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Case Notes

CASE NOTES

Administrative Law—FCC—Full Comparative Hearings Mandated for Contested Broadcast License Renewals.—In January, 1970 the Federal Communications Commission (FCC) issued an announcement entitled Policy Statement on Comparative Hearings Involving Regular Renewal Applicants.[1] That Statement revised the comparative hearing process, creating a severe limitation upon the ability of new applicants to challenge incumbent licensees. Two nonprofit organizations, Black Efforts for Soul in Television (BEST) and Citizens Communications Center (CCC), petitioned the FCC to reconsider its position, but that request was denied.[2] The petitioners[3] sought review[4] of that decision, contending that the Policy Statement was violative of the Communications Act of 1934[5] and not in accord with controlling case law.[6] The United States Court of Appeals for the District of Columbia Circuit held that the Statement was clearly violative of the Communications Act[7] as previously interpreted by the Supreme Court.[8] *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

In 1912 Congress authorized the Secretary of Commerce and Labor to license all radio broadcasters capable of interstate transmission.[9] These licenses

1. 35 Fed. Reg. 822 (1970) [hereinafter cited as Policy Statement].

2. BEST, 21 F.C.C.2d 355 (1970), rev'd sub nom. Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971). The petitioners' request that the FCC institute rule-making proceedings to codify standards for all comparative hearings was also denied. 21 F.C.C.2d at 355.

3. Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), was a consolidation of three cases. Case No. 24,471 is described in the text. Case No. 24,491 was a similar petition filed by Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc. Id. at 1202 n.2. Case No. 24,221 was an appeal from an order of the United States District Court for the District of Columbia which dismissed a complaint seeking an injunction filed by the same parties as in case No. 24,471. Id.

4. Petitioners sought review pursuant to 47 U.S.C. § 402(a) (1970) and 28 U.S.C. § 2342 (1970). Section 402(a) provides: "Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in [28 U.S.C. § 2342]." Section 2342 provides in pertinent part: "The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47 . . . ."

5. 47 U.S.C. §§ 151-609 (1970).

6. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

7. 47 U.S.C. § 309(e) (1970).

8. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

9. Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed 1927). For a discussion of early governmental regulation of radio see W. Emery, Broadcasting and Government 16-17 (1961); Rosenbloom, Authority of the Federal Communications Commission, in Freedom and Responsibility in Broadcasting 99-104 (J. Coons ed. 1961) [hereinafter cited as Rosen-

were to be issued to the first qualified party to apply.[10] This licensing power was used by the Secretary to regulate the expanding broadcasting industry[11] until 1926 when a federal court held that, under the Radio Act of 1912,[12] the Department of Commerce had no power either to require stations to broadcast on assigned frequencies or to limit their hours of operation.[13] As a result of the chaotic situation caused by that holding,[14] Congress passed the Radio Act of 1927.[15] Certain provisions of that Act were instrumental in establishing a basis for the practice of providing mutually exclusive applicants for broadcast licenses with comparative hearings. Licensees were forewarned that their licenses were granted for a maximum of three years,[16] and that no private property right was to be derived from their operation of the station for that period.[17] Upon expiration of the three year period, application for renewal was to be approved only if, in the opinion of the Federal Radio Commission, the "public interest, convenience, or necessity" would thereby be best served.[18]

The Communications Act of 1934 incorporated many of the license renewal provisions of the Radio Act of 1927.[19] Repeated reference was made to the

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bloom]; Taugher, The Law of Radio Communication with Particular Reference to a Property Right in a Radio Wave Length, 12 Marq. L. Rev. 179, 182-92 (1928).

10. Radio Act of 1912, ch. 287, § 1, 37 Stat. 302 (repealed 1927). The Secretary was given no discretionary power. He was directed to grant licenses "upon application therefor . . . ." Id.

11. See Rosenbloom 112.

12. Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed 1927).

13. United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). This decision was based on the reasoning that the Act's delegation of authority, without appropriate guidelines, was unconstitutional. See Rosenbloom 112-13 for a discussion of the impact of the decision.

14. See Rosenbloom 112.

15. Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934). For some of the more interesting congressional discussions leading to the passage of the Act, see 67 Cong. Rec. 1235-59, 5555-86, 12497-508 (1926); 68 Cong. Rec. 2556-80, 3117-24 (1927). See also Rosenbloom 99-131.

16. Radio Act of 1927, ch. 169, § 9, 44 Stat. 1166 (repealed 1934). The precise term was the subject of lengthy congressional debate. See, e.g., 68 Cong. Rec. 3025-39, 4109-14 (1927).

17. Radio Act of 1927, ch. 169, § 11, 44 Stat. 1167 (repealed 1934). "The station license shall not vest in the licensee any right . . . in the use of the frequencies . . . designated in the license beyond the term thereof . . . ." Id. § 11(A).

18. Id. § 11. See Rosenbloom 137. The Federal Radio Commission's power to refuse renewal of licenses, despite the resultant loss of substantial private investment, was given strong judicial support. See General Elec. Co. v. FRC, 31 F.2d 630 (D.C. Cir. 1929), cert. dismissed, 281 U.S. 464 (1930); United States v. American Bond & Mort. Co., 31 F.2d 448 (N.D. Ill. 1929), aff'd, 52 F.2d 318 (7th Cir. 1931), cert. denied, 285 U.S. 538 (1932); White v. FRC, 29 F.2d 113 (N.D. Ill. 1928), cert. dismissed, 282 U.S. 367 (1931).

19. Compare Radio Act of 1927, ch. 167, §§ 9-11, 44 Stat. 1166 (repealed 1934), with Communications Act of 1934, 47 U.S.C. §§ 307-11 (1970). Provisions of the Radio Act of 1927 which dealt with renewal applications were incorporated almost verbatim into title III of the Communications Act of 1934. The Supreme Court has indicated that the objectives remained "substantially unaltered." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

idea that in considering an application for the renewal of a license, public, not private, interests should control.[20] In addition, language was added which specified that application for the renewal of a license would "be limited to and governed by the same considerations and practice which affect the granting of original applications."[21] Sections 309(a)[22] provided that if the Commission decided that the "public interest, convenience, or necessity" would be served by the grant or renewal of a license no hearing would be necessary.[23] However, if such a decision could not be reached, the Commission was to "notify the applicant thereof . . . fix and give notice of a time and place for hearing thereon, and . . . afford such applicant an opportunity to be heard . . . ."[24] The same section reaffirmed the policy that the grant of such licenses would not vest in the licensees any property right "beyond the term thereof."[25]

As the number of frequencies remained constant and the number of applications therefor increased, the FCC was forced to develop a "fair and equitable" system of allocating licenses.[26] In the case of mutually exclusive applications, consolidation of the hearings became the generally accepted procedure.[27] This presented the question of whether the consolidation of such hearings was left to the discretion of the FCC.[28] The Supreme Court, by its holding in *FCC v. Pottsville Broadcasting Co.*,[29] indicated that it was.

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20. See, e.g., 47 U.S.C. §§ 304, 307(d) (1970).

21. Communications Act of 1934, ch. 652, § 307(d), 48 Stat. 1084, as amended, 47 U.S.C. § 307(d) (1970). In 1952 this clause was deleted, "[p]erhaps to guard against the inference that an incumbent's past broadcast record could not be considered at all at renewal time . . . ." Citizens Communications Center v. FCC, 447 F.2d 1201, 1206, n.13 (D.C. Cir. 1971).

22. Communications Act of 1934, ch. 652, § 309(a), 48 Stat. 1085, as amended, 47 U.S.C. § 309(e) (1970). This section was taken from the Radio Act of 1927, ch. 167, § 11, 44 Stat. 1167 (repealed 1934). See note 19 supra.

23. Communications Act of 1934, ch. 652, § 309(a), 48 Stat. 1085, as amended, 47 U.S.C. § 309(e) (1970).

24. Id.

25. Id. § 309(b)(1).

26. See FRC v. Nelson Bros. Bond & Mort. Co., 289 U.S. 266, 285 (1933).

27. See NBC v. United States, 319 U.S. 190, 216-17 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 & n.2 (1940). See generally K. Davis, Administrative Law Treatise § 8.12 (1958). For the "mechanics" of the renewal procedure see Comment, The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?, 118 U. Pa. L. Rev. 368, 371-74 (1970). The court in Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), adopted the rule of WHDH; see notes 76-80 & 84 infra and accompanying text. Therefore, the "mechanics" should be the same.

28. Pottsville Broadcasting Co. v. FCC, 98 F.2d 288 (D.C. Cir. 1938), rev'd, 309 U.S. 134 (1940).

29. 309 U.S. 134 (1940). The Court, in dictum, made it clear that "[t]he Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio . . . ." Id. at 138. Under the facts of the case, the Supreme Court dissolved a writ of mandamus

In 1945 the Supreme Court firmly established the right of an applicant to a "full" comparative hearing in *Ashbacker Radio Corp. v. FCC*.[30] The FCC had had before it two mutually exclusive applications for the same frequency. It had granted one application and on the same day ordered a hearing on the other.[31] The Court, taking into account the practicalities of the problem, held that "where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."[32] At the heart of the issue before the Court was an apparent conflict within section 309(a) of the Communications Act of 1934.[33] On the one hand, it empowered the FCC to grant licenses without a hearing,[34] and on the other, it gave applicants the right to a hearing before their applications could be denied.[35]

This dichotomy was clearly resolved in favor of the applicant's right to a hearing. "[I]f the grant of one [license] effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing."[36] Preservation of the "form" of the statutory right would be insufficient if, as a practical matter, it has been "substantially nullified."[37]

The full comparative hearing mandate of *Ashbacker* became the established procedure of the FCC,[38] although, until 1969,[39] no new applicant, once granted such a hearing, ever prevailed over an incumbent.[40] This was due primarily to the insurmountable preference given the incumbent under the rule established by the FCC in *Hearst Radio, Inc.*[41] and *Wabash Valley Broadcasting Corp.*[42]

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issued by the Court of Appeals for the District of Columbia Circuit which had directed the FCC not to grant a comparative hearing. Id. at 134. See generally K. Davis, supra note 27, § 8.12.

30. 326 U.S. 327 (1945).

31. John E. Fetzer, 10 F.C.C. 437 (1945).

32. 326 U.S. at 333.

33. Communications Act of 1934, ch. 652, § 309(a), 48 Stat. 1085, as amended, 47 U.S.C. § 309(e) (1970).

34. Id.

35. Id.

36. 326 U.S. at 330.

37. Id. at 334.

38. E.g., Radio Cincinnati v. FCC, 177 F.2d 92 (D.C. Cir. 1949). "[T]he Commission set the two [applications] down for a comparative hearing. Since the two applications were mutually exclusive, this comparative hearing was required by the now-familiar doctrine of the Ashbacker Case." Id. at 94 (footnotes omitted). The Ashbacker doctrine has had a great impact on many other fields of administrative law. See, e.g., Northeastern Gas Trans. Co. v. FPC, 195 F.2d 872 (3d Cir.), cert. denied, 344 U.S. 818 (1952); Northwest Airlines v. CAB, 194 F.2d 339 (D.C. Cir. 1952).

39. See notes 44-48 infra and accompanying text.

40. Comment, supra note 27, at 368.

41. Hearst Radio, Inc. (WBAL), 15 F.C.C. 1149 (1951).

42. Wabash Valley Broadcasting Corp. (WTHI-TV), 35 F.C.C. 677 (1963). This case applied the Hearst rule to television renewal hearings.

In these cases the FCC established the rule that a renewal applicant's past record of "acceptable" service would outweigh the new applicant's "paper proposals" of seemingly more desirable service.[43]

In 1969 the FCC refused to renew the license of a Boston television station and awarded it instead to a competing applicant.[44] This was the first time a new applicant had ever succeeded in a comparative hearing.[45] Although the FCC's 1965 Policy Statement[46] had clearly foreshadowed such a result, the industry was shocked.[47] *WHDH* dismissed the notion that a past record of "acceptable" service would give a renewal applicant a built-in advantage, and as a result the new applicant and the incumbent licensee were placed on an equal footing.[48] It was feared that "[t]he newly announced principle could mean that all licenses [would be] at hazard every three years, a proposition which would work a revolution in the industry . . . ."[49]

In December, 1969 a bill was introduced in the Senate by Senator Pastore which proposed substantial changes in the comparative hearing process,[50] much to the consternation of various citizen groups.[51] The Pastore bill proposed that the comparative hearing be converted into a two-stage procedure, the first stage of which was to be an exclusive consideration of the incumbent's application.[52] If, at that first stage, it were determined that renewal would be in the public interest, the hearing would terminate.[53] The second stage, at which a competing applicant would have the opportunity to convince the FCC that

43. 15 F.C.C. at 1175.

44. WHDH, Inc., 16 F.C.C.2d 1 (1969), aff'd sub nom. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971).

45. See Jaffe, WHDH: The FCC and Broadcasting License Renewals, 82 Harv. L. Rev. 1693 (1969).

46. Comparative Broadcast Hearings, 30 Fed. Reg. 9660 (1965).

47. Broadcasting, Feb. 3, 1969, at 19.

48. 16 F.C.C.2d at 28.

49. Jaffe, supra note 45, at 1693.

50. S. 2004, 91st Cong., 1st Sess. (1969); see Comment, supra note 27, at 368-70, 401-02. See also N. Johnson, How to Talk Back to Your Television Set 45-78 (1970). Commissioner Johnson questioned "whether government can ever realistically be expected to sustain a vigilant posture over an industry which controls the very access of government officials themselves to the electorate." Id. at 71.

51. See Hearings on S. 2004 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 91st Cong., 1st Sess., ser. 91-18 (1969).

52. S. 2004, 91st Cong., 1st Sess. (1969). The bill proposed adding the following to section 309(a) of the Communications Act of 1934: "Notwithstanding any other provision of the Act, the Commission, in acting upon any application for renewal . . . may not consider the application of any other person for the facilities for which renewal is sought. If the Commission finds . . . that the public interest, convenience, and necessity has been and would be served thereby, it shall grant the renewal application. If the Commission determines after a hearing that a grant of the application of a renewal applicant would not be in the public interest, convenience, and necessity, it shall deny such application, and applications for construction permits by other parties may then be accepted . . . ." Id.

53. Id.

it could better serve the public interest, was to occur only if it was determined that renewal was not in the public interest at all.[54]

On January 15, 1970, before any vote could be taken on the Pastore bill, the FCC issued its Policy Statement. Consequently, further consideration of the Pastore bill was deferred.[55] In formulating this Statement the FCC balanced the "statutory spur" provided by the right to a comparative hearing against the benefits of "predictability and stability of broadcast operation."[56] The latter were found to be more important. Accordingly, a new applicant was not to be afforded the opportunity to show that he could provide better service to the public than the renewal applicant unless the FCC first decided that the incumbent's past service had not "been substantially attuned to meeting the needs and interests of its area . . . ."[57] The 1970 Policy Statement "in effect . . . administratively 'enact[ed]' what the Pastore bill sought to do."[58]

In *Citizens Communications Center v. FCC*,[59] the basic issue was "[w]hether the Policy Statement denies a competing applicant the full comparative hearing to which he is entitled . . . ."[60] This was considered by the court to be a valid legal issue,[61] ripe for review.[62] The court reached its decision by comparing the statutory language of section 309(e) of the Communications Act of 1934,[63] as interpreted in *Ashbacker Radio Corp. v. FCC*,[64] with the "summary judgment" form of comparative hearing prescribed by the FCC's 1970 Policy Statement.[65]

The court admitted that Congress gave the FCC a great deal of discretion in choosing between competing applicants.[66] However, it insisted that that authority was not *"carte blanche,"*[67] pointing to the "full hearing" requirement of section 309(e).[68] Emphasizing that limitation, it explained what a "full

54. Id.

55. See Comment, supra note 27, at 395.

56. Policy Statement 822.

57. Id. at 823 (footnote omitted).

58. Citizens Communications Center v. FCC, 447 F.2d 1201, 1210 (D.C. Cir. 1971).

59. 447 F.2d 1201 (D.C. Cir. 1971).

60. Id. at 1205.

61. Id.

62. Id. Respondents had argued that the Policy Statement was not reviewable under the provisions of 28 U.S.C. § 2342(1) (1970), and 47 U.S.C. § 402(a) (1970), which contemplate the review of final orders only. The court, employing the test laid down by the Supreme Court in Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), found that even if the Policy Statement were characterized as interlocutory, it was still reviewable. 447 F.2d at 1205.

63. 47 U.S.C. § 309(e) (1970).

64. 326 U.S. 327 (1945).

65. 35 Fed. Reg. 822 (1970). For a discussion of the suitability of summary judgment to the administrative process see Gellhorn and Robinson, Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612 (1971).

66. 447 F.2d at 1212.

67. Id.

68. Id.

hearing" entails, quoting at length from *Johnston Broadcasting Co. v. FCC*:[69] " 'A choice between two applicants involves more than the bare qualifications of each applicant. It involves a comparison of characteristics. Both A and B may be qualified, but if a choice must be made, the question is which is the better qualified.' "[70] It is not within the discretionary power of the FCC to " 'ignore a material difference between two applicants . . . . ' "[71] Rather, it must " 'take into account all the characteristics which indicate differences, and reach an over-all relative determination . . . of all factors . . . .' "[72]

The court gave great weight to "the towering shadow of *Ashbacker* . . . and its progeny, perhaps the most important series of cases in American administrative law."[73] In light of *Ashbacker* the court seemed to find the basic issue before it almost cursory:[74]

> In *Ashbacker* the Commission had promised the challenging applicant a hearing on his application after the rival application was granted. The Supreme Court in *Ashbacker* said that such a promise was 'an empty thing.' At least the Commission here must be given credit for honesty. It does not make any empty promises. It simply denies the competing applicants the 'full hearing' promised them by Section 309(e) of the Act. Unless the renewal applicant's past performance is found to be insubstantial or marred by serious deficiencies, the competing applications get no hearing at all. The proposition that the 1970 Policy Statement violates Section 309(e), as interpreted in *Ashbacker* is so obvious it need not be labored.[75]

Finally, the court turned to the *Hearst—Wabash Valley* problem.[76] It did not dispute the fact that past performance is the most accurate indicator of future intentions and, in dictum, indicated that insubstantial and superior performance should be taken into account.[77] The former "should preclude renewal,"[78] and the latter "should be a plus of major significance."[79] Nonetheless, the court held that even if the incumbent can clearly show a past record of superior performance, and therefore place a great burden on the shoulders of the new applicant, the new applicant must be given the opportunity to be heard under the provisions of section 309(e).[80]

It is an unassailable premise that broadcast frequencies should be allocated

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69. 175 F.2d 351 (D.C. Cir. 1949).

70. 447 F.2d at 1212, quoting from Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 356 (D.C. Cir. 1949).

71. Id.

72. Id.

73. Id.

74. See text accompanying note 75 infra.

75. 447 F.2d at 1211-12 (footnote omitted).

76. Id. at 1208.

77. Id. at 1213.

78. Id.

79. Id. Inferrentially, average performance should not be taken into account at all.

80. Id. "How can he ever show his application is comparatively better if he does not get a hearing on it?" Id.

to those who will best serve the public interest.[81] The industry, however, is based on a system of competitive free enterprise. As such, its profit motive strongly conflicts with the public service concept.[82] Factors which enhance profit, such as increased commercialization, budgetized programming and avoidance of controversial issues, by definition decrease the quality of public service. The comparative hearing process can be envisioned as a means of reconciliation. It is a process by which new applicants, willing to provide better service by operation at a lower profit level than the incumbent,[83] are afforded the opportunity to convince the FCC that the public will benefit if they are granted a license. The FCC's 1970 Policy Statement, which removed whatever potential effectiveness the comparative hearing process had, proposed no other method of controlling the industry. The court, in *Citizens Communications Center*, by ruling the Policy Statement void, reestablished the rule of the *WHDH* decision and of *Ashbacker*.[84] Consequently, new applicants who are able to convince the FCC that they will provide better service than incumbents, should prevail. Practically, it will be difficult to overcome the inertia of the FCC's "rubber stamp" policy, although public interest groups such as CCC may be reaching the point where they will be able to provide the necessary impetus for change, and *Citizens Communications Center* may provide the necessary vehicle.

Administrative Law—Teachers' Rights—State University Must Provide a Statement of Reasons and a Hearing to a Nontenured Professor Upon Its Decision Not to Retain His Services.—Appellee, a nontenured professor, contracted to teach at a state university for one year. During that year the president of the university notified him that he would not be retained for the succeeding year. No reason was given nor was a hearing offered. The complaint alleged that the university's action was taken in retaliation for the professor's constitutionally protected expression of his opinions. The Court of Appeals for the Seventh Circuit, in affirming the district court,[1] held that the teacher was entitled to a statement of the reasons underlying his nonretention and a hearing at which he could respond and, further, that he could not be dismissed capriciously or wholly without reason. *Roth v. Board of Regents*, 446 F.2d 806 (7th Cir. 1971), cert. granted, 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No. 71-162).

Public employees fall into one of two categories with respect to retention. The

81. See, e.g., 47 U.S.C. § 309 (1970).

82. See generally R. Coase, The Economics of Broadcasting and Public Policy, in The Crisis of the Regulatory Commissions 93 (P. MacAvoy ed. 1970).

83. See generally R. Coase, supra note 82. In the nation's top 50 markets "the rate of return on capital for some stations [has been] 200 or 300 percent per annum (after taxes)." Id. at 95.

84. Compare 16 F.C.C.2d at 9-11 with notes 76-80 supra and accompanying text.

1. Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970), aff'd, 446 F.2d 806 (7th Cir. 1971), cert. granted, 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No. 71-162).

first involves the employee whose position is protected by a statute[2] which guarantees notice and a hearing in the event of nonretention,[3] the other encompasses those who are not protected by such a statute. The latter's procedural rights are protected, if at all, only by judicial enforcement.[4] Public school teachers' tenure rights are determined by statute.[5] Central to the tenure system is the provision that a tenured teacher may be discharged only "for cause."[6] While tenure may be attained in several ways,[7] it is normally granted only after a probationary period of two to five years.[8] Tenured status provides a teacher with the substantive right not to be dismissed except "for cause."[9] Procedurally,

2. See, e.g., 5 U.S.C § 7501 (1970); N.Y. Civ. Serv. Law § 75 (McKinney Supp. 1970); Wis. Stat. Ann. § 37.31 (Supp. 1971).

3. Employees protected by statute must receive written notice stating the reason for dismissal and an opportunity to reply to the charges. 5 C.F.R. § 752.202 (1971). Even where the statute itself does not provide for notice and hearing, the fact that removal is "for cause" implies such a result. Shurtleff v. United States, 189 U.S. 311 (1903); Reagan v. United States, 182 U.S. 419 (1901); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), cert. denied, 396 U.S. 843 (1969); Napolitano v. Ward, 317 F. Supp. 79 (N.D. Ill. 1970); Winslow v. Minto, 164 Ore. 495, 102 P.2d 919 (1940).

4. See, e.g., Pickering v. Board of Educ., 391 U.S. 563 (1968); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971). This substantive constitutional protection is not affected by the presence or absence of state tenure laws. Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970), aff'd, 446 F.2d 806 (7th Cir. 1971), cert. granted, 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No. 71-162).

5. See, e.g., N.Y. Educ. Law § 3012 (McKinney 1970); Wis. Stat. Ann. § 37.31 (Supp. 1971).

6 "For cause" could include dismissal for insubordination, immoral character, conduct unbecoming a teacher, inefficiency, incompetency, physical or mental disability, or neglect of duty. N.Y. Educ. Law § 3012(2) (McKinney 1970). Other statutes merely refer generally to lack of efficiency or good behavior. See, e.g., Wis. Stat. Ann. § 37.31 (Supp. 1971).

7. Since many states do not have tenure statutes, and most existing statutes only protect public school teachers, tenure by contract is very important. Absent a tenure statute, a teacher is limited to those substantive and procedural rights which are stated in his contract. However, during the term of the contract, a teacher, unless he waives the right, may only be dismissed "for cause," just as under a tenure statute. Parker v. Board of Educ., 237 F. Supp. 222, 226 (D. Md.), aff'd, 348 F.2d 464 (4th Cir. 1965), cert. denied, 382 U.S. 1030 (1966); see Millar v. Joint School Dist. No. 2, 2 Wis. 2d 303, 86 N.W.2d 455 (1957); Curkeet v. Joint School Dist., 159 Wis. 149, 149 N.W. 708 (1914). In New York, a teacher may also gain tenure by estoppel. Eulalie M. Sanders, 72 N.Y. Dep't R. 39 (Educ. Dep't 1951). See generally Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1099-1104 (1968).

8. E.g., N.Y. Educ. Law § 3012(1) (McKinney 1970) (three years probation); Wis. Stat. Ann. § 37.31 (Supp. 1971) (five years probation). Contra, Wash. Rev. Code § 28A.67.070 (1970) (no probation).

9. See N.Y. Educ. Law § 3020-a (McKinney 1970). The New York statute requires written notice to the teacher specifying the charges in detail and outlining his rights under the statute. The teacher may then request a hearing at which he is entitled to be represented by counsel, and to cross-examine witnesses who are to be under oath. A stenographic record of the hearing, if kept, is made available to the teacher. The right of appeal is also given

he is also assured that, once charges are brought, he will have notice of their content and an opportunity to answer them at an administrative hearing.[10] The nontenured public school teacher, however, has only the rights of a non-protected public employee.[11]

The Court of Appeals for the Fifth Circuit has extended nontenured teachers' rights by equating an "expectancy of reemployment" with tenure.[12] In *Ferguson v. Thomas*[13] and *Sindermann v. Perry*,[14] public university teachers alleged that they had been dismissed for exercising their constitutionally protected rights of expression and association. In *Sindermann* the court held that for procedural rights to be granted, it must be determined that the teacher had tenure or an "expectancy of reemployment."[15] Once either of these is present the teacher cannot be refused reemployment except "for cause,"[16] and a list of reasons for

whereby the teacher may appeal to the commissioner of education or to the courts. Id. However, review by the courts may be inadequate. New York courts will not overturn an administrative decision unless it is "arbitrary and capricious." See Board of Educ. v. Allen, 6 N.Y.2d 127, 160 N.E.2d 60, 188 N.Y.S.2d 515 (1959). In other states the reviewing court will uphold a ruling by the board of education as long as such ruling was based upon "substantial evidence." See Hauswold v. Board of Educ., 20 Ill. App. 2d 49, 155 N.E.2d 319 (1958); Swisher v. Darden, 59 N.M. 511, 287 P.2d 73 (1955).

10. See note 3 supra and accompanying text.

11. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); cf., e.g., Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), cert. denied, 396 U.S. 843 (1969); Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984 (W.D. Wis. 1970); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970), aff'd, 446 F.2d 806 (7th Cir. 1971), cert. granted, 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No 71-162).

12. Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970). In that case the court held that a nontenured teacher's long employment in a continuing relationship through the use of renewals of short-term contracts was sufficient to give him the expectancy of reemployment necessary to construct a protectible interest. Id. at 947.

13. 430 F.2d 852 (5th Cir. 1970).

14. 430 F.2d 939 (5th Cir. 1970), cert. granted, 403 U.S. 917 (1971). Since the Supreme Court has denied certiorari in other cases regarding rights of nontenured teachers, e.g., Fenton v. School Comm., 401 U.S. 929 (1971), denying cert. to DeCanio v. School Comm., 260 N.E.2d 676 (Mass. 1970); Freeman v. Gould Special School Dist., 396 U.S. 843 (1969), denying cert. to 405 F.2d 1153 (8th Cir.); Johnson v. Branch, 385 U.S. 1003 (1967), denying cert. to 364 F.2d 177 (4th Cir. 1966); Parker v. Board of Educ., 382 U.S. 1030 (1966), denying cert. to 348 F.2d 464 (4th Cir. 1965), Sindermann and Roth may yet provide a definitive answer in this area.

15. 430 F.2d at 943. The case was remanded for a determination regarding plaintiff's expectancy. Id. at 945. In Ferguson "expectancy of reemployment" was not an issue because the plaintiff alleged that his termination was based upon his exercise of the constitutionally protected rights of expression and association. These rights are protected even without tenure. See notes 19-24 infra and accompanying text.

16. Ferguson v. Thomas, 430 F.2d at 856; Sindermann v. Perry, 430 F.2d at 944. A determination that a teacher has an "expectancy of reemployment" also shifts the burden of proof. If plaintiff alleges that he was refused reemployment because of the exercise of his constitutional rights, he has the initial burden of proving the reason for termination. Once

nonretention and a hearing on the merits must be accorded.[17]

In cases involving public employees' rights, the courts have traditionally held that government employment without statutory protection can be terminated at the will of the appointing officer.[18] This view is subject, however, to the limitation that neither a teacher, tenured or not, nor, for that matter, any other public employee, can be dismissed for constitutionally impermissible reasons.[19] Thus a school board's decision not to rehire may not operate as an abridgement of the employee's constitutional rights of freedom of speech,[20] freedom of religion,[21] equal protection,[22] right against self-incrimination,[23] or the newly asserted right of freedom of association.[24] However, as long as no specific constitutional right is violated, the general rule has been that " '[t]he [school] board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all.' "[25] Procedurally, the traditional rule guaranteed a

an "expectancy of reemployment" is established, however, it becomes the school district's burden to show cause for the termination, just as with a tenured teacher. Id. at 943-44.

17. Ferguson v. Thomas, 430 F.2d at 856; Sindermann v. Perry, 430 F.2d at 944. The court in Ferguson held that when it is determined that a teacher who is to be terminated for cause opposes his termination, due process requires the following procedures: "(a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist, (b) he be advised of the names and the nature of the testimony of witnesses against him, (c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense, (d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges." 430 F.2d at 856 (citations omitted).

18. Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 896-97 (1961), citing Vitarelli v. Seaton, 359 U.S. 535, 539 (1959). In Vitarelli an Interior Department employee who had not qualified for statutory protection under the Civil Service Act, 5 U.S.C. § 7532 (1970), "could have been summarily discharged by the Secretary at any time without the giving of a reason . . . ." 359 U.S. at 539. See Taylor v. Beckham, 178 U.S. 548, 577 (1900); Crenshaw v. United States, 134 U.S. 99, 104 (1890).

19. Parker v. Board of Educ., 237 F. Supp. 222, 227-28 (D. Md.), aff'd, 348 F.2d 464 (4th Cir. 1965), cert. denied, 382 U.S. 1030 (1966); see Thaw v. Board of Public Instruction, 432 F.2d 98 (5th Cir. 1970); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991 (1970); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), cert. denied, 396 U.S. 843 (1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967); Shirck v. Thomas, 315 F. Supp. 1124 (S.D. Ill. 1970); DeCanio v. School Comm., 260 N.E.2d 676 (Mass. 1970), appeal dismissed and cert. denied sub nom. Fenton v. School Comm., 401 U.S. 929 (1971); Williams v. School Dist., 447 S.W.2d 256 (Mo. 1969).

20. Hetrick v. Martin, 322 F. Supp. 545 (E.D. Ky. 1971); Jones v. Battles, 315 F. Supp. 601 (D. Conn. 1970) (dictum).

21. Torcaso v. Watkins, 367 U.S. 488 (1961).

22. Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966); Franklin v. County School Bd., 360 F.2d 325 (4th Cir. 1966).

23. Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

24. Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952); Township Fed. of Teachers v. Hanover Community School Corp., 318 F. Supp. 757 (N.D. Ind. 1970).

25. Freeman v. Gould Special School Dist., 405 F.2d 1153, 1158 (8th Cir.), cert. denied, 396 U.S. 843 (1969), quoting 47 Am. Jur. Schools § 114 (1943).

nontenured teacher neither a statement of the reasons for his dismissal nor a hearing to answer the charges.[26]

In *Cafeteria Workers Local 473 v. McElroy*,[27] a short-order cook was denied access to the government owned facility where she worked for failure to satisfy security requirements. The Supreme Court held not only that the public employee could be summarily discharged,[28] but also that the employee was not entitled to a hearing or a statement of the reasons for her dismissal.[29] In coming to its determination on the latter issue, the Supreme Court enunciated a "balancing of interests" test which provided:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[30]

In balancing the equities, the Supreme Court has indicated that a greater degree of procedural protection must be given in a case involving one's field or profession generally,[31] as opposed to a specific job.[32] Several lower federal courts have required greater procedural safeguards where dismissal or nonretention of a public employee jeopardized his professional standing.[33] This balancing test has also been used extensively in determining whether nontenured teachers are entitled to certain procedural safeguards.

The Court of Appeals for the First Circuit dealt with the problem of nontenured teachers' rights in *Drown v. Portsmouth School District*.[34] A nontenured teacher who was not retained brought an action against the school district after her requests for a list of reasons and a hearing were denied. The court divided the procedural question into the separate issues of a right to a list of reasons and a

26. Freeman v. Gould Special School Dist., 405 F.2d 1153, 1160-61 (8th Cir.), cert. denied, 396 U.S. 843 (1969); Parker v. Board of Educ., 237 F. Supp. 222, 227 (D. Md.), aff'd, 348 F.2d 464 (4th Cir. 1965), cert. denied, 382 U.S. 1030 (1966); DeCanio v. School Comm., 260 N.E.2d 676, 680 (Mass. 1970), appeal dismissed and cert. denied sub nom. Fenton v. School Comm., 401 U.S. 929 (1971).

27. 367 U.S. 886 (1961).

28. Id. at 896-97.

29. Id. at 897-98.

30. Id. at 895.

31. See, e.g., Willner v. Committee on Character and Fitness, 373 U.S. 96, 103 (1963); Greene v. McElroy, 360 U.S. 474, 492, 496-97 (1959); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957).

32. See 367 U.S. at 896.

33. See, e.g., Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968) (physician); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) (physician); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969) (public school teacher).

34. 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971). This court had earlier confronted the problem of procedural due process rights in Medoff v. Freeman, 362 F.2d 472 (1st Cir. 1966). In that case the plaintiff was not a teacher, but a former employee of the Department of Agriculture whose position was not protected by a statute. In an action for reinstatement, the court held that since the plaintiff had not completed the probationary period at the time of his dismissal, due process did not require a hearing. Id. at 474.

right to a hearing, and applied the "balancing of interests" test to each category.[35] Since a statement of reasons was found to place only a small burden on the school board and to provide a great benefit to the individual,[36] the court held that a nontenured teacher is entitled to written notice stating the reasons for his dismissal.[37] However, the court also found that requiring a hearing would place an unbearable burden upon school boards[38] and therefore refused to extend that safeguard to nontenured teachers.[39]

Several district court decisions have held that upon nonretention, nontenured teachers are entitled to both a statement of the reasons for their dismissal and a hearing. In *Roth v. Board of Regents*[40] and *Gouge v. Joint School District No. 1*,[41] the District Court for the Western District of Wisconsin ruled upon both the procedural and substantive rights of a nontenured teacher. Applying the "balancing test" of *Cafeteria Workers*, the district court reached the opposite result in these cases. The district court distinguished the result reached in *Cafeteria Workers* by finding that a college professor and a public school teacher had more to lose by their dismissal than did a short-order cook,[42] and that the federal government had a greater interest in national security (*Cafeteria Workers*) than the state government had in the "unfettered control" of nontenured teachers in its proprietary educational capacity.[43] Because the court found that the "balancing of interests" in these cases favored the employee, it held that, procedurally, a nontenured college professor and a nontenured public school teacher were entitled to a list of reasons for their dismissal and a hearing at which to respond to those reasons.[44] Furthermore, the district court held in both *Roth* and *Gouge* that a nontenured teacher could not be refused reemployment on a basis wholly without support in fact.[45]

In *Orr v. Trinter*[46] a nontenured teacher requested, but was denied, written disclosure of the reasons for his nonretention as well as an opportunity to present

35. 435 F.2d at 1184, 1186.

36. Id. at 1184-85.

37. Id. at 1185.

38. Id. at 1185-87.

39. Id. at 1188. Similarly, in Olson v. Regents of Univ. of Minn., 301 F. Supp. 1356 (D. Minn. 1969), the court held "that while due process does not require a full hearing prior to dismissal, it does require advance written notice with the opportunity to respond either in writing or by an informal appearance." Id. at 1361.

40. 310 F. Supp. 972 (W.D. Wis. 1970), aff'd 446 F.2d 806 (7th Cir. 1971), cert. granted, 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No. 71-162).

41. 310 F. Supp. 984 (W.D. Wis. 1970).

42. Roth v. Board of Regents, 310 F. Supp. at 977-78; see Gouge v. Joint School Dist. No. 1, 310 F. Supp. at 991.

43. Roth v. Board of Regents, 310 F. Supp. at 978; see Gouge v. Joint School Dist. No. 1, 310 F. Supp. at 991-92.

44. Roth v. Board of Regents, 310 F. Supp. at 980; see Gouge v. Joint School Dist. No. 1, 310 F. Supp. at 992.

45. Roth v. Board of Regents, 310 F. Supp. at 979; Gouge v. Joint School Dist. No. 1, 310 F. Supp. at 991.

46. 318 F. Supp. 1041 (S.D. Ohio 1970), rev'd, 444 F.2d 128 (6th Cir. 1971).

his case and confront his accusers at a hearing. The district court was persuaded by the decision at the district court level in *Roth* and found that the balance of interests favored the teacher in this case as well.[47] The district court in *Orr v. Trinter* held that procedural safeguards for the nonretention of public school teachers must include a written statement[48] specifying the reasons for nonretention, notice of a hearing, and a hearing at which the teacher may reply to the stated reasons.[49] Upon appeal, the Court of Appeals for the Sixth Circuit reversed and applied the traditional rule[50] by holding that it was neither arbitrary nor capricious for the school board to refuse to renew a nontenured teacher's contract without giving reasons or holding a hearing.[51] In balancing interests the court of appeals held that "[a] non-tenured teacher's interest in knowing the reasons for the non-renewal of his contract and in confronting the Board on those reasons is not sufficient to outweigh the interest of the Board in free and independent action with respect to the employment of probationary teachers."[52]

In *Roth v. Board of Regents*[53] the Court of Appeals for the Seventh Circuit also applied the *Cafeteria Workers* "balancing of interests" test. Evaluating the equities involved in granting nontenured teachers a statement of reasons and a hearing, the court stated:

> We think the district court properly considered the substantial adverse effect nonretention is likely to have upon the career interests of an individual professor and concluded, after balancing it against the governmental interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection.[54]

In addition to requiring these procedural safeguards, and perhaps more importantly, the *Roth* court followed the lead of several other federal courts[55] and adopted a new standard for refusing to reemploy nontenured teachers, holding that " 'the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without

47. Id. at 1046.

48. Id. In Henson v. City of St. Francis, 322 F. Supp. 1034 (E.D. Wis. 1971), it was held that a nontenured teacher was entitled to notification of the reasons for his nonretention, but that the notification could be oral as well as written.

49. 318 F. Supp. at 1046.

50. See notes 18, 25 & 26 supra and accompanying text.

51. Orr v. Trinter, 444 F.2d 128, 135 (6th Cir. 1971).

52. Id.

53. 446 F.2d 806 (7th Cir. 1971), cert. granted, 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No. 71-162).

54. Id. at 809.

55. Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966); Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970), rev'd, 444 F.2d 128 (6th Cir. 1971); Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984 (W.D. Wis. 1970); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970), aff'd, 446 F.2d 806 (7th Cir. 1971), cert. granted, 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No. 71-162).

reason.' "[56] While the traditional rule that government employment is a privilege and not a right has been gradually eroded,[57] the *Roth* standard for nonretention is still a radical change. This new standard, however, was intended to be much less severe than the standard of "cause" applicable to tenured teachers.[58]

The *Roth* court felt that the effect of the procedural right to a hearing and a statement of reasons for nonretention would be twofold.[59] First, it would show whether the *Roth* standard of dismissal has been breached and the reason for nonretention was without basis in reason or in fact.[60] Secondly, the new procedures will serve to protect against nonretention decisions improperly based upon the teacher's exercise of protected constitutional rights.[61]

Judge Duffy, dissenting in *Roth*, raised several objections to the new safeguards prescribed by the majority. One objection was based upon the great burden, both financial and administrative, they would place upon the state.[62] Another was that, in his interpretation of the opinion, "the majority now goes beyond [prior] cases to hold that a university must 'shoulder the burden' in *all* cases, even in those situations where there is no allegation of infringement of First Amendment rights."[63]

This conclusion, however, is not literally mandated since the district court's decision, which the court of appeals affirmed, held that the burden of proof rests with the professor.[64] Thus the distinction between rights afforded tenured and nontenured professors should not become as blurred as Judge Duffy feared.[65] While a nontenured professor who is refused reemployment will now get a hearing and a report of the reasons for his dismissal, he still has the burden of proving that the university had no basis in fact for not retaining him. A tenured pro-

56. 446 F.2d at 808, quoting the opinion of the district court, 310 F. Supp. at 979.

57. See notes 19-24, 36-37 & 42-45 supra and accompanying text. See also Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 234 (1956); Van Alstyne, The Demise of the Right- Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

58. 446 F.2d at 808.

59. Id.

60. Id.

61. Id. at 810. See notes 19-24 supra and accompanying text for specifically protected constitutional rights. See also Drown v. Portsmouth School Dist., 435 F.2d 1182, 1184-85 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971).

62. 446 F.2d at 811. See also Drown v. Portsmouth School Dist., where the court outlined the burdens which hearings for nonretention of nontenured teachers would place upon school districts. 435 F.2d at 1185-87.

63. 446 F.2d at 814.

64. 310 F. Supp. at 980. Regarding the required procedures of stated reasons and a hearing, the district court said that "[a]t such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact." Id.

65. 446 F.2d at 812 (dissenting opinion).

fessor, on the other hand, may only be dismissed "for cause,"[66] and the university has the burden of proof in this regard.[67]

The importance of the *Roth* decision does not lie so much in its extension of the procedural requirements as in its establishment of a new standard for nonretention of nontenured teachers. Where the substantive right is great enough, due process must accord proper procedural safeguards.[68] Therefore the critical question, in the determination of which interests must be balanced, is whether nonretention of nontenured teachers should " 'rest on a basis wholly unsupported in fact, or on a basis wholly without reason,' "[69] not whether the procedures of hearing and statement of reasons are too great a burden for the state.

Civil Rights—Educational and Testing Requirements—Employment Tests Not to be Given Controlling Force Unless They are Demonstrably a Reasonable Measure of Job Performance.—Duke Power Company required a high school diploma or passage of certain standardized tests[1] as a condition of employment in, or promotion to, their more attractive departments. Black employees of the Dan River Steam Station of Duke Power brought a class action[2] under Title VII of the Civil Rights Act of 1964[3] alleging these requirements to be discriminatory and illegal. In rejecting the plaintiffs' claims, the district court held that section 703(h)[4] of the act neither empowered it to eliminate the present effects of past discrimination[5] nor required employment standards to be strictly related to the positions available.[6] The court of appeals reversed in part,[7] re-

66. See note 6 supra and accompanying text.

67. 446 F.2d at 808-10; see State ex rel. Ball v. McPhee, 6 Wis. 2d 190, 94 N.W.2d 711 (1959). See also note 6 supra.

68. See, e.g., notes 19-24, 36-37 & 42-45 supra and accompanying text for substantive rights protected by due process procedures.

69. 446 F.2d at 808, quoting the opinion of the district court, 310 F. Supp. at 979.

1. Griggs v. Duke Power Co., 401 U.S. 424, 428 (1971). The tests involved were the Wonderlic Personnel Test, "which purports to measure general intelligence," and the Bennett Mechanical Comprehension Test. Id. See note 79 infra and accompanying text.

2. Griggs v. Duke Power Co., 420 F.2d 1225, 1227-28 (4th Cir. 1970), rev'd in part, 401 U.S. 424 (1971). The class was defined as those blacks employed at the Dan River Steam Station and all blacks who might thereafter seek employment at or transfer to the Dan River Steam Station. 420 F.2d at 1227-28. The action was originally brought in a federal district court under authority of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(f), 78 Stat. 241, 260-61 (codified at 42 U.S.C. § 2000e-5(f) (1970)). The district court held that a class action was permissible under Fed. R. Civ. P. 23. Griggs v. Duke Power Co., 292 F. Supp. 243, 246 (M.D.N.C. 1968), rev'd in part, 420 F.2d 1225 (4th Cir. 1970), rev'd in part, 401 U.S. 424 (1971).

3. 42 U.S.C. § 2000e (1970).

4. Id. § 2000e-2(h).

5. 292 F. Supp. at 249.

6. Id. at 250.

7. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), rev'd in part, 401 U.S. 424 (1971).

jecting the holding that residual discrimination arising from prior practices was insulated from remedial action[8] while affirming the proposition that a test need only have a general business purpose.[9] The Supreme Court reversed the court of appeals on this point,[10] holding that Congress, through Title VII, had mandated that no tests be used unless necessary for the maintenance of the employer's business,[11] measuring "the person for the job and not the person in the abstract."[12] The Court found the educational and testing requirements imposed by Duke to be unnecessary and illegal because they invidiously discriminated against blacks who, due to a history of socio-economic deprivation, were unable to meet standards which in no way related to their ability to perform on the job.[13] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Racial discrimination in the area of employment has long been recognized as a serious social and economic problem.[14] Title VII of the Civil Rights Act of 1964 represents the first comprehensive attempt by the federal government to deal with this situation.[15] The title declared discrimination in the hiring, ad-

8. Id. at 1231.

9. Id. at 1235 & n.8.

10. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

11. Id. at 431.

12. Id. at 436.

13. Id. at 434. Chief Justice Burger delivered the opinion of the Court, in which all members joined except Justice Brennan, who took no part in the consideration or decision of the case.

14. See Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1599 n.3 (1969). "In January, 1969, the unemployment rate for white males was 2.2%. The figure for white females was 3.6%. The comparable figures for nonwhites were 4.8% and 5.8%. The unemployment rates for each group were higher, but roughly in the same proportion, in January, 1968. U.S. Dep't of Labor, Bureau of Labor Statistics, Employment and Earnings and Monthly Report on the Labor Force 77 (Feb. 1969)." Id. See also Report of National Advisory Comm'n on Civil Disorders 91 (1968), which stated that "[t]he record before this Commission reveals that the causes of recent racial disorders are imbedded in a massive tangle of issues and circumstances." Id. The Commissioners stated further: "At the base of this mixture are three of the most bitter fruits of white racial attitude .... The first is surely the continuing exclusion of great numbers of Negroes from the benefits of economic progress through discrimination in employment and education . . . ." Id; President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 75-77 (1967), discussing the connection between the black crime rate and black unemployment; cf. notes 77 & 78 infra and accompanying text.

15. Note, Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968, 82 Harv. L. Rev. 834, 834-35 (1969). For a review of earlier legislative attacks on discrimination in employment see Rosen, The Law and Racial Discrimination in Employment, 53 Calif. L. Rev. 729 (1965); Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum. L. Rev. 563 (1962); Proceedings, Toward Equal Opportunity in Employment: The Role of State and Local Government, 14 Buffalo L. Rev. 1 (1964). See also Comment, Fair Employment Policies and the Federal Contractor Program—Some Unanswered Questions, 37 Geo. Wash. L. Rev. 372 (1968), discussing the role of the executive in fighting discrimination in public employment.

vancement and discharge of employees to be illegal,[16] and established an administrative body, the Equal Employment Opportunity Commission (EEOC),[17] to deal with employee complaints as they arose.[18]

Certain members of Congress feared that the breadth of this legislation[19] might deny an employer the means of determining the "trainability and competence" of a prospective employee or of a present employee seeking promotion.[20]

16. 42 U.S.C. § 2000e-2(a) (1970). "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." Id. Employers covered by the act, with exceptions, are all private employers with twenty-five or more employees engaged in an industry affecting commerce, and all federal employers. Id. § 2000e-2(b).

17. Id. § 2000e-4 (1970). The act directed that the Commission be composed of five members, not more than three being members of the same political party, all to be appointed by the President and approved by the Senate. Id. § 2000e-4(a). The original members were appointed to staggered terms, but their successors were to serve terms of five years each. Id. The President was authorized to appoint the Chairman who was made responsible for the administrative operations of the Commission. Id. An annual report to Congress and the President concerning its activity was required of the Commission. Id. § 2000e-4(d). Washington was designated as the location of its central headquarters, but the Commission was empowered to establish such regional offices as might become necessary. Id. § 2000e-4(e).

18. Id. § 2000e-5. After allowing sixty days for an appropriate state agency to act, the Commission attempts to conciliate the dispute if probable cause exists to credit the charge. If the Commission is unable to affect conciliation, or after thirty days, it so informs the complainant. He is then entitled to take his case to court. Only the courts have the power to grant and enforce appropriate relief. Id. For a critical discussion of this process see Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Colum. L. Rev. 691, 706-07 (1968).

19. Members of Congress were confused as to the implications of much of the statute. Senator Morse (D., Ore.) stated during debate over the act: "If I ever saw a bill that needed to be clarified for the courts by way of a committee report, the argument which has taken place on the floor of the Senate in the past 14 days has shown that bill to be the one before the Senate." 110 Cong. Rec. 6419 (1964). This confusion resulted in a rash of explanatory and restrictive amendments. See 42 U.S.C. § 2000e-2(h) (1970) (the so-called Mansfield-Dirksen amendment, protecting the use of a "bona-fide seniority or merit system" not the result of an "intention to discriminate"); id. § 2000e-2(i) (protecting preferential treatment of Indians by business on or near a reservation); id. § 2000e-2(j) (assuring employers that Title VII could not be used to impose minority quota requirements).

20. 110 Cong. Rec. at 13492. Senator Tower (R., Tex.) was a moving force behind the amendments aimed at qualifying Title VII. Without an amendment safeguarding the use of employment examinations, the Senator felt that the EEOC was capable of finding that "college entrance examinations discriminate[d] against culturally deprived and disadvantaged persons. . . . Various examinations given by the Federal Government for civil service positions requiring special abilities could be ruled to be discriminatory. Bar examinations could be ruled to be discriminatory to the culturally deprived and disadvantaged." Id.

Myart v. Motorola,[21] a decision handed down by the Illinois Fair Employment Practices Commission, compounded this fear and resulted in the introduction of an amendment aimed at preserving the validity of fairly administered employment examinations.[22] *Myart* held that Motorola would have to either abandon or modify its then current hiring practices, particularly those requiring the successful completion of a standardized intelligence test.[23] The Commission stated: "The task is one of adapting procedures within a policy framework to fit the requirements of finding and employing workers heretofore deprived because of race . . . ."[24] Senator Case,[25] one of the act's floor managers, introduced a memorandum discounting *Myart* as precedent in an attempt to assure his colleagues that Title VII would not permit "even a Federal court to rule out the use of particular tests by employers because they do not 'equate inequalities and environmental factors among the disadvantaged and culturally deprived groups.' "[26] Nevertheless, Senator Tower,[27] sponsor of the original amendment which had been defeated,[28] insisted upon some limitation and proposed an amendment which was adopted as section 703(h) of the act.[29]

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[30]

The EEOC reported that test usage increased markedly upon the passage of the act, as did the employment of "doubtful testing practices which . . . have discriminatory effects."[31] Minority applicants were failing to attain minimum

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21. Unreported. Discussed, id. at 5662-64.

22. The first amendment introduced by Senator Tower allowed for the use of any "professionally developed ability test" as long as the examination was designed to determine or predict trainability and given to "all individuals seeking similar employment." Id. at 13493. This amendment was defeated by a vote of 49-38. Id. at 13505.

23. The job sought by the complainant was one as an "analyzer and phaser" or, as the Commission put it, a "trouble shooter." Id. at 5663. All applicants for this job were required to have a certain amount of training in the field of electronics, fill out a detailed application, be interviewed, and pass a test labeled "Test No. 10." Id. at 5662-63. The author of this test testified that it was "the shortest test of intelligence that has been developed, as far as he knew." Id. at 5663. It was said to "test verbal understanding, understanding of instructions . . . ." Id. (citation omitted).

24. Id. at 5664.

25. R., N.J.

26. 110 Cong. Rec. at 6415.

27. R., Tex.

28. See note 20 supra.

29. 110 Cong. Rec. at 13724. There were those who, although eventually agreeing to the amendment, felt it to be redundant, e.g., Senator Humphrey (D., Minn.), who found that it was "in accord with the intent and purpose of that title." Id.

30. 42 U.S.C. § 2000e-2(h) (1970).

31. 29 C.F.R. § 1607.1(b) (1971). Doubtful practices, as characterized by the Commission,

standards at "disproportionately high rates"[32] on examinations "lacking demonstrated validity (i.e., having no known significant relationship to job behavior) . . . ."[33] Therefore, in February 1966, the Commission issued its Guidelines on Employment Testing Procedures[34] which encouraged employers to seek out minority group applicants,[35] to examine them on the basis of specific job-related criteria,[36] and to adjust those differences in scores resulting from the inadvertent cultural and racial bias prevalent in standardized tests.[37] These requirements were somewhat vague[38] and were updated in a more comprehensive 1970 version.[39] The new guidelines compel an employer to maintain for inspection empirical evidence of the validity of any test used.[40] It is required that as part of this evidence studies be made which establish a significant correlation between tests and skills relevant to the job.[41] There must be included in these studies a testing sample which is "representative of the minority population available for the job or jobs in question . . . ."[42] Administration and scoring procedures also must be controlled and standardized.[43] "The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups."[44]

The courts have not been as demanding in their interpretation of section 703(h) as was the EEOC.[45] In *United States v. H.K. Porter Co.*[46] the use of a

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included the exclusive reliance on tests and the failure to obtain "evidence that they are valid predictors of employee job performance." Id.

32. Id.

33. Id.

34. EEOC, Guidelines on Employment Testing Procedures (1966).

35. Id. at 3.

36. Id.

37. Id. at 4.

38. See id. at 2-4. For this reason the Commission announced that it would "[scrutinize] carefully" the use of tests by those employers who had been guilty of discrimination in the past. Id. at 2.

39. 35 Fed. Reg. 12333 (1970) (codified at 29 C.F.R. §§ 1607.1-.14 (1971)).

40. 29 C.F.R. § 1607.4. See, e.g., Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), wherein the court reviewed "a plethora of lengthy affidavits and exhibits" (id at 207) dealing with the validity of exams administered to applicants for principalships in the New York City school system. Id. at 210-13.

41. 29 C.F.R. § 1607.4 (1971).

42. Id. § 1607.5(b)(1). Differential validity was required only where "technically feasible," (id. § 1607.5(b)(5)), e.g., "[w]here a minority group is sufficiently large to constitute an identifiable factor in the local labor market . . . ." Id.

43. Id. § 1607.5(b)(2).

44. Id. § 1607.5(b)(4). Discrimination in testing was defined by the Commission to be "[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity . . . unless: (a) the test has been validated and evidences a high degree of utility . . . (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use." Id. § 1607.3.

45. See Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964,

lengthy battery of twelve tests measuring nine aptitudes was challenged.[47] The court found that the H.K. Porter Company tested only a few of these aptitudes for any particular job, and that the "aptitudes which are measured are relevant to the jobs in the plant and in the departments and that where . . . [the tests] are not relevant, they are not used."[48] Moreover, the court refused to enforce those EEOC standards which called for comprehensive validating procedures[49] and allowed the use of hiring tests related only to the possibility of future advancement.[50] Similar conclusions were reached in *Dobbins v. Local 212, Electrical Workers*,[51] where two union admission tests were challenged as discriminatory. In finding one of them, a general intelligence test, to be invalid under section 703(h), the court ruled that "[t]he fair test of an individual's qualifications to work in the electrician trade in this geographical area is actual ability to work on the job in the trade for the average contractor operating in the trade."[52] Yet, in condemning the first and in giving their approval to the second of the two tests, this court also failed to give any real consideration to those EEOC guidelines which called for evidence of the use of validating procedures.[53]

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84 Harv. L. Rev. 1109, 1165 (1971), discussing the courts' lack of forcefulness as a function of the early stage of development of the law of employment discrimination.

46. 296 F. Supp. 40 (N.D. Ala. 1968). This action was brought by the Attorney General as a case of general public importance under 42 U.S.C. § 2000e-5(e) (1970).

47. The test involved in this case was the General Aptitude Test Battery (GATB) of the United States Employment Service, a battery of tests requiring two and one-half hours to administer. The aptitudes measured vary from "general intelligence" to "manual dexterity." 296 F. Supp. at 72. Plaintiff complained that these tests were unrelated to the jobs involved, which were all physically oriented (i.e., maintenance and production, id. at 53), and further, that they had not been subjected to the validating procedures necessary to avoid discrimination. Id. at 75-76.

48. Id. at 78.

49. Id. at 79. The court determined that it could not properly accept the proposition that "the use of aptitude tests without validation necessarily equals discrimination . . . ." Id. Assuming, arguendo, that the proposition was valid, the court found that the company personnel manager had sufficiently validated the exams by "study[ing] the performance on the job of employees who had been tested in light of their test scores." Id. at 76.

50. Id. at 78. The court found that the mathematical portion of the test could not be found to be unrelated to job performance, for the "fact that the reading of instructions and the use of mathematics are not required in this job is hardly evidence that they are not required in the higher rated jobs in the department." Id.

51. 292 F. Supp. 413 (S.D. Ohio 1968). The court held a so-called general "competency test," although objectively administered and graded, to be unrelated to the position sought since "the 44 who failed—and some dismally—were successfully employed, and had been for years, for major union contractors specializing in the building and construction areas." Id. at 433. For a discussion of the second test passed upon by the court see note 53 infra.

52. 292 F. Supp. at 434.

53. Id. at 439. In approving a test administered to applicants for apprenticeships, the court held that the test was "fairly and reasonably related to the proper aptitudes . . . properly selected . . . and . . . objectively administered and graded." Id. The court failed to discuss the EEOC validating requirements, stating only that differences in scores were concomitant with intellectual ability. Id.

Several cases have gone beyond *Porter* and *Dobbins* in insisting on the use of some procedure to adapt test results to variations in educational and cultural background, yet even these cases have been indefinite as to how thorough these procedures must be.[54] In *Arrington v. Massachusetts Bay Transportation Authority*[55] the court found that a standardized test, which was both unrelated to the jobs offered and classified so that de facto racial patterns would adversely affect minority groups, was unacceptable.[56] How the court reached this conclusion is unclear, but it would appear that they were dissatisfied with the lack of effort made to equalize the differential impact of the tests used.[57] The court was equally indefinite in *Penn v. Stumpf*[58] when it stated that "[w]hile general intelligence tests are a commonly used method of screening applicants in many phases of public and private employment, recent studies on culture differences have made the validity of such tests increasingly suspect."[59] A comparison between the total non-white population and the number of non-whites on the local police force created just such a suspicion in the court's mind and resulted in the use of the test being declared illegal.[60]

The courts have not been quite so hesitant to take a stand on the issue of prospectiveness, *i.e.*, whether Title VII reached the residual effects of a discrimination policy officially proscribed and terminated in 1965 but perpetuated through less obvious means. The most influential early case to deal with this problem, *Quarles v. Philip Morris, Inc.*,[61] answered this question in the affirmative.[62] In that case it was held that the present difference in departmental senior-

54. Penn. v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970); Arrington v. Massachusetts Bay Transp. Auth., 306 F. Supp. 1355 (D. Mass. 1969). See generally United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969) (partially subjective test marked on pass-fail basis held invalid); Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536 (E.D. La. 1970) (lack of significant study as to differential impact of Bennett and Wonderlic tests led to invalidation).

55. 306 F. Supp. 1355 (D. Mass. 1969).

56. Id. at 1358. The court found that the reason for the poor performance by blacks on the test used (the General Aptitude Test Battery) was not a lack of innate intelligence or ability in the applicants, but rather the "socio-economic realities of a history of economic, cultural and educational deprivation to which the black race has been subject." Id.

57. Id. at 1358-59. The court stressed two factors: one, that only 20% of the black applicants, as compared with 75% of the white applicants, had passed (id. at 1358); and two, that the same tests and scores were required of bus drivers and toll collectors. Id. at 1359.

58. 308 F. Supp. 1238 (N.D. Cal. 1970).

59. Id. at 1242.

60. Id. at 1243. The court accepted the holding of H.K. Porter that test validation, as an abstract proposition, is desirable. See 296 F. Supp. at 76-77. But the mere statistical disparities in test scores were not enough to establish discrimination. 308 F. Supp. at 1243. However, such a finding is called for when, according to the court, tests have not been validated and it can be shown that twice as many blacks as whites were applying for positions in a police force only 3-4% black in a city with a population 32-45% black. Id. at 1243 n.7.

61. 279 F. Supp. 505 (E.D. Va. 1968).

62. Id. at 517. Title VII cases have followed the lead of Quarles on the question of prospectiveness. See United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 134 (8th Cir.

ity between blacks and whites "[having] its genesis"[63] in the defendant's earlier policy of segregating departments was illegal.[64]

In *Griggs v. Duke Power Co.*,[65] the work force at the defendant's Dan River generating facility was divided into five main departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor.[66] The Labor Department was primarily responsible for the janitorial services in the plant, and its employees were the lowest paid.[67] Prior to 1966 Duke overtly discriminated against Negroes by refusing to hire or promote any black into the four "operational" departments, thereby limiting them to positions in the Labor Department.[68] In 1965, when Title VII took effect, Duke terminated this practice and replaced it with one which required a high school diploma and passage of two professionally developed aptitude tests for placement in all but the Labor Department.[69] For transfer into a department other than Labor an employee had only to meet one of these requirements, *i.e.*, a high school education *or* minimum scores on both exams.[70] Plaintiffs argued that these new standards were a sham, instituted to comply with Title VII but intended to perpetuate segregation between departments.[71] The defendant contended that they were instituted because of the developing complexity of its business.[72] This record presented the Court with three basic questions: (1) does Title VII reach the residual effects of past discrimination? (2) were the standards applied by Duke sufficiently validated to avoid these residual effects? and (3) by what rationale, if any, could such results be sanctioned under the act?

In dealing with the first question, the Chief Justice, writing for a unanimous Court, stated that the objective of Congress in enacting Title VII was "plain."[73]

1969); United States v. H.K. Porter Co., 296 F. Supp. 40, 56 (N.D. Ala. 1968); Dobbins v. Local 212, Electrical Workers, 292 F. Supp. 413, 443 (S.D. Ohio 1968). See also Gaston County v. United States, 395 U.S. 285, 296-97 (1969), wherein it was held that past discrimination in education made voting literacy requirements illegal.

63. 279 F. Supp. at 517.

64. Id. Philip Morris had maintained all-white and all-black departments. After passage of Title VII black workers were permitted to transfer to previously all-white departments, but only at the bottom rung. Id. at 512. Quarles was thereby prevented from transferring directly into a truck driver's position. The court held this barrier to be illegal. Id. at 515.

65. 401 U.S. 424 (1971), rev'g in part, 420 F.2d 1225 (4th Cir. 1970).

66. Id. at 427.

67. 420 F.2d at 1228. The maximum wage paid in the Labor Department was $1.56 per hour, which was less than the minimum paid in any other department. Maximum wages paid in other departments ranged from $3.18 per hour to $3.65 per hour. Id.

68. 401 U.S. at 427.

69. Id. at 427-28. Duke accepted both a high school education or its equivalent. 420 F.2d at 1229.

70. 401 U.S. at 428.

71. 420 F.2d at 1229.

72. Id. The company claimed that these requirements were instituted to cull out those applicants "unable to adjust to the increasingly more complicated work requirements and thus unable to advance through the company's lines of progression." Id.

73. 401 U.S. at 429. Mr. Justice Brennan did not participate in the decision.

It was to remove *any and all* barriers in the area of employment operating to favor one identifiable group of employees over another.[74] Consequently, "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[75] The Court, in determining that Duke's newly established qualifications were, in fact, maintaining their past discriminatory patterns, placed great emphasis on the fact that whites registered far better on the Company's alternative qualifications than did blacks.[76] As to the educational requirements, this result was traced to the "inferior education" received by blacks in the schools of North Carolina.[77] The Court cited 1960 census statistics which showed that, "while 34% of white males had completed high school, only 12% of Negro males had done so."[78] This inequity was compounded by the fact that, lacking a proper education, blacks were unable to compete on an equal basis with whites on the Wonderlic and Bennett tests.[79] "Basic intelligence," according to the Chief Justice, "must have the means of articulation to manifest itself fairly in a testing process."[80]

The Court determined, in response to the issues presented by questions two and three, that Duke's practices could not be prohibited on the basis of the residual effects alone. The Court stated that "the Act does not command that any person be hired simply because he was formerly the subject of discrimi-

74. Id. at 429-30.

75. Id. at 430.

76. Id. at 429.

77. Id. at 430. See Gaston County v. United States, 395 U.S. 285, 293-95 (1969), wherein the Court discussed the quality of black education in North Carolina, e.g., the poorer facilities, lower qualifications for teachers and lower pay for teachers. See also Hobson v. Hansen, 269 F. Supp. 401, 419-21 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc), where the court castigated the School Board of Washington, D.C., for the dilapidated buildings, lack of kindergarten facilities and lower per-pupil expenditures in black schools, all of which were factors contributing to the unequal education received by black children.

78. 401 U.S. at 430 n.6. See also Katin, Equal Educational Opportunity: The Emerging Role of the State Board of Education, 50 B.U.L. Rev. 211-14 (1970); Note, Integration: A Tool for the Achievement of the Goal of Quality Education, 14 How. L.J. 372, 377-84 (1968).

79. The Court reported that passing scores on the two required exams "approximated the national median [score] for high school graduates." 401 U.S. at 428 (footnote omitted). The test standards were thus "more stringent than the high school requirements, since they would screen out approximately half of all high school graduates." Id. at 428 n.3. The Court also cited an EEOC study in which it was found that the use of a battery of tests, including the Wonderlic and Bennett tests used by Duke, resulted in 58% of the whites passing as compared with only 6% of the blacks. Id. at 430 n.6. For an in-depth critique of the contents and cultural bias of these two exams see Cooper & Sobol, supra note 14, at 1641-42 nn.16 & 20; Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Colum. L. Rev. 691, 705 (1968); Comment, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1121-22 (1971).

80. 401 U.S. at 430.

nation, or because he is a member of a minority group."[81] However, the burden was placed upon Duke to justify the discriminatory consequences of their policy by a showing of business necessity.[82] The Company was unable to do so. Indeed, the record showed that employees who had not completed high school or taken the two tests continued to perform well and progress in the four favored departments.[83] Duke's failure to make any "meaningful study"[84] of the tests' relationship to job-performance ability was also instrumental in the Court's disapproval of the examinations. The fact that the Company instituted the new qualifications on the judgment of a vice-president that they "generally would improve the overall quality of the work force"[85] was deemed by the Court to be an inadequate substitute for the intensive validation required for such examinations.[86] Nor was the showing by Duke of a lack of an intent to discriminate sufficient in the eyes of the Court to allow for the continued use of the educational and testing standards.[87] The Court held that Title VII was directed at the consequences of employment practices, not their motivation.[88] The Court found Duke's policies to be " 'built-in headwinds' for minority

81. Id. at 430-31.

82. Id. at 431. Here, as throughout its interpretation of Title VII, the Court emphasized EEOC standards. See notes 31-44 supra and accompanying text and notes 86 & 88 infra.

83. 401 U.S. at 431-32 & n.7.

84. Id. at 431.

85. Id.

86. Id. at 431. The court of appeals felt that, since the tests given at Dan River were "professionally developed and . . . reliable . . . 'low level' tests . . . [administered] by one who has had special training in the administration of such tests," (420 F.2d at 1233) they were sufficiently validated. Id. at 1235. The Supreme Court, without setting any specific standards of its own, impliedly disagreed (401 U.S. at 431) via its discussion of the weight administrative interpretations such as the EEOC standards should be given. Id. at 433-34. See also note 88 infra.

87. 401 U.S. at 432. The Court held that the company had adopted the diploma and test requirements without any intention to discriminate against blacks. This was evidenced from Duke's policy of paying two-thirds of the expense incurred by an employee in securing a high school education or its equivalent. Id.

88. In reaching this conclusion, Chief Justice Burger emphasized that part of the act prohibiting employment practices " 'designed, intended or used to discriminate because of race . . . .' " Id. at 433, quoting 42 U.S.C. § 2000e-2(h) (1970) (emphasis deleted). By focusing on the consequences of employment practices, the Court adopted the EEOC interpretation of Title VII, finding it to be "expressing the will of Congress." Id. at 434. Administrative construction of legislative action has long been given great deference by the courts. See United States v. City of Chicago, 400 U.S. 8, 10 (1970) (ICC interpretation of 13a(1) of Interstate Communications Act adopted by Court); Udall v. Tallman, 380 U.S. 1, 4 (1965) (interpretation of executive order by Secretary of Interior must be respected if reasonable); Cox v. United States Gypsum Co., 284 F. Supp. 74, 78 (N.D. Ind. 1968), modified, 409 F.2d 289 (7th Cir. 1969) (EEOC interpretation and application of Title VII given great weight); International Chemical Workers Union v. Planters Mfg. Co., 259 F. Supp. 365, 366 (N.D. Miss. 1966) (EEOC interpretation of Title VII not conclusive but entitled to highest respect). But cf. Griggs v. Duke Power Co., 420 F.2d 1225, 1234 (4th Cir. 1970), rev'd in part, 401 U.S. 424 (1971) (court held EEOC interpretation of Title VII unreasonable and inapplicable where it was clearly contrary to compelling legislative history).

groups and unrelated to measuring job capability."[89] In striking them down, the Chief Justice noted: "Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality."[90]

On the surface, *Griggs* would seem to insure blacks the most objective evaluation possible in competing for jobs. It virtually makes law of the rigid Guidelines established by the EEOC.[91] However, in endorsing these criteria the Court has assumed that it is possible to develop tests which can satisfy them. No doubt there are tests which might be adapted to jobs and to business necessity, yet there are many who feel that, regardless of how intricate the validating procedures employed, no test can be developed which is free from cultural bias.[92] Faced with this problem, as well as with the expense and bother of complying with the guidelines, the employer may be persuaded to abandon the use of aptitude tests for less scientific means of selection and promotion with the attendant serious problems of proving discrimination.[93] The Court has also burdened the employer by requiring him to show a "manifest relationship"[94] between educational requirements and job capability. In doing so they have denied him the right of establishing a level of personnel quality of his own choosing. Perhaps the courts will find in future applications of this decision[95] that a more flexible approach, in which the subjective intent of the employer is given some consideration, would be less likely to alienate the employer and, therefore, more effectual in eradicating discrimination in employment.[96]

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89. 401 U.S. at 432.

90. Id. at 433.

91. See note 88 supra.

92. See D. Goslin, The Search for Ability 137-39 (1963); Adler, Intelligence Testing of the Culturally Disadvantaged: Some Pitfalls, 37 J. Negro Ed. 364, 365 (1968); Cameron, Nonintellectual Correlates of Academic Achievement, 37 J. Negro Ed. 252, 257 (1968); Krug, Some Suggested Approaches for Test Development and Measurement, 19 Personnel Psych. 24, 31 (1966).

93. See, e.g., Cooper & Sobol, supra note 14, at 1676-78, for a discussion of this evidentiary problem.

94. 401 U.S. at 432.

95. See Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971). In this case a preliminary injunction was granted barring the use of certain exams in choosing principals for the New York City schools. The court was as strict as the Griggs Court in judging the necessity and job-relatedness of the tests, but hinted at a more lenient approach to educational requirements in stating: "Current efforts to promote higher educational opportunities for minority groups will not produce qualified teachers for some years. But statistics as to the current dearth of qualified minority teachers do not have probative value with respect to the question before us, which is whether New York City's examination system discriminates against minority candidates who have already qualified as licensed teachers." Id. at 214 (emphasis deleted). "Where the education of our children is at stake, such insistence upon the highest possible quality in our teachers is a salutary and lawful objective, provided it does not result in racial discrimination between candidates who are otherwise eligible . . . ." Id.

96. But cf. Cooper & Sobol, supra note 14, at 1669-79, wherein the authors, in considering

Constitutional Law—Parolee Entitled to Counsel at a Parole Revocation Hearing.—The relator, Menechino, pleaded guilty in 1947 to a charge of murder in the second degree and was sentenced to prison for an indeterminate term of from twenty years to life.[1] He was released on parole in 1963. The following year he was declared delinquent, taken into custody and brought before a "parole court"[2] for a revocation hearing. At the hearing[3] the relator was not represented by counsel.[4] The board ordered his parole revoked and barred him from being reconsidered for further parole for at least two years.[5] Menechino then brought a habeas corpus proceeding[6] in the supreme court alleging that he had been deprived of his right to counsel at the parole revocation hearing. The lower court dismissed the petition.[7] Menechino appealed on constitutional grounds directly to the New York Court of Appeals[8] which held, for the first time, that the assistance of an attorney at a parole revocation hearing was mandated by the

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the ramifications of a totally effect-oriented approach such as adopted in Griggs, concluded that were employers thereby precluded from employing the objectivity of testing and educational standards they would be forced to use de facto quotas so as to avoid an adverse and illegal impact on minorities. The authors did not share the assumption that these "de facto quotas would be worse than existing de facto discrimination." Id. at 1677.

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1. People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 378, 267 N.E.2d 238, 318 N.Y.S.2d 449, 450 (1971). Menechino was sentenced pursuant to Law of Feb. 13, 1928, ch. 32, § 1, [1928] N.Y. Laws 151st Sess. 31.

2. 27 N.Y.2d at 378, 267 N.E.2d at 239, 318 N.Y.S.2d at 450. Menechino was brought before the parole board pursuant to Law of April 23, 1963, ch. 731, § 2, [1963] N.Y. Laws 186th Sess. 2493 (repealed 1970) (replaced by N.Y. Correc. Law § 212 (McKinney 1970)).

3. 27 N.Y.2d at 378-79, 267 N.E.2d at 239, 318 N.Y.S.2d at 450. Menechino agreed to the board's characterization of his relationship with a group of ex-convicts as "consorting" and then admitted that he had falsely denied knowing these ex-convicts. Id.

4. Id. Law of April 23, 1963, ch. 731, § 2, [1963] N.Y. Laws 186th Sess. 2493 (repealed 1970), stated that a parolee could not be represented by counsel at such hearings.

5. 27 N.Y.2d at 379, 267 N.E.2d at 239, 318 N.Y.S.2d at 450-51. The parole board took this action although there was no intimation that Menechino had committed a crime or participated in any criminal activity. He subsequently appeared before the board on three different occasions, each time without counsel, for reconsideration of his parole revocation. In each instance he was denied reconsideration. Id.

6. Menechino had initiated two unsuccessful proceedings before bringing the present action. He first brought an Article 78 proceeding (N.Y. C.P.L.R. Art. 78 (McKinney 1963)) in July 1968, asserting that he had a constitutional right to counsel. Special Term decided in his favor but this decision was reversed on procedural grounds without prejudice to the constitutional question presented. Menechino v. Division of Parole, 26 N.Y.2d 837, 258 N.E.2d 84, 309 N.Y.S.2d 585 (1970), aff'g mem. 32 App. Div. 2d 761, 301 N.Y.S.2d 350 (1st Dep't 1969), rev'g mem. 57 Misc. 2d 865, 293 N.Y.S.2d 741 (Sup. Ct. 1968).

The second action was brought in a federal district court seeking a declaratory judgment that he had a constitutionally protected right to procedural due process at a parole application hearing. The court of appeals affirmed the denial of this application. Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), aff'g 311 F. Supp. 319 (S.D.N.Y.).

7. 27 N.Y.2d at 379, 267 N.E.2d at 239, 318 N.Y.S.2d at 451.

8. Id. The appeal was taken under the provisions of N.Y. C.P.L.R. § 5601(b)(2) (McKinney 1963).

constitutions of both New York and the United States. *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).

In *Gideon v. Wainwright*[9] the Supreme Court held that the sixth amendment and the due process clause of the fourteenth amendment require that an indigent in a criminal proceeding be afforded an attorney's services and that if necessary the state must provide the attorney.[10] Both federal and state courts have extended *Gideon* beyond its original dimensions.[11] This liberal application of the sixth and fourteenth amendments was continued in *Mempa v. Rhay*,[12] wherein the Supreme Court held that there is a right to counsel at a probation revocation hearing.[13]

In *Mempa* the petitioner had been convicted on his plea of guilty, given a deferred sentence, and placed on probation on the condition, *inter alia*, that he

9. 372 U.S. 335 (1963), overruling Betts v. Brady, 316 U.S. 455 (1926).

10. Id. at 343-45.

11. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (welfare recipient entitled to certain procedural due process protections before termination of benefits, including the right to representation by retained counsel at a hearing); United States v. Wade, 388 U.S. 218 (1967) (right to counsel guaranteed not only at trial but also at any critical confrontation by the prosecution at pretrial proceedings where the results might well determine defendant's fate and where the absence of counsel might derogate from his right to a fair trial); In re Gault, 387 U.S. 1 (1967) (counsel required in a juvenile proceeding); Anders v. California, 386 U.S. 738 (1967) (failure to grant indigent petitioner seeking initial review of his conviction the services of an advocate (as contrasted with an amicus curiae) which would have been available to an appellant with financial means violated petitioner's rights to fair procedure and equality under the fourteenth amendment); Swenson v. Bosler, 386 U.S. 258 (1967) (assistance of appellate counsel to a criminal defendant is an advantage which may not be denied, solely because of indigency, on the only appeal which the state affords him as a matter of right); Miranda v. Arizona, 384 U.S. 436 (1966) (person in custody must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation); Escobedo v. Illinois, 378 U.S. 478 (1964) (an accused is denied the assistance of counsel in violation of the sixth and fourteenth amendments where a police investigation has begun to focus on a particular suspect in police custody who has been refused an opportunity to consult with his counsel and who has not been warned of his constitutional right to keep silent); Massiah v. United States, 377 U.S. 201 (1964) (petitioner is denied sixth amendment protection when evidence of his own incriminating words, which had been deliberately elicited from him in the absence of counsel after he had been indicted, is used against him at his trial); White v. Maryland, 373 U.S. 59 (1963) (a preliminary hearing is a critical stage of a proceeding where there is a constitutional right to counsel); Douglas v. California, 372 U.S. 353 (1963) (an indigent must be afforded counsel on appeal in a federal court whenever he challenges a certification that the appeal is not taken in good faith). People v. Hamilton, 26 App. Div. 2d 134, 271 N.Y.S.2d 694 (4th Dep't 1966), and People v. Reynolds, 25 App. Div. 2d 487, 266 N.Y.S.2d 604 (4th Dep't 1966), both held that a defendant accused of probation violations has a right to counsel and must be fully and correctly advised of such a right.

12. 389 U.S. 128 (1967).

13. Id. at 137. Compare Mempa with Williams v. Dunbar, 377 F.2d 505 (9th Cir. 1967), which had held a few months earlier that the parolee had no such right. See 42 N.Y.U.L. Rev. 955 (1967).

first spend thirty days in county jail.[14] Four months later the prosecuting attorney moved to have the petitioner's probation revoked on the ground that he had been involved in a burglary while on probation.[15] During the hearing to determine whether probation should be revoked, Mempa was not represented by counsel, nor was he asked whether he wished to have counsel appointed for him.[16] On the basis of the evidence presented, the court ordered probation revoked and the petitioner was sentenced.[17]

The Court stated that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."[18] Noting that the sixth amendment right to counsel extends to sentencing in federal cases,[19] the Court concluded that counsel should be provided at a probation revocation hearing since in such a case "the eventual imposition of sentence . . . is based on the alleged commission of offenses [burglary while on probation] for which the accused is never tried."[20] The Court did not question Washington's deferred sentencing procedure, but limited its decision to the question of a right to counsel.[21]

Although the holding in *Mempa* was limited to its specific facts in several federal court decisions,[22] its rationale has subsequently been applied by both state and federal courts.[23] In *Hewett v. North Carolina*[24] the United States Court of Appeals for the Fourth Circuit unequivocally applied the *Mempa* doctrine with-

14. 389 U.S. at 130. Sentence was deferred pursuant to Wash. Rev. Code §§ 9.95.200 & 9.95.210 (1968).

15. 389 U.S. at 130-31.

16. Id. at 131.

17. Id. In this situation the trial judge is required by statute to impose the maximum sentence provided by law for the offense committed. Wash. Rev. Code § 9.95.010 (1971). Washington law also requires the judge to recommend to the parole board the amount of time that the defendant should serve in prison. Id. § 9.95.030.

18. 389 U.S. at 134.

19. Id.

20. Id. at 137. There can be no doubt that the Court was influenced by Washington case law which provided that an appeal in a case involving a plea of guilty followed by probation can only be taken after sentence is imposed following revocation of probation. Id. at 135-36. The Court stated: "Therefore in a case where an accused agreed to plead guilty, although he had a valid defense, because he was offered probation, absence of counsel at the imposition of the deferred sentence might well result in loss of the right to appeal." Id. at 136.

21. Id. at 137. "All we decide here is that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing." Id.

22. Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968); United States ex rel. Bishop v. Brierly, 288 F. Supp. 401 (E.D. Pa. 1968); Holder v. United States, 285 F. Supp. 380 (E.D. Tex. 1968); Sommons v. United States, 285 F. Supp. 100 (S.D. Tex. 1968); see Hewett v. North Carolina, 415 F.2d 1316, 1322 (4th Cir. 1969).

23. See, e.g., Hewett v. North Carolina, 415 F.2d 1316, 1322 (4th Cir. 1969); People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965); People v. Hamilton, 26 App. Div. 2d 134, 271 N.Y.S.2d 694 (4th Dep't 1966); People ex rel. Decker v. Martin, 57 Misc. 2d 57, 291 N.Y.S.2d 408 (Sup. Ct. 1968).

24. 415 F.2d 1316 (4th Cir. 1969).

out confining it to the specific facts of *Mempa*.[25] The court of appeals recognized a factual distinction between *Mempa* and *Hewett*.[26] In *Mempa* the Supreme Court dealt with a situation in which no sentence was initially imposed.[27] Sentencing was delayed until such time as probation was revoked, thus making the revocation hearing part of the sentencing procedure.[28] In *Hewett* the revocation of probation simply reinstated the original sentence.[29]

The court in *Hewett* reasoned that probation was a stage of the criminal proceeding even though, unlike *Mempa*, a new sentence was not imposed.[30] Judge Winter, speaking for the majority, based his decision on the fact that revocation of probation is a restriction on individual liberty and rejected the argument that probation is a mere privilege or matter of grace to which constitutional mandates do not apply:

> [W]hen a state undertakes to institute proceedings for the disposition of those accused of crime it must do so consistently with constitutional privileges, even though the actual institution of the procedure was not constitutionally required.[31]

This interpretation has been followed in New York.[32]

While the right to counsel at probation revocation hearings was before the courts, the closely related issue of the right to counsel at parole revocation hearings was also being raised. Many states have enacted legislation relating to this question.[33] Although commentators have argued for a right to counsel at such a hearing,[34] case law has generally run to the contrary.[35]

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25. Id. at 1322. "As we read Mempa we are persuaded, unlike the majority of the decisions which deny the right to counsel, that it cannot be limited to its narrow factual context." Id.

26. Id.

27. 389 U.S. at 132.

28. Id. at 131.

29. 415 F.2d at 1318.

30. Id. at 1322.

31. Id. at 1323 (citation omitted). See also Griffin v. Illinois, 351 U.S. 12 (1956).

32. See New York cases cited note 23 supra.

33. Several states by statute permit a prisoner to be represented by counsel at parole hearings. See, e.g., Ga. Code Ann. § 77-541 (1968); Mich. Comp. Laws Ann. § 791.240(a) (Supp. 1971); Mont. Rev. Codes Ann. § 94.9835 (1969); Tex. Code Crim. Proc. Ann. art. 42.12, § 18 (Supp. 1970). Other states allow the parole board to decline to hear counsel. See, e.g., Del. Code Ann. tit. 11, § 4350 (Supp. 1970); Kan. Stat. Ann. § 62-2248 (1964); Minn. Stat. § 637.06, renumbered, § 243.05 (Supp. 1960); N.M. Stat. Ann. § 41-17-27 (1955). See Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. Crim. L.C. & P.S. 175 (1964) for a complete schedule of state statutes with respect to requirements for a hearing and counsel in probation and parole revocation hearings.

34. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services 68 (Approved Draft, 1967); ABA Project on Standards for Criminal Justice, Standards Relating to Probation § 5.4(a)(ii) (Approved Draft, 1970); Model Penal Code §§ 301.4, 305.15 (Proposed Official Draft 1962); President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society 150 (1967); Cohen, Due Process, Equal Protection and State Parole Revocation Proceedings, 42 U. Colo. L. Rev. 197 (1970); Sklar, supra note 33, at 181-82; Note, Constitutional

Section 218 of the New York Correction Law[36] provided that at a parole revocation hearing a prisoner shall be given "an opportunity to appear personally, *but not through counsel or others*, before such board of parole and explain the charges made against him."[37]

In 1959, the Appellate Division of the Third Department held that in an *application for parole* a prisoner had no constitutional right to be represented by counsel at a hearing before the Board of Parole.[38] This decision was followed eleven years later in *Briguglio v. Board of Parole*.[39] In that case the court distinguished *Mempa*, stating that there are substantial differences between the revocation of probation and the granting of parole. When his probation was revoked Mempa was being deprived of his freedom which, the court argued, had never been completely taken from him. The court stated that in a parole application hearing, however, a prisoner would not be divested of his freedom because he would already be incarcerated at the time of the hearing.[40]

On the question of right to counsel at parole revocation hearings, lower New York courts have rendered contradictory decisions.[41] In *People ex rel. Combs v.*

Law, Parole Status and the Privilege Concept, 1969 Duke L.J. 139; Note, Parole Revocation in the Federal System, 56 Geo. L.J. 705, 719-26 (1968); cf. Comment, Freedom and Rehabiltation in Parole Revocation Hearings, 72 Yale L.J. 368 (1962). But see sources cited at note 33 supra.

35. See, e.g., Earnest v. Willingham, 406 F.2d 681, 683 (10th Cir. 1969); Rose v. Haskins, 388 F.2d 91 (6th Cir.), cert. denied, 392 U.S. 946 (1968); Williams v. Dunbar, 377 F.2d 505 (9th Cir. 1967); Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963); Johnson v. Stucker, 203 Kan. 253, 453 P.2d 35, cert. denied, 396 U.S. 904 (1969); Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966); State ex rel. London v. Pardon & Parole Comm'n, 2 Ohio St. 2d 224, 208 N.E.2d 137 (1965); Beal v. Turner, 22 Utah 2d 418, 454 P.2d 624 (1969). The courts of three states have, however, held that a right to counsel at a probation revocation hearing is constitutionally mandated. Warden v. Palumbo, 214 Md. 407, 135 A.2d 439 (1957); Warren v. Parole Bd., 23 Mich. App. 754, 179 N.W.2d 664 (1970); Commonwealth v. Tinson, 433 Pa. 328, 249 A.2d 549 (1969).

36. Law of April 23, 1963, ch. 731, § 2, [1963] N.Y. Laws 186th Sess. 2494 (repealed 1970) (section remains effective as to those offenses committed prior to Sept. 1, 1967. Law of May 8, 1970, ch. 476, § 44, [1970] N.Y. Laws 193rd Sess. 1958).

37. Id. (emphasis added).

38. Schwartzberg v. Oswald, 8 App. Div. 2d 570, 183 N.Y.S.2d 521 (3d Dep't 1959).

39. 55 Misc. 2d 584, 285 N.Y.S.2d 883 (Sup. Ct.), aff'd mem., 30 App. Div. 2d 639 (3d Dep't 1968), aff'd, 24 N.Y.2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969).

40. Id. at 585-86, 285 N.Y.S. 2d at 885. The court concluded that this subject "may well . . . be viewed by others in an entirely different light." Id. at 586, 285 N.Y.S.2d at 885. See also People ex rel. Ochs v. La Vallee, 60 Misc. 2d 629, 303 N.Y.S.2d 774 (Sup. Ct.), aff'd, 33 App. Div. 2d 80, 307 N.Y.S.2d 982 (3d Dep't 1969), which reviewed the history of New York law concerning the right to counsel.

41. Compare People ex rel. Combs v. La Vallee, 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (4th Dep't 1968), and Menechino v. Division of Parole, 57 Misc. 2d 865, 293 N.Y.S.2d 741 (Sup. Ct. 1968), rev'd on procedural grounds, 32 App. Div. 2d 761, 301 N.Y.S.2d 350 (1st Dep't 1969), aff'd mem., 26 N.Y.2d 837, 258 N.E.2d 84, 309 N.Y.S.2d 585 (1970), with People ex rel. Smith v. Deegan, 32 App. Div. 2d 940, 303 N.Y.S.2d 789 (2d Dep't 1969), and People ex rel. Johnson v. Follette, 58 Misc. 2d 474, 295 N.Y.S.2d 565 (Sup. Ct. 1968).

La Vallee[42] the court held that the right existed,[43] stating that although there are basic differences between probation and parole,[44] these differences are not so vital that the presence of counsel should be mandated in the one and denied outright in the other.[45] Justice Bastow, writing for the majority, argued that section 218 of the Correction Law[46] gave a parolee the right "to appear personally . . . and explain the charges made against him,"[47] and concluded that without the right to counsel this statutory guarantee would be of little avail.[48]

> When all the legal niceties are laid aside a proceeding to revoke parole involves the right of an individual to continue at liberty or to be imprisoned. It involves a deprivation of liberty just as much as did the original criminal action, and it is submitted, falls within the due process provision of section 6 of article I of our State Constitution.[49]

In the same year that *Combs* was decided Chief Judge Fuld of the New York Court of Appeals wrote in his dissenting opinion in *People v. Simons*[50] that, although the question need not be considered in that case, he was "inclined to the view that a parolee is also entitled to be represented by counsel in a parole revocation proceeding which is truly independent of, and unrelated to, a criminal prosecution brought against the parolee."[51] Shortly thereafter, the Supreme Court of Dutchess County, in *People ex rel. Johnson v. Follette*,[52] held that no such right existed. The court took cognizance of both *Combs* and Chief Judge Fuld's statement in *People v. Simons*, but concluded that in order for the relator

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42. 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (4th Dep't 1968).

43. Id. at 131, 286 N.Y.S.2d at 602. The court based its decision on New York case law and the state constitution but did not go as far as to state that the United States Constitution mandated such a result. Id.

44. Id., 286 N.Y.S.2d at 603. The court stated that in parole situations, contrary to probation hearings, the sentence imposed by the court may not be changed and also that a violation of parole is not part of a criminal proceeding. Id.

45. Id.

46. Law of April 23, 1963, ch. 731, § 2, [1963] N.Y. Laws 186th Sess. 2493 (repealed 1970).

47. 29 App. Div. 2d at 131, 286 N.Y.S.2d at 603, quoting Law of April 23, 1963, ch. 731, § 2, [1963] N.Y. Laws 186th Sess. 2493 (repealed 1970).

48. 29 App. Div. 2d at 131, 286 N.Y.S.2d at 603. " 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' (Powell v. Alabama, 287 U.S. 45, 68-69 [(1932)])." Id.

49. Id.

50. 22 N.Y.2d 533, 543, 240 N.E.2d 22, 28, 293 N.Y.S.2d 521, 529 (1968) (Fuld, C.J., dissenting), cert. denied, 393 U.S. 1107 (1969). The case was unrelated to the question of right to counsel at a parole revocation hearing.

51. Id. at 545, 240 N.E.2d at 28-29, 293 N.Y.S.2d at 531.

52. 58 Misc. 2d 474, 295 N.Y.S.2d 565 (Sup. Ct. 1968).

to succeed, "a clear constitutional right to the relief sought must be shown."[53] The court concluded that, unlike the situation in *Mempa*, parole revocation is not a stage of a criminal proceeding,[54] and held that nothing in the United States Constitution required that the parolee be afforded counsel.[55] The majority also examined the guarantee in the New York State Constitution[56] of the right to counsel in a trial "in any court"[57] but differed with *Combs* by holding that the characterization of the Parole Board as a "court" is not in accord with the meaning intended by the state constitution.[58]

In *Menechino v. Division of Parole*,[59] which was subsequently reversed on procedural grounds, the court, in holding that a right to counsel was constitutionally mandated, stated:

> The present dialogue and decisional trend throughout the land seems to suggest that at *any* stage of *any* proceeding involving a person's liberty, an 'accused' is entitled to a hearing as a matter of constitutional right; he must be afforded the same opportunity to defend himself and explain his actions as that afforded a defendant in a court action; that both the right to counsel and to meaningful advice with respect to such right are concomitants of such a hearing and perhaps the most important individuating notes of due process.[60]

The opposite view was again expressed in *People ex rel. Smith v. Deegan*,[61] where the court cited a number of federal court decisions[62] in arguing that "parole is a matter of grace and . . . such a hearing does not involve constitutional due process, neither the assistance of counsel nor even a hearing being constitutionally mandated . . . ."[63] The court reasoned that the parole revocation hearing is neither a "trial" nor "a judicial proceeding" within the meaning of the federal or state constitutions.[64] Quoting *People ex rel. Johnson v. Follette*,[65] the majority then stated that " '[i]t is an administrative proceeding, not judicially reviewable, where a purely discretionary determination concerning the withdrawal of a privilege, not a right, is made'. . . ."[66]

53. Id. at 476, 295 N.Y.S.2d at 568.

54. Id. at 479-80, 295 N.Y.S.2d at 571-72.

55. Id. at 480, 295 N.Y.S.2d at 572.

56. N.Y. Const. art. I, § 6.

57. 58 Misc. 2d at 480, 295 N.Y.S.2d at 572.

58. Id.

59. 57 Misc. 2d 865, 293 N.Y.S.2d 741 (Sup. Ct. 1968), rev'd on procedural grounds, 32 App. Div. 2d 761, 301 N.Y.S.2d 350 (1st Dep't 1969), aff'd mem., 26 N.Y.2d 837, 258 N.E.2d 84, 309 N.Y.S.2d 585 (1970).

60. Id. at 866, 293 N.Y.S.2d at 742. See generally Model Penal Code § 305.15 (Proposed Official Draft 1962); Sklar, supra note 33, at 175.

61. 32 App. Div. 2d 940, 303 N.Y.S.2d 789 (2d Dep't 1969).

62. Id. at 941, 303 N.Y.S.2d at 791, citing Eason v. Dickson, 390 F.2d 585 (9th Cir. 1968), cert. denied, 392 U.S. 914 (1968); Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968); Rose v. Haskins, 388 F.2d 91 (6th Cir.), cert. denied, 392 U.S. 946 (1968); Williams v. Dunbar, 377 F.2d 505 (9th Cir.), cert. denied, 389 U.S. 866 (1967).

63. 32 App. Div. 2d at 941, 303 N.Y.S.2d at 790-91 (citation omitted).

64. Id., 303 N.Y.S.2d at 792.

65. 58 Misc. 2d 474, 480, 295 N.Y.S.2d 565, 572 (Sup. Ct. 1968).

66. 32 App. Div. 2d at 941, 303 N.Y.S.2d at 792 (citation omitted).

These contradictory lower court holdings were resolved by the court of appeals in *People ex rel. Menechino v. Warden*,[67] wherein the court squarely held that the right to counsel is constitutionally mandated.[68]

The court argued that this case, like *Mempa*, involved the central issue of liberty or imprisonment.[69] It stated that the principle enunciated in *Mempa* was sufficiently broad to encompass not only revocation of probation, but also revocation of parole, since the value of counsel in developing and probing factual and legal problems is equally important in both proceedings.[70] The court went on to state that the right to be heard[71] would be practically useless without proper legal representation,[72] concluding that:

> It is for reasons such as these that the Supreme Court, rejecting all efforts to limit the right to counsel to the narrow confines of 'criminal prosecutions' under the Sixth Amendment, has treated such right as an essential element of due process applicable to all proceedings, whether they be classified as civil, criminal or administrative, where individual liberty is at stake.[73]

The court found completely unpersuasive the contention that since parole is a mere "privilege"[74] the right to counsel may properly be denied.[75] The majority

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67. 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).

68. Id. at 380, 267 N.E.2d at 240, 318 N.Y.S.2d at 452 (citations omitted).

69. Id. at 381-82, 267 N.E.2d at 241, 318 N.Y.S.2d at 453. The court did not discuss Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969), a probation revocation case which presented a fact situation of greater similarity to the subject case than did Mempa. Hewitt, like Menechino, dealt with a situation in which the revocation simply reinstated the original sentence while in Mempa sentence was delayed until such time as probation was revoked. See text accompanying notes 26-29 supra.

70. 27 N.Y.2d at 381-82, 267 N.E.2d at 241, 318 N.Y.S.2d at 453-54.

71. See Law of April 23, 1963, ch. 731, § 2, [1963] N.Y. Laws 186th Sess. 2493 (repealed 1970).

72. 27 N.Y.2d at 382, 267 N.E.2d at 241, 318 N.Y.S.2d at 454. See Goldberg v. Kelly, 397 U.S. 254, 270 (1970); Powell v. Alabama, 287 U.S. 45, 68-69 (1932). The court reasoned: "Certainly, a 'parole court' or a parole board panel may not be permitted—simply because it is an administrative body rather than a judicial tribunal—to base its determination, having so serious an impact on the lives of the individuals who appear before it, on a possibly mistaken view of the facts owing to the parolee's inability to make a proper factual presentation. In the present case, for instance, counsel would have been able not only to analyze and question the accuracy of the parole supervisor's report but also would have been available to educe and marshall the facts necessary to refute the technical and rather ambiguous charge of 'consorting.'" 27 N.Y.2d at 382-83, 267 N.E.2d at 241-42, 318 N.Y.S.2d at 454.

73. 27 N.Y.2d at 383, 267 N.E.2d at 242, 318 N.Y.S.2d at 454, citing Mempa v. Rhay, 380 U.S. 128 (1967); In re Gault, 387 U.S. 1 (1967). See also Specht v. Patterson, 386 U.S. 605 (1967); Hewett v. North Carolina, 415 F.2d 1316, 1323 (4th Cir. 1969); United States ex rel. Schuster v. Herold, 410 F.2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969); Shone v. Maine, 406 F.2d 844 (1st Cir.), vacated as moot, 396 U.S. 6 (1969).

74. Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935), enunciated the right-privilege doctrine by stating that "[p]robation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." Since then, however, the Supreme Court has consistently held that sub-

held that both the United States and New York State Constitutions require legal representation.[76]

Chief Judge Fuld, speaking for the majority, concluded with the argument that social policy requires such a step.

> Although few circumstances could better further that purpose [the rehabilitation of convicted criminals] than a belief on the part of such offenders in a fair and objective parole procedure, hardly anything could more seriously impede progress toward that important goal than a belief on their part that the law's machinery is arbitrary, too busy or impervious to the facts.[77]

Judge Scileppi dissented, relying on *Briguglio v. Board of Parole*,[78] for his contention that the special nature of the parole system militates against a right to counsel at a parole revocation hearing.[79] The parolee is not a free man because he is under the supervision of parole officials and, since Menechino had already been tried and convicted, the action of the board was not a taking of his liberty within the meaning of the due process clause.[80] Judge Scileppi stated that while in *Mempa* the probationer was not sentenced until after the probation revocation hearing, in this case the parolee had already been sentenced.[81] He further argued that since the parole revocation proceeding is nonadversary, as opposed to a trial proceeding, a right to counsel is not guaranteed.[82] Further-

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stantial interests, even though denominated "privileges," may not be taken from an individual by governmental action in disregard of fundamental constitutional rights. See, e.g., Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 894 (1961); Speiser v. Randall, 357 U.S. 513, 518 (1958); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952). A recent case, Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969), while recognizing the existence of a right-privilege dichotomy, reasoned that when a state grants a privilege to an accused it must do so consistently with the dictates of the Constitution. Id. at 1323. One author has argued that the concept of "privilege" is today no longer viable and that, because of the increased governmental role in today's society, there is a need for due process control of the state in all its capacities. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1445-64 (1968).

75. 27 N.Y.2d at 384, 267 N.E.2d at 242, 318 N.Y.S.2d at 455.

76. Id. at 383, 267 N.E.2d at 242, 318 N.Y.S.2d at 454. The court reasoned, however, that the effect of its holding need not result in unreasonable delays in the parole revocation process, stating: "In other words, participation by counsel need be no greater than is required to assure, to the board as well as to the parolee, that the board is accurately informed of the facts before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for that same purpose." Id., 267 N.E.2d at 242, 318 N.Y.S.2d at 455.

77. Id. at 386, 267 N.E.2d at 243-44, 318 N.Y.S.2d at 456-57.

78. 24 N.Y.2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969), aff'g 30 App. Div. 639 (3d Dep't 1968), aff'g 55 Misc. 2d 584, 285 N.Y.S.2d 883 (Sup. Ct.).

79. 27 N.Y.2d at 387-89, 267 N.E.2d at 244-46, 318 N.Y.S.2d at 458-59 (dissenting opinion).

80. Id. at 389, 267 N.E.2d at 246, 318 N.Y.S.2d at 459-60 (dissenting opinion).

81. Id. at 390, 267 N.E.2d at 246, 318 N.Y.S.2d at 460 (dissenting opinion).

82. Id. at 391, 267 N.E.2d at 247, 318 N.Y.S.2d at 461-62 (dissenting opinion).

more, he contended that delays and procedural difficulties which already plague the court will only be increased as a result of this holding.[83]

In a separate dissent, Judge Breitel argued that while social policy dictates that there should be right to counsel, such a conclusion is not constitutionally mandated. Consequently, it is not proper for the courts to impose their policy view on an overburdened correctional and criminal justice system.[84] He concluded that faulty constitutional reasoning cannot be justified by social policy.[85]

Menechino represents a major extension of due process guarantees. The due process clause is not susceptible of an exact definition.[86] Due process may mean different things to different generations. In recent years the concern for individual rights in an unwieldy and sometimes unjust procedural system has spawned increasingly broader applications of due process. It is safe to predict that it will not be long before the New York Court of Appeals will be asked to decide whether the right to counsel is guaranteed at a parole application hearing[87] and whether an indigent should be provided such counsel at the expense of the state.[88]

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83. Id. at 392, 267 N.E.2d at 247, 318 N.Y.S.2d at 462 (dissenting opinion).

84. Id. at 394, 267 N.E.2d at 249, 318 N.Y.S.2d at 464 (dissenting opinion).

85. Id. at 393-94, 267 N.E.2d at 248-49, 318 N.Y.S.2d at 463-64 (dissenting opinion). "The gap-bridging reasoning which advances from probation revocation to parole revocation is, recognizably, the result of an erosive process which progressively treats each small distinction in a series as being of no account. Of course, as steps are taken in any novel direction it frequently becomes increasingly difficult to mark the instant gap before the next step, only because another gap was bridged earlier. The process becomes endless and the logic is not that of rational compulsion but the dialectic piecemeal erosion of distinction.

"Vagaries in constitutional adventures often have a deeper cause. They stem from the unperceived or dimly perceived assumption that all that is fair, good, or desirable must be constitutional and, the converse, that all that is unfair, evil, and undesirable must be unconstitutional. If this were true, however, then apart from budget-making, areas of private law, and the like, there would be little left for legislative action. All important public law questions affecting individuals would then become issues of constitutional dimension and the province of the courts. Because declared constitutional the judicial pronouncement becomes supreme." Id.

86. In Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961) it was stated: "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . ' "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions . . . .' " Id. at 895 (citations omitted).

87. The New York Court of Appeals has recently decided that while constitutional imperatives are of sufficient magnitude to give retroactive application to the decision in People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971), the issue will be determined on a case-by-case basis because the number of potential violations is myriad and it would be hard to determine the substantiality of any violation in the abstract. People ex rel. Maggio v. Casscles, 28 N.Y.2d 415, 271 N.E.2d 517, 322 N.Y.S.2d 668 (1971). In People ex rel. Silbert v. Cohen, 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422 (1971), the court of appeals extended the principle of right to counsel to parole revocation hearings involving juveniles.

88. In Warren v. Parole Bd., 23 Mich. App. 754, 179 N.W.2d 664 (1970) it was held that the state was required to provide counsel for an indigent at a parole revocation hearing. Id. at 771-72, 179 N.W.2d at 673.

Constitutional Law—Separation of Church and State—State Aid for Teachers' Salaries in Church-Related Elementary and Secondary Schools Held Unconstitutional.—Plaintiffs, as individual citizens and taxpayers of Rhode Island and Pennsylvania, challenged the constitutionality of statutes in their respective jurisdictions which granted state aid to nonpublic schools. The Rhode Island Salary Supplement Act[1] provided, under certain conditions, for a 15% salary supplement to teachers of secular subjects in nonpublic elementary schools. The Pennsylvania Nonpublic Elementary and Secondary Education Act[2] reimbursed nonpublic schools for certain textbooks, instructional materials, and teachers' salaries. The United States District Court for the District of Rhode Island declared the Rhode Island statute to be unconstitutional, holding that it violated the establishment clause of the first amendment by fostering excessive government entanglement with religion.[3] The United States District Court for the Eastern District of Pennsylvania dismissed a complaint challenging the Pennsylvania statute for failure to state a claim upon which relief could be granted.[4] On appeal, the United States Supreme Court consolidated the actions and held that both statutes were unconstitutional under the establishment clause of the first amendment. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion."[5] This phrase is known as the "establishment of religion" clause and rests on "the belief that a union of government and religion tends to destroy government and to degrade religion."[6] The traditional interpretation of the establishment of religion clause is summarized by the phrase "separation of church and state."[7] This phraseology

1. R.I. Gen. Laws Ann. §§ 16-51-1 to -9 (Supp. 1970) provides in part: "It is . . . the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth, those in public and nonpublic schools alike; within the limitations imposed by the constitutions of the United States and of Rhode Island. In pursuance of said policy, in order to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality, we hereby enact the following . . . ." Id. § 16-51-1.

2. Pa. Stat. Ann. tit. 24, §§ 5601-09 (Supp. 1971) is "[a]n act to promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the commonwealth of Pennsylvania attending nonpublic schools; creating a Nonpublic Elementary and Secondary Education Fund to finance the purchase of secular educational services . . . ." Preamble Law of Mar. 25, 1970, ch. 23, [1970] Pa. Laws 154th Sess. 216.

3. DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970), aff'd sub nom. Lemon v. Kurtzman, 403 U.S. 602 (1971).

4. Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969), rev'd, 403 U.S. 602 (1971).

5. U.S. Const. amend. I. Murdock v. Pennsylvania, 319 U.S. 105 (1943), specifically incorporated the first amendment into the fourteenth amendment. Earlier, Cantwell v. Connecticut, 310 U.S. 296 (1940), had held that the establishment of religion clause and the free exercise clause of the first amendment were applicable to the states through the fourteenth amendment.

6. Engel v. Vitale, 370 U.S. 421, 431 (1962).

7. Thomas Jefferson is credited with originating this phrase in 1801. He wrote, "I con-

does not appear in the Constitution, but is the result of an historical analysis of the intent of the founding fathers.[8]

The first significant modern[9] case interpreting the establishment of religion clause was *Everson v. Board of Education*.[10] In *Everson*, the Supreme Court confronted the question of whether a state that provided free transportation for public school pupils could constitutionally reimburse parents of parochial school pupils for the cost of bus transportation to and from school. Although the Court expressly stated that there must be a "high and impregnable"[11] wall of separation between church and state, it held that the statute did not violate the establishment of religion clause of the first amendment,[12] reasoning that the purpose of the act was not to benefit nonpublic schools but to promote the safety and health of all school children.[13] This rationale, which has become known as the "child-benefit theory,"[14] has been interpreted to mean that the "government may

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template with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." Letter from Thomas Jefferson to the Danbury Baptists Association, Jan. 1, 1802, in L. Pfeffer, Church State and Freedom 133 (1967).

8. See generally C. Antieau, A. Downey & E. Roberts, Freedom from Federal Establishment (1964); L. Pfeffer, Church State and Freedom (1967); Sky, The Establishment Clause, The Congress and the Schools: An Historical Perspective, 52 Va. L. Rev. 1395 (1966). For a complete collection of essays on the entire subject of church-state relationships, see The Wall Between Church and State (D. Oaks ed. 1963).

9. Early cases dealing with the establishment of religion clause generally did not involve aid to nonpublic schools. E.g., Bradfield v. Roberts, 175 U.S. 291 (1899) (appropriation of money by Congress to a hospital run by a religious society not violative of the constitutional provision against laws respecting an establishment of religion); Reynolds v. United States, 98 U.S. 145 (1878) (establishment clause did not prevent Congress from making bigamy a crime, even if such a statute would conflict with defendant's religious beliefs). But cf. Quick Bear v. Leupp, 210 U.S. 50 (1908) (establishment clause did not bar government aid to Indian schools run by Roman Catholic missionaries since the aid was not gratuitous but mandatory under a treaty).

10. 330 U.S. 1 (1947).

11. Id. at 18.

12. Id. Several state courts have refused to follow the holding in Everson on the grounds that the Court did nothing more than accept the New Jersey Supreme Court's interpretation of that state's constitution. E.g., Matthews v. Quinton, 362 P.2d 932 (Alas. 1961), appeal dismissed and cert. denied, 368 U.S. 517 (1962); Squires v. City of Augusta, 155 Me. 151, 153 A.2d 80 (1959); McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953); Board of Educ. v. Antone, 384 P.2d 911 (Okla. 1963); Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949); State ex rel. Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962). But see Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960), appeal dismissed, 365 U.S. 299 (1961); Quinn v. School Comm., 332 Mass. 410, 125 N.E.2d 410 (1955); School Dist. of Robinson Township v. Houghton, 387 Pa. 236, 128 A.2d 58 (1956).

13. 330 U.S. at 18.

14. This theory was first accepted by the Supreme Court in Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). The Court held that the appropriation of state money for the supplying of non-sectarian school books to parochial school children was constitu-

advance lawful secular purposes with its spending programs"[15] regardless of incidental benefit to nonpublic schools.

The *Everson* Court was also concerned with maintaining neutrality[16] between "religious believers and non-believers."[17] The Court stated that the first amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[18]

The Court, in dictum, attempted to illuminate the nebulous meaning of the establishment clause by saying that neither a state nor the federal government can set up a church or pass laws which aid one religion, all religions, or prefer one religion over another.[19] No tax can be levied to support any religious activities or institutions, and neither a state nor the federal government can participate in the affairs of any religious organizations.[20]

In *People ex rel. McCollum v. Board of Education*,[21] the question before the Court was the constitutionality of a state program which authorized the release of public school students from their classes in order to permit them to attend religious classes in the school.[22] The Court reiterated its language in *Everson*

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tional because the books were not granted to the schools themselves but only to or for the use of the children. See also Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (Dist. Ct. App. 1946); Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929); Adams v. County Comm'rs, 180 Md. 550, 26 A.2d 377 (1942); Board of Educ. v. Wheat, 174 Md. 314, 199 A. 628 (1938); Chance v. Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941). Contra, Matthews v. Quinton, 362 P.2d 932 (Alas. 1961), appeal dismissed and cert. denied, 368 U.S. 517 (1962); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1942); Dickman v. School Dist., 232 Ore. 238, 366 P.2d 533 (1961); Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955). For a criticism of the child-benefit theory, see Judd v. Board of Educ., supra; Choper, The Establishment Clause and Aid to Parochial Schools, 56 Calif. L. Rev. 260, 313-18 (1968) [hereinafter cited as Choper].

15. Kauper, The Warren Court: Religious Liberty and Church-State Relations, 67 Mich. L. Rev. 269, 271 (1968). For a discussion of the "secular purpose" theory, see Choper 277-83. See generally Paul v. Dade County, 202 So. 2d 833 (Fla. Dist. Ct. App. 1967), cert. denied, 390 U.S. 1041 (1968); Murray v. Comptroller, 241 Md. 383, 216 A.2d 897 (1966), cert. denied, 385 U.S. 816 (1966); Thomas v. Daughters of Utah Pioneers, 114 Utah 108, 197 P.2d 477 (1948), appeal dismissed per curiam, 336 U.S. 930 (1949).

16. Professor Philip B. Kurland is the originator and leading exponent of the "neutralism" theory which is based on the principle that "[t]he freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." P. Kurland, Religion and the Law 112 (1962). See also Katz, Freedom of Religion and State Neutrality, 20 U. Chi. L. Rev. 426 (1953).

17. 330 U.S. at 18.

18. Id.

19. Id. at 15. Accord, Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970); Torcaso v. Watkins, 367 U.S. 488, 492-93 (1961); McGowan v. Maryland, 366 U.S. 420, 443 (1961).

20. 330 U.S. at 16.

21. 333 U.S. 203 (1948).

22. Id. at 205.

concerning the wall of separation between church and state[23] and held that the state program was an unconstitutional attempt to breach this wall. The crucial factors were the use of the tax-supported public school buildings and the use of the compulsory powers of the public school system to provide pupils for religious classes.[24]

Four years later, however, in *Zorach v. Clauson*[25] the Court, presented with a question similar to that in *McCollum*, held the statute in *Zorach* constitutional, distinguishing the two cases on their facts.[26] While *McCollum* involved religious instruction in public school classrooms and the expenditure of public funds, the instruction in *Zorach* did not take place on school property. One constitutional commentator has classified the rationale of *Zorach* as the "accommodation theory"—namely, that "a state may, consistent with the establishment limitation, act in a positive way to accommodate its institutions and programs in order to provide the opportunity for its citizens to cultivate religious interests."[27]

More important than its specific holding, *Zorach* was an indication that the *Everson* "wall" rationale was beginning to be shattered. The Court conceded that the first amendment does not say that there shall be a separation of church and state in every respect.[28] It also recognized that "[t]he problem, like many problems in constitutional law, is one of degree."[29]

In 1963, the Court ruled in *School District of Abington Township v. Schempp*[30] that the Pennsylvania practice of starting the public school day with a Bible reading was an unconstitutional religious activity forbidden by the establishment clause.[31] The test set forth in *Schempp* was an effort to simplify interpretation of the establishment clause by careful examination of "the purpose and the

23. Id. at 212.

24. Id.

25. 343 U.S. 306 (1952).

26. Id. at 315.

27. Kauper, supra note 15, at 271. See Walz v. Tax Comm'n, 397 U.S. 664 (1970); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230-304 (1963) (concurring opinion); Reed v. Van Hoven, 237 F. Supp. 48, 53-54 (W.D. Mich. 1965). For a discussion of the general concept of accommodation, see P. Kauper, Religion and the Constitution 80-119 (1964).

28. 343 U.S. at 312.

29. Id. at 314.

30. 374 U.S. 203 (1963).

31. Id. A similar case was Engel v. Vitale, 370 U.S. 421 (1962), where the Court declared New York's public school program of daily prayer asking God's blessings unconstitutional. It reasoned that the prayer was a religious activity and the use of the public school system to encourage recitation of such prayer was inconsistent with the establishment of religion clause, even though such recitation was voluntary. For a discussion of Engel's significance, see Sutherland, Establishment According to Engel, 76 Harv. L. Rev. 25 (1962). Compare DeSpain v. DeKalb, 384 F.2d 836 (7th Cir.), cert. denied, 390 U.S. 906 (1967), and Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965), and Adams v. Engelking, 232 F. Supp. 666 (S.D. Idaho 1964), and Johns v. Allen, 231 F. Supp. 852 (D. Del. 1964), with Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965), where Schempp and Engel were distinguished by the use of the accommodation theory.

primary effect of the [statutory] enactment."[32] Hence, to withstand the constitutional challenge, it was necessary for the legislation to have a distinct secular purpose and its "primary" effect could neither advance nor retard religion.[33] While enunciating the above test, the Court nevertheless based its decision on a "neutrality" theory.[34] This theory relies on the principle that " '[t]he government is neutral, and, while protecting all [religions], it prefers none, and it disparages none.' "[35]

Thereafter, the Court applied the *Schempp* "purpose and primary effect" test in *Board of Education v. Allen*.[36] In that case a New York statute[37] which authorized the loan of textbooks to all school children in grades seven through twelve, including parochial school children, was held constitutional since its primary purpose was the "furtherance of the educational opportunities available to the young."[38] Once again, as in *Everson*, the Court utilized the "child-benefit rationale,"[39] which is based on the premise that the nonpublic school is only an incidental beneficiary. This theory "assumes that a child by attending a parochial school does not render himself ineligible to receive those benefits which the state confers on all pupils."[40] The Court in *Allen* also abandoned the "wall" concept of separation by speaking in terms of a "line"[41] between church and state which was difficult to locate.

In 1970, the Supreme Court in *Walz v. Tax Commission*[42] was confronted with the constitutionality of the practice of granting property tax exemptions to religious organizations for properties used solely for religious worship. In deciding that the New York statute[43] was constitutional, the Court added a third test to the *Schempp* "purpose and effect" tests by adopting the "excessive entanglement" test[44] for determining whether the establishment clause had been violated. Admitting that the Court's prior rationale had been inconsistent and lacked any

32. 374 U.S. at 222. Mr. Justice Brennan, in a concurring opinion, proposed a "three-pronged" test: "What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." Id. at 294-95.

33. Id. at 222.

34. Id. at 226. Although this theory had been hinted at in Everson, 330 U.S. at 17-18 and Zorach, 343 U.S. at 314, it had never before been the basis of a decision.

35. 374 U.S. at 215 (emphasis deleted).

36. 392 U.S. 236 (1968).

37. N.Y. Educ. Law § 701(3) (McKinney 1969).

38. 392 U.S. at 243.

39. Id. at 243-44.

40. R. Drinan, Religion, The Courts, and Public Policy 154 (1963) (emphasis deleted).

41. 392 U.S. at 242.

42. 397 U.S. 664 (1970), noted in 49 N.C.L. Rev. 342 (1971) and 24 Vand. L. Rev. 140 (1970).

43. N.Y. Real Prop. Tax Law § 420(1) (McKinney Supp. 1970).

44. 397 U.S. at 674-75.

general principles,[45] the majority opinion stated that "[t]he general principle deducible from . . . all that has been said . . . is . . . that we will not tolerate either governmentally established religion or governmental interference with religion."[46] The main task of the Court in this area is to see that legislation does not traverse this barrier. The problem was recognized as one of degree. Therefore, according to the *Walz* Court, the critical question was whether the statute created an excessive entanglement between government and religion.[47]

In *Lemon v. Kurtzman*[48] the Court began its analysis by considering the "cumulative criteria" gleaned from prior cases dealing with the establishment clause. After examining these opinions, three tests were enunciated by the Court:[49] the first two tests were the *Schempp* "purpose and primary effect" standard,[50] while the third test was the "excessive entanglement" criterion of *Walz*.[51] The Court had little difficulty with the first two tests, conceding that both statutes passed the "secular purpose" test and finding it unnecessary to consider the "primary effect" test. Consequently the "excessive entanglement" test proved to be the crucial standard. In order to determine whether a statute has successfully met this standard, three factors must be considered: "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[52]

Factors such as the proximity of the schools to churches and the pervasive religious atmosphere of the schools themselves induced the Court to agree with the Rhode Island District Court[53] that parochial schools constitute " 'an integral part of the religious mission of the Catholic Church.' "[54] Since the Rhode Island and Pennsylvania parochial school systems were essentially similar,[55] both systems were held to have a substantial religious character and purpose.

The nature of the aid which the two statutes provided also militated against their approval. Both acts authorized the supplementation of the salaries of

45. Id. at 668.

46. Id. at 669.

47. Id. at 674.

48. 403 U.S. 602 (1971).

49. Id. at 612-13. In Tilton v. Richardson, 403 U.S. 672 (1971) (decided on the same day), the Court employed a fourth test (does the implementation of the act inhibit the free exercise of religion?) in determining the constitutionality of federal aid to parochial colleges and universities for the construction of secular buildings. This application of different standards on the same day substantiates Chief Justice Burger's remark in Walz that the statements of the Court regarding the establishment of religion clause have little value as general principles. See note 45 supra and accompanying text.

50. See text accompanying note 32 supra.

51. 397 U.S. at 674-75.

52. 403 U.S. at 615.

53. DiCenso v. Robinson, 316 F. Supp. 112, 117 (D.R.I. 1970), aff'd sub nom. Lemon v. Kurtzman, 403 U.S. 602 (1971).

54. 403 U.S. at 616.

55. Id. at 620.

teachers of secular subjects.[56] Non-ideological assistance, such as transportation and secular textbooks, had been held constitutionally permissible[57] but "teachers have a substantially different ideological character from books."[58] This type of aid was found to be pregnant with the possibility of dangerous church-state entanglements. Parochial school teachers would be seriously impaired in their duties if they had to constantly avoid mingling religion with secular subjects.[59] The Pennsylvania statute[60] had the additional defect of providing financial aid directly to the parochial schools. In the opinion of the Court, this factor clearly distinguished it from the statutes involved in *Everson* and *Allen*.[61]

The Court concluded that the above factors gave rise to "entangling church-state relationships of the kind the Religion Clauses sought to avoid."[62] In order to properly supervise such programs and to satisfy the first amendment, "[a] comprehensive, discriminating, and continuing state surveillance [would] inevitably be required . . . ."[63] Moreover, the Court feared that these statutes would engender a divisive political atmosphere by polarizing voters along religious lines.[64] As a result of this analysis, the Court declared the two state statutes unconstitutional.[65]

Mr. Justice Douglas concurred[66] in the result but without recourse to any formulation of a test. Instead, he adhered to the belief that all aid to nonpublic schools is unconstitutional because of the religious nature and purposes of such schools. Mr. Justice Brennan also concurred,[67] advocating the use of the "three-pronged" test he had first enunciated in his concurrence in *Schempp*.[68] Mr. Justice White, dissenting, said: "It is enough for me that the States and the Federal Government are financing a separable secular function of overriding importance in order to sustain the legislation here challenged."[69]

56. R.I. Gen. Laws Ann. § 16-51-3 (Supp. 1970) stated that "[e]very nonpublic schoolteacher shall, upon his or her request, be paid by the state through the commissioner of education, a salary supplement . . . ." Pa. Stat. Ann. tit. 24, § 5604 (Supp. 1971) stated that "[t]here is hereby created . . . a Nonpublic Elementary and Secondary Education Fund dedicated to the particular use of purchasing secular educational service . . . ." Section 5603(2) defines secular educational service as "the providing of instruction in a secular subject."

57. See notes 10 & 36 supra and accompanying text.

58. 403 U.S. at 617.

59. Id. at 618-19.

60. Pa. Stat. Ann. tit. 24, §§ 5601-09 (Supp. 1971).

61. 403 U.S. at 621.

62. Id. at 616.

63. Id. at 619.

64. Id. at 622. The Court stated that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Id., citing Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969).

65. 403 U.S. at 607.

66. Id. at 625-42.

67. Id. at 642-61.

68. See note 32 supra.

69. 403 U.S. at 664 (dissenting opinion).

Concurrently with *Lemon*, the Court decided *Tilton v. Richardson*,[70] involving the constitutionality of the Higher Education Facilities Act of 1963[71] which provided federal grants to parochial colleges and universities for the construction of non-sectarian buildings. In holding that the federal aid was constitutional, the Court stated that the crucial question was "whether its [the statute's] principal or primary effect advances religion."[72] With respect to the excessive entanglement issue, the Court distinguished *Tilton* from *Lemon* on three grounds: 1) there is less likelihood that religion will permeate the area of secular education since religious indoctrination is not a substantial purpose of church-related colleges and universities; 2) the non-ideological character of the aid which the government provides lessens the possibility of entanglement; and 3) the fact that the government aid is in the form of a one-time grant further lessens the possibility of entanglement.[73]

The *Lemon* and *Tilton* decisions indicate that the Supreme Court will not invalidate all legislation assisting nonpublic schools. However, it is also evident that such legislation will undergo a rigorous analysis to determine its constitutionality. A cursory reading of the main decisions is sufficient to enable one to presage the types of aid which will be deemed permissible.[74] Non-ideological assistance such as health and lunch programs, transportation facilities, and non-sectarian books, supplies and equipment will probably continue to be sustained. On the other hand, salary supplements and other forms of direct aid to the schools themselves will likely be invalidated.[75]

Tilton made it clear that church-related colleges and universities will be treated differently than elementary and secondary nonpublic schools.[76] The *Lemon* Court added another factor to be considered—the amount of political controversy engendered by the legislation.[77] The merit of this consideration seems doubtful in that the constitutional validity of a statute bears little relation to the amount of publicity it generates.

If little else, the cases dealing with aid to nonpublic schools reveal a myriad of

70. 403 U.S. 672 (1971).

71. 20 U.S.C. §§ 701-58 (1970).

72. 403 U.S. at 679.

73. Id. at 685-88.

74. For a prediction of the types of aid which will probably be held constitutional, see Note, 66 Nw. U.L. Rev. 118, 144-45 (1971).

75. Prior to Lemon, various state courts had held direct aid to nonpublic schools to be constitutional. E.g., St. Hedwig's Indus. School v. Cook County, 289 Ill. 432, 124 N.E. 629 (1919); Dunn v. Chicago Indus. School, 280 Ill. 613, 117 N.E. 735 (1917); State ex rel. Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940); Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956). Contra, Swart v. South Burlington Town School Dist., 122 Vt. 177, 167 A.2d 514, cert. denied, 366 U.S. 925 (1961). Indirect aid had been sustained in St. Patrick's Church Soc'y v. Heermans, 68 Misc. 487, 124 N.Y.S. 705 (Sup. Ct. 1910); Gubler v. Utah State Teachers' Retirement Bd., 113 Utah 188, 192 P.2d 580 (1948).

76. 403 U.S. at 685-87. See also P. Kauper, Religion and the Constitution 115 (1964); Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle, 81 Harv. L. Rev. 513, 581-90 (1968).

77. 403 U.S. at 622.

constitutional theories. As Chief Justice Burger stated in *Walz*, each decision is essentially a value judgment.[78] Thus, it is unlikely that the *Walz-Lemon* excessive entanglement test is the culmination of the Court's interpretation of the establishment clause. Future decisions will inevitably advance new rationalizations and resurrect old ones. This ambiguity will only be resolved when the Supreme Court directly answers the fundamental question posed by the establishment clause—"What types of aid can the federal or state government provide to nonpublic schools?" Until the Court presents a straightforward answer to this most delicate question, the current perplexity among legislators, educators and parents will continue to exist.

Constitutional Law—State Constitutional Requirement of Referendum Approval for Low-Cost Housing Held Not Violative of Equal Protection.—An amendment to the California constitution[1] required that all proposals for publicly-funded low-rent housing be approved by a referendum of the communities where the housing was to be erected. In a referendum held pursuant to the amendment, residents of San Jose and San Mateo Counties rejected low-rent housing programs that had been planned for their communities.[2] Plaintiffs, residents of both counties eligible for low-cost public housing, challenged the constitutionality of the referendum requirement before a three-judge district court on the ground that the provision placed special burdens on poor citizens and, therefore, denied them equal protection of the law. Relying exclusively on the case of *Hunter v. Erickson*,[3] the district court declared the referendum provision unconstitutional.[4] The Supreme Court held that since the amendment did not expressly discriminate against racial minorities, *Hunter* was not applicable. The Court, therefore, reversed, upholding the referendum as a valid exercise of democratic principles. *James v. Valtierra*, 402 U.S. 137 (1971).

Classifications are necessary for all legislation.[5] Grouping people for the purposes of legislation is not in itself unconstitutional and a law which affects the activities of one group in a different manner from the way it affects others is not, of itself, violative of the fourteenth amendment.[6] However, where "[c]lass legislation, discriminat[es] against some [while] favoring others," a violation of

78. 397 U.S. at 669.

1. Cal. Const. art. XXXIV, § 1.

2. James v. Valtierra, 402 U.S. 137, 139 (1971). The projects were to be federally funded pursuant to the United States Housing Act of 1937, 42 U.S.C. §§ 1401-35 (1970).

3. 393 U.S. 385 (1969).

4. Valtierra v. Housing Auth., 313 F. Supp. 1 (N.D. Cal. 1970), rev'd sub nom. James v. Valtierra, 402 U.S. 137 (1971).

5. Hill v. Rae, 52 Mont. 378, 382, 158 P. 826, 828 (1916); see Carrington v. Rash, 380 U.S. 89 (1965); Thompson v. Kentucky, 209 U.S. 340 (1908).

6. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947); Snowden v. Hughes, 321 U.S. 1, 8 (1944).

the equal protection clause may occur.[7] "Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated."[8] Whether a classification is violative of equal protection or not depends upon "whether the discrimination relates to a matter upon which classification is legally permissible, [that is,] whether the classification is a reasonable one."[9] It may not be arbitrary[10] and must bear a rational relationship to the end sought to be achieved.[11]

There are, however, certain classifications which are inherently suspect. Statutes which create classifications based upon race are the prime example. In 1879, the Supreme Court declared unconstitutional a state statute which denied Negroes the right to serve as jurors.[12] The Court stated that the fourteenth amendment required that "the law in the States shall be the same for the black as for the white . . . ."[13] Classifications based upon lineage[14] and alienage[15] have also been consistently condemned.

Challenges to the constitutionality of classifications based upon wealth have not always met with such success.[16] While the Supreme Court has noted that

7. Barbier v. Connolly, 113 U.S. 27, 32 (1885). See also Douglas v. California, 372 U.S. 353, 356-57 (1963); Truax v. Corrigan, 257 U.S. 312, 333 (1921).

8. Truax v. Corrigan, 257 U.S. 312, 333 (1921). The Court went on to say: "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class." Id.

9. Hill v. Rae, 52 Mont. 378, 382, 158 P. 826, 828 (1916).

10. Morey v. Doud, 354 U.S. 457 (1957); Southern Ry. v. Greene, 216 U.S. 400 (1910).

11. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

12. Strauder v. West Virginia, 100 U.S. 303 (1879).

13. Id. at 307. In Plessy v. Ferguson, 163 U.S. 537 (1896), the Strauder rationale was ignored and a statute which provided for separate but equal facilities for Negroes and whites was held to be constitutional. The result of this case led one contemporary writer to conclude that the equal protection clause "did not restrain the states from requiring segregated, and generally inferior, facilities for Negroes." M. Berger, Equality By Statute 72 (rev. ed. 1968). Plessy successfully withstood attack until 1954 when in Brown v. Board of Educ., 347 U.S. 483 (1954), the Court finally recognized that in the area of public education, separate can never be equal. Id. at 495; see Buchanan v. Warley, 245 U.S. 60, 79 (1917) which distinguished Plessy. For cases which recognized the rights of Negroes in the political area see generally Reynolds v. Sims, 377 U.S. 533 (1964); Nixon v. Herndon, 273 U.S. 536 (1927).

14. E.g., Korematsu v. United States, 323 U.S. 214 (1944). Although the Court upheld the constitutionality of an executive order requiring the exclusion of Japanese Americans from West Coast areas during World War II, it did so with great reluctance. Id. at 219. The Court believed that such a discriminatory state action must be intensely scrutinized by the courts. Id. at 216.

15. E.g., Graham v. Richardson, 403 U.S. 365 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); Truax v. Raich, 239 U.S. 33 (1915); see Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969) [hereinafter cited as Developments].

16. In cases involving statutes respecting taxation, courts have generally held economic classifications to rest upon a rational basis. See, e.g., Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931);

classifications or discriminations based upon wealth have been "traditionally disfavored"[17] in this country, analyses of the cases which involve these classifications show that such classifications by themselves would not be enough to violate the equal protection clause. However, when such a classification is created in connection with a fundamental constitutional right and so burdens an individual or class in the exercise of that right, the statute establishing the classification is constitutionally suspect.[18]

Cases which ruled economic classifications or discriminations unconstitutional had at issue such fundamental rights as the right to vote,[19] the right to travel,[20] and those rights inuring to defendants in the area of criminal procedure where the most fundamental right of personal liberty is necessarily involved.[21] *Harper v. Virginia Board of Elections*[22] held a poll tax unconstitutional. Mr. Justice Douglas stated for the Court that "[v]oter qualifications have no relation to wealth . . . ."[23] In defining the standard for review he said:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.[24]

Yazoo & M.V.R.R. v. Board of Miss. Levee Comm'rs, 188 Miss. 889, 195 So. 704, appeal dismissed, 311 U.S. 607 (1940).

17. E.g., McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (wealth classifications affecting voting rights); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (unconstitutionality of poll taxes); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (indigent's right to appellate review). See also Edwards v. California, 314 U.S. 160 (1941), which ruled unconstitutional a California statute that punished citizens who brought indigent persons into the state. In his concurring opinion, Mr. Justice Jackson noted that "a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. . . . The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." Id. at 184-85.

18. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 806-07 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). See also Note, 56 Cornell L. Rev. 343, 344-45 (1971); Developments 1120-23.

19. See, e.g., McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

20. Shapiro v. Thompson, 394 U.S. 618 (1969).

21. E.g., Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

22. 383 U.S. 663 (1966).

23. Id. at 666. In the area of criminal procedure see Griffin v. Illinois, 351 U.S. 12, (1956), where Mr. Justice Black, writing for himself and three other justices, reasoned that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Id. at 19. The dissent in James v. Valtierra takes it for granted that "'[t]he States . . . are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" as such in the formulation and application of their laws.'" 402 U.S. at 144 (dissenting opinion) (emphasis deleted), quoting Douglas v. California, 372 U.S. 353, 361 (1963) (dissenting opinion).

24. 383 U.S. at 670. See McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); cf. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

It would follow that if housing were held to be a "fundamental right"[25] and that right were adversely affected by legislation which created an economic classification, such legislation would be subject to "exacting judicial scrutiny."[26] "Exacting judicial scrutiny" means that the state must show a compelling interest for the classification it seeks to make.[27]

The Supreme Court has never expressly decided whether housing should be considered a fundamental right. In *Shelley v. Kraemer*[28] the Court prohibited judicial enforcement of racially discriminatory convenants since such judicial enforcement constituted state action violative of the fourteenth amendment. In dictum, the Court stated: "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property."[29] More recently, in *Jones v. Alfred H. Mayer Co.*,[30] the petitioners alleged that the respondents had refused to sell them a home because they were Negroes.[31] The Court stated that "the badges and incidents of slavery—its 'burdens and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom, namely the *same right* . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.' "[32] Although *Jones* was based on the interpretation of the thirteenth amendment and the language in *Shelly* was dictum, both cases indicate that the Court was concerned with a citizen's right to own, use, lease, and alienate property. Since the right to housing should follow from these property rights, it was at least arguable that the Court might consider housing a fundamental right. In fact, some commentators have been of that view.[33]

25. Other fundamental rights include travel (Shapiro v. Thompson, 394 U.S. 618 (1969)), education (Brown v. Board of Educ., 347 U.S. 483 (1954)), and procreation (Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)).

26. McDonald v. Board of Election Comm'rs, 394 U.S. at 807; see notes 18 & 24 supra and accompanying text. See generally Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan. L. Rev. 767, 768 (1969); Developments 1121. Older equal protection cases only required a showing of rationality in the classification and distribution of benefits and burdens. Newer equal protection cases "[require] much more of legislation that impinges upon the protected interests of social and political equality: such legislation at least bears a heavy burden of justification." Sager, supra, at 768.

27. Shapiro v. Thompson, 394 U.S. 618, 638 (1969). In Shapiro, the Court set up a strict test for determining the validity of a classification which "touches on the fundamental right . . . ." In such cases a "compelling state interest" must be shown to justify the classification. Id.

28. 334 U.S. 1 (1948).

29. Id. at 10. In Shelley, 30 owners of land signed an agreement which restricted the sale or use of their land exclusively to whites. After Shelley, a Negro, bought a parcel of land from one of the signers of the agreement, the others sought to divest Shelley of his title and to enjoin him from taking possession. Id. at 4-6. See also Buchanan v. Warley, 245 U.S. 60, 78-79 (1917).

30. 392 U.S. 409 (1968).

31. Id. at 412.

32. Id. at 441 (citation omitted) (emphasis added).

33. E.g., Black, The Supreme Court, 1966 Term, Foreword: "State Action," Equal Pro-

In some cases,[34] the effect of the legislation was considered in determining whether there was a violation of equal protection. In *Reitman v. Mulkey*,[35] for instance, the Supreme Court declared that an amendment to the California constitution[36] which repealed all previous fair housing laws and declared that anyone could rent or sell property to whomever he desired was unconstitutional as a violation of equal protection.[37] The Court acknowledged the propriety of the California Supreme Court's consideration of the amendment's " 'immediate objective,' its 'ultimate effect,' and its 'historical context and the conditions existing prior to its enactment.' "[38] Mr. Justice White, writing for the majority in *Reitman*, recognized that the California court was "familiar with the milieu in which [the amendment] would operate"[39] and, therefore, accepted its finding that the purpose of the statute was to encourage racial discrimination in housing.[40] The dissent, in which Mr. Justice Black joined, stated that there was no showing that the effect of the statute was racially discriminatory. The dissenters would have upheld the amendment, reasoning that only a repeal of prior statutes was effected and nothing more.[41]

In *Hunter v. Erickson*[42] the Court examined the validity of an amendment to the city charter of Akron, Ohio which prevented the city council from implementing any ordinance relating to racial, religious or ancestral discrimination in housing without the approval of the majority of the voters in a referendum.[43] The Supreme Court held the amendment to be unconstitutional as a violation

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tection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967). Black, in his discussion of the right to housing, commented that "[w]hen a racial minority is struggling to escape drowning in the isolation and squalor of slum-ghetto residence, everywhere across the country, I do not see why the refusal to throw a life-preserver does not amount to a denial of protection." Id. at 73; see Note, 56 Cornell L. Rev. 343, 347 (1971); Note, 16 How. L.J. 351, 352 (1971). See also Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 296 n.9 (9th Cir. 1970) (dictum).

34. E.g., Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967); Griffin v. County School Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971). But cf. Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970); Southern Alameda Spanish Speaking Org. v. City of Union City, 314 F. Supp. 967 (N.D. Cal.), aff'd, 424 F.2d 291 (9th Cir. 1970). For a discussion of the propriety of using legislative motivations see Developments 1091-101.

35. 387 U.S. 369 (1967).

36. Cal. Const. art. I, § 26.

37. 387 U.S. at 373.

38. Id.; see Wolfinger & Greenstein, The Repeal of Fair Housing in California: An Analysis of Referendum Voting, 62 Am. Pol. Sci. Rev. 753 (1968), for a breakdown of the voting patterns on Proposition 14 manifesting the fact that the motivations for passing the amendment were racial in character.

39. 387 U.S. at 378.

40. Id. at 378-79.

41. Id. at 389 (dissenting opinion).

42. 393 U.S. 385 (1969).

43. Id. at 387.

of equal protection.[44] The Court did not have to rely on *Reitman* here since there was an express "racial classification treating racial housing matters differently from other racial and housing matters."[45] In addition, the Court looked to the effect of the legislation and found that its impact, though seemingly of general application, "falls on the minority,"[46] and that it "places special burdens on racial minorities within the governmental process."[47]

In his dissent to *Hunter*, the late Mr. Justice Black did not find it necessary to consider the effect the referendum had on the people. On the contrary, he supported the idea of a referendum and expressed disbelief that: "In this Government, which we boast is 'of the people . . . ,' conditioning the enactment of a law on a majority vote of the people condemns that law as unconstitutional in the eyes of the Court!"[48]

In *James*, the district court relied heavily upon *Hunter* in laying a foundation for its decision.[49] But the Supreme Court held that *Hunter* was not applicable. Mr. Justice Black, writing for the majority, pointed out that in *Hunter* the statute made an express racial classification and "it cannot be said that California's article XXXIV rests on 'distinctions based on race.' "[50] Moreover, the Court held the record insufficient to support a finding that article XXXIV, "neutral on its face," was "aimed at a racial minority."[51] Black's opinion for the majority in *James* was in part a reiteration of his dissent in *Hunter* and *Reitman*. Again he lauded the referendum as a democratic device and held that "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[52] In addition, he deemed this provision appropriate since it guaranteed to the citizens of a community the controlling voice in a decision which would subject them to an increased tax burden.[53]

The Supreme Court in *James* apparently did not believe that economic classifications should be suspect or that housing should be a fundamental right.[54] The *James* Court, in distinguishing *Hunter* on the basis of the difference in the classifications involved, viewed economic discrimination as a "neutral" designation.[55] In addition, the Court did not expressly consider, as the *Hunter* court

44. Id. at 393.

45. Id. at 389.

46. Id. at 391.

47. Id.; see Seeley, The Public Referendum and Minority Group Legislation: Postcript to Reitman v. Mulkey, 55 Cornell L. Rev. 881, 886-90 (1970).

48. 393 U.S. at 397 (dissenting opinion).

49. Valtierra v. Housing Auth., 313 F. Supp. 1 (N.D. Cal. 1970), rev'd sub nom. James v. Valtierra, 402 U.S. 137 (1971).

50. 402 U.S. at 141 (1971). Justice Black was joined by the Chief Justice and Justices Harlan, Stewart and White.

51. Id.

52. Id.

53. Id. at 143.

54. See notes 19-33 supra and accompanying text.

55. 402 U.S. at 141. The dissent contended that the majority viewed an "invidious classification" as "a totally benign, technical economic classification." Id. at 145 (dissenting opinion).

had,[56] the increased burden which this statute placed upon minority groups. Although the district court had made a specific finding that the impact of the law fell upon minorities,[57] the majority stated that the record failed to show that the statute was aimed at a racial minority.[58]

In his dissenting opinion, Mr. Justice Marshall did not deem it necessary to find implied racial discrimination in the amendment because, in his view, an economic classification which expressly burdened the poor was alone sufficient to violate the equal protection clause.[59] To support its contention that the classification created by the amendment "on its face constitute[d] invidious discrimination,"[60] the dissent pointed out, as had the district court, that "[p]ublicly assisted housing developments designed to accommodate . . . any class of citizens other than the poor, need not be approved by prior referenda."[61] The minority was particularly disturbed by the majority's failure to scrutinize the statute more closely in light of prior decisions which had condemned wealth discriminations.[62]

The majority implied that its decision might have been different if the trial record in *James* had contained more evidence that the amendment was in fact aimed at racial minorities. If that were the case, the Court's distinction between *James* and *Hunter* would disappear and presumably *Hunter* would control the result. However, in view of Justice Black's dissenting posture in *Hunter* and *Reitman*, and the majority's unqualified approval of referenda, it is not certain that a future plaintiff could successfully challenge a referendum even upon a strong showing that it was ethnically discriminatory. In any event, the plaintiffs' failure of proof foreclosed the direct application of *Hunter* to *James*. Moreover, in viewing the economic classifications as "neutral," the Court disregarded analogies that might easily have been drawn between wealth and racial discrimination. In refusing to extend *Hunter* by analogy, the Court did not distinguish or even discuss the many Supreme Court decisions which, at least in the minority's opinion, have condemned economic classifications.[63] Whether or not *James*

56. 393 U.S. at 391. See also Seeley, supra note 47, at 895.

57. Valtierra v. Housing Auth., 313 F. Supp. 1, 5 (N.D. Cal. 1970), rev'd sub nom. James v. Valtierra, 402 U.S. 137 (1971). The district court's research disclosed that "[i]n 1960, only 5% of the units occupied by white-non-Mexican-Americans were in delapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by non-whites were in delapidated or deteriorated condition." Id. n.2. Moreover, the district court observed: "That minority groups comprise 'the poor' is increasingly clear." Id.

58. 402 U.S. at 141. In failing to examine the effect of the statute, the Court did not follow the Reitman approach. See notes 35-41 supra and accompanying text.

59. 402 U.S. at 144 (dissenting opinion).

60. Id. In expressing its view that the wealth classification involved violated equal protection, the minority apparently did not find it necessary to designate housing as a fundamental right.

61. Id. (footnote omitted).

62. Id. at 144-45.

63. Id., citing McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969);

eventually erodes the impact of these cases, its effect on low-rent housing legislation is likely to be profound.[64] Apparently any community can easily avoid the increased tax-burden necessarily imposed by the implementation of housing projects, provided the objectionable measure is defeated in a referendum. But perhaps the most significant aspect of this decision is the fact that the majority did not expressly consider whether housing should be a fundamental right. Since the Supreme Court has held that economic classifications are unconstitutional only when they burden a fundamental right,[65] the majority must have concluded that the right to housing was not guaranteed by the constitution.

Constitutional Law—Trial by Jury—Categorical Denial of Change of Venue in Misdemeanor Cases Held Violative of Right to Trial by Impartial Jury.—The defendant was arrested while participating in a civil rights demonstration in violation of an emergency proclamation issued by the Mayor of Milwaukee which prohibited all marches, rallies, and demonstrations during the night hours.[1] Prior to the trial on the charge of resisting arrest[2] defendant's counsel, claiming that community prejudice and pre-trial publicity would influence the jury, moved for a change of venue " 'to a county where community prejudice against this defendant does not exist and where an impartial jury trial can be had.' "[3] The trial judge interpreted the Wisconsin statute[4] which allowed a change of venue in felony cases to preclude such a change in a trial for a misdemeanor and denied the motion. The defendant was subsequently convicted and sentenced to six months in jail and a $500 fine. The Wisconsin Supreme

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Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963).

64. See generally A Higher Wall Around Suburbia, Business Week, May 1, 1971, at 24.

65. Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); see notes 19-24 supra and accompanying text.

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1. State v. Groppi, 41 Wis. 2d 312, 315, 164 N.W.2d 266, 267 (1969), vacated, 400 U.S. 505 (1971).

2. Wis. Stat. Ann. § 946.41(1) (1958).

3. Groppi v. Wisconsin, 400 U.S. 505, 506 (1971). "The motion asked the court to take judicial notice of 'the massive coverage by all news media in this community of the activities of this defendant,' or, in the alternative, that 'the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial.' " Id.

4. Act of Aug. 8, 1949, ch. 631, § 111, [1949] Wis. Laws 589. "If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to an adjoining county. Only one change may be granted under this subsection." Id. This subsection has subsequently been changed to read: "If the court determines that there exists in the county where the action is pending such prejudice that a fair trial cannot be had, it shall order that the trial be held in any county where an impartial trial can be had. . . ." Wis. Stat. Ann. § 971.22(3) (1971). The Supreme Court interpreted this new section to permit a change of venue "in all criminal cases." 400 U.S. at 507 n.4.

Court affirmed the trial court's decision.[5] The United States Supreme Court vacated the judgment and remanded the case for a hearing on the question of whether pre-trial publicity had influenced the jury. *Groppi v. Wisconsin*, 400 U.S. 505 (1971).

Although the exact origin of the jury trial is unknown,[6] there is evidence that it arrived in America with the earliest of the English colonists.[7] The right to a trial by jury was included in the various colonial charters.[8] The First Congress of the American Colonies, meeting in 1765, declared "[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies,"[9] and this right was again affirmed by the First Continental Congress in 1774.[10] With independence, trial by jury was incorporated into the new state constitutions,[11] and the constitution of every state which thereafter entered the Union protected, in some manner, the right to a trial by jury in criminal cases.[12] Finally, the right was guaranteed not only by article III of the United States Constitution,[13] but also by the sixth amendment thereto.[14]

In determining whether a defendant in a particular case is entitled to a trial by jury the Supreme Court has employed a "serious-petty" offense test.[15] When a defendant has been charged with a so-called "petty" offense it is permissible to try him without a jury.[16] In *District of Columbia v. Clawans*,[17] the

5. State v. Groppi, 41 Wis. 2d 312, 164 N.W.2d 266 (1969).

6. F. Heller, The Sixth Amendment to the Constitution of the United States 5-8 (1969); Sources of Our Liberties 7-9 (R. Perry ed. 1959).

7. F. Heller, The Sixth Amendment to the Constitution of the United States 16 (1969).

8. See, e.g., Connecticut Charter of 1662, in 1 The Federal and State Constitutions 533 (Thorpe comp. 1909); Virginia Charter of 1606, in 7 id. 3788. See F. Heller, The Sixth Amendment to the Constitution of the United States 14 (1969).

9. Sources of Our Liberties 270 (R. Perry ed. 1959).

10. The Fifth Resolution of the First Continental Congress of October 14, 1774, resolved "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of the Continental Congress 1774-1789, at 69 (reprint 1904).

11. See, e.g., Del. Const. art. I, § 7 (1792); Ga. Const. art. IV, § 3 (1789); Md. Const. art. III (1776). See also F. Heller, The Sixth Amendment to the Constitution of the United States 22-24 (1969).

12. Duncan v. Louisiana, 391 U.S. 145, 153 (1968).

13. U.S. Const. art. III, § 2. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

14. U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

15. See Cheff v. Schnackenberg, 384 U.S. 373 (1966); District of Columbia v. Clawans, 300 U.S. 617 (1937); District of Columbia v. Colts, 282 U.S. 63 (1930); Schick v. United States, 195 U.S. 65 (1904); Natal v. Louisiana, 139 U.S. 621 (1891); Callan v. Wilson, 127 U.S. 540 (1888); Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926).

16. See sources cited note 15 supra. But see Kaye, Petty Offenders Have No Peers!, 26 U. Chi. L. Rev. 245 (1959).

17. 300 U.S. 617 (1937).

Court sought a definition of a "petty" offense by looking to the standards prevalent at the time the Constitution was adopted. The results of this examination indicated that certain offenses punishable by up to one year in prison were triable without a jury. The Court, however, refused to adopt the imposition of any particular sentence as determinative of "petty," and decided only that a ninety day maximum sentence was not "serious."[18] Although Congress had subsequently adopted a definition of a "petty" offense,[19] the Court refused to accept this standard when it extended the right to a jury trial to a defendant in a state court in *Duncan v. Louisiana*.[20] Instead, the Court continued its case-by-case determination and decided that a possible sentence of two years was serious, thus requiring a trial by jury.[21] In 1970 the Court finally adopted, for both federal and state court proceedings, a standard of six months as determinative of whether an offense is serious or petty.[22]

The sixth amendment guarantee is one of a trial by an *impartial* jury.[23] An essential element of this impartiality is that the jury is to consider only the evidence presented in court and is not to be influenced by out-of-court statements, whether public or private.[24] The Supreme Court first handled the problem of pre-trial publicity in 1851, when it held that such publicity actually had to influence the jurors before the defendant could be said to have been denied a fair trial.[25] For over a century the Court insisted upon a showing of actual prejudice.[26]

The Court first began to bend this requirement in 1959, in *Marshall v. United States*.[27] In this case the defendant's prior convictions were listed in two newspaper articles after the judge had refused to allow them to be entered into evidence. Although at least seven of the jurors saw the articles, they said they were not influenced by them and could still deliver an impartial decision. The judge decided that, absent a showing of actual prejudice, he would not dismiss the jury. The Supreme Court felt that prejudice was almost a certainty in this

18. Id. at 625-27.

19. 18 U.S.C. § 1(3) (1970): "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

20. 391 U.S. 145 (1968).

21. Id. In Frank v. United States, 395 U.S. 147 (1969), a case involving a charge of criminal contempt which carried no maximum sentence, the Court held that "where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense." Id. at 149.

22. Baldwin v. New York, 399 U.S. 66 (1970). "We cannot . . . justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment." Id. at 73-74.

23. See U.S. Const. amend. VI.

24. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

25. United States v. Reid, 53 U.S. (12 How.) 361 (1851).

26. Reynolds v. United States, 98 U.S. 145, 157 (1878). See also Rideau v. Louisiana, 373 U.S. 723, 729 (1963) (Clark, J., dissenting); Beck v. Washington, 369 U.S. 541 (1962); Irvin v. Dowd, 366 U.S. 717 (1961); Stroble v. California, 343 U.S. 181 (1952).

27. 360 U.S. 310 (1959).

situation and ordered a new trial.[28] However, this decision was based on the Court's supervisory powers over the federal courts[29] and thus was not binding on state courts.[30]

In *Rideau v. Louisiana*[31] the Supreme Court established a special situation exception to the requirement of showing actual prejudice. This exception was based upon constitutional grounds rather than the Court's supervisory powers. In *Rideau* the Court ordered a reversal where the defendant's confession, obtained before counsel was appointed, had been broadcast over a local television station. The Court indicated that the procedure followed was so inherently prejudicial that the defendant had no chance of receiving a fair trial.[32] The Supreme Court has subsequently applied this special situation test in a number of cases involving widespread prejudicial publicity.[33]

Change of venue is a method of protecting a defendant from prejudicial publicity which has long been recognized in Anglo-American jurisprudence. Blackstone pointed out that under English common law "if a whole county is interested in the question to be tried, the trial by the rule of law must be in some adjoining county . . . ."[34] Courts in the United States have followed this rule where it was shown that a fair trial could not be had in the county in which the cause of action had been brought.[35]

Many early state court decisions held that a change of venue was available only in felony cases, and was "not authorized in a misdemeanor case."[36] Most

28. Id. at 312-13.

29. Id. at 313.

30. Note, The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury, 42 Notre Dame Law. 925, 939 (1967). Most states have declined to follow Marshall. See, e.g., Wilson v. State, 247 Ind. 454, 217 N.E.2d 147 (1966); Pacheco v. State, 82 Nev. 172, 414 P.2d 100 (1966); People v. Genovese, 10 N.Y.2d 478, 180 N.E.2d 419, 225 N.Y.S.2d 26 (1962); Glasgow v. State, 370 P.2d 933 (Okla. Crim. App. 1962); Smith v. State, 205 Tenn. 502, 327 S.W.2d 308 (1959), cert. denied, 361 U.S. 930 (1960). Marshall has been expressly adopted in only one state: Alaska. See Watson v. State, 413 P.2d 22 (Alas. 1966). The Second Circuit further limited the effectiveness of this decision by emphasizing the time factor. United States v. Bowe, 360 F.2d 1 (2d Cir. 1966), cert. denied, 385 U.S. 961 (1966).

31. 373 U.S. 723 (1963).

32. Id. at 726. "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." Id.

33. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965). See also Turner v. Louisiana, 379 U.S. 466 (1965). For a more thorough discussion of this development see Note, supra note 30, at 940-41.

34. 3 W. Blackstone, Commentaries * 383 (footnote omitted). See also Rex v. Harris, 97 Eng. Rep. 858 (K.B. 1762); Rex v. Cowle, 97 Eng. Rep. 587 (K.B. 1759).

35. E.g., Brennan v. People, 15 Ill. 511 (1854); Negro Jerry v. Townshend, 2 Md. 274 (1852); Crocker v. Justices of the Superior Court, 208 Mass. 162, 94 N.E. 369 (1911); People v. Peterson, 93 Mich. 27, 52 N.W. 1039 (1892); State v. Miller, 15 Minn. 344 (1870); State v. Albee, 61 N.H. 423, 60 Am. R. 325 (1881); People v. Vermilyea, 7 Cow. 108 (N.Y. Sup. Ct. 1827); Commonwealth v. Balph, 111 Pa. 365, 3 A. 220 (1886); Bob v. State, 10 Tenn. 155 (1826).

36. E.g., Fox v. State, 53 Tex. Crim. 150, 152, 109 S.W. 370, 371 (1908); see Washing-

of these cases relied upon statutory interpretation, and none raised the federal constitutional issue.[37]

In 1953, the Oregon Supreme Court overruled an earlier decision[38] and declared that the right to a change of venue could not be limited to cases involving felonies.[39] The court ruled that any other interpretation would violate both the state constitution[40] and the due process clause of the fourteenth amendment.[41] The Fifth Circuit adopted this position in 1966, holding "that the same constitutional safeguard of an impartial jury is available to a man denied his liberty . . . for a misdemeanor as for a felony."[42]

The Wisconsin Supreme Court, noting that it was not compelled to follow these last two decisions, held in *State v. Groppi*[43] that the refusal to grant a change of venue did not constitute a denial of due process.[44] The Court felt that "it would be extremely unusual for a community as a whole to prejudge the guilt of any person charged with a misdemeanor,"[45] and if such prejudice did exist, there were numerous other measures which could be implemented to protect the defendant's right to a fair trial by an impartial jury.[46]

In vacating the state court's decision,[47] the United States Supreme Court proceeded upon the premise that when a state has purported to accord a jury trial, that trial must be free from the infection of community prejudice.[48] The Court examined two commonly used methods of protecting a defendant from community prejudice, the *voir dire* and the continuance, and found both to be deficient.[49] Relying upon its decision in *Rideau*, the Court suggested that the

ton v. State, 2 Okla. Crim. 428, 101 P. 863 (1909); State v. Swanson, 119 Ore. 522, 250 P. 216 (1926); Halsell v. State, 29 Tex. Ct. App. R. 22, 18 S.W. 418 (1890); Patton v. State, 124 Tex. Crim. 656, 65 S.W.2d 308 (1933); Henderson v. State, 39 S.W. 116 (Tex. Crim. App. 1897); Commonwealth v. Rolls, 2 Va. Cas. 68 (1817).

37. One Texas court did, however, consider the constitutionality of such a statute under the state constitution. In Patton v. State, 124 Tex. Crim. 656, 65 S.W.2d 308 (1933), the court held that a statute which denied a change of venue in misdemeanor cases was valid and compatible with a provision in the Texas constitution which said: "The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law; and the Legislature shall pass laws for that purpose." Tex. Const. art. III, § 45.

38. State v. Swanson, 119 Ore. 522, 250 P. 216 (1926).

39. State ex rel. Ricco v. Biggs, 198 Ore. 413, 431, 255 P.2d 1055, 1063 (1953).

40. Id. at 428-29, 255 P.2d at 1062. Ore. Const. art. I, § 11 provides: "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed . . . ."

41. 198 Ore. at 431, 255 P.2d at 1063.

42. Pamplin v. Mason, 364 F.2d 1, 7 (5th Cir. 1966).

43. 41 Wis. 2d 312, 164 N.W.2d 266 (1969).

44. Id. at 321, 164 N.W.2d at 270.

45. Id. at 317, 164 N.W.2d at 268.

46. Id. at 321, 164 N.W.2d at 270. These methods included continuances, voir dire proceedings, and a new trial.

47. Groppi v. Wisconsin, 400 U.S. 505 (1971).

48. Id. at 508-09.

49. Id. at 510.

only method which would guarantee an impartial jury was a change of venue.[50] Although community prejudice may not usually be aroused against a defendant in a misdemeanor case "under the Constitution a defendant must be given an opportunity to show that a change of venue *is* required in *his* case."[51]

Mr. Justice Blackmun, in his concurring opinion, emphasized the limited nature of this holding. In agreeing with the majority that a person charged with a misdemeanor has a constitutional right to a change of venue upon a proper showing,[52] he pointed out that this did not necessarily mean that the defendant in this case would be granted a new trial.[53] While the defendant has the right to prove that prejudice infected the jury's decision, his right to a new trial depends upon his ability to sustain this burden.[54] Although noting that this case contained neither the extensive nor offensive prejudicial publicity which had required reversal in *Sheppard* and *Rideau*, Mr. Justice Blackmun made it clear that the Constitution demands that unfairness be eliminated from even those cases which seem the least important.[55]

Mr. Justice Black, in his dissenting opinion, distinguished *Rideau* on the ground that refusing a change of venue in that case was a denial of due process because "the State had provided for venue changes as a method of insuring an impartial jury."[56] He pointed out that there are many methods available to protect the defendant's right to an impartial jury[57] and that, although a change of venue may or may not prove to be a better method, it is not required by the Constitution.[58] The defendant had not exhausted the remedies available to him under Wisconsin procedure and he could have been granted a new trial if prejudice on the part of the jury had been proven. For this reason Mr. Justice Black felt that there had not been a denial of due process.[59] Although he would have denied the motion for a change of venue, Mr. Justice Black would have granted the defendant a hearing on a motion for a new trial wherein he could "bring forth any relevant evidence to show that the jury that tried him was not impartial."[60]

Other common law jurisdictions have instituted very simplistic solutions to the problem of pre-trial publicity. In Britain, for example, if a newspaper dares to comment upon a case in a way which the judge feels would influence the jury, the editor can be held in contempt and subjected to a fine and imprisonment.[61] Being

50. Id. at 510-11.
51. Id. at 511.
52. Id. at 513 (Blackmun, J., concurring).
53. Id. at 514.
54. Id.
55. Id.
56. Id. at 515 (Black, J., dissenting).
57. Id.
58. Id.
59. Id. at 516.
60. Id.
61. Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1, 2 (1960). See also Rex v. Davies, [1945] 1 K.B. 435; The King v. Parke [1903] 2 K.B. 432; Morton,

solely preventive in nature, this solution is not wholly successful in guaranteeing a fair trial. " 'It is of little service to an accused person who is written into jail by a prejudiced press that the publisher or editor is fined or imprisoned.' "[62]

There are two reasons why this solution is unacceptable in the United States. First, many of our judges are elected and not appointed as they are in Great Britain. In light of the close ties between the courts and the political forces in the United States, granting American courts the power to hold the editor of a newspaper in contempt could seriously threaten freedom of the press— a matter of at least as much concern as prejudicial publicity in criminal trials.[63]

The second, and more important, reason is that the first amendment guarantees the freedom of the press. The struggle in this country has not been that of a fair trial *against* a free press, but the effort to guarantee both a fair trial *and* a free press.[64] Thus the remedy of a defendant who has suffered from prejudicial publicity "is not the punishment of editors, but the granting of new trials, changes in venue, or continuances to parties who are prejudiced."[65]

There are several methods available to an American judge to protect a party from prejudicial publicity, including use of the *voir dire* in the selection of the jury, continuances, changes of venue, and sequestration of the jury.[66] None of these methods, however, are entirely successful in preserving an impartial jury.[67] As Justice Holmes has said, "[a]ny judge who has sat with juries knows that

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Prejudicial News Reporting of Criminal Trials in the British Commonwealth, in Free Press-Fair Trial: A Report of the Proceedings of A Conference on Prejudicial News Reporting in Criminal Cases 32, 47-48 (F. Inbau ed. 1962); Comment, Controlling Prejudicial Publicity by the Contempt Power: The British Practice and Its Prospect in American Law, 42 Notre Dame Law. 957 (1967).

62. Monroe, A Radio and Television Newsman's View, Symposium on a Free Press and a Fair Trial, 11 Vill. L. Rev. 687, 691 (1966).

63. Graham, A Newspaperman's View, Symposium on a Free Press and a Fair Trial, 11 Vill. L. Rev. 680, 684-85 (1966).

64. Id. at 683. The desire to protect the right to a free press can be seen not only in the first amendment, but also in other documents and statements of our Founding Fathers. "Printing presses shall be free, except . . . where by commission of private injury they shall give cause of private action . . . ." Jefferson's First Draft of the Virginia Constitution 1776, 1 The Papers of Thomas Jefferson 344-45 (J. Boyd ed. 1950). Substantially the same wording also appears in Jefferson's Second Draft, id. at 353, and Third Draft, id. at 363. "[T]he freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." James Madison, 1 Annals of Cong. 434 (1789).

65. Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1, 3 (1960). "[F]or to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' More specifically, it is to forget the environment in which the First Amendment was ratified." Bridges v. California, 314 U.S. 252, 264 (1941) (citations omitted). See also Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946).

66. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); Broeder, Voir Dire Examinations An Empirical Study, 38 S. Cal. L. Rev. 503, 505 (1965).

67. See notes 68-76 infra and accompanying text.

in spite of forms they are extremely likely to be impregnated by the environing atmosphere."[68]

The *voir dire* is considered the least successful method of preserving an impartial jury. The results of one study show that the "[*v*]*oir dire* was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.' "[69] Judges[70] and defense attorneys[71] agree, although there is some disagreement on the part of prosecutors,[72] that little faith is to be placed in the ability of the *voir dire* to remove prejudiced jurors.

The use of continuances and changes of venue also has limited effectiveness. Neither of these devices can prevent the republication of the prejudicial commentary at the new time or the new place of trial.[73] The use of a continuance presents another problem since it might deny the defendant his right to a speedy trial, and the courts are reluctant to force a defendant to choose between these two sixth amendment rights.[74] Sequestration of the jury, although considered the best method available to keep prejudicial publicity from the jury,[75] cannot effectively prevent jurors from developing a preconceived opinion of guilt or innocence even before their selection.[76]

Another method of preventing prejudice from entering the jury box is the regulation of out-of-court statements made by parties and attorneys. It has been suggested that the various bar and press associations establish such guidelines for their members to follow.[77] Several such guidelines have been established,[78] but their effectiveness has yet to be demonstrated.[79]

68. Frank v. Mangum, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting).

69. Broeder, Voir Dire Examinations: An Empirical Study, 38 S. Cal. L. Rev. 503, 505 (1965).

70. Siebert, Trial Judges' Opinions on Prejudicial Publicity, in Free Press and Fair Trial: Some Dimensions of the Problem 1 (C. Bush ed. 1970). Of the judges who answered the questionnaire only 5.4% felt that the voir dire was highly effective while 52.4% felt that it was ineffective. Id. at 14.

71. A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to a Fair Trial and Free Press 57 (Approved Draft 1968).

72. Specter, A Prosecutor's View, Symposium on a Free Press and a Fair Trial, 11 Vill. L. Rev. 697, 701 (1966).

73. Trescher, A Bar Association View, Symposium on a Free Press and a Fair Trial, 11 Vill. L. Rev. 709, 710 (1966). See Gelb, Fair Trials and Free Speech, 31 Geo. Wash. L. Rev. 607, 612-13 (1963); Comment, Trial by Newspaper, 33 Fordham L. Rev. 61, 68-69 (1964).

74. Klopfer v. North Carolina, 386 U.S. 213 (1967); Gelb, Fair Trials and Free Press, 31 Geo. Wash. L. Rev. 607, 613 (1963); Comment, Trial by Newspaper, 33 Fordham L. Rev. 61, 69 (1964). This problem was recognized by the Supreme Court in Groppi, but it reached no conclusion as to whether the choice of one constitutes a denial or a waiver of the other. Groppi v. Wisconsin, 400 U.S. 505, 510 (1971).

75. Siebert, supra note 70, at 11, 14.

76. Trescher, supra note 73, at 711. The cost of sequestering the jury is so great that it is prohibitive in all but the most publicized cases. Id.

77. Taylor, Crime Reporting and Publicity of Criminal Proceedings, 66 Colum. L. Rev. 34, 44 (1966). See also Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

78. E.g., A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating

Although a defendant in a misdemeanor case has the right to a jury trial,[80] it is not clear what other rights are inherent in this trial. There is no uniform rule throughout the nation with respect to these rights. Right to counsel, for example, is granted in many jurisdictions,[81] while denied in others.[82] In *Groppi* the Court took the first step toward defining these rights. Although Mr. Justice Black may be correct in saying that the defendant was not denied a fair trial since there were other methods available to protect his right to an impartial jury, that argument would seem to ignore the majority's point that the defendant cannot be denied full protection because of the label placed on the crime by the legislature. "[U]nfairness anywhere, in small cases as well as in large, is abhorred, is to be ferreted out, and is to be eliminated."[83] Since no single method of insuring an impartial jury has been found to be wholly successful, the only way a defendant can be assured of complete protection is to have all of the methods available. If one accused of a misdemeanor is to be accorded full due process, following the Court's logic in *Groppi*, he must be granted the same rights as an accused felon.

Criminal Procedure—Self-Incrimination—Statement Admissible to Impeach Defendant Even Though *Miranda* Warnings were Not Given.—Harris was charged with selling heroin to an undercover police officer on two occasions. At trial the officer who allegedly purchased the heroin and two other officers testified concerning the details of the sales and the chemical composition of the material purchased. In the face of this evidence the defendant decided to testify on his own behalf. He denied that one of the sales was made

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to a Fair Trial and Free Press 2 (Approved Draft 1968); American Newspaper Publishers Association, Free Press-Fair Trial 95-119 (1967); Release of information by personnel of the Department of Justice relating to criminal proceedings, 28 C.F.R. § 50.2 (1971).

79. Compare Release of information, supra note 78, with the procedures followed in the case of Phillip Berrigan, as reported in N.Y. Times, May 1, 1971, at 12, col. 3; id., May 2, 1971, at 1, col. 2; id., May 11, 1971, at 21, col. 1.

80. Baldwin v. New York, 399 U.S. 66 (1970).

81. See e.g., Beck v. Winters, 407 F.2d 125 (8th Cir.), cert. denied, 395 U.S. 963 (1969); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Mitchell v. Wainwright, 308 F. Supp. 436 (M.D. Fla. 1969); Burrage v. Super. Ct., 105 Ariz. 53, 459 P.2d 313 (1969); In re Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967); State ex rel. Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970); State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967); State v. McClam, 7 N.C. App. 477, 173 S.E.2d 53 (1970); State v. Best, 5 N.C. App. 379, 168 S.E.2d 433 (1969); Stevenson v. Holzman, 254 Ore. 94, 458 P.2d 414 (1969). See also Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685 (1968).

82. See, e.g., Cableton v. State, 243 Ark. 351, 420 S.W.2d 534 (1967); People v. Neidhart, 129 Ill. App. 2d 240, 262 N.E.2d 731 (1970); City of Toledo v. Frazier, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967); Hendrix v. City of Seattle, 76 Wash. 2d 142, 456 P.2d 696, cert. denied, 397 U.S. 948 (1970). See also Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685 (1968).

83. Groppi v. Wisconsin, 400 U.S. 505, 514 (1971) (Blackmun, J., concurring).

and claimed that the material sold in the second alleged narcotics sale was in fact merely baking powder. On cross-examination the prosecuting attorney questioned the defendant regarding statements made by him to the police on the day of his arrest. These statements, which were read to the defendant in the presence of the jury, contradicted his direct testimony. Harris disclaimed any recollection of these statements or of the questions asked of him by the police. No attempt was made by the prosecution to introduce these statements in its case in chief since it was clear, and the government conceded, that they were obtained in violation of the rules set forth in *Miranda v. Arizona*.[1] The trial judge instructed the jury that these statements could be considered only on the question of the defendant's credibility and not directly as evidence of his guilt. The defendant's conviction for the second heroin sale, affirmed by the New York Court of Appeals,[2] was upheld by the United States Supreme Court. *Harris v. New York*, 401 U.S. 222 (1971).

The Supreme Court has invariably excluded evidence obtained in violation of the fifth amendment privilege against compulsory self-incrimination.[3] On the other hand, no such exclusion originally attached to evidence seized in violation of the fourth amendment's privilege against unreasonable searches and seizures.[4] However in *Weeks v. United States*[5] the Court held that evidence obtained in violation of the fourth amendment was inadmissible in a federal prosecution. This doctrine became known as the "exclusionary rule."[6] After *Weeks* the fourth amendment, and in turn, the exclusionary rule, were given broader interpretations.[7] By 1961 this right was considered significant enough to be held applicable to the several states through the fourteenth amendment.[8]

At the same time the privilege against compulsory self-incrimination was also being expanded[9] and was made applicable to state prosecutions by *Malloy v.*

1. 384 U.S. 436 (1966). The defendant was not advised of his right to counsel. Harris v. New York, 401 U.S. 222, 224 (1971).

2. 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (per curiam), aff'g 31 App. Div. 2d 828, 298 N.Y.S.2d 245 (2d Dep't 1969).

3. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); United States v. Lombardo, 241 U.S. 73 (1916), aff'g 228 F. 980 (W.D. Wash. 1915); Bram v. United States, 168 U.S. 532 (1897); Counselman v. Hitchcock, 142 U.S. 547 (1892).

4. See Adams v. New York, 192 U.S. 585, 598 (1904); 8 J. Wigmore, Evidence § 2183 (McNaughton rev. ed. 1961).

5. 232 U.S. 383 (1914). Weeks held that letters seized in violation of the fourth amendment could not be used against the defendant. Id. at 398.

6. See Mapp v. Ohio, 367 U.S. 643, 650 (1961); 8 J. Wigmore, supra note 4, § 2184a.

7. See, e.g., Agnello v. United States, 269 U.S. 20 (1925); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). For a discussion of Agnello see note 15 infra. Silverthorne held that the government could not use evidence obtained illegally to procure additional evidence to be offered at trial. The indirect evidence so obtained was also excluded. 251 U.S. at 392. This became known as the "fruit of the poisonous tree" doctrine. See 8 J. Wigmore, supra note 4, § 2184a.

8. Mapp v. Ohio, 367 U.S. 643 (1961), overruling Wolf v. Colorado, 338 U.S. 25 (1949).

9. See, e.g., Griffin v. California, 380 U.S. 609 (1965); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

Hogan.[10] Subsequent to *Malloy* this privilege was further extended and held to be closely related to the right to counsel guaranteed by the sixth amendment.[11] This trend culminated in the landmark decision of *Miranda v. Arizona*.[12] In *Miranda*, the Supreme Court held that in order for any statement by an accused subsequent to his arrest to be admissible at trial, it must have been obtained after he has been informed of his basic constitutional rights.[13]

Prior to *Miranda*'s expansion of the fifth amendment privilege, the Court had somewhat narrowed the scope of the fourth amendment exclusionary rule in *Walder v. United States*.[14] In *Walder* illegally seized evidence, which the prosecution had attempted to introduce at a prior trial (on a different charge) against the same defendant, was used to impeach the direct testimony of the defendant to the effect that he had never dealt in narcotics.[15] The Supreme Court held that such evidence obtained in violation of the fourth amendment was admissible to impeach the defendant's credibility where his direct testimony went further than a mere denial of the elements of the crime.[16]

Commentators who have examined the implications of *Walder* have noted the apparent stress placed upon the collateral nature of the evidence in question.[17] In following *Walder*, many courts have also indicated that the collateral nature of the evidence involved was crucial.[18] As a circuit court judge, Chief Justice

10. 378 U.S. 1 (1964), overruling Twining v. New Jersey, 211 U.S. 78 (1908).

11. See Escobedo v. Illinois, 378 U.S. 478 (1964).

12. 384 U.S. 436 (1966).

13. Id. at 444. The so-called "Miranda warnings" require that law enforcement officials inform the accused "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id.

14. 347 U.S. 62 (1954).

15. Id. at 62-64. The Walder situation was distinguished from that in Agnello v. United States, 269 U.S. 20 (1925), where the Government sought to "smuggle" in the illegally seized evidence after the defendant denied for the first time on cross-examination that he had ever seen cocaine. See 347 U.S. at 66. In Walder, the sweeping denial was made on direct examination. Id. at 62.

16. 347 U.S. at 65.

17. E.g., Kent, Miranda v. Arizona—The Use Of Inadmissible Evidence for Impeachment Purposes, 18 W. Res. L. Rev. 1177 (1967); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1029-30 (1966); Comment, The Collateral Use Doctrine: From Walder to Miranda, 62 Nw. U.L. Rev. 912 (1968); Comment, The Impeachment Exception to the Exclusionary Rules, 34 U. Chi. L. Rev. 939 (1967). That the Court intended the evidence to be used only collaterally is indicated by the following: "[The defendant] must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." 347 U.S. at 65. As one analyst put it: "The Court apparently meant that, although illegally seized evidence may be used to impeach the defendant's testimony relating to his 'good character,' it may not be used to impeach testimony that directly relates to the offense charged." Developments in the Law—Confessions, supra, at 1030 (footnote omitted).

18. See, e.g., Groshart v. United States, 392 F.2d 172, 175-76 (9th Cir. 1968); United States v. Curry, 358 F.2d 904, 910 (2d Cir.), cert. denied, 385 U.S. 873 (1966); Bailey v. United States, 328 F.2d 542, 543-44 (D.C. Cir.), cert. denied, 377 U.S. 972 (1964); Tate

Burger apparently interpreted *Walder* to allow impeachment by illegally seized evidence only when it tended to prove collateral matters.[19] In *Tate v. United States*[20] he said: "Once [the defendant] goes beyond denial of the crime itself and testifies as to collateral matters he is under an *added* compulsion to tell the truth."[21]

Similarly in *United States v. Curry*,[22] the Court of Appeals for the Second Circuit held:

> [T]he defendant's denial of the elements of the crime may not be disputed by evidence which is the fruit of illegal action. . . . But once the government has presented a prima facie case without using such evidence, it may use the suppressed evidence to challenge the truth and reliability of the defendant's assertions as to *collateral matters*.[23]

It seems apparent that if the tainted evidence being used for impeachment purposes were directly probative of the crime charged, these courts would not have affirmed its admission.[24]

The Court in *Harris*, however, has apparently rejected this implication. Admitting that the questionable evidence bore a more direct relationship to the crime charged than that in *Walder*, the majority insisted that there was no "difference in principle" requiring a different conclusion.[25] Quoting from *Walder*, the Court stated that " '[t]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' "[26] The majority was clearly sensitive to the possibility that a contrary result might leave a defendant free to perjure himself.[27]

Mr. Justice Brennan's dissent, in which Justices Marshall and Douglas joined, also cited the *Walder* case, but in support of the argument that the tainted pretrial statement should not have been admitted even for impeachment purposes.[28] The minority noted the collateral nature of the tainted evidence in

v. United States, 283 F.2d 377 (D.C. Cir. 1960); see Lockley v. United States, 270 F.2d 915, 919 (D.C. Cir. 1959) (Burger, J., dissenting).

19. Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960) (Burger, J.). In view of his opinion in Tate, it is questionable whether the Chief Justice would have decided Harris the same way if the case had arisen ten years earlier.

20. 283 F.2d 377 (D.C. Cir. 1960).

21. Id. at 381. See also Bailey v. United States, 328 F.2d 542 (D.C. Cir.), cert. denied, 377 U.S. 972 (1964).

22. 358 F.2d 904 (2d Cir.), cert. denied, 385 U.S. 873 (1966).

23. Id. at 911 (emphasis added).

24. See Inge v. United States, 356 F.2d 345, 350 (D.C. Cir. 1966); Johnson v. United States, 344 F.2d 163, 166 (D.C. Cir. 1964).

25. 401 U.S. at 225.

26. Id. at 224, quoting Walder v. United States, 347 U.S. 62, 65 (1954).

27. 401 U.S. at 226. "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." Id.

28. Id. at 226-28. The late Mr. Justice Black dissented separately without writing an opinion. Id. at 226.

Walder as opposed to the more direct involvement of the evidence in *Harris*.[29] The dissent emphasized the language in *Walder* to the effect that a defendant should "be free to deny all the elements of the case against him . . . ."[30] It was Justice Brennan's opinion that Harris was not "free" to deny all such elements without thereby risking the introduction of the tainted evidence.[31] Thus the dissent reasoned that *Walder* should have precluded the introduction of the defendant's pretrial statement.

Aside from the fact that the evidence in *Harris* was more direct than that in *Walder*, the cases differ in another significant respect. Although *Walder* involved physical evidence illegally seized,[32] *Harris* involved an inculpatory statement wrongfully obtained.[33] Even before *Miranda* it was arguable that, due to the inherently hostile and coercive environment associated with precinct interrogation, wrongfully obtained inculpatory statements ought not to be admitted for impeachment purposes under the *Walder* doctrine.[34] Moreover, it could have been contended that *Walder* had actually been overruled by *Escobedo v. Illinois*[35] and by *Miranda* itself.[36] Indeed, there is language in *Miranda* to support this view:

> The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner . . . . [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial . . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.[37]

The binding nature of these words as precedent was a matter of dispute between the majority and minority in *Harris*. The majority admitted that these comments might be construed to render the defendant's statement inadmissible even for impeachment purposes.[38] However, they argued that since the statement quoted was not necessary to the holding in *Miranda*, it was dictum and therefore

29. Id. at 226-28.

30. 347 U.S. at 65.

31. 401 U.S. at 230.

32. 347 U.S. at 64.

33. 401 U.S. at 222.

34. See 4 Houston L. Rev. 144, 149 (1966); 45 Minn. L. Rev. 669, 675-76 (1961). See also Comment, The Impeachment Exception to the Exclusionary Rules, supra note 17, at 948-49. Many of the cases following Walder dealt with situations where evidence was obtained while other rights were being violated. See, e.g., Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960), where incriminating statements were obtained during an unlawful detention. Such statements had previously been held to be inadmissible as part of the prosecution's case. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). See also United States v. Curry, 358 F.2d 904 (2d Cir.), cert. denied, 385 U.S. 873 (1966); People v. Kulis, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966) (per curiam). Curry and Kulis both involved violations of the sixth amendment right to counsel.

35. 378 U.S. 478 (1964).

36. See Kent, supra note 17, at 1178-79; Note, Limited Use of Unlawfully Obtained Statements to Impeach Defendant's Credibility: The New York Rule in Light of Escobedo and Miranda, 13 N.Y.L.F. 146, 155-56 (1967).

37. 384 U.S. at 476-77 (emphasis added).

38. 401 U.S. at 224.

not controlling precedent.[39] The dissent, on the other hand, placed heavy emphasis on this quote from *Miranda*.[40] In addition, Justice Brennan noted that several federal and state appellate courts concurred in this view.[41]

Thus the *Harris* decision represents a broadening of the generally accepted view of *Walder*[42] and a narrowing of the scope of *Miranda*.[43] This marks a significant reversal of the recent trend in Supreme Court decisions which had expanded the rights of the defendant in a criminal prosecution.[44] The previously consistent behavior of the Court in this regard has been the subject of much publicity and has not met with unanimous approval.[45]

Conceivably the application of *Harris* might give rise to undesirable consequences. There is the possibility of a deleterious effect on the conduct of police officers who are aware that tainted evidence (bearing on primary or collateral matters) will be admissible for impeachment purposes. The police may feel that they have more leeway in questioning an accused and there will be at least a temptation to engage in unauthorized interrogation.[46] It has been suggested that a possible effect will be a two-step interrogation process, *i.e.*, the police would begin with an unconstitutional interrogation to obtain impeachment evidence, followed by an interrogation pursuant to *Miranda* which would be used to garner evidence for use in the state's case in chief.[47] While it may be disconcerting to conceive of the police acting in such a devious manner, this eventuality cannot be completely ruled out.[48] There is also the very practical consideration that while the tainted evidence used for impeachment is admissible only on the question of the defendant's credibility, and the jury must be so instructed[49] there is realistically nothing to stop the jury from viewing the statements as proof of what is contained therein.[50]

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39. Id.

40. Id. at 230-31.

41. Id. at 231 n.4, citing, inter alia, United States v. Fox, 403 F.2d 97 (2d Cir. 1968); United States ex rel. Hill v. Pinto, 394 F.2d 470 (3d Cir. 1968); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968). These cases, in the dissent's view, support the proposition that "[t]his language completely disposes of any distinction between statements used on direct as opposed to cross-examination." 401 U.S. at 231 (footnote omitted).

42. See notes 14-24 supra and accompanying text.

43. See notes 36-41 supra and accompanying text.

44. See notes 5-13 supra and accompanying text.

45. See, e.g., N.Y. Times, June 15, 1969, § 1, at 43, col. 1; U.S. News & World Report, May 20, 1968, at 51.

46. The majority in Harris argued that sufficient deterrence was placed upon the police through the denial of the use of the tainted evidence to the prosecution in its case in chief. 401 U.S. at 225.

47. Groshart v. United States, 392 F.2d 172, 180 (9th Cir. 1968). See also 45 Minn. L. Rev. 669, 677-78 (1961).

48. In such a situation it would be possible to argue that the second statement was "poisoned" by the oral admissions made before the "Miranda warnings" had been given. Contra, People v. Stephen, 23 N.Y.2d 611, 246 N.E.2d 344, 298 N.Y.S.2d 489 (1969).

49. This was done by the trial judge in Harris. 401 U.S. at 223.

50. 53 Mich. L. Rev. 136, 137 (1954); 32 Tex. L. Rev. 883, 884 (1954). On this point the case of Bruton v. United States, 391 U.S. 123 (1968), is most instructive. The Bruton

Finally *Harris* poses a dilemma for a defendant who has made an incriminating statement before being informed of his constitutional rights. If he decides to testify in his own behalf the prosecution can introduce the illegally obtained statement to impeach him and prejudice his case. Conversely, if he does not testify he cannot tell his side of the story and the jury might improperly interpret his silence as an admission of guilt.[51]

The *Harris* decision is thus a narrowing of the previously expanded rights of defendants in criminal prosecutions. However, in allowing otherwise inadmissible evidence of the crime charged for purposes of impeachment, the Court's departure from precedent is arguably too radical. The Court could have fashioned its decision to give the trial judge discretion to exclude the illegally obtained evidence only if it would be unduly prejudicial to admit it.[52] An obvious difficulty here is the fact that this is a subjective test, placing added pressure on the trial judge and leaving him without a hard and fast rule as a guide. However, this approach would be more just, since it would allow tainted evidence to be admitted for impeachment purposes only when its probative value on the issue of credibility outweighs any prejudicial effect on the defendant's case.[53] While it may be contended that the Court was correct in its implicit conclusion that the great expansion of defendants' rights recently imposed on the judicial system ought not be extended any further, perhaps it has been too intemperate in its retreat.

Federal Civil Procedure—Jurisdiction Upheld Under 28 U.S.C. § 1338(b) Where Pendent Claim Named Party Not Named in Federal Claim.—In 1959, the plaintiff, Astor-Honor, Inc., contracted with William F. Buckley, Jr. for exclusive rights to publish his book, *Up From Liberalism*. In December 1966, Astor appointed Grosset & Dunlap, Inc. exclusive distributor of Astor's publications. One of the provisions of the agreement called for Grosset to pay Buckley money owed to him by Astor. Grosset advised Astor that it was making such payments, but actually, with Buckley's consent, no payments were made. Then, in August 1967, with the non-payment of royalties as a pretext, Buckley notified Astor that he was terminating the contract and entering into a contract with Bantam Books, Inc. to publish his book.[1] Astor then brought an action

Court noted a distinction between types of hearsay evidence which were being admitted for limited purposes. The Court stated that in some instances the chance that the jury would not obey the limiting instructions was so great that the statement should not be admitted to avoid undue prejudice to the defendant. Id. at 135.

51. Comment, The Collateral Use Doctrine: From Walder to Miranda, supra note 17, at 923. See generally Griffin v. California, 380 U.S. 609 (1965).

52. This suggestion was made in Comment, The Collateral Use Doctrine: From Walder to Miranda, supra note 17, at 921.

53. The suggested rule is analogous to rules of evidence in other areas. See J. Prince, Richardson on Evidence §§ 131, 151 (9th ed. 1964).

1. Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627, 628 (2d Cir. 1971).

in the district court charging Buckley and Bantam with copyright infringement,[2] which was a claim within the exclusive jurisdiction of the federal courts.[3] Astor did not allege any federal claims against Grosset, but charged it with unfair competition and unfair trade practices,[4] claims grounded in state common law.[5] Grosset moved to dismiss the claims[6] for want of jurisdiction, contending that they arose under state law and thus required complete diversity of citizenship.[7] The district court granted the motion, but the Second Circuit Court of Appeals reversed and upheld the court's jurisdiction under section 1338(b) of Title 28, United States Code,[8] indicating that a federal court could entertain jurisdiction over a pendent state claim against a party not named in the federal claim if the state claim arose out of "a common nucleus of operative fact."[9] *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971).

The power of the federal courts to exercise jurisdiction over claims is limited to cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, admiralty cases, cases naming the United States as a party, and cases in which there is established diversity of citizenship between the parties.[10] Despite this limitation, federal courts have exercised discretionary jurisdiction over claims that would otherwise fall within the province of the state courts when such claims have been joined with federal claims.[11] This pendent jurisdiction has been based on the fact that many federal rights are coextensive with state rights;[12] therefore judicial policies of economy, con-

2. Id. at 629. The court noted that the plaintiff might have avoided the controversy at hand if it had alleged a claim for copyright infringement against Grosset & Dunlap, Inc. Id.

3. 28 U.S.C. § 1338(a) (1970).

4. 441 F.2d at 629.

5. See, e.g., Electrolux Corp. v. Val-Worth, Inc., 6 N.Y.2d 556, 567-69, 161 N.E.2d 197, 203-04, 190 N.Y.S.2d 977, 985-88 (1959).

6. 441 F.2d at 629.

7. Id. Grosset contended that diversity of citizenship between it and Astor-Honor was required under 28 U.S.C. § 1332(a) (1970).

8. 28 U.S.C. § 1338(b) (1970). That section provides: "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws." See Note, The Doctrine of Hurn v. Oursler and the New Judicial Code, 37 Iowa L. Rev. 406 (1952).

9. 441 F.2d at 629, quoting UMW v. Gibbs, 383 U.S. 715, 725 (1966); see Shakman, The New Pendent Jurisdiction of the Federal Courts, 20 Stan. L. Rev. 262 (1968); Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657 (1968). See generally Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018 (1962); Note, Pendent Jurisdiction: An Expanding Concept in Federal Court Jurisdiction, 51 Iowa L. Rev. 151 (1965).

10. U.S. Const. art. III, § 2.

11. E.g., UMW v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 238 (1933). For a broad review of the area of pendent jurisdiction, see generally 1 W. Barron and A. Holtzoff, Federal Practice and Procedure §§ 23, 50 (1960); 3A J. Moore, Federal Practice ¶ 18.07, at 1921-53 (2d ed. 1970).

12. E.g., Hurn v. Oursler, 289 U.S. 238 (1933); Siler v. Louisville & N.R.R., 213 U.S. 175 (1909).

venience, and "fairness to litigants" call for the adjudication of all the elements in controversy in a single action.[13]

In *Osborn v. Bank of the United States*[14] the Supreme Court recognized the power of the federal courts to exercise jurisdiction over state matters the determination of which was deemed necessary to the resolution of federal claims.[15] Thereafter, in *Siler v. Louisville & Nashville Railroad*,[16] the Court upheld the jurisdiction of federal courts to dispose of state claims joined with federal claims[17] when they both sought identical relief.[18] However, since the Court, in accord with its traditional policy,[19] avoided the constitutional question in this case,[20] the decision did not have an immediate impact on pendent jurisdiction.[21]

The Court's indecisiveness in *Siler* left open the question of a federal court's power to exercise jurisdiction over a claim of unfair competition that was pendent to a claim under the copyright, patent or trademark laws.[22] Some federal courts upheld such jurisdiction on the basis of *Siler*,[23] while others denied

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13. UMW v. Gibbs, 383 U.S. 715, 726 (1966).

14. 22 U.S. (9 Wheat.) 326 (1824) (Marshall, C.J.).

15. Id. at 362. Osborn involved an injunction sought by the Bank of the United States to prevent the collection of a state tax. Id. at 369. Congress had authorized federal circuit courts to exercise jurisdiction over cases involving the Bank. The Court upheld this grant of jurisdiction even in cases where the controversy involved matters otherwise within the realm of the state courts. Id. at 362-63.

16. 213 U.S. 175 (1909).

17. Id. at 191. In Siler, the plaintiff challenged a state statute and an order regulating railroad rates promulgated thereunder as violative of the fourteenth amendment in that it deprived the plaintiff of its property without due process of law and, in the alternative, alleged that the order was not authorized by state law. Id. at 190-91.

18. Id. The Court upheld the jurisdiction of the federal courts to hear this case "even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." Id. at 191. The Court followed this line of reasoning in several later cases. See, e.g., Stark Bros. Co. v. Stark, 255 U.S. 50 (1921); Lincoln Gas & Elec. Light Co. v. Lincoln, 250 U.S. 256 (1919).

19. See Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

20. 213 U.S. at 193. The Court chose to hold the state statute inapplicable rather than declare it unconstitutional, stating that cases should be handled without reference to the federal constitution whenever possible. Id.

21. Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018, 1020 (1962). The Court had not yet been faced with a case where the federal ground asserted did not involve the Constitution. In fact, prior to Siler, the Court had denied pendent jurisdiction in this type of a case. See, e.g., A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 201 U.S. 166 (1906); Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901).

22. 28 U.S.C. § 1338(a) (1970).

23. E.g., Vogue Co. v. Vogue Hat Co., 12 F.2d 991 (6th Cir.), cert. denied, 273 U.S. 706 (1926) (granting jurisdiction over an unfair competition claim after dismissal of a claim for trademark infringement); Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co.,

it.[24] Finally, in the landmark decision of *Hurn v. Oursler*,[25] where the plaintiff had joined an unfair competition claim based on a common law right with a claim for copyright infringement,[26] the Supreme Court resolved the issue by upholding the power of federal courts to decide such state claims.[27] In so doing, the Court set out a two-fold rule for the exercise of pendent jurisdiction by the federal courts: (1) the federal question averred must not be plainly wanting in substance; and (2) it must be a case wherein two distinct grounds, only one of which is federal, are alleged in support of a single cause of action, as opposed to a case in which both a federal and a non-federal cause of action are alleged.[28]

In *Hurn v. Oursler* the Court used the term "cause of action,"[29] a phrase which it had previously recognized to be a source of confusion.[30] This unfortunate choice of words continued to confuse the lower courts which attempted to apply the rule as thus enunciated.[31] Thus, when the rule of *Hurn v. Oursler* was codified as section 1338(b) of Title 28, United States Code,[32] Congress attempted to clarify the law in the areas of patent, trademark and copyright by replacing the term "cause of action" with the phraseology "substantial and related claim."[33] Nevertheless, the courts continued to interpret the doctrine of

182 F. 832 (C.C.N.D.N.Y. 1910) (upholding jurisdiction over an unfair competition claim joined with a claim for patent infringement).

24. E.g., Craig Demagnetizer & Ink Dryer Corp. v. Static Control Co., 295 F. 72 (2d Cir. 1923); Planten v. Gedney, 224 F. 382 (2d Cir. 1915); Recamier Mfg. Co., v. Harriet Hubbard Ayer, Inc., 59 F.2d 802 (S.D.N.Y. 1932). These cases were based on the so-called "second circuit rule," which held that no matter how intimately related the claims for infringement of copyright, trademark or patent were with the claim for unfair competition, the federal courts lacked jurisdiction to consider the latter.

25. 289 U.S. 238 (1933).

26. Id. at 239.

27. Id. at 246. The Court based its decision on the holdings in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 326 (1824), and Siler v. Louisville & N.R.R., 213 U.S. 175 (1909), and rejected the views expressed in A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 201 U.S. 166 (1906), and Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901). 289 U.S. at 243-45.

28. 289 U.S. at 246. The Court reaffirmed the test enunciated in Hurn v. Oursler in Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 325 (1938), upholding federal jurisdiction over an unfair competition claim joined with a claim for trademark infringement where the facts which supported both claims were "substantially the same."

29. 289 U.S. at 246.

30. United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933); see Shakam, The New Pendent Jurisdiction of the Federal Courts, 20 Stan. L. Rev. 262, 263 (1968). See generally Gavit, A "Pragmatic Definition" of a "Cause of Action"?, 82 U. Pa. L. Rev. 129 (1933); McCaskill, Actions and Causes of Action, 34 Yale L.J. 614 (1925).

31. Excellent examples of the confusion this term caused are the decisions of the United States Court of Appeals for the Second Circuit. E.g., Musher Foundation, Inc. v. Alba Trading Co., 127 F.2d 9 (2d Cir.), cert. denied, 317 U.S. 641 (1942); Lewis v. Vendome Bags, Inc., 108 F.2d 16 (2d Cir. 1939), cert. denied, 309 U.S. 660 (1940). See also Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 659 (1968).

32. 28 U.S.C. § 1338(b) (1970).

33. Id.; see note 8 supra. This has been recognized as an expansion of the Hurn rule in this

pendent jurisdiction narrowly,[34] thus forcing the parties to undertake a multiplicity of actions to resolve a single controversy.

The Supreme Court reconsidered *Hurn v. Oursler* in *United Mine Workers v. Gibbs*,[35] wherein the plaintiff sought relief under section 303 of the Labor Management Relations Act[36] for an alleged secondary boycott and at common law for an unlawful boycott and conspiracy to interfere with a contract.[37] The trial court dismissed the federal claims but allowed the plaintiff to recover on the pendent state claims.[38] The Supreme Court unanimously affirmed on the jurisdictional issue[39] and announced a new test, which distinguished between the *power* to entertain pendent jurisdiction and the *discretion* of the courts in exercising that power.[40] This exercise of power was justified by both the impulse towards "entertaining the broadest possible scope of action consistent with fairness to the parties . . . ,"[41] as emphasized by the Federal Rules of Civil Procedure,[42] and by considerations of judicial economy and convenience.[43] Mr. Justice Brennan phrased the new test as follows:

> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in the federal courts to hear the whole.[44]

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area. River Brand Rice Mills, Inc. v. General Foods Corp., 334 F.2d 770 (5th Cir. 1964), cert. denied, 379 U.S. 998 (1965); 3A J. Moore, Federal Practice ¶ 18.07, at 1923 (2d ed. 1970).

34. E.g., Kleinman v. Betty Dain Creations, Inc., 189 F.2d 546 (2d Cir. 1951). Contra, Schreyer v. Casco Prod. Corp., 190 F.2d 921 (2d Cir. 1951), cert. denied, 342 U.S. 913 (1952). These cases point out that the controversy which had existed in the Second Circuit prior to the codification of § 1338(b) continued after the enactment of the statute.

35. 383 U.S. 715 (1966), noted in 80 Harv. L. Rev. 220 (1966), 13 Loyola L. Rev. 167 (1966) and 44 Texas L. Rev. 1631 (1966).

36. 29 U.S.C. § 187 (1970).

37. 383 U.S. at 720.

38. Gibbs v. UMW, 220 F. Supp. 871 (E.D. Tenn. 1963), aff'd, 343 F.2d 609 (6th Cir. 1965), rev'd, 383 U.S. 715 (1966).

39. Mr. Justice Harlan, in a concurring opinion in which Mr. Justice Clark joined, agreed with that part of the Court's opinion relating to pendent jurisdiction. 383 U.S. at 742.

40. Id. at 726.

41. Id. at 724.

42. Id. The Court referred to the following rules: Fed. R. Civ. P. 2 (one form of action), 18 (joinder of claims), 19 (necessary joinder of parties), 20 (permissive joinder), and 42 (consolidation). 383 U.S. at 724.

43. 383 U.S. at 724. The Court noted that if a federal claim was dismissed before trial or if the state issues substantially predominate, the state claim may be dismissed. But if the state claim is closely tied to questions of federal policy, the merits favoring the exercise of pendent jurisdiction are particularly strong. Id. at 726-27.

44. Id. at 725 (footnote omitted). The Court cited Armstrong Co. v. Nu-Enamel Corp., 305 U.S. 315, 325 (1938), in support of this test. 383 U.S. at 725 n.13. This case affirmed the rule of Hurn v. Oursler but used slightly broader language. See note 28 supra.

The Court noted that this power "need not be exercised in every case in which it is found to exist."[45] Rather, its existence is discretionary. Unless the exercise of jurisdiction is justified by the underlying policy considerations of judicial economy, convenience, and fairness to the parties, federal courts should "hesitate to exercise jurisdiction over state claims . . . ."[46] The policies underlying *Gibbs* have continued to motivate the Court to reaffirm and expand the concept of pendent jurisdiction.[47]

The concept of pendent jurisdiction poses a problem in an action where the pendent claim names a party not named in the federal claim—a pendent party. Under the rule of *Hurn v. Oursler*, the pendent claim had to be a separate ground underlying the same cause of action;[48] the fact that a pendent party would have to be named in a separate cause of action compelled the courts to refuse to exercise jurisdiction over such parties.[49]

In *Wojtas v. Village of Niles*[50] the plaintiff joined an action against a police officer brought under federal civil rights statutes[51] with a claim against a village arising under state common law.[52] In an opinion by the Seventh Circuit Court of Appeals affirming the dismissal of the claim against the village,[53] the court held that the lack of diversity between the parties was "fatal to the district court's

45. 383 U.S. at 726.

46. Id.

47. See, e.g., Rosado v. Wyman, 397 U.S. 397 (1970), where the Court, citing Gibbs, upheld jurisdiction over a pendent state claim after the federal claim had become moot, noting that this was not "a threshold jurisdictional defect." Id. at 404.

After reviewing the trend towards expansion of the doctrine of pendent jurisdiction, the American Law Institute has recommended its codification in even broader terms than the Court used in Gibbs. The proposed draft seeks to give federal courts "jurisdiction to determine all claims arising under State law that arise out of the same transaction or occurrence or series of transactions or occurrences as the federal claim, defense, or counterclaim, if such a determination is necessary in order to give effective relief on the federal claim or counterclaim or if a substantial question of fact is common to the claims arising under State law and to the federal claim, defense, or counterclaim." ALI Study of the Division of Jurisdiction Between State and Federal Courts § 1313(a) (1969).

48. Hurn v. Oursler, 289 U.S. 238, 246 (1933); see text accompanying notes 25-28 supra; Rumbaugh v. Winifrede R.R., 331 F.2d 530, 539 (4th Cir.), cert. denied, 379 U.S. 929 (1964).

49. Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964), cert. denied, 379 U.S. 964 (1965); Wasserman v. Perugini, 173 F.2d 305 (2d Cir. 1949); New Orleans Public Belt R. Co. v. Wallace, 173 F.2d 145 (5th Cir. 1949); Pearce v. Pennsylvania R.R., 162 F.2d 524 (3d Cir.), cert. denied, 332 U.S. 765 (1947). See also Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018 (1962), where the author noted the following criterion for the exercise of pendent jurisdiction: "At a minimum, the courts agree that federal and nonfederal claims alleged to be but different grounds asserted in support of a single cause of action must be claims brought by the same plaintiff against the same defendant." Id. at 1027 (footnotes omitted).

50. 334 F.2d 797 (7th Cir. 1964), cert. denied, 379 U.S. 964 (1965).

51. 42 U.S.C. §§ 1983, 1985-86 (1970).

52. 334 F.2d at 798. The claims were for the common law torts of false arrest and imprisonment, malicious prosecution and assault. Id.

53. Id. at 800.

jurisdiction . . . ."[54] Even in the realm of patents, trademarks and copyrights, where the doctrine had been codified,[55] the courts held that they were without power to exercise jurisdiction over pendent parties.[56]

The impact of the Supreme Court's decision in *Gibbs* influenced some lower federal courts to revise their views on pendent parties.[57] The question to be resolved was whether the "common nucleus of operative fact" included claims against pendent parties.[58] In *Hymer v. Chai*[59] the Court of Appeals for the Ninth Circuit held that the *Gibbs* test stood for "[j]oinder of claims, not joinder of parties . . . ."[60] Yet other courts have reasoned that the *Gibbs* test deserved a liberal interpretation and should include claims against pendent parties.[61] The

54. Id. at 799; see note 49 supra.

55. 28 U.S.C. § 1338(b) (1970).

56. See, e.g., T. B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. denied, 381 U.S. 915 (1965); French Renovating Co. v. Ray Renovating Co., 170 F.2d 945 (6th Cir. 1948); see Note, The Doctrine of Hurn v. Oursler and The New Judicial Code, 37 Iowa L. Rev. 406, 413 (1952).

57. See cases cited note 61 infra.

58. Along with the "common nucleus of operative fact" language the Gibbs Court added that the plaintiff's claim should be of a type that would be disposed of in one judicial proceeding. 383 U.S. at 725. This latter statement has been relied on by some courts to support the exercise of jurisdiction over pendent parties. See cases cited note 62 infra.

59. 407 F.2d 136 (9th Cir. 1969). The court directed the dismissal of a wife's claim for loss of consortium joined with her husband's damage suit because it fell below the minimum monetary amount required to sustain federal diversity jurisdiction under 28 U.S.C. § 1332(a) (1970). 407 F.2d at 137. Contra, Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966).

60. 407 F.2d at 137; accord, Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969); Howmet Corp. v. Tokyo Shipping Co., 320 F. Supp. 975, 979 (D. Del. 1971); Tucker v. Shaw, 308 F. Supp. 1, 9 (E.D.N.Y. 1970). ("Gibbs . . . was decided in the context of a suit in which both the State and Federal claims were between the same parties. Pendent jurisdiction, while used to bring in a State claim which the Court would otherwise not have the power to hear, was not used to create jurisdiction against totally different parties."); Rosenthal & Rosenthal, Inc. v. Aetna Cas. & Sur. Co., 259 F. Supp. 624, 630 (S.D.N.Y. 1966) ("The doctrine of pendent jurisdiction may be invoked only where the claim based upon a substantial federal question is made against the same defendants with respect to whom nonfederal claims are asserted."); Gautreau v. Central Gulf S.S. Co., 255 F. Supp. 615, 617 (E.D. La. 1966) ("This much, however, appears to be an accepted criterion: A nonfederal claim may be joined to a related federal claim under the Court's pendent jurisdiction when both claims are asserted by the same plaintiff against the same defendant.") (footnote omitted); see 3A J. Moore, Federal Practice ¶ 18.07, at 1952 (Supp. 1970), where Professor Moore states: "The doctrine of pendent jurisdiction has been applied only in cases in which the claim is against the same party against whom the main claim is pending. It does not permit the bringing in of a different party as to whom no federal claim exists as to which the state claim can be said to be pendent." Id. (footnote omitted). Contra, American Foresight, Inc. v. Fine Arts Sterling Silver, Inc., 268 F. Supp. 656 (E.D. Pa. 1967).

61. E.g., Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969) (wife's claim for loss of consortium, which was less than the minimum required for federal jurisdiction, held pendent to husband's injury claim); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968) (claim that

courts favoring the exercise of jurisdiction over pendent parties[62] have stressed that the Court's language in *Gibbs* calls for the disposition of all claims in one judicial proceeding.[63]

Even in those areas covered by section 1338(b),[64] the courts were in disagreement over their power to exercise jurisdiction over unfair competition claims lodged against pendent parties. In *American Foresight, Inc. v. Fire Arts Sterling Silver, Inc.*[65] the court upheld jurisdiction over unfair competition claims against individual defendants joined with a claim for copyright infringement against a corporate defendant.[66] The court found that the claims were so interwoven that they constituted one " 'factual nucleus'."[67] But in *Ellicott Machine Corp. v. Wiley Manufacturing Co.*,[68] a case in which the plaintiff alleged a patent infringement claim against a corporate defendant and joined with it a claim for unfair competition against a former employee,[69] the court held that it was without jurisdiction over the pendent claim because "no claim under patent laws was asserted against [the employee]."[70]

In *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*[71] the Second Circuit noted that in light of *Gibbs* all cases prior to that opinion were of suspect authority.[72] The court reasoned that "[a]lthough the pendent claim in *Gibbs* did not include a party not named in the federal claim, Mr. Justice Brennan's language and the common sense considerations underlying it seem broad enough to cover that problem also."[73] The court noted that one of the key elements in the doctrine of pendent jurisdiction is the fact that it is within the discretion of the federal court to exercise it.[74] Thus the federal courts are free to close their doors to suits

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did not meet jurisdictional amount held pendent); Connecticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41 (5th Cir. 1968) (insurance company held to be a pendent party in suit between union members and employer over insurance coverage arising out of collective bargaining agreement); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966) (father's claim for damages held pendent to minor son's negligence action). See also Smith Petroleum Serv., Inc. v. Monsanto Chem. Co., 429 F.2d 1103 (5th Cir. 1970).

62. E.g., Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 816-17 (8th Cir. 1969); Stone v. Stone, 405 F.2d 94, 98 (4th Cir. 1968); Connecticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41, 48 (5th Cir. 1968); American Foresight, Inc. v. Fine Arts Sterling Silver, Inc., 268 F. Supp. 656, 661 (E.D. Pa. 1967).

63. See UMW v. Gibbs, 383 U.S. 715, 725 (1966).

64. 28 U.S.C. § 1338(b) (1970).

65. 268 F. Supp. 656 (E.D. Pa. 1967).

66. Id. at 657-58, 662.

67. Id. at 662.

68. 297 F. Supp. 1044 (D. Md. 1969).

69. Id. at 1045.

70. Id. at 1046 (footnote omitted); accord, Bevan v. Columbia Broadcasting Sys., Inc., 293 F. Supp. 1366 (S.D.N.Y. 1968).

71. 441 F.2d 627 (2d Cir. 1971).

72. Id. at 629.

73. Id.

74. Id. at 630. This was clearly articulated by the Supreme Court in UMW v. Gibbs, 383 U.S. 715, 726 (1966); see Patrum v. City of Greensburg, 419 F.2d 1300, 1301 (6th Cir.

in which the joinder of claims would not serve the policy considerations set forth by the Supreme Court in *Gibbs*.[75] This discretion would allow the courts to decline jurisdiction in cases where the exercise of jurisdiction would work a hardship on one of the parties or in suits where state courts would have the predominant interest in the controversy, thus preserving federal-state comity.[76]

Although the bulk of the court's opinion in *Astor-Honor* was concerned with the concept of jurisdiction over pendent parties in general, the actual holding was limited.[77] The court was inclined towards the view that a federal court may exercise jurisdiction over a party not named in a federal claim if the pendent state claim arose from a common nucleus of operative fact; nonetheless it stated that it was not required to decide that issue,[78] since Astor's claim clearly fell within the class of claims covered by section 1338(b).[79] The court noted that since the statute did not specifically exclude claims against pendent parties and they were not mentioned in the reviser's note,[80] there was nothing to indicate that Congress would have wished to exclude such a case had it been considered. The court felt compelled, therefore, to interpret the statute in light of the policy considerations announced in *Gibbs*.

The court in *Astor-Honor* held that claims brought against a pendent party under section 1338(b) clearly fall within the scope of that statute.[81] Although the only basis given for this conclusion was the fact that the court found nothing in the statute which would exclude such claims,[82] by adopting this stance the court has expanded the scope of section 1338(b) to include the standards set out by the Supreme Court in *Gibbs* rather than limit the statute to the narrow rule of *Hurn v. Oursler*.[83] Thus, as a result of *Astor-Honor*, in future actions brought under section 1338(b), federal courts, in determining whether a claim

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1969), cert. denied, 397 U.S. 990 (1970); Kletschka v. Driver, 411 F.2d 436, 450 (2d Cir. 1969).

75. 441 F.2d at 630.

76. UMW v. Gibbs, 383 U.S. 715, 726-27 (1966). Gibbs recognized another serious problem in the exercise of pendent jurisdiction—excessive meddling with state law. Id. at 726 n.15; see Strachman v. Palmer, 177 F.2d 427, 433 (1st Cir. 1949) (concurring opinion); ALI Study, supra note 47, at 209-10; Shulman & Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L.J. 393, 408 (1936); Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 665-67 (1968).

77. 441 F.2d at 630.

78. Id.

79. 28 U.S.C. § 1338(b) (1970).

80. The reviser's note to § 1338(b) reads: "Subsection (b) is added and is intended to avoid 'piecemeal' litigation to enforce common-law and statutory copyright, patent, and trade-mark rights by specifically permitting such enforcement in a single civil action in the district court. While this is the rule under Federal decisions, this section would enact it as statutory authority." Reviser's Note, 28 U.S.C. § 1338(b) (1970).

81. 441 F.2d at 630.

82. Id.

83. In American Foresight, Inc. v. Fine Arts Sterling Silver, Inc., 268 F. Supp. 656 (E.D. Pa. 1967), the court noted that Congress did not intend to limit the doctrine of pendent jurisdiction to the Hurn rule, pointing out that the reviser's note referred to subsequent decisions. Id. at 661-62.

against a pendent party is a related pendent claim, may apply the *Gibbs* "common nucleus of operative fact"[84] test. Furthermore, in actions involving claims not covered by Section 1338(b), *Astor-Honor* indicates that federal courts will be able to exercise discretionary pendent jurisdiction without fear that the exercise of such jurisdiction will be defeated by the presence of a party who, although necessary to the adjudication of the entire controversy, is not named in the federal claim.[85] In so doing, federal courts will be able to economize judicial energy during an era in which the overriding concern of those responsible for the administration of justice is to clear court congestion by avoiding frivolous claims, piecemeal litigation, and multiple suits to rectify a single wrong.

International Law—Act of State Doctrine—*Bernstein* Letter—Doctrine Applicable Despite Executive Expression to the Contrary.—In response to the Cuban government's expropriation[1] of properties in Cuba owned by the defendant American bank, the defendant sold collateral which secured a loan it had made to the plaintiff bank, an instrumentality of the Cuban Government.[2] From the sale, the defendant received an amount substantially greater than that required to discharge the loan and the plaintiff sued in the United States District Court for the Southern District of New York to recover the excess realized. The court granted the defendant's motion for summary judgement, holding that the Cuban confiscation had been in violation of international law and that therefore the defendant was entitled to retain the excess as a set-off against the value of its expropriated assets.[3] The Court of Appeals for the Second Circuit reversed

84. 383 U.S. at 725.

85. The Second Circuit has done just this in a recent admiralty case, reaffirming the dictum in Astor-Honor. Leather's Best, Inc., v. S.S. Mormaclynx, No. 35562 (2d Cir., Oct. 29, 1971).

1. The expropriation was made pursuant to the Law of July 6, 1960, Concerning Nationalization (Cuba). The law provides in part: "Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriation, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws." Id., art. 1.

2. Banco Nacional de Cuba v. First Nat'l City Bank, 270 F. Supp. 1004, 1005 (S.D.N.Y. 1967), rev'd, 431 F.2d 394 (2d Cir. 1970), vacated, 400 U.S. 1019, on remand, 442 F.2d 530 (2d Cir. 1971), cert. granted, 40 U.S.L.W. 3161 (U.S. Oct. 12, 1971) (No. 70-295). In 1958 the defendant, First National City Bank, made a fifteen million dollar secured loan to Banco de Desarrollo Economicoy Social (Bandes), an agency of the Cuban government. Part of the collateral securing the loan was pledged by plaintiff, Banco Nacional de Cuba. After the Castro government seized control, First National City Bank and Banco Nacional, the successor to the rights and obligations of Bandes, renegotiated the loan. Subsequently, on September 16, 1960, the Cuban government nationalized all the defendant's branch banks in Cuba. 270 F. Supp. at 1005.

3. 270 F. Supp. at 1010. The district court held that the Hickenlooper Amendment (22 U.S.C. § 2370(e)(2) (1970)) directed the judiciary, regardless of the act of state doctrine, to

on the ground that the act of state doctrine foreclosed judicial inquiry into the validity of the confiscation and directed that the excess be paid to the plaintiff.[4] After the plaintiff had petitioned the Supreme Court for a writ of certiorari, the State Department sent a letter to the clerk of the Court expressing its opposition to the application of the act of state doctrine in this case.[5] The Supreme Court, granting certiorari, vacated the judgement and remanded the case for reconsideration in view of the State Department's letter.[6] On remand, the Second Circuit, adhering to its prior decision, held that the doctrine applied to preclude consideration of the legality of the confiscation, notwithstanding the Executive's expression of a contrary position. *Banco Nacional de Cuba v. First National City Bank*, 442 F.2d 530 (2d Cir. 1971), *cert. granted*, 40 U.S.L.W. 3161 (U.S. Oct. 12, 1971) (No. 70-295).

The Supreme Court has held that the power to conduct foreign affairs is vested by the Constitution of the United States in the legislative and the executive branches of the federal government.[7] However, since interactions between the United States and all other states are generally political in nature, most questions relating to foreign affairs are outside the domain of the judiciary.[8] Further-

determine whether a confiscation by a foreign state was in violation of international law. 270 F. Supp. at 1007. See generally notes 49-51 infra and accompanying text.

4. Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394, 398-99 (2d Cir. 1970), vacated, 400 U.S. 1019, on remand, 442 F.2d 530 (2d Cir. 1971), cert. granted, 40 U.S.L.W. 3161 (U.S. Oct. 12, 1971) (No. 70-295). The court concluded that the Hickenlooper Amendment was not applicable to the facts of this case. 431 F.2d at 402; see notes 52-55 infra and accompanying text.

5. 442 F.2d at 531. The letter stated in part: "[T]he foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." Id. at 538.

6. First Nat'l City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1971). The Court expressed no view on the merits of the case. Id.

7. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U. Pa. L. Rev. 903, 920 (1959); see U.S. Const. art. I, § 8 & art. II, § 2.

8. See, e.g., United States ex rel. Knauf v. Shaughnessy, 338 U.S. 537, 543 (1950) (exclusion of aliens); Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938) (recognition of foreign governments); Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965) (extradition); Pauling v. McNamara, 331 F.2d 796, 798-99 (D.C. Cir. 1963), cert. denied, 377 U.S. 933 (1964) (nuclear weapons); Worthy v. Herter, 270 F.2d 905, 909-11 (D.C. Cir. 1959) (restriction of travel); United States v. Travis, 241 F. Supp. 468, 471-72 (S.D. Cal. 1963) (restriction of travel); Healing v. Jones, 174 F. Supp. 211, 214-15 (D. Ariz. 1959) (Indian relations); Trimble v. Johnston, 173 F. Supp. 651, 654-55 (D.D.C. 1959) (public records). "There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. [Supreme Court] cases in this field seem invariably to show a discriminating analysis of the particular question

more, even in those cases where no political question is presented, the courts have indicated an awareness of the importance of preserving a proper distribution of functions between the judiciary and the political branches of the government.[9] Thus, the courts, in order to avoid usurping the power of the political departments, have traditionally applied the act of state doctrine where the legality of actions of foreign sovereigns has been sought to be adjudicated.[10]

In 1897 the classic American statement of the act of state doctrine was set forth by the Supreme Court in *Underhill v. Hernandez*:[11] "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory."[12] In the years following *Underhill*, this formulation of the doctrine was periodically reaffirmed by the Supreme Court[13] and consistently applied by the lower courts.[14]

In 1954, however, an important exception to the act of state doctrine was announced in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatshappij*.[15] The plaintiff, a German Jew, had been coerced by Nazi officials to assign his stock in a German liability corporation to the German (Nazi) government.[16] After the termination of the Second World War, he brought an action for conversion against a Dutch corporation which had cooperated with the German government in confiscating his property.[17] Initially, the United States Court of Appeals for the Second Circuit ruled that the act of state doctrine prevented judicial examination of the acts of the Nazi government.[18] Subsequent to that decision, however, the State Department issued a press release[19] which stated that it was

posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." Baker v. Carr, 369 U.S. 186, 211-12 (1962) (footnote omitted); accord, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

9. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); Republic of Mexico v. Hoffman, 324 U.S. 30, 34-36 (1945); cf. Baker v. Carr, 369 U.S. 186, 211-12 (1962).

10. See notes 13 & 14 infra.

11. 168 U.S. 250 (1897).

12. Id. at 252.

13. See, e.g., United States v. Pink, 315 U.S. 203, 233 (1942); Shapleigh v. Mier, 299 U.S. 468, 471 (1937); Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357-58 (1909).

14. See, e.g., Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 362-63 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965); Jimenez v. Aristeguieta, 311 F.2d 547, 557 (5th Cir. 1962); Pons v. Republic of Cuba, 294 F.2d 925, 926 (D.C. Cir. 1961).

15. 210 F.2d 375 (2d Cir. 1954), modifying 173 F.2d 71 (2d Cir. 1949).

16. 173 F.2d at 73.

17. Id. at 72-73.

18. Id. at 73.

19. State Department Press Release, 20 Dept. State Bull. 592 (April 27, 1949). Published with the release was a letter from the Acting Legal Advisor of the State Department to the plaintiff's attorneys which set forth the Executive's position regarding property confiscated by the Nazi government. See id. at 592-93.

the "Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property . . ."[20] and that the Department was opposed to any restraints being placed upon the judiciary regarding the adjudication of the legality of acts of Nazi officials.[21] As a result of this "supervening expression of Executive Policy," the court, in a per curiam decision, amended its previous mandate so as to remove all judicial restraints upon the district court stemming from the act of state doctrine.[22]

The *Bernstein* exception to the act of state doctrine was not an entirely new concept in American jurisprudence.[23] Traditionally, the courts had acquiesced in executive determinations regarding the granting of immunity[24] to foreign sovereigns.[25] The courts acted on the principle that the judiciary "should not so act as to embarrass the executive arm in its conduct of foreign affairs."[26] *Bernstein*, however, is the only case in which a party asserting an exception to the act of state doctrine based on an executive statement of policy has ever been successful. Only two judicial decisions have ever relied on the *Bernstein* exception: *Kane v. National Institute of Agrarian Reform*[27] and *Banco Nacional de*

20. Id. at 592.

21. Id. The release stated that "[t]he policy of the Executive . . . is to relieve American courts from any restraint upon the exercise of their jurisdication to pass upon the validity of the acts of Nazi officials." Id. at 593 (quoting from letter to plaintiff's counsel).

22. 210 F.2d at 376.

23. In a prior case involving the application of the act of state doctrine, the court had said that it was important to consider whether "our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine . . . does not apply." Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 249 (2d Cir.), cert. denied, 332 U.S. 772 (1947).

24. Under the doctrine of governmental immunity a sovereign cannot be sued in a foreign court unless it voluntarily submits to the jurisdiction of that court. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135-36 (1812); C. Fenwick, International Law 368 (4th ed. 1965).

25. See, e.g., Ex parte Republic of Peru, 318 U.S. 578, 587 (1943); Compañía Española de Navegación Maritima, S.A. v. The Navemar, 303 U.S. 68, 74 (1938); Henkin, The Foreign Affairs Power of the Federal Courts: Sabbatino, 64 Colum. L. Rev. 805, 824-25 (1964). Even in cases where the courts initially refused to recognize a claim of immunity, they have reversed their decisions to follow a supervening expression by the Executive that such immunity should be granted. See, e.g., Flota Maritima Browning de Cuba v. Motor Vessel Ciudad, 335 F.2d 619 (4th Cir. 1964); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961).

26. Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (dictum). The Supreme Court has recognized that in this area independent actions of the judiciary which are contrary to existing executive policy can adversely affect relations with other nations. Id. at 35-36

27. 18 Fla. Supp. 116 (Cir. Ct. 1961), rev'd, 153 So. 2d 40 (Fla. Dist. Ct. App. 1963). In this case American stockholders in a Cuban corporation sued to recover damages from the Cuban government for the expropriation of the corporation's properties. Id. at 117. Subsequently the Executive sent a telegram to the plaintiff's attorneys which stated: "Effect in U.S. of decrees, etc. of Castro regime is [a] question for court in which case heard." Id. at 120. The court found that this telegram qualified as a Bernstein letter. Id. The appellate court reversed, holding that this telegram would not defeat the application of the doctrine. 153

Cuba v. Sabbatino.[28] Both were reversed on appeal.

In *Sabbatino* an American commodity broker contracted with a Cuban corporation to purchase sugar.[29] Following the nationalization of the corporation's assets in Cuba, the broker, in order to receive authorization to ship the commodity from Cuba, had to contract for the same sugar with a government corporation.[30] After selling the sugar, the broker transferred the proceeds of the sale to a receiver who had been appointed to manage those assets which had not been seized by the Cuban authorities.[31] The successor in interest to the government corporation then sued both the receiver and the broker for conversion.[32] Subsequent to the district court's granting of summary judgement for the defendants,[33] the Legal Advisor to the State Department sent a letter to the counsel for the amici[34] in the case stating: "Whether or not [the Cuban] nationalizations will in the future be given effect in the United States is . . . for the courts to determine. . . . [A]ny comments on this question by the Department of State would be out of place at this time."[35] The court of appeals accepted this letter as evidence that the Executive had no objection to the court's passing on the validity of the confiscation, and held that the case was therefore within the *Bernstein* exception.[36] The court went on to determine that the taking had been in violation of international law and affirmed the district court's decision.[37] The Supreme Court reversed, holding that the act of state doctrine precluded inquiry into the validity of the governmental acts of Cuba.[38] Regarding the executive's statements, the Court found that it was unnecessary to rule on the *Bernstein* exception since it concluded that the statements "were intended to

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So. 2d at 44. The court stated that "[t]he extent to which the telegram can be given effect is simply that the Executive Department of the United States Government will not interpose itself one way or the other in this litigation." Id.

28. 307 F.2d 845 (2d Cir. 1962), aff'g 193 F. Supp. 375 (S.D.N.Y. 1961), rev'd, 376 U.S. 398 (1964).

29. Id. at 849.

30. Id. at 849-50.

31. Id. at 850-51.

32. Id. at 851.

33. 193 F. Supp. at 386.

34. The Cuban-American Sugar Co. and the Cuban American Sugar Mills Co. filed briefs as amici curiae with the court of appeals. 307 F.2d at 852.

35. Id. at 858 (emphasis deleted). The Under Secretary of State for Economics Affairs also sent a letter to the same effect to the counsel. Id.

36. Id. at 857-59. The court reasoned that although the Executive's statements were rather ambiguous, they implied that the State Department lacked any concern as to whether the court made a judicial determination of the legality of the expropriation. See id. at 858-59.

37. Id. at 868-69. The court concluded that the confiscation violated international law "[s]ince the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nationals . . . ." Id. at 868.

38. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

reflect no more than the Department's then wish not to make any statement bearing on this litigation."[39]

The Sabbatino Court, although not passing on the *Bernstein* exception, did provide an insight into the basis for the act of state doctrine. The Court stated that the application of the doctrine was not compelled by either international law or the Constitution and that "its continuing vitality depend[ed] on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government . . . ."[40] In setting forth the relevant policy considerations governing the application of the doctrine, the Court recognized that it is necessary to examine the possible effect of a judicial decision on foreign relations[41] and to avoid conflicts between the judicial and political branches of the government.[42] The Court also noted that:

> The greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[43]

Applying these policy considerations to expropriations, the *Sabbatino* Court concluded that because of the sensitivity of the issue within the international community,[44] the lack of internationally accepted legal standards,[45] and the possible

39. Id. at 420. The Court said that any ambiguity regarding the meaning of the letters had been removed by the position taken by the government as amicus curiae in the Supreme Court. Id.

40. Id. at 427-28.

41. Id. "[S]ome aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." Id. at 428. Also, "[t]he balance of relevant considerations may . . . be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . ." Id.

42. See id. at 431-32. See generally Comment, The Relationship Between Executive and Judiciary: The State Department as the Supreme Court of International Law, 53 Minn. L. Rev. 389 (1968).

43. 376 U.S. at 428. See generally Stevenson, The State Department and Sabbatino—"Ev'n Victors Are By Victories Undone," 58 Am. J. Int'l L. 707, 708-09 (1964) [hereinafter cited as Stevenson].

44. 376 U.S. at 430. "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." Id. (footnote omitted).

45. Id. There are several views on a state's power of nationalization. See id. at 429-30; J. Brierly, The Law of Nations 284-87 (6th ed. 1963); Friedmann, National Courts and the International Legal Order: Projections on the Implications of the Sabbatino Case, 34 Geo. Wash. L. Rev. 443, 451-54 (1966); Goldie, The Sabbatino Case: International Law Versus The Act of State, 12 U.C.L.A. L. Rev. 107, 158-59 (1964). But see Mann, The Legal Consequences of Sabbatino, 51 Va. L. Rev. 604, 611-20 (1965) [hereinafter cited as Mann]. The traditional American view is that the taking must be for a public purpose, must not be discriminatory, and must provide for prompt, adequate and effective compensation. Restatement of The Foreign Relations Law of the United States §§ 190-95 (Proposed Official Draft

embarrassment of the political branches of the government[46] in the exercise of their more effective practices[47] in dealing with foreign nations, the judiciary should generally refrain from inquiring into the validity of confiscations.[48]

As a reaction to what many American investors considered a basic unfairness inherent in the *Sabbatino* decision,[49] Congress passed the Hickenlooper Amendment to the Foreign Assistance Act of 1961,[50] which provides that the courts are not to apply the act of state doctrine where there has been a confiscation in violation of international law unless the President has requested its application in the interest of foreign policy.[51] This amendment, however, was given a very limited interpretation by the Court of Appeals for the Second Circuit in its initial decision in *Banco Nacional de Cuba v. First National City Bank*.[52] The court, after reviewing the legislative history of the amendment,[53] concluded that it was

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1962). The Communist countries recognize no such obligation. Doman, Postwar Nationalization of Foreign Property in Europe, 48 Colum. L. Rev. 1125, 1143-58 (1948). The newly emerging states consider the traditional view to reflect imperialist interests and to be inappropriate. Anand, Rôle of the "New" Asian-African Countries in the Present Legal Order, 56 Am. J. Int'l L. 383 (1962).

46. 376 U.S. at 433. See generally Stevenson. One commentator has suggested that the position taken by the Sabbatino Court does in fact embarrass the Executive. Mann 624-25.

47. 376 U.S. at 431. The Court pointed out that "[f]ollowing an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able, either by bilateral or multilateral talks, by submission to the United Nations, or by the employment of economic and political sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country." Id. (footnote omitted).

48. Id. at 428. The court indicated that if there were "a treaty or other unambiguous agreement regarding controlling legal principles . . ." a proper case for judicial decision might be presented. Id. See also id. at 420; Stevenson 711.

49. See Mazaroff, An Evaluation of the Sabbatino Amendment as a Legislative Guardian of American Private Investment Abroad, 37 Geo. Wash. L. Rev. 788, 790 (1969).

50. Act of Sept. 6, 1965, Pub. L. No. 89-171, § 301, 79 Stat. 658-59, amending 22 U.S.C. § 2370(e)(2) (1964) (codified at 22 U.S.C. § 2370(e)(2) (1970)).

51. 22 U.S.C. § 2370(e)(2) (1970). The Hickenlooper Amendment provides: "[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party . . . based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsecton . . . ." Id. This statute was held to be a constitutionally valid exercise of congressional power in Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968). For a critical analysis of the amendment see Bleicher, The Sabbatino Amendment in Court: Bitter Fruit, 20 Stan. L. Rev. 858 (1968). See also 376 U.S. at 436.

52. 431 F.2d 394, 399-403 (2d Cir. 1970).

53. Id. at 400-02.

only applicable to those cases involving expropriated properties which had actually entered the United States.[54]

On remand, the Second Circuit reaffirmed its position that the Hickenlooper Amendment was inapplicable.[55] The court then considered the question of whether, under the *Bernstein* exception, the State Department's letter removed the restraints imposed upon the court by the act of state doctrine.[56] The court compared the factual circumstances in *Bernstein* with those in *Banco Nacional* and noted several differences.[57] For example, the court observed that in *Bernstein* the United States had been at war with the Nazi government and that the actions of Germany had been condemned throughout the world as crimes against humanity.[58] Also, the court said the letter in *Bernstein* indicated "that it was the affirmative policy of our government to restitute identifiable property to *all* those victimized by the Nazi confiscation, not merely, as the letter indicates in this case, to those who assert counterclaims or setoffs."[59] Furthermore, the court pointed out that, unlike *Banco Nacional*, the letter in *Bernstein* had been sent at a time when the Nazi government was no longer in power.[60] The court also found that the cases differed because the balance of equities in *Bernstein* was almost entirely on the side of the party opposing the application of the doctrine, whereas in the present case the defendant was "seeking a windfall."[61] On the basis of the foregoing considerations, the limited application of the *Bernstein*

54. Id. at 402. For an interpretation of the concept of "property" as applied to the amendment see generally Comment, Sabbatino Property: A French Twist, 57 Geo. L.J. 1299, 1306-10 (1969).

55. 442 F.2d at 531.

56. See id. at 532.

57. Id. at 534-35.

58. Id. at 534.

59. Id. In the original Bernstein letter, the State Department stated that the act of state doctrine should not bar the adjudication of a plaintiff's claim where his property had been taken by the Nazi government through force, coercion or duress. See notes 19-21 supra and accompanying text. The letter in the present case expressed the view that the doctrine should not be applied where "(a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine." 442 F.2d at 537. However, while the Bernstein letter may be broader in scope, the State Department letter in Banco Nacional was no less adamant in its opposition to the application of the doctrine. See note 5 supra.

60. 442 F.2d at 534. The court recognized that the Sabbatino Court had suggested that there may be less justification for applying the act of state doctrine in such cases. See id. at 535. See generally note 41 supra.

61. 442 F.2d at 534-35. The court relied upon its earlier decision in this case (431 F.2d at 404 n.18) where it had concluded that First National City Bank, by resorting to self-help in order to avoid having to file its claim with the Foreign Claims Settlement Commission (which was created to distribute Cuban assets to all those having claims against Cuba (22 U.S.C. § 1643(b) (1970))), was seeking a windfall at the expense of other American investors who had resorted to this congressionally established program. 442 F.2d at 534-35.

exception by the courts,[62] and the court's view that "the thrust of the entire decision in *Sabbatino* is contrary to recognizing exceptions to the act of state doctrine in [expropriation] cases,"[63] the court concluded "that *Bernstein* is best left narrowly limited to its own peculiar facts and that . . . the exception to the act of state doctrine created by that case is inapplicable to the case at bar."[64]

Judge Hays, dissenting, argued that by applying the act of state doctrine the majority was "usurping the same executive prerogative which it is the function of that doctrine to preserve."[65] He further implied that the majority, in failing to apply the *Bernstein* exception, had in effect overruled that case.[66]

In view of the rationale of the majority in *Banco Nacional*, it must be concluded, as the dissent suggests, that the court which established the *Bernstein* exception has now elected to abolish it. The exception might be considered a safeguard for the preservation of executive leadership in foreign affairs. However, because of the lack of internationally accepted legal standards for adjudicating the validity of confiscations, the obvious effect of following the exception is the delegation of foreign policy decisions to the judiciary.[67] These are the same type of decisions which the *Sabbatino* Court refused to render on the ground that the national interest is better served by reserving that function to the political branches of the government.[68] Furthermore, the policy considerations relied upon by the *Sabbatino* Court are equally applicable to a case like *Banco Nacional*. Even when the *Sabbatino* Court referred to executive embarrassment it was concerned with the embarrassment that would arise if the Executive and the judiciary were to reach conflicting decisions regarding the legality of an expropriation, not the possible embarrassment that may be created by a court's refusal to follow the Executive's expressed desire that the court rule on the legality of the expropriation.[69] Therefore, the court in *Banco Nacional* correctly chose to apply the act of state doctrine, thus avoiding inquiry into the Cuban confiscation.

Notwithstanding the apparent correctness under existing law of the *Banco Nacional* decision, the Supreme Court has granted certiorari in this case.[70] Gen-

62. Id. at 535. The court noted that Bernstein "has never been followed successfully; it has been relied upon only twice, and in both of those instances, by lower courts whose decisions were subsequently reversed." Id.; see notes 27-28 supra and accompanying text.

63. 442 F.2d at 535. One commentator has said that Sabbatino "disclose[s] a judicial mood that appears favorable to a reconsideration, if not to a repudiation, of the Bernstein exception . . . ." R. Falk, The Status of Law in International Society 407 (1970).

64. 442 F.2d at 535.

65. Id. at 538.

66. Id.

67. See notes 43 & 45 supra and accompanying text.

68. See notes 44-48 supra and accompanying text.

69. See notes 42, 46-47 supra and accompanying text. The immunity cases are not to the contrary. Those cases do not involve the delegation of a foreign policy decision to the judiciary. See notes 24-26 supra and accompanying text.

70. 40 U.S.L.W. 3161 (U.S. Oct. 12, 1971) (No. 70-295). Sup. Ct. R. 19(1) provides in part:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion,

erally, except where review by the Supreme Court is compelled by "irreconcilable conflict,"[71] the Court will attribute "major significance" to the importance of the issues involved when considering a petition for certiorari.[72] The importance of an issue is "a relative factor, dependent upon the type of issue involved,[73] the way in which it was decided below, the status of the law on the matter,[74] the correctness of the decision below,[75] and the nature and number of persons who may be affected by the case."[76] Thus the granting of certiorari in *Banco Nacional* suggests that the Supreme Court may now consider it desirable to decide the important separation of powers issue expressly reserved in *Sabbatino*—the effect of a *Bernstein* letter. The decision will have important ramifications regarding the role that United States courts will play in the development of the international law of expropriation. Additionally, and more significantly, the manner in which the Court disposes of this case will provide an insight into the Court's view of its relationship with the political branches of government, a view which is certain to influence the Court's decisions on constitutional issues for years to come.

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and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered [in granting certiorari to a United States Court of Appeals]:

. . . .

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

71. R. Stern & E. Gressman, Supreme Court Practice § 4.11, at 167 (4th ed. 1969) [hereinafter cited as Stern & Gressman]. "Ordinarily, a conflict between decisions of the same court of appeals is not a basis for granting a writ of certiorari, since the later decision in point of time is considered controlling within that circuit." Id. § 4.6, at 160. Regarding conflicts which may precipitate the granting of certiorari see id. §§ 4.3-.10.

72. Id. § 4.11, at 167.

73. Certiorari has often been granted in cases involving important constitutional and statutory issues. Id. §§ 4.12-.13. "The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved . . . ." Id. § 4.14, at 172, citing United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

74. "[C]ertiorari has been granted where the court of appeals decision is based upon a point expressly reserved or left undecided in prior Supreme Court opinions . . . ." Id. § 4.5, at 160, citing FTC v. Travelers Health Ass'n, 362 U.S. 293, 297 (1960); Ickes v. Virginia-Colorado Dev. Corp., 295 U.S. 639, 640, 646 (1935).

75. "The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari. Nor, for that matter, is the fact [that] a case may have been rightly decided in itself enough to preclude certiorari." Address by the Honorable John M. Harlan, The Ass'n of the Bar of the City of New York, Oct. 28, 1958, quoted in 13 Record of N.Y.C.B.A. 541, 551 (1958).

76. Stern & Gressman § 4.11, at 167 (footnotes added).

Patents—Mutuality Rule No Longer a Bar to Defensive Use of Collateral Estoppel on the Issue of Validity—*Triplett v. Lowell* Overruled *Pro Tanto*.— Respondent, the assignee of a United States patent for a "frequency independent unidirectional antenna," initiated an infringement suit against the petitioner in the District Court for the Northern District of Illinois. The respondent's patent was adjudged valid in an opinion affirmed by the Court of Appeals for the Seventh Circuit.[1] This result conflicted with a judgment[2] previously entered in another infringement suit in the Eighth Circuit, involving the same patent, brought by the respondent against a different defendant. The petitioner was granted certiorari because of this conflict.[3] The Supreme Court, sua sponte, examined the appropriateness of allowing a patentee who had initiated an infringement suit and lost on the issue of validity to relitigate this issue in a later suit against a different adversary. Overruling *Triplett v. Lowell*,[4] the Court decided that the plea of collateral estoppel should be available as an affirmative defense to the subsequent action, provided that the party to be estopped had had a full and fair opportunity to litigate the issue in the previous action. Because of the failure of the petitioner, in reliance on *Triplett*, to plead estoppel, the Court vacated the judgment of the court of appeals and remanded the case to the district court to allow the pleadings to be amended.[5] *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

Collateral estoppel is a doctrine of judicial economy which precludes a party, or his privy, who has had a full and fair opportunity to litigate an issue from relitigating that issue in any subsequent action, whether or not the later suit is based on the same cause of action.[6] Certain conditions precedent to the estoppel plea have been developed by the courts to satisfy the due process requirement that no person be deprived of personal or property rights by a judgment without adequate notice and an opportunity to be heard.[7] Thus, to have preclusive effect,

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1. University of Ill. Found. v. Blonder-Tongue Labs., Inc., 422 F.2d 769 (7th Cir. 1970), vacated, 402 U.S. 313 (1971).

2. University of Ill. Found. v. Winegard Co., 271 F. Supp. 412 (S.D. Iowa 1967), aff'd, 402 F.2d at 125 (8th Cir. 1968), cert. denied, 394 U.S. 917 (1969).

3. Blonder-Tongue Labs., Inc. v. University of Ill. Found., 400 U.S. 864 (1970). In its grant of the writ the Court requested, inter alia, that the continued validity of Triplett v. Lowell, 297 U.S. 638 (1936), be discussed. 400 U.S. at 864.

4. 297 U.S. 638 (1936), overruled as to mutuality, Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 350 (1971).

5. 402 U.S. at 350.

6. Cromwell v. County of Sac, 94 U.S. 351 (1876); 1B J. Moore, Federal Practice ¶ 0.441 (2d ed. 1965) [hereinafter cited as Moore]. See generally Polasky, Collateral Estoppel—Effects of Prior Litigation, 39 Iowa L. Rev. 217 (1954); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942). Collateral estoppel is narrower in scope than the doctrine of res judicata, which gives conclusive effect to all issues which were or could have been adjudicated in an earlier action. Cromwell v. County of Sac, supra, at 352-54; Moore ¶¶ 0.405[1], 0.412[1]. See generally Vestal, Rationale of Preclusion, 9 U. St. Louis L.J. 29 (1964).

7. Emma Silver Mining Co. v. Emma Silver Mining Co. of N.Y., 7 F. 401, 407 (2d Cir. 1880); Coca Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 130, 172 A. 260, 262 (1934).

an issue must have been actually adjudicated in the former action[8] not merely as an evidentiary or incidental question,[9] but as the very basis of relief, denial of relief, or other ultimate remedy determined by the judgment.[10] Furthermore, the judgment in the earlier action, in order to operate as an estoppel, must have been final.[11]

Of all the safeguards restricting the application of collateral estoppel in the interest of fairness, one that has proven especially susceptible to litigation[12] and scholarly debate[13] has been the axiom of mutuality of estoppel—the rule that the plea of estoppel is available only to one who was a party, or privy to a party, to the earlier action.[14] The effect of the mutuality requirement is that a litigant

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8. Cromwell v. County of Sac, 94 U.S. 351, 353 (1876); Little v. Blue Goose Motor Coach Co., 346 Ill. 266, 270-71, 178 N.E. 496, 497-98 (1931).

9. Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir.), cert. denied, 375 U.S. 942 (1963); United States Fid. & Guar. Co. v. McCarthy, 33 F.2d 7 (8th Cir.), cert. denied, 375 U.S. 942 (1929).

10. North C.R.R. v. Story, 268 U.S. 288 (1925); Cambria v. Jeffery, 307 Mass. 49, 29 N.E.2d 555 (1940); Polasky, supra note 6, at 222.

11. G. &. C. Merriam Co. v. Saalfield, 241 U.S. 22, 28 (1916); Firestone Tire & Rubber Co. v. Hart's Estate, 104 Vt. 197, 200-02, 158 A. 92, 93-94 (1932). Many courts do not consider the issues involved in judgments by default or consent judgments to have been finally adjudicated for collateral estoppel purposes. United States v. International Bldg. Co., 345 U.S. 502 (1953); Fruehauf Trailer Co. v. Gilmore, 167 F.2d 324 (10th Cir. 1948); Crowder v. Red Mountain Mining Co., 127 Ala. 254, 29 So. 847 (1900). Contra, Biggio v. Magee, 272 Mass. 185, 172 N.E. 336 (1930). See generally James, Consent Judgments as Collateral Estoppel, 108 U. Pa. L. Rev. 173 (1959).

12. See notes 17-30 infra and accompanying text.

13. Many commentators have opposed the doctrine of mutuality. Cox, Res Adjudicata, Who Entitled to Plead, 9 Va. L. Reg. 241 (1923); Currie, Civil Procedure: The Tempest Brews, 53 Calif. L. Rev. 25 (1965); Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27 (1967); Note, Res Judicata—Mutuality of Estoppel and Privity Rules in Automobile Negligence Field, 18 N.Y.U.L.Q. Rev. 565 (1923); Comment, Privity and Mutuality in the Doctrine of Res Judicata, 35 Yale L.J. 607 (1926); 35 Tex. L. Rev. 137 (1956); 15 U. Cinn. L. Rev. 349 (1941); 27 Va. L. Rev. 955 (1941). There have also been those who have defended the doctrine. Moore & Currier, Mutuality and the Conclusiveness of Judgments, 35 Tul. L. Rev. 301 (1961); von Moschzisker, Res Judicata, 38 Yale L.J. 299 (1929); Seavey, Res Judicata with Reference to Persons Neither Parties or Privies—Two California Cases, 57 Harv. L. Rev. 98 (1943).

14. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 131 (1912); 1 A. Freeman, Law of Judgments § 407 (5th ed. 1925). The doctrine of mutuality had its genesis in the days when a party could not be a witness in his own suit. Atkinson v. White, 60 Me. 396, 399 (1872). It was thought that injustice would result if a witness whose testimony may have influenced the judgment in one action could use that judgment for his own benefit in a later suit. Id. Professors Moore and Currier describe the modern function of mutuality as "keeping the in personam judgment within . . . proper bounds," that is, strictly limiting the effects of litigation to those persons immediately involved. Moore & Currier, supra note 13, at 301, 330. Another defender of mutuality has written that the fundamental basis of the doctrine is the fallibility of the legal process. Greenebaum, In Defense of the Doctrine of Mutuality of Estoppel, 45 Ind. L.J. 1, 2 (1969). For a discussion of the role of

who has lost an action on a question of fact can not be estopped from retrying the identical issue each time he can obtain a new adversary not in privity with the former one.[15]

Eventually, with strong support from the commentators,[16] many courts established exceptions to the requirement of mutuality by expanding the category of persons who could be considered to be in privity with a party to a prior judgment.[17] Thus, for example, some courts made the plea of estoppel available in appropriate cases to persons whose liability was merely derived from that of a party—such as a servant or bailee—who had been exonerated on the issue of liability in an earlier action.[18] A number of courts simply chose to delimit or abandon the application of the doctrine of mutuality.[19] For example, some jurisdictions permitted the non-mutual use of estoppel where the party against whom the estoppel was raised had been a plaintiff in the earlier suit, or his privy, provided that the earlier judgment had resulted from a full and fair opportunity to litigate the precluded issue.[20] The culmination of the anti-mutuality trend was the complete rejection of the doctrine by the California Supreme Court in *Bernhard v. Bank of America National Trust and Savings Association*.[21] *Bernhard* was the second of two attempts by the beneficiary of a deceased bank depositor to contest the disposition of the money held in a certain bank account.[22] In the first action the beneficiary lost when the court declared that the decedent had made an *inter vivos* gift to her executor in the amount of the deposit.[23] Nevertheless, the plaintiff sued the depository bank for having paid over the money in question to the executor.[24] The court held that the final ruling on the

mutuality in "railroad" or multiple-liability situations, see Currie, Civil Procedure, The Tempest Brews, 53 Calif. L. Rev. 25 (1965); Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957).

15. See Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 132 (1912).

16. See note 13 supra.

17. See Moore ¶ 0.412[3], at 1813; note 18 infra and accompanying text.

18. E.g., Eisel v. Columbia Packing Co., 181 F. Supp. 298 (D. Mass. 1960); Good Health Dairy Food Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937). Another example is the recognition by some courts that a participating non-party should be bound by a judgment favoring an opposing party. Universal Oil Prods. Co. v. Winkler-Koch Eng'r Co., 27 F. Supp. 161 (N.D. Ill. 1939); Moore ¶ 0.411[6]. One commentator has explained that " 'privity' in itself does not state a reason for either including or excluding a person from the binding effect of a prior judgment, but rather it represents a legal conclusion that the relationship . . . is sufficiently close to afford application of the principle of preclusion." Vestal, supra note 13, at 45; see Greenebaum, supra note 14, at 4-5.

19. See Moore ¶ 0.412[1], at 1805-08; notes 20-30 infra and accompanying text.

20. E.g., United States v. Wexler, 8 F.2d 880 (E.D.N.Y. 1925); Coca Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934); Atkinson v. White, 60 Me. 396 (1872); Liberty Mut. Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506 (1932); Eagle, Star & Br. Dominion Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927).

21. 19 Cal. 2d 807, 122 P.2d 892 (1942) (Traynor, J.).

22. Id. at 809-10, 122 P.2d at 893.

23. Id.

24. Id. at 810, 122 P.2d at 893.

question of ownership in the earlier action precluded a retrial of that issue, notwithstanding the fact that the bank had been neither a party nor privy to a party in the earlier action.[25] Neither logic nor due process, in the court's opinion, justified the relitigation of an issue fairly tried and finally decided in a prior suit.[26]

Bernhard has been followed in whole or in part on the issue of mutuality by many state[27] and federal courts.[28] Although its acceptance is not universal,[29] there is an unmistakable trend, at least in the federal courts, to disavow mutuality.[30]

A notable exception to the erosion of the doctrine of mutuality in the federal courts has been the field of patent litigation. This was due to a strong Supreme Court precedent in that area, *Triplett v. Lowell*.[31] The petitioner in *Triplett* had

25. Id. at 813, 122 P.2d at 895. The result in Bernhard was not novel, and could in fact have been achieved within one of the recognized exceptions to mutuality. Currie, supra note 13, at 26.

26. 19 Cal. 2d at 812, 122 P.2d at 894-95. The California Supreme Court later approved the defensive use of estoppel against a party who had not initiated the earlier action. Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962); accord, Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 411 F.2d 88, 92-95 (3d Cir. 1969); Seguros Tepeyac, S.A. Compañía Mexicana v. Jernigan, 410 F.2d 718, 726-28 (5th Cir.), cert. denied, 396 U.S. 905 (1969); United States v. Webber, 396 F.2d 381, 389 (3d Cir. 1968); Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 302-05 (D. Md. 1967); Barbour v. Great Atl. & Pac. Tea Co., 143 F. Supp. 506 (E.D. Ill. 1956); Henley v. Panhandle E. Pipeline Co., 138 F. Supp. 768 (W.D. Mo. 1956). An even more radical breach of the mutuality rule has occurred in certain cases where collateral estoppel has been invoked offensively, i.e., by plaintiffs who were strangers to the first action against the losing party in that action. Zdanok v. Glidden, 327 F.2d 944, 955-56 (2d Cir.), cert. denied, 377 U.S. 934 (1964); B.R. DeWitt Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). See generally Vestal, supra note 13, at 43-76.

27. E.g., Woodcock v. Udell, 97 A.2d 878 (Del. Super. Ct. 1953); Tezak v. Cooper, 24 Ill. App. 2d 356, 164 N.E.2d 493 (1960); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956); Bahler v. Fletcher, 474 P.2d 329 (Ore. 1970); see Note, The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty, 35 Geo. Wash. L. Rev. 1010 (1967).

28. E.g., Graves v. Associated Transp. Inc., 344 F.2d 894 (4th Cir. 1965); Davis v. McKinnon & Mooney, 266 F.2d 879 (6th Cir. 1959); Colorado v. Ohio Cas. Ins. Co., 232 F.2d 474 (10th Cir. 1956); Gibson v. United States, 211 F.2d 425 (3d Cir. 1954); Adriaanse v. United States, 184 F.2d 968 (3d Cir. 1950), cert. denied, 340 U.S. 942 (1951); Bruszewski v. United States, 181 F.2d 419 (3d Cir.), cert. denied, 340 U.S. 865 (1950); Eisel v. Columbia Packing Co., 181 F. Supp. 298 (D. Mass. 1960); Connelly v. Balkwill, 174 F. Supp. 49 (N.D. Ohio 1959), aff'd, 279 F.2d 685 (6th Cir. 1960); United Banana Co. v. United Fruit Co., 172 F. Supp. 580 (D. Conn. 1959); cases cited note 22 supra. See generally Vestal, supra note 13.

29. See Tobin v. McClellan, 225 Ind. 335, 73 N.E.2d 679 (1947); Montgomery v. Taylor-Green Gas Co., 306 Ky. 256, 206 S.W.2d 919 (1947); Aasen v. Aasen, 228 Minn. 1, 36 N.W.2d 27 (1949); Gilman v. Gilman, 115 Vt. 49, 51 A.2d 46 (1947); Ferebee v. Hungate, 192 Va. 32, 63, S.E.2d 761 (1951).

30. Moore ¶ 0.412, at 23 (Supp. 1970); see cases cited note 28 supra.

31. 297 U.S. 638 (1936), overruled as to mutuality, Blonder-Tongue v. University of Ill. Found., 402 U.S. 313, 350 (1971).

challenged his opponent's right to bring an infringement suit on three patent claims that had been adjudged invalid in an earlier infringement suit brought against a different defendant.[32] The Court, citing a few cases where successful infringement suits had followed earlier adjudications of invalidity against different opponents,[33] concluded that:

> [n]either reason nor authority supports the contention that an adjudication adverse to any or all the claims of a patent precludes another suit upon the same claims against a different defendant. While the earlier decision may by comity be given great weight in a later litigation and thus persuade the court to render a like decree . . . [collateral estoppel] may not be pleaded as a defense.[34]

The silence of the Supreme Court since *Triplett* on the bar to non-mutual collateral estoppel in patent litigation has resulted in an anomalous situation in the lower federal courts. Even in those circuits where mutuality had been for most purposes completely abandoned, the collateral estoppel plea was consistently denied to litigants in patent suits who were strangers to prior judgments on identical issues of fact.[35]

The surrender to precedent by the lower federal courts in the patent field ranged from the reluctant application of *Triplett*[36] to a vigorous defense of the patentee's right to vindicate an unfavorable decision on the issue of his claim's validity.[37] The opinions in this latter vein commonly stressed the need to protect the property rights of the inventor[38] and often betrayed a certain lack of judicial self-confidence in dealing with the technicalities of patent litigation.[39]

The few courts that questioned the logic of *Triplett* either managed to preclude redundant litigation on the issue of validity by the principle of comity[40] or bowed

32. Id. at 639-40.

33. Id. at 643-44, citing Abercrombie & Fitch Co. v. Baldwin, 245 U.S. 198 (1917); Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U.S. 428 (1911); Expanded Metal Co. v. Bradford, 214 U.S. 366 (1909). These cases contain no discussion of the collateral estoppel issue. The Triplett Court said that the question of defending a second infringement suit with the plaintiff's earlier adjudication of invalidity had never been seriously argued before the Supreme Court. 297 U.S. at 643.

34. 297 U.S. at 642.

35. See notes 36-42 infra and accompanying text. See generally Rollins, In Rem Invalidity: A Solution in Search of a Problem? 52 J. Pat. Off. Soc'y 561, 574-85 (1970).

36. E.g., University of Ill. Found. v. Blonder-Tongue Labs., Inc. 422 F.2d 769 (7th Cir. 1970), vacated, 402 U.S. 313 (1971); Nickerson v. Kutschera, 390 F.2d 812 (3d Cir. 1968); Pierce v. Allen B. DuMont Labs., Inc., 156 F. Supp. 237 (D. Del. 1957).

37. Aghnides v. Holden, 226 F.2d 949 (7th Cir. 1955); Agrashell, Inc. v. Bernard Sirotta Co., 281 F. Supp. 704 (E.D.N.Y. 1968). Many decisions in the field of patent litigation were based on an uncritical application of Triplett. See, e.g., Tatko Bros. Slate Co. v. Hannon, 270 F.2d 571 (2d Cir.), cert. denied, 361 U.S. 915 (1959); S.H. Kress & Co. v. Aghnides, 246 F.2d 718 (4th Cir.), cert. denied, 355 U.S. 889 (1957); Park-In Theatres, Inc. v. Waters, 185 F.2d 193 (5th Cir. 1950).

38. E.g., Aghnides v. Holden, 226 F.2d 949, 951 (7th Cir. 1955); Agrashell, Inc. v. Bernard Sirotta Co., 281 F. Supp. 704, 707-08 (E.D.N.Y. 1968).

39. See Harries v. Air King Prods. Co., 183 F.2d 158, 164 (2d Cir. 1950); Technograph Printed Circuits, Ltd., v. United States, 372 F.2d 969, 977-78 (Ct. Cl. 1967).

40. E.g., Nickerson v. Kutschera, 419 F.2d 983 (3d Cir. 1969) (construing Triplett as

to the authority of *Triplett* despite their reservations.[41] "This queer result," complained one judge, "is one which we are unable to avoid. It is a situation which is particularly abhorrent when considered against the backlog of untried cases which clogs our federal courts."[42]

The policy served by the *Triplett* rule was deemed to be the protection of "good" patents "against improvident judgments of invalidity."[43] However, this objective has not been emphasized by the Supreme Court in its post-*Triplett* decisions in the patent field. Instead, the Court has increasingly based its patent decisions on a policy of judicial protection of the public against invalid patent monopolies.[44]

The Court's opinion in the recent patent case of *Lear, Inc. v. Adkins*[45] is a clear expression of this new priority:

> Surely the equities of the [patentee] do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain.[46]

The Court in *Lear* tried to effectuate this anti-monopoly policy by abolishing "licensee estoppel," the doctrine which had insulated patent-holders who sued their licensees for unpaid royalties from the defense of patent invalidity.[47] The majority reasoned that if such challenges to the patentability of an inventor's discovery were "muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification."[48]

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permitting preclusion, not automatically, but possibly after a new trial to determine if new issues or new evidence were involved in the second infringement action). Comity is the doctrine by which the courts of one jurisdiction, out of deference and respect, and not out of obligation, give effect to the laws and judicial decisions of another jurisdiction. See Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485 (1900).

41. See cases cited note 36 supra.

42. Aghnides v. Holden, 226 F.2d 949, 951 (7th Cir. 1955) (Schnakenberg, J., concurring). The history of Blonder-Tongue also reveals the dissatisfaction of the lower court at having to revive the mutuality rule for patent suits only: "It would seem sound judicial policy that the adjudication of [the issue of validity] against the Foundation in one action where it was a party would provide a defense in any other action by the Foundation for infringement of the same patent. That, however, is not the law in this field." University of Ill. Found. v. Blonder-Tongue Labs., Inc., 422 F.2d 769, 772 (7th Cir. 1970) (footnote omitted), citing Triplett v. Lowell, 297 U.S. 638 (1936).

43. Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 330-31 (1971); see cases cited note 37 supra.

44. See, e.g., Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). See generally Kennedy, Patent and Antitrust Policy: The Search for a Unitary Theory, 35 Geo. Wash. L. Rev. 512, 514 (1967); Siegel, Patent Monopoly and Sherman Act Monopolization, 49 J. Pat. Off. Soc'y 67 (1967).

45. 395 U.S. 653 (1969).

46. Id. at 670. See Stern, Antitrust Implications of Lear v. Adkins, 52 J. Pat. Off. Soc'y 213 (1970).

47. 395 U.S. at 674. See Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 836 (1950).

48. 395 U.S. at 670.

In several other post-*Triplett* decisions the Court condemned any attempt by a patentee to broaden the scope of his monopoly,[49] sometimes applying the equitable "misuse of patent" doctrine to deny relief against infringers if the patentee-plaintiff was seeking to extend his claim beyond its rightful limits.[50] It has also recommended that in every infringement suit the patentability of the contested claim should be examined,[51] and has sanctioned the use of the declaratory judgment suit as an additional test of spurious patent claims.[52]

The Supreme Court has also attempted to facilitate the task of judging patent validity by setting forth guidelines for the lower federal courts.[53] The most recent cases establishing guidelines[54] involved the construction of section 103 of the 1952 Patent Act,[55] which explicitly added "non-obviousness" to the criteria of novelty and utility for measuring the patentability of an invention. In *Graham v. John Deere Co.*,[56] the Court stressed the need for the strict application of uniform and definite standards to remedy what it called "the free rein . . . exercised by [Patent Office] Examiners in their use of the concept of 'inven-

49. E.g., Compco Corp. v. Day-Brite, Inc., 376 U.S. 234 (1964); Sears, Roebuck & Co., v. Stiffel Co., 376 U.S. 225 (1964); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Katzinger Co. v. Chicago Mfg. Co., 329 U.S. 394 (1946).

50. Transparent-Wrap Mach. Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947); Mercoid Corp. v. Minneapolis Honeywell Regulator Co., 320 U.S. 680 (1944); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942); see Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); Maffei, The Patent Misuse Doctrine: A Balance of Patent Rights and the Public Interest, 52 J. Pat. Off. Soc'y 178 (1970); Nordhaus, Antitrust Laws and Public Policy in Relation to Patents, 3 Duquesne L. Rev. 1 (1964).

51. Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327, 330 (1945).

52. Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952); see Laven, Invalid Patents: Removing Statutory Protection from Improperly Granted Monopolies, 21 Case W. Res. L. Rev. 247 (1970), where it was argued that the declaratory judgment is not an effective deterrent to patent abuses because it is available only when a patentholder has taken affirmative threatening action against the alleged infringer. Furthermore, it is quite expensive in the field of patent litigation and is merely discretionary with the court. Id. at 267-68. See generally Krieger, The Federal Declaratory Judgments Act as it Applies to Patent Litigation, 52 J. Pat. Off. Soc'y 440 (1970).

53. Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147 (1950); Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84 (1941); cases cited note 54 infra.

54. United States v. Adams, 383 U.S. 39 (1966); Graham v. John Deere Co., 383 U.S. 1 (1966). See generally Kitch, Graham v. John Deere Co., New Standards for Patents, 49 J. Pat. Off. Soc'y 237 (1967).

55. 35 U.S.C. § 103 (1964) provides in pertinent part: "A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

56. 383 U.S. 1 (1966). According to the Graham guidelines, "the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined." Id. at 17.

tion' "[57]—a debilitating situation which, in the opinion of the Court, had produced a disproportionate number of undeserved patent monopolies.[58]

In *Blonder-Tongue*, the Court discussed and reaffirmed some recent anti-monopoly decisions in the patent field[59] and described parallel developments in other government quarters.[60] It also reviewed with apparent favor the erosion of mutuality in the courts.[61] The Court concluded that in permitting the enforcement of patent claims which had been formerly judged invalid, the uncritical acceptance of mutuality in patent litigation was contrary to its policy that a patent holder "should not be . . . allowed to exact royalties for the use of an idea that is not in fact patentable or that is beyond the scope of the patent monopoly granted . . . ."[62] It therefore overruled so much of *Triplett* as had depended on the mutuality doctrine[63] and held that an earlier judgment of patent invalidity should be available as an affirmative defense in subsequent infringement suits.[64]

The Court recognized that the effect of this ruling on the judicial purse and calendar may prove to be de minimis, as contended by the respondent,[65] but made it clear that its chief concern was with the extra-judicial effects of con-

57. Id. at 18. The Patent Office concedes that it employs a so-called "rule of doubt" procedure, which resolves questions of patentability in favor of the applicant, supposedly because certain factors, such as the nonobviousness or utility of a claim, may not become apparent until later. In re Hofstetter, 150 U.S.P.Q. 105, 109 (C.C.P.A. 1966). The growing backlog of applications in the Patent Office has been cited as an important reason for this allegedly pro-applicant policy. Nickerson v. Kutschera, 419 F.2d 983, 986 (3d Cir. 1969); see Hearings on S. 2, S. 1042, S. 1377 & S. 1691 Before the Subcomm. of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 82 (1967) (Statement of S. Rifkind, Co-Chairman, President's Comm. on the Patent System); Stedman, The U.S. Patent System and Its Current Problems, 42 Tex. L. Rev. 450, 475-76 (1964); Wright, U.S. Patent System and the Judiciary, 47 J. Pat. Off. Soc'y 727, 728 (1965).

58. 383 U.S. at 18. See Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 156 (Douglas, J., concurring).

59. 402 U.S. at 342-49, citing Lear, Inc. v. Adkins, 395 U.S. 653 (1969); Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180 (1952); Precision Instrument Mfg. Co. v. Automative Maintenance Mach. Co., 324 U.S. 806 (1945); Mercoid v. Mid-Continent Investment Co., 320 U.S. 661 (1944).

60. 402 U.S. at 339-42. See note 72 infra.

61. 402 U.S. at 322-27.

62. Id. at 349-50.

63. Id. at 350. The issue actually certified for review in Blonder-Tongue was the conflict between the Seventh and Eighth Circuits on the issue of the validity of the Foundation's patent in two different patent suits. The Court requested each party to brief the issue of the advisability of preserving Triplett as precedent. Both parties advocated the maintenance of Triplett in their written briefs. A third brief, submitted by the United States as amicus curiae, argued for its overruling. The Court compared the exercise of its initiative in this question of judicial administration in kind, if not in importance, with its overruling of a long-standing precedent in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). 402 U.S. at 320-21 n.6.

64. 402 U.S. at 348.

65. Id. at 348-49.

tinued adherence to the *Triplett* rule[66]—that is, that the inordinate length[67] and expense[68] of an infringement suit gives the holder of an invalid patent great leverage to exact undeserved settlement payments and license fees.[69] The true costs of *Triplett*, in the opinion of the Court, included the diversion of research and development funds to wasteful litigation, needless settlement or royalty expenses, higher consumer prices, the competitive disadvantage suffered by businesses that are forced to absorb unfair royalty payments, and the barrier posed by the enforceability of patents that have been judged invalid to the entry of new, small firms into a market.[70] These costs, implied the Court, could be reduced if an "initial ruling of invalidity had at least the potential for broader effect."[71]

Presumably, then, *Blonder-Tongue's* ruling is intended to deprive owners of patent claims that have been adjudged invalid of their source of profit by rendering such claims virtually unenforceable in later infringement suits. Since this deterrence depends upon a potential defendant's confidence that an invalid claim cannot withstand relitigation, it must be noted that the estoppel effect given to an invalidity judgment will not be automatic and predictable.[72] According to the guidelines prescribed in *Blonder-Tongue*, once estoppel is invoked the trial court must consider whether the issue common to each action is identical, and whether in the earlier suit the patentee had had a full and fair opportunity

66. Id.

67. Id. at 336-38. According to the statistics quoted by the Court, "while the three-year trend [fiscal 1968-1970] in the district courts appears to be toward more expeditious handling of civil cases tried without a jury in terms of an annual increase in the percentage of cases concluded in three trial days or less and an overall decrease in the percentage of cases requiring 10 or more days, the trends in patent litigation are exactly contrary." Id. at 337 n.31.

68. Id. 334-38. One estimate quoted by the Court is that the average cost of an infringement suit is $50,000. Id. at 335, quoting Hearings on Patent Law Revision Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess., 616 (1968) (statement of H.J. Capello, President, Space Recovery Center, Inc., and consultant on patent policy for the Nat'l Small Bus. Assoc.). See generally Kitch, supra note 54, at 295-96, for an analysis of the reasons underlying these costs.

69. 402 U.S. at 338.

70. Id. at 346-47.

71. Id. at 346.

72. Id. at 332-33. Some recent House and Senate proposals, based on the recommendations of the 1966-67 President's Commission on the Patent System, would, if passed, have gone further toward finalizing patent judgments than the estoppel method allowed in Blonder-Tongue. The Court noted that the authors of these bills had suggested that any adverse judgments on the issue of validity be rendered in rem, which would have the effect of cancelling the patent. 402 U.S. at 342 n.37. Under these proposed systems a final adjudication of validity could follow upon mere notice to the patentee that the validity of his claim was at issue, unlike the Blonder-Tongue ruling which requires full and fair litigation of the issue by the patentee as a prerequisite to estoppel. Id. See S. 1042, 90th Cong., 1st Sess. § 294 (1967); H.R. 5924, 90th Cong., 1st Sess. § 294 (1967). See generally Rich, The Proposed Patent Legislation: Some Comments, 35 Geo. Wash. L. Rev. 641 (1967).

to litigate that issue.[73] This determination of fairness, said the Court, must be based on an examination of the patentee's incentive to litigate the prior action, his choice of forum and his ability to procure crucial evidence and witnesses for that trial.[74] The adherence by the court of first impression to the *Graham* guidelines in an appropriate case and the judge's very ability to master the technical issues involved in the first suit were recommended by the Court as additional indicia of a full and fair chance to litigate.[75]

A flexible approach to these tests by the lower courts is required by due process.[76] However, since such flexibility removes the certainty that an estoppel defense will be successful, it may also weaken the ability of the *Blonder-Tongue* ruling to deter unfair licensing agreements. Such policy considerations, and the likelihood that any patentee who initiates an infringement suit would contest an estoppel defense with all available resources, suggest that the application of the *Blonder-Tongue* tests may not be as routine and easy as the Court seemed to expect.[77]

The construction of the tests may also prove to be a source of confusion in the lower courts. According to the Court, one criterion of the fairness of earlier proceedings is the adherence of the initial trial court to the *Graham* guidelines of patentability.[78] This test implies that the validity question is capable of an objective and standardized evaluation by a court. However, as indicated by the amount of forum-shopping that currently precedes patent litigation, the standards of patentability applied in validity suits by the different circuits are far from uniform.[79] Rather than follow the *Graham* decision as their primary guide, many circuits have merely assimilated it into their traditional tests of validity.[80]

73. 402 U.S. at 333.

74. Id.

75. Id.

76. See note 7 supra and accompanying text.

77. 402 U.S. at 333.

78. Id.

79. See McWilliams, Patent Litigation, 1970 Patent L. Ann. 1. Four years after the Graham standards were announced, the author stated: "Although most plaintiff patent lawyers do not like to admit it, when there is the prospect of filing a patent infringement suit, they engage in forum shopping—with good reason." Id. at 5-6. Based on tabulations of the various circuits' application of Graham over the four-year period, the article recommends that "the Eighth Circuit and the Tenth Circuit should be avoided," and that the "best circuit for a plaintiff-patent owner is the Seventh Circuit because it handles more patent infringement cases than any other circuit, and its rate of holding patents valid is higher than any other circuit." Id. at 6-7.

The flexible venue requirements for patent infringement suits favor the plaintiff in this "shopping." An infringement suit can be instituted wherever the defendant has a regular and established place of business, and has committed acts of infringement—virtually any place in the country where the product is regularly sold. 28 U.S.C. § 1400 (1970).

80. See Note, The Impact of the Supreme Court Section 103 Cases on the Standard of Patentability in the Lower Federal Courts, 35 Geo. Wash. L. Rev. 818 (1967), for an analysis of the varied reception of Graham among the circuits. But see Richards and Clapp, Recent Developments in Patent Law, in 1970 Patent L. Ann. 197. The authors of this article observed that lower courts are making an increased effort to align themselves with the Graham standards. Id. at 203.

Under such circumstances, it may be a difficult matter for a court to evaluate the procedural fairness of earlier litigation in a sister circuit without imposing its own construction of *Graham* upon the decision rendered in the prior suit. It seems clear that the ability of the lower courts to apply the *Graham* standards as well as the *Blonder-Tongue* tests with strictness, uniformity and fairness will be an important factor in determining whether *Blonder-Tongue* will make the prospect of an estoppel defense in infringement cases a viable deterrent to patent monopoly abuses.

The deterrent effect of *Blonder-Tongue* may also be qualified by the self-imposed limits of the decision which permit the non-mutual, defensive use of estoppel only against a party who had initiated an earlier suit.[81] Presumably, *Blonder-Tongue* may not be invoked against a patent-owner who has lost as a defendant in a declaratory judgment action concerning the validity of his claims. Yet such a suit in the patent field typically results from the desire of the plaintiff to protect himself from threats of an infringement suit or from other overbearing behavior on the part of the defendant-patentee.[82] It would seem to be a salutary extension of the *Blonder-Tongue* logic to make the non-mutual estoppel defense available in an appropriate case whether or not the patent-owner had initiated the prior action, provided that he had exhibited sufficient motivation and ability to litigate the validity issue in the earlier suit. The due process tests incorporated in *Blonder-Tongue* to protect "good" patents seem to leave open the possibility of such a wide application of collateral estoppel in patent law. In fact, although the Court refrained from a wholesale endorsement of *Bernhard*,[83] it did express a concern for the effects of mutuality on the integrity of the court system.[84] As Justice White observed in the opinion of the Court:

> Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.'[85]

Thus, the Court's acceptance of non-mutual estoppel in certain patent cases may presage an even wider repudiation of the mutuality rule by the Supreme Court, at some time in the future.

Whatever the immediate effects of *Blonder-Tongue* on the mechanics and integrity of the patent system and its influence on the anti-mutuality trend in other contexts, the decision is an important policy statement by the Supreme Court, expressing its priorities in patent law. *Blonder-Tongue*, like *Graham* and *Lear*, expressly announces the Court's strong disapproval of the extension of patent monopolies beyond their legitimate scope.

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81. 402 U.S. at 332.
82. See Treemond Co. v. Schering Corp., 122 F.2d 702 (3d Cir. 1941).
83. 402 U.S. at 327.
84. Id. at 328-29.
85. Id. at 329, quoting from Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 185 (1952).

Remedies—Covenant Not to Compete Between Professionals—Severance and Enforcement of Only that Portion of Covenant Which is Reasonable in Scope.—The plaintiff, an oral surgeon, entered into a written agreement with the defendant, also an oral surgeon, whereby the latter was to serve as the plaintiff's employee for a period of three years. The contract contained a restrictive covenant[1] in which the defendant agreed never to practice "dentistry and/or Oral Surgery"[2] in five rural counties of New York except in association with the plaintiff. Additionally, in conjunction with the agreement, the defendant executed a $40,000 promissory note which was to become payable if the defendant were to breach the covenant.[3] Shortly after the original agreement had expired the defendant left the plaintiff's employ and opened his own office in the same town, where he began treating many patients from the five county area. These patients were referred by dentists who had formerly sent patients to the plaintiff's office. The plaintiff, alleging a breach of the restrictive covenant, sought an injunction as well as a judgment of $40,000 on the promissory note. The appellate division, reversing the judgment of the supreme court, held that the restrictive covenant was unenforceable and void on the ground that its prohibition against the practice of dentistry as well as oral surgery was unreasonably broad.[4] The court of appeals reversed, holding that, while the covenant against practicing both dentistry and oral surgery was too broad, the restriction against practicing oral surgery alone was reasonable and should therefore be severed from the covenant as drafted and, as severed, enforced. *Karpinski v. Ingrasci*, 28 N.Y.2d 45, 268 N.E.2d 751, 320 N.Y.S.2d. 1 (1971).

English and American courts have considered the problem of whether or not to enforce covenants not to compete for almost three centuries.[5] The treatment of this problem "at the hands of the courts has reflected the evolution of industrial technology and business methods, as well as the ebb and flow of such social values as freedom of contract, personal economic freedom, and business ethics."[6] The court in *Mitchel v. Reynolds*,[7] a leading English decision, noted that while general restraints not to compete were invalid, a restrictive covenant would be valid if it were given for reasonable consideration, limited to a par-

1. Karpinski v. Ingrasci, 28 N.Y.2d 45, 47-48, 268 N.E.2d 751, 752, 320 N.Y.S.2d 1, 3 (1971). The pertinent clause of the agreement stated "that the defendant 'promises and covenants that while this agreement is in effect and forever thereafter, he will never practice dentistry and/or Oral Surgery in Cayuga, Cortland, Seneca, Tompkins or Ontario counties except: (a) In association with the [plaintiff] or (b) If the [plaintiff] terminates the agreement and employs another oral surgeon'." Id. at 48, 268 N.E.2d at 752, 320 N.Y.S.2d at 3.

2. Id.

3. Id.

4. Karpinski v. Ingrasci, 34 App. Div. 2d 403, 312 N.Y.S.2d 473 (4th Dep't 1970), rev'd, 28 N.Y.2d 45, 268 N.E.2d 751, 320 N.Y.S.2d 1 (1971).

5. See, e.g., Oregon Steam Nav. Co. v. Winsor, 87 U.S. (20 Wall.) 64 (1873); Interstate Tea Co. v. Alt, 271 N.Y. 76, 2 N.E.2d 51 (1936); Diamond Match Co v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887); Horner v. Graves, 131 Eng. Rep. 284 (C.P. 1831); Mitchel v. Reynolds, 24 Eng. Rep. 347 (Ch. 1711).

6. Blake, Employee Agreements Not To Compete, 73 Harv. L. Rev. 625, 626-27 (1960).

7. 24 Eng. Rep. 347 (Ch. 1711).

ticular area, and if business conditions indicated that such a covenant was reasonable.[8]

In the nineteenth century the "reasonableness" test was redefined to insure that the requirement was not limited to the element of consideration but included all facts relevant to the terms of the restrictive covenant.[9] The majority in one English case stated that this standard would be met if "the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public."[10]

In this country geographic limitations were significant factors in determining whether or not a covenant not to compete was reasonable.[11] An early New York case indicated that a contract prohibiting a man from pursuing his occupation within an entire state would be void.[12] Shortly thereafter, in *Diamond Match Co. v. Roeber*,[13] New York abandoned the state boundary approach and replaced it with the more flexible rule of "commercial reasonableness."[14] Important New York decisions have indicated that the period of time,[15] extent of territory,[16] hardship to the person restricted,[17] tendency to create a monopoly,[18] and amount of protection required by the business for whose benefit the restraint is imposed[19] are all important factors to be considered in determining

8. Id. at 351.

9. Horner v. Graves, 131 Eng. Rep. 284 (C.P. 1831).

10. Id. at 287.

11. See Morse Twist Drill & Mach. Co. v. Morse, 103 Mass. 73 (1869); Keeler v. Taylor, 53 Pa. 467, 470 (1866); Herreshoff v. Boutineau, 17 R.I. 3, 19 A. 712 (1890).

12. Dunlop v. Gregory, 10 N.Y. 241, 244 (1851) (dictum). Contra, Oregon Steam Nav. Co. v. Winsor, 87 U.S. (20 Wall.) 64 (1873).

13. 106 N.Y. 473, 13 N.E. 419 (1887).

14. Id. at 485-86, 13 N.E. at 423. The Diamond Match court strongly suggested that restrictive covenants, particularly those in connection with manufacturing industries, may very well be commercially reasonable even where they extend beyond state boundaries. The court asserted that in such cases covenants not to compete, if supported by adequate consideration, should be enforced so long as they are partial and not general restraints. Id.; see Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 247, 246 N.Y.S.2d 600, 603 (1963) (dictum); Millet v. Slocum, 4 App. Div. 2d 528, 167 N.Y.S.2d 136 (4th Dep't 1957), aff'd, 5 N.Y.2d 734, 152 N.E.2d 672, 177 N.Y.S.2d 716 (1958); Lynch v. Bailey, 275 App. Div. 527, 90 N.Y.S.2d 359 (1st Dep't), aff'd, 300 N.Y. 615, 90 N.E.2d 484 (1949). For foreign state cases advocating "reasonableness" standards see generally Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962); Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950 (Tex. 1960).

15. Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 271, 196 N.E.2d 245, 247, 246 N.Y.S.2d 600, 603 (1963).

16. Id.

17. Millet v. Slocum, 4 App. Div. 2d 528, 531, 167 N.Y.S.2d 136, 139 (4th Dep't 1957), aff'd, 5 N.Y.2d 734, 152 N.E.2d 672, 177 N.Y.S.2d 716 (1958).

18. Diamond Match Co. v. Roeber, 106 N.Y. 473, 483, 13 N.E. 419, 422 (1887).

19. Lynch v. Bailey, 275 App. Div. 527, 535, 90 N.Y.S.2d 359, 366 (1st Dep't), aff'd, 300 N.Y. 615, 90 N.E.2d 484 (1949).

whether or not to uphold covenants not to compete.[20]

Where employers have had legitimate business interests to protect, but where the restraints they imposed on their employees have been too extensive, some courts have severed the restrictive covenants and enforced only those parts that were reasonable in scope.[21] Other courts have rejected the severance approach and have judged restrictive covenants as a whole, totally rejecting those which were too broad.[22] In a leading New York case, *Paramount Pad Co. v. Baumrind*,[23] a salesman who had left the plaintiff's employ six months prior to the execution of the agreement agreed, in consideration of the sum of $3,000, not to solicit the plaintiff's customers for three years.[24] The court found that the restrictions against the covenantor exceeded the degree of protection necessary to guard the covenantee's legitimate interests and therefore voided the entire restrictive covenant.[25] Severance has been suggested as an alternative to the *Baumrind* approach of completely invalidating unreasonably broad covenants not to compete. Describing its practicality, one commentator stated that: "If in balancing the equities the court decides that his [the employee's] activity would fall within the scope of a reasonable prohibition, it is apt to make use of the tool of severance, paring an unreasonable restraint down to appropriate size and enforcing it."[26]

The all or nothing approach employed in *Baumrind* was abandoned in favor of the severance doctrine by the New York Court of Appeals in *Karpinski v. Ingrasci*.[27] In *Karpinski* the court, after determining that the terms of a restrictive covenant had clearly been violated by the defendant, was faced with the task of deciding whether it should enforce the restriction.[28] Citing several earlier New York cases,[29] the court noted that "[s]uch covenants by physicians [and other professionals] are, if reasonable in scope, generally given effect."[30] The

20. See Restatement of Contracts § 515, comments a-d at 989-90 (1932). Some states have specific statutes regulating employee agreements not to compete. E.g., Ala. Code tit. 9, §§ 22-24 (1958); Cal. Bus. & Prof. Code §§ 16600 & 16602 (1964); S.D. Code § 10.0706 (1939).

21. E.g., Tobin v. Cody, 343 Mass. 716, 180 N.E.2d 652 (1962); Conforming Matrix Corp. v. Faber, 104 Ohio App. 8, 13, 146 N.E.2d 447, 452 (1957) (dictum); Kelite Prods., Inc. v. Brandt, 206 Ore. 636, 294 P.2d 320 (1956); Denny v. Roth, 296 S.W.2d 944 (Tex. Civ. App. 1956).

22. E.g., Welcome Wagon, Inc. v. Morris, 224 F.2d 693 (4th Cir. 1955); Brecher v. Brown, 235 Iowa 627, 17 N.W.2d 377 (1945).

23. 4 N.Y.2d 393, 151 N.E.2d 609, 175 N.Y.S.2d 809 (1958).

24. Id. at 396, 151 N.E.2d at 610, 175 N.Y.S.2d at 810.

25. Id. at 397, 151 N.E.2d at 610, 175 N.Y.S.2d at 811.

26. Blake, supra note 6, at 674-75.

27. 28 N.Y.2d 45, 268 N.E.2d 751, 320 N.Y.S.2d 1 (1971).

28. Id. at 49, 268 N.E.2d at 753, 320 N.Y.S.2d at 4.

29. Id., citing Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 247, 246 N.Y.S.2d 600, 603 (1963); Interstate Tea Co. v. Alt, 271 N.Y. 76, 80, 2 N.E.2d 51, 53 (1936); Millet v. Slocum, 4 App. Div. 2d 528, 167 N.Y.S.2d 136 (4th Dep't 1957), aff'd, 5 N.Y.2d 734, 152 N.E.2d 672, 177 N.Y.S.2d 716 (1958); Lynch v. Bailey, 275 App. Div. 527, 90 N.Y.S.2d 359 (1st Dep't), aff'd, 300 N.Y. 615, 90 N.E.2d 484 (1949).

30. 28 N.Y.2d at 49, 268 N.E.2d at 753, 320 N.Y.S.2d at 4. "It is a firmly established

court further held that the area restriction imposed by the covenant was not unreasonably broad since the five counties included were precisely those from which the plaintiff obtained his patients.[31] The opinion also stated that a covenant not to compete is not invalid merely because it is unlimited as to time and restricts the covenantor forever.[32] The majority further concluded that nearly all of the defendant's practice was derived from his prior association with the plaintiff.[33]

Having disposed of these matters, the court dealt with the central issue in the case, which involved that part of the covenant which prohibited the defendant from practicing " 'dentistry and/or Oral Surgery' "[34] in the five enumerated counties. The plaintiff had limited his practice to oral surgery and hired the defendant to assist him exclusively in that type of dentistry.[35] The appellate division had reached the conclusion that the restrictive covenant was unreasonably broad in preventing the defendant from practicing dentistry in addition to oral surgery and therefore held the entire covenant void.[36] That court followed the reasoning of *Baumrind*,[37] where the court of appeals had stated that when "the restraint imposed is more extensive than the legitimate interests sought to be protected, the restraint is invalid."[38] In *Karpinski* the court of appeals also concluded that the covenant was too broad, but questioned whether it should be entirely discarded.[39] Chief Judge Fuld, speaking for the majority, asserted that: "The plaintiff would have all the protection he needs if the restriction were to be limited to the practice of oral surgery, and this poses the question as to the court's power to 'sever' the impermissible from the valid and uphold the covenant to the extent that it is reasonable."[40]

Judge Fuld noted that while the court could find no New York cases directly in point, there have been New York decisions in this area which supported the

doctrine that a member of one of the learned professions, upon becoming assistant to another member thereof, may, upon a sufficient consideration, bind himself not to engage in the practice of his profession upon the termination of his contract of employment, within a reasonable territorial extent, as such an agreement is not in restraint of trade or against public policy." Annot., 58 A.L.R. 156, 162 (1929). See 6A A. Corbin, Contracts § 1393 (1962).

31. 28 N.Y.2d at 49, 268 N.E.2d at 753, 320 N.Y.S.2d at 5. See Corbin, supra note 30, § 1393.

32. 28 N.Y.2d at 50, 268 N.E.2d at 753, 320 N.Y.S.2d at 5; see Diamond Match Co. v. Roeber, 106 N.Y. 473, 484, 13 N.E. 419, 423 (1887); Goos v. Pennisi, 10 App. Div. 2d 643, 644, 197 N.Y.S.2d 253, 254 (2d Dep't 1960).

33. 28 N.Y.2d at 50, 268 N.E.2d at 754, 320 N.Y.S.2d at 5.

34. Id.

35. Id.

36. Karpinski v. Ingrasci, 34 App. Div. 2d 403, 406, 312 NY.S.2d 473, 476 (4th Dep't 1970), rev'd, 28 N.Y.2d 45, 268 N.E.2d 751, 320 N.Y.S.2d 1 (1971).

37. Paramount Pad Co. v. Baumrind, 4 N.Y.2d 393, 151 N.E.2d 609, 175 N.Y.S.2d 809 (1958); see notes 23-25 supra and accompanying text.

38. 4 N.Y.2d at 396-97, 151 N.E.2d at 610, 175 N.Y.S.2d at 810. See Janitor Serv. Management Co. v. Provo, 34 App. Div. 2d 1098, 312 N.Y.S.2d 580 (4th Dep't 1970) (mem.).

39. 28 N.Y.2d at 51, 268 N.E.2d at 754, 320 N.Y.S.2d at 6.

40. Id.

existence of such a power.[41] Furthermore, several foreign state decisions had explicitly recognized the court's power to sever.[42] Accordingly, since the plaintiff limited himself to the practice of oral surgery exclusively, the court of appeals severed the agreement, enforcing only that part of the covenant which prohibited the defendant from practicing oral surgery.[43]

The court then considered the question of whether injunctive relief was precluded by the provision that the $40,000 promissory note executed by the defendant was to become payable if he breached the covenant not to compete.[44] It asserted that "[t]he mere inclusion in a covenant of a liquidated damages provision does not automatically bar the grant of an injunction."[45] The court, however, decided that to grant the full amount of damages as proposed in the covenant, in addition to an injunction, would in effect award the plaintiff a double recovery since the injunction would prevent further injury to the plaintiff.[46] The court instead granted the plaintiff the actual damages he had sustained during the period of the breach, prior to the injunction.[47]

The use of the restrictive covenant not to compete has come to be recognized by the courts as an acceptable mode of protecting one's business or professional practice.[48] Consequently, it would seem rather harsh for a court to invalidate a covenant not to compete in toto merely because a phrase within the restriction is impermissibly broad.[49] This is especially so where the basis and bulk of the agreement is essentially reasonable and sound.[50]

The court of appeals in *Karpinski*, following the enlightened example of

41. Id. Several earlier New York decisions have strongly suggested severance by stating that restrictive covenants should only be enforced to the extent necessary to protect the employer's legitimate interests. See Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 248, 246 N.Y.S.2d 600, 604 (1963); Carpenter & Hughes v. De Joseph, 10 N.Y.2d 925, 179 N.E.2d 854, 224 N.Y.S.2d 9 (1961) (mem.); Interstate Tea Co. v. Alt, 271 N.Y. 76, 80, 2 N.E.2d 51, 53 (1936).

42. E.g., New England Tree Expert Co. v. Russell, 306 Mass. 504, 509, 28 N.E.2d 997, 999 (1940); Wood v. May, 73 Wash. 2d 307, 313, 438 P.2d 587, 591 (1968); see 6A A. Corbin, Contracts § 1390 at 71 n.53 (1962, Supp. 1957).

43. 28 N.Y.2d at 52, 268 N.E.2d at 755, 320 N.Y.S.2d at 7.

44. Id.

45. Id.; see Rubinstein v. Rubinstein, 23 N.Y.2d 293, 298, 244 N.E.2d 49, 52, 296 N.Y.S.2d 354, 358-59 (1968); Wirth & Hamid Fair Booking, Inc. v. Wirth, 265 N.Y. 214, 224, 192 N.E. 297, 301 (1934); Diamond Match Co. v. Roeber, 106 N.Y. 473, 486, 13 N.E. 419, 423-24 (1887). See also 5 A. Corbin, Contracts § 1071 (1964).

46. 28 N.Y.2d at 52-53, 268 N.E.2d at 755, 320 N.Y.S.2d at 7; see Wirth & Hamid Fair Booking, Inc. v. Wirth, 265 N.Y. 214, 225, 192 N.E. 297, 302 (1934).

47. 28 N.Y.2d at 53, 268 N.E.2d at 756, 320 N.Y.S.2d at 8. The court followed the approach taken in Wirth & Hamid Fair Booking, Inc. v. Wirth, 265 N.Y. 214, 225, 192 N.E. 297, 302 (1934). The Wirth approach provides for complete recovery; the plaintiff is awarded damages for injury sustained before the injunction is issued, and is protected by the injunction from future injury.

48. 28 N.Y.2d at 49, 268 N.E.2d at 753, 320 N.Y.S.2d at 4; see cases cited note 14 supra.

49. E.g., Karpinski v. Ingrasci, 34 App. Div. 2d 403, 312 N.Y.S.2d 473 (4th Dep't 1970).

50. 28 N.Y.2d at 49-50, 268 N.E.2d at 753-54, 320 N.Y.S.2d at 4-5.

several sister states,[51] has pursued a much more flexible theory by severing that portion of the restriction which was unreasonably broad and enforcing only that part of the agreement which was necessary to protect the covenantee's professional practice.[52] Severance, judiciously applied, can serve as a useful technique in preserving the reasonable clauses in agreements by employees not to compete with their former employers. By severing such agreements and upholding only those sections necessary to guard the employer's legitimate interests, the courts will not preclude employees from practicing vocations for which they have been trained when they do not in fact compete with their former employers.[53]

Torts—Medical Malpractice—Michigan Abandons "Locality Rule" with Regard to Specialists.—Plaintiff sued two certified pediatricians[1] practicing in Detroit for their alleged negligence in failing to make a timely diagnosis of phenylketonuria (PKU).[2] As a consequence of this alleged failure, plaintiff suffered permanent mental retardation.[3] To support his claim of negligence, plaintiff presented the testimony of two recognized experts on PKU, one from Chicago and the other from Los Angeles. One expert testified that any board certified pediatrician who was, at that time, evaluating a child with mental retardation should have included a test for PKU.[4] Neither expert professed a

51. See, e.g., cases cited note 42 supra.

52. 28 N.Y.2d at 52, 268 N.E.2d at 755, 320 N.Y.S.2d at 7.

53. Id. at 51, 268 N.E.2d at 754, 320 N.Y.S.2d at 6. See also Monroe Coverall Serv., Inc. v. Bosner, 283 App. Div. 451, 128 N.Y.S.2d 476 (4th Dep't 1954).

1. Naccarato v. Grob, 384 Mich. 248, 251 n.2, 180 N.W.2d 788, 789 n.2 (1970), rev'g 12 Mich. App. 130, 162 N.W.2d 305 (1968). Both Drs. Otto Grob and David Krevsky were board certified pediatricians. Pediatrics is recognized as an area of medical specialty by both the American Medical Association and the Advisory Board of Medical Specialties. 1 Lawyers' Medical Cyclopedia of Personal Injuries and Allied Specialties § 1.8, at 13 (C. Frankel rev. ed. 1966) [hereinafter cited as Lawyers' Medical Cyclopedia]. Certification by a specialty board (in this case the American Board of Pediatrics) is virtually a mandatory requirement for a doctor to obtain recognition as a specialist. "[Specialty boards] are national organizations of specialists who certify individuals as diplomates of the board on the basis of time spent in approved residencies and satisfactory performance on examinations set by the board." Id. § 1.10, at 15.

2. 12 Mich. App. at 132, 162 N.W.2d at 306. Phenylketonuria is a "metabolic disorder often associated with mental retardation or defects." 2 J. Schmidt, Attorneys' Dictionary of Medicine and Word Finder 668.2 (1971). The Michigan Supreme Court has categorized it as a childhood disease which begins at birth and becomes progressively more severe. 384 Mich. at 249, 180 N.W.2d at 789.

3. 12 Mich. App. at 132, 162 N.W.2d at 306.

4. Id. at 133, 162 N.W.2d at 306-07. The test for phenylketonuria consists of a "[u]rine and blood test for the presence of phenylpyuric acid . . . ." 2 J. Schmidt, Attorneys' Dictionary of Medicine and Word Finder 668.2 (1971). It should be noted that as early as 1963, Massachusetts had passed legislation requiring that all children be tested for phenylketonuria at birth. Act of July 17, 1963, ch. 545, § 110A, [1963] Mass. Acts and Resolves 410 (codified

knowledge of the standard of care normally employed by Detroit pediatricians in treating mental retardation in children. Defendants, while admitting they "had knowledge of PKU, its symptoms, and the tests which are given to detect the existence of the disease,"[5] introduced the testimony of three doctors[6] from Detroit who testified that, at the time the alleged negligence occurred, it was not a common practice in Detroit to test for PKU and that neither defendant had deviated from the standard of care for the locality. Following a jury verdict for the plaintiff, the trial judge granted defendants' motion for judgment notwithstanding the verdict, holding that "the testimony of the plaintiff's experts could not be considered by the jury as worthy of belief regarding the standards of actual private practice of the physicians in the Detroit area . . . ."[7] The Supreme Court of Michigan reversed and reinstated the award of damages, holding that the standard of care for a specialist should not be determined by geographical considerations and that therefore the competency of the plaintiff's witnesses in this case would not be affected. *Naccarato v. Grob*, 384 Mich. 248, 180 N.W.2d 788 (1970).

In a medical malpractice action,[8] as in any negligence action, the plaintiff must show the breach of a standard of care.[9] It is well settled, however, that in a malpractice case this breach may be shown only by expert testimony,[10]

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at Mass. Ann. Laws ch. 111, § 110A (1967)). By 1968, at least forty states had enacted similar legislation. Michigan, which enacted its statute in 1965, provided: "It shall be the duty of any physician in charge at the birth of any infant to administer or cause to be administered a phenylketonuria test . . . and to report the results of the test to the parents . . . of the infant; and such test shall be administered before the infant is discharged from its place of birth . . . ." Act of July 8, 1965, Pub. Act No. 119, § 1, [1965] Mich. Pub. & Local Acts 163 (codified at Mich. Comp. Laws Ann. § 325.521 (1967)).

5. 12 Mich. App. at 137, 162 N.W.2d at 309.

6. The decision of the court of appeals does not clearly indicate whether defendants' expert witnesses were pediatricians; however, the recognition by the trial court that they were competent to establish the standard of care for Detroit pediatricians would seem to indicate that they were specialists. See id. at 133, 162 N.W.2d at 307. It should be noted, however, that some jurisdictions will admit the expert testimony of general practitioners even where the defendant is a specialist. Annot., 31 A.L.R.3d 1167 (1970).

7. 384 Mich. at 252, 180 N.W.2d at 790.

8. Since the gravamen in a malpractice case is the breach of a duty imposed by law rather than the breach of a contractual obligation arising out of the physician-patient relationship, malpractice cases fall into the same category as all other negligence actions. See 1 Lawyers' Medical Cyclopedia § 2.35, at 101; Comment, Malpractice and Medical Testimony, 77 Harv. L. Rev. 333, 334-36 (1963).

9. See W. Prosser, Torts § 32, at 161-63 (4th ed. 1971) [hereinafter cited as Prosser].

10. 7 J. Wigmore, Evidence § 2090(a) (3d ed. 1940); see R. Long, The Physician and the Law 23 (3d ed. 1968); Prosser § 32, at 164. There are, however, several well recognized exceptions to this rule whereby the plaintiff may take his case to the jury without the need to produce expert testimony. Expert testimony is not required where the negligence alleged by the plaintiff would be within the common knowledge of the jury. See, e.g., Graham v. St. Luke's Hosp., 46 Ill. App. 2d 147, 196 N.E.2d 355 (1964); Grosjean v. Spencer, 258 Iowa 685, 140 N.W.2d 139 (1966); Easterling v. Walton, 208 Va. 214, 156 S.E.2d 787 (1967); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963). A plaintiff may also avoid a

since juries are generally not deemed competent to resolve technical medical issues without the aid of experts.[11] This additional burden of providing expert testimony, while seemingly a simple one, has often turned out to be a troublesome area of proof for the plaintiff.[12] Although the expert's testimony need not assert that the defendant physician was in fact negligent, it must establish the appropriate standard against which the defendant's conduct is to be judged.[13] Therefore, in order for the expert's testimony to be admissible, it must first be shown that he is knowledgeable concerning the appropriate standard of care.[14] For this reason, the criteria which are applied in determining the standard of care will also determine the competency of the expert to testify.[15]

The standard of care for a physician has generally been stated to be "that degree of care, skill, and proficiency which is commonly exercised by the ordinarily skillful, careful, and prudent physician . . . engaged in similar practice under the same or similar conditions."[16] Although this standard is professedly an

directed verdict by using the defendant-doctor as a witness or by using his extrajudicial admissions to show negligence. See, e.g., Wickoff v. James, 159 Cal. App. 2d 664, 324 P.2d 661 (Dist. Ct. App. 1958); Greenwood v. Harris, 362 P.2d 85 (Okla. 1961). Some courts have even extended the doctrine of res ipsa loquitur to allow a plaintiff to show negligence. See, e.g., Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963). Further, two states will allow a plaintiff to offer recognized medical texts in place of expert witnesses. See Mass. Ann. Laws ch. 233, § 79C (Supp. 1970); Nev. Rev. Stat. § 51.040 (1967). See generally McCoid, The Care Required of Medical Practitioners, 12 Vand. L. Rev. 549, 620-21 (1959) [hereinafter cited as McCoid]. Alabama allows this same practice by common law. Stoudenmeir v. Williamson, 29 Ala. 558 (1857). Two jurisdictions, Idaho and California, allow the admission of medical brochures as direct evidence. See Note, Overcoming the "Conspiracy of Silence": Statutory and Common-Law Innovations, 45 Minn. L. Rev. 1019, 1045-48 (1961).

11. Prosser § 32, at 164.

12. See generally Comment, Malpractice and Medical Testimony, 77 Harv. L. Rev. 333, 336-38 (1963). In addition to plaintiff's problem of locating a physician competent to testify, plaintiff must also overcome the general reluctance of most physicians to testify against a fellow physician. This problem has been referred to as the "Conspiracy of Silence" among physicians and has become a well recognized issue. Id. Some courts have even extended judicial recognition to the matter. See Agnew v. Parks, 172 Cal. App. 2d 756, 343 P.2d 118 (Dist. Ct. App. 1959); Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170 (1931); Johnson v. Winston, 68 Neb. 425, 94 N.W. 607 (1903); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953); Coleman v. McCarthy, 53 R.I. 266, 165 A. 900 (1933).

13. 5A L. Frumer, R. Benoit, M. Friedman & L. Pilgrim, Personal Injury Actions, Defenses and Damages § 1.01 [4][a], at 36 (1967) [hereinafter cited as Personal Injury].

14. Ardoline v. Keegan, 140 Conn. 552, 557, 102 A.2d 352, 355 (1954); Couch v. Hutchison, 135 So. 2d 18, 23 (Fla. Dist. Ct. App. 1961); Huttner v. MacKay, 48 Wash. 2d 378, 293 P.2d 766 (1956). Plaintiff must also show that the expert is competent with regard to the subject matter. See Personal Injury § 1.01[1][e], at 12; B. Shartel & M. Plant, The Law of Medical Practice § 3-16, at 130 (1959) [hereinafter cited as The Law of Medical Practice].

15. Ardoline v. Keegan, 140 Conn. 552, 102 A.2d 352 (1954); Couch v. Hutchison, 135 So. 2d 18 (Fla. Dist. Ct. App. 1961); Huttner v. MacKay, 48 Wash. 2d 378, 293 P.2d 766 (1956).

16. Personal Injury § 1.01[1][a]; see 1 D. Louisell & H. Williams, Medical Malpractice ¶

objective one, it does not have uniform application throughout the nation[17] due to the varied interpretations given by courts as to what constitutes "same or similar" conditions.[18]

During the latter part of the nineteenth century,[19] the courts enunciated what has become known as the "locality rule." Briefly stated, this rule set forth the proposition that a physician could only be held to that standard of care practiced by other physicians located in the same community, locality or neighborhood.[20] The rationale behind this rule reflected the obvious inequities existing at that time between physicians practicing in large urban centers and those practicing in remote rural areas.[21] Some courts chose to state these differences in terms of the opportunities for continuing medical education,[22] for observation and practice of medical techniques,[23] and for access to modern medical facilities such as hospitals and laboratories.[24] One court went so far as to recognize that rural areas did not attract the same caliber of physicians as urban areas and that rural physicians had less training and experience.[25]

Although these distinctions were valid at the time the rule was formulated, courts soon recognized that a strict locality standard could create a harsh result—the possibility that a plaintiff might be left without a remedy in a locality which had only one physician, in a locality where all physicians were below the standards generally set for rural communities[26] or where a "conspiracy of silence" in the plaintiff's locality eliminated the possibility of securing expert testimony.[27] Thus, many courts began to accept a modification of the locality rule which permitted expert testimony from physicians practicing in other localities if it could be established that the communities were in fact "similar."[28] As a result

8.04, at 201 (1970) [hereinafter cited as Medical Malpractice]; McCoid 558-60. Since, at the time the locality rules were formulated, there was little if any medical specialization, no distinction was drawn based upon differing standards for specialists and general practitioners. It is interesting to note that a Michigan court was one of the first to consider distinguishing between the standard of care for a specialist and a general practitioner. See Sampson v. Veenboer, 252 Mich. 660, 666-67, 234 N.W. 170, 172 (1931). For other early decisions recognizing the applicability of differing standards, see McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Cavallaro v. Sharp, 84 R.I. 67, 121 A.2d 669 (1956).

17. See Medical Malpractice ¶ 8.04.

18. See notes 20-32 infra and accompanying text.

19. See notes 20, 22-28 infra.

20. See Smothers v. Hanks, 34 Iowa 286 (1872); Tefft v. Wilcox, 6 Kan. 46 (1870); Hathorn v. Richmond, 48 Vt. 557 (1876); Wilmot v. Howard, 39 Vt. 447 (1867); Gates v. Fleischer, 67 Wis. 504, 30 N.W. 674 (1886).

21. See notes 22-25 infra and accompanying text.

22. See, e.g., Smothers v. Hanks, 34 Iowa 286 (1872).

23. E.g., Tefft v. Wilcox, 6 Kan. 46, 63-64 (1870).

24. E.g., Gramm v. Boener, 56 Ind. 497 (1877).

25. Small v. Howard, 128 Mass. 131, 136 (1880), overruled, Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968).

26. Whitesell v. Hill, 101 Iowa 629, 70 N.W. 750 (1897); Burk v. Foster, 114 Ky. 20, 69 S.W. 1096 (1902). See generally McCoid 570.

27. See note 12 supra.

28. Gramm v. Boener, 56 Ind. 497 (1877); Whitesell v. Hill, 101 Iowa 629, 70 N.W. 750

of this modification, however, it was necessary to establish criteria which could be applied in determining the similarity of localities. Initially some courts approached this problem by comparing various socio-economic factors of communities, *e.g.*, size of population and type of economy.[29] Other courts simply applied a standard of geographic proximity between communities.[30] More recently, courts which continue to apply the "similar locality rule" have tended to reject a socio-economic or geographic approach and have instead looked toward the similarity of "medical factors"[31] such as medical schools, teaching hospitals and research and laboratory facilities[32] in the localities to be compared. This would seem to be the most logical application of the rule since the actual question involved concerns the resources available to enable the physician to maintain the standard of his practice, and not the socio-economic status of the community.

While the locality rule as thus formulated (applying the standard of either the "same" or "similar" localities) has achieved wide acceptance,[33] a few jurisdictions have recognized variations upon this rule.[34] As early as 1916, in *Viita v. Fleming*,[35] the Minnesota Supreme Court, recognizing the growing improvements in transportation and communication, rejected a rigid interpretation of the locality rule as being strictly determinative of the standard of care to be applied and held the standard to be that of a physician similarly situated, locality merely being one of the criteria by which "similarly situated" could be determined.[36] More recent decisions of courts in Iowa,[37] Maine,[38] New Jersey,[39] and Pennsyl-

(1897); Burk v. Foster, 114 Ky. 20, 69 S.W. 1096 (1902); Pelky v. Palmer, 109 Mich. 561, 67 N.W. 561 (1896).

29. Michael v. Roberts, 91 N.H. 499, 23 A.2d 361 (1941); Morrill v. Komasinski, 256 Wis. 417, 41 N.W.2d 620 (1950).

30. E.g., Warnock v. Kraft, 30 Cal. App. 2d 1, 85 P.2d 505 (Dist. Ct. App. 1938); Allen v. Voje, 114 Wis. 1, 89 N.W. 924 (1902).

31. See Waltz, The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation, 18 De Paul L. Rev. 408, 415 (1969) [hereinafter cited as Waltz].

32. See Horton v. Vickers, 142 Conn. 105, 111 A.2d 675 (1955); Geraty v. Kaufman, 115 Conn. 563, 162 A. 33 (1932); Cook v. Lichtblau, 144 So. 2d 312 (Fla. Dist. Ct. App. 1962); Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170 (1931); Cavallaro v. Sharp, 84 R.I. 67, 121 A.2d 669 (1956); Teig v. St. John's Hosp., 63 Wash. 2d 369, 387 P.2d 527 (1963).

33. For an exhaustive listing of jurisdictions applying either the "same" or "similar" locality rule see 18 De Paul L. Rev. 328, 332-33 nn.13 & 14 (1969).

34. See notes 35-40 infra and accompanying text.

35. 132 Minn. 128, 155 N.W. 1077 (1916).

36. Id. at 137, 155 N.W. at 1081.

37. McGulpin v. Bessmer, 241 Iowa 1119, 1131, 43 N.W.2d 121, 128 (1950) (locality is only one circumstance to be considered and should not be a limitation on the skill required).

38. Josselyn v. Dearborn, 143 Me. 328, 62 A.2d 174 (1948) (upholding an instruction by the trial judge that locality was merely one factor to be considered).

39. Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953) (a physician who holds himself out as a specialist will be held to the level of skill of the average specialist in his field); Fernandez v. Baruch, 96 N.J. Super. 125, 135, 232 A.2d 661, 666 (1967), rev'd on other grounds, 52 N.J. 127, 244 A.2d 109 (1968) (physician is held to that level of skill practiced by the average physician in his field).

vania[40] have supported this view.

Specialists have been held to a higher standard of care than general practitioners. It is generally accepted that where one holds himself out as a specialist, he "is required to possess the degree of knowledge and ability and to exercise the amount of care and skill which are ordinarily possessed and exercised by specialists of a similar class, having regard to the current state of knowledge in medicine and surgery in his field."[41] While some courts have continued to recognize the application of locality rules to the standard of care demanded of a specialist,[42] a number of decisions have specifically rejected or omitted them.[43] The most significant decision to abandon the locality standard for specialists was *Brune v. Belinkoff*.[44] In *Brune*, an anesthesiologist administered an excessive dosage of a local anesthetic during childbirth which resulted in subsequent harm to the plaintiff.[45] In reversing an instruction to the jury by the trial judge that the defendant anesthesiologist should be held to a local standard of care, the Massachusetts Supreme Judicial Court held that "the 'locality rule' . . . is unsuited to present day conditions"[46] and that the standard to be applied in the case of a specialist is the "standard of care and skill of the average member of the profession practising the specialty, taking into account the advances in the profession."[47] The court did, however, point out that it would be permissible to consider the medical

40. Hodgson v. Bigelow, 335 Pa. 497, 7 A.2d 338 (1939) (standard of practice can no longer be restricted to locality, which is merely one factor to be considered).

41. The Law of Medical Practice § 3.05, at 118. See also Ayers v. Parry, 192 F.2d 181 (3d Cir. 1951), cert. denied, 343 U.S. 980 (1952); Crovella v. Cochrane, 102 So. 2d 307 (Fla. Dist. Ct. App. 1958); Rule v. Cheeseman, 181 Kan. 957, 317 P.2d 472 (1957); Rayburn v. Day, 126 Ore. 135, 268 P. 1002 (1928); Rann v. Twitchell, 82 Vt. 79, 71 A. 1045 (1909); Dinner v. Thorp, 54 Wash. 2d 90, 338 P.2d 137 (1959); Huttner v. MacKay, 48 Wash. 2d 378, 293 P.2d 766 (1956).

42. See Stallcup v. Coscarart, 79 Ariz. 42, 282 P.2d 791 (1955); Valentine v. Kaiser Foundation Hosps., 194 Cal. App. 2d 282, 15 Cal. Rptr. 26 (Dist. Ct. App. 1961); Huttner v. MacKay, 48 Wash. 2d 378, 293 P.2d 766 (1956). It is interesting to note that some decisions upholding the application of the locality rule to specialists have been strongly criticized by the commentators. In Lockart v. Maclean, 77 Nev. 210, 361 P.2d 670 (1961), the testimony of plaintiff's experts concerning the standard of care applicable to two certified surgeons in Reno was excluded by a holding that the experts had failed to demonstrate a knowledge of the standard for the "same" locality. This case has been criticized as too narrow an interpretation of the locality rule in a study of the locality rule as applied to medical specialists. 14 Stan. L. Rev. 884 (1962). In Horton v. Vickers, 142 Conn. 105, 111 A.2d 675 (1955), the testimony of plaintiff's expert was disregarded, based on a holding that he was not competent to testify as to the standard of care for a specialist, the standard being that of the "general neighborhood." This decision has been termed "doubtful" by at least two commentators. See Lawyers' Medical Cyclopedia § 2.45, at 123-24; McCoid 574.

43. See notes 44-60 infra and accompanying text.

44. 354 Mass. 102, 235 N.E.2d 793 (1968).

45. Id. at 103, 235 N.E.2d at 794-95.

46. Id. at 108, 235 N.E.2d at 798.

47. Id. at 109, 235 N.E.2d at 798. In dictum the court indicated a similar standard should be applicable to general practitioners. Id.

facilities available to the specialist in applying the standard.[48] It is interesting to note that, in arriving at its decision, the court considered the various applications of the locality rule[49] and recognized that it could have achieved the same result by simply determining that New Bedford, Massachusetts, the situs of the case, was within the same medical jurisdiction as Boston.[50] Instead, the court chose to reject the locality rule,[51] thus giving implicit recognition to a "national" community of specialists.

In addition to Massachusetts, the State of Washington has also abandoned the locality rule. In *Pederson v. Dumouchel*,[52] a medical malpractice action, the trial judge in his instructions to the jury stated that the standard of care to be applied to the defendant-physician was "the learning, skill, care and diligence ordinarily possessed and practiced by others in the same profession in good standing, engaged in like practice, *in the same locality or in similar localities* . . . ."[53] In holding the instruction to be erroneous,[54] the Supreme Court of Washington stated that "[t]he 'locality rule' has no present-day vitality except that it may be considered as *one* of the elements to determine the degree of care and skill which is to be expected of the average physician of the class to which he belongs."[55] In a subsequent malpractice case, *Douglas v. Bussabarger*,[56] the Supreme Court of Washington cited *Pederson* with approval[57] and recognized that today there is uniformity of practice throughout the nation with regard to specialists.[58] Observing that rural physicians do not admit to patients that they may be "a little more careless and act with less responsibility"[59] than doctors in larger communities, the court stated that "small-town doctors should not enjoy advantages not given by the law to any other class of . . . small-town tort defendants."[60]

Other jurisdictions, without explicitly rejecting the locality rule, have reached similar conclusions. New Jersey[61] and North Carolina[62] have both held that

48. Id.

49. Id. at 104-08, 235 N.E.2d at 795-98.

50. The court appears to have considered the relative locations of New Bedford and Boston as a significant factor in its decision, observing that New Bedford had a population of 100,000 and was located "slightly more than fifty miles from Boston, one of the medical centers of the nation, if not the world." The court then stated that to charge a jury "that if the skill and ability of New Bedford physicians were 'fifty percent inferior' to those obtaining in Boston the defendant should be judged by New Bedford standards . . . may well be carrying the [locality rule] to its logical conclusion," but that it was "a reductio ad absurdum of the rule." Id. at 108-09, 235 N.E.2d at 798.

51. Id. at 109, 235 N.E.2d at 798.

52. 72 Wash. 2d 73, 431 P.2d 973 (1967).

53. Id. at 76, 431 P.2d at 976.

54. Id. at 79-80, 431 P.2d at 978.

55. Id. at 79, 431 P.2d at 978.

56. 73 Wash. 2d 476, 438 P.2d 829 (1968).

57. Id. at 490, 438 P.2d at 838.

58. Id. at 489-90, 438 P.2d at 837-38.

59. Id. at 490, 438 P.2d at 838.

60. Id.

61. Fernandez v. Baruch, 96 N.J. Super. 125, 232 A.2d 661 (1967). See also Schueler v.

specialists should be held to that degree of care exercised by others of the same specialty, similarly situated.[63] Although neither state court defined "similarly situated," it is clear that they were referring to the circumstances surrounding the alleged negligence, as opposed to locality factors.[64] A similar interpretation appears in *Josselyn v. Dearborn*,[65] where the trial court's charge to the jury that the defendants should be held to that degree of skill and care " 'ordinarily possessed by other physicians under like conditions' "[66] was upheld by the Supreme Court of Maine. The West Virginia Supreme Court of Appeals, in *Hundley v. Martinez*,[67] criticized the locality rule[68] and may have abandoned it with regard to specialists.[69]

As a result of *Naccarato v. Grob*,[70] Michigan has clearly joined the growing trend toward recognition of national medical standards. In *Naccarato* the intermediate appellate court, in affirming the decision of the trial court, determined that the applicable standard of care for a physician in Michigan was that "a defendant physician is not to be held to a greater duty of practice than that customarily expected of his fellow physicians in the community."[71] Although that court recognized that nonresident expert testimony may be admitted to establish the applicable standard of care,[72] it determined that the plaintiff's experts were "not competent or qualified to testify as to the actual practices of pediatricians in the Detroit area,"[73] since "[c]ompetent cross-examination and the use of

Strelinger, 43 N.J. 330, 204 A.2d 577 (1964); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953).

62. Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

63. Fernandez v. Baruch, 96 N.J. Super. at 135, 232 A.2d at 666-67; Belk v. Schweizer, 268 N.C. at 56, 149 S.E.2d at 569.

64. Fernandez v. Baruch, 96 N.J. Super. at 135, 232 A.2d at 666-67; Belk v. Schweizer, 268 N.C. at 55-56, 149 S.E.2d at 569-70.

65. 143 Me. 328, 62 A.2d 174 (1948).

66. Id. at 340, 62 A.2d at 181.

67. 151 W. Va. 977, 158 S.E.2d 159 (1967).

68. Id. at 990-91, 158 S.E.2d at 167.

69. Id. at 995, 158 S.E.2d at 169. The court in Hundley dealt with a malpractice action arising out of a cataract operation. When plaintiff's expert witness failed to state that he was familiar with the standard of care for Charleston, West Virginia, the trial court barred his testimony. Id. at 983, 158 S.E.2d at 163-64. The supreme court of appeals, in reversing on this point, avoided directly abrogating the locality rule by holding that when plaintiff's witness "testified that he was familiar with the standard of procedure in relation to cataract operations throughout the country, certainly localities similar to Charleston were included within his scope of knowledge." Id. at 994, 158 S.E.2d at 169. The court then went on to state that the defendant-physician, as a specialist with a higher degree of skill and advanced training, should have had knowledge of the standard procedures for cataract operations as performed throughout the country. Id. at 994-95, 158 S.E.2d at 169. In adopting this approach, the court left open the status of the locality rule in West Virginia, but clearly indicated a preference for a liberal interpretation. Id.

70. 384 Mich. 248, 180 N.W.2d 788 (1970).

71. 12 Mich. App. at 138-39, 162 N.W.2d at 309.

72. Id. at 136, 162 N.W.2d at 307-08.

73. Id., 162 N.W.2d at 308.

Detroit area physicians . . . effectively showed that [plaintiff's experts were] not familiar with the prevailing practice of pediatrics in the Detroit area . . . ."[74] In reversing, the Michigan Supreme Court was in fact recognizing that it was no longer relevant to determine whether cities like Los Angeles and Detroit were "similar," since the standard to be set for a specialist was national in scope, not local.[75] "The reliance of the public upon the skills of a specialist and the wealth and sources of his knowledge are not limited to the geographic area in which he practices. Rather his knowledge is a specialty. . . . Therefore, geographical conditions or circumstances control neither the standard of a specialist's care nor the competence of an expert's testimony."[76] The court reasoned that the emphasis should no longer be on the state of local practice but instead should rest on the duty of a "community of specialists" to practice their specialty "in the light of present day scientific knowledge."[77] This was an implicit recognition by the court that a national standard of uniformity[78] had been obtained among board certified specialists.[79]

The rejection of locality rules has received almost unanimous approval from the commentators.[80] When the locality rule was first developed, it was designed

74. Id., 162 N.W.2d at 309. The intermediate appellate court recognized that an expert, to be competent to testify, need not have knowledge of the standard of care in the community so long as it could be shown that he was knowledgeable concerning the standard to be applied in "similar" communities. Id. at 135, 162 N.W.2d at 308. The court based this view on Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170 (1931). However, the court determined "that the experts [plaintiff's witnesses] although familiar with the practice and standards in a similar urban community, were not sufficiently familiar with Detroit practices in the light of the contradictory testimony." 12 Mich. App. at 136, 162 N.W.2d at 308. The court therefore seemed to be indicating that the standard by which Michigan would determine "similar" communities is the "degree of familiarity with Detroit procedures." Id.

75. 384 Mich. at 254, 180 N.W.2d at 790-91.

76. Id. at 253-54, 180 N.W.2d at 791.

77. Id. Although courts (especially in referring to the standard of care owed by a specialist to his patients) have long recognized the duties "to keep abreast" and "to practice within the light of current day scientific advancements," these terms have generally not been defined. See, e.g., Lewis v. Owen, 395 F.2d 537 (10th Cir. 1968); McHugh v. Audet, 72 F. Supp. 394 (M.D. Pa. 1947); Darling v. Charleston Comm. Mem. Hosp., 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964), aff'd, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), cert. denied, 383 U.S. 946 (1966); Lewis v. Read, 80 N.J. Super. 148, 193 A.2d 255 (1963); Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 (1898); Hodgson v. Bigelow, 335 Pa. 497, 7 A.2d 338 (1939); Reed v. Church, 175 Va. 284, 8 S.E.2d 285 (1940).

78. There has been some recognition by courts that where a plaintiff can establish that there is a national standard of practice, expert testimony can be admitted without regard to the locality rule. The principle is most clearly applied in cases dealing with fractures and X-rays. The presumption in these cases appears to be that since the practice is so basic and elementary, there is no significant variation between localities. See, e.g., Lewis v. Johnson, 12 Cal. 2d 558, 561, 86 P.2d 99, 101 (1939); Murphy v. Little, 112 Ga. App. 517, 522-23, 145 S.E.2d 760, 764 (1965); McElroy v. Frost, 268 P.2d 273 (Okla. 1954); Christian v. Jeter, 445 S.W.2d 51 (Tex. Civ. App. 1969).

79. See note 1 supra.

80. See R. Long, The Physician and the Law 24 (3d ed. 1968); D. Louisell & H. Williams,

to protect physicians from the inequities then existing between rural and urban practice.[81] As it is employed today, at a time when it is generally agreed that "the practice of medicine by certified specialists within most medical specialties is similar throughout the country,"[82] it often presents a severe problem to an injured plaintiff. With the advent of medical specialty boards which provide minimum uniform standards for all specialists[83] and the availability of numerous educational facilities which "serve to keep physicians informed and increasingly to establish nationwide standards,"[84] it is inevitable that the trend toward recognition of national medical standards will be followed in other jurisdictions. Although some courts will invariably continue to apply locality standards to general practitioners, it is likely that they will agree with the Michigan Supreme Court, that "[w]hatever the considerations were that allowed the area practice to set the standard for the country general practitioners—they are not relevant to a metropolitan specialist—calling a specialist parochial or bucolic is hardly appropriate."[85]

The Parenchyma of Law 182-84 (1960); McCoid 575; Waltz 419-20; Comment, A Review of the Locality Rule, 1969 U. Ill. L.F. 96, 103-04; Comment, An Evaluation of Changes in the Medical Standard of Care, 23 Vand. L. Rev. 729, 752-53 (1970).

81. See notes 19-25 supra and accompanying text.

82. 14 Stan. L. Rev. 884, 889 (1962).

83. Lawyers' Medical Cyclopedia § 1.10, at 15. "The specialty boards have, no doubt, done much to improve medical care in this country and to guarantee minimal standards of education for those representing themselves as specialists." Id.

84. D. Louisell & H. Williams, The Parenchyma of Law 184 (1960). See also 14 Stan. L. Rev. 884, 888-89 (1962).

85. Naccarato v. Grob, 384 Mich. 248, 253, 180 N.W.2d 788, 791 (1970).