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Case Notes

CASE NOTES

Administrative Law—CAB—Presidentially Approved Board Orders Held Reviewable.—The Civil Aeronautics Board approved applications by a group of small domestic airlines[1] to engage in supplemental air service[2] by operating "inclusive tours"[3] in foreign and "transatlantic" areas.[4] The orders were approved by the President, as required by section 801 of the Federal Aviation Act.[5] Petitioner then brought the instant action seeking a review of the orders in the Court of Appeals for the Second Circuit on the ground that the Board had exceeded its statutory power in granting inclusive tour authority to supplemental air carriers. The Board moved to dismiss, contending that judicial review of the challenged orders was precluded by the Federal Aviation Act itself,[6] as well as by the holding in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*[7] The court, rejecting both contentions, concluded that the Board had acted

1. Saturn Airways, Inc., Modern Air Transport, Inc., World Airways, Inc., Trans International Airlines, Inc., American Flyers Airline Corp., Johnson Flying Service, Inc., Purdue Aeronautics Corp., Capitol Airways, Inc. The American Society of Travel Agents, Inc., was also an intervenor in the subsequent litigation.

2. Supplemental air carriers are air carriers holding a certificate of public convenience and necessity authorizing them to engage in supplemental air transportation, defined as "charter trips in air transportation . . . to supplement the scheduled service" of regular route carriers. 49 U.S.C. § 1301(32), (33) (1964).

3. " 'Inclusive tour' charters are arrangements by which the air carrier charters a plane to a 'tour operator' or travel agent who sells the entire package [air transportation, as well as various land arrangements, i.e., hotel accommodations, meals, and sightseeing] to the public for a single price . . . ." Pan Am. World Airways, Inc. v. CAB, 380 F.2d 770, 771-72 n.1 (2d Cir. 1967), aff'd per curiam, 391 U.S. 461 (1968).

4. Inclusive tour authorization in domestic areas was also involved. As these domestic orders required no presidential approval, petitioners in the instant case immediately sought review of these determinations in the Court of Appeals for the District of Columbia, contending, inter alia, that the Board exceeded its statutory authority in granting inclusive tour authority to supplemental air carriers. Petitioner was unsuccessful in this proceeding. American Airlines, Inc. v. CAB, 365 F.2d 939 (D.C. Cir. 1966).

5. 49 U.S.C. § 1461 (1964), (formerly Federal Aviation Act of 1958 § 801, 49 U.S.C. § 601): "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession . . . shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof."

6. Federal Aviation Act of 1958 § 1006, 49 U.S.C. § 1486(a) (1964), provides: "Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia . . . ."

7. 333 U.S. 103 (1948).

in excess of its statutory power[8] in authorizing such inclusive tours and set aside the presidentially approved Board order. The Supreme Court granted review[9] and affirmed in a per curiam opinion by an equally divided court. *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (2d Cir. 1967), *aff'd per curiam*, 391 U.S. 461 (1968).

Whether action taken by an administrative body may later be reviewed by the courts is a question which is, at best, unsettled. Professor Kenneth Culp Davis finds "the most striking feature of the law of reviewability is the unreliability of the literal words of statutes, no matter how clear and unequivocal."[10] He notes a "judicial tendency to disregard statutory provisions cutting off judicial review,"[11] whether for Constitutional or policy reasons, and a "basic idea, which is getting increasing support, that an adjudication of private rights ought to be judicially reviewable unless special reasons exist for refusing review."[12]

Whether or not presidential action under section 801 of the Act[13] is reviewable by the courts was (supposedly) authoritatively determined in *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*[14] In *Waterman*, the Board, with express presidential approval, had issued an order denying Waterman Steamship Corp. a "certificate of convenience and necessity"[15] to engage in foreign and overseas air transportation, and granting one to Chicago & Southern Air Lines, a rival applicant. Waterman sought review of the order in the Court of Appeals for the Fifth Circuit;[16] Chicago & Southern intervened and, with the Board, moved to dismiss. They alleged that the questioned orders required, and had received, the approval of the President,[17] and that therefore they were not reviewable. The question, as eventually stated by the Supreme Court, was whether what is now section 1486 of the Federal Aviation Act[18] precludes judicial review of Board orders which concern applications by citizen carriers to engage in overseas and foreign air transportation, and which are subject to approval by the President.[19] The Court recognized that the statute expressly provided that "[a]ny order . . . except any order in respect of any foreign air carrier

8. 380 F.2d at 774.

9. 390 U.S. 919 (1968).

10. 4 K. Davis, Administrative Law Treatise § 28.01, at 2 (1958).

11. 4 Id. at 4.

12. 4 Id. § 28.05, at 20.

13. See note 5 supra.

14. 333 U.S. 103 (1948).

15. The factors which the Board considers in deciding what is in the "public convenience and necessity" include: (1) "encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States . . . ."; (2) insurance of safety and sound economic conditions in air carriers; (3) fair and non-discriminatory competitive practices; (4) adequate competition; (5) safety promotion; and (6) development of civil aeronautics. See 49 U.S.C. § 1302 (1964).

16. Under then § 1006, now, 49 U.S.C. § 1486(a) (1964); see note 6 supra.

17. Under then § 801, now, 49 U.S.C. § 1461 (1964); see note 5 supra.

18. See note 6 supra.

19. See note 5 supra.

subject to the approval of the President . . . shall be subject to review . . . ."[20] However, it decided to construe the "except" clause broadly so as to make it encompass a citizen air carrier, as well as a foreign air carrier, where the order respecting the citizen air carrier concerned foreign transportation and required presidential approval. To justify this construction, the *Waterman* Court noted that two types of authority in the CAB must be distinguished.[21] The first involves conventional powers, exercised through usual procedures, applying settled standards with only administrative finality. Typically, such functions of federal agencies manifest themselves in "[t]hose orders which do not require Presidential approval [and which] are subject to judicial review to assure application of the standards Congress has laid down."[22] On the other hand, an order requiring presidential approval is not subject to judicial review, for, "[i]nstead of [such] order serving as a final disposition . . . its force is exhausted when it serves as a recommendation to the President."[23]

The instant court apparently overruled the judicially created distinction between these two types of authority. The court, however, did not expressly do this. Rather, it attempted to distinguish *Waterman* by noting that, in *Waterman*, "[p]etitioner did not challenge the regularity of the Board's proceedings and apparently raised no issue as to the Board's statutory authority; instead it attacked the correctness of the Board's findings and the adequacy of the evidence supporting them."[24] Here, the instant court noted, the petitioner challenged the very action of the Board in the first place, before the matter reached the President, and claimed that the Board had *initially* exceeded its statutory authority.

Such a distinction is, at best, a specious one. A careful reading of *Waterman* shows that the basis of nonreviewability in that case was not that mere Board findings were being attacked, but that nonreviewable presidential discretion as to foreign affairs was involved. The instant court relied rather on the second sentence of the *Waterman* opinion, dealing with "regularity" of Board proceedings. In so doing, the court ignored the thrust of *Waterman*, which clearly precluded review because presidential discretion in foreign affairs was involved, not because of any procedural niceties.

In so distinguishing the instant case, the court further relied on a recent District of Columbia Court of Appeals decision[25] to uphold its claim that it had power to review the questioned Board decision. In that case, the court refused to review petitioners' contention that the Board decision questioned was not based on " 'understandable reasoning and clear and definite findings of fact.' "[26] It did, however, expressly undertake to review the question of whether the Board had exceeded its statutory power by authorizing supplemental carriers

20. See note 6 supra.
21. 333 U.S. at 107.
22. Id. at 109.
23. Id.
24. 380 F.2d at 775.
25. American Airlines, Inc. v. CAB, 348 F.2d 349 (D.C. Cir. 1965).
26. Id. at 353.

to undertake "split charter" operations, although such Board action had been approved by the President. The inconsistency in the instant court's reasoning becomes clear when it is seen that *Waterman* " '[c]learly . . . presupposed lawfully exercised congressional authority in the Board's action. . . .' "[27] This point *Waterman* considers important, but the *overriding* factor is that "[t]he only reason for the denial of review [in *Waterman*] was the Court's belief that the Board's action could not be reviewed without also reviewing a determination of the President, which could depend upon confidential considerations of international relations."[28]

Another court recently looked upon the *Waterman* Doctrine as omitting from the purview of judicial review cases involving "military and foreign policy considerations."[29] Other cases have cited *Waterman* in support of their refusal to review "political judgments"[30] or matters such as the "conduct of foreign relations"[31] or the "conduct of diplomatic and foreign affairs."[32] Moreover, the instant court failed to mention any of the holdings of the Supreme Court that the basis for precluding review in *Waterman* was that presidential discretion in foreign affairs was involved. Indeed, neither the instant court nor the District of Columbia court made even the slightest reference to the so-called "political question doctrine," which precludes review of presidential discretionary action in foreign affairs.

By thus failing to grasp the thrust of *Waterman*, the instant court has left a dilemma which it is apparent the Supreme Court must resolve in the near future. It is a fundamental tenet of constitutional law that "the province of the court is . . . not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in [a] court."[33] While the political question doctrine is itself far from clear,[34] in 1962, *Baker v. Carr*,[35] the single most significant case to be decided by the Supreme Court in almost a decade,[36] led to a revaluation of the doctrine, so that what emerged was a "revamped and generally restricted notion of political questions . . . ."[37] In establishing six "areas"[38] within which an issue must be

27. 380 F.2d at 775.

28. 4 K. Davis, supra note 10, § 28.19, at 105-06.

29. Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 310 (1963).

30. Gonzales v. United States, 348 U.S. 407, 412 n.4 (1955).

31. Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952).

32. Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

34. Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485, 512 (1924): "[T]he courts have not formulated any very clear conception of the doctrine of political questions, nor have they always acted upon the same general principles." Cf. McCloskey, The Supreme Court 1961 Term, 76 Harv. L. Rev. 54 (1962). See also Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338, 344 (1924): "[C]haos that exists in the cases with reference to what are and what are not political questions defies classification."

35. 369 U.S. 186 (1962).

36. McCloskey, supra note 34, at 54.

37. Friedelbaum, Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism, 29 U. Chi. L. Rev. 673 (1962).

"intimately bound"[39] to qualify as a political question, the Supreme Court has drawn guidelines for the lower federal courts to follow in determining whether or not a "political question" is involved in particular litigation. Yet the instant court has ignored these guidelines in its failure to make any mention of the political question doctrine. Thus, while it is well settled that a court will not render an advisory opinion and review Board action prior to presidential approval,[40] it will now review the action of the Board after the President has approved, according to the instant court, to determine whether or not the Board exceeded its authority in the first place. It would seem that presidential approval can not save an initially invalid Board order. Yet, the instant court's exercise in circuitous logic wholly ignores the true meaning of *Waterman*, which clearly is based on the premise that presidential discretion as to foreign affairs is unreviewable.[41] The relevant inquiry is not whether the Board has exceeded its authority, as stated by the instant court, but whether the final order is nonreviewable because it involves "presidential discretion in foreign affairs," as stated by the Supreme Court in *Waterman*.

Administrative Law—FCC—Personal Attack Rules Held Unconstitutional as Violative of First Amendment.—Petitioners, an unincorporated association of radio and television journalists and eight companies holding licenses for radio and television stations,[1] asked the Court of Appeals for the Seventh Circuit to set aside as unconstitutional[2] recently promulgated rules of the Federal Communications Commission concerning the airing of personal attacks and political editorials by licensed broadcasting companies.[3] The

38. 369 U.S. at 217.

39. Id.

40. This so-called "advisory opinion" doctrine is cited with approval in numerous cases, including Waterman, 333 U.S. at 112-13. Cf. Rochester Tel. Corp. v. United States, 307 U.S. 125, 131 (1939); United States v. Los Angeles & S.L.R.R., 273 U.S. 299 (1927); United States v. Illinois Cent. R.R., 244 U.S. 82 (1917).

41. 333 U.S. at 114.

1. These petitioners were Radio Television News Directors Association, Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc.

2. Petitioners also urged unconstitutionality of the fairness doctrine itself. Specific first amendment grounds argued were: (1) the unreasonable burdens imposed on the licensee's freedom of press; (2) vagueness of the rules in relation to the severe penalties imposed; (3) censorship by the Commission through the power of determining who had a right of reply. They also challenged the authorization of the FCC to promulgate the rules, but the court found it unnecessary to resolve this issue since it held the rules violative of the first amendment. 400 F.2d 1002, 1021 (7th Cir. 1968).

3. The full text of the Commission's rules issued on July 10, 1967, as amended August 10, 1967, reads: "Personal attacks; political editorials. (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee

court found that the rules posed a "substantial likelihood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance,"[4] and held the rules to be in conflict with the free speech and free press guarantees of the first amendment.[5] *Radio Television News Directors Association v. FCC*, 400 F.2d 1002 (7th Cir. 1968).

Broadcast licensees, which are authorized by the FCC to use but not to own prescribed transmission channels for three year periods, are required by the "fairness doctrine"[6] to devote a reasonable percentage of time to the discussion of controversial issues of public importance. Implied in this doc-

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shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities. (b) The provisions of paragraph (a) of this section shall be inapplicable (1) to attacks on foreign groups or foreign public figures; (2) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events. Note: The fairness doctrine is applicable to situations coming within (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (2), above. See section 315(a) of the [Communications] Act, [44] U.S.C. § 315(a) [1965]; Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversal Issues of Public Importance. 29 F[ed]. R[eg]. 10415. (c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate, or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 C.F.R. § 73.123 (1968).

On March 27, 1968 the Commission adopted a further revision of the personal attack rules exempting the "bona fide news interview" and the "[news] commentary or analysis contained" in bona fide newscasts, interviews, or on-the-spot coverage of a bona fide news event. 33 Fed. Reg. 5364 (1968). The fairness doctrine, however, remained applicable to all exempted categories. 400 F.2d at 1009.

4. Id. at 1012.

5. Id. at 1020. Motion pictures, newspapers and radio are included in the press whose freedom is guaranteed by the first amendment. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

6. Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The initial concept of the fairness doctrine was enunciated in the Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162, by an equal time provision for opposing political candidates. Two years later the statutory coverage was extended by the Federal Radio Commission to all discussions of important issues. Great Lakes Broadcasting Co. v. FRC, 3 F.R.C. Ann. Rep. 32 (1929), rev'd on other grounds, 37 F.2d 993 (D.C. Cir.),

trine is the requirement that the licensee afford the public an opportunity to hear different and opposing positions on the various issues.[7]

One aspect of the fairness doctrine is the personal attack principle, which becomes operative when there are "statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual is simply named or referred to."[8] The principle requires the licensee to transmit a text of the broadcast to the person or group attacked, and offer the station's facilities for an adequate response.[9] In July, 1967 the Commission promulgated specific rules embodying the personal attack principle. The instant court was faced with the constitutionality of these rules in light of the first amendment freedoms.

For guidance the court might have turned to *Red Lion Broadcasting Co. v. FCC*,[10] a case decided before the rules attacked in the instant case were formulated by the FCC. Petitioner there appealed from a Commission order directing him to comply with the fairness doctrine by sending to a person attacked on the air a tape or transcript of the broadcast, or an accurate summary if these were not available, and by offering him a free and comparable opportunity to respond.[11] The court found no infringement of first amendment rights,[12] holding that the fairness doctrine recognized and enforced the free speech right of the *subject* of the personal attack, and did not limit the petitioner's right of free speech.[13]

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petition for cert. dismissed, 281 U.S. 706 (1930). The basic provisions of the 1927 Act were included in the Communications Act of 1934, ch. 652, 48 Stat. 1064, which created the FCC. See 47 U.S.C. § 151 (1964). See also Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 917-18 (D.C. Cir.), cert. granted, 389 U.S. 968 (1967), oral argument postponed, 390 U.S. 916 (1968) for a brief history of the development of the fairness doctrine.

7. Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Implicit congressional approval was given the fairness doctrine through a 1959 amendment to 47 U.S.C. § 315.

8. 29 Fed. Reg. 10415, 10420 n.6 (1964).

9. 28 Fed. Reg. 7962 (1963). A Commission study resulted in distribution of the "Fairness Primer" in 1964, dealing with numerous examples of applications of the fairness doctrine. Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964). Broadcasters' failure to comply with the suggested procedures in the Primer was one reason advanced by the F.C.C. for the promulgation of the rules at issue. 400 F.2d at 1006.

10. 381 F.2d 908 (D.C. Cir.), cert. granted, 389 U.S. 968 (1967). In December, 1967 the Supreme Court granted certiorari. CBS, NBC, and the news directors asked the Court to hear the instant case, although it had not yet been decided by the Court of Appeals. The Justice Department, however, asked the Court to proceed to rule on the Red Lion case, leaving the instant case for a later review. In January, 1968 the Court postponed oral argument on Red Lion until the instant decision. 390 U.S. 916 (1968); Wall St. J., Sept. 12, 1968, at 15, col. 1.

11. 381 F.2d at 915.

12. Id. at 924.

13. Id. The court also dismissed petitioner's contentions that the fairness doctrine violated the fifth, ninth, and tenth amendments. Id. at 923, 926.

Since the instant court was faced with rules undoubtedly developed on the strength of *Red Lion*[14] its holding necessarily conflicted with that decision. The instant court found that the Commission failed to demonstrate the required public interest in the attainment of fairness in broadcasting, and that the Commission did not negate the possibility that it could obtain the required fairness by less restrictive and oppressive means.[15]

In basing its holding on a violation of first amendment freedoms, the instant court refused to distinguish between the broadcast press and the printed press.[16] Newspapers and periodicals, for instance, are totally free to editorialize, and of course have no obligation to afford any space, much less free space, to the attacked person or point of view.[17]

The Commission, relying on *National Broadcasting Co. v. United States*,[18] argued in the instant case that the rules imposed on broadcasters were necessary to protect the public interest, since transmission frequencies are inherently not available to all. Conceding that there are more radio and television stations in the United States than there are daily newspapers of general circulation,[19] the Commission contended that the only barriers to additional newspaper publication were those of an economic rather than a technical nature.[20] The instant court, however, found this argument unpersuasive in light of the fact that many allocated frequencies remain silent, suggesting that economic considerations are a factor, and the fact that new technology involving UHF TV frequencies may result in an increased number of broadcasting frequencies in the future.[21] The present court distinguished *National Broadcasting* on the ground that the issue before the Supreme Court in that case was the validity of the Commission's chain broadcasting regulations, not the Commission's supervisory control of licensees' programming.[22] The court's conclusion was that since no significant difference in access to the two types of press exists, rules which would clearly be unconstitutional if applied to newspapers may not be imposed upon broadcasting companies.[23]

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14. "[W]e think that the order was essentially an anticipation of an aspect of the personal attack rules which are here being challenged." 400 F.2d at 1018. For a well reasoned criticism of the Red Lion decision, see Robinson, The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulation, 52 Minn. L. Rev. 67, 149 (1967).

15. 400 F.2d at 1020.

16. Id. at 1018.

17. Many countries do provide for the "right of reply." E.g., the "Droit de Response" of the French Civil Code, where the party attacked may reply up to twice the length of the original article. W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 1033 (2d ed. 1967).

18. 319 U.S. 190 (1943).

19. 400 F.2d at 1018-19.

20. Id. at 1019-20.

21. Id. at 1019.

22. Id. at 1018 n.43; see FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 479 (1940).

23. 400 F.2d at 1018.

The Commission also relied on the concept of public ownership of the airways to distinguish the broadcast press from the printed press.[24] It maintained that licensees are granted a "privilege" and thus must act as "trustees" for the public since the airways are owned by the public.[25] The instant court discarded this contention, noting that "[a] State cannot foreclose the exercise of constitutional rights by mere labels."[26] The Commission, reasoned the court, cannot impose unreasonable burdens by arguing that the broadcast license is a "privilege."[27] Only a compelling governmental interest in the regulation of an area within the constitutional power of the government to regulate can justify limitations on first amendment freedoms.[28]

The instant court also considered the import of *New York Times v. Sullivan*[29] and its progeny,[30] which hold that unreasonable burdens cannot be imposed on the freedom of the press to disseminate views on questions of public importance. The FCC argued in a perfunctory fashion that there was no "possibility of inhibition" of licensees under the rules.[31] The court, however, found that the personal attack rules posed a great likelihood of inhibiting a broadcast licensee's dissemination of such views,[32] due to the great economic and practical burdens which attend the mandatory requirements of notification, providing a tape, and arranging for a reply to the attack.[33] The rules were also held to be unconstitutionally vague, considering the unclear meaning of terms in the rules such as "attack," "character," "like personal qualities," and identified

24. Id. at 1019. "To give this construct an independent nature and then attempt to justify the regulation itself in those terms is entirely circular. It is like saying that the Commission owns the frequencies because it has power to regulate their use, and that it has the power to regulate their use . . . because it owns them." Robinson, supra note 14, at 152. At least one member of the Supreme Court, however, seems to have accepted the public domain theory. W. Douglas, The Right of the People 76-77 (1958).

25. 400 F.2d at 1019.

26. Id. at 1020; see NAACP v. Button, 371 U.S. 415, 429 (1963).

27. 400 F.2d at 1020; see Lamont v. Postmaster General, 381 U.S. 301 (1965); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963).

28. When the views threaten to ripen clearly and imminently into conduct which the legislature has a right to prevent there may be restraint or punishment. See American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

29. 376 U.S. 254 (1964). "[T]he First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . ." 376 U.S. at 271.

30. St. Amant v. Thompson, 390 U.S. 727 (1968) (public official criticized in television speech, N.Y. Times rule applied); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (N.Y. Times requirement of actual malice applied to public figures); Time, Inc. v. Hill, 385 U.S. 374 (1967) (N.Y. Times Rule applies to private persons exposed to public view); Mills v. Alabama, 384 U.S. 214 (1966) (criminal action after publication of political editorial); Garrison v. Louisiana, 379 U.S. 64 (1964) (actual malice is the test even if the official's private, as well as public reputation is harmed).

31. 400 F.2d at 1011.

32. Id. at 1012.

33. Id.

individual." Such vagueness might result in rigorous self-censorship by the uncertain licensee, and restrict the dissemination of views on public issues. Strict compliance may well result, said the court, in a "blandness and neutrality pervading all broadcasts."[34]

Since the Supreme Court postponed oral argument in the *Red Lion* appeal until the instant case was heard in the court of appeals, the two cases will presumably be decided together.[35] Following the Commission's reasoning the Court could affirm *Red Lion,* and find the fairness doctrine to be constitutional. This broad holding could be reconciled with the instant case, which did not hold *directly* on that issue.[36] The Court could further hold that the doctrine *as applied* in *Red Lion* was constitutional. This would almost surely require a reversal of the instant case, due to the extreme similarity between the ad hoc order in *Red Lion* and the formally promulgated rules at issue in the instant case. Alternatively the Court could uphold the instant case. This would necessitate a finding that the personal attack rules as promulgated, and the order of the Commission in *Red Lion* were unconstitutional violations of the first amendment. As noted above, the fairness doctrine could theoretically survive such a finding, but the equation, under first amendment standards of protection, of the broadcast press with the printed press would place in doubt the underlying concepts which have sustained the doctrine since its initial formulation.

If the instant case is upheld the resulting setback to the FCC would be a severe blow, especially at a time when its primary enforcement tool, its discretionary power over broadcast license renewals, is "nearly as perfunctory as library-card renewals."[37] The aggrieved party would be limited, under the *New York Times* rule, to a civil suit for damages, and then only if the statement broadcast was libelous, and was broadcast with actual malice, knowledge of the falsity of the statement or a reckless disregard as to its truth.[38] If the fairness doctrine also fails to pass constitutional muster the Commission

34. Id. at 1014. 47 U.S.C. § 326 prohibits Commission censorship of program content. The sanctions for noncompliance with the fairness doctrine are limited to the possibility of non-renewal if the FCC finds that renewing the license will not serve the "public interest, convenience, and necessity." The instant rules could subject a licensee to severe and immediate penalties on the basis of a single broadcast. 47 U.S.C. §§ 502, 503 (1964). Thus the discretion that the licensee is presumably afforded under the fairness doctrine is severely restricted under the personal attack rules, since one infraction can subject the licensee to immediate penalties. Regarding the strict standards of permissible statutory vagueness, see Keyishian v. Board of Regents, 385 U.S. 589 (1967).

35. See note 10 supra.

36. 400 F.2d at 1018.

37. Time, Sept. 27, 1968, at 58. Violations of the fairness doctrine have never been considered sufficient to refuse to renew a broadcaster's license. Barron, In Defense of "Fairness": A First Amendment Rationale For Broadcasting's "Fairness" Doctrine, 37 U. Colo. L. Rev. 31, 36 (1964).

38. 376 U.S. at 280. The absolutist conception of the first amendment recognizes no constitutional libel or defamation law. Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U.L. Rev. 549, 557 (1962); see Brant, Edmond Cahn and American Constitutional History, 40 N.Y.U.L. Rev. 218, 222 (1965).

could theoretically be excluded from considering a personal attack as a factor in deciding whether the licensee was acting in the "public interest" when the next determination was made concerning the renewal of his license. Taking this factor into such a consideration could be deemed an unreasonable burden on the broadcaster's freedom of the press. However distasteful to the Commission, such a result would appear to be required if the Court agrees that first amendment protections applicable to the printed press are to be equally applied to the broadcast press.[39]

Civil Rights—Private Housing—Civil Rights Act of 1866 Held To Prohibit Discrimination in Sales and Rentals.—Petitioners were in search of a new home during the spring of 1965 when a newspaper advertisement led them to inspect certain privately owned and financed homes then under construction by the respondents. After receiving an offer to purchase a home, the respondents stated their general policy of refusing to convey houses to Negroes and rejected petitioners' application solely because of their race.[1] Petitioners thereafter sought damages and injunctive relief against respondents for their alleged violation of the Civil Rights Act of 1866, which grants "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."[2] The district court granted respondents' motion to dismiss, holding that the discrimination displayed in respondents' refusal to sell was private and did not involve such "state action" as would subject respondents to the restrictions imposed by the equal protection clause of the fourteenth amendment.[3] The decision of the district court was affirmed on appeal.[4] However, on writ of certiorari to the United States Supreme Court, it was reversed. The Court held that the Civil Rights Act of 1866 forbids any discrimination in the sale of property, even if conducted by a private individual or group without the faintest sanction of governmental authority. The Court arrived at this conclusion by interpreting the Act as a valid exercise of congressional power under the thirteenth amendment, and by avoiding any discussion of whether such discrimination violated

39. A recent decision held that a private person with no access to news media who was defamed during a radio program need not prove actual malice under the Pennsylvania libel law. Considering the extension of the actual malice requirement in Time v. Hill to relatively anonymous persons the result is doubtful. Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737 (E.D. Pa. 1968).

1. Jones v. Alfred H. Mayer Co., 225 F. Supp. 115, 118 (E.D. Mo. 1966), aff'd 379 F.2d 33 (8th Cir. 1967), rev'd, 392 U.S. 409 (1968). Jurisdiction was established under 28 U.S.C. §§ 1343(3)-(4) (1964), which allow a person to redress a deprivation of his rights guaranteed by the U.S. Constitution or Acts of Congress and recover damages or equitable relief without regard to requirements of jurisdiction or amount.

2. Civil Rights Act of 1866, ch. 31, § 1, 42 U.S.C. § 1982 (1964).

3. 255 F. Supp. at 119.

4. Jones v. Alfred H. Mayer Co., 379 F.2d 33 (8th Cir. 1967).

the fourteenth amendment's equal protection clause. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Analyzing the wording of the Act, the Court stated that "whenever property 'is placed on the market for whites only, whites have a right denied to Negroes.' "[5] The Court found that on its face the Act prohibits all racial discrimination in the sale or rental of property, whether this discrimination is exercised by private individuals or by the state itself.[6]

Reviewing the legislative history of the Act, the Court stated that the right to buy and rent realty could be and in fact was abridged, not only by state law or local ordinance, but also by "custom or prejudice." These latter words were derived from a bill which attempted to enlarge the powers of the Freedman's Bureau by giving former slaves the power to "inherit, purchase, lease, sell, hold, and convey real and personal property . . . ."[7] "[A]lthough the Senate had failed to override the President's veto . . . the bill was nonetheless significant for its recognition that the 'right to purchase' was a right that could be 'refused or denied' by 'custom or prejudice' as well as by 'State or local law.' "[8]

The Court answered respondents' claim that the 1866 Act was merely a sanction on governmental power by stating that "if § 1 [of the 1866 Act] had been intended to grant nothing more than an immunity from *governmental* interference, then much of § 2 would have made no sense at all."[9] Since section 2 exempted private individuals from any criminal liability, "there would . . . have been no private violations to exempt if the only 'right' granted by § 1 had been a right to be free of discrimination by public officials."[10] Respondents' charge that the Civil Rights Act of 1866 was merely meant to abolish the Black Codes of the South was rebutted by noting the hostility of individuals and private groups, notably the Ku Klux Klan, as evidence of congressional intent not to exempt individual conduct from the provisions of the Act.[11]

When the House approved the Civil Rights Act on March 13, 1866 after previous passage by the Senate, it was convinced that it had enacted a law "to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.[12] Although President Andrew Johnson vetoed the Act, Congress quickly garnered the necessary votes to sustain it.[13] Two years later the

5. 392 U.S. at 421.

6. Id.

7. S. Rep. No. 60, 39th Cong., 1st Sess. (1866); see Cong. Globe, 39th Cong., 1st Sess. 129, 209 (1866).

8. 392 U.S. at 423 n.30 (citation omitted); R. Harris, The Quest for Equality 36 (1960); J. tenBroek, Equal Under Law 277 (1965). See generally H. Flack, The Adoption of the Fourteenth Amendment (1908); J. tenBroek, The Anti-Slavery Origins of the Fourteenth Amendment (1951).

9. 392 U.S. at 424. § 2 is presently codified in 18 U.S.C. § 242 (1964).

10. 392 U.S. at 425-26.

11. Id. at 436.

12. Id.

13. Id. at 435.

fourteenth amendment was ratified, containing the language that "[n]o *State* shall . . . deny to any person . . . the equal protection of the laws,"[14] thus suggesting that only deprivations of civil right under *color of law* were to be redressed and not the discriminatory acts of individuals. The result of this prefatory language was the "state action" concept—that any discrimination to be corrected must be the product of, or receive the sanction of, public authority—embedded by judicial construction since the *Civil Rights Cases*.[15] The thirteenth amendment, which abolished slavery, on the other hand, made no mention of the prerequisite of action under color of law. The second section of this amendment grants Congress power to enforce the amendment by appropriate legislation which "may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not . . . ."[16] The instant majority opinion added that we cannot assume from the foregoing that any subsequent readoption of the 1866 Act, such as Congress' re-enactment of it in 1870,[17] was intended to place fourteenth amendment restrictions on it.[18]

Justice Harlan, joined by Justice White, dissented and read the 1866 Act as a statute operating only against "state-sanctioned discrimination" and argued that it granted no new or absolute right enforceable against discriminatory practices of individuals.[19] He concluded from his readings of the congressional debates that the civil rights bills were to apply only to the action of a state, and that popular thought abhorred the idea that the government could force on individual to dispose of property against his will.[20]

The focal point of the decision, that the Act was passed under Congress' authority to enforce the thirteenth amendment, is persuasive when the chronology of the Act and the relevant amendments is considered. The thirteenth amendment became law on December 18, 1865 and the Civil Rights Act was passed on April 8, 1866. These measures were followed by the ratification of the fourteenth amendment on July 28, 1868 and the signing on May 31, 1870 of the Civil Rights Act which specifically re-enacted the 1866 statute. The applicability of the 1866 Act clearly could neither depend upon the fourteenth amendment before the latter was ratified nor after, unless the scope of the Act was intentionally narrowed by its subsequent readoption in 1870.

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14. U.S. Const. amend. XIV, § 1 (emphasis added).

15. 109 U.S. 3 (1883). For recent Court interpretations of "state action" see Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

16. Civil Rights Cases, 109 U.S. 3, 23 (1883).

17. Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144.

18. 392 U.S. at 436.

19. The dissenters would have dismissed the writ of certiorari as improvidently granted. They disagreed with the necessity of deciding the case when the type of relief sought could be granted after January 1, 1969 under the Civil Rights Act of 1968, even though this relief could be of no aid to petitioners in the instant case. Id. at 450; see Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601-19, 3631 (1968).

20. 392 U.S. at 473-74; see Avins, The Civil Rights Act of 1866, the Civil Rights Bill of 1966, and the Right to Buy Property, 40 S. Cal. L. Rev. 274, 305 (1967).

Such a construction is implausible in as much as the "reconstructed" state governments had, certainly by the time of the Act's re-enactment in 1870, effectively curbed public discrimination, but had failed to restrict private discrimination.[21] This result leads to the conclusion that Congress merely intended to reaffirm its prior enactment under the thirteenth amendment, and not impose upon the Act any of the restrictions found in the fourteenth amendment.

The 1866 Act was passed to counteract the Black Codes which deprived Negroes of the right to hold property, and to counteract private racial violence which had developed in the South.[22] "The inclusion of custom . . . is most significant, and shows a determination to root out specified racial discriminations founded on custom or unofficial action as well as on law . . . ."[23] Comments of several members of the thirty-ninth Congress support this interpretation of the 1866 Act. Senator Trumbull, sponsor of the bill, declared that its purpose was to eradicate discrimination against the Negro and to enforce the thirteenth amendment by eliminating the vestiges of slavery.[24] Representative Thayer of Pennsylvania dwelled on the need to give effect to the thirteenth amendment so that all free men could enjoy the benefits of that amendment,[25] while Representative Cook of Illinois declared how a "combination of men in [a] neighborhood" could deprive the Negro of basic civil rights.[26]

This interpretation had been rejected, however, in a number of earlier cases. In *Virginia v. Rives*,[27] the Court stated that "[a]fter [the fourteenth amendment's] adoption the Civil Rights Act was re-enacted, and upon the first section of that amendment it rests."[28] In the *Civil Rights Cases*,[29] the Court mentioned the 1866 Act as intended to counteract and furnish redress merely against state laws and proceedings.[30] In declaring unconstitutional sections 1 and 2 of the Civil Rights Act of 1875,[31] which prohibited discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement," the Court stated that "[i]ndividual invasion of individual rights is not the subject-matter of the amendment."[32] The Court also placed a narrow interpretation on the power of Congress under the enabling clause of the fourteenth amendment which allows Congress to enforce the amendment by "appropriate

21. 392 U.S. at 436-37.
22. R. Harris, supra note 8, at 25.
23. Id. at 26.
24. Cong. Globe, 39th Cong., 1st Sess. 474 (1866).
25. Id. at 1151.
26. Id. at 1124. Flack concludes that "Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by States." H. Flack, supra note 8, at 277. See also R. Harris, supra note 8, at 25-26.
27. 100 U.S. 313 (1879).
28. Id. at 333.
29. 109 U.S. 3 (1883).
30. Id. at 22.
31. Act of March 1, 1875, ch. 114, 18 Stat. 335.
32. 109 U.S. at 11.

legislation" and viewed that section as empowering Congress only to remedy violations of the first four sections and not to create any new rights.[33] It did, however, recognize the distinction between the thirteenth and fourteenth amendments, the former "operating on the acts of individuals, whether sanctioned by State legislation or not,"[34] and the latter requiring enforcement of discrimination by the state. Thus, Congress could legislate to remove the "incidents of slavery," but the Court in the *Civil Rights Cases* failed to recognize violations of the 1875 Act as "badges of servitude," although a dissent was centered about this proposal. The *Civil Rights Cases* thus rejected the contention in *United States v. Harris*[35] that the 1866 Act was derived from the thirteenth amendment,[36] but a later district court followed the dissent and stated that the right to lease land was a "fundamental and inherent [right of] every freeman."[37]

The Act of 1866 was last before the Court in *Hurd v. Hodge*,[38] in which property owners in the District of Columbia sought judicial enforcement of racially restrictive covenants which were declared violative of the Act. However, this case "did not present the question whether *purely* private discrimination . . . would violate [the Act]"[39] since a lower federal court had enforced the agreement thereby providing the requisite governmental action. "It is true that a dictum in Hurd said that [the Act] was directed only toward 'governmental action,' . . . but neither *Hurd* nor any other case before or since has presented that precise issue for adjudication . . . ."[40] One of the petitioners' major arguments was that respondents' housing project exercised a governmental function:

> [T]he state plays an important part in the success of the private housing development. It does so by way of licensing and regulation of the real estate business; zoning laws and building codes; required approval of subdivision plans; schools; utilities; police and fire services; and the like. . . . [A] board of trustees usually manages the community, holds title to the streets, levies assessments . . . and provides recreational facilities. It is asserted, then, that it is a denial of equal

33. Robison, The Possibility of a Frontal Assault on the State Action Concept, with Special Reference to the Right to Purchase Real Property Guaranteed in 42 U.S.C. § 1982, 41 Notre Dame Law. 455, 456 (1966).

34. 109 U.S. at 23.

35. 106 U.S. 629 (1882).

36. Id. at 640.

37. United States v. Morris, 125 F. 322, 327 (E.D. Ark. 1903).

38. 334 U.S. 24 (1948).

39. 392 U.S. at 419.

40. Id. at 419-20 (citation omitted). Justice Stewart cited Virginia v. Rives, 100 U.S. 313 (1879), and the Civil Rights Cases, 109 U.S. 3 (1883), which contain dicta to the effect that the 1866 Act is limited to "state action." Likewise, he recognized that dictum in Hurd v. Hodge, 334 U.S. 24 (1948), had characterized Corrigan v. Buckley, 271 U.S. 323 (1926), as holding that the Act requires state action. "But no such statement appears in the Corrigan opinion, and . . . it cannot be read as authority for the proposition attributed to it in Hurd." 392 U.S. at 420 n.25. The court of appeals had found Hurd v. Hodge controlling, but noted its failure to appear in several recent Court decisions.

protection for the state to allow private persons discriminatorily to carry out what are governmental functions.[41]

Here petitioners drew analogies to *Marsh v. Alabama*,[42] where the Court vacated a trespassing conviction brought about by distribution of religious documents in a company-owned town, concluding that the company was exercising a function normally reserved to the state, thus subjecting the regulation of street use to fourteenth amendment restrictions. Support for petitioners' argument can also be found in the "white primary cases"[43] in which restrictions on voting enforced by private groups were held a delegation of a state function. However, the court of appeals in the instant case failed to sustain this theory on the grounds that "those [cases] where relief has been granted involve factual elements of far greater depth and significance . . . ."[44] Although the courts have generally avoided grafting governmental attributes on housing projects,[45] could it not "be argued that the state may not permit a private developer in effect to create racial zoning which is prohibited to the states by the fourteenth amendment[?]"[46]

It had also been argued in the lower courts that Congress had already acted through the 1866 Act to create private housing rights as part of its power to enforce the fourteenth amendment by "appropriate legislation." Although the majority opinion in *United States v. Guest*[47] reserved judgment on the point, six justices were clearly of the opinion that section 5 of the fourteenth amendment, which grants Congress the above power, sanctioned legislation over purely private conspiracies as well as "state action" that impaired fourteenth amendment rights.[48] Thus, petitioners argued that Congress had acted

41. 379 F.2d at 44.

42. 326 U.S. 501 (1946).

43. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932).

44. 379 F.2d at 45.

45. See Hackley v. Art Builders, Inc., 179 F. Supp. 851 (D. Md. 1960); Johnson v. Levitt & Sons, Inc., 131 F. Supp. 114 (E.D. Pa. 1955); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512 (1949).

46. Robison, supra note 33, at 469 n.94. An additional means of finding "state action" could be developed by reasoning that the licensing of a business by the state, for example, a real estate broker, or a realty corporation, shows sufficient state interest to justify a violation of equal protection. However, this theory has met with the favor of only one member of the Court. See Justice Douglas concurring in Reitman v. Mulkey, 387 U.S. 369, 381 (1967). See also Lombard v. Louisiana, 373 U.S. 267 (1963); Garner v. Louisiana, 368 U.S. 157 (1961).

47. 383 U.S. 745 (1966).

48. Id. at 761, 762 (Clark, J., concurring, joined by Black & Fortas, J.J.); id. at 774, 777 (Brennan, J., concurring, joined by Warren, C. J. & Douglas, J.). The Court has recently upheld the constitutionality of various congressional statutes in such a manner, e.g., the Voting Rights Act of 1965 was upheld in Katzenbach v. Morgan, 384 U.S. 641 (1966). Justices Douglas and Goldberg sustained the 1964 Civil Rights Act on this ground rather than in the commerce clause in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (concurring opinion). Note, however, that only a state can deprive

to redress the violation of the "right to purchase"; however, the court of appeals failed to find such a "right" guaranteed by that amendment.[49]

Although Congress did pass a Fair Housing Law as part of the Civil Rights Act of 1968,[50] it exempted single-family dwellings sold after December 31, 1969 without the aid of brokers or advertising,[51] as well as apartment, hotel, or motel units of four or less families where the owner actually resides.[52] Has the Court in the instant case responded to Congress' and the states' failure to enact comprehensive open housing legislation? Racial discrimination in housing has long been a major factor in condemning the American Negro, as well as other racially-oppressed minorities, to a ghetto-style existence in the slums of our nation's largest cities.[53] The failure of the Court in the present case to approach the problem on fourteenth amendment grounds, which were amply presented in the oral argument, leaves one in wonder regarding the "state action" requirement. Several authorities have already questioned the viability and desirability of such a concept.[54] Did the Court evade the fourteenth amendment to postpone the judicial burial of its "state action" requirement, or has it by silence already presided over the requirements' internment? The Court in the instant case was probably as leery of expanding the "state action" concept as it was of abandoning it; but, the Court was clearly precluded from working within its previously-defined limits. Although the present case involved only real property, the statute also levies the same requirements for the sale or rental of personalty and could easily "constitute a nationwide law against discrimination in all retail stores."[55] However, since the 1866 Act applies by its terms only to discrimination in real and personal property, it can hardly be termed a panacea for the enforcement of other civil rights involving, for example, education, employment and access to places of public

a person of equal protection of § 1 of the fourteenth amendment. Collins v. Hardyman, 341 U.S. 651 (1951).

49. 379 F.2d at 43 (1967). See Avins, supra note 20, at 305, where he argues that "right" should mean "capacity."

50. 42 U.S.C.A. §§ 3601-19, 3631 (1968). The instant case contains an excellent contrast between the statute at issue and the 1968 Civil Rights Act. 392 U.S. at 413-17.

51. 42 U.S.C.A. § 3603(b)(1) (1968).

52. 42 U.S.C.A. § 3603(b)(2) (1968).

53. Report of the Nat'l Advisory Comm'n on Civil Disorders 474 (Bantam ed. 1968). This commission cited inadequate housing as the third most significant grievance of the Negro leading to the racial disorders of 1967. Id. at 7.

54. See Horowitz, Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing, 52 Calif. L. Rev. 1 (1964); Robison, supra note 33; St. Antoine, Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination, 59 Mich. L. Rev. 993 (1961); Williams, The Twilight of State Action, 41 Texas L. Rev. 347 (1963).

55. Robison, supra note 33, at 465. The importance of such a law would be reduced by the absence of widespread discrimination in the sale of personal property, and also by the availability of an exact or suitable substitute in another establishment. Id. Note, however, the actual uniqueness that a certain parcel of realty may possess, as well as the great public need and demand for adequate housing.

accomodation. The importance of the instant decision clearly lies in the use by the Court of the thirteenth amendment to validate congressional proscriptions of the "badges and incidents of slavery," thus circumventing the "state action" requirement.

Civil Rights—Public Accommodations—Coverage Provisions of Title II, Civil Rights Act of 1964, To Be Liberally Construed.—The plaintiff, a Negro, took her two children to Fun Fair Park, a Louisiana amusement park owned and operated by the defendant. The park contains eleven mechanical rides, a small refreshment stand, and an ice skating rink. While many of the facilities were manufactured outside of Louisiana, they are permanently affixed to the defendant's property and have not at any time since their purchase by the defendant been moved in either interstate or intrastate commerce. The defendant advertised over local radio and television, soliciting the business of the general public, although, in fact, Negroes were systematically excluded. Accordingly, the plaintiff and her children were refused admission to the park solely because of their race. The plaintiff then brought an action to permanently enjoin the defendant from its discriminatory practices,[1] claiming that Fun Fair Park was an establishment covered by section 201 of the Civil Rights Act of 1964.[2] The plaintiff made no claim other than that Fun Fair Park

1. The action was brought pursuant to 42 U.S.C. §§ 2000a-2, a-3 (1964), which state: "§ 2000-2. No person shall (a) withold, deny, or attempt to withold or deny, or deprive, or attempt to deprive, any persons of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any person with the purpose of interfering with any right or privilege secured by excercising or attempting to excercise any right or privilege secured by section 2000a or 2000a-1 of this title. § 2000a-3. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security."

2. Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a (1964). Section 201 is part of the controversial Public Accomodations Subchapter, widely known as Title II. See Simpson, The Public Accomodations Section of the Civil Rights Bill, 25 Ala. Law. 305 (1964). Section 201 provides: "(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin. (b) Each of the following establishments which serve the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (1) any inn, hotel, motel, or . . . ; (2) any restaurant, cafeteria,

was a "place of exhibition or entertainment" as contemplated by section 201(b)(3) of the Act[3] and that it was, therefore, a covered establishment.[4] The trial court dismissed the suit, holding that section 201(b)(3) applied only to those establishments which furnish entertainment to a spectator audience, rather than to a participating audience.[5] The court of appeals affirmed the dismissal,[6] but on rehearing reversed, holding that amusement parks and all other establishments which provide recreational or other facilities for the amusement or enjoyment of their patrons are "places of exhibition or entertainment" as contemplated by the Act, and are, therefore, covered establishments. *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968).

By broadly construing the section in question, the instant court has radically altered the applicability of Title II to public accommodations. Prior to the decision on rehearing in the instant case, there were three classifications into which a place of public amusement might fall. First, it might have been a covered establishment by virtue of having eating facilities within the scope of section 201(b)(2). Thus, the entire establishment would be covered under the captive facilities provisions of section 201(b)(4). Within the scope of section 201(b)(2), there was no distinction made between establishments of spectator or participant amusement.[7] Second, it might have been a place of *spectator* amusement, covered as a public accomodation under section 201(b)(3).[8] Finally, it might have been an establishment of *participant* amusement without an eating

lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

3. 42 U.S.C. § 2000a(b)(3) (1964).

4. The parties so stipulated. It is at least arguable that the presence of the refreshment stand would bring Fun Fair Park within the scope of the Act through section 201(b)(2), 42 U.S.C. § 2000a(b)(2) (1964). The stipulation by the parties that no claim was being made under this section seems to have been designed to formulate a clear-cut test case as to the scope of section 201(b)(3), 42 U.S.C. § 2000a(b)(3) (1964). The United States, as amicus curiae, argued that the stipulation created a hypothetical question not based on the facts presented. The government requested a trial of facts as to whether Fun Fair Park was an establishment covered by any section of the Act, but the stipulation was upheld. It is also arguable that the sale of refreshments at the stand was merely incidental to the operation of the park, so that section 201(b)(2) would not apply. See Kyles v. Paul, 263 F. Supp. 412 (E.D. Ark. 1967).

5. Miller v. Amusement Enterprises, Inc., 259 F. Supp. 523 (E.D. La. 1966).

6. Miller v. Amusement Enterprises, Inc., 391 F.2d 86 (5th Cir. 1967). See also 43 Notre Dame Law. 440 (1968).

7. See Note, Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964, 16 W. Res. L. Rev. 660, 674 (1965). See also Bureau of National Affairs, The Civil Rights Act of 1964, at 84 (1964).

8. See Twitty v. Vogue Theatre Corp., 242 F. Supp. 281 (M.D. Fla. 1965).

facility falling within the scope of section 201(b)(2). In such case, it had been held not to be covered by the provisions of the Act.[9] These distinctions have their roots in the legislative history of the Act.

When the Civil Rights Act was first proposed to Congress by President Kennedy in 1963, it was intended to bar discrimination in all facilities and accommodations open to the general public.[10] However, the bill which was enacted into law was so worded as to be much narrower than the President's proposal. The final wording of the bill was specifically designed not to include many establishments which were within the constitutional reach of federal regulation. The Act was aimed only at those establishments which were the most troublesome and visible points of discrimination. It was the hope of the administration that, given a solution to the immediate problems, removal of discriminatory practices in less chronic fields could be voluntarily induced.[11] It was this philosophy of regulating only the most chronic areas of discrimination, combined with the frequency of the "lunch counter sit-ins," which led directly to passage of section 201(b)(2), the section which, when paired with section 201(b)(4), may make the greatest contribution to the scope of Title II.[12] This method of combating discrimination, rather than the use of a more sweeping policy, was strongly criticized.[13] The administration, nevertheless, seemed willing to forego any universal attempt to end discrimination in order to secure immediate passage of a bill designed to curb only the most pressing problems.

A striking example of how the scope of the bill was narrowed between the time it was proposed by President Kennedy and when it was passed by Congress may be found in the history of the section in question in the instant case. As originally proposed, what was to become section 201(b)(3) included "any

9. See Kyles v. Paul, 263 F. Supp. 412 (E.D. Ark. 1967); Miller v. Amusement Enterprises, Inc., 259 F. Supp. 523 (E.D. La. 1966), aff'd, 391 F.2d 86 (5th Cir. 1967), rev'd on rehearing, 394 F.2d 342 (5th Cir. 1968); Robertson v. Johnston, 249 F. Supp. 618 (E.D. La. 1966), rev'd on other grounds, 376 F.2d 43 (5th Cir. 1967).

10. Hearings on Civil Rights Before a Subcomm. of the House Comm. on the Judiciary, 88th Cong., 1st Sess., ser. 4, pt. 2 at 1446-49 (1963). [hereinafter cited as House Hearings].

11. See the statement of Attorney General Kennedy concerning the scope of Title II, where he said: "The coverage was quite explicit. We did not include other establishments which were constitutionally within the reach of Federal regulations, either because they do not customarily discriminate or because we felt that—given solution to the major problems—removal of these discriminatory practices could be voluntarily induced. We were reluctant to extend Federal power beyond those areas where it was clearly needed to meet existing problems." House Hearings, ser. 4, pt. 4, at 2655-56.

12. The sit-ins were referred to as "organized direct action" by President Kennedy in his message proposing the Act. House Hearings, ser. 4, pt. 2, at 1447. See also Bureau of National Affairs, The Civil Rights Act of 1964, at 84 (1964).

13. Congressman Kastenmeir filed a separate opinion recommending passage of the bill, but commenting that it covered only some public accommodations, "as if racial equality were somehow divisible." H.R. Rep. No. 914, 88th Cong., 1st Sess. 40 (1963). The administration was aware of this criticism. See Attorney General Kennedy's defense of Title II, supra note 11, at 2654-56.

motion picture house, theater, sports arena, stadium, exhibition hall, or other public place of amusement or entertainment . . . ."[14] In light of the knowledge that the Act was designed to be extremely specific, pinpointing those establishments which were to be covered in such a way as to allow one to easily determine whether or not they were covered,[15] the explicit inclusion of concert halls and the substitution of "places of exhibition" for "public places of amusement" in the final bill must be treated as a significant and intentional change.[16]

While there was no specific mention during debate of whether or not amusement parks were intended to be covered,[17] there was wide agreement that there were many facilities which were not within the limited scope of the Act. It was recognized that service establishments and retail stores would not be covered by the Act unless a restaurant falling within the scope of section 201(b)(2) was located on the premises.[18] Bowling alleys, dance studios, and billiard parlors were specifically mentioned as excluded from coverage under the Act.[19] Congressman Kastenmeir stated that places of recreation and participation sports were not to be covered.[20] The reason for these exceptions was not a constitutional limitation. Congress could have extended the scope of the Act far beyond what was ultimately passed. It, however, chose not to do so.[21] Among the types of establishments Congress specifically chose to exclude were many offering participatory amusement.[22] On the other hand, establishments of spectator amusement such as theaters, concert halls, sports arenas, and stadiums were specifically included in the text of the Act.

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14. House Hearings, ser. 4, pt. 1, at 652.

15. See 110 Cong. Rec. 7404-05 (1964) (remarks of Senator Magnuson).

16. Senator Humphrey noted that the reach of the reported version of Title II was much narrower than when it was introduced. He also noted that it was considerably narrower than the version reported by the Commerce Committee. 110 Cong. Rec. 6533 (1964). Representative Lindsay called the bill "pinpointed," "nonsweeping," and "precise." 110 Cong. Rec. 1924 (1964).

17. Senator Humphrey did mention the disturbances at Gwynn Oak Amusement Park in Baltimore on the Senate floor as an example of the need for Congressional action on the Civil Rights Bill proposed by President Kennedy. However, at the time the bill had not yet been reported out of committee and the scope of its coverage had not yet undergone the narrowing process already discussed. See 109 Cong. Rec. 12,275-77 (1963).

18. See Congressman Kastenmeir's criticism of the bill, supra note 13, where he noted the inconsistency of having one establishment covered by the Act while an identical establishment on the same block would not be covered because it did not provide eating facilities.

19. Senator Magnuson, the floor manager for the bill in the Senate, discussed the coverage of the bill in detail. During this discussion, he noted many specific establishments which were exempt. The three noted areas were among them. In response to a question as to whether a barber shop would be covered, he noted that barber shops were not specifically listed in section 201(b) and would, therefore, not normally be covered. This would support the theory that the section was to be strictly construed. 110 Cong. Rec. 7406-07 (1964).

20. See note 13 supra.

21. See Attorney General Kennedy's statements before the House Judiciary Comm., supra note 11, at 2655.

22. For example, bowling alleys, dance studios, and billiard parlors, all establishments

The distinction between participatory and spectator amusement was drawn more sharply by Attorney General Kennedy in his testimony on the bill before the Senate Commerce Committee. At that time, he stated that the language which was to become section 201(b)(3) would not apply to the participants in an athletic contest. Thus, while the owner of an athletic team would not be able to discriminatorily refuse spectators admission to see an athletic contest, he would be allowed to refuse Negro participants.[23] Therefore, it seems clear that Title II was narrowly written and intended to be strictly construed. It was a remedial statute, designed to include only those establishments where immediate regulation was required. Establishments not falling within the categories included in the statute were not intended to be covered.

The judicial interpretation of the scope of the Act began shortly after its passage. There was no appreciable controversy as to the scope of section 201(b)(2). The section was held to apply to most eating establishments.[24] The applicability of the captive facilities section was also easily determined. The presence of eating facilities within the scope of section 201(b)(2) required that the entire establishment be covered, even if it would not have been except for the eating facilities.[25] However, dispute did arise as to the extent of such general phrases as "other places of exhibition or entertainment," as found in section 201(b)(3). Prior to the decision in the instant case, this phrase had never been applied to an establishment of participatory amusement. Rather, it had been unanimously agreed that it applied only to establishments of spectator amusement.[26]

In December, 1964 the Supreme Court in *Hamm v. City of Rock Hill*[27] ruled that the Civil Rights Act created certain "federal statutory rights," one of which is a guaranteed freedom from prosecution for any person peacefully seeking service in a covered establishment.[28] Therefore, the Supreme Court ruled that the Act abated the petitioners' convictions for trespassing at lunch counters, even though the incident occurred prior to the passage of the Act. Yet, in June, 1965, the Supreme Court denied *certiorari* sought by a group of petitioners convicted of disorderly conduct in a segregated amusement park.[29] Following the reasoning in the *Hamm* case, if the amusement park had been a

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offering participant amusement, were specifically mentioned as being beyond the scope of the Act many times. Supra note 19.

23. Hearings on S. 1732 before the Senate Comm. on Commerce, 88th Cong., 1st Sess., ser. 26, pt. 1, at 107 (1963).

24. See Gregory v. Myers, 376 F.2d 509 (5th Cir. 1967). But cf. Cuevas v. Sdrales, 344 F.2d 1019 (10th Cir. 1965), cert. denied, 382 U.S. 1014 (1966), the first in a line of cases holding that beer is not food as contemplated by the Act.

25. See Adams v. Fazzio Real Estate Co., 268 F. Supp. 630 (E.D. La. 1967), where a bowling alley was held to be a covered establishment solely because of its eating facilities.

26. See cases cited note 9 supra.

27. 379 U.S. 306 (1964).

28. Id. at 311.

29. Drews v. Maryland, 381 U.S. 421 (1965). Ironically, the disturbance was the same one referred to by Senator Humphrey in his attempt to show the need for the passage of the bill. 109 Cong. Rec. 12,275 (1963).

covered establishment, the convictions should have been abated, even though the arrests came before passage of the Act. Mr. Chief Justice Warren, dissenting in an opinion in which Mr. Justice Douglas joined, assumed that the majority did not believe the amusement park to be covered and could not agree with this position. The Chief Justice felt certain that the park was a covered establishment, as it had a restaurant. The possibility that the park might fall within the scope of section 201(b)(3) was mentioned only parenthetically.[30] It seems clear, therefore, that the Supreme Court was then unwilling to take the position that an amusement park was covered by the section in question.

The tone of further judicial interpretation of the Act was set by *Robertson v. Johnston*.[31] That case held that the interpretive principle of *ejusdem generis*[32] must be applied to determine the scope of the section. This was done to prevent the general words from extending the scope of the statute into a field not intended to be included.[33] Specifically, *Robertson* held that "place of entertainment" was not to be construed to mean "place of enjoyment," but rather to mean "place where performances are presented."[34] This interpretation of the section has been followed with respect to a recreational park offering facilities for swimming and boating,[35] a bowling alley,[36] and a golf course,[37] although the golf course was held to be a covered establishment because it customarily presented two golf exhibitions per year to spectator audiences. The court ruled that once the golf course was covered as a result of the spectator entertainment, it must also adhere to the requirements of the Act with respect to playing golfers. It was, therefore, agreed that only those establishments offering spectator entertainment were to be included as public accommodations within the scope of the Act.

On rehearing, the Fifth Circuit Court of Appeals held Fun Fair Park to be

30. 381 U.S. at 428 n.10.

31. 249 F. Supp. 618 (E.D. La. 1966), rev'd on other grounds, 376 F.2d 43 (5th Cir. 1967). The court of appeals reversed the dismissal of the complaint and remanded the case for an evidentiary hearing to determine if a cause of action might have been stated under section 2000a-1.

32. Literally: "Of the same kind, class, or nature." Black's Law Dictionary 608 (4th ed. 1951). The court in Robertson stated, "when specific terms in a statute are followed by general terms, the general terms are limited to matters similar to, or of the same general kind or class as, those specified." 249 F. Supp. at 622.

33. 249 F. Supp. at 622.

34. Id. This ruling was analogous to the application of ejusdem generis to section 201(b)(2) in Cuevas v. Sdrales, 344 F.2d 1019 (10th Cir. 1965). The rule of Cuevas that a bar is not an "other facility principally engaged in selling food for consumption on the premises" has not been questioned. It is possible that the holding may be doubtful if the doctrine of the instant case is followed.

35. Kyles v. Paul, 263 F. Supp. 412 (E.D. Ark. 1967).

36. Adams v. Fazzio Real Estate Co., 268 F. Supp. 630 (E.D. La. 1967). In Adams, the bowling alley was found to be a covered establishment by virtue of its snack bar, although the court noted that bowling alleys are not covered unless they operate eating facilities falling within the scope of section 201(b)(2).

37. Evans v. Laurel Links, Inc., 261 F. Supp. 474 (E.D. Va. 1966).

an establishment covered by section 201. In doing so, the court reasoned in two distinct modes. First, Fun Fair Park was ruled to be an establishment offering spectator entertainment. The court took judicial notice of the fact that human beings are "people watchers" and enjoy this pastime. Therefore, the court found that the people on the rides were providing entertainment to the spectators. Thus, Fun Fair Park was found to be "covered by the literal terms of the Act."[38] This reasoning also disposed of the problem of whether Fun Fair met the requisite affect on commerce.[39] Since the participants on the rides were the actual entertainment under this construction, the court merely hypothesized that there must have been interstate travelers at the park, although there was no proof on this point.

Had the decision stopped at this point, the case would have been very narrowly read, so as to apply only to amusement parks. Even then, it would probably have been distinguished, as the reasoning behind the ruling was obviously tenuous. However, the decision went much further. It found that the legislative history as to amusement parks was inconclusive. This being so, the general purpose of the Act was held to be controlling. The court found that Title II was designed to be broadly read and liberally construed.[40] Therefore, Fun Fair Park was held to be a covered establishment. In so ruling, the court abolished the prior distinction between establishments of spectator and participant amusement.[41] Most important, the court substituted a new definition of "place of entertainment" for the old one, which it found invalid. The court held that Fun Fair Park was a "place of enjoyment, fun and recreation, and thus was a place of entertainment."[42] The implication that all "places of

38. 394 F. Supp. at 348. It is interesting to note that the court, in its own words, finds the amusement park to be covered "by the literal terms of the Act" only by this obviously unrealistic reasoning. There seems to be an implication that the court feels it is also holding Fun Fair Park to be a covered establishment by something other than the literal terms of the Act.

39. The Act was passed under a combination of the Equal Protection Clause and the Interstate Commerce Clause. Since Congress may not regulate purely local matters, there must be some burden on commerce, however slight, to allow the use of the commerce power. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

40. In order to support this contention, the court cited the Hamm case, supra note 27, and Alabama v. United States, 304 F.2d 583 (5th Cir.), aff'd mem., 371 U.S. 37 (1962). The former case dealt with sit-ins at lunch counters which were obviously covered by section 201(b)(2). While the case was a landmark in the field of civil rights in that the Supreme Court held that petitioners' trespass convictions were abated, it does not stand for the proposition that Title II is to be broadly read. The lunch counters in question were indisputably covered establishments. The latter case dealt with the voters' rights provisions of the Civil Rights Act of 1957; yet it is cited as authority that the public accommodations provisions of the Civil Rights Act of 1964 were meant to be broadly construed. The court has obviously relied on extremely weak authority to support the major premise of its decision.

41. "We find that the phrase 'place of entertainment' as used in § 201(b)(3) includes both establishments which present shows, performances and exhibitions to a passive audience and those establishments which provide recreational or other activities for the amusement or enjoyment of its patrons." 394 F.2d at 350.

42. The court includes many synonyms for the word entertainment such as "fun,"

enjoyment, fun and recreation" will now be covered establishments is extremely far-reaching.[43]

In ruling that Title II is to be broadly read and liberally construed, the court quoted President Kennedy's language in proposing the bill, but ignored the ultimate appraisal of the Kennedy administration itself. The decision was made in 1963 to seek a remedial bill capable of immediate passage, and hope for voluntary compliance with the spirit of non-discrimination in non-covered areas.[44] However, the decision in the instant case has taken a legislatively narrow statute and judicially transformed it into an extremely broad one. While an end to all discrimination is desirable, it must be questioned whether the decision in the instant case will aid this goal or further impede it. How much more difficult will it be to achieve passage of further civil rights legislation after Congress sees the distortion of what is has already passed?

The more immediate consequences of the decision are also yet to be determined. While it would be fairly easy to accept the case as standing for the proposition that amusement parks are within the scope of section 201(b)(3), the sweeping language of the decision does not lend itself to such a narrow construction. The case now stands for the proposition that all establishments where customers experience any kind of "enjoyment, fun and recreation" are covered regardless of the type of enjoyment. Since practically every activity provides some degree of "enjoyment, fun and recreation," this definition is all-inclusive. To apply it is to extend the scope of section 201 into every area of public life. It seems more likely that a situation will arise which is clearly beyond the intended scope of the Act and that the sweeping language of the instant decision will be limited. Until then, the case stands as an extremely broad interpretation of Title II.

Contracts—Third Party Beneficiary—Extrinsic Evidence Held Inadmissible to Prove Intent to Benefit in an Integrated Contract.—Hylte Bruks, a Swedish corporation, contracted with the defendant, a New Jersey corporation, for the installation of a "recovery system" at a new pulp mill in Ivetofta, Sweden. The contract contained a non-assignment and integration clause and a provision that New York law controlled contractual interpretation. No third party was mentioned in the contract.[1] Several months after the contract was executed,

"recreation," and "diversion" taken from a dictionary and a thesaurus. It has apparently chosen "enjoyment, fun and recreation" from this list to comprise the new legal definition of "entertainment." 394 F.2d at 351 & n.14.

43. Since an application for certiorari was not filed, the case will not have the immediate nationwide impact of a Supreme Court decision.

44. See note 11 supra.

1. There was, however, evidence offered to show that defendant at time of contracting knew Hylte Bruks intended to form plaintiff corporation to run the new mill, and plaintiff argued that this same evidence showed the intention of the parties to benefit the plaintiff. The evidence was a separate licensing agreement to use certain patents, also entered into between the same parties at the same time which, unlike the contract in question, expressly

Hylte Bruks formed the plaintiff corporation, a subsidiary, for the purpose of owning and operating the new mill. The defendant corporation sent notice to Hylte Bruks of the transfer restrictions in the contract. Hylte Bruks replied that the contract was not being transferred to plaintiff but that plaintiff would act as its representative during installation of the system. Three years after the contract was signed, the system was fully delivered and installed; subsequently, it proved faulty. Plaintiff brought suit on the contract for loss of profits caused by defective operation and breach of warranty, contending that it was a third party beneficiary of the contract. On a motion to stay the action at law pending arbitration,[2] the district court held as a matter of law, that the plaintiff was not a third party beneficiary of the contract between Hylte Bruks and the defendant, and, therefore, could neither maintain the suit on the contract nor participate in the arbitration. On appeal, the Court of Appeals for the Second Circuit affirmed. *Hylte Bruks Aktiebolag v. Babcock & Wilcox Company*, 399 F.2d 289 (2d Cir. 1968).

New York has long recognized the right of a third person to sue as beneficiary on a contract clearly made for his benefit.[3] To determine whether a third party beneficiary of a contract has a legally enforceable right,[4] the test generally applied is whether the contract was intended to benefit the third party.[5] There are, however, various views of the test of intent to benefit, differing on whose intention should dominate and where the evidence admissible to prove such intention is to be found. One view is that both parties to the contract (promisor and promisee) must intend to benefit the third person and such intention must be found in the contract.[6] A second view sees the promisor's intent to benefit as a necessary element to be determined in light of the circumstances

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permitted an assignment of the agreement "to any successor in interest to the operations of the Licensee" at the new mill. Other evidence included an affidavit by the Managing Director of Hylte Bruks who conducted pre-contract negotiations with defendant to the effect that he told personnel of defendant that Hylte Bruks was not purchasing the recovery system for its own account. It was also alleged that defendant knew and acknowledged this fact through subsequent communications, and an admission in its own reply brief in the district court.

2. Previous to this law suit, plaintiff and Hylte Bruks filed a formal demand for arbitration pursuant to a contractual provision. The defendant moved, and it was ordered, that the arbitration be stayed for so long as plaintiff was a party. When plaintiff alone brought the instant suit, defendant moved that the suit be stayed pending arbitration. The district court found that the parties were in a "procedural cul-de-sac" and decided to determine the rights and relationships of the parties on the motion, when it recognized that the parties were essentially arguing the standing of plaintiff to either sue or participate in arbitration.

3. Lawrence v. Fox, 20 N.Y. 268 (1859), is the leading American case in this field. "In the field of the law of contract there has been a gradual widening of the doctrine of Lawrence v. Fox . . . until today the beneficiary of a promise, clearly designated as such, is seldom left without a remedy . . . ." Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931) (Cardozo, C.J.) (citation omitted).

4. A third party beneficiary entitled to sue on the promise is sometimes referred to as a "protected" beneficiary. 6 Encyclopedia N.Y. Law, Contracts § 1005 (1963).

5. 17A C.J.S. Contracts § 519(3) (1963).

6. Spires v. Hanover Fire Ins. Co., 364 Pa. 52, 70 A.2d 828 (1950).

of the execution of the contract.[7] The third and most popular view is that intent to benefit be determined by the purpose of the promisee in the light of all the circumstances surrounding the execution of the contract,[8] provided, however, the promisor had reason to know the promisee's intention.[9] The promisee's intention is important, under the third view, because it is presumed that the promisee is bargaining for the performance which he intends to give to another, whereas the promisor is only bargaining for the consideration.[10]

The New York cases are not clear on the question of whose intention should control. It has been said[11] that the promisee's intent to benefit is more important in a donee beneficiary case than in a creditor beneficiary case.[12] By definition, a third person is a donee beneficiary where the promisee expressed the intention to confer the promised prformance on the beneficiary as a gift.[13] However, where the promisee, or other person, is obligated to the third person and the performance of the contract discharges this obligation, the third person is referred to as a creditor beneficiary.[14] In the creditor beneficiary case, the required intent to benefit may easily be inferred from the obligation between the debtor promisee and the creditor third person beneficiary. In all cases, however, each party to the contract, consciously or subconsciously, has its own reasons for contracting which are not necessarily the same as those of the other party.[15] In some of the cases, therefore, the courts have tried to distinguish between the subtleties of motive, intention and purpose of the parties to the contract.[16]

In the instant case plaintiff argued that the required intent to benefit, while usually found in the contract, may also be found in facts and circumstances surrounding its execution.[17] An examination of the New York cases reveals that

7. Byram Lumber & Supply Co. v. Page, 109 Conn. 256, 146 A. 293 (1929).

8. Hamill v. Maryland Cas. Co., 209 F.2d 338 (10th Cir. 1954); McCulloch v. Canadian Pac. Ry., 53 F. Supp. 534 (D. Minn. 1943) (interpreting New York law); Restatement of Contracts § 133(1) (1932).

9. The standard of reasonable expectation, a test adopted by Corbin to determine the existence of a contract, holds that a contract exists in accord with the understanding, if any, that the promisee reasonably could rely upon, providing the promisor had reason to foresee this understanding. 3 A. Corbin, Contracts § 538 (1960).

10. See 6 Encyclopedia N.Y. Law, Contracts § 1005 (1963).

11. Cappello v. Union Carbide & Carbon Corp., 200 Misc. 924, 929, 103 N.Y.S.2d 157, 162 (Sup. Ct. 1951).

12. Restatement (Second) of Contracts, Introductory Note at 3 (Tent. Draft No. 3, 1967) avoids the terms "donee" and "creditor" beneficiary. Instead, the terms "intended" beneficiary and "incidental" beneficiary are used to distinguish those beneficiaries who have enforceable rights from those who do not.

13. Restatement of Contracts § 133(1)(a) (1932); 4 A. Corbin, Contracts § 774 (1951).

14. 4 A. Corbin, supra note 13.

15. Corbin, Third Parties as Beneficiaries of Contractors' Surety Bond, 38 Yale L.J. 1, 5 (1928).

16. Daniel-Morris Co. v. Glens Falls Indem. Co., 308 N.Y. 464, 126 N.E.2d 750 (1955); Cappello v. Union Carbide & Carbon Corp., 200 Misc. 924, 103 N.Y.S.2d 157 (Sup. Ct. 1951); Ronzo v. Vernon Indus. Inc., 195 Misc. 873, 91 N.Y.S.2d 52 (Sup. Ct. 1949); see Annot., 81 A.L.R. 1271, 1287 (1932).

17. More properly referred to as "transactional context." See Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833, 836 (1964).

the question of where the intent to benefit is to be found has seldom been raised as an issue and never authoritatively settled. It is generally said that the intent to benefit must be found in the contract.[18] However, a minority of cases have examined the contract and its surrounding circumstances[19] or have used extrinsic evidence to find the intent to benefit.[20] These cases, however, are distinguishable from the instant case in that the third person was named in the contract, expressly or impliedly, or was a creditor beneficiary, or was the beneficiary of a surety bond or life insurance contract.[21] The court, therefore, rejected plaintiff's argument and held that under New York law the intent to benefit must be found in the contract.[22]

The unmentioned donee beneficiary, who must necessarily use evidence extrinsic to the contract to prove his status,[23] has been successful in New York in two situations. In *United States v. Carpenter*[24] an unmentioned third party successfully fought a motion for summary judgment by introducing extrinsic evidence which the court said could be used by the jury in the determination of the question of intent to benefit. Here, a contract between a Canadian exporter and an eastern Long Island potato dealer had a limitation that the "potatoes will be used for seed purposes only." The potato dealer sold them for table use and the United States brought suit. The government introduced evidence of an agreement between Canada and the United States in which the Canadian government agreed to limit all the potato exports for seed purposes so that the

18. In Beveridge v. New York Elevated R.R., 112 N.Y. 1, 26, 19 N.E. 489, 496 (1889), the case most often cited for that view, the court said "Such . . . [an] intent [to benefit a third party] must be clearly found in the agreement." See also Resinol v. Valentine Dolls, Inc., 14 App. Div. 2d 853 (1st Dep't 1961); 10 N.Y. Jur. Contracts § 239 (Supp. 1968).

19. Recently, in Cutler v. Hartford Life Ins. Co., 22 N.Y.2d 245, 239 N.E.2d 361, 292 N.Y.S.2d 430 (1968) the court adopted the surrounding circumstances test and cited to Restatement (Second) of Contracts § 133, comments a, c, and d (Tent. Draft No. 3, 1967). See also Restatement of Contracts § 133(1)(a) (1932) where circumstances is expressly stated as a proper place to find intention in donee beneficiary cases. Daniel-Morris Co. v. Glens Falls Indem. Co., 308 N.Y. 464, 126 N.E.2d 750 (1955); Fosmire v. National Sur. Co., 229 N.Y. 44, 127 N.E. 472 (1920). In Leary v. N.Y. Cent. R.R., 212 App. Div. 689, 209 N.Y.S. 575 (3d Dep't 1925), Weinbaum v. Algonquin Gas Transmission Co., 20 Misc. 2d 276, 132 N.Y.S.2d 128 (Sup. Ct. 1954), aff'd, 285 App. Div. 818, 136 N.Y.S.2d 423 (2d Dep't 1955), and Cappello v. Union Carbide & Carbon Corp., 200 Misc. 924, 103 N.Y.S.2d 157 (Sup. Ct. 1951), the courts noted the "circumstances" but looked essentially to the contracts.

20. In McClare v. Massachusetts Bonding & Ins. Co., 266 N.Y. 371, 195 N.E. 15 (1935), the court relied upon the fact that two bonds were made, one for the state and one for the materialmen; therefore in this situation the materialmen must have been intended beneficiaries. Id. at 377, 195 N.E. at 16.

21. Surety bonds and life insurance contracts are examples of special types of contracts that necessarily involve third persons and as a result are often considered as a separate category of third party beneficiary contracts. See, e.g., 4 A. Corbin, Contracts §§ 798, 807 (1951). Whether a third party beneficiary of a surety bond should be considered a donee or creditor beneficiary see id. at § 802.

22. 399 F.2d at 292.

23. See Ridder v. Blethen, 24 Wash. 2d 552, 166 P.2d 834 (1946) where the court said that unless expressly made for third persons, resort, of necessity, must be had to extrinsic evidence for intent to benefit.

24. 113 F. Supp. 327 (E.D.N.Y. 1949).

United States could continue its "price-support" policies on table potatoes.[25] The court said that this agreement between governments was relevant to the factual question of whether the United States was an intended beneficiary and allowed its use.[26]

Another example of an unmentioned third party's recovery has occurred in cases involving a "compulsory" contract, *i.e.*, damage suits brought against defendants under a statutory duty to perform a contract.[27] In one such case,[28] the defendant construction company relied upon a filed map drawn up by plaintiff surveyors pursuant to a contract with previous owners of the property. The contract made no mention of the defendant. The map proved defective and the defendant asked the plaintiffs to draw another map. When plaintiffs sued to recover payment for the second performance, defendant counterclaimed for damages suffered in reliance upon the defective original map. The court reasoned that since the map had to be filed, the legislative intention was to benefit subsequent purchasers.[29] Yet even where recording statutes are permissive, subsequent purchasers have been permitted to enforce restrictive covenants on land on the theory that they were intended third party beneficiaries of such statutes.[30]

It is an accepted rule that an "incidental" beneficiary, unnamed in the contract, has no standing to sue. An incidental beneficiary is defined negatively as one to whom the parties to the contract assumed no duty and conferred no right although such a person may indirectly benefit from the performance of the contract.[31] The mere fact that a third party is not specifically named in a contract but is only a member of a mentioned class of beneficiaries does not

25. Id. at 329.

26. In a closely related price-support case, United States v. Capps Inc., 204 F.2d 655 (4th Cir. 1953) the court of appeals refused to hold that the United States was a third party beneficiary without passing on the validity of the executive agreement which they said was invalid as beyond the powers of the President and "in contravention of the policy declared by Congress." Id. at 660. On appeal, the Supreme Court affirmed on other grounds, 348 U.S. 296 (1955). The Court, refusing to pass upon the validity of the executive agreement, gave judgment to defendant by reinstating the district court's opinion that there was insufficient evidence of a breach of contract.

27. Putman, Contracts, 1959 Survey of New York Law, 34 N.Y.U.L. Rev. 1435, 1441 (1960).

28. Vandewater v. Sacks Builders, Inc., 20 Misc. 2d 677, 186 N.Y.S.2d 103 (Sup. Ct. 1959).

29. Id. at 679, 186 N.Y.S.2d at 106; accord, Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928) (the court read an absolute liability statute into a contract to rent a car); Fosmire v. National Sur. Co., 229 N.Y. 44, 127 N.E. 472 (1920) (legislative intention behind a statute requiring a state highway contractor to furnish a bond was deemed that of protection for the State and did not make the contractor's laborers donee beneficiaries). Putman, supra note 27 at 1441, said that in the area of compulsory contracts "[t]he contractual duties are determined by law without regard to the manifestations of the contracting parties."

30. See, e.g., Zamiarski v. Kozial, 18 App. Div. 2d 297, 239 N.Y.S.2d 221 (4th Dep't 1963) (court refused summary judgment holding that the intent to benefit is a question of fact).

31. Restatement (Second) of Contracts § 133, comment e at 16 (Tent. Draft No. 3, 1967). See also Restatement of Contracts § 133(1)(c) (1932).

relegate him to the category of incidental beneficiary.[32] In *Isbrandtsen Co. v Longshoremen's Local 1291*,[33] the plaintiff, although affected by a work stoppage contrary to a union's contract with a marine trade association, was two or three steps removed from the parties to the contract and was not mentioned in the contract. The court decided plaintiff was merely an incidental beneficiary and refused to hear evidence of the "supposed intention of the parties with regard to persons to benefit by this contract."[34] In a footnote the court intimated that in most cases the unmentioned third person is apt to be deemed an incidental beneficiary.[35] Although the court in the instant case did not characterize plaintiff as an incidental beneficiary it did note that the performance of the contract did not run to the plaintiff.[36] It also relied upon the presence of the non-assignment clause in the contract as strong evidence that the parties intended no third party beneficiary.[37] The court contrasted the presence of an assignment clause in the licensing agreement[38] executed between the same parties and the presence of a non-assignment clause in the contract in question and noted that "[w]hile this may indicate that B & W [defendants] may have known that Hylte Bruks contemplated a 'successor in interest' to those operations, it also illustrates B & W's desire to maintain a contractual relationship with the successor on the equipment contract."[39] The law of assignment and third party beneficiaries is at times closely related[40] and assignees are some-

32. It is well established in New York that it is immaterial whether the beneficiary is identified in the contract or in existence at the time the contract is executed. See Coster v. Mayor of Albany, 43 N.Y. 399 (1871); Vandewater v. Sacks Builders, Inc., 20 Misc. 2d 677, 186 N.Y.S.2d 103 (Sup. Ct. 1959); In re Jacoby, 33 N.Y.S.2d 621 (Sup. Ct. 1942); S. & B. Rubber and Chem. Corp. v. Stein, 7 N.Y.S.2d 553 (Sup. Ct. 1938), aff'd, 255 App. Div. 1012, 8 N.Y.S.2d 695 (2d Dep't 1938). However, he must be identified and in existence when the performance is due. 4 A. Corbin, Contracts § 781 (1951).

33. 204 F.2d 495 (3d Cir. 1953).

34. Id. at 498 (footnote omitted).

35. "While a third party need not be ascertained when the contract is made in order to acquire a right thereunder . . . we have found no case in which a right has been held to exist in a third party whose existence is not referred to in the contract." Id. n.13.

36. 399 F.2d at 292-93.

37. The plaintiff's argument to circumvent the presence of a non-assignment clause in the contract, apparently barring all third party claims, was that the non-assignment clause only limited Hylte Bruks from assigning its obligations to pay for the installation of the recovery system. Brief for Appellant at 26, Hylte Bruks Aktiebolag v. Babcock & Wilcox Co., 399 F.2d 289 (2d Cir. 1968). The defendant contended that such an interpretation would be to impute to the parties the intention of installing a meaningless clause in the contract, since basic contract law is that the assignor remains liable after the assignment. Brief for Appellee at 31, Hylte Bruks Aktiebolag v. Babcock & Wilcox Co., 399 F.2d 289 (2d Cir. 1968). It is interesting to note that under the Uniform Commercial Code defendant's argument would fail. N.Y. U.C.C. § 2-210(3) says that "[u]nless the circumstances indicate the contrary a prohibition of assignment of 'the contract' is to be construed as barring only the delegation to the assignee of the assignor's performance."

38. See licensing agreement, supra note 1.

39. 399 F.2d 290 n.2.

40. Aside from the fact that the two areas of contract law involve rights of third persons under a contract, similarity also exists in the rules of defenses and vested rights of the

times referred to as third party beneficiaries of assignment agreements.[41] Inasmuch as an expressed third party beneficiary contract has been described as a "short cut" through the law of assignment,[42] the presence of a non-assignment clause in a contract constitutes a serious obstacle to a third party beneficiary's claim, especially an unmentioned third party.

The parol evidence rule may also preclude proof of plaintiff's claim that he is a third party beneficiary of a contract.[43] The court in the instant case said that the contract in question "expressly precluded the use of extrinsic evidence by a third party who would seek to maintain a legally enforceable right in the contract."[44] Because the integration clause in question[45] said nothing about the rights of third persons but only the "subject matter" of the proposal, it was apparent that the court used the integration clause as a springboard for the operation of the parol evidence rule and interpreted it as an exclusion clause. It is settled in New York that third persons may be denied beneficiary status through a provision in the contract.[46] Such a provision, however, is usually explicit in its exclusion of third parties.[47] Even where a contract contains an exclusion clause it may not necessarily be given effect if it otherwise conflicts with an implied intent to benefit third persons.[48]

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third persons. The general principle that the promisor may assert against the beneficiary any defense which he has against the promisee is similar to the rule that the obligor may assert against the assignee any defense which he could assert against the assignor. Also, similar to the two areas is the general rule that once the rights of the beneficiary or assignee vest they cannot be divested through subsequent agreements of the parties to the contract.

41. See, e.g., Spector v. National Pictures Corp., 201 Cal. App. 2d 217, 20 Cal. Rptr. 307 (1962).

42. Whittier, Contract Beneficiaries, 32 Yale L.J. 790, 795 (1923).

43. The substance of the parol evidence rule is that "[w]hen two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." 3 A. Corbin, Contracts § 573 (1960).

44. 399 F.2d at 293.

45. The contract provided: "There are no understandings between the parties hereto as to the subject matter of this Proposal other than as herein set forth and in the accompanying letters specifically referred to herein. All previous communications between the parties hereto, either verbal or written, are hereby abrogated and withdrawn and the acceptance of this Proposal with the specifications, drawings and accompanying letters specifically referred to herein constitutes the whole agreement between the parties hereto. The Contract cannot be assigned nor may the general conditions be modified except by a duly approved agreement signed by both parties." Id. at 292 n.5.

46. Costa v. Callanan Rd. Improvement Co., 15 Misc. 2d 198, 184 N.Y.S.2d 534 (Ulster County Ct. 1958).

47. E.g., Larkin v. Metropolitan Life Ins. Co., 28 Misc. 2d 451, 212 N.Y.S.2d 538 (Sup. Ct. 1961); Majestic Mfg. Corp. v. Riso & Sons Bldg. Co., 27 N.Y.S.2d 845 (Sup. Ct. 1940), aff'd, 261 App. Div. 1099, 27 N.Y.S.2d 846 (2d Dep't 1941).

48. In Spector v. National Pictures Corp., 201 Cal. App. 2d 217, 20 Cal. Rptr. 307 (1962), a clause expressly stated that nothing in the agreement would be construed to give any other person a legal or equitable right under the agreement. It was held that this was in direct conflict with another paragraph in the contract in which the defendant promised to assume the promisee's obligations to the plaintiff. The trial court apparently

The use of extrinsic evidence is permissible to prove the meaning intended in an ambiguous contract or to show that no contract was intended by the parties.[49] The use of extrinsic evidence by a third party, however, to show that he was the intended beneficiary of a contract raises the somewhat unsettled question of whether the parol evidence rule is binding on third persons.[50] It would appear that where the intention of the parties is clearly expressed through the language of the contract, extrinsic evidence cannot be introduced to vary that language either to prove or disprove an intent to benefit a third person. In *Klefstad v. American Central Insurance Co.*[51] the plaintiff sought to recover on an insurance contract taken out by the owner from defendant company during the construction of a building by plaintiff. The evidence he submitted was not the insurance contracts but depositions of himself, the owner and the insurance broker. The lower court granted summary judgment for defendant and the court of appeals affirmed. The plaintiff argued that the defendant knew that plaintiff would be constructing the building and that to take out such insurance before commencing construction was the custom of the trade. The court held that where there is no contractual ambiguity, no extrinsic evidence can be admitted and that in such clear situations the intention of the parties is to be found in the language of the contract.[52] Where there is contractual ambiguity or a special type of contract,[53] the court will admit extrinsic evidence in an attempt to clarify the ambiguity by interpreting the

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also accepted the plaintiff's contention that such an exclusion clause was intended to exclude every other party except the plaintiff.

49. 9 N.Y. Jur. Contracts § 1; 10 N.Y. Jur. Contracts § 220 (1960).

50. 3 A. Corbin, Contracts § 596 (1960). It appears that Corbin does not favor the application of the rule in third party beneficiary cases, especially donee beneficiary cases, see his criticism of Commissioner v. Dwight's Estate, 205 F.2d 298 (2d Cir.), cert. denied, 346 U.S. 871 (1953).

51. 207 F.2d 288 (7th Cir. 1953).

52. New York, in a reverse situation, has arrived at a similar conclusion although the third person was impliedly mentioned in the contract. In Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 190 N.E.2d 230, 239 N.Y.S.2d 865 (1963) the question was whether the plaintiff corporation could introduce extrinsic evidence to prove that it did not intend to release defendant accountant when it promised its former director who had been using corporate assets for his own benefit, that it would not bring "any suit against any person whomsoever." The court of appeals held that parol evidence could not be introduced to vary the terms of such a clear and unambiguous release and thus no extrinsic evidence was admissible to show that the defendant, as a third party, was not intended to benefit from the agreement.

53. For example, contracts involving a close family relationship, infra note 57, or a contract to draft a will as in Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961). In the Lucas case the court overruled precedent to permit a disappointed legatee to recover damages from a lawyer who negligently drew up the will for the testator. Looking to the type of contract the court said "in a situation like those presented here . . . the main purpose of the testator in making his agreement with the attorney is to benefit the persons named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries." Id. at 590, 364 P.2d at 689, 15 Cal. Rptr. at 825. See also cases involving insurance and surety bond contracts, supra note 21.

contract[54] or to identify the third party impliedly mentioned.[55] In contrast, it should be noted that in cases involving close family relationships, courts seek to do justice by concerning themselves with the subjective intention of the parties[56] and therefore admit extrinsic evidence more readily than in the field of commercial contracts.[57]

The unmentioned third party beneficiary of a well drafted commercial contract is very likely to be deemed an unintended beneficiary, relegated either to the status of an incidental beneficiary or barred from using extrinsic evidence to prove an intent to benefit. The two situations in which unmentioned third persons have recovered in New York on commercial contracts are distinguishable from the instant case. The compulsory contract cases look to the intention of the legislature rather than the intention of the parties to the contract.[58] In the other situation, *i.e.*, *Carpenter*, the opinion is silent as to whether the contract included an integration or non-assignment clause. Also in *Carpenter* there is the possibility that the defendant purposely breached the contract to test the validity of the Canadian-American executive agreement.[59] This agreement indirectly limited the contractual freedom of American importers, and thus can be considered another variation of compulsory contracts. Since New York will enforce a third party beneficiary's right where he is clearly designated as such, the ideal to seek may well be the judicial requirement of an "express" third party beneficiary, thus giving definite form to the general test of intent to benefit.[60] By precluding the use of extrinsic evidence by an unmen-

54. Where a party is named in a contract but the intent to benefit such a party is not readily apparent in the contract or the facts surrounding it, the problem is one of interpretation or construction of the contract. G. Grismore, Contracts § 238 (rev. ed. 1965). Extrinsic evidence may then be examined under the basic principle of interpretation of contracts that ambiguity is to be resolved by reading the contract as a whole in the light of the circumstances surrounding its execution. Patterson, supra note 17, at 836. See, e.g., Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 178 N.E. 498 (1931); Stahl v. Rawlins, 304 S.W.2d 549 (Tex. Civ. App. 1957).

55. United States v. Maryland Cas. Co., 323 F.2d 473 (5th Cir. 1963) (on the question whether the government was an "other creditor" on a surety bond the court held that in the absence of extrinsic facts or surrounding circumstances indicating such an intent the government was not a creditor); Segar v. Irish, 156 Misc. 714, 282 N.Y.S. 450 (Otsego County Ct. 1935) (construed "materials" to be insured to exclude the "tools" of a carpenter).

56. See, e.g., Arata v. Bank of Am. Nat'l Trust & Sav. Ass'n, 223 Cal. App. 2d 199, 35 Cal. Rptr. 703 (1963); Ridder v. Blethen, 24 Wash. 2d 552, 166 P.2d 834 (1946).

57. Cases involving close family relationships have always held a special place in the law of third part beneficiaries. Seaver v. Ransom, 224 N.Y. 233, 120 N.E. 639 (1918), sets up close relationship cases as one class of cases in which third persons have traditionally recovered, citing Buchanan v. Tilden, 158 N.Y. 109, 52 N.E. 724 (1899), DeCicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807 (1917) and the early English case of Dutton v. Poole, 83 Eng. Rep. 523 (K.B. 1677).

58. Putnam, supra note 27.

59. 113 F. Supp. at 328 n.1. The court sidestepped the question by deciding that the validity question was not in issue. Id. at 329.

60. Comment, The Third Party Beneficiary Concept: A Proposal, 57 Colum. L. Rev. 406, 426 (1957).

tioned third party beneficiary of a fully integrated contract, the instant case has tacitly laid the foundation for such a requirement.

Criminal Law—Stop and Frisk—Court Establishes Reasonable Man Test. —The Supreme Court recently decided two New York cases under New York's stop and frisk law.[1] In both cases, *People v. Sibron*[2] and *People v. Peters*,[3] the New York Court of Appeals had upheld the constitutionality of the law and of the stops and searches involved.[4]

In *Sibron*, a police officer observed the defendant talking with known narcotic addicts during an eight hour period. Although the defendant was neither observed to have transacted any business with them nor were any of his conversations with the addicts overheard, an officer followed the defendant into a restaurant, asked him to step outside and said, " 'You know what I am looking for.' "[5] The defendant had nothing in his hands at the time, but he reached into his pocket. As he did, the officer also reached into the defendant's pocket and intercepted a packet of narcotics. The Supreme Court reversed the New York conviction of unlawful possession of narcotics. *Sibron v. New York*, 392 U.S. 40 (1968).

Peters involved an off-duty police officer, who, hearing noises in the hall of his apartment building, looked through the peephole in his door and saw two strange men tiptoeing toward the stairs. The officer called the police and proceeded to chase the men. He apprehended the defendant on the stairwell landing. The defendant's reply to the officer's question as to his purpose for being in the building was that he was visiting a girlfriend whose name he preferred not to disclose because she was married. The officer frisked the defendant and felt a hard object which, when removed, was seen to be an opaque plastic envelope containing burglar's tools. The Supreme Court upheld Peters' conviction of unlawful possession of burglar's tools. *Peters v. New York*, 392 U.S. 40 (1968).

The history of stop and frisk is a long one. The right to detain suspicious

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1. N.Y. Code Crim. Proc. § 180-a (Supp. 1968). The law reads: "1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has commited or is about to commit a felony or any of the offenses specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions. 2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

2. 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966).

3. 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966).

4. For the New York reasoning on the distinction between searches and frisks see note 17 infra.

5. 18 N.Y.2d at 603, 219 N.E.2d at 197, 272 N.Y.S.2d at 376.

persons was recognized at common law[6] and was codified in a number of states[7] by the 1942 Uniform Arrest Act.[8] Other states, including New York, have their own statutes.[9] New York passed its present stop and frisk law in 1964.[10] The New York Court of Appeals had upheld the constitutionality of stop and frisk as a legitimate police power in the absence of a statute.[11]

The Supreme Court's holding in *Sibron* is based on its decision in *Terry v. Ohio*,[12] decided the same day. The Court introduced its discussion of *Terry* with a summary defense of the exclusionary rule[13] which was made applicable to the states in *Mapp v. Ohio*.[14] The *Terry* opinion noted, however, that the exclusionary rule is effective only in the cases which result in prosecution. Thus, there remains the large area of field investigation[15] which investigations are outside the scope of the exclusionary rule and are a frequent source of harassment to citizens.[16]

These field investigations (stops and frisks) were distinguished from arrests and searches by the New York Court of Appeals in *People v. Rivera*.[17] The

6. "Watchmen and beadles have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed." Lawrence v. Hedger, 128 Eng. Rep. 6 (C.P. 1810).

7. See, e.g., Del. Code Ann. tit. 11, §§ 1901-12 (1953); N.H. Rev. Stat. Ann. § 594:1-25 (1955); R.I. Gen. Laws Ann. § 12-7-1 to 13 (1956).

8. Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942).

9. Hawaii Rev. Laws § 255-4 to 9 (1955); Mass. Ann. Laws ch. 41, § 98 (1966); Mo. Rev. Stat. § 544.170 (1959); N.Y. Code Crim. Proc. § 180-a (Supp. 1967).

10. N.Y. Code Crim. Proc. § 180-a (Supp. 1968).

11. People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964), cert. denied, 380 U.S. 936 (1965); People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), cert. denied, 379 U.S. 978 (1965).

12. 392 U.S. 1 (1968).

13. See Mapp v. Ohio, 367 U.S. 643 (1961). The exclusionary rule requires that evidence which is taken in violation of the constitutional right stated in the fourth amendment be inadmissable in court. The rule is designed to discourage searches and seizures that are unconstitutional by not allowing the state any benefit from the illegally seized evidence. U.S. Const. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

14. 367 U.S. 643 (1961).

15. Field investigation is the term used to describe the whole area of street encounters which involve the police and citizens and which do not always lead to prosecution. The Court discusses the varieties of street encounters which range from pleasant to hostile. Terry v. Ohio, 392 U.S. 1, 13-14 (1968).

16. Members of minority groups find this sort of police activity especially irritating. Terry v. Ohio, 392 U.S. 1, 14 (1968).

17. 14 N.Y.2d 441, 446, 201 N.E.2d 32, 35, 252 N.Y.S.2d 458, 463 (1964): "It [frisk] is something of an invasion of privacy; but so is the stopping of the person on the street in the first place something of an invasion of privacy. The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on

Terry Court, however, flatly refused to draw any distinction at all: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' "[18] The Court dealt with on-the-scene searches and seizures which are of necessity done without warrants since they occur in situations requiring immediate judgment and action. The language of the fourth amendment was the basis for the Court's test of the validity of such searches: the judgment of a "reasonably prudent man"[19] in the situation.[20] In determining the reasonableness of a police officer's actions in a particular set of circumstances, consideration must be given to balancing governmental interest in the prevention and detection of crime and the protection of police officers against the individual's interest in freedom from intrusion. The police officer's experience must also be taken into account.[21]

Having decided in *Terry* that the basic elements of a valid search under the fourth amendment were applicable to a stop and frisk situation, the Court applied the reasonableness test in the instant cases. However, in the instant cases the additional factor of a statute regulating stop and frisk was present. The Court therefore had to consider the constitutionality of the New York stop and frisk statute on its face.[22] The facial constitutionality of a statute concerned with the fourth amendment had been discussed in another case, *Berger v. New York*,[23] where the Court declared a New York wiretap statute[24] unconstitutional on its face.[25] But in *Sibron* the Court refused "to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of § 180-a [New York's stop and frisk statute] next to the categories of the Fourth amendment in an effort to determine

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pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person."

18. 392 U.S. 1, 16 (1968).

19. Id. at 27.

20. This test was the one on which the following writers expected the Court to rely: Priar & Martain, Searching and Disarming Criminals, 45 J. Crim. L.C. & P.S. 481 (1954); Siegel, The New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?, 30 Brooklyn L. Rev. 274 (1964); Sindell, Stop and Frisk: Police Protection or Police State, 21 N.Y.U. Intra. L. Rev. 180 (1966); Comment, Police Power to Stop, Frisk, and Question Suspicious Persons, 65 Colum. L. Rev. 848 (1965); 13 Wayne L. Rev. 449 (1967).

21. Terry v. Ohio, 392 U.S. 1, 27 (1968).

22. The Court initially had two obstacles to overcome in Sibron: mootness and the admission of error by the District Attorney. As to the first obstacle the Court reasoned, according to its opinion in Pollard v. United States, 352 U.S. 354 (1957), that the question in this case was not moot in spite of the fact that Sibron had already served his sentence because of the collateral legal consequences that may affect the defendant. The majority merely ignored the second obstacle, admission of error, in order to make the final determination on the issue. They were eager to guide lower courts awaiting final settlement of the question.

23. 388 U.S. 41 (1967).

24. N.Y. Code Crim. Proc. § 813-a (Supp. 1968).

25. 388 U.S. at 64.

whether the two are . . . compatible."[26] The Court had found no such difficulty in *Berger* because the wiretap statute dealt with the procedure required to obtain a warrant permitting the use of wiretapping.[27] Instead, the stop and frisk statute prescribed no procedure since stop and frisk actions are performed without warrants. The Court deemed the statute more substantive than the wiretap statute.[28]

The Court noted several difficulties which would arise were it to judge the constitutionality of section 180-a.[29] The stop and frisk statute does not make clear whether the power to stop includes the power to detain,[30] and whether a citizen must respond to the police inquiries. Also, will the stop be regarded as custodial within the meaning of *Miranda v. Arizona*?[31] Still another difficulty concerns whether the power granted by the statute to search for weapons is greater than the power that was recognized in *Terry*.[32] The final difficulty is whether the New York standard of reasonable suspicion[33] as expressed in section 180-a is the same as the standard established by the fourth amendment.[34]

The Court reiterated its position as stated in *Ker v. California*[35] that the validity of individual states' statutory methods of stopping and frisking may vary as may the circumstances that require stopping and frisking, thereby making it difficult to set up uniform rules. The only guide is that the method adopted by the states to meet the needs of law enforcement agencies must not violate the fourth amendment.[36] The Court's refusal to rule on section 180-a's constitutionality does not, however, prevent New York or any other state from establishing "workable rules"[37] to aid law enforcement. Having dealt with the facial constitutionality problem, the Court turned its attention to the particular facts of the instant cases, judging the police action in each by the standard of reasonableness.

The facts of *Sibron* indicated that there was no probable cause to arrest

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26. 392 U.S. at 59.

27. Id. at 60.

28. The Court did not give any further explanation as to why it considered § 180-a a more substantive statute than the wire tap statute. It did state that the wire tap statute sets up a definite procedure for the issuance of warrants, and that § 180-a does not establish a definite method. Id. However, effective stop and frisk legislation would seem to demand that no warrant need be issued in order to stop and frisk. Otherwise the time element would stifle the spontaneity that is needed.

29. 392 U.S. at 60-61 n.20. Without explanation the Court refused to judge the constitutionality of the statute. Id. at 61-62.

30. Detention, it would appear, means a restriction of freedom of movement for more than a few moments.

31. 384 U.S. 436, 444 (1966): "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." If the stop is of a custodial nature the rules established by the Court will be applicable.

32. 392 U.S. at 29 (1968).

33. N.Y. Code Crim. Proc. § 180-a (Supp. 1968).

34. As defined in Terry v. Ohio, 392 U.S. at 60-61 n.20.

35. 374 U.S. 23, 34 (1963).

36. Id.

37. Id.

Sibron. The probable cause standard was established by the Court in *Carroll v. United States*[38] and *Brinegar v. United States*.[39] "Since Marshall's time, at any rate, it [probable cause] has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has or is being committed."[40] In *Sibron* the officer had no knowledge or information concerning the defendant and had no idea about the contents of the conversations between Sibron and the addicts.[41] Probable cause can not be based on having observed the defendant talking with known narcotic addicts and nothing more. The officer's actions were not taken to protect himself, and he made no effort to search for a weapon.[42] He intended to look for narcotics.[43] All these factors demonstrated to the Court that there had not been a reasonable search under the fourth amendment. Justice Black, however, in dissent, declared that the Court was too far removed from the initial situation and should, therefore, let the lower courts determine the reasonableness of the police action.[44]

Justice Harlan, in his concurring opinion in *Terry*, had voiced the idea that stop and frisk done in a field situation may be made when circumstances do not meet the probable cause standard.[45] Justice Douglas on the other hand found that the lack of probable cause was violative of the fourth amendment.[46] He concurred with the majority in *Sibron* and took the opportunity to express his opinion that talking to narcotic addicts was suspicious but not suspicious enough to form probable cause.[47]

In *Peters* the Court found that the search was reasonable, and therefore valid, because it was incident to a lawful arrest. The New York Court of Appeals had found the search legal under section 180-a, but the Supreme Court, deciding to test stop and frisk actions by the reasonableness standard and not the standard in section 180-a, based the validity of the search on the valid arrest that took place at the time the officer restrained defendant's freedom on the stairs.

The Supreme Court's decision in the instant cases should alter the result in at least one New York case, should the facts arise again. In *People v. Taggart*,[48] the New York Court of Appeals stated that section 180-a was applicable in a situation involving a search by a police officer for a weapon as a result of a tip from an anonymous caller. The officer found the defendant standing in the midst

38. 267 U.S. 132 (1925).

39. 338 U.S. 160 (1949).

40. Id. at 175-76. The Court was quoting the language of Carroll v. United States, 267 U.S. 132, 162 (1925).

41. 392 U.S. at 62.

42. Id. at 64. Justice Black in his dissent expressed the opinion that the officer could reasonably have thought that the defendant was reaching for a gun. Id. at 80.

43. Id. at 46-47 n.4.

44. Id. at 79-82.

45. 392 U.S. at 31-34.

46. Id. at 35-39.

47. 392 U.S. at 68.

48. 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967), modified, 21 N.Y.2d 729, 287 N.Y.S.2d 695 (1968).

of a crowd of children. The New York Court stated that, although in the other cases decided under section 180-a the officer observed the suspicious behavior first hand, this action was also within section 180-a. The police officer approached the defendant and went directly to the defendant's pocket for the gun. The New York courts held that the search was valid and upheld the police officer's right to conduct such a search.

There are few other reported New York decisions under section 180-a.[49] The ultimate question posed by the Court is the reasonableness of the police officer's search in the particular circumstances. Unlike *Terry*, in which the officer was assigned to a downtown area for thirty years and had personally observed the defendant repeatedly walking by a department store and casing the job,[50] the officer in *Taggart* did not have any personal observation on which to base his action. Like the officer in *Sibron*, the officer in *Taggart* searched for the object he believed to be there. Neither officer patted the defendant's clothing—both went directly for the object. These factors, no personal observation and a direct search, indicate the unreasonableness of the action. The presence of the children and the defendant's standing in their midst in *Taggart* weigh in favor of a finding of reasonable action. A reasonable man would be aware of the danger to the children if the defendant had a gun. This factor does not, however, weigh heavily enough to warrant a search like the one in *Taggart*.

The effect of the decision in the instant cases is to shift the emphasis from the standards of section 180-a to the standards of the fourth amendment. By denying blanket approval to section 180-a and approving the standard of reasonableness of the fourth amendment, the Court has left to the states the burden of establishing their own "workable rules."[51]

Criminal Procedure—Indictments Based Solely upon Hearsay Will Be Dismissed Where the Hearsay Was Deliberately Relied upon When Competent Evidence Was Readily Available.—The defendants were convicted primarily on the testimony of six Treasury Agents who witnessed them pass counterfeit bills. Despite the fact that there were so many government observers of the crime, a single government agent, who neither observed the crime nor had direct knowledge of it, had been the sole government witness to testify before the grand jury that indicted the defendants. There, he had summarized and synthesized the observations of the other agents, as if he had seen the events himself. The prosecution had justified his appearance merely by saying that the other agents were busy at that time. The defendants moved both during

49. People v. Teams, 18 N.Y.2d 835, 222 N.E.2d 603, 275 N.Y.S.2d 841 (1966); People v. Davies, 26 App. Div. 2d 573, 271 N.Y.S.2d 132 (2d Dep't 1966); People v. Hoffman, 24 App. Div. 2d 497, 261 N.Y.S.2d 651 (2d Dep't 1965); People v. Terrell, 53 Misc. 2d 32, 277 N.Y.S.2d 926 (Sup. Ct. 1967); People v. Reason, 52 Misc. 2d 425, 276 N.Y.S.2d 196 (Sup. Ct. 1966); People v. Anonymous, 48 Misc. 2d 713, 265 N.Y.S.2d 705 (Nassau County Ct. 1965); People v. Cassese, 47 Misc. 2d 1031, 263 N.Y.S.2d 734 (N.Y.C. Crim. Ct. 1965).

50. 392 U.S. at 6.

51. 374 U.S. 23, 34 (1963).

the trial and after they were found guilty to dismiss the indictment because it was based solely on hearsay evidence.[1] The district court denied the motions, holding that an indictment is not invalid simply because it is based solely on hearsay evidence, unless it is shown that the defendant was actually prejudiced by the use of the hearsay evidence. However, the court went on to lay down the prospective rule that it would, in the future, dismiss an indictment *even without a showing of prejudice* if it were apparent that hearsay evidence was deliberately relied upon when more competent evidence was readily available for presentation. *United States v. Arcuri*, 282 F. Supp. 347 (E.D.N.Y. 1968).

In 1956, in the landmark case of *Costello v. United States*,[2] the Supreme Court squarely faced the issue of whether an indictment was valid if based *totally* on hearsay evidence. The Court came to the conclusion that the fifth amendment[3] did not prescribe the type of evidence upon which grand juries must act.[4] Consequently, it affirmed the court of appeals' refusal to dismiss the indictment explaining that, "[i]f indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the *competency and adequacy of the evidence* before the grand jury. This is not required by the Fifth Amendment."[5]

Although *Costello* appeared to represent established law on the question of the validity of indictments based on hearsay testimony,[6] the practice of deliberately presenting hearsay evidence to the grand jury when more competent evidence was readily available came under judicial criticism in the Second Circuit in the

1. J. Richardson, Evidence § 206, at 196 (9th ed. 1964), defines hearsay as "a statement made out of court, that is, not made in the course of the trial in which it is offered . . . if it is offered for the truth of the fact asserted in the statement."

2. 350 U.S. 359 (1956). The defendant had been charged with income tax evasion. At the grand jury proceedings the only witnesses who testified were three government agents. However, at trial the government had 144 witnesses testify and introduced 368 exhibits dealing with the defendant's business transactions. The defense then moved for a dismissal of the indictment on the ground that it was based on "hearsay."

3. U.S. Const. amend. V provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

4. The fifth amendment has been construed to mean that no individual may be placed on trial without a fair and prior determination of probable cause. See Note, Quashing Federal Indictments Returned upon Incompetent Evidence, 62 Harv. L. Rev. 111 (1948).

5. 350 U.S. at 363 (emphasis added). Practical considerations of convenience of prosecution appear to have swayed the Court in Costello. At a grand jury proceeding the government must show probable cause as to all elements of an offense. The crime of income tax evasion consists of both an intent to evade payment of taxes and a false disclosure of taxable income. To show false disclosure the government must prove the suspect's net worth and his nondeductible expenditures. Normally this cannot be done with only a few witnesses. See generally 65 Yale L.J. 390 (1956).

6. See United States v. Beltram, 388 F.2d 449 (2d Cir. 1968); United States v. Andrews, 381 F.2d 377 (2d Cir. 1967), cert. denied, 390 U.S. 960 (1968).

case of *United States v. Umans*.[7] In that case the defendant was accused of bribing several Internal Revenue Service employees. At trial a major portion of the prosecution's case against the defendant consisted of the testimony of these employees. At the grand jury proceedings, however, the only evidence presented was the testimony of a government agent who summarized the affidavits of the witnesses who were later to appear at trial. His hearsay testimony was used despite the fact that the employees were available and wished to co-operate.[8] The court of appeals in *Umans* stated that the excessive use of hearsay testimony undermined the historic function of grand juries in evaluating the probability of the prosecution's success at trial and, thus, prevented grand juries from protecting individuals from unwarranted prosecutions. The court implied, therefore, that the excessive use of hearsay could be prejudicial to the accused.[9] The court concluded that hearsay testimony should be used at grand jury hearings only when it is obviously inconvenient to call witnesses who had personal knowledge of the events. Consequently, if the government deliberately presented a witness with only secondhand knowledge of what had transpired when more competent evidence was easily accessible, and the accused was prejudiced, the indictment might be dismissed.[10]

The judicial trend toward a restrictive interpretation of *Costello*, which began in *Umans*, gained support from a later case, *United States v. Beltram*.[11] In this case the defendants were indicted as a result of the testimony of a witness who had no direct knowledge of the events. The Court of Appeals for the Second Circuit refused to dismiss the indictment, however, citing *Costello* as authority for its position. The court noted, however, that the indictment in *Beltram* was handed down prior to the decision in *Umans*. It implied, therefore, that the *Umans'* decision announced a new rule, but because the indictment in *Beltram* preceded *Umans* the *Beltram* case was not to be governed by *Umans'* standards.[12]

The instant court's decision represented a further restriction of the *Costello* rule, for it announced that the court would dismiss indictments that were based on hearsay evidence, *even without a showing of prejudice* to the defendant, if more competent evidence were readily available. What the court opposed was not the use of hearsay evidence as such,[13] but the *deliberate* use of this evidence

7. 368 F.2d 725 (2d Cir. 1966), cert. granted, 386 U.S. 940, writ dismissed as improvidently granted, 389 U.S. 80 (1967).

8. See 43 N.Y.U.L. Rev. 578, 583 (1968).

9. See United States v. Arcuri, 282 F. Supp. 347, 351 (E.D.N.Y. 1968).

10. Id. at 349.

11. 388 F.2d 449 (2d Cir. 1968).

12. Id. at 451.

13. The dismissal of all indictments that were based on hearsay testimony, would be unwise. The grand jury's effectiveness is not necessarily lessened by the use of hearsay, for such hearsay is converted into competent evidence when the eyewitness testifies at the trial. See generally 43 N.Y.U.L. Rev. 578 (1968).

In addition, the primary reason for excluding hearsay testimony at trial is that the accused cannot attack it through cross-examination. At grand jury proceedings, however, there is no right to adversary cross-examination. Grand jurors have a right to question a

when eyewitness reports could be easily obtained.[14] The present court reasoned that there was no suggestion in *Costello* that the Court wished to encourage the practice of deliberately relying on the testimony of witnesses who had only secondhand information on what had transpired when immediate observers of the event were on hand, as they were in the instant case. Since the Supreme Court was not faced with the problem of the government intentionally substituting a witness with indirect knowledge for one with direct knowledge of the event, the *Costello* holding, according to the instant court, was merely designed to avoid "technical failures of indictments" because of the use of inadmissible evidence. There is much in the *Costello* opinion which suggests such an interpretation. For instance, Justice Black, in *Costello*, stated that prohibiting the use of hearsay in indictments "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules."[15]

Since *Costello* was interpreted as not intended to cover a situation similar to that presented here, the instant court felt free to criticize the deliberate use of hearsay in indictments for two reasons. The first was that hearsay evidence appeared "smooth and well integrated" with no "rough edges" or inconsistencies as might appear in the testimony of honest observers of the facts.[16] Consequently, the grand jury is unable to distinguish between weak and strong prosecutions and, therefore, is not able to perform its screening function. This inability to evaluate the prosecution's chance of success is obvious when one considers the fact that grand jurors might not even be aware that they are receiving hearsay testimony. They might believe that the witness had firsthand knowledge of the event,[17] which is indeed possible since the government is not required to disclose to the jury whether or not it is using hearsay evidence.[18] The second

witness, but this cross-examination is less effective than that of a defense counsel. Since the grand jury's ability to cross-examine is small, irrespective of whether hearsay testimony is present, the use of such hearsay testimony will not significantly lessen the defendant's procedural safeguards.

Moreover, factors other than cross-examination, such as demeanor evidence, the oath, and the risk of inaccurate transmission, which insure dependability of testimony are not significantly undermined by the use of hearsay evidence at the grand jury proceedings. Demeanor evidence is of particular value only when the witness is subject to adversary cross-examination, which he is not in grand jury proceedings. The oath is not much of a preventative with regard to lying, save the fear of a perjury conviction. The risk of inaccurate transmission which encompasses the risk of mistakes in perception and memory, and is more foreseeable in the case of hearsay than in the case of eyewitnesses, can be evaluated by grand jurors much in the way trial jurors evaluate these risks when considering hearsay exemptions. This is true, of course, only when grand jurors are aware of the fact that the evidence presented is hearsay. See generally 65 Yale L.J. 390 (1956).

14. 282 F. Supp. at 349.

15. 350 U.S. at 364.

16. 282 F. Supp. at 349.

17. United States v. Payton, 363 F.2d 996, 999-1000 (2d Cir.), cert. denied, 385 U.S. 993 (1966) (dissenting opinion).

18. Id. at 999 (majority opinion).

reason for the court's attack was that hearsay evidence prevented the defense from using grand jury testimony at trial in cross-examining trial witnesses. If a witness at trial has not testified before the grand jury, the defense is unable to use this prior testimony to impeach his trial testimony. The defendant's right to criminal discovery might also be hampered.[19]

Since transcripts of grand jury minutes have recently been made more accessible for use by defendants for impeachment purposes,[20] it would indeed be peculiar to permit a prosecutor to foil this trend in the law by withholding key witnesses from the grand jury proceeding.[21] The Supreme Court has declared that the defense may examine grand jury minutes if there is a "particular need."[22] Particular need includes the use of a grand jury transcript to impeach a witness' testimony, to sharpen his memory, and to examine the veracity of his statements.[23] At present, the rule in the Second Circuit[24] is that the defendant has a right to study the grand jury testimony of all trial witnesses on the topic about which they testified at trial. Further, federal law[25] provides that a party to the proceedings may request the court to transcribe the minutes of a grand jury proceeding where it is not required by law that a record be made. Since the court of appeals has recognized the value to the accused of disclosing grand jury testimony for purposes of his defense,[26] it would indeed be unwise to devitalize this procedure by permitting indictments to be returned solely on the basis of hearsay evidence when more competent evidence can be easily attained.

Nevertheless, the instant court did not dismiss the indictments against the defendants, for it read the *Umans* and *Beltram* cases together, and concluded that the court of appeals wished that indictments handed down after *Umans*, which were based on hearsay evidence, be studied carefully to determine whether the accused had been prejudiced by the use of such evidence. An indictment handed down prior to the decision in the instant case should be carefully scrutinized for prejudice. However, the instant court's purpose was to deter the

19. An example of the importance of this discovery process was presented by Judge Medina of the Court of Appeals for the Second Circuit in United States v. Beltram, 388 F.2d 449 (2d Cir. 1968) (Medina, J., dissenting).

20. See Dennis v. United States, 384 U.S. 855 (1966).

21. See United States v. Beltram, 388 F.2d 449, 452 (2d Cir. 1968) (Medina, J., dissenting).

22. Dennis v. United States, 384 U.S. 855 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Proctor & Gamble Co., 356 U.S. 677 (1958). The Dennis court, while maintaining the requirement of "particular need," strongly restricts the trial court's discretion to refuse to disclose the grand jury minutes for the purpose of preserving grand jury secrecy. It seems, therefore, that Dennis establishes the accused's right to see the grand jury minutes for impeachment purposes. See 43 N.Y.U.L. Rev. 578, 582 (1968).

23. United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958).

24. See United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967).

25. See 28 U.S.C. § 753 (1964).

26. For a description of the traditional reasons for grand jury secrecy and the explanation why these reasons are no longer as valid as they once were, see United States v. Youngblood, 379 F.2d 365, 370 n.3 (2d Cir. 1967).

prosecution from using hearsay evidence at grand jury proceedings when more competent evidence could conveniently be obtained. As a result the court declared its ruling to be prospective: hereafter indictments so handed down will be dismissed without a showing of prejudice.[27] The court based this aspect of its decision on the case of *United States v. Tane*[28] where the court stated that it was within the trial court's discretion to dismiss an indictment based on incompetent evidence.

The present court's opinion, although for the most part cogent and well-reasoned, is susceptible to criticism. The court stated that the deliberate use of hearsay evidence in indictments was pernicious for it prevented the grand jury from adequately performing its screening function. In a different context, the Supreme Court apparently has reached a contrary conclusion when considering the probative value of hearsay evidence. The Court declared that a search warrant could properly be issued on the basis of hearsay information provided that there was substantial ground for crediting the hearsay.[29] Since hearsay evidence was deemed adequate for use by a magistrate in determining probable cause, why should hearsay testimony be excluded from hearings before a grand jury which is trying to determine the accused's probable guilt?

An answer to this question might be found in the Supreme Court's requirement that there must be a substantial basis for crediting the hearsay presented to the magistrate. The magistrate must be given assurance from a set of separate facts that the hearsay evidence is true. Otherwise the Court will strike down the warrant as stating mere conclusions.[30] Since the Supreme Court felt that a magistrate would be unable to make a determination on probable cause when he was presented solely with uncorroborated hearsay testimony, limiting the use of hearsay evidence at grand jury proceedings seems proper.

On the other hand, dismissing *all* indictments based on hearsay testimony would introduce practical difficulties. Such a rule would necessitate the presence of a "judge or master"[31] at the grand jury proceedings, thereby changing the traditional structure of the grand jury, causing procedural delays and restricting the grand jury's "investigative function."[32] Appropriately, the instant court struck a balance between the accused's rights and the prosecutorial interests of the public by ruling that future indictments, based solely on hearsay evidence when competent testimony was readily available, will be struck down.

27. This procedure was approved by the Supreme Court in the case of Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

28. 329 F.2d 848 (2d Cir. 1964). It should be noted that this case involved the use by the government of unlawful wiretap evidence to secure an indictment against the defendant. Consequently, it is open to conjecture whether hearsay evidence is the type of incompetent evidence the court of appeals wanted within the trial court's discretion.

29. Jones v. United States, 362 U.S. 257 (1960).

30. See Aguilar v. Texas, 378 U.S. 108 (1964).

31. See generally 43 N.Y.U.L. Rev. 578, 582 (1968).

32. Id. at 583.