8, at 191 & n.3.

12. 376 U.S. at 268, 273, 279, 283. Courts wishing to confine the Times rule might very well construe this restriction as excluding political candidates.

13. *Id.* at 271-79. The argument that the defense of truth was still available to defendants was dismissed by the Court as an inadequate safeguard to freedom of speech and of the press and as a compulsion to "self-censorship." *Id.* at 279. The problems attendant upon the libelous publisher's attempt to prove the truthfulness of the underlying facts also motivated the Court's decision. *Ibid.* The "truth" required by the "fair comment" rule is

malice."¹⁴ To buttress its opinion, the Court, albeit unnecessarily,¹⁵ chose to assert a second ground for its decision—the plaintiff's failure to make an adequate showing that the criticism was "of and concerning" him.¹⁶ The Court held that criticism of governmental activities may not be transmuted into personal criticism of those responsible for such operations.¹⁷

This duality in the decision underlies the Court's basic reasoning in applying the guaranties of freedom of the press and of speech to the law of defamation—that "the touchstone of the First Amendment has become the abolition of seditious libel"¹⁸ Thus, the essence of these first amendment freedoms is the protection of the right of the citizen to criticize governmental operations and those having responsibility for these activities.

The plaintiff in the instant case first attempted to establish a "colloquium" by urging that the writing in question "cast suspicion indiscriminately on the small number of persons . . . whether or not it [was] found that the imputation of misconduct was specifically made of and concerning him."¹⁹ The Court rejected this proposition as being "tantamount to a demand for recovery based upon libel of government"²⁰ since those in the group to which plaintiff claimed to belong "would have been barred from suit . . . under *New York Times*."²¹

that "the facts on which it [the comment] is based are truly stated or privileged or otherwise known either because the facts are of common knowledge or because . . . they are readily accessible" 1 Harper & James § 5.28, at 459. (Footnote omitted.) One of the most formidable problems involved in the application of the former rule of fair comment was that of distinguishing between fact and comment. See Harper, *Privileged Defamation*, 22 Va. L. Rev. 642, 655-64 (1936); Noel, *supra* note 9, at 878-80; Thayer, *supra* note 10, at 291-92; Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 Vand. L. Rev. 1203 (1962).

14. 376 U.S. at 279-80. One writer has urged that "what the press offers as fact on its own responsibility (and the news services on which it relies) must be backed with reasonably diligent reportorial work or it ought to be chargeable with a reckless disregard . . ." Pedrick, *supra* note 10, at 600. (Footnote omitted.) But see *Walker v. Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231, 235 (W.D. Ky. 1965).

15. It is surprising that the Court chose to state two grounds of the reversal inasmuch as either would have sufficed. See Kalven, *supra* note 8, at 204.

16. 376 U.S. at 288.

17. *Id.* at 292.

18. Kalven, *supra* note 8, at 209. However, as Professor Kalven properly hastened to point out, "this is not the whole meaning of the Amendment. . . . But at the center there is no doubt what speech is being protected and no doubt why it is being protected." *Id.* at 208. See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 14-16 (1965).

19. 86 Sup. Ct. at 673. (Footnote omitted.)

20. *Id.* at 674.

21. *Id.* at 674. (Footnote omitted.) The Court referred to a law review note in a footnote to this statement. *Id.* at 674 n.7. Therein, it was concluded that "the tenor of Sullivan strongly suggests that the right to criticize the conduct of public officials is generally superior to the interest . . . of an incidentally defamed individual." Note, 114 U. Pa. L. Rev. 241, 247 (1965).

However, Mr. Justice Harlan, in a separate opinion,²² attempted to distinguish the situation in the instant case from that in *Times* on the basis of the specificity of the charges.²³ Mr. Justice Harlan's error consisted in his view that the Court's reasoning in Part II of its opinion violated the traditional theory of "group defamation."²⁴ In fact, it did not.²⁵ As Mr. Justice Brennan pointed out in writing for the Court,²⁶ the jury was permitted in this case to render a verdict for an individual on a finding of libelous reference in an article which did not expressly charge anyone with wrongdoing,²⁷ but merely referred impersonally to the conduct of a governmental activity.²⁸

In response to the second theory urged as a basis for recovery—"that the column was read as referring specifically to him . . ."²⁹—the Court stated that "the question is squarely presented whether the 'public official' designation under *New York Times* applies."³⁰ However, the Court failed to meet this issue "squarely," and the hope for a more definite categorization of the "public official" is nowhere fulfilled. The existence of the constitutional privilege enunciated in *Times* is dependent upon the plaintiff's being within the "public official" class. Thus, the resolution of this problem is integral to the national uniformity sought by the Court's application of constitutional standards to the law of defamation as it pertains to public officials.³¹ In rejecting local definitions of "public official," the Court stated that "states have developed definitions

22. 86 Sup. Ct. at 681 (separate opinion). Mr. Justice Harlan dissented only in regard to Part II of the opinion dealing with the question of impersonal libel, stating that "this salutary principle has been applied, I believe incorrectly, to the facts of this case." *Id.* at 682 (separate opinion).

23. *Id.* at 683 (separate opinion).

24. *Ibid.* If this view were correct, Mr. Justice Harlan's dissent from Part II would be valid inasmuch as the group involved was certainly numerically within the traditional requirements for group libel. See Prosser § 106, at 768 & nn.65-70.

25. In fact, the Court stated that, "were the statement . . . an explicit charge that the Commissioners and Baer or the entire area management were corrupt, we assume without deciding that any member of the identified group might recover." 86 Sup. Ct. at 673. (Footnote omitted.) However, as the Court noted, "such recovery would . . . be subject to a showing of actual malice if the individual were a 'public official' . . ." *Id.* at 673 n.5.

26. The decision can hardly be called a "majority opinion," however, inasmuch as there were, in addition to the opinion of the Court, one dissent, two separate opinions, two concurring opinions, and a concurrence in result.

27. *Id.* at 674. The Court stated that "here, no explicit charge of peculation was made; no assault on the previous management appears." *Ibid.* The Court's view that the column "could also be read, in context, merely to praise the present administration . . ." *id.* at 672, is questionable at best. However, granted that this view is warranted in light of the facts, all else follows.

28. *Id.* at 674.

29. *Ibid.*

30. *Id.* at 675.

31. In the *Times* case, the Court stated that "the constitutional guarantees require, we think, a federal rule . . ." 376 U.S. at 279.

of 'public official' for local administrative purposes, not the purposes of a national constitutional protection."³²

Although the *Times* case involved an elected official, the instant case has extended the category beyond elective offices "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."³³ This *descriptio personae* is little improvement over the Court's previous classification. However, the Court refused to plumb the depths of bureaucracy and rejected³⁴ Mr. Justice Douglas' suggestion that, "if free discussion of public issues is the guide, I see no way to draw lines that exclude . . . anyone on the public payroll."³⁵

As a result of the amorphous definitions supplied by the Court in both *Times* and the instant case, the dimensions of Mr. Justice Fortas' "Procrustean bed"³⁶ are far from definite.³⁷ Interpretations of the *Times* designation have run the gamut from being "limited to high-ranking Government officials"³⁸ to being extended to the so-called "public man."³⁹ This latter view would appear unwar-

32. 86 Sup. Ct. at 675. (Footnote omitted.)

33. *Id.* at 676. (Footnote omitted.) It should be noted that the Court has set down a subjective test of "apparent" governmental responsibility or control, rather than limiting the criterion to those who do "in fact" occupy positions of importance.

34. See *id.* at 676 n.13.

35. *Id.* at 677 (concurring opinion).

36. In his dissent, Mr. Justice Fortas emphasized that "our decision furnishes a necessarily Procrustean bed for state law . . ." *Id.* at 683-84.

37. Compare *Pearson v. Fairbanks Publishing Co.*, 33 U.S.L. Week 2307 (Alaska Super. Ct. Nov. 25, 1964), with *Harper v. National Review, Inc.*, 33 U.S.L. Week 2341 (N.Y. Sup. Ct. Dec. 22, 1964).

38. *Clark v. Pearson*, 248 F. Supp. 188, 193 (D.D.C. 1965). This extremely restrictive view of the *Times* category is not shared by other jurisdictions. Several courts have reached down the hierarchical ladder. See *Pape v. Time, Inc.*, 354 F.2d 558 (7th Cir. 1965), cert. denied, 34 U.S.L. Week 3355 (U.S. April 19, 1966) (police lieutenant); *Lundstrom v. Winnebago Newspapers, Inc.*, 58 Ill. App. 2d 35, 206 N.E.2d 525 (1965) (mayor); *Raffa v. Shilbury*, 24 App. Div. 2d 814, 263 N.Y.S.2d 876 (3d Dep't 1965) (memorandum decision) (town supervisor); *Schnepf v. New York Times Co.*, 22 App. Div. 2d 641, 252 N.Y.S.2d 934 (1st Dep't 1964) (memorandum decision) (assistant city corporation counsel); *Fegley v. Morthimer*, 204 Pa. Super. 54, 202 A.2d 125 (1964) (member of school board). The cases applying the *Times* rule indicate that "the title of the office and the function it normally serves are not the only criteria . . ." *Gilligan v. King*, 48 Misc. 2d 212, 215, 264 N.Y.S.2d 309, 313 (Sup. Ct. 1965). The "official conduct" requirement of the *Times* doctrine has not yet received much attention, but at least one case has held that, where a man's position is merely coincidental to the criticism and the libel is not of his official conduct, the privilege cannot be invoked. See *Tucker v. Kilgore*, 388 S.W.2d 112 (Ky. Ct. App. 1965). While the court in *Tucker* held that a police officer was a public official, it stated that *Times* "cannot sensibly be turned into an open season to shoot down the good name of any man who happens to be a public servant." *Id.* at 116.

39. *Walker v. Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231 (W.D. Ky. 1965); *Pearson v. Fairbanks Publishing Co.*, 33 U.S.L. Week 2307 (Alaska Super. Ct. Nov.

ranted inasmuch as the *Times* decision was based upon the unconstitutionality of laws punishing seditious libel.⁴⁰ Viewed in a proper perspective, the *Times* doctrine does not apply to an individual whose notoriety is prompted by other than the governmental position which he holds and the public interest which it engenders in his qualifications and performance independently of peculiar circumstances.⁴¹ Nonetheless, references in the instant case do lend themselves to the extension of the constitutional fair comment rule to other than public officials.⁴² Although such extensions are improper,⁴³ it would seem appropriate at least to extend the "public official" rule to candidates for public office inasmuch as the public interest would seem to be as strong in regard to those who seek a position of public trust as it is in their performance once they are in office.⁴⁴ The "public

25, 1964); *Pauling v. National Review, Inc.* (N.Y. Sup. Ct. April 19, 1966) in *N.Y.L.J.*, April 21, 1966, p. 17, col. 1. While admitting that it was "plowing new ground" in extending the meaning of the term "public official," the court in the *Walker* case reasoned that, "if any person seeks the 'spotlight' of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof . . ." *Walker v. Courier-Journal & Louisville Times Co.*, supra at 234. Apparently, the furthest any court has gone in applying the *Times* doctrine is to a druggist whose refusal to sell a civil rights newspaper in his store provoked the newspaper allegedly to make him appear to be a bigot in its editorials. The court's view was that "the dispute . . . is so overlaid with questions of pressing contemporary importance that I am unwilling to say [the editor] could not reasonably believe . . . that [the druggist's] actions raised an issue of public interest." *Afro-American Publishing Co., Inc. v. Jaffe*, 33 U.S.L. Week 2634-35 (D.C. Cir. May 27, 1965). These cases indicate that the prognostication by Judge Friendly has been fulfilled—"the participant in public debate on an issue of grave public concern would be next in line . . ." *Pauling v. News Syndicate Co.*, 335 F.2d 659, 671 (2d Cir. 1964), cert. denied, 379 U.S. 968 (1965). At least one writer would extend the *Times* doctrine to "matters of public concern." *Pedrick*, supra note 10, at 592-95.

40. See note 17 supra and accompanying text.

41. See 86 Sup. Ct. at 676 & n.13.

42. In choosing "a strong interest in debate on public issues," *id.* at 675, as a significant factor in its "public official" rule, the Court provided a tool for liberal courts to employ in stretching the *Times* rule. The Court also explicitly left the "public man" question open. *Id.* at 676 n.12. Thus, it has left the door open to such radical extensions of its fair comment rule as have been made in several jurisdictions. See note 39 supra.

43. See *Dempsey v. Time Inc.*, 43 Misc. 2d 754, 756-57, 252 N.Y.S.2d 186, 189 (Sup. Ct.), aff'd mem., 22 App. Div. 2d 854, 254 N.Y.S.2d 80 (1st Dep't 1964); *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 223-24, 250 N.Y.S.2d 529, 535 (Sup. Ct. 1964), aff'd, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1st Dep't 1965). This appearance of solidarity in the New York courts has been dispelled by the recent decision in *Pauling v. National Review, Inc.* (N.Y. Sup. Ct. April 19, 1966) in *N.Y.L.J.*, April 21, 1966, p. 17, col. 1.

In *Butts v. Curtis Publishing Co.*, 242 F. Supp. 390 (N.D. Ga. 1964), the court held that faculty members at state universities and agents of a "separate governmental corporation" were not public officials within *Times*. *Id.* at 394. However, the court viewed public officials as only those included in such a class under state law. See *ibid.* This method of determining the operation of the constitutional privilege has been explicitly rejected by the Supreme Court in the instant case. See note 32 supra and accompanying text.

44. "A candidate for public office would seem an inevitable candidate for extension . . ."

man" is distinguishable from a candidate for purposes of the *Times* designation inasmuch as he is not presenting his qualifications to the public for election to public office.

Despite its obvious failure to clear the muddied waters in which the "public official" problem has been submerged,⁴⁵ the Court has at least expressed itself, if only by indirection, as to the nature of the constitutional privilege established by *Times*. Despite the continuing insistence on the part of Justices Black and Douglas⁴⁶ and of several commentators,⁴⁷ the Court has refused to absolutize the first amendment freedoms of speech and of the press or, concomitantly, the fair comment privilege.⁴⁸ Judicial conjecture that the fair comment rule should be absolute⁴⁹ has been laid to rest.⁵⁰

Unfortunate though it may be, the Court has, in the final analysis, chosen an "inappropriate case"⁵¹ and has merely confused the already perplexing state of the law of defamation under *Times*.

Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964), cert. denied, 379 U.S. 968 (1965). It should be noted that, under the liberal rule approved in *Times*, the privilege extended to candidates. See Note, 37 Geo. L.J. 404, 405-08 (1949).

45. Although the Court's approach is in accord with its traditional method of approaching first amendment problems on a case-by-case basis, the process of "balancing" in each individual case fosters a systemic condition in constitutional law which lacks the coherence and uniformity desired. See Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* 97 (1966). See generally *id.* at 76-105.

46. See Douglas, *A Living Bill of Rights* 25-26 (1961); Black, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. Rev. 549 (1962).

47. See, e.g., Meiklejohn, *Political Freedom* 20 (1960); Berney, *supra* note 8, at 57; Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245. But see Hook, *The Paradoxes of Freedom* 17-46 (1962); Kalven, *supra* note 8, at 219-20; Pedrick, *supra* note 10, at 595.

48. The Court still views the privilege as defeasible on a showing of actual malice. 86 Sup. Ct. at 677.

49. See *Keogh v. Pearson*, 244 F. Supp. 482, 486 (D.D.C. 1965). The conjecture had been prompted by the Court's drawing of an analogy in *Times* between the fair comment rule and the absolute privilege accorded to public officials as defamatory statements made by them in their duties. See 376 U.S. at 282. This argument applied by the Court in *Times* has been criticized as "sauce for the goose, sauce for the gander." Pedrick, *supra* note 10, at 590. However, it has surprisingly been used by one court to restrict the *Times* rule precisely to public officials. See *Figrole v. Curtis Publishing Co.*, 247 F. Supp. 595, 597-98 (S.D.N.Y. 1965).

50. See 86 Sup. Ct. at 675 n.10. The Court stated: "[W]e reject any suggestion that our references . . . mean that we have tied the New York Times rule to the rule of official privilege." *Id.* at 675 n.10. (Italics omitted.)

51. As has been stated by one court, the issue of extension of the *Times* doctrine to candidates (and to "public men") "must await an appropriate case." *Buckley v. New York Times Co.*, 338 F.2d 470, 475 (5th Cir. 1964). This was not such a case, and one must agree with Justices Douglas and Fortas that the writ was "improvidently granted." 86 Sup. Ct. at 679, 683. It is also lamentable that, as Mr. Justice Douglas noted, "the oral argument and the briefs were not squarely addressed to the larger and profoundly important questions stirred by this litigation." *Id.* at 679 n.5.

Verdicts—Affidavits of Jurors Averring Their Own Misconduct Not Admissible as Grounds for Granting a New Trial.—Defendants were convicted of attempted burglary and possession of burglar's tools. They moved for a new trial on the basis of affidavits made by certain jurors, after the verdict had been returned, that they had made an unauthorized inspection of the premises where the alleged crime was committed. The trial court denied the motion and the court of appeals, in a four-to-three decision, affirmed, holding that an unauthorized view was not by itself a sufficient ground for setting aside a verdict, and that, in any case, jurors may not impeach their verdicts by statements of their own misconduct. *People v. De Lucia*, 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377, cert. denied, 382 U.S. 821 (1965).

The principle that a juror will not be heard to impeach his own verdict was first enunciated by Lord Mansfield when, on a motion for a new trial on the ground that the verdict had been reached by the toss of a coin, he stated that "the Court cannot receive such an affidavit from any of the jurymen themselves . . . but in every such case the Court must derive their knowledge from some other source . . ." ¹ This holding was soon adopted, almost universally, ² in both the United States ³ and England. ⁴ The rapid spread of the rule is probably best explained by a strong desire to preserve the sanctity of the jury system. ⁵

It was soon recognized by both the federal ⁶ and state ⁷ courts that the inflexibility of such a ruling would violate, in many situations, "the plainest principles of justice." ⁸ Thus, although it was, seemingly, an accepted premise that any exceptions ⁹ to the basic rule were to be applied with great caution and discretion, ¹⁰ the need for their existence was recognized. These inroads, however, have not prevented the courts from denying motions for new trials based upon jurors' affidavits which alleged that the verdict had been arrived at by averaging the

1. *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). (Footnotes omitted.)

2. *McDonald v. Pless*, 238 U.S. 264, 268 (1915); § Wigmore, *Evidence* § 2352, at 697 (McNaughton rev. ed. 1961).

3. E.g., *State v. Embrey*, 62 N.M. 107, 305 P.2d 723 (1956); *State v. Cooper*, 4 Wis. 2d 251, 89 N.W.2d 816 (1958).

4. E.g., *The King v. Thomas*, [1933] 2 K.B. 489.

5. The rule is based upon considerations of a public policy which, in an effort to preserve the sanctity of the jury trial, subordinates the possibility of injustice to an individual to the public harm which would result from disclosure of what had occurred during the deliberations. *McDonald v. Pless*, 238 U.S. 264, 267 (1915).

6. *Id.* at 268-69; *Mattox v. United States*, 146 U.S. 140, 148 (1892); *United States v. Reid*, 53 U.S. (12 How.) 360, 366 (1851).

7. *Smith v. Chestham*, 3 Cal. R. 57 (N.Y. Sup. Ct. 1805). See generally § Wigmore, *Evidence* §§ 2352-54 (McNaughton rev. ed. 1961).

8. *United States v. Reid*, 53 U.S. (12 How.) 360, 366 (1851).

9. The courts chose not to delve into the nature of such exceptions. See *McDonald v. Pless*, 238 U.S. 264, 269 (1915), stating that such exceptions are necessary "without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion . . ."

10. See *id.* at 268-69; *State v. Gardner*, 230 Ore. 569, 575, 371 P.2d 558, 561 (1962), stating that the verdict will stand "unless the evidence clearly establishes that the misconduct constitutes a serious violation of the juror's duty . . ."

measure of damages as stated by each juror,¹¹ that there had been an unauthorized view of the scene of an accident,¹² that the verdict was based upon a misunderstanding of the court's instructions,¹³ that the charge of the court was not heard,¹⁴ and that statements by jurors about extraneous matters had influenced the decision.¹⁵

Engrained within this basically inflexible framework which the original doctrine created, a certain select number of circumstances have evolved where a juror will be heard to impeach his own verdict. The most common of such circumstances are false answers given at the voir dire examination¹⁶ and a verdict arrived at by chance.¹⁷

Perhaps the most significant departure from the basic doctrine was the holding in an early Iowa case, *Wright v. Illinois & Miss. Tel. Co.*,¹⁸ where, in ruling on a juror's affidavit concerning a quotient verdict, it was held that affidavits of jurors were admissible to show misconduct on the part of a juror, providing that such matters did not inhere in the verdict itself, *i.e.*, matters concerning objective rather than subjective circumstances which may have influenced the verdict.¹⁹

11. *McDonald v. Pless*, 238 U.S. 264 (1915); *Allen v. City of Tulsa*, 345 P.2d 443 (Okla. 1959). Such a verdict is called a quotient verdict.

12. *Sopp v. Smith*, 59 Cal. 2d 12, 377 P.2d 649, 27 Cal. Rptr. 593 (1963); *Wyckoff v. Chicago City Ry.*, 234 Ill. 613, 85 N.E. 237 (1908); *Easley v. Missouri Pac. Ry.*, 113 Mo. 236, 20 S.W. 1073 (1892).

13. *Dawson v. Eldredge*, 84 Idaho 331, 372 P.2d 414 (1962), concerned a juror's affidavit that, if he had understood that awarding damages to defendant barred any recovery on the part of plaintiff, he would have voted differently; *Inhabitants of Bridgewater v. Inhabitants of Plymouth*, 97 Mass. 382 (1867); *State v. Beesskove*, 34 Mont. 41, 85 Pac. 376 (1906); see *Olson v. Williams*, 270 Wis. 57, 70 N.W.2d 10 (1955).

14. See *State v. Hollingsworth*, 263 N.C. 158, 166, 139 S.E.2d 235, 240 (1964) (dictum).

15. *State v. Joseph*, 230 Ore. 585, 371 P.2d 689 (1962); Annot., 58 A.L.R.2d 556 (1958); see *Olson v. Williams*, 270 Wis. 57, 68, 70 N.W.2d 10, 15-16 (1955). But see *State v. Gardner*, 230 Ore. 569, 371 P.2d 558 (1962). See generally 8 Wigmore, Evidence § 2349 (McNaughton rev. ed. 1961).

16. See, e.g., *People v. Leonti*, 262 N.Y. 256, 186 N.E. 693 (1933) (per curiam); *Sopp v. Smith*, 59 Cal. 2d 12, 14, 77 P.2d 649, 650, 27 Cal. Rptr. 593, 594 (1963) (dictum); Annot., 48 A.L.R.2d 978 (1956).

17. E.g., Cal. Civ. Proc. § 657(2); S.D. Code § 33.1605(2) (Supp. 1960); Wash. Rev. Code § 4.76.020(2) (1956); Utah R. Civ. P. 59(a)(2) (1953).

18. 20 Iowa 195 (1866) (negligence action in which damages were arrived at through quotient verdict).

19. *Id.* at 210. This so-called "Iowa" rule has been accepted by a small number of the states. E.g., *Marks v. State Rd. Dep't*, 69 So. 2d 771 (Fla. 1954); *Gardner v. Malone*, 60 Wash. 2d 836, 376 P.2d 651 (1962). See 8 Wigmore, Evidence § 2354 n.1 (McNaughton rev. ed. 1961). The United States Supreme Court seemed to adopt this view in *Mattox v. United States*, 146 U.S. 140, 149 (1892), where the Court quoted from *Perry v. Bailey*, 12 Kan. 539, 545 (1874), to the effect that "the affidavits [of the jurors] were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one." The Supreme Court, however, failed to follow this holding in the later case of *McDonald v. Pless*, 238 U.S. 264, 269 (1915), where it was stated

A recent case²⁰ appears to extend the scope of the "Iowa" rule to include any factor which would be likely to influence the verdict.²¹ There are still, however, very few positive guidelines for the determination of those acts of misconduct which this minority rule envisions.²²

In the earliest New York case²³ concerning the admissibility of a juror's affidavit, the court granted a new trial, refusing thereby to follow the Mansfield precedent. This holding was rather short-lived, however, and, in the next such case²⁴ to come before the court, it was held that "the affidavits of jurors are not to be received to impeach a verdict . . ." ²⁵

It was subsequently recognized that, although New York was a strict adherent to the majority rule,²⁶ it would admit an affidavit that a verdict had been erroneously reported.²⁷ As the court pointed out, however, this did not constitute an actual exception, but merely "an attempt to correct a clerical mistake."²⁸ In accordance with this announced intention of strict adherence to the rule as stated, affidavits as to the extraneous and prejudicial statements of a juror, during deliberations, were held inadmissible by the highest court of the state.²⁹

The serious problems associated with the enforcement of such a rigid holding

that the general rule is "unquestionably" that a juror may not impeach his own verdict. The Court looked with disfavor upon the reasoning of the *Mattox* case, when it stated that "subsequently . . . the juror's affidavit as to an overt act of misconduct, which was capable of being controverted by other jurors, was made admissible. . . . The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule." *Id.* at 268.

20. *Bashford v. Slater*, 250 Iowa 857, 96 N.W.2d 904 (1959).

21. "That a juror may not impeach his verdict by testifying to the reason he reached it is well settled. . . . [I]f what occurred amounted to misconduct, and if it was of such a character that it is reasonable to believe that it did influence the result of the deliberation and the final verdict, that verdict should not be allowed to stand." *Id.* at 867, 96 N.W.2d at 910. (Citations omitted.)

22. See, e.g., *Crawford v. Detering Co.*, 150 Tex. 140, 237 S.W.2d 615 (1951), where a juror's extraneous remark during deliberation did not vitiate the verdict since it did not constitute unsworn testimony of material facts which probably would have changed the result of the deliberation; *Trousdale v. Texas & N.O.R.R.*, 264 S.W.2d 489, 494-95 (Tex. Civ. App. 1953), *aff'd*, 154 Tex. 231, 276 S.W.2d 242 (1955), which listed those circumstances of misconduct which have been considered overt acts.

23. *Smith v. Cheetham*, 3 Cai. R. 57 (N.Y. Sup. Ct. 1805) (affidavit as to a quotient verdict).

24. *Dana v. Tucker*, 4 Johns. R. 487 (N.Y. Sup. Ct. 1809) (*per curiam*) (quotient verdict).

25. *Id.* at 488.

26. *Dalrymple v. Williams*, 63 N.Y. 361, 363 (1875).

27. The verdict agreed upon in *Dalrymple* was in favor of one of the two defendants and against the other, but was erroneously reported as a general verdict in favor of the plaintiff. See *Annot.*, 40 A.L.R.2d 1119 (1955) (jurors' affidavits to effect that they did not agree to purported verdict).

28. *Dalrymple v. Williams*, 63 N.Y. 361, 364 (1875).

29. *People v. Sprague*, 217 N.Y. 373, 111 N.E. 1077 (1916) (juror reporting results of unauthorized experiments to other jurors).

were strikingly brought to the cognizance of the courts when they were presented with the affidavits of two jurors in a civil case in which it was revealed that, prior to the commencement of deliberations, one of the jurors informed them that he intended to find for the defendant, irrespective of the evidence.³⁰ The court, although recognizing that the misconduct was of so grave a nature as to be sufficient grounds to render the verdict invalid, refused to grant a new trial because the only evidence of the misconduct was to be found in the affidavits of the jurors.³¹

The first significant weakening of the rule came several years later in a case concerning false statements made by a juror at the voir dire examination, in which true statements by the juror would have led to disqualification.³² The court of appeals, by a process of circular reasoning, concluded that it was not receiving evidence from a juror to impeach his verdict since he "never was eligible to become a member of the jury, that from the beginning he was disqualified on the ground of prejudice and that his vote for conviction was, therefore, a nullity."³³

A more decisive stand was taken in *Skinitzero v. City of New York*,³⁴ where jurors' affidavits stating that they had made an unauthorized view of the scene of an accident were held to be admissible as evidence in support of a motion for a new trial by the supreme court. The appellate division and the court of appeals³⁵ affirmed the trial court's ruling. This decision, if not constituting a complete repudiation of the majority rule, at least established an unauthorized view which prejudices the verdict as another exception.³⁶

30. *Payne v. Burke*, 236 App. Div. 527, 260 N.Y. Supp. 259 (4th Dep't 1932), aff'd mem., 262 N.Y. 630, 188 N.E. 96 (1933).

31. *Payne v. Burke*, supra note 30, at 529-31, 260 N.Y. Supp. at 261-63.

32. *People v. Leonti*, 262 N.Y. 256, 186 N.E. 693 (1933) (per curiam). The juror concealed a prejudice against Italians of foreign birth which, if known, would have disqualified him on grounds of prejudice. See *McHugh v. Jones*, 258 App. Div. 111, 16 N.Y.S.2d 332 (2d Dep't 1939), aff'd per curiam, 283 N.Y. 534, 29 N.E.2d 76 (1940).

33. *People v. Leonti*, supra note 32, at 258, 186 N.E. at 694. This decision was followed by federal court decision in which a juror's affidavit uncovering an agreement to abide by a majority verdict was allowed, although it was held that such misconduct was not of so grave a nature as to warrant vitiating the verdict. *Jorgensen v. York Ice Mach. Corp.*, 160 F.2d 432 (2d Cir.), cert. denied, 332 U.S. 764 (1947), 47 Colum. L. Rev. 1373.

34. 274 App. Div. 787, 79 N.Y.S.2d 741 (1st Dep't 1948) (memorandum decision).

35. 299 N.Y. 570, 86 N.E.2d 102 (1949) (memorandum decision).

36. There is little question that an unauthorized view of the premises by the jury, in either a civil or criminal proceeding, constitutes misconduct on the part of the jury or the individual jurors so acting. N.Y. Code Crim. Proc. § 465(2); *Fisch*, *New York Evidence* § 146 (1959). Similarly, it is agreed that such a view alone, although improper, is not sufficient ground for vitiating a verdict in the absence of a showing that it resulted in substantial prejudice to a party's rights. "No verdict or judgment shall be set aside or new trial granted . . . in any civil or criminal cause . . . unless . . . it shall affirmatively appear that the error complained of has affected the results of the trial." *Tenn. Code Ann.* § 27-117 (1955.) See *Ng Sing v. United States*, 8 F.2d 919, 922 (9th Cir. 1925); N.Y. Code Crim. Proc. § 465.

The recent case of *People v. Whitmore*³⁷ provided a further relaxation of the rule. The defendant, an illiterate Negro, convicted of attempted rape and assault, moved to have the verdict set aside on the grounds that the prejudice of certain members of the jury and the sensational publicity given the trial³⁸ made a fair trial impossible.³⁹ In granting the motion, the court held that proof of serious extraneous matters which were discussed by the jurors during deliberations, in addition to comments by certain members indicating racial prejudice, justified the court in vacating the verdict and that the secrecy of jury deliberations should be subordinated to the fundamental rights of the individual.⁴⁰ In *Whitmore*, although the testimony of the juror was not the sole evidence of

The particular circumstances which, when paired with an unauthorized view of the premises, would prejudice the rights of a party have remained quite vague, a diligent search having failed to uncover any case which establishes a basic guideline for the determination of what conditions must exist for an unauthorized view to be prejudicial to the rights of the defendant or litigant. The most illuminating passage on this problem is to be found in *People v. Kraus*, 147 Misc. 906, 265 N.Y. Supp. 294 (Ct. Gen. Sess. 1933), where the court, in refusing to grant a new trial in a homicide prosecution, stated that "the circumstances as to how this crime was committed are clear; and the proof in this case clearly established the defendant's guilt. At the trial, there was no dispute as to the exact location of its commission; and it is not claimed nor established by the defendant that at the time the juror viewed the locality, the street plan or the relation of one street to another at the point in question was in any way changed or that their position was not the same as on the day of the tragedy. . . . The inspection by the juror was in its nature cumulative, inasmuch as the scene of the crime was clearly shown on the photograph placed in evidence by the People and in the testimony offered by the district attorney." *Id.* at 911, 265 N.Y. Supp. at 300. (Citations omitted.) The theory of the jury trial has been said to be "that all information about the case must be furnished to the jury in open court, where the judge can separate the legal from the illegal evidence, and where the parties can explain or rebut . . ." *Aldrich v. Wetmore*, 52 Minn. 164, 172-73, 53 N.W. 1072, 1074 (1893). A careful reading of the Kraus case, in view of this theory, leads rather decidedly to the conclusion that, so long as what is viewed is limited to that which has been, or shall be, duly presented to the jurors for their consideration in arriving at a verdict, the rights of the party involved will not have been prejudiced. Conversely, it appears that any circumstances even remotely related to any material fact at issue, with which the jury comes into contact exclusively via an unauthorized view, constitute grounds for granting a new trial. See *Sindle v. 761 Ninth Ave. Corp.*, 127 N.Y.S.2d 258 (Sup. Ct.), *aff'd mem.*, 283 App. Div. 939, 130 N.Y.S.2d 880 (1st Dep't 1953) (denying motion for new trial since everything juror observed was submitted into evidence); *Annot.*, 58 A.L.R.2d 1147 (1958); *cf. People v. Gallo*, 149 N.Y. 106, 43 N.E. 529 (1896) (granting motion because of conversations with outsiders during view and altered physical scene); *People v. Klein*, 213 App. Div. 66, 209 N.Y. Supp. 594 (4th Dep't 1925) (same). See also *Brock v. Smith*, 268 S.W.2d 947 (Ky. 1954) (mere opportunity for improper influence created by an unauthorized view warranting new trial); Model Code of Evidence rule 301, *illust.* 2 (1942). See generally *Wendorf, Some Views on Jury Views*, 15 *Baylor L. Rev.* 379 (1963).

37. 45 Misc. 2d 506, 257 N.Y.S.2d 787 (Sup. Ct. 1965).

38. See, e.g., *N.Y. Times*, May 16, 1965, § 6 (Magazine), p. 30.

39. 45 Misc. 2d at 508, 257 N.Y.S.2d at 793.

40. *Id.* at 520, 257 N.Y.S.2d at 809.

prejudice which the court accepted, the court's opinion suggests a vast new field of possible exceptions to the old rule. It was reasoned that an act of misconduct which deprives or prejudices the individual's fundamental right to a fair trial would be a sufficient reason to vitiate the verdict, notwithstanding that it was evidenced by a juror's affidavit.⁴¹ Thus, we have in *Whitmore* a complete turn-about from the old rationale that the rights of the individual must be subordinated to a broad public policy which prohibits jurors' affidavits.⁴²

In affirming the convictions of the defendants in the instant case, the court of appeals chose to reverse this trend towards a more liberal interpretation of the doctrine, first laid down by Lord Mansfield, at a time when the liberal approach was gaining noticeable momentum.⁴³ It should be re-emphasized that, when the court stated that an unauthorized view of the premises is not by itself a sufficient ground for granting a motion for a new trial, it was, in effect, holding (in view of their ruling as to the admissibility of a juror's affidavit) that, even if such a view did prejudice the defendant's rights, a new trial would be granted *only* if evidence of such misconduct stemmed from a source other than the juror himself. The holding stands as a direct contradiction of the *Skinitzero* case, of which the court failed to take cognizance.

If the majority view of the present court prevails, it is indeed difficult to visualize any situation in which an exception to the old rule can logically be made, regardless of the inequities with which the defendant or litigant might conceivably be burdened.⁴⁴

41. Id. at 522-23, 257 N.Y.S.2d at 811.

42. E.g., *Payne v. Burke*, 236 App. Div. 527, 260 N.Y. Supp. 259 (4th Dep't 1932), aff'd mem., 262 N.Y. 630, 188 N.E. 96 (1933), where it was stated that it is "better that an individual should suffer, than that such a rule, which must be productive of infinite mischief, should be introduced." Id. at 529, 260 N.Y. Supp. at 262, quoting from *Tyler v. Stevens*, 4 N.H. 116, 117 (1827).

43. See, e.g., Uniform Rule of Evidence 41, Commissioner's Note; Model Code of Evidence rule 301 (1942); Harnsberger, Amend Canon 23 or Reverse Opinion 109, 51 A.B.A.J. 157, 158 (1965); Leavitt, *The Jury at Work*, 13 *Hastings L.J.* 415 (1946).

44. The court stated rather broadly that "jurors may not impeach their own duly rendered verdict by statements or testimony averring their own misconduct within or without the jury room . . ." 15 N.Y.2d at 296, 206 N.E.2d at 324-25, 258 N.Y.S.2d at 378.