CASE NOTES

Admiralty—Shipping Act of 1916—Steamship Conference Must Show Commercial Necessity of Dual-Rate Contracts for Approval Under Section 14b.—Petitioner, a steamship conference[1] which served five trade areas,[2] filed proposed dual-rate contracts[3] with the Federal Maritime Commission for approval pursuant to the requirements of section 14b of the Shipping Act.[4] These exclusive patronage contracts obligated shippers and receivers in any of the trade areas to use conference vessels in *all* the areas. The Commission said it would approve the proposed contracts only if petitioners agreed to offer them on a *separate* basis in *each* of the five trade areas.[5] Petitioners appealed[6] to the United States Court of Appeals for the District of Columbia Circuit which affirmed the separability condition.[7] Held: The Commission had properly placed upon petitioners the burden of proving that these dual-rate contracts were necessary in terms of "legitimate commercial objectives," and that petitioners had not met

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1. Conferences have been described as "agreements organized by shipping lines to restrict or eliminate competition, to regulate and rationalize sailing schedules and ports of call, and occasionally to arrange for the pooling of cargo, freight monies, or net earnings. They generally control prices, i.e. freight rates and passenger fares." D. Marx, International Shipping Cartels 3 (1953) [hereinafter cited as Marx].

2. Latin America/Pacific Coast S.S. Conf. v. F.M.C., 465 F.2d 542, 543-44 (D.C. Cir. 1972).

3. A dual-rate contract is an agreement whereby a shipper obligates himself to use conference vessels exclusively and is in return charged lower rates for the carriage of his cargo. Marx 55-56.

4. Section 14b of the Act provides in pertinent part: "[O]n application the Federal Maritime Commission . . . shall, after notice and hearing, by order, permit the use by any common carrier or conference . . . of any contract, amendment, or modification thereof . . . which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers . . . ." 46 U.S.C. § 813a (1970).

5. The Dual Rate Cases, 8 F.M.C. 16 (1964). The Commission held that "[I]f the conference is permitted to offer a single dual rate contract which includes all five of the trade areas, merchants will be forced to obligate themselves to exclusive conference patronage in trade areas not desired in order to obtain contract rates in a trade area where they feel the dual rate contract meets their needs. This seems to us neither necessary nor fair." Id. at 50.

6. The full history of this case spans a decade. In 1962 petitioners filed the proposed dual-rate contracts for approval and the Commission imposed its requirement of separability. This ruling was upheld on appeal to the Ninth Circuit Court of Appeals in Pacific Coast European Conf. v. United States, 350 F.2d 197 (9th Cir.), cert. denied, 382 U.S. 958 (1965). However, it was set aside on rehearing by the same court in an unpublished per curiam opinion. Following remand the Commission again imposed its separability condition relying on F.M.C. v. Svenska Amerika Linien, 390 U.S. 238 (1968), which had been decided in the interim. Agreement No. 8660—Latin America/Pacific Coast S.S. Conf. and Proposed Contract Rate System, 12 F.M.C. 149 (1969). From this ruling petitioners instituted their appeal to the Court of Appeals for the District of Columbia Circuit. 465 F.2d at 543-45.

7. 465 F.2d at 543.

this burden. *Latin America/Pacific Coast Steamship Conference v. Federal Maritime Commission*, 465 F.2d 542 (D.C. Cir. 1972).

Steamship conferences have been a fact of maritime life since the early days of the steamer in the British East India Trade.[8] It was found that in order to operate economically, cargo carrying vessels had to carry close to capacity. In order to secure full cargoes, independent steamship lines naturally scheduled most sailings to and from busy ports at peak seasons. As a consequence, shippers found an abundance of carriers available at certain times of year, with rates depressed by competition. During slack seasons, however, only a few lines were willing to schedule sailings and at extremely high rates.[9] The resulting schedule and rate instability hurt the shippers; the intense competition periodically thinned the ranks of the steamship lines, leaving to those which could hold out longest the spoils of high carrying rates until other lines, enticed by this wealth, would move in to begin anew the rate wars.[10] Steamship conferences were the answer to this strife, introducing a measure of stability to the steamship trade at the price of decreased competition.[11]

In the first decade of this century, conference practices came under the scrutiny of the Royal Commission on Shipping Rings in Great Britain.[12] The Commission found that in order to function effectively, conferences employed what were known as tying arrangements—that is, agreements which bound a shipper to a conference and denied his cargo to competing independent lines.[13] Such arrangements were deemed necessary by the conferences because it was felt that "[a]ny substantial invasion of the trade by a lower-rated competitor would lead to the break-up of the conference, either by resignation or by declaring rates 'open', which means that they are fixed by the individual lines and not by conference action."[14] The most frequently employed tying arrangements were the deferred rebate system[15] and the dual-rate contract. A dual-rate contract has been defined as:

an exclusive patronage contract whereby a shipper—or consignee—promises to transport all of the cargo under his control, between ports within the scope of a steamship conference agreement, aboard vessels belonging to that conference. Shippers who do

8. Royal Commission Report on Shipping Rings 12 (1909).

9. See Dodds, Legality of Shipper Tying Arrangements in Ocean Commerce, 23 U. Pitt. L. Rev. 933, 934 (1962); Gardner, Steamship Conferences and the Shipping Act, 1916, 35 Tulane L. Rev. 129, 130 (1960). See generally Marx 7-25.

10. Gardner, supra note 9, at 130.

11. Marx 19-22; see Note, Rate Regulation in Ocean Shipping, 78 Harv. L. Rev. 635, 636 (1965).

12. Royal Commission Report on Shipping Rings (1909); see Marx 50; Dodds, supra note 9, at 936-37; McGee, Ocean Freight Rate Conferences and the American Merchant Marine, 27 U. Chi. L. Rev. 191, 193 (1960).

13. Royal Commission Report on Shipping Rings 12, 37 (1909).

14. Gardner, supra note 9, at 132.

15. The deferred rebate system was a device whereby conferences would charge all shippers the same rates, but would then refund a percentage of the rates paid by a shipper over a prescribed period provided during that time the shipper had used conference vessels exclusively. See Marx 55; McGee, supra note 12, at 232.

not sign such an agreement are assessed a rate, called the noncontract rate, substantially above the so-called contract rate which is available to signatories.[16]

In 1912 the Alexander Committee,[17] a subdivision of the Merchant Marine and Fisheries Committee of the House of Representatives, followed the lead of the Royal Commission and began a study of shipping conferences, their practices, and the relation of these to the antitrust laws.[18] In 1914 the Committee published a compilation of its findings and recommendations in what became known as the Alexander Report.[19] The Report favored continuation of the conference system under government supervision and control in order to secure stable rates and more frequent scheduling of sailings, and to keep American and European rates on a parity.[20] However, several conference practices were condemned as unduly discriminatory.[21]

Influenced by the Alexander Report, Congress enacted the Shipping Act of 1916.[22] The Act provided that shipping conferences would be exempted from antitrust law if the agreements forming them were filed with and approved by the Shipping Board.[23] Specifically prohibited were deferred rebates,[24] fighting ships,[25] retaliation or discrimination against any shipper, and unfair or unjustly discriminatory contracts with any shipper.[26] Also prohibited was undue or unreasonable preference of a shipper.[27] Nowhere, however, did the Act specifically

16. Testimony of Senator Kefauver, Index to Legislative History of Steamship Conference Dual Rate Law, S. Doc. No. 100, 87th Cong., 1st Sess. 292 (1962); see McGee, supra note 12, at 232-33.

17. The Committee was named for Representative Joshua W. Alexander, Chairman of the House Committee on the Merchant Marine and Fisheries, who had sponsored a successful resolution to have a study made of shipping combinations. Proceedings of the House Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations Under H.R. 587, 62d Cong., 2d Sess. (1913).

18. As Committee Chairman Alexander later pointed out, the purpose of the inquiry was to ascertain "whether or not we should recognize the agreements existing between carriers by water or recommend that the Sherman antitrust law should be enforced against them and these conferences broken up." 54 Cong. Rec. 8077 (1916); see Dodds, supra note 9, at 939.

19. House Committee on the Merchant Marine and Fisheries, Report on Steamship Agreements and Applications in the American Foreign and Domestic Trade, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914).

20. Id. at 416-17.

21. The Alexander Report specifically decried the use of deferred rebates and so-called "fighting ships," conference vessels which quoted less than compensatory rates (losses being distributed among the members) in order to drive out independent lines. Id. at 305-07.

22. Shipping Act, 1916, ch. 451, 39 Stat. 728, as amended, 46 U.S.C. §§ 801-42 (1970).

23. Id. § 15, 39 Stat. at 734. The Act created the Shipping Board to regulate the conferences and to foster the growth of the American merchant marine. Id. § 4, 39 Stat. at 729. The Shipping Board was successively replaced by the Shipping Board Bureau of the Department of Commerce, 1933-36, the United States Maritime Commission, 1936-50, the Federal Maritime Board, 1950-61, and the Federal Maritime Commission. Marx 105.

24. See note 15 supra.

25. See note 21 supra.

26. Shipping Act, 1916, ch. 451, § 14, 39 Stat. 728, as amended, 46 U.S.C. § 812 (1970).

27. Id.

prohibit dual-rate contracts;[28] and the legality of dual-rate systems became the "burning issue" of United States ocean commerce.[29]

Under section 15 of the Act,[30] the Shipping Board possessed the power to withdraw its approval of a conference agreement—thereby removing the conference's exemption from the antitrust laws and forcing it, in effect, to disband. Thus, although given no statutory power to oversee rates, the Board nevertheless possessed this power in a very real sense. Possession of power in this instance, however, proved quite different from its exercise. One commentator has noted: "Until 1954 it was generally assumed by the Board and the industry that the approved establishment of a shipping rate conference gave it implicit authority to establish a [dual] contract rate system."[31] This assumption, coupled with the reality of Board inaction, gave rise to conference abuse of the dual-rate system.[32]

The proliferation of such abuse eventually forced independent lines into the difficult choice of either joining the conferences, or abandoning routes plied by conference vessels. In 1954, however, Isbrandtsen Lines, a large independent carrier threatened with great loss by a proposed dual-rate system, sought the aid of the Justice Department. At that point began almost a decade of litigation aimed at declaring the dual-rate contract an illegal device.[33]

The Isbrandtsen litigation was instigated by the application of the Japan-Atlantic and Gulf Freight Conference for Board approval of a proposed dual-rate system.[34] The Japan-Atlantic conference was a competitor of Isbrandtsen in the lucrative trade between the Far East and the Pacific and Gulf ports in the United States. The proposed system provided for a nine and one-half percent difference in the contract and noncontract rates, and for liquidated damages in the amount of fifty percent of the freight charges paid to nonconference carriers in the event of a shipper's breach.[35] Over Isbrandtsen's objection, the Maritime Board allowed the dual-rate system to become effective pending a hearing on the question of approval.[36] Isbrandtsen then petitioned the Court of Appeals for the

28. Latin America/Pacific Coast S.S. Conf. v. F.M.C., 465 F.2d 542, 549 (D.C. Cir. 1972). Possibly this is explained by the fact that before its express prohibition in the Act the deferred rebate was the favored and prevalent form of tying arrangement, as compared with which the dual rate contract appeared rather infrequently. See Marx 55. Furthermore, the deferred rebate has been considered to be the more onerous device; to impose a "tighter hold upon shippers" than the contract preference system. McGee, supra note 12, at 233. The truest analysis, however, seems to be that dual rate contracts were not prohibited simply because they were not disapproved of in the Alexander Report. See Dodds, supra note 9, at 940.

29. Dodds, supra note 9, at 941.

30. Shipping Act, 1916, ch. 451, § 15, 39 Stat. 728, as amended, 46 U.S.C. § 814 (1970).

31. Gardner, supra note 9, at 133.

32. Id. at 136. As Gardner succinctly observed: "It is not possible, in this world of ordinary men, to maintain an awed respect, or even a consistent adherence, to a statute which has been substantially unenforced for nearly half a century." Id.

33. See text accompanying notes 34-47 infra.

34. Isbrandtsen Co. v. United States, 211 F.2d 51, 53 (D.C. Cir.), cert. denied, 347 U.S. 990 (1954).

35. 211 F.2d at 53.

36. See Isbrandtsen Co. v. United States, 239 F.2d 933, 935 (D.C. Cir. 1956), aff'd, 356 U.S. 481 (1958).

District of Columbia Circuit for injunctive relief, which was granted in *Isbrandtsen Co. v. United States.*[37] The court chastised the Board for abrogation of its responsibilities, and disallowed initiation of the proposed system until the Board had either given or denied approval under its section 15 power to compel filing of all conference agreements.[38]

Subsequently the conference "opened" its rates—*i.e.*, allowed each member line to fix rates—so as to compete effectively with Isbrandtsen. The resultant rate war hurt both sides as rates dropped to noncompensatory levels.[39] The Board, prompted by the gravity of the situation (as well, perhaps, as by its generally pro-conference outlook), approved the filed dual-rate system.[40]

In *Isbrandtsen Co. v. United States*, Isbrandtsen and the Justice Department appealed this ruling and won reversal.[41] In its decision, the circuit court first addressed itself to the divergent viewpoints of the Maritime Board and the Justice Department. While the Board favored a stable rate situation conducive to the growth of the American Merchant Marine,[42] the Justice Department was concerned with what must have seemed to it, in the words of one commentator, "a primordial monster which has somehow survived from the mists of pre-Sherman history."[43]

Finding against the Board, the court noted: "We might agree with the Board that the objectives it seeks in approving the dual-rate system are consistent with the objectives of the [1916] statute; but these can be furthered *only* by means permitted by the statute."[44] The Board argued that dual-rate contracts were permitted means because they were not specifically prohibited by the Act, as were deferred rebates.[45] In response the court pointed to the language in section 14(3) prohibiting "retaliation" against any shipper,[46] and contended further that the dual-rate system proposed was vastly different from that in existence in 1916—*i.e.*, that the latter had involved "bona fide requirements contracts" whereas the former was merely a device to compel shipper loyalty at the price of severe penalties for breach.[47]

The Board appealed, but the Supreme Court agreed with Isbrandtsen and

37. 211 F.2d at 57. The court noted that until the Board had approved such an agreement it would not be considered as exempt from operation of the antitrust laws, under which price fixing was illegal per se. Id., citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

38. Id. Section 15 of the Act, as enacted originally, authorized the Board to disapprove or modify any unjustly discriminatory agreements, and to approve all other filed agreements. Shipping Act of 1916, ch. 451, § 15, 39 Stat. 728, as amended, 46 U.S.C. § 814 (1970); see text accompanying note 30 supra.

39. See 239 F.2d at 935.

40. Japan-Atlantic & Gulf Freight Conf., 4 F.M.C. 706, 742-43 (1955), rev'd, 239 F.2d 933 (D.C. Cir. 1956), aff'd, 356 U.S. 481 (1958).

41. 239 F.2d at 933.

42. Id. at 937.

43. Gardner, supra note 9, at 129.

44. 239 F.2d at 936 (emphasis added).

45. Id. at 939.

46. Id. at 938.

47. Id. at 940 (concurring opinion).

the Justice Department,[48] holding that in section 14 of the Act, Congress had covered all predatory practices to which conferences might resort, including dual-rate contracts.[49]

Faced with a Supreme Court decision which had for all intents and purposes outlawed dual-rate systems, the shipping lobby turned to Congress for succor. A friendly Congress obliged, passing a moratorium law[50] which allowed dual-rate contracts pending more permanent legislation.

After exhaustive hearings,[51] Congress passed the 1961 Amendments to the Shipping Act,[52] and "reaffirmed its view that some monopoly in ocean shipping is necessary but that it must be regulated to prevent abuses."[53] The House had favored an antitrust oriented bill, but the more permissive Senate version was passed.[54]

Section 14 of the Act was amended to specifically allow dual-rate contracts if, among other provisos, the Federal Maritime Commission found them not to be detrimental to United States commerce, contrary to the public interest, or unjustly discriminatory.[55] Despite the qualifications imposed, it seemed indeed that the conferences had been given by Congress what they couldn't win in the courts; that new life had been breathed into the dual-rate contract.[56]

In 1968, however, the Supreme Court was called upon to evaluate the 1961 Amendments in a case involving a tying arrangement similar in spirit to a dual-rate contract. In *F.M.C. v. Svenska Amerika Linien*[57] the Court was presented, inter alia, with an agreement whereby a conference prohibited travel agents booking passage on its ships from selling passage on competing, non-conference lines.[58] The Federal Maritime Commission had found this arrangement to be detrimental to commerce and violative of the public interest standard of amended

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48. Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958).

49. Id. at 491-93.

50. Act of Aug. 12, 1958, Pub. L. No. 85-626, 72 Stat. 574. This interim legislation, arranged to be inserted at the end of the Shipping Act, declared that "nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved . . . by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement . . . ." Id.

51. See House Comm. on the Merchant Marine and Fisheries, Providing for the Operation of Steamship Conferences, H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961).

52. 46 U.S.C. §§ 813a, 814, 815, 817, 819, 841a (1970).

53. Note, Rate Regulation in Ocean Shipping, 78 Harv. L. Rev. 635, 641. The Note provides a general overview of the congressional history of the 1961 Amendments to the Shipping Act.

54. See 465 F.2d at 550 & n.26.

55. 46 U.S.C. § 813a (1970). Identical provisos appear in amended section 15, which authorizes cancellation of any filed agreement found to contravene them.

56. See Note, Rate Regulation in Ocean Shipping, 78 Harv. L. Rev. 635, 642 (1965).

57. 390 U.S. at 251.

58. Id. at 240.

section 15.[59] It reached this conclusion by resting upon the conference the burden of adducing facts justifying the restraint in terms of serious transportation need, and by finding that this burden had not been met.[60] The Supreme Court agreed with the Commission,[61] thus setting the stage for the instant case.

In *Latin America/Pacific Coast Steamship Conference v. Federal Maritime Commission*[62] the United States Court of Appeals for the District of Columbia Circuit was faced with several problems. Did the rationale of *Svenska*, holding a specific tying arrangement to be contrary to the public interest under section 15, apply as well to dual-rate contracts in view of the affirmative direction of that section that the Commission "shall" permit such contracts?[63] If so, did the burden of showing an overriding need for the system shift, as in *Svenska*, to petitioners after the Commission had decided that the proposed contracts were contrary to the public interest? If it did shift, did the petitioners in fact here meet their burden? The court resolved these problems in favor of free competition and affirmed the Commission's ruling denying approval of the proposed system.[64]

Petitioners urged that *Svenska* was distinguishable since it concerned a passenger agent tying arrangement under section 15, rather than a dual-rate system under section 14 of the Act.[65] They argued further that even if *Svenska* were in point, the Commission had misapplied it and had improperly evaluated the evidence.[66] Petitioners also pointed to the clear language of section 14b which purported to allow dual-rate systems, and alleged that this mandate precluded imposition upon them of the burden of proving the propriety of such systems.[67]

The Commission replied that the tests of discrimination and detrimental effect on commerce, as well as the public interest standard, had been specifically added to section 14b, the dual-rate section, as well as to section 15, the section covering all agreements.[68] The court, noting this, agreed with the Commission

59. Investigation of Passenger Steamship Conferences Regarding Travel Agents, 10 F.M.C. 27 (1966).

60. Id. at 34-35. The Supreme Court held that the showing required by the Commission —i.e., serious transportation need—was "an appropriate refinement of the statutory 'public interest' standard." 390 U.S. at 245-46.

61. 390 U.S. at 251.

62. 465 F.2d 542 (D.C. Cir. 1972).

63. See note 67 infra.

64. 465 F.2d at 543.

65. Id. at 551.

66. Id.

67. Id. at 552. In response to this contention the court urged that "the language of section 15 is no less mandatory," and that "[d]espite th[e] mandatory language in section 15, the Supreme Court has permitted imposing the burden upon conferences in section 15 proceedings. We see no reason to differ with respect to section 14b . . . ." Id.

68. 465 F.2d at 552-53. The court pointed out that the "public interest" standard articulated in the 1961 Amendments was in both sections similarly phrased. It noted: "The language of section 14b is: 'detrimental to the commerce of the United States or contrary to the public interest.' Section 15 uses the following words: 'detriment of the commerce of the United States, or to be contrary to the public interest.'" Id. at 552 n.32.

and held that "we see no reason to reach a different conclusion [than the *Svenska* court had reached as to section 15] with regard to section 14b . . . . We feel that the ambiguities, if any, should be resolved in favor of free competition."[69] Thus, once the Commission ascertained that a certain practice under *either* section 15 *or* section 14b was contrary to the public interest,[70] it could shift to petitioners the burden of proving, as the *Svenska* court had directed, a transportation need which outweighed antitrust considerations.

Petitioner's argument that such a finding rendered nugatory the congressional allowance of dual-rate contracts was rejected by the court. It noted that "placing the burden of proof upon the conference does not make the limited antitrust immunity conferred by the Shipping Act illusory because actions which would violate antitrust laws may still be approved if sufficient justification for them exists."[71]

Once the court had determined that the public interest test applied by the Commission was valid, it had little difficulty in upholding that body's finding that the petitioner failed to prove necessity for dual-rate contracts covering *all* of the five trade areas in that conference's sphere of operations.[72] In concluding the court stated:

> We should bear in mind that the Commission did not disapprove of the dual-rate contract concept, but merely placed *limitations* upon its use. Such action is clearly in accord with our national policy that only the least restrictive inroads into free competition will be tolerated. Absent the protection of section 14(b), the exclusive patronage tying system embodied in a dual-rate contract would clearly run counter to the antitrust laws.[73]

Despite the court's conclusion that the dual-rate concept was still valid, its decision removed much of the efficacy of such agreements. A dual-rate contract which ties a shipper to a conference, but which fails to cover four-fifths of the trade of that conference, loses much of its effect. Furthermore, the extension by the court of the *Svenska* burden of proof to dual-rate contracts gives the Maritime Commission enough latitude to deny approval to almost any conceivable variation of dual-rate contract.[74] In *Latin America* the court attempted to

69. 465 F.2d at 552.

70. The Svenska Court had held that an antitrust violation would alone constitute evidence that an agreement was contrary to public policy. 390 U.S. at 245-46. Hence proposing a dual-rate contract—by its very nature violative of antitrust principles—would automatically entail a showing by petitioner of an over-riding need for such a contract. 465 F.2d at 554-55.

71. 465 F.2d at 554.

72. Id. at 555-57. The court noted that the scope of its review had been summarized by the Fifth Circuit Court of Appeals in Port of New York Authority v. F.M.C., 429 F.2d 663 (5th Cir.), cert. denied, 401 U.S. 909 (1971), wherein it was said respecting review of administrative rulings: "As to fact questions, we must consider whether the order in question is supported by substantial evidence. We are not to review the matter de novo nor are we to substitute our discretion for that of the Commission to provide a forum for the solution of the technical and complex matters involved in the shipping industry." Id. at 666.

73. 465 F.2d at 557 (emphasis added).

74. See notes 70 & 72 supra.

resolve the question which had been raised by every dual-rate contract case since the passage of the Shipping Act: At what price stability? The court here decided that the dual-rate contract, in its purest and most effective form, is too great a price. In so deciding the court recognized the metamorphosis which such agreements had undergone—from the "bona fide requirements contracts" of the days of the Alexander Report, to the competition stifling weapons which could drive a thriving independent line such as Isbrandtsen to the brink of ruin. If the United States is to have a merchant marine capable of competing with the fleets of the world, the courts must continue to disallow devices which infringe on competition while serving no pressing commercial need. *Latin America* will do much toward laying to rest the catch-all goal of "stability."

Civil Rights—Jurisdiction Under Section 1343(3) of Title 28, United States Code—The *Lynching* of *Hague* and *Eisen*.—In 1968 the appellant, Dorothy Lynch, arranged for her employer to deposit ten dollars of her sixty-nine dollar weekly salary in a savings bank. The following year, the appellee, Household Finance Corporation, in preparation for a suit against the appellant on a note, garnished her savings account under a Connecticut law[1] providing for such pre-judicial garnishment. Having received neither notice nor an opportunity to be heard, Mrs. Lynch brought a class action in a federal district court "against [state] sheriffs who levy on bank accounts and against creditors who invoke the garnishment statute."[2] The complaint challenged the validity of the Connecticut statute under the equal protection and due process clauses of the fourteenth amendment and sought declaratory and injunctive relief pursuant to section 1983 of Title 42, United States Code,[3] and its jurisdictional counterpart, section 1343(3) of Title 28, United States Code.[4] Holding that it had jurisdiction only where personal and not merely property rights were involved, a three judge district court dismissed the action. The three judge court also held that section 2283 of Title 28, United States Code,[5] prohibited enjoining

1. Conn. Gen. Stat. Ann. § 52-329 (Supp. 1972-73).

2. Lynch v. Household Fin. Corp., 405 U.S. 538, 539-40 (1972).

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

4. 28 U.S.C. § 1343(3) (1970) provides in pertinent part: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

5. 28 U.S.C. § 2283 (1970). The section provides: "A court of the United States may not

state court proceedings, including garnishment actions.[6] On appeal,[7] the United States Supreme Court remanded the case, holding that section 1343(3) did not distinguish between personal rights and property rights and that the garnishment action was not a judicial proceeding; therefore, neither of these grounds required dismissal. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

One of the most expansive grants of federal jurisdiction is section 1343(3) of Title 28, United States Code, which deals with rights arising under section 1983. Both of these sections originated in the Civil Rights Act of 1871,[8] a post-Civil War act passed under the enabling clause of the fourteenth amendment. Initially the courts indicated that jurisdiction under section 1343(3) was limited to cases in which the wrong alleged was the deprivation of civil rights created by the 1871 Act. In 1884, in *Carter v. Greenhow*[9] and *Pleasants v. Greenhow*[10] the Court declared that protection of contracts was not a right directly conferred or secured by the Constitution and did not therefore fall within the orbit of the 1871 Act.[11] Similarly, in *Holt v. Indiana Manufacturing Co.*[12] the Court announced that the predecessor of section 1343(3) "refer[red] to civil rights only"[13] and would not apply to the state tax question raised in the case. However, discrimination in employment, attacked as violating equal protection rights, was generally recognized by the courts as an adequate basis for jurisdiction.[14]

The courts thus far had avoided defining those rights which would fall within the section, confining themselves to narrowly circumscribed decisions on each individual case. In 1939, Mr. Justice Stone, in his concurring opinion to *Hague v. CIO*,[15] attempted to limit the breadth of section 1343(3) by resolving a supposed conflict between that statute and section 1331 of Title 28, United States Code,[16] the "general federal question statute" which unlike section 1343(3) has a minimum jurisdictional amount requirement.[17] The plaintiffs in

grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

6. See note 70 infra for a discussion of the disposition of this issue on appeal.

7. Appeals from a three judge district court are taken directly to the United States Supreme Court. 28 U.S.C. § 1253 (1970).

8. Civil Rights Act of April 20, 1871, ch. 22, 17 Stat. 13. The Act was also known as the Ku Klux Klan Act. See Monroe v. Pape, 365 U.S. 167, 171 (1961).

9. 114 U.S. 317 (1884).

10. 114 U.S. 323 (1884).

11. 114 U.S. at 322.

12. 176 U.S. 68 (1900).

13. Id. at 72.

14. See, e.g., Crane v. Johnson, 242 U.S. 339 (1917); Truax v. Raich, 239 U.S. 33 (1915).

15. 307 U.S. 496 (1939).

16. 28 U.S.C. § 1331 (1970) provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

17. At present the minimum jurisdictional amount is ten thousand dollars. 28 U.S.C. § 1331 (1970).

Hague sought to enjoin city officials from enforcing an ordinance requiring a permit for public assembly. The assembly was to be for the purpose of explaining citizens' rights under the National Labor Relations Act. The injunction was granted although there was some dispute within the Court as to whether the violated rights of freedom of speech and assembly were protected by the "privileges and immunities" clause or, as Mr. Justice Stone maintained, by the due process clause.[18]

More significantly, however, Mr. Justice Stone determined that since jurisdictional amount clearly did not apply to civil rights cases, jurisdiction under the civil rights section existed only when the right involved was "incapable of pecuniary valuation."[19] From this evolved the rule that section 1343(3) covered infringements of "personal liberty, not dependent for [their] existence upon the infringement of property rights . . . ."[20]

This distinction was adopted by most of the lower federal courts despite widespread criticism[21] that the test "appears to be contrary to both the language and the spirit of [28 U.S.C. § 1343(3)] and the Civil Rights Act of 1871."[22] In 1943 the Jehovah's Witnesses brought two actions claiming that certain city ordinances, which required a license for solicitation of merchandise, violated their rights of free speech and of religion.[23] Applying the personal liberty-property right distinction, the Court upheld jurisdiction despite the fact that the statute was framed in terms of a non-discriminatory licensing requirement—undeniably a financial and therefore property oriented regulation. These cases foreshadowed the problems which were to arise repeatedly in the application of the Stone test. The right to a license, like most rights, has a dual nature, being neither exclusively personal nor exclusively property related. Even the right to a jury trial, an indisputably personal right, takes on property aspects when coupled with a claim for damages. Such was the case in *Bottone v. Lindsley*[24] wherein the Tenth Circuit, citing *Hague*, upheld jurisdiction.

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18. 307 U.S. at 521-26 (Stone, J., concurring).

19. Id. at 530.

20. Id. at 531. In formulating this rule Mr. Justice Stone relied on the earlier cases of Truax v. Raich and Crane v. Johnson as authority for his rule, observing that in each the "gist of the cause of action" was a personal rather than a property injury. Id. He failed to note, however, that even in areas of pure personal liberty, the damages may be capable of valuation as was certainly true in the two employment cases which he cited as authority. See note 14 supra and accompanying text.

21. See, e.g., Laufer, Hague v. C.I.O.: Mr. Justice Stone's Test of Federal Jurisdiction—A Reappraisal, 19 Buffalo L. Rev. 547 (1970); Comment, Civil Procedure: Section 1343(3) Jurisdiction and the Property—Personal Right Distinction, 1970 Duke L. J. 819; Comment, The "Property Rights" Exception to Civil Rights Jurisdiction—Confusion Compounded, 43 N.Y.U.L. Rev. 1208 (1968); Comment, Another and Hopefully Final Look at the Property—Personal Liberty Distinction of Section 1343(3), 24 Vand. L. Rev. 990 (1971); Note, 49 B.U.L. Rev. 377 (1969); Note, 66 Harv. L. Rev. 1285 (1953).

22. Laufer, supra note 21, at 551.

23. Douglas v. City of Jeannette, 319 U.S. 157 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

24. 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944 (1949).

In the 1969 case of *Eisen v. Eastman*,[25] Judge Friendly strongly supported the *Hague* distinction by ruling that a landlord's reduction of income under a rent control law constituted an injury to property only, rather than deprivation of property without due process of law as the plaintiff maintained. Judge Friendly avoided detailed analysis of the test, relying instead on his instinct that there was "something essentially right about it."[26] He felt that there was indeed a need both to distinguish "the overlap between 28 U.S.C. § 1331 and 28 U.S.C. § 1343 (3)"[27] and, as he pointed out in a later case, to avoid "the tidal wave of actions under the civil rights statute."[28] *Eisen* was so powerfully supportive of *Hague* that by 1970 the Fourth Circuit relied on it without question, dismissing a plaintiff's claim while at the same time acknowledging that he had been "deprived of his property without due process of law."[29]

Thus, by 1970 it was all but uniformly assumed that where the right allegedly denied "concern[ed] a property or monetary right, the . . . amount in controversy must exceed $10,000 . . . ."[30] One source of this conviction was a series of tax challenges brought under section 1343(3) in which jurisdiction was repeatedly denied.[31] In a 1968 tax case, *Hornbeak v. Hamm*,[32] the majority found that the plaintiff alleged only a "property right" rather than a "civil right." Judge Johnson wrote a strong dissent in which he refused to accept the *Hague* rule[33] and drew attention to another Fifth Circuit case[34] which had seemingly rejected the Stone rule by finding jurisdiction in a liquor license case.

However, Judge Friendly noted in *Eisen* that "cases involving denials or

25. 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970).

26. Id. at 565.

27. Id.

28. Negron v. Wallace, 436 F.2d 1139, 1141 (2d Cir.), cert. denied, 402 U.S. 998 (1971).

29. Weddle v. Director, Patuxent Institution, 436 F.2d 342, 343 (4th Cir. 1970), cert. granted, vacated and remanded mem., for reconsideration in light of Lynch, 405 U.S. 1036 (1972). In Weddle, prison guards had taken several items of personal property from the plaintiff on the grounds that they were contraband. The confiscated items had in fact been purchased at the prison commissary. See also Howard v. Higgins, 379 F.2d 227 (10th Cir. 1967).

30. Spears v. Robinson, 431 F.2d 1089, 1091 (8th Cir. 1970), wherein it was claimed that the state's refusal to pay on a bond issued during the Civil War constituted a deprivation of property without due process.

31. Bussie v. Long, 383 F.2d 766 (5th Cir. 1967); Hornbeak v. Hamm, 283 F. Supp. 549 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 9 (1968); Abernathy v. Carpenter, 208 F. Supp. 793 (W.D. Mo. 1962), aff'd per curiam, 373 U.S. 241 (1963). Contra, Joe Louis Milk Co. v. Hershey, 243 F. Supp. 352 (N.D. Ill. 1965), in which the court specifically rejected Hague, maintaining that property rights are equally entitled to constitutional protection: "[n]either logic nor policy compels the conclusion that property rights are less deserving of protection under the Constitution and Civil Rights Act than are human freedoms." Id. at 354.

32. 283 F. Supp. 549 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 9 (1968).

33. Id. at 554. (Johnson, C.J., dissenting). Specifically, the dissent discussed Bussie v. Long, 383 F.2d 766 (5th Cir. 1967), which was "based upon" Hague. Id. at 552.

34. Atlanta Bowling Center, Inc. v. Allen, 389 F.2d 713 (5th Cir. 1968).

revocations of licenses,"[35] like dismissals from public employment, are analogous to "a deprivation of the personal liberty to pursue a calling of one's choice."[36] Thus in 1970, the Second Circuit sustained jurisdiction where a plaintiff's real estate broker's license had been suspended.[37] These cases do not "fit snugly under the Stone formula."[38] As a rule, a stricter standard of personal harm was required in employment cases before jurisdiction under section 1343(3) would be sustained.

Taylor v. New York City Transit Authority[39] was the first post-*Eisen* employment case considered in the Second Circuit. In *Taylor* jurisdiction was sustained and the right to work was given personal liberty status.[40] However, later the same year, the Second Circuit rejected *Taylor* in *Tichon v. Harder*.[41] There a probationary social worker was discharged without a hearing. The court relied on a Connecticut law under which probationary employees are not entitled to a hearing or notice in dismissal actions.[42] The court reasoned that since the plaintiff was a mere probationer no "professional reputation ... [was] at stake,"[43] and therefore her "ability to engage in [her] occupation"[44] had not been destroyed nor was "a right of personal liberty . . . involved."[45] Unless "underlying

35. 421 F.2d at 565. The court spoke of "all kinds of licenses ranging from automobile drivers through liquor licensees to accountants, doctors and lawyers, and the imposition of terms on or the refusal of building permits or application for changes in zoning . . . ." Id. at 568 n.13.

36. Id. at 565; see, e.g., Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964), wherein a liquor license was at issue.

37. Gold v. Lomenzo, 425 F.2d 959 (2d Cir. 1970).

38. 421 F.2d at 565. Rights which Judge Friendly found to "fit snugly" were the right to vote (citing Baker v. Carr, 369 U.S. 186 (1962)) and freedom of speech (citing Tenney v. Brandhove, 341 U.S. 367 (1951)). Id. at 564-65.

39. 309 F. Supp. 785 (E.D.N.Y. 1970), aff'd, 433 F.2d 665 (2d Cir. 1970).

40. Taylor had been discharged from his job as inspector, the court found that a substantial due process question arose "when the official responsible for prosecution . . . casts the deciding vote" on the board reviewing the earlier order for removal. Id. at 788. The court observed that "[c]ertainly it cannot seriously be contended that a man's liberty is not diminished when he is denied the option of remaining in a government job vital to his own and his family's sustenance." Id. at 789.

41. 438 F.2d 1396 (2d Cir. 1971).

42. Conn. Gen. Stat. Ann. § 5-202 (1969), as amended, Conn. Gen. Stat. Ann. § 5-202 (Supp. 1972).

43. 438 F.2d at 1399.

44. Id. at 1402. The implication is that had the plaintiff been tenured, a "personal liberty" question would have arisen. But see Kiernan v. Lindsay, 334 F. Supp. 588 (S.D.N.Y. 1971), aff'd mem. 405 U.S. 1000 (1972), rehearing denied, wherein a tenured policeman was relegated to probationary status for one year without a hearing. There the mere fact of tenure was insufficient to yield 1343(3) jurisdiction.

45. 438 F.2d at 1402. Clearly distinguishable is Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966), in which a physician discharged from his public position for racial discrimination sought and gained 1343(3) jursdiction because of the probability of permanent damage to both his reputation and his career.

interests"[46] falling within the first eight amendments are involved, the court indicated that it would not find the right abrogated to be one of personal liberty.[47] Failing this, the claim must be dismissed because it alleges merely the loss of a property right.[48]

Welfare rights cases have more consistently been accorded jurisdiction under section 1343(3) than either employment or licensing questions. This liberality has resulted primarily from *Goldberg v. Kelly*,[49] a Supreme Court case in which jurisdiction was sustained although the right asserted was unmistakably property related—the right to receive money. Since the *Goldberg* Court premised its findings on the conviction that procedural safeguards are as essential to welfare rights as to property rights, that decision leads to the inescapable conclusion that property rights hold a more elevated position than the Stone formula indicated.

In *Johnson v. Harder*[50] the Second Circuit, somewhat ambiguously, adopted the *Goldberg* position by interpreting welfare entitlements as "some sort of right to exist in society, a personal right under the Stone formula."[51] The Fourth Circuit has applied the welfare reasoning in finding jurisdiction in a dispute over the termination of a public housing lease.[52] In a similar problem the Second Circuit has also taken jurisdiction, while juggling to keep the Stone distinction alive.[53] The court found that the termination of a lease without a hearing violated the plaintiff's right to due process, clearly a civil right.[54] Thus by 1971 it was clear that the personal liberty-property right distinction was, at least in theory, well entrenched, especially in the Second Circuit, "[p]ending further instructions from the Supreme Court . . . ."[55]

46. 438 F.2d at 1400.

47. Id.

48. Id. at 1403. Contra, Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953), wherein public school teachers gained jurisdiction in an action on a salary dispute; Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970), wherein alleged discriminatory hiring practices gave rise both to 1343(3) jurisdiction and a judicial criticism of the property distinction.

49. 397 U.S. 254 (1970). In an even earlier case, King v. Smith, 392 U.S. 309 (1968) the Supreme Court found jurisdiction under § 1343(3) when the plaintiff's welfare benefits were cut off because she had had sexual relations with a man not the father of her children.

50. 438 F.2d 7 (2d Cir. 1971).

51. Id. at 12. Contra, Roberts v. Harder, 440 F.2d 1229 (2d Cir. 1971), cert. granted, vacated and remanded mem., for reconsideration in light of Lynch, 405 U.S. 1037 (1972), wherein plaintiff's rent was sent directly to the landlord and deducted from plaintiff's welfare check. The circuit court, citing the Johnson case, found no unconstitutional deprivation since the plaintiff's subsistence had not been threatened. 440 F.2d at 1230.

52. Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003 (1971).

53. Escalera v. New York City Housing Authority, 425 F.2d 853, 864 (2d Cir.), cert. denied, 400 U.S. 853 (1970).

54. Id. at 864. But see note 29 supra and accompanying text for inconsistency within the Second Circuit.

55. Tucker v. Maher, 441 F.2d 740, 741 (2d Cir. 1971), cert. granted, vacated and remanded mem., for reconsideration in light of Lynch, 405 U.S. 1052 (1972).

When *Lynch v. Household Finance Corp.* was presented on appeal to the Supreme Court last term, it provided an ideal opportunity for the resolution of the conflict over section 1343(3). Moreover, it was an opportunity which the Court could neither avoid nor reject since the appeal from the decision of a three judge district court was an appeal of right.[56] The case squarely presented the property rights issue to the Court. The garnishment of Mrs. Lynch's bank account under color of state law had allegedly deprived Mrs. Lynch of her rights to due process and to equal protection under the law.[57] The only issue to be determined was whether a right in property, here a bank account, fell properly within the scope of section 1343(3).

The decision in *Lynch* resolved the uncertainty and confusion which had resulted from Justice Stone's formula and the various interpretations assigned to it, by "expressly reject[ing] that distinction."[58] In delivering the opinion of the Court,[59] Mr. Justice Stewart reasoned that there exists, in fact, no conflict between section 1331 and section 1343(3).[60] He found that the limiting words in section 1343(3)—"under color of state law"—adequately separate those issues which fall under the respective statutes.[61] Furthermore, he noted that "contraction of [section] 1343(3) jurisdiction is not supported by the legislative history of [section] 1331,"[62] nor was section 1331 intended to narrow civil rights jurisdiction under section 1343(3),[63] especially since " 'repeals by implication are not favored.' "[64] He concluded therefrom that the "descendants . . . of the Civil Rights Act of 1871 must be given the meaning and sweep that their origins and their language dictate."[65]

The Court disposed of the property right limitation placed on the statute even more vigorously by finding it contrary to congressional intent.[66] Property rights are neither secondary rights nor purely pecuniary rights, but are essential to other civil rights and vital to the value and meaning of the fourteenth amendment under which section 1343(3) was enacted.[67] The Court maintained that it had

56. 28 U.S.C. § 1253 (1970). See note 7 supra.

57. 405 U.S. at 540.

58. Id. at 542.

59. All the Justices concurred in the disposition of the § 1343(3) issue, Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of the case.

60. See text accompanying note 16 supra.

61. 405 U.S. at 547.

62. Id. at 548.

63. Moreover, other exemptions from § 1331's minimum jurisdictional amount have since been drafted. Id. at 549-50 n.17. The concern with congestion in the courts is in reality confined to diversity cases which are the principal source of the problem. Id. at 550.

64. Id. at 549 (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968); Posadas v. National City Bank, 296 U.S. 497, 503 (1936)).

65. 405 U.S. at 549.

66. Id. at 543. See Monroe v. Pape, 365 U.S. 167, 171-90 (1961), for the history of the section and congressional debate thereon. See also Cong. Globe, 42d Cong., 1st Sess., App. 69 (1871) where the rights sought to be protected were described as "the enjoyment of life and liberty, with the right to acquire and possess property of every kind . . . ."

67. 405 U.S. at 544.

never accepted the personal liberties-property rights dichotomy, distinguishing cases in which it had appeared to endorse the formula as state tax cases,[68] which the federal courts are obliged to avoid under the abstention doctrine if there exists a state remedy.[69] The Court concluded this aspect of the decision[70] with a reiteration of its belief that there is a "fundamental interdependence . . . between the personal right to liberty and the personal right in property."[71]

Finally, the Court rejected the Stone limitation on section 1343(3) for "the virtual impossibility of applying it."[72] Mr. Justice Stewart spoke of the " 'mixed' cases in which both personal and property rights are implicated,"[73] and cited many of the cases discussed above as examples of the confusion and illogic generated by the test.[74]

The impact of this decision has already been making itself evident.[75] Having rejected the personal liberties-property rights distinction, it was unnecessary for the *Lynch* Court to undertake a convoluted analysis of the plaintiff's deprivation in order to fit it into the personal liberty category.[76] As a result of *Lynch*, cases

68. Id. at 542-43 n.6. See also note 31 supra and accompanying text.

69. 28 U.S.C. § 1341 (1970) provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

70. The remainder of the opinion dealt with a discussion of § 2283, the majority finding that the statute did not bar the issuance of an injunction since the garnishment action was not a judicial proceeding in a state court within the meaning of § 2283. See note 5 supra. For a further discussion of this problem see Roudebush v. Hartke, 405 U.S. 15 (1972) wherein an injunction against an election recount was found not to conflict with § 2283 since the state court was determined to have acted in a non-judicial capacity in granting the petition for a recount. Mr. Justice White's dissent in Lynch, in which Chief Justice Burger and Mr. Justice Blackmun joined, dealt solely with this aspect of the decision.

71. 405 U.S. at 552.

72. Id. at 550-51.

73. Id. at 551.

74. Id. passim.

75. The following cases have been vacated and remanded for reconsideration in light of Lynch: Tucker v. Maher, 441 F.2d 740 (2d Cir. 1971), cert. granted, vacated and remanded mem., 405 U.S. 1052 (1972) (pre-judgment attachment challenge); Roberts v. Harder, 440 F.2d 1229 (2d Cir. 1971), cert. granted, vacated and remanded mem., 405 U.S. 1037 (1972) (welfare question); Garren v. City of Winston-Salem, N.C., 439 F.2d 140 (4th Cir. 1971), cert. granted, vacated and remanded mem., 405 U.S. 1052 (1972) (zoning challenge); Weddle v. Director, Patuxent Institution, 436 F.2d 342 (4th Cir. 1970), cert. granted, vacated and remanded mem., 405 U.S. 1036 (1972) (prisoner deprived of property); Lung v. Jones, 322 F. Supp. 1067 (D.N.M. 1971), cert. granted, vacated and remanded mem., 405 U.S. 1051 (1972) (state tax challenge). But see Kiernan v. Lindsay, 334 F. Supp. 588 (S.D.N.Y. 1971), aff'd mem., 405 U.S. 1000 (1972), rehearing denied, 405 U.S. 1076 (1972), which was affirmed in a memorandum decision only four days after Lynch was decided and to which a rehearing was denied. Assigning an explanation to this denial of rehearing would be purely speculative; but it should probably not be read as a limitation on or a narrowing of Lynch. See note 44 supra.

76. The plaintiff had tried such an analysis in the court below (318 F. Supp. at 1113), relying on Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), which had found that

brought under section 1343(3) can be simply and economically disposed of on their merits without becoming enmeshed in the web of tangled reasoning that has long surrounded the jurisdictional statute.

Constitutional Law—"Liberalized" Abortion Statute Held Constitutional.—Plaintiff, the appointed guardian ad litem for the infant "Roe" and all similarly situated members of a class of unborn infants of less than twenty-four weeks' gestation scheduled for abortion in New York State public hospitals, sought to have New York's "liberalized" abortion statute[1] declared unconstitutional, as violative of the constitutional rights of his wards. Specifically, plaintiff contended that a fetus is a legal person under the United States Constitution and therefore could not be deprived of life without due process or equal protection under the law. In the initial judicial determination, plaintiff obtained a temporary injunction from a New York Supreme Court[2] against the performing of any abortional acts.[3] On appeal the Appellate Division reversed and vacated the injunction, upholding the constitutionality of the statute.[4] The New York Court of Appeals

prejudgment garnishment of a debtor's wages violated due process and gave rise to possible severe hardship. The Lynch Court noted this now unnecessary attempt to characterize the garnishment as endangering plaintiff's ability to purchase necessities of daily life. 405 U.S. at 551.

For comparison the Court cited Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970), wherein the court assumed jurisdiction in a dispute over distraint proceedings for the sale of plaintiff's goods under the color of state law. The grey area appears to be, as was true in the welfare cases, the subsistence level or level of necessity. Lynch obviates this subjective and difficult categorization.

1. N.Y. Penal Law § 125.05(3) (McKinney 1967), as amended, (McKinney Supp. 1972-73). The amendment was enacted as chapter 127 of the Laws of 1970, eff. July 1, 1970. See note 11 infra for a more complete legislative history.

2. Byrn v. New York City Health and Hosps. Corp., N.Y. Sup. Ct. (Queens County, Jan. 7, 1972), rev'd, 38 App. Div. 2d 316, 329 N.Y.S.2d 722 (2d Dep't), aff'd, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972).

3. The injunction provided for an exception where the mother's life was endangered, an exception made previously by the older "restrictive" New York abortion statute, and in fact by every state's older abortion laws. According to Denzer, Supplementary Practice Commentary, N.Y. Penal Law § 125.05(3), at 110-12 (McKinney Supp. 1972-73) [hereinafter cited as Denzer], as of 1965 forty-nine of the fifty-two American jurisdictions limited legal abortions to those necessary to save the mother's life and the other three also allowed abortions to preserve the mother's health. Id. at 110. For a discussion of the similar common law exception, see R. Perkins, Criminal Law 145-49 (2d ed. 1969) [hereinafter cited as Perkins].

Exactly what may be encompassed under the exception "for the preservation of the woman's life" is a matter of judicial interpretation. For a recent case holding that such exception does not encompass mental or psychiatric grounds, see People ex rel. Hanrahan v. White, 52 Ill. 2d 70, 285 N.E.2d 129 (1972).

4. 38 App. Div. 2d 316, 329 N.Y.S.2d 722 (2d Dep't), aff'd, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972).

affirmed, preferring to leave the question of a fetus's legal personality to the judgment of the legislature. *Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972).

At common law, the abortion of a "quick" child[5] was a crime,[6] and generally all older statutes dealing with the subject placed severe restrictions on the performing of abortions.[7] However, within the past few years there has been a definite two-pronged tendency toward liberalization of abortion restrictions: on the one hand, restrictive statutes have increasingly met resistance in the courts,[8] and on the other, several states have enacted statutes which permit abortions more freely.[9] The New York statute attacked in *Byrn* is illustrative of the latter,[10] in that it permits "abortion on demand" within the first twenty-four weeks after conception, or at any time if such seems reasonably necessary to save the mother's life.[11]

Because of the newness of the New York statute, *Byrn* was the first direct attack on liberalized, legalized abortion in New York. However, there existed a line of well-known New York cases dealing with the legal rights of fetuses in different factual contexts. *Woods v. Lancet*[12] was the first New York case to

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5. A "quick" child is defined as one so developed as to be capable of detectable movement in the mother's womb. Black's Law Dictionary 1415 (rev. 4th ed. 1968) (citations omitted). Such movements usually occur between the fourth and fifth months of pregnancy. Gaylord, The Dilemma of Abortion, 77 Case & Com., July–Aug. 1972, at 19, 21 n.9.

6. E.g., Evans v. People, 49 N.Y. 86, 88 (1872). See also Perkins 140.

7. See George, Current Abortion Laws: Proposals and Movements for Reform, 17 West. Res. L. Rev. 371 (1965) (part of a symposium on Abortion and the Law); Stern, Abortion: Reform and the Law, 59 J. Crim. L.C. & P.S. 84 (1968).

8. For a discussion of these cases, see notes 28-37 infra and accompanying text.

9. From 1966 through 1970, 14 states enacted amendatory legislation relaxing their abortion laws. Denzer 110.

10. The current New York statute provides: "§ 125.05 Homicide, abortion and related offenses; definitions of terms

. . . .

3. 'Justifiable abortional act.' An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy."

11. The legislative history of the New York statute is both dramatic and significant. After easy passage by the New York State Senate, the bill failed its first test in the State Assembly by a vote of 73-70 (with 76 votes needed for passage); however, the bill was kept alive for another vote by some parliamentary maneuvering. N.Y. Times, Apr. 1, 1970, at 1, col. 8. Upon the revote, the bill passed 76-73, after the "dramatic last-minute switching of a single vote in the Assembly . . . ." N.Y. Times, Apr. 10, 1970, at 1, cols. 6-8.

12. 303 N.Y. 349, 102 N.E.2d 691 (1951).

accord a right of recovery in tort to a child subsequently born alive for injuries received while it was in a viable[13] state in the womb.[14] *Woods* was extended to encompass injuries to "nonviable" fetuses as well, in *Kelly v. Gregory*,[15] since separability of mother and child begins at conception, and, therefore, any distinction between "viable" and "nonviable" was artificial.[16]

The fact that the child must be born alive in order to have a cause of action for prenatal injuries was underscored in *Endresz v. Friedberg*.[17] There, the personal representative of a stillborn fetus which had died because of injuries received in the womb was declared to have no right of recovery under New York's wrongful death statute,[18] since the statute applied only to "decedents," i.e., persons necessarily born alive.[19] The court discussed at length the rights and protections afforded to fetuses in New York and concluded that:

[A]lthough an unborn child has certain rights under property law, his enjoyment of

13. "[The] term [viable] is applied to a newly-born infant, and especially to one prematurely born, which is not only born alive, but in such a state of organic development as to make possible the continuance of its life." Black's Law Dictionary 1737 (rev. 4th ed. 1968). Hence, the term is applied to a fetus so developed as to be capable of independent life outside the womb. For information on the biological processes which take place after conception, and their possible legal ramifications, see Byrn, Abortion-on-Demand: Whose Morality?, 46 Notre Dame Law. 5, 7-9 (1970).

14. Thus Woods did not follow the earlier logic of Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), which had held that an unborn child has no cause of action for prenatal injuries. The court in Drobner had relied on Dietrich v. Northampton, 138 Mass. 14 (1884), in which Judge (later Justice) Holmes reasoned "that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her . . . ." Id. at 17. The Woods court based its abandonment of Drobner-Dietrich on the effects of more recent decisions, since "the basic reason for Drobner v. Peters was absence of precedent." 303 N.Y. at 353, 102 N.E.2d at 693.

15. 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953).

16. Id. at 543-45, 125 N.Y.S.2d at 697-98. For a discussion of cases from other jurisdictions on the question of liability for prenatal injuries, see Annot., 40 A.L.R.3d 1222 (1971).

17. 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

18. N.Y. Est., Powers & Trusts Law § 5-4.1 (McKinney 1967).

19. Authority from other jurisdictions both in accord and opposed to the New York decision to deny a wrongful death recovery to stillborns is collected at nn. 1-2, 24 N.Y.2d at 482, 248 N.E.2d at 903, 301 N.Y.S.2d at 68. Accord, Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (3d Dist. 1954); Keyes v. Constr. Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Powers v. City of Troy, 4 Mich. App. 572, 145 N.W.2d 418 (1966); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Padillow v. Elrod, 424 P.2d 16 (Okla. Sup. Ct. 1967); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958). Contra, Gullborg v. Rizzo, 331 F.2d 557 (3d Cir. 1964); Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); State ex rel. Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

those rights is contingent upon his being born alive. . . . In other words, even if, as science and theology teach, the child begins a separate "life" from the moment of conception, it is clear that, "except in so far as is necessary to protect the child's own rights" *the law has never considered the unborn foetus as having a separate "juridical existence" or a legal personality or identity "until it sees the light of day."*[20]

A contrary New York case which upheld fetal rights was *Robin v. Village of Hempstead.*[21] There, a village ordinance forbidding abortions unless performed in state-licensed hospitals was challenged. The court, in dictum, discussed the legal right to life of a fetus, and concluded that such right "supersedes even the religious freedom of the mother . . . ."[22] In so holding, the court relied on the determination, set out in *Kelly v. Gregory,*[23] that a fetus has a separate biological and, hence, legal identity from its mother.

Robin invoked the "transfusion" cases, which have dealt with whether or not a pregnant woman can be forced to have a blood transfusion necessary to protect the life of her unborn child. In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson,*[24] the New Jersey Supreme Court held that "the unborn child is entitled to the law's protection"[25] and that the transfusion should thus be made. The court relied on *Smith v. Brennan,*[26] another New Jersey case which had held that a fetus was a separate legal entity and thus, if born alive, entitled to recover for a prenatal injury. While these transfusion cases are not

20. 24 N.Y.2d at 485, 248 N.E.2d at 904-05, 301 N.Y.S.2d at 70 (emphasis added) (citations omitted). As for the fetal property rights discussed in Endresz, one New York case on point is In re Peabody, 5 N.Y.2d 541, 158 N.E.2d 841, 186 N.Y.S.2d 265 (1959), wherein the New York Court of Appeals held that a fetus is not a "person beneficially interested" in a trust (within the meaning of N.Y. Pers. Prop. Law § 23 (McKinney 1949), as amended, N.Y. Pers. Prop. Law § 23 (McKinney 1962)), and therefore a trust may be revoked without the fetus's "consent." However, the court pointed to other areas of property rights where the state legislature expressly protected fetuses when the prior interest in the property ended; for example, under section 6-5.7 of the N.Y. Est., Powers & Trusts Law (McKinney 1967) (formerly, at the time of the Peabody decision, N.Y. Real Prop. Law § 56 (McKinney 1945)), when a future estate is limited to heirs, distributees, or issue, "posthumous children shall be entitled to take in the same manner as if living at the death of their ancestors." 5 N.Y.2d at 547, 158 N.E.2d at 844-45, 186 N.Y.S.2d at 269-70.

21. 66 Misc. 2d 482, 321 N.Y.S.2d 20 (Sup. Ct. 1971), rev'd on other grounds, 38 App. Div. 2d 758, 329 N.Y.S.2d 678 (2d Dep't), aff'd, 30 N.Y.2d 347, 285 N.E.2d 285, 334 N.Y.S.2d 129 (1972).

22. 66 Misc. 2d at 485, 321 N.Y.S.2d at 23.

23. 282 App. Div. at 543-44, 15 N.Y.S.2d at 697-98 (dictum); see notes 15-16 supra and accompanying text.

24. 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

25. Id. at 422, 201 A.2d at 538; accord, Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961). See also In re President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964), in which it was held that the state may require a woman to have a blood transfusion necessary to save her life so that her seven month-old child should not be left without a mother.

26. 31 N.J. 353, 363-64, 367, 157 A.2d 497, 502-03, 504-05 (1960), overruling Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942).

exactly on point, the appellate division in its *Byrn* opinion conceded that they "do establish, however, that the State has intervened before birth to protect the life of the unborn child endangered by the exercise of a constitutional right [e.g., the right of free exercise of religion] asserted by the mother."[27]

However, there is contrary authority from several courts in other jurisdictions which, in considering restrictive abortion statutes, have championed the mother's constitutional right to choose whether or not to bear children, a right held by these courts to override any right to life of the fetus.[28] For example, in *People v. Belous*,[29] the California Supreme Court overturned that portion of the California Penal Code which prohibited abortion, on the grounds that the words "necessary to preserve [the life of the mother]"[30] were unconstitutionally vague and violative of legislative intent. In dictum, the court suggested that "[t]he fundamental right of the woman to choose whether to bear children follows from the [United States] Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."[31]

Similarly, certain lower federal courts have invalidated restrictive abortion statutes as unconstitutional invasions of a woman's private right to refuse to bear a child. In *Babbitz v. McCann*,[32] which overturned a Wisconsin statute[33] that made it a crime to perform abortions except to save the life of the mother, the court said:

> Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state

27. 38 App. Div. 2d at 326, 329 N.Y.S.2d at 731-32.

28. For a general discussion of cases dealing with the validity, under the Federal Constitution, of abortion laws, see Annot., 28 L. Ed. 2d 1053 (1972).

29. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U.S. 915 (1970), noted in 48 Texas L. Rev. 937 (1970).

30. Id. at 960, 458 P.2d at 197, 80 Cal. Rptr. at 357. The statute held unconstitutional was Cal. Penal Code § 274 (West Supp. 1968), as amended, Cal. Penal Code § 274 (West 1970) and Cal. Health & Safety Code §§ 25950-25955.5 (West Supp. 1972).

31. 71 Cal. 2d at 963-64, 458 P.2d at 199, 80 Cal. Rptr. at 359. The United States Supreme Court cases relied upon were Loving v. Virginia, 388 U.S. 1 (1967) (state may not prohibit interracial marriages); Griswold v. Connecticut, 381 U.S. 479 (1965) (state may not make it a crime to instruct married persons in the use of contraceptives); Skinner v. Oklahoma, 316 U.S. 535 (1942) (state sterilization statute declared invalid; marriage and procreation are "basic rights"); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state statute that required parents to send children to public schools interfered with parents' right to decide children's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (state statute forbidding the teaching of foreign languages to schoolchildren also interfered with basic liberty). California cases relied upon were Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948) and Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1st Dist. 1967).

32. 310 F. Supp. 293 (E.D. Wis.), appeal dismissed on procedural grounds, 400 U.S. 1, injunction granted, 320 F. Supp. 219 (E.D. Wis. 1970), vacated and remanded for reconsideration on procedural grounds, 402 U.S. 903 (1971). The case is discussed in Fox, Abortion: A Question of Right or Wrong?, 57 A.B.A.J. 667 (1971).

33. Wis. Stat. Ann. § 940.04 (1958).

without a more compelling public necessity[34] than is reflected in the statute in question. When measured against the claimed "rights" of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo.[35]

The *Babbitz* court relied on both the ninth amendment and those Supreme Court cases which have formulated a right to privacy and to one's own person,[36] as justifying a woman's right to abortion.[37]

However, roughly an equal number of federal courts have upheld restrictive abortion statutes, generally on the grounds that the fetus had a constitutionally protected right to life which outweighed any rights of the mother. For example, in *Rosen v. Louisiana State Board of Medical Examiners*,[38] a three-judge district court upheld a statute which authorized the revocation of a doctor's license if the physician performed an abortion not necessary to preserve the life of the mother. The court noted that, while a woman may have a constitutional right to determine whether to *become* pregnant, such right does not allow the destruction of a

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34. For a compilation of abortion cases which have explicitly touched upon whether restrictive state abortion statutes are supported by a "compelling state interest," see Annot., 28 L. Ed. 2d 1053, 1070-76 (1972), which discusses cases that have found both for and against the existence of such an interest. For: Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), appeal dismissed, 402 U.S. 936, probable jurisdiction postponed to a hearing on the merits, 402 U.S. 941 (1971); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La.), appeal filed, 39 U.S.L.W. 3302 (U.S. Nov. 27, 1970) (No. 70-42). Against: Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill.), appeal docketed sub noms. Hanrahan v. Doe and Heffernan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522 & 1523); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), probable jurisdiction postponed to a hearing on the merits, 402 U.S. 941 (1971); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.), vacated and remanded for reconsideration on procedural grounds, 402 U.S. 903 (1971); People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U.S. 915 (1970).

35. 310 F. Supp. at 301 (footnote added).

36. For an enumeration of the cases relied upon see note 31 supra.

37. Accord, Abele v. Markle, 342 F. Supp. 800 (D. Conn.), petition for cert. filed, 41 U.S.L.W. 3136 (U.S. July 10, 1972); Doe v Scott, 321 F. Supp. 1385 (N.D. Ill.), appeal docketed sub noms. Hanrahan v. Doe and Heffernan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522 & 1523); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), probable jurisdiction postponed to a hearing on the merits, 402 U.S. 941 (1971); cf. Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), appeal dismissed, 402 U.S. 936, probable jurisdiction postponed to a hearing on the merits, 402 U.S. 941 (1971) (ninth amendment right to privacy encompasses decision to terminate an unwanted pregnancy, but state may assert "legitimate area of control short of an invasion of the personal right of initial decision." 319 F. Supp. at 1055).

In addition, both Planned Parenthood Comm., Inc. v. Maricopa County, 92 Ariz. 231, 375 P.2d 719 (1962), and Sturgis v. Attorney Gen., 358 Mass. 37, 260 N.E.2d 687 (1970), dealt with whether state police power was unduly extended by state statutes that curtailed the counseling and advertising of abortions and birth control. In both cases, the courts upheld the statutes as constitutional.

38. 318 F. Supp. 1217 (E.D. La.), appeal filed, 39 U.S.L.W. 3302 (U.S. Nov. 27, 1970) (No. 70-42).

created fetus.[39] The *Babbitz* view was held to be neither constitutionally mandated nor in line with the "theories of life and being" held by most Americans.[40]

To date the United States Supreme Court has not passed directly on the issue of whether abortion, other than for reasons of the mother's safety, is constitutionally permitted, but it has recently ruled that a restrictive abortion statute was not unconstitutionally vague when it made reference to the mother's "health."[41] The Court refused to comment on the district court's suggestion that "as a secular matter a woman's liberty . . . may well include the right to remove an unwanted child at least in early stages of pregnancy."[42]

Faced with these conflicting precedents, the New York courts, in adjudicating the *Byrn* case, could find "no case directly in point which controls our determination."[43] The appellate division, after a thorough discussion of previous case law, dealt with the constitutional issue of a fetus's right to life in an historical fashion:

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39. 318 F. Supp. at 1222-23.

40. Id. at 1231; accord, Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C.), appeal filed, 40 U.S.L.W. 3098 (U.S. July 17, 1971) (Corkey is significant in that it anticipates Byrn's deference to the determinations of the legislature. The Corkey court noted that the choice between the mother's interests and those of the fetus "is a value judgment not committed to the discretion of judges but reposing instead in the representative branch of government." Id. at 1253-54); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

In addition, one further pro-abortion argument that has uniformly met with disfavor in the courts is the equal protection argument, which contends that restrictive state abortion statutes should be overturned since they discriminate against the poor and the nonwhite. For example, the court in Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La.), appeal filed, 39 U.S.L.W. 3302 (U.S. Nov. 27, 1970) (No. 70-42) said: "[W]e have considered the argument that an affluent woman, whether by legal or illegal means, has a better opportunity than a poor one to obtain an abortion at little risk to her life or health. We are, however, unwilling to equate the types of inequality suggested [here] with a denial of a protected right under the Fourteenth Amendment. Therefore, we reject plaintiff's equal protection argument." 318 F. Supp. at 1232 n.19. For cases in accord with the Rosen majority's view see Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), appeal dismissed, 402 U.S. 936, probable jurisdiction postponed to a hearing on the merits, 402 U.S. 941 (1971); Sturgis v. Attorney Gen., 358 Mass. 37, 260 N.E.2d 687 (1970). But see Judge Cassibry's dissenting opinion in Rosen, 318 F. Supp. at 1243, which cited statistics indicating that deaths from illegal abortions strike mostly the poor nonwhite. For a further discussion of the equal protection argument, and cases which discuss it as it applies to statutes which allegedly discriminate against nonphysicians, see Annot., 28 L. Ed. 2d 1053, 1082-84 (1972).

41. United States v. Vuitch, 402 U.S. 62 (1971), rev'g 305 F. Supp. 1032 (D.D.C. 1969). The statute in question was D.C. Code Ann. § 22-201 (1967). The Supreme Court has also dismissed appeals or denied certiorari in a number of other cases which unsuccessfully challenged restrictive state abortion statutes, e.g., Abodeely v. State, 179 N.W.2d 347 (Iowa Sup. Ct. 1970), cert. denied, 402 U.S. 936 (1971); Vuitch v. State, 10 Md. App. 389, 271 A.2d 371 (1970), cert. denied, 404 U.S. 868 (1971); Lashley v. State, 10 Md. App. 136, 268 A.2d 502 (1970), cert. denied, 402 U.S. 991 (1971).

42. 305 F. Supp. at 1035.

43. 38 App. Div. 2d at 325, 329 N.Y.S.2d at 730.

We have seen no indication that the framers of the Fifth Amendment intended to include fetal life when they provided that no "person" shall be deprived of life without due process. In construing a constitution or any part of it, a court should look to the law as it existed at the time it was adopted. It has been said that our Federal Constitution should be construed with reference to the common law of England . . . . [I]t was generally believed at common law that the unborn child was physically a part of the mother and legal personality was accorded to it merely as a fictional device in anticipation of birth. We think it unlikely, therefore, that the framers of the Fifth Amendment . . . gave any consideration to whether a child *en ventre sa mere* was within the protection of that amendment.[44]

However, in resolving the case the appellate division found the "decisive" consideration to be the strong presumption of constitutionality inherent in state statutes, and deferred to the legislature the question of whether or not fetal life is to be constitutionally protected.[45]

The New York Court of Appeals, in upholding the appellate division's decision, approached the issue of whether a fetus is a legal person with the right to life on two levels.[46] The first turned on the legal history which had been set out in detail by the appellate division. The court of appeals recognized the line of New York cases—*Endresz, Woods,* and *Kelly*—which had granted rights to fetuses in certain "narrow" legal categories, but noted that "unborn children have never been recognized as persons in the law in the whole sense."[47] And as for abortion itself, restrictive abortion statutes were "evidently" designed to protect the mother and not the child:[48]

It has been argued, of course, that anti-abortion laws were also designed to protect the

44. Id. at 330, 329 N.Y.S.2d at 735 (citations omitted). Note that the old common law view that the fetus was merely a part of its mother was specifically rejected in Kelly v. Gregory, 282 App. Div. at 543-44, 125 N.Y.S.2d at 697-98; see notes 15-16 & 23 supra.

45. "Questions of wisdom, need or appropriateness are for the Legislature and we strike down statutes it has enacted only as a last resort and only when unconstitutionality is shown beyond a reasonable doubt . . . .

. . . .

". . . In resolving the important issues presented by this case, this court is not required to weigh and choose between the competing values urged by those who support the law and those who oppose it. The Legislature has made that determination and the court inquires only whether the Federal Constitution permits the choice it made and whether there is a reasonable basis for it. We answer both questions in the affirmative. In our opinion, the extent to which fetal life should be protected 'is a value judgment not committed to the discretion of judges but reposing instead in the representative branch of government' (Corkey v. Edwards, 322 F. Supp. 1248, 1253-1254 [W.D.N.C. 1971]). . . ." 38 App. Div. 2d at 330-31, 329 N.Y.S. 2d at 735-36.

46. 31 N.Y.2d at 200, 286 N.E.2d at 888, 335 N.Y.S.2d at 392.

47. Id.

48. Id. As support, the court cited Means, The Phoenix of Abortional Freedom: Is a Penumbral or a Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N.Y.L.F. 335 (1971). This article provides a thorough discussion of the common law aspects of the abortion question.

fetus; but the argument is hard to sustain so long as there have been provisions that limited unlawful abortions to pregnancies after "quickening" and abortions have been justified to protect the mother even though it meant destruction of the fetus.[49]

In any event, the court noted that historical analysis was not determinative.[50]

The second level of debate was the "real one," and it dealt directly with the question of whether a fetus is a legal person.[51] The court recognized that, in the natural or conceptual sense, a fetus can be regarded as a person, but "[i]t is not true, however, that the legal order necessarily corresponds to the natural order . . . ."[52] Therefore, "[w]hat is a legal person is for the law, including, of course, the Constitution, to say . . . ."[53]

The process is, indeed, circular, because it is definitional. *Whether the law should accord legal personality is a policy question which in most instances devolves on the Legislature* . . . . That the legislative action may be wise or unwise, even unjust and violative of principles beyond the law, does not change the legal issue or how it is to be resolved. The point is that it is a policy determination whether legal personality should attach and not a question of biological or "natural" correspondence.[54]

The court also exposed what it considered an inconsistency in plaintiff's position: plaintiff would allow abortion to save the mother's life, but, before the law, the mother's and fetus's lives must be co-equal, and therefore plaintiff seemingly contradicted his own belief in the fetus's full right to life.[55]

In summary, while the New York Court of Appeals recognized that there were real issues in the case, these issues were not legal or justiciable unless the legislature should provide otherwise. There is no constitutional mandate which requires complete legal personality for fetuses: "the Legislature may [confer legal personality on the unborn], or it may do something less, as it does in limited abortion statutes, and provide some protection far short of conferring legal personality."[56]

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49. 31 N.Y.2d at 200, 286 N.E.2d at 888, 335 N.Y.S.2d at 392.

50. Id. at 200, 286 N.E.2d at 889, 335 N.Y.S.2d at 392.

51. Id. at 200, 286 N.E.2d at 889, 335 N.Y.S.2d at 393.

52. Id. at 201, 286 N.E.2d at 889, 335 N.Y.S.2d at 393 (citation omitted).

53. Id. at 201, 286 N.E.2d at 889, 335 N.Y.S.2d at 393.

54. Id. (emphasis added). The court cited from J. Gray, The Nature and Sources of the Law 38-39 (2d ed. 1921) and G. Paton, A Text-book of Jurisprudence 353-54 (3d ed. 1964). But cf. Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La.), appeal filed, 39 U.S.L.W. 3302 (U.S. Nov. 27, 1970) (No. 70-42): "[W]e do not believe that the constitutional validity of statutes turns upon whether legislators make speeches . . . ." 318 F. Supp. at 1228.

55. 31 N.Y.2d at 203, 286 N.E.2d at 890, 335 N.Y.S.2d at 395.

56. Id. at 203, 286 N.E.2d at 890, 335 N.Y.S.2d at 395. The appellate division opinion in Byrn was followed in Klein v. Nassau County Medical Center, No. 72-C-386 (E.D.N.Y., Aug. 24, 1972), where the court held that "Medicaid" must pay for the abortions of indigent women, since an abortion may be thought of as "necessary" medical assistance. The court declared that any question as to the validity of the permissive New York abortion statute was settled in Byrn.

Likewise, in People v. Dobbs Ferry Medical Pavilion, Inc., 332 N.Y.S.2d 186 (Sup. Ct.

Judges Burke and Scileppi dissented in separate opinions. Basically, they contended that the liberalized abortion statute contravened the natural law[57] and therefore could not be upheld. Further, as one dissent argued, to allow the legislature to be the sole judge of the matter would authorize capricious changes in the law, depending on legislative whim and changing concepts of legality.[58] The dissenters also noted that the statute may be irrational, since there are several practical factors—the reliability of modern contraceptive devices, the large number of families which would be willing to adopt "unwanted" babies, and the trend toward zero population growth—which seem to undermine any compelling state interest necessitating liberalized abortion.[59] Finally, it would be inconsistent with earlier decisions granting the fetus certain property or tort rights to deny it "the most valuable of all rights, which is life itself."[60]

Regardless of one's personal views on abortion, it is unfortunate that the court of appeals based its affirmation of New York's liberal abortion statute primarily on the chameleon of legislative action. As the dissenters pointed out,[61] it is too easy to attack such a position by demonstrating legislative vulnerability to changing concepts of law and morality.[62] More importantly, *Byrn* squarely

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1972), where the state tried to enjoin the operation of an abortion clinic for failure to observe technical requirements of the N.Y. Pub. Health Law (McKinney 1971), the court emphasized that the action can "in no way [relate] to or [hinge] upon a value judgment as to abortions per se," since that question was settled in Byrn. Id. at 189.

A recent federal court case, McGarvey v. Magee-Womens Hosp., 340 F. Supp. 751 (W.D. Pa. 1972), has also declared that a fetus is not a legal person, and cited Byrn as authority. Id. at 753.

57. Natural law was defined as "inalienable rights that come not from the State but from an external source of authority superior to the State which authority regulated our inalienable liberties and with which our laws and Constitutions must now conform." 31 N.Y.2d at 208, 286 N.E.2d at 893, 335 N.Y.S.2d at 399 (Burke, J., dissenting).

58. "The rationale of the majority opinion admits that customs do change and the Legislature could, if it should in the future be the attitude of the Legislature, do away with old folks and eliminate the great expense the aged are to the taxpayers. This, of course, would parallel the Hitler laws which decreed the death of all the inmates of mental hospitals and also decreed that for many purposes non-Aryans were nonpersons.

. . . .

"According to the majority opinion, valid law is a merger of legislative and executive emotions, whims and hunches—announced today and perhaps changed tomorrow. One's rights are never permanent as the existence of the natural law is denied. The majority suggests that all law is man made. Such a philosophy of law we know would not attract persons educated in philosophy." Id. at 208-09, 286 N.E.2d at 893-94, 335 N.Y.S.2d at 399 (Burke, J., dissenting).

59. Id. at 206-07, 286 N.E.2d at 892, 335 N.Y.S.2d at 397-98 (Burke, J., dissenting).

60. Id. at 214, 286 N.E.2d at 897, 335 N.Y.S.2d at 404 (Scileppi, J., dissenting).

61. See notes 57-60 supra and accompanying text.

62. This is especially true given the erratic legislative history of the New York statute. See note 11 supra. In this regard it is interesting to note that, shortly before the New York Court of Appeals passed on Byrn, the liberal New York statute was actually repealed by the state legislature after acrimonious public debate. N.Y. Times, May 11, 1972, at 1, col. 1. However, Governor Nelson A. Rockefeller vetoed the repeal. N.Y. Times, May 14, 1972, at 1, col. 1.

put before the New York courts the question of whether a fetus is a "person" within the meaning of the fifth and fourteenth amendments, and it is improper for the courts to ignore their duty to define such an important constitutional term merely by deferring to legislative enactments. As the United States Supreme Court has said in another context, "our constitution being . . . one of enumeration, and not of definition, to ascertain the extent of the [commerce] power, it becomes necessary to settle the meaning of the word,"[63] and such power of definition lies primarily in the judicial branch.[64] Indeed, it may be that any legislature lacks the power to define constitutional terms, and therefore, courts need not even presume the constitutionality of legislative definitions.[65] Since the New York courts have refused to perform the task of definition, it is time for the United States Supreme Court to deal conclusively with the question of fetal rights, in a manner grounded in the United States Constitution, and not in legislative whim.

Landlord and Tenant—Retaliatory Eviction—Landlord Must Show Substantial Business Reason for Removal of Leasehold from Market where Tenant has Successfully Withheld Rent.—In 1968, appellant, Lena Robinson, moved into a row house in Northwest Washington, D.C., owned by appellee Diamond Housing Corp. ("Diamond"). Not long thereafter, Mrs. Robinson began to withhold rent. In a suit by Diamond for possession, Mrs. Robinson defended on the grounds that substantial housing code violations existed at the time the lease was signed making it void and unenforceable. The trial court, after a jury verdict, granted judgment in her favor.[1] Diamond instituted a second suit claiming that since the lease was void Mrs. Robinson was a trespasser and subject to immediate eviction. This time the trial court granted Mrs. Robinson's motion to dismiss.[2] On appeal, the District of Columbia Court of Appeals affirmed, holding that Mrs. Robinson was a tenant at sufferance and not a trespasser.[3] The court did, however, state that this tenancy could be ended by giving thirty days notice and removing the property from the rental market.[4] Based

63. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824).

64. E.g., Cooper v. Aaron, 358 U.S. 1 (1958); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). See also 16 C.J.S. Const. Law § 13 (1956), especially n.13.

65. However, there is a presumption in favor of the validity of legislative acts. See, e.g., Graves v. Minnesota, 272 U.S. 425, 428 (1926).

1. Robinson v. Diamond Housing Corp., 463 F.2d 853, 858 (D.C. Cir. 1972). The jury found that code violations did in fact exist at the time the lease was signed, making the premises unsafe and unsanitary.

2. Id.

3. Diamond Housing Corp. v. Robinson, 257 A.2d 492, 495 (D.C. Ct. App. 1969). The court held: "It is well established that an agreement entered into in violation of the law creates no rights upon the wrongdoer. . . . We hold that appellee, having entered possession under a void and unenforceable lease, was not a trespasser but became a tenant at sufferance." Id.

4. Id. "Where, as here, it has been determined that the property when rented was not habitable . . . and should not have been rented, and if the landlord is unwilling or unable

on this statement Diamond instituted still another action for possession.[5] The District of Columbia Court of General Sessions rendered summary judgment for Diamond,[6] and the District of Columbia Court of Appeals affirmed.[7] The United States Court of Appeals for the District of Columbia Circuit reversed, holding that Mrs. Robinson could invoke the defense of retaliatory eviction, and that the landlord must establish that his desire to evict and to withdraw the unit from the market is based on a "substantial business reason."[8] *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972).

Traditionally the common law did not apply the usual bilateral contract rules to leases. Covenants in a lease were treated as independent,[9] and a landlord's breach of even an express covenant to repair was no defense to an action by him for rent.[10] The only duty imposed by law upon the tenant was that of paying rent once in possession,[11] and the only implied warranty imposed upon the landlord was that of "quiet enjoyment."[12] No warranty of repair or of habitability was implied.[13] These landlord-tenant relationships may have made sense

to put the property in a habitable condition, he may and should promptly terminate the tenancy and withdraw the property from the rental market, because the Regulations forbid both the rental and the occupancy of such premises." Id. (footnote omitted). The court cited section 2301 of the Housing Regulations of the District of Columbia as its authority. Id. at 495 n.14. That section provides: "No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations."

5. 463 F.2d at 859. Diamond gave the required notice and stated that it was unwilling to make the repairs and that it intended to remove the unit from the market.

6. Id.

7. Robinson v. Diamond Housing Corp., 267 A.2d 833, 835 (D.C. Ct. App. 1970). The court held that the retaliatory eviction defense of Edwards v. Habib (397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969)) should be limited strictly to its facts and not invoked where a tenant was withholding rent under a successful Brown v. Southall Realty Co. (237 A.2d 834 (D.C. Ct. App. 1968)) defense. Id.; see notes 36-41 infra and accompanying text.

8. 463 F.2d at 866.

9. 1 American Law of Property § 3.11 (A.J. Casner ed. 1952).

10. Id.

11. Quinn & Phillips, The Law of Landlord-Tenant: A Critical Evaluation of The Past With Guidelines for the Future, 38 Fordham L. Rev. 225, 227 (1969) [hereinafter cited as Quinn & Phillips]. In addition, since lease covenants were treated as independent (see note 9 supra and accompanying text) a breach by the landlord of the implied warranty of quiet enjoyment would not allow the tenant to withhold rent unless the landlord had actually evicted him and destroyed the possession-rent relationship. Id. at 230. It was only after much evolution of the law that the doctrine of constructive eviction arose. The doctrine allowed the tenant to abandon the premises and thus sever the possessory relationship, only when the landlord's breach of his covenant became unbearable. Id. at 235. For a full discussion of the doctrine of constructive eviction with abandonment see 1 American Law of Property § 3.51 (A.J. Casner ed. 1952).

12. Quinn & Phillips 228. The landlord's duty referred only to his own non-interference. He was under no obligation to protect the tenant from third party interference. Id. at 227 n.2; see Hughes v. Westchester Dev. Corp., 77 F.2d 550 (D.C. Cir. 1935); United Merchants' Realty and Improv. Co. v. Roth, 193 N.Y. 570, 86 N.E. 544 (1908). For a full discussion of the implied warranty of quiet enjoyment see Annot., 41 A.L.R.2d 1414 (1955).

13. 2 R. Powell, The Law of Real Property ¶ 233 (1971). "The lessee took the premises

when they were developed,[14] but they are hardly attuned to the needs of the modern urban dweller who is more-or-less dependent upon the landlord with respect to the quality of his surroundings.[15]

In response to the new needs posed by the urban environment, legislatures and local real estate boards began to impose new obligations on the landlord in the form of provisions in form leases and local statutes and codes.[16] However, the courts continued to treat the rent obligation as independent from the new duties imposed on the landlord.[17] Thus, a breach of these duties would give the tenant a right to sue for breach of the service agreement[18] but not a right to withhold rent absent an eviction.[19]

The most recent attempt to modernize the lease relationship has involved the use of local building and health codes.[20] Initially, these codes relied solely upon criminal sanctions as a means of forcing landlord compliance.[21] Criminal sanctions, however, have proven largely ineffective in improving the situation,[22] and the trend is now toward the creation of private remedies for noncompliance.[23]

In 1922 the New York Court of Appeals in *Altz v. Leiberman*,[24] held that housing regulations imposed a duty of repair upon the landlord which, if negligently breached, allowed an injured tenant the right to sue for personal injury in tort,[25] despite the fact that the statute made no mention of tort liability, but rather authorized only criminal sanctions.[26] Judge Cardozo stated:

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as they were and assumed all risks as to their condition. The lessor had no obligation to put the premises in repair at the commencement of the term and no obligation to make any repairs during the term's continuance . . . ." Id. at 300 (footnotes omitted).

14. Quinn & Phillips 231.

15. Id. at 232.

16. Id. at 232 n.9.

17. 39 Geo. Wash. L. Rev. 152, 154 (1970).

18. Quinn & Phillips 233-34; see Thomson-Houston Elec. Co. v. Durant Land Improv. Co., 144 N.Y. 34, 39 N.E. 7 (1894).

19. Quinn & Phillips 233-34.

20. Id. at 239. See also Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254, 1259 (1966).

21. Gribetz & Grad, supra note 20, at 1262. The codes had originally relied on vacate orders, but the housing shortage caused by World War I rendered this method of enforcement ineffective. Id.

22. See Quinn & Phillips 239-42 for a full discussion of the problems in attempting to use criminal sanctions as a means of achieving progress in this area.

23. 39 Geo. Wash. L. Rev. 152, 157 (1970).

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

25. Id. at 18-19, 134 N.E. at 704. "The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect." Id. at 19, 134 N.E. at 704 (citations omitted). The common law rule of no duty to repair when the landlord had given up control of the premises had been firmly established in New York. E.g., Golob v. Pasinsky, 178 N.Y. 458, 70 N.E. 973 (1904). The landlord, however, did have a duty to repair those areas which the tenants used in common and over which he kept control. E.g., Dollard v. Roberts, 130 N.Y. 269, 29 N.E. 104 (1891).

26. New York Tenement House Act, ch. 61, § 124, [1909] N.Y. Cons. Laws (Wadhams) 4453-54.

At common law there was no duty resting on the landlord of an apartment house to repair the rooms demised .... The Tenement House Law ... has changed the measure of his burden. ... The meaning is that the premises shall not be suffered to fall into decay. The duty to prevent this, which, in part at least, once rested upon the tenant, is now cast upon another.[27]

Citing the *Altz* decision the United States Court of Appeals for the District of Columbia Circuit, in *Whetzel v. Jess Fisher Management Co.*,[28] overturned the common law rule. There the plaintiff, a tenant in defendant's rooming house, was injured by a falling ceiling, and brought an action in negligence against the landlord. The court held that the District of Columbia Housing Regulations impose a duty of care upon the landlord, a breach of which gives the tenant an action in tort for personal injury.[29]

The regulations were given further scope by the District of Columbia Court of Appeals in *Brown v. Southall Realty Co.*[30] There the landlord had brought an eviction action based on nonpayment of rent.[31] The court held that since the landlord knew at the beginning of the lease that the premises were unsafe and unsanitary, in violation of the code, the lease contract was void and no rent was due.[32] Although the code nowhere specifically required a lease so entered into

27. Altz v. Lieberman, 233 N.Y. 16, 17-18, 134 N.E. 703, 703-04 (1922).

28. 282 F.2d 943 (D.C. Cir. 1960).

29. Id. at 950. The court relied on D.C. Housing Regs. §§ 2301, 2304, 2501, and 2504 (1955). Section 2301 provides: "No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations." Section 2304 provides: "No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition . . . ." Section 2501 provides: "Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants." Section 2504 provides specifically for the maintenance of walls and ceilings; see Kanelos v. Kettler, 406 F.2d 951, 954 (D.C. Cir. 1968), which reaffirmed the Whetzel case. Whetzel changed the old District of Columbia rule found in Bowles v. Mahoney, 202 F.2d 320, 323 (D.C. Cir. 1952), cert. denied, 344 U.S. 935 (1953), which had been decided prior to the Regulations. See National Bank v. Dixon, 301 F.2d 507, 509 (D.C. Cir. 1961), which held that the landlord's actual knowledge of the defects is not required if he should have known of them by the use of reasonable care.

30. 237 A.2d 834 (D.C. Ct. App. 1968).

31. In fact Brown had vacated the premises. The court agreed to hear the case on the basis that its decision, and that of the court below, would serve to make certain facts res judicata in any future action for rent. Id. at 835. Thus, the question of whether a tenant can remain in possession without paying rent once a lease is declared void was not before this court. For a full discussion of this question see notes 53-72 infra and accompanying text. But cf. Atkins v. United States, 283 A.2d 204 (D.C. Ct. App. 1971) (landlord's possessory action held moot where the tenant had vacated and made no claim for a right to possession); Gaddis v. Dixie Realty Co., 248 A.2d 820 (D.C. Ct. App. 1969).

32. 237 A.2d at 836-37. The court relied on sections 2304 and 2501 of the Regulations (see note 29 supra). Testimony at the trial by an inspector for the Department of Licenses and Inspections established that the landlord had been put on notice of the violations prior to the lease and that they still existed at the time of the trial. Id. at 836.

to be held void, the court interpreted sections 2304 and 2501 of the code as " 'imply[ing] a prohibition so as to render the prohibited act void.' "[33] *Southall Realty*, therefore, established the principle that when housing code violations were in existence prior to the agreement to lease, the contract was void.[34] In 1970 this principle was codified by the District's City Council.[35]

Edwards v. Habib[36] involved the reporting of a number of code violations by a month-to-month tenant to the Department of Licenses and Inspections, and a subsequent attempt by the landlord to evict in retaliation. The United States Court of Appeals for the District of Columbia Circuit further increased the protections afforded a tenant under the code by holding that proof of a landlord's retaliatory motive would be a good defense to an action for eviction although the District of Columbia eviction statute did not require the landlord to give any reason at all for the eviction.[37] The court reasoned that to allow retaliatory evictions would so intimidate tenants as to prevent their reporting code violations, and would thereby frustrate the purposes of the remedial legislation.[38] The court inferred the illegality of such intimidation as "inherent in the legislation even if it is not expressed in the statute itself."[39] Judge Wright further held that the question of whether the landlord's subjective intent was indeed retaliatory was one of fact, "not significantly different from problems with which the courts must deal in a host of other contexts, such as when they must decide whether the employer who discharges a worker has committed an unfair

33. Id. at 837. The court thus extended what it called the general rule of illegal contracts to housing leases. The court relied on Hartman v. Lubar, 133 F.2d 44, 45 (D.C. Cir. 1942). "The general rule is that an illegal contract, made in violation of the statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer." (footnote omitted).

34. 237 A.2d at 837. The question of whether the rule should be extended to violations arising after the lease was started was one of the problems in Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

35. D.C. Housing Regs. § 2902.1(a) (1970).

36. 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969). See also Comment, Protection for Citizen Complaints to Public Authorities—Prohibition of Retaliatory Evictions: The case of Edwards v. Habib, 48 Neb. L. Rev. 1101 (1969). For a full discussion of the retaliatory eviction defense see Annot., 40 A.L.R.3d 753 (1971).

37. 397 F.2d at 699. Judge Wright stated: "It is true that in making his affirmative case for possession the landlord need only show that his tenant has been given the 30-day statutory notice . . . . But while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities." (footnote omitted). Cf. L'Orange v. Medical Protective Co., 394 F.2d 57, 63 (6th Cir. 1968) (attempt to cancel malpractice insurance because the insured had testified in a malpractice suit against a colleague covered by the same company held to be against public policy and a breach of contract).

38. 397 F.2d at 701.

39. Id. at 702 (footnote omitted). Since the Brown holding the Regulations have been amended to specifically prohibit the type of eviction attempted therein. See D.C. Housing Regs. § 2910(a) (1970); cf. Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967) (Florida statute which denied unemployment insurance to workers who were discharged in retaliation for having filed complaints of unfair labor practices struck down).

labor practice because he has done so on account of the employee's union activities."[40]

The *Edwards* court, although it chose a statutory basis for its holding, also considered, and apparently approved, constitutional arguments brought by Mrs. Edwards against the validity of retaliatory evictions.[41] Other courts have relied on constitutional grounds.[42] In *Hosey v. Club Van Cordlandt* the United States District Court for the Southern District of New York stated in dictum that a tenant has a first amendment right to discuss with other tenants the condition of the building and to encourage them to use legal means to remedy the situation, and that under the fourteenth amendment the state can take no action to prevent or penalize his exercise of those rights.[43] It further stated that a retaliatory eviction would be a state action and to allow it would be a violation of the fourteenth amendment.[44]

As discussed earlier, the traditional view was that leases gave rise to neither implied warranties of habitability nor of fitness for use.[45] However, in *Javins v. First National Realty Corp.*,[46] the United States Court of Appeals for the District of Columbia Circuit held that the District's housing regulations create such a warranty in all urban leases, with the standards of the warranty set by the regulations, and that a breach of the warranty "gives rise to the usual remedies for breach of contract."[47] The court, applying usual contract principles, held the tenant's obligation to pay rent to be "dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition."[48]

This decision thus extended the earlier *Southall Realty* ruling by requiring the landlord to substantially comply with the code not only at the beginning of

40. 397 F.2d at 702-03 (footnote omitted); see, e.g., John Hancock Mut. Life Ins. Co. v. NLRB, 191 F.2d 483 (D.C. Cir. 1951). The Edwards court thus did not establish any judicial presumption of an illegal motive. But see notes 59-61 infra and accompanying text.

41. 397 F.2d at 690-98; cf. Yates v. United States, 354 U.S. 298, 319 (1957).

42. See, e.g., Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969). But cf. Lindsey v. Normet, 405 U.S. 56 (1972) (though not involving retaliatory evictions this case strongly indicates that the landlord-tenant relationship should be governed by local law and not on a constitutional basis). For a discussion of the constitutional question see 23 Ark. L. Rev. 122 (1969); 3 Harv. Civ. Rights-Civ. Lib. L. Rev. 193 (1967).

43. 299 F. Supp. at 504; cf. Thorpe v Housing Authority, 386 U.S. 670, 679 (1967) (Douglas, J., concurring) (a tenant in a public housing project could not be evicted for the exercise of her right of association protected by the first and fourteenth amendments).

44. 299 F. Supp. at 505-06; cf. Griffin v. Maryland, 378 U.S. 130 (1964) (involving state enforcement of trespass laws designed for private discrimination).

45. See note 13 supra.

46. 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

47. Id. at 1073. See also Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). For a full discussion of the law of implied warranties of habitability in leases see Annot., 40 A.L.R.3d 646 (1971). See also 40 Fordham L. Rev. 123 (1971); 39 Geo. Wash. L. Rev. 152 (1970).

48. 428 F.2d at 1082.

the lease period, but throughout the lease.[49] However, unlike *Southall Realty*, the *Javins* decision did not declare the lease contract void for noncompliance. Instead the tenant was given the right either to set off part of his rent as damages from the breach in an action for eviction based on nonpayment,[50] or to seek specific performance of the implied warranty of habitability.[51] The warranty provided by *Javins* has since been specifically provided for in the housing code.[52]

In *Robinson v. Diamond Housing Corp.*,[53] the United States Court of Appeals for the District of Columbia Circuit was faced with the question of whether a landlord who had been unsuccessful in attempting to evict a tenant for nonpayment of rent because of a *Southall Realty* defense, could, without any consideration of motive, automatically achieve the same result by serving a 30 day notice to quit. Judge Wright held that the retaliatory defense established in *Edwards*[54] should be available to those withholding rent under a successful *Southall Realty* defense, and that the tenant should be given the opportunity to present her case to the jury for a determination of the landlord's true subjective motivation.[55]

The court noted the factual differences between the *Edwards* and *Robinson* cases, but felt that they were not sufficiently relevant to take the principal case out of the general rule established in *Edwards*.[56] Insisting that the instant eviction was retaliatory, and that if allowed would have a chilling effect on future use of the private mechanisms provided by *Brown* and *Edwards* and by the housing code,[57] the court refused to limit *Edwards* to its facts. In making this determination, Judge Wright noted, with reference to the right to withhold rent:

> This right would be shallow indeed if the landlord were free to penalize its exercise by eviction. . . . Surely, then, the legislature no more intended to permit retaliatory evictions as punishment for rent withholding than it intended to permit such evictions as punishment for reporting housing code violations.[58]

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49. Id. at 1081. The court took notice of Southall Realty's reliance upon section 2501.

50. 428 F.2d at 1082-83.

51. Id. at 1082 n.61. See 39 Geo. Wash. L. Rev. 152, 159 n.69 (1970) where it is suggested that the court did not declare the lease void because of the fear that a tenancy at sufferance would be created which would allow eviction on 30 days notice. This problem was dealt with in Robinson. 463 F.2d at 862-63.

52. D.C. Housing Regs. § 2902.2 (1970).

53. 463 F.2d 853 (D.C. Cir. 1972).

54. 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).

55. 463 F.2d at 861. The Robinson court, as had the Edwards court, considered briefly the constitutional basis of preventing retaliatory evictions, but held that "it is unnecessary for us to reach the constitutional argument, since the legislative intent is now even clearer than it was when Edwards was decided." Id. at 863. The court then discussed § 2910(c) of the Regulations which prohibits retaliatory evictions for a tenant's good faith assertion of rights provided by § 2901 or § 2902 (§ 2902.1 codified the Brown rule). See note 35 supra. The court concluded that "[i]t is thus clear that the City Council has forbidden evictions in retaliation for assertion of a Southall Realty defense . . . ." 463 F.2d at 864.

56. Id. at 862-63.

57. Id.

58. Id. at 863.

The court also attempted to clarify those circumstances which would give rise to a presumption of retaliatory motive. Initially it noted that the defense is based upon the jury's determination of the landlord's motive—a determination which it recognized could in most instances be made only by examining the landlord's objective manifestations.[59] The court then reasoned that "when the landlord's conduct is 'inherently destructive' of tenants' rights, or unavoidably chills their exercise, the jury may . . . presume that the landlord intended this result."[60] Further, it held that an unexplained eviction after the successful assertion of a *Southall Realty* (or *Javins*) defense is inherently destructive and so gives rise to the presumption of the illegal purpose.[61]

The court next addressed the question of what the landlord must prove to rebut the presumption of illegal purpose. This was answered in terms of "substantial business reason." That is, the landlord must show that he was "motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed."[62] As an example of what would be considered a valid business reason the court posited the situation of a landlord forced to remove a unit from the market because his financial condition precluded the making of repairs required by the code.[63] Another example, according to the court, would be where a landlord chose to go out of business entirely. This example, however, was carefully circumscribed by adding that the landlord's absolute "right to discontinue rental of all his units in no way justifies a partial closing designed to intimidate the remaining tenants."[64]

The court further defined the "substantial business reason" test by applying it to the instant facts. It observed that, even if Diamond had asserted a valid business purpose, summary judgment would not have been warranted. In the first place, the final determination of whether the asserted reason actually exists is a question of fact for the jury.[65] In the second place, even if the jury finds that a valid reason does in fact exist, it may still decide that the landlord's true motivation was retaliatory, and judgment may be for the tenant.[66]

59. Id. at 865; see Ackerhalt v. Smith, 141 A.2d 187, 189 (D.C. Mun. Ct. App. 1958).

60. 463 F.2d at 865; cf. NLRB v. Brown, 380 U.S. 278, 287 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 45 (1954).

61. 463 F.2d at 866. But see note 40 supra. The Edwards court did not make a presumption of an illegal motive.

62. 463 F.2d at 865. The court emphasized "that the landlord's desire to remove a tenant who is not paying rent is not such a legitimate purpose." Id.; cf. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967).

63. 463 F.2d at 866. The court emphasized that inability to repair is not the only legitimate business reason for taking a unit off the market and the legitimacy of other reasons should be decided case by case. Id. at n.61.

64. 463 F.2d at 867 (footnote omitted). The court relied on the Supreme Court's holding in Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 274-75 (1965).

65. 463 F.2d at 865.

66. Id. Where the jury finds several possible motives it has the duty of weighing them and determining which was the true cause. Cf. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268-69 (1965).

Another problem facing the court was whether allowing Mrs. Robinson to remain indefinitely in the unit without paying rent would be inconsistent with the public policy against long-term occupancy of substandard housing.[67] The court concluded that its decision would not have such a result.[68] In the opinion of the court, substandard housing can be divided into two categories. There are those situations in which the landlord has a legitimate business reason for removing the unit from the market. In this category public policy will be served by allowing the landlord to evict his tenants. There is another category in which the landlord is able to repair the premises, but is unwilling to do so. In this situation he has constructively evicted the tenant by making the premises untenantable. He has thus breached the implied warranty of habitability provided by *Javins* and by the code, so that the tenant may bring an action for specific performance.[69]

In a dissenting opinion, Judge Robb opposed the majority presumption of illicit purpose and its imposition of the burden of proving a substantial business reason for removing the unit from the market.[70] He believed that the decision would, in effect, put the landlord's business at the discretion of the jury.[71] The ultimate effect, he felt, would be to discourage investment in rental housing, rather than, as the majority suggested, to promote such housing.[72]

The holding of the court concerning the retaliatory eviction defense certainly appears to be a logical extension of past decisions and the housing code. The trend toward private remedies for substandard housing is strong and the District of Columbia Circuit seems to be determined to remain at the forefront. There is, however, one potential danger—landlord abandonment. It may well prove to be the case that the cost of strict compliance with the provisions of the housing code will simply drive low-cost housing from the market. This is certainly one of the factors which will have to be monitored in evaluating the long term effect of this decision.

There is another problem which must be considered. Judge Robb's fears—that the court has placed such an oppressive burden of proof upon the landlord that it will be virtually impossible for him to prove proper motive, and that the

67. 463 F.2d at 867-68.

68. Id. at 868; see D.C. Housing Regs. § 2301 (1955). Judge Wright also makes the assumption that despite the strict enforcement of the regulations "most landlords will find ownership of property sufficiently profitable . . . to remain in business." 463 F.2d at 860. But see National Comm'n on Urban Problems, Report to the Congress and to the President of the United States, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. (1968). The Commission in discussing housing codes stated "that strict enforcement on a mass basis would lead to mass abandonment of properties by their owners and/or higher rents with resultant occupant displacement." Id. at 286 (footnote omitted).

69. 463 F.2d at 869; see 428 F.2d at 1082 n.61. The court seemed to ignore the situation in which the landlord cannot make the repairs, but in which the jury finds his true motive was retaliatory. In such a case the landlord cannot evict the tenant, but an action by the tenant for specific performance would be ineffective.

70. 463 F.2d at 871.

71. Id.

72. Id. at 872.

landlord is in fact subject to virtually unlimited jury discretion—may be well founded. Only future cases will show how wisely juries use this power. This, and a clarification of what courts will accept as legitimate and substantial business reasons may well determine whether this case will, in the long run, improve housing conditions or, instead, discourage future investment.

Patent Law—Sale of Partially Assembled Components of a Patented Device For Final Assembly in a Foreign Country Does Not Infringe Domestic Combination Patent.—Plaintiff obtained an injunction in the United States District Court for the Eastern District of Louisiana against infringement by defendant of plaintiff's patented shrimp deveiner.[1] Plaintiff's patent was for the combination of the components that made up the device—none of the individual parts were themselves patentable.[2] Defendant requested a modification of the injunction to establish that he was not prohibited from manufacturing in the United States and exporting to Brazil, the unassembled parts that would comprise plaintiff's machine.[3] The district court[4] held that modification of the injunction was unnecessary since the law clearly established that an injunction against manufacturing and selling did not include a prohibition on exporting the unassembled parts.[5] The United States Court of Appeals for the Fifth Circuit, reversed.[6] It rejected the district court's analysis of what consti-

1. Laitram Corp. v. Deepsouth Packing Co., 301 F. Supp. 1037 (E.D. La. 1969).

2. The court determined that plaintiff held two valid patents. The first, granted in 1954, was for a device which utilized water pressure, natural forces of gravity and sharpened blades, to slit open the curved backs of shrimp thus exposing their unpalatable intestines—commonly called veins. This patent expired shortly before argument before the Supreme Court.

The second, granted in 1957, was for a "tumbler," a device consisting of a cylindrical steel drum whose sides have been perforated resulting in numerous hooked "lips" which fully remove the exposed shrimp veins to complete the deveining process.

There was nothing original about any of the parts making up the machine. In fact the essence of the tumbler, perforated sheet metal, is a standard punch lip material ordered by plaintiff from an illustrated commercial catalog. Id.

3. All of the parts were produced in the United States but not all of the parts were assembled in the United States to complete the apparatus. Defendant shipped the several sections of the device in separate crates but admitted that the entire machine could then be fully assembled in less than an hour. In writing to his foreign customer, defendant said: " 'We are handicapped by a decision against us in the United States. This was a very technical decision and we can manufacture the entire machine without any complication in the United States, with the exception that there are two parts that must not be assembled in the United States, but assembled after the machine arrives in Brazil. This assembly will take less than one hour.' " 443 F.2d 936, 938 (5th Cir. 1971).

4. Laitram Corp. v. Deepsouth Packing Co., 310 F. Supp. 926 (E.D. La. 1970).

5. "Every court of appeal that has considered an actual situation in any way resembling the one here proposed has held that the sale of a product for export in unassembled form is not an infringement of the domestic patent." Id. at 927.

6. Laitram Corp. v. Deepsouth Packing Co., 443 F.2d 936 (5th Cir. 1971).

tutes patent infringement according to section 271 of title 35, United States Code,[7] and held that by "substantially manufacturing" the machine in the United States, defendant had infringed plaintiff's patent.[8] The United States Supreme Court, citing this country's "historical antipathy to monopoly," which would require literal interpretation of patent statutes and strict construction of patent rights, held that defendant's actions did not constitute infringement and it reversed.[9] *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972).

"Under the common law the inventor had no right to exclude others from making and using his invention."[10] This situation was the outgrowth of the common law aversion to monopoly[11] and the common law right possessed by every member of the community to carry on any trade or business in any manner or way that he so desired.[12] During the sixteenth century English monarchs began granting exclusive privileges to manufacturers and craftsmen in an effort to induce skilled aliens to come to England and help stimulate the British industrial base which at this period lagged far behind the continental countries in development.[13]

Since these "privileges" created monopolies,[14] a continuing struggle evolved

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7. 35 U.S.C. § 271 (1970) provides in pertinent part: "Infringement of patent. (a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent. (b) Whoever actively induces infringement of a patent shall be liable as an infringer. (c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

8. The court took issue with the reasoning of the district court that a machine is not "made" in the United States until it is in fully assembled form. The court said: "The word 'makes' should not be given an artificial, technical construction but should be accorded a construction in keeping with the ordinary meaning of that term. . . . We hold that 'makes' means what it ordinarily connotes—the substantial manufacture of the constituent parts of the machine." 443 F.2d at 938-39. "To hold otherwise would subvert the Constitutional scheme of promoting 'the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' U.S. Const. art. I § 8 cl. 8." Id. at 939.

9. The Supreme Court, interpreting the Constitutional provision for patents as a mandate to Congress to set up whatever procedures it deemed necessary, felt itself limited to the construction of the 1952 statute, giving great weight to what the Court saw as legislative intent. For a skeptical approach as to the true intent of the legislature, see Rich, Congressional Intent —Or, Who Wrote the Patent Act of 1952?, Pat. Procurement & Exploitation 61 (1963).

10. 406 U.S. at 525-26.

11. "'At common law no man could be prohibited from working in any lawful trade, for the law abhors idleness . . . and therefore the common law abhors all monopolies which prohibit any from working in any lawful trade . . . .'" H. Fox, Monopolies and Patents 90, n.15 (1947) [hereinafter cited as Fox].

12. Id. at 9.

13. Id. at 24-56.

14. Id.

between the monarchs, who wished to develop the realm by granting monopolies, and Parliament, which was striving to preserve the free trade guarantees of Magna Carta[15] and the statutes which followed.[16]

In 1624 Parliament passed the Statute of Monopolies which declared all monopolies contrary to the laws of England,[17] but provided an exception: the granting of limited patent rights to meritorious inventors.[18] This exception was the underlying rationale of the American constitutional[19] provision for patents.[20] The conflict between the proponents of stimulating inventiveness through limited patent rights, and the opponents of all monopolies, continues to pervade judicial opinions concerning patent infringements and patent rights.[21]

15. "The declaration of Magna Carta that all merchant strangers in the realm should be able to buy and sell their goods by the old and rightful customs, is itself an illustration of the early attempts at limitation of the prerogative right of granting monopolies . . . ." Id. at 58-59.

16. For a discussion of the statutes involved see id. at 59.

17. Id. at 113-15.

18. "'That any declaration beforementioned shall not extend to any letters-patent or grants of privilege for the term of fourteen years, or under, hereafter to be made of the sole working or making of any manner of new manufacture within this realm, to the true and first inventor of such manufactures, which others, at the time of making such letters-patent and grant, shall not use . . . .'" F. Vaughan, Economics of Our Patent System 18 (1925) [hereinafter cited as Vaughan].

In the years preceding the Statute of Monopolies the courts had already distinguished the granting of patents to reward inventiveness from the royal grants of industrial monopolies. Thus, Lord Coke said: "'Now, therefore, I will show you how the judges have heretofore allowed of monopoly-patents,—which is that when any man by his own charge and industry, or by his own wit or invention doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before; and that for the good of the realm;—that in such cases the king may grant to him a monopoly-patent . . . .'" Id. at 17-18.

19. U.S. Const. art. I, § 8, cl. 8.

20. Fox 191-94; Vaughan 18-20. For a discussion of the development of the patent system see Hulme, The History of the Patent System under the Prerogative and at Common Law, 16 L.Q. Rev. 44 (1900); Hulme, On the Consideration of the Patent Grant, Past and Present, 13 L.Q. Rev. 313 (1897); Hulme, The History of the Patent System under the Prerogative and at Common Law, 12 L.Q. Rev. 141 (1896). For a discussion of the historical development of the American Patent system see Federico, State Patents, 13 J. Pat. Off. Soc'y 166 (1931); Prager, Historic Background and Foundation of American Patent Law, 5 Am. J. Legal Hist. 309 (1961).

21. This conflict may also be seen in the related issue of defining the status of the patent right under the federal patent statutes and the interpretation of the intent of the Constitutional mandate in article III. See Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972); A. & P. Tea Co. v. Supermarket Corp., 340 U.S. 147, 154 (1950). Thus, Fox, for example, viewed the Constitutional mandate as being a new concept in patent rights. "[T]he right to obtain a patent is here expressed as being no longer a matter of grace or expediency but a right to which, upon fulfillment of the prescribed conditions, any person is entitled." Fox 193. While Justice Douglas on the other hand, the outspoken foe of monopolies, viewed it as a limited privilege and as a mandate to apply a strict Constitutional standard. In his concurring opinion in the A. & P. case, he said: "Every patent is the grant of a privilege of

Ever since *Brown v. Duchesne*,[22] the Supreme Court has clearly stated that there is no common law property right in one's inventions, and any right to the exclusive use of one's creation must be derived from the Constitution and statutory provisions for patent rights.[23] The Court in *Brown* also affirmed the principle that the patent rights were limited to the territorial jurisdiction of the United States.[24] In *Bullock Electric and Manufacturing Co. v. Westinghouse Electric and Manufacturing Co.*,[25] this doctrine was clarified by the court when it held:

> The monopoly of a patent extends to the making or selling, as well as the using, of the patented device within the United States....
>
> While it is true that the monopoly of the plaintiff's patents did not extend beyond the limits of the United States, yet it would be no defense to say that the patented article had been made in the United States only for the purpose of being sold and used in a country to which the protection of the laws of the United States did not extend. The patentee is entitled to monopolize the *making of his device* in the United States as well as a monopoly of there selling or using it.[26]

The court found on the facts in this case that there had been no infringement of the combination patent when defendant manufactured a part of the combination in the United States and exported it to be integrated into the complete apparatus in Canada, where the completed machine was sold. The court held that since the combination would only be duplicated in Canada, where the United States patent laws had no effect, the intent of defendant to aid in the construction of the machine was no more of an infringement than if defendant had sent the part to someone licensed by the patentee to manufacture the machine.[27]

Early in the development of patent law the Supreme Court limited the scope of combination patents.[28] In *Prouty v. Draper*,[29] plaintiffs claimed damages for

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exacting tolls from the public." 340 U.S. at 154. See also Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944). For a discussion of the various opinions see 20 Am. U.L. Rev. 175 (1970).

22. 60 U.S. 183 (1856).

23. "But the right of property which a patentee has in his invention, and his right to its exclusive use, is derived altogether from these statutory provisions . . . and that his rights are to be regulated and measured by these laws, and cannot go beyond them." Id. at 195.

24. Id. at 195-96. The Court said: "[T]he use of [the patent] outside of the jurisdiction of the United States is not an infringement of his rights . . . ." Id. This jurisdictional limitation has been codified at 35 U.S.C. § 154 (1970) which states in pertinent part: "Every patent shall contain a short title of the invention . . . of the right to exclude others from making . . . throughout the United States . . . ."

25. 129 F. 105 (6th Cir.), cert. denied, 194 U.S. 636 (1904).

26. Id. at 109 (emphasis added).

27. Id. at 111-12.

28. E.g., Clark Thread Co. v. Willimantic Linen Co., 140 U.S. 481, 492 (1891); Prouty v. Draper, 41 U.S. 335 (1842). For an analysis of the criteria necessary to constitute a combination and a discussion of the various elements therein see J. Hayes, The Nature of Patentable Invention 90-102 (1948).

29. 41 U.S. 335 (1842).

the infringement of their patented plough by defendant who had constructed a plough using at least two of the three major components of plaintiffs' machine. The Court held that since plaintiffs' patent was for the combination of all the elements, the use of two out of three of these elements would not constitute infringement.[30] The Court went on to state:

The patent is for a combination. . . . None of the parts referred to are new, and none are claimed as new . . . . The use of any two of these parts only, or of two combined with a third, which is substantially different, in form, . . . is, therefore, not the thing patented. It is not the same combination, if it substantially differs from it in any of its parts.[31]

In *Mercoid Corp. v. Mid-Continent Investment Co.*,[32] the patentee of a combination patent attempted to control the sale of one of the unpatentable components. The Court overruled the holding of *Leeds and Catlin Co. v. Victor Talking Machine Co.*,[33] which offered "authority for the conclusion that he who sells an unpatented part of a combination patent for use in the assembled machine may be guilty of contributory infringement."[34] Justice Douglas, writing for the majority, said: "The result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement."[35] In effect, the *Mercoid* court ruled that "if there is no [direct] infringement of a patent there can be no contributory infringer."[36]

When Congress enacted the Patent Act of 1952[37] the status of the *Mercoid* case was put into question. However, in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*,[38] the Court held that the 1952 statute left the *Mercoid* decision intact.[39] The Court read section 271(c),[40] defining contributory infringement, as being applicable only in cases where there would also be a direct infringement.[41]

30. Id. at 340-41.
31. Id. at 341.
32. 320 U.S. 661 (1944).
33. 213 U.S. 301 (1909).
34. 320 U.S. at 668.
35. Id. at 669.
36. Id. at 677.
37. Act of July 19, 1952, Pub. L. No. 593, 66 Stat. 729 (codified at 35 U.S.C. §§ 1-293 (1970)).
38. 365 U.S. 336 (1961).
39. Id. at 341, 365 n.8 (Brennan, J., concurring). For a discussion of the Aro-Mercoid decisions, the demise of the contributory infringement doctrine, and the effect of the 1952 Statute, see Glaser, The Expansion of Protection for Patentee—Proceeding Against the Inducing or Contributory Infringer, 9 Pat. L. Ann. 63 (1971); Hildreth, Contributory Infringement, 44 J. Pat. Off. Soc'y 512 (1962); Comment, Infringement Under Section 271(b) of 1952 Patent Act, 7 St. Louis U.L.J. 98 (1962); 3 B.C. Ind. & Com. L. Rev. 94 (1961); 41 B.U.L. Rev. 547 (1961); 49 Calif. L. Rev. 988 (1961); 37 Notre Dame Law. 263 (1961); 1961 U. Ill. L. Forum 343; 7 Vill. L. Rev. 149 (1961).
40. See note 7 supra.
41. The Court said: "It is plain that § 271(c)—a part of the Patent Code enacted in 1952—made no change in the fundamental precept that there can be no contributory infringe-

Since there can be no contributory infringement unless there is a direct infringement,[42] and there can be no infringement outside the territorial jurisdiction of the United States,[43] in determining whether there is an infringement of a combination patent by one who manufactures and partially assembles the components in the United States for export sale, the primary question is whether there has been a direct infringement in the United States.[44] This precise question was answered by the court in *Radio Corp. of America v. Andrea*.[45]

In *Radio Corp. of America v. Andrea,* plaintiff held valid combination patents[46] on certain electrical circuits, used in radio receiving sets, involving methods "of generating or producing alternating currents by 'causing current to flow' in one of two coupled circuits . . ."[47] to provide power to operate a radio receiver. Defendant manufactured radio receivers exclusive of the vacuum tubes, which defendant bought on the open market. "To operate the receiver, it [was] necessary to insert the vacuum tubes into the sockets provided for them . . . ."[48]

The court determined that plaintiff's combination was not achieved until there was an actual physical connection between the terminals of the circuits of the receiver manufactured by defendant, and the electrodes of the vacuum tubes; "that is, until the tubes [were] inserted in the sockets of the receiver,"[49] and potentially able to make use of the current provided through plaintiff's patented methods of electrical conduction.[50] Defendant packaged the tubes and the receiver in one carton, but the tubes were separately wrapped and were not attached to the electrodes. The radio was fully assembled, by inserting the tubes, outside the territorial jurisdiction of the United States.

The court held that there was no direct infringement of plaintiff's patent since the radio receiver was never in fully assembled form in the United States.[51]

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ment in the absence of a direct infringement. That section defines contributory infringement in terms of direct infringement—namely the sale of a component of a patented combination or machine for use 'in an infringement of such patent.'" 365 U.S. at 341-42.

42. Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 526 (1972).

43. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U.S. 641 (1915); Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co., 129 F. 105 (6th Cir.), cert. denied, 194 U.S. 636 (1904); see note 25 supra.

44. Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 527 (1972).

45. 79 F.2d 626 (2d Cir. 1935).

46. The two claims said to have been infringed were as follows: "'25. Means for producing sustained electrical oscillations comprising an oscillatory circuit having two electrodes in an exhausted receptacle and a second circuit coupled thereto having a conducting body interposed between said electrodes.'" Id. at 628. "'19. In an electrical system, an evacuated vessel, hot and cold grid and plate electrodes therefor, a circuit connecting each of said cold electrodes with said hot electrode, said circuits being associated to react upon one another.'" Id.

47. Id. at 627.

48. Id.

49. Id. at 628.

50. Id. at 627-29.

51. Id. at 628. The court also held that export sale of all of the unassembled parts of a combination patent was also not contributory infringement. Id. This aspect of the unassembled

It said:

No wrong is done the patentee until the combination is formed. His monopoly does not cover the manufacture or sale of separate elements capable of being, but never actually, associated to form the invention. Only when such association is made is there a direct infringement of his monopoly, and not even then if it is done outside the territory for which the monopoly was granted.[52]

Upon rehearing in 1937[53] defendant admitted having initially connected the circuits and the vacuum tubes in order to test the receivers, and having then disassembled the radio, separately wrapped the tubes and the receivers and exported them. The court said:

In the instant case the invention is defined as a combination of vacuum tubes with circuits. Defendants may not be relieved of infringement merely because the tube electrodes are physically disconnected from the circuits at the moment of sale.[54]

An argument has been made[55] that in modifying the earlier injunction the court did not solely rely on the technicality of the single instance of complete assemblage, rather that the court was reversing its previous decision and finding infringement because of the status of the parts themselves at the time of sale.[56] This interpretation of the 1937 decision was supported by the words of Judge Swan, the author of the 1935 decision, in his dissent to the 1937 decision. He said:

In holding that the sale in this country of the disassembled parts of the invention for assembly and use abroad is a direct infringement, I think we overrule our prior decision in Radio Corporation v. Andrea.[57]

The cases following the two *Andrea* decisions, however, distinguished the two holdings on the grounds that there had been an instance of complete assemblage, and considered the 1935 *Andrea* decision as the law, untouched by the 1937 holding or Judge Swan's remarks.[58]

In *Cold Metal Process Co. v. United Engineering and Foundry Co.*,[59] the court stated:

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components export sales cases need no longer be delved into in light of the Mercoid—Aro decisions.

52. Id.

53. Radio Corp. of America v. Andrea, 90 F.2d 612 (2d Cir. 1937).

54. Id. at 614.

55. This was the argument of the court of appeals in Laitram Corp. v. Deepsouth Packing Co., 443 F.2d 936 (5th Cir. 1971), rev'd, 406 U.S. 518 (1972), and of the dissent in the Supreme Court in Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 532-33 (1972) (dissenting opinion).

56. The court said: "The purchaser to connect the tube needs only insert it in the socket. No adjustment is required; no screw or nut need be tightened. Where the elements of an invention are thus sold in substantially unified and combined form, infringement may not be avoided by a separation or division of parts which leaves to the purchaser a simple task of integration." 90 F.2d at 613.

57. Id. at 615 (dissenting opinion).

58. For a full discussion of this concept see text accompanying notes 59-64 infra.

59. 235 F.2d 224 (3rd Cir. 1956).

We are in full accord with the rule thus laid down in the Andrea case .... Its force, in our view, is not impaired by the later opinion of the court after final hearing in the same case . . . .[60]

In *Hewitt-Robins Inc. v. Link-Belt Co.*,[61] the court relied on the clear precedents provided by the *Cold Metal* and 1935 *Andrea* decisions,[62] in holding:

[T]he manufacture and sale in this country of parts of an apparatus to be assembled outside the territorial limits of the United States does not infringe a combination patent limited to the embodiment of those parts as elements in combination.[63]

The *Hewitt* court quoted the analysis by the *Cold Metal* court of the effect of the 1937 *Andrea* holding on the 1935 decision and agreed that the two holdings were distinguishable on the basis of the evidence in the 1937 rehearing that there had been a fully assembled radio for testing purposes.[64]

When the 1952 patent statute was under consideration in Congress,[65] a sponsor of the bill said, in a Congressional debate prior to passage, that it merely codified existing case law.[66] The assumption was made that the case law codified in the 1952 statute was the 1935 *Andrea* decision.[67] Since any patent rights plaintiff may have are "derived from its patent grant, and thus from the patent statute,"[68] the state of the law on these types of combination patent infringements depends somewhat on what law was codified in 1952, and the concomitant question of whether the 1935 *Andrea* decision is the correct case law to be followed.

The district court in *Laitram Corp. v. Deepsouth Packing Co.*,[69] held that the 1937 *Andrea* decision did not overrule the 1935 holding[70] and also that the 1935 decision was the law to be followed.[71]

The law would have remained clear on this point: that there is no infringement unless there is final assembly in the United States, had not the court of appeals in *Laitram* unearthed the 1937 *Andrea* decision and set the scene for questioning

60. Id. at 230.

61. 371 F.2d 225 (7th Cir. 1966).

62. Id. at 229-30.

63. Id. at 229.

64. Id. at 230.

65. 98 Cong. Rec. 9323 (1952).

66. Id. (remarks of Senator McCarran); see Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 519-30 (1972).

67. 406 U.S. at 530 n.10.

68. Id. at 526.

69. 310 F. Supp. 926 (E.D. La. 1970).

70. Id. at 928. The court said: "The decree was then modified although Judge Swan dissented on the basis of the original opinion. Plaintiffs argue that Judge Swan was correct in saying that the prior opinion was in effect overruled; a majority of that court did not think so." Id.

71. "'We read Andrea as standing for the proposition that a combination claim of a United States patent is not infringed absent presence of the combination in assembled form within the United States.'" Id. at 928 (italics omitted) (quoting Hewitt-Robins, Inc. v. Link-Belt Co., 371 F.2d 225, 229 (7th Cir. 1966)).

whether it had in fact left the 1935 *Andrea* decision "unimpaired."[72] The court also questioned whether the statements in Congress concerning the 1952 statute could still be construed as legislative intent to codify that 1935 decision.[73] The court of appeals said that the issue was one of first impression in that circuit and that the only other decisions applicable were *Andrea, Cold Metal* and *Hewitt*. The latter two cases, the court pointed out, were based on *Andrea*.[74] The court summed up the *Andrea* 1935 reasoning:

> Since the machine was not completed within the United States, there can literally be no infringement. "No wrong is done the patentee until the combination is formed."[75]

The court then went on to reject this reasoning as being antagonistic to the constitutional mandate providing for patent grants, and as an erroneous construction of the relevant statute, section 271(a).[76] It said:

> Such a dependence on technicality would require us to countenance obvious schemes, perhaps as simple as omitting an important screw, designed to evade the mandate of § 271(a). . . . We hold that "makes" means what it ordinarily connotes—the substantial manufacture of the constituent parts of the machine.[77]

The court did not set minimum guidelines for what would constitute infringement but said:

> [W]hen all the parts of a patented machine are produced in the United States and, in merely minor respects, the machine is to be finally assembled for its intended use in a foreign country, that the machine is "made" within the United States.[78]

Thus, the court of appeals in reversing the district court's decision urged a test of substantiality over a test of technicality in considering what the word "makes" in section 271(a) means.[79]

The issue facing the Supreme Court[80] was what practical consideration was to be given to section 271(a). The Court said:

> Thus, in order to secure the injunction it seeks, Laitram must show a § 271(a) direct infringement by Deepsouth in the United States, that is, that Deepsouth "makes," "uses," or "sells" the patented product within the bounds of this country. . . .

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72. The court had hinted at this earlier in Kirby v. United States, 297 F.2d 466 (5th Cir. 1961). The court said: "We do not pass on the taxpayer's legal contention that in the case of a combination patent there is no infringement until all elements are finally brought together in workable shape, and if that is all done in a foreign country after they are all manufactured and shipped from the United States there is no violation of a United States patent. The principal cases relied upon by him in support of this thesis are [Andrea and Cold Metal]. But see the second appearance of . . . Andrea." 297 F.2d at 470 n.2 (citations omitted).
73. 406 U.S. at 530-31.
74. 443 F.2d at 938.
75. Id.
76. Id. at 939; see note 7 supra.
77. 443 F.2d at 939.
78. Id.
79. See note 33 supra.
80. 406 U.S. 518 (1972).

The sales question thus resolves itself into the question of manufacture: did Deepsouth "make" (and then sell) something cognizable under the patent law as the patented invention, or did it "make" (and then sell) something that fell short of infringement?[81]

The Court held that absent new Congressional action, the law as stated in *Andrea* 1935 was to be followed,[82] and that the 1952 statute did indeed codify that very decision.[83] The Court dismissed the lower court's argument that the 1935 decision did not conform to the intent of article I, section 8, clause 8 of the Constitution:

[T]he Constitution is permissive, and the sign of how far Congress has chosen to go can come only from Congress. We are here construing the provisions of a statute passed in 1952.[84]

The *Laitram* Court left the 1935 *Andrea* decision fully intact, and by rejecting the criticisms of the 1935 holding levied by the court of appeals, firmly established that 1935 *Andrea* was the law and that this decision was codified by the 1952 statute.[85]

The scope of the Court's decision in *Laitram* was limited. This becomes clear by examining the traditional tests applied by the courts in dealing with infringement challenges to devices which are not exact reproductions of patented devices. The first is the court-made doctrine of equivalents, applied in cases where the challenged device performs substantially in the same way to achieve the same result as the patented one, but has minor alterations.[86] The leeway granted the patentee concerning what constitutes "substantially the same performance" depends on the degree of invention and other relevant factors.[87] While this doctrine applies to combination patents it is usually narrowly construed, giving the patentee a small range wherein to prove equivalent operation.[88] The second

81. Id. at 527.

82. Id. at 529.

83. Id. at 530.

84. Id.

85. At the foundation of the Court's opinion was the anti-monopoly viewpoints shared by the majority; see note 22 supra. In Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 816 (1945), the Court said: "[A] patent is an exception to the general rule against monopolies . . . . The . . . consequences of a patent . . . give the public a paramount interest in seeing that . . . such monopolies are kept within their legitimate scope." In reference to this point the Court said in Blonder-Tongue Lab., Inc. v. Univ. of Ill. Foundation, 402 U.S. 313, 343 (1971), "One obvious manifestation of this principle has been the series of decisions in which the Court has condemned attempts to broaden the physical or temporal scope of the patent monopoly." This attitude of the Court prompted Mr. Justice Jackson to say: "But I doubt that the remedy for such Patent Office passion for granting patents is an equally strong passion in this Court for striking them down so that the only patent that is valid is one which this Court has not been able to get its hands on." Jungersen v. Ostby & Barton Co., 335 U.S. 560, 572 (1949) (dissenting opinion).

86. Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605 (1950).

87. Id. at 608-09.

88. Texstream Corp. v. Blanchard, 352 F.2d 983 (5th Cir. 1965), cert. denied, 387 U.S. 936 (1967); Morley Sewing Mach. Co. v. Lancaster, 129 U.S. 263 (1889); Clough v. Barker,

test concerns challenged devices that omit an element of a combination and do not replace it with its equivalent. Since all elements of a combination patent as issued are considered essential,[89] any omission of a claimed element in the combination will preclude infringement.[90] The *Laitram* decision established a third test, to be applied in hybrid cases—where the partially assembled device is substantially the same as the completed device, but where final assembly is lacking. The substantiality test used in the doctrine of equivalents dealing with challenged devices that are whole was urged by the court of appeals for application in the unassembled component cases as well.[91] The Supreme Court, however, preferred the technicality test, and thus significantly limited the area in which a combination patentee can claim infringement.[92]

Given the coexistence and continued vitality of the substantiality and technicality tests the *Laitram* decision has no effect in the area of pioneer patent cases where the test of substantiality is used. Even within the realm of unassembled combination patents, the decision is limited to the export sale and foreign assembly situation. This is so because manufacture and sale in the United States of unassembled components of a combination patent to be assembled within the United States has been held to be not only contributory infringement but direct infringement as well.[93] Although limited in scope, the decision firmly and clearly establishes that short of final assembly, any degree of assemblage of the components of a combination patent for export sale and final "operative" assembly, is not infringement of the patent. The 1935 *Andrea* decision, where final assembly could have been accomplished by the simple insertion of the vacuum tubes, is an even better example of the extent to which this rule will be applied, than the *Laitram* case where an hour's time was required for final assembly.

While the *Laitram* holding practically nullifies any advantage the combination patentee may have had regarding foreign markets, he still has recourse to foreign

106 U.S. 166 (1882); Wicke v. Ostrum, 103 U.S. 461 (1880); Imhaeuser v. Buerk, 101 U.S. 647 (1879); Ives v. Hamilton, 92 U.S. 426 (1875); FMC Corp. v. F.E. Myers & Bro., 384 F.2d 4 (6th Cir. 1967), cert. denied, 390 U.S. 988 (1968); Pratt & Whitney Co. v. United States, 345 F.2d 838 (Ct. Cl. 1965).

89. Keating v. Stearnes Imperial Co., 347 F.2d 444 (7th Cir. 1965); McCullough Tool Co. v. Well Surveys, Inc., 343 F.2d 381 (10th Cir. 1965), cert. denied, 383 U.S. 933 (1966); Reed v. Parrack, 276 F.2d 784 (5th Cir. 1960).

90. Cimiotti Unhairing Co. v. American Fur Ref. Co., 198 U.S. 399 (1905); Roller Mill Patent, 156 U.S. 261 (1895); Weatherhead v. Coupe, 147 U.S. 322 (1893); Phoenix Caster Co. v. Spiegel, 133 U.S. 360 (1890); Forncrook v. Root, 127 U.S. 176 (1888); Yale Lock Mfg. Co. v. Sargent, 117 U.S. 373 (1886); Wilcox Mfg. Co. v. Eastern Gas & Fuel Ass'n, 400 F.2d 960 (4th Cir. 1968), cert. denied, 393 U.S. 1051 (1969); FMC Corp. v. F.E. Myers & Bro., 384 F.2d 4 (6th Cir. 1967), cert denied, 390 U.S. 988 (1968); Keating v. Stearnes Imperial Co., 347 F.2d 444 (7th Cir. 1965); Power Curbers Inc. v. E.D. Etnyre & Co., 298 F.2d 484 (4th Cir. 1962).

91. 443 F.2d at 939.

92. 406 U.S. at 531.

93. Metal Arts Co. v. Fuller Co., 389 F.2d 319, 323 (5th Cir. 1968).

patent law to protect his invention.[94] The Court disapproved of plaintiff's not trying to avail himself of this opportunity and felt that plaintiff should have relied on his foreign patent instead of attempting to have the United States courts expand the jurisdiction of the patent laws.[95]

In those instances where the patentee is unable to resort to foreign patents for protection he is left with almost no chance of enjoining infringement of his patent unless he can show total duplication and assembly within the United States. In light of the Court's ruling, this will be very hard for the combination patentee to establish.[96]

Securities—Beneficial Owner of More Than 10% of a Corporation's Stock Allowed to Minimize Section 16(b) Liability by Disposing of His Holdings in Two Transactions.—On June 16, 1967, Emerson Electric Company, in a take-over attempt, acquired 13.2% of the outstanding Dodge Manufacturing Company common stock. The take-over attempt was stymied by Dodge shareholder approval of a defensive merger with Reliance Electric Company. Failing to gain control, Emerson thereafter sought to divest itself of its Dodge holdings.[1] Following the advice of its general counsel, Emerson, in an attempt to reduce liability for "short-swing" profits under section 16(b) of the Securities Exchange Act of 1934,[2] reduced its holdings to 9.96% in one transaction and

94. 406 U.S. at 531.

95. Id.

96. The dissent is significant and may prove to be the harbinger of a new Court approach to patent rights. The four Nixon appointees dissented, echoing for the most part the criticisms of the 1935 Andrea decision made originally by the court of appeals. Id. at 533-34 (dissenting opinion). They urged a test of substantiality, arguing that to do otherwise would violate the intent of the Constitution. Id. at 534 (dissenting opinion). They were also troubled by the position of the patentee as a result of the technical interpretation of § 271(a). While the Court in the past limited the scope of patents and often found no infringement, and the majority opinion is a continuation of the anti-monopoly limited patent rights approach of the Court, the dissent, advocates of stronger patent rights, may yet carry the day.

1. Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 420 (1972).

2. Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970). This section provides: "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

thereafter sold its remaining shares in a second transaction.[3] Since the two transactions had occurred within six months of the original purchase, Reliance demanded the profits realized in both transactions. To clarify its section 16(b) liability, Emerson sought a declaratory judgment in Federal court.[4] The court held that the sales, although technically discrete were part of "a single pre-determined plan . . . with the overall intent and purpose of avoiding Section 16(b) liability."[5] The court of appeals reversed, holding that since Emerson was no longer the beneficial owner of more than 10% of the outstanding Dodge stock at the time of the second sale, there could be no liability for short-swing profits.[6] The Supreme Court, in affirming the decision, reasoned that the intent to escape section 16(b) liability did not affect the express statutory requirement that a person own more than 10% of the stock at the time of both purchase and sale.[7] *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418 (1972).

Congressional investigations[8] leading to the enactment of the Securities Exchange Act of 1934[9] exposed widespread abuse by corporate officers, directors and large shareholders of inside information used in transactions involving the securities of their corporations. Designed to prevent this unfair use of inside information, section 16(b) allowed the issuer to recover the profits made by any beneficial owner of more than 10% of the outstanding stock, or by its directors or officers "from any purchase and sale, or any sale and purchase,

The term "beneficial owner" in section 16(b) refers to "[e]very person who [owns] more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12 of this title." Securities Exchange Act of 1934 § 16(a), 15 U.S.C. § 781 (1970). Although the terms "short-swing" and "insider" are consistently used in cases and commentaries, they lack explicit statutory definition. Under section 16(b), "short-swing" is generally understood to mean any transaction consisting of a purchase and sale or sale and purchase of an equity security within six months; an "insider" is understood to mean a director, officer or more-than-10% shareholder of the corporation whose stocks are being traded. See generally 15 U.S.C. § 78p(a) (1970); Meeker & Cooney, The Problem of Definition in Determining Insider Liabilities Under Section 16(b), 45 Va. L. Rev. 949, 963 (1959); Comment, Stock Exchanges Pursuant to Corporate Consolidation: A Section 16(b) "Purchase or Sale"?, 117 U. Pa. L. Rev. 1034 n.4 (1969).

3. 404 U.S. at 420.

4. Emerson Elec. Co. v. Reliance Elec. Co., 306 F. Supp. 588 (E.D. Mo. 1969), modified, 434 F.2d 918 (8th. Cir 1970), aff'd, 404 U.S. 418 (1972).

5. 306 F. Supp. at 592.

6. Pursuant to 28 U.S.C. § 1292(b) (1970), the district court certified the case for interlocutory appeal and the court of appeals granted leave to appeal. Emerson Elec. Co. v. Reliance Elec. Co., 434 F.2d 918 (8th Cir. 1970), aff'd, 404 U.S. 418 (1972).

7. 404 U.S. 418 (1972). Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of the case.

8. S. Rep. Nos. 792 & 1455, 73d Cong., 2d Sess. (1934); H.R. Rep. Nos. 1383 & 1838, 73d Cong., 2d Sess. (1934); Hearings on Stock Exchange Practices Before the Senate Comm. on Banking and Currency, 72d & 73d Cong. (1932-34).

9. Securities Exchange Act of 1934, Pub. L. No. 291, 48 Stat. 881 (1934) (codified, as amended, 15 U.S.C. §§ 78a-jj (1970)).

of any equity security . . . within any period of less than six months."[10] Underlying the section was the theory that if all possibility of profit were removed, insiders would discontinue such trading.[11]

Although section 16(b) seems uncommonly straightforward,[12] numerous cases have been necessary to determine the meaning of such terms as "purchase,"[13] "sale,"[14] "10% shareholder"[15] and "director."[16] In the usual purchase and sale transaction the objective criteria of section 16(b) have been stressed.[17] In *Smolowe v. Delendo Corp.*,[18] the first case to construe section 16(b), the defendant contended that since he had not actually made use of inside information, he was outside the scope of the section.[19] The court, however, adopting the objective test intended by the drafters of the Act,[20] stated that to require a "showing of an actual unfair use of inside information, would render senseless the provisions of the legislation . . . ."[21] Therefore, the *Smolowe* court reasoned that the legislative test must be applied without regard to actual intent.[22] This interpretation has been consistently followed,[23] and re-

10. Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970). During a hearing leading to the adoption of section 16(b), one of the drafters explained the operation of the section as follows: "You hold the director, irrespective of any intention or expectation to sell the security within 6 months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing." Hearings on Stock Exchange Practices Before the Senate Comm. on Banking and Currency, 73d Cong., 1st Sess., pt. 15, at 6557 (1934).

11. See Cook & Feldman, Insider Trading Under the Securities Exchange Act, 66 Harv. L. Rev. 385, 387 (1953); Comment, Stock Exchanges Pursuant to Corporate Consolidation: A Section 16(b) "Purchase or Sale"?, 117 U. Pa. L. Rev. 1034, 1035 (1969).

12. See Cook & Feldman, supra note 11, at 386; Meeker & Cooney, supra note 2, at 953.

13. See notes 25-32 infra and accompanying text.

14. Id.

15. See notes 35-37 infra and accompanying text.

16. See notes 33-34 infra and accompanying text.

17. See W. Painter, Federal Regulation of Insider Trading 24-52 (1968).

18. 136 F.2d 231 (2d Cir.), cert. denied, 320 U.S. 751 (1943).

19. Id. at 235.

20. See note 10 supra.

21. 136 F.2d at 236. In 1959, the Court of Appeals for the Second Circuit noted that "the statutory mandate . . . presupposes that, at some moment before making a sale of stock, the insider was in an official position which he could have used to influence the sale price." Adler v. Klawans, 267 F.2d 840, 848 (2d Cir. 1959) (emphasis omitted).

22. 136 F.2d at 236.

23. See, e.g., Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971), cert. granted sub nom. Kern County Land Co. v. Occidental Petroleum Corp., 405 U.S. 1064 (1972); Bershad v. McDonough, 428 F.2d 693 (7th Cir. 1970), cert. denied, 400 U.S. 992 (1971); Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969), cert. denied, 396 U.S. 1036 (1970); Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), cert. denied sub nom. Blau v. Petteys, 385 U.S. 1006 (1967); Western Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736 (8th Cir. 1965), cert. denied, 382 U.S. 987 (1966); Blau v. Max Factor & Co.,

cently the Court of Appeals for the Second Circuit in reaffirming the *Smolowe* doctrine stated: "The objective standard of Section 16(b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation."[24]

This strict liability originally encompassed many complex transactions as the courts liberally interpreted the meanings of "purchase" and "sale." In *Park & Tilford, Inc. v. Schulte*,[25] the defendant, a more-than-10% shareholder, within a six month period converted preferred stock into common and thereafter sold the common.[26] In an expansive reading of the statutory definition[27] of purchase,[28] the court held that any "conversion of preferred into common stock followed by a sale within six months is a 'purchase and sale' within the statutory language of § 16(b)."[29] Consistent with this reasoning, several courts have expanded the scope of section 16(b) liability to include the exercise of options and warrants.[30] However, acknowledging the harshness of such general definitions,[31] other courts have adopted a far more pragmatic interpretation of what will constitute a purchase. Under such scrutiny section 16(b) will be applied to unusual purchase and sale transactions *only* if the "possibility of speculative abuse" exists.[32]

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342 F.2d 304 (9th Cir.), cert. denied, 382 U.S. 892 (1965); Blau v. Lehman, 286 F.2d 786 (2d Cir. 1960), aff'd, 368 U.S. 403 (1962).

24. Bershad v. McDonough, 428 F.2d 693, 696 (7th Cir. 1970), cert. denied, 400 U.S. 992 (1971).

25. 160 F.2d 984 (2d Cir.), cert. denied, 332 U.S. 761 (1947).

26. Id. at 986-87.

27. The court stated: "Whatever doubt might otherwise exist as to whether a conversion is a 'purchase' is dispelled by definition of 'purchase' to include 'any contract to buy, purchase, or otherwise acquire.'" Id. at 987 (citation omitted); see Securities Exchange Act of 1934 §§ 3(a)(13) & (14), 15 U.S.C. §§ 78c(a)(13), (14) (1970). As late as 1965, the Court of Appeals for the Third Circuit still applied this broad interpretation stating that "the test employed in Park & Tilford employs the language of §§ 3(a)(13) and 3(a)(14) in the manner which we think Congress intended it to be used . . . ." Heli-Coil Corp. v. Webster, 352 F.2d 156, 164 (3d Cir. 1965). Contra, Blau v. Max Factor & Co., 342 F.2d 304 (9th Cir.), cert. denied, 382 U.S. 892 (1965); Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), cert. denied, 359 U.S. 927 (1959).

28. Securities Exchange Act of 1934, § 3(a)(13), 15 U.S.C. § 78c(a)(13) (1970) provides: "The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire."

29. 160 F.2d at 987.

30. E.g., Walet v. Jefferson Lake Sulphur Co., 202 F.2d 433 (5th Cir.), cert. denied, 346 U.S. 820 (1953); Blau v. Hodgkinson, 100 F. Supp. 361 (S.D.N.Y. 1951); Steinberg v. Sharpe, 95 F. Supp. 32 (S.D.N.Y. 1950), aff'd per curiam, 190 F.2d 82 (2d Cir. 1951). Contra, Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971), cert. granted sub nom. Kern County Land Co. v. Occidental Petroleum Corp. 405 U.S. 1064 (1972).

31. See Lowenfels, Section 16(b): A New Trend in Regulating Insider Trading, 54 Cornell L. Rev. 45 (1968).

32. E.g., Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971), cert. granted sub nom. Kern County Land Co. v. Occidental Petroleum Corp., 405 U.S. 1064

Apart from these attempts to restrict the types of purchase and sale situations to be included within the scope of section 16(b), federal courts have continued to otherwise expand its purview through liberal interpretation of the term "director"[33] to the extent that directors may be liable for profits realized in short-swing transactions although they were not directors at the time of purchase.[34] In a similar manner, the courts have liberally construed the definition of what constitutes 10% ownership "at the time of" purchase and sale. In *Stella v. Graham-Paige Motors Corp.*,[35] the court held that "at the time of" meant "simultaneous with" with the result that purchases which make a person a more-than-10% owner are included within the scope of section 16(b).[36] Moreover, a series of purchases pursuant to a single tender

(1972); Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), cert. denied sub nom. Blau v. Petteys, 385 U.S. 1006 (1967); Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), cert. denied, 385 U.S. 1002 (1967); Blau v. Max Factor & Co., 342 F.2d 304 (9th Cir.), cert. denied, 382 U.S. 892 (1965); Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), cert. denied, 359 U.S. 927 (1959). The rule as stated in 1966 was that "[i]f, from an examination of the particular facts, a transaction is of a kind that can possibly lend itself to the speculation encompassed by § 16(b) and falls within the broad definitions of 'purchase' and 'sale', it will be so defined. However, if an examination of the facts indicates that there is no possibility of abuse, there is no need to apply a § 16(b) label to the transaction." Petteys v. Butler, 367 F.2d 528, 535 (8th Cir. 1966), cert. denied sub nom. Blau v. Petteys, 385 U.S. 1006 (1967) (citation omitted). In 1966, SEC Rule 16b-9 exempted conversions from liability under section 16(b). 17 C.F.R. § 240.16b-9 (1972).

33. Under a "deputization" theory expounded by Judge Learned Hand in his concurring opinion in Rattner v. Lehman, 193 F.2d 564, 566-67 (2d Cir. 1952), a partnership could be held liable as an inside director if the firm deputized a partner "to represent its interests as a director on the board . . . ." Id. at 567. The "deputization" theory subsequently recognized the possibility of partnerships and corporations incurring section 16(b) liability. Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969), cert. denied, 396 U.S. 1036 (1970); Marquette Cement Mfg. Co. v. Andreas, 239 F. Supp. 962 (S.D.N.Y. 1965); see Blau v. Lehman, 368 U.S. 403 (1962).

34. Adler v. Klawans, 172 F. Supp. 502 (S.D.N.Y. 1958), aff'd, 267 F.2d 840 (2d Cir. 1959); Blau v. Allen, 163 F. Supp. 702 (S.D.N.Y. 1958). Similarly, in Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969), cert. denied, 396 U.S. 1036 (1970), Martin Marietta (the defendant corporation) purchased stock in Sperry Rand Corporation, while defendant's president was a Sperry director. After a short time Martin Marietta's president resigned from his position with Sperry. Subsequently defendant sold its Sperry stock, the sale taking place within six months of the stock purchase. Relying on a "deputization" theory, the court held that the defendant had been a "director" of Sperry and that section 16(b) attaches to a sale by a former director if the stock is purchased while he was a director and the sale takes place within six months of the purchase. Id. at 269.

35. 232 F.2d 299 (2d Cir.), cert. denied, 352 U.S. 831 (1956). The court of appeals adopted the reasoning of the district court's denial of a motion for judgment in 104 F. Supp. 957 (S.D.N.Y. 1952).

36. 232 F.2d at 300-01. Stella, the defendant corporation, purchased shares of plaintiff corporation by which defendant changed its status from a less-than-10% to a more-than-10% owner. The court of appeals adopting the lower court's interpretation of the words "at the time of" purchase to mean "simultaneously with" held that the defendant became a more-than-10% owner at the very moment when the purchase was made. 104 F. Supp.

offer which boost the purchaser's holdings to more than 10% of the corporation's outstanding stock has also been held to fall within the scope of the Act.[37] Such decisions indicate that the language of section 16(b) will be construed so as to bring a wide range of short-swing transactions within the reach of the Act. However, once it has been determined that a defendant comes within the scope of section 16(b), objective criteria are applied and liability may be imposed regardless of intent.[38]

In *Reliance Electric Co. v. Emerson Electric Co.*, the Court considered for the first time the question whether section 16(b) liability would attach to a seller's "short-swing" profits realized after he had ceased to be a more-than-10% shareholder by reason of a prior sale.[39] Since an investor must own more than 10% of the stock of a corporation both at the time of the purchase and at the time of sale[40] the applicability of the Act in this situation turns on the interpretation of the words "at the time of." The district court held that both transactions were part of a single plan and that "time of sale" should be construed as including the entire period during which a series of related transactions took place.[41] Moreover, the court felt that a contrary holding "would . . . subvert the purposes of Section 16(b) and . . . produce a result plainly at variance with its manifest policy."[42] The Supreme Court, in rejecting this interpretation of the statutory language, recognized the arbitrary nature of the objective standards prescribed by section 16(b).[43] Mr. Justice Stewart, speaking for the majority, noted that liability could be avoided if one did not come within the statutory definition of insider.[44] He further stated that any attempt to include transactions of this type by showing the possibility of "taint" or the seller's pre-existing intent was not in "harmony with the congressional design of predicating liability upon an 'objective measure of proof.' "[45] Moreover, while the Court conceded that there may be logic in

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at 959-60. See Emerson Elec. Co. v. Reliance Elec. Co., 434 F.2d 918, 923-24 (8th Cir. 1970), aff'd on other grounds, 404 U.S. 418 (1972). The literal meaning of the words "at the time of" has been the subject of much discussion. See, e.g., 57 Colum. L. Rev. 287, 289 (1957).

37. Abrams v. Occidental Petroleum Corp., 323 F. Supp. 570, 579 (S.D.N.Y. 1970), rev'd on other grounds, 450 F.2d 157 (2d Cir. 1971), cert. granted sub nom. Kern County Land Co. v. Occidental Petroleum Corp., 405 U.S. 1064 (1972).

38. Feder v. Martin Marietta Corp., 406 F.2d 260, 262-63 (2d Cir. 1969), cert. denied, 396 U.S. 1036 (1970). Here the court stated that "[t]he judicial tendency . . . has been to interpret Section 16(b) in ways that are most consistent with the legislative purpose, even departing where necessary from the literal statutory language. . . . Through the creation of a legal fiction . . . our courts have managed to remain within the limits of § 16(b)'s literal language and yet have expanded the Act's reach." Id. (citations omitted).

39. 404 U.S. 418 (1972).

40. Securities Exchange Act of 1934, § 16(b), 15 U.S.C. § 78p(b) (1970).

41. 306 F. Supp. at 592.

42. Id.

43. 404 U.S. at 422-23.

44. Id. at 422.

45. Id. at 424-25 (citation omitted).

allowing this type of proof, it nonetheless felt that such evidence was clearly rejected as a basis for liability when Congress required that a person must own more than 10% of the stock of a corporation both at the time of purchase and at the time of sale.[46] Reading the statute literally, the Court held that "a statutory insider might sell enough shares to bring his holdings below 10%, and later—but still within six months—sell additional shares," thereby incurring no liability for the latter transactions.[47] In the opinion of the Court, any potential for abuse arising under this loophole should be prevented by legislative amendment rather than a "judicial search for the will-o'-the-wisp of an investor's 'intent' . . . ."[48]

Mr. Justice Douglas,[49] in a dissenting opinion, joined by Justices Brennan and White, reminded the Court of the abuses of insider trading and of the history behind the enactment of section 16(b).[50] He concluded that the majority's interpretation was "plainly at variance" with the purposes and policy of the legislation.[51] Analyzing prior judicial construction of this section, he observed that the problem in interpreting the section was not one of semantics but rather one of the resolution of the cases in light of legislative intent to prevent insider short-swing speculation.[52] His dissent also stressed that other courts had often felt that section 16(b) was not so objective in nature as to prevent factual inquiry and analysis.[53] He, therefore, reasoned that if inquiry could be made into the existences of speculative abuses[54] and "de facto" directors,[55] a court could also determine whether the facts substantiated a finding that "ostensibly separate sales [were] 'legally tied.' "[56]

46. Id. at 424.

47. Id. at 423. In this instance the Court referred to a commentator who interpreted the statute similarly. Id. at 423 n.3; see C. Meyer, The Securities Exchange Act of 1934, at 112 (1934).

48. 404 U.S. at 425.

49. Mr. Justice Douglas was a commissioner of the SEC in 1936 and was appointed Chairman in 1937.

50. 404 U.S. at 428-31.

51. Id. at 431 (citation omitted). The dissent was of the opinion that the Court undermined the statute in the guise of an "objective" approach which had been once used to broadly incur liability.

52. Id. at 433. Mr. Justice Douglas noted that Mr. Justice Stewart, while on the court of appeals, deviated from the "mechanistic" approach he espoused in the majority opinion. Id. at 432. In Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), cert. denied, 359 U.S. 927 (1959), Justice Stewart, writing for the majority, stated that a transaction which might constitute a purchase was to be judged so that if it could "possibly lend itself to . . . speculation" it would be governed by section 16(b). He therefore refused to apply an arbitrary test but applied a more pragmatic one. Id. at 345.

53. 404 U.S. at 434-36.

54. See notes 31-32 supra and accompanying text.

55. See notes 33-34 supra and accompanying text.

56. 404 U.S. at 436-37 (footnote omitted). Here Mr. Justice Douglas noted that a factual inquiry was used to determine whether possibility of speculative abuse existed (Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), cert. denied, 359 U.S. 927 (1959)), whether a firm

Rejecting the majority's "mechanical" approach and noting the probability that any series of sales within six months of a major part of the shares held by a more-than-10% shareholder would be part of a single plan, Mr. Justice Douglas urged an alternative standard, one that would create a "rebuttable presumption" that any "series of dispositive transactions will be deemed to be part of . . . a single 'sale' for the purposes of § 16(b)."[57] Such a rule would not involve the problems of proof of intent, he reasoned, since a factual inquiry into the circumstances surrounding the transactions would be sufficient.[58] Only if the beneficial owner could carry the burden of proof that the series of transactions afforded him no opportunity for speculative abuse would he be able to rebut the presumption and escape liability.[59]

The prophylactic effect of section 16(b)—prevention of short-swing speculation—has been significantly weakened by the *Reliance* decision. Perhaps the Court reached an equitable solution since Emerson had not participated in any speculative abuses,[60] but the decision seems contrary to the avowed purpose of section 16(b) to hold parties liable irrespective of actual intent or abuse.[61] Furthermore, the Court has created a loophole[62] through which an investor may avoid 16(b) liability on at least part of his short-swing transactions. An investor may purchase sufficient stock in a corporation to gain inside information or to control corporate activity, and then sell within six months in two

can be a director under a "deputization" theory (Blau v. Lehman, 368 U.S. 403 (1962)), and whether an individual although not called a director may be a "de facto" officer or director (Colby v. Klune, 178 F.2d 872 (2d Cir. 1949)). As a result of these cases, Mr. Justice Douglas noted: "Insiders have come to recognize that 'in order not to defeat [§ 16(b)'s] avowed objective,' federal courts will resolve 'all doubts and ambiguities against insiders.'" 404 U.S. at 436 (citation omitted).

57. Id. at 438 (footnote omitted).

58. Id. at 439. The dissent, noting that the statutory elimination of proof of intent was not adopted to limit actions but rather was intended to ease plaintiff's burden, rejected the district court's plan where the plaintiff would have been required to prove a "plan of distribution." Id. at 437. Also the dissent's rule would not "import questions of 'intent'" since it would require only an objective analysis. Id. at 439. In addition, the Court rejected the SEC's claim that this transaction came within the meaning of section 16(b), since SEC Rule 16a-10 provided an exemption in reporting and hence from 16(b) liability in a situation like the one at hand. Furthermore, it noted that SEC interpretations are not determinative of the law. Id. at 425-27. Mr. Justice Douglas rebutted the contention that Rule 16a-10 exempted this transaction. He stated that in Greene v. Dietz, 247 F.2d 689, 692-93 (2d Cir. 1957), it was held that the SEC's power to make rules is not solely within its discretion; and more recently in Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969), cert. denied, 396 U.S. 1036 (1970), Rule 16a-10 was held invalid where it exempted transactions by ex-directors from liability under section 16(b). 404 U.S. at 440-41.

59. 404 U.S. at 440.

60. Id. at 420.

61. See Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970).

62. Various members of the news media have interpreted the decision as the opening of a large loophole by the Supreme Court. N.Y. Times, Jan. 12, 1972, at 3, col. 1-2. The circuit court compared this conduct with that of tax avoidance. Emerson Elec. Co. v. Reliance Elec. Co., 434 F.2d 918, 925 (8th Cir. 1970), aff'd, 404 U.S. 418 (1972).

or more transactions, retaining profits on all sales where he owned at the time of the sale less than 10% of the stock of the corporation. Although the argument may be made that Rule 10b-5[63] would cover the later transactions if inside information were used, it is not persuasive since Rule 10b-5 requires proof of actual use of the inside information,[64] while a primary purpose of section 16(b) was to eliminate the need for such proof in the case of insider trading.[65] Justice Douglas' proposal, although necessitating more subjective judgment on the part of the finder of fact, would seem more consistent with legislative purpose and the recent pragmatic trend favored by a number of the courts.[66] In 1968, the Supreme Court, in its only other decision concerning section 16(b),[67] indicated its approval of a subjective approach. In *Blau v. Lehman*, a court was permitted to make a factual inquiry to determine whether, for the purposes of section 16(b) liability, an officer had been deputized by a partnership to represent its interests as a director on the board of a corporation.[68] Certainly, it is no more offensive to the objective nature of the section to allow inquiry into whether a series of transactions may be legally connected. It would seem, therefore, that the Court has abandoned the trend toward application of section 16(b) to more complex insider transactions and will now require such transactions to conform more strictly to the mechanical language of the statute.

Criticism of this change in trend, however, must lie not solely with the *Reliance* decision but also with the operation of the section itself. First, the six-month rule is not an effective deterrent since any insider can wait for six months and one day to avoid liability.[69] Second, relatives, friends and business associates of the insider whose liability under Rule 10(b)-5 may be difficult or impossible to prove, may be able to benefit from the insider's position without falling within the scope of the section.[70] Third, since the insider is forced to disgorge at most his profits, there is no penalty imposed for his unfair practices per se. Should no profit result, he incurs no penalty under section 16(b). Fourth, a party actually hurt by the transaction, *e.g.*, a share-

63. 17 C.F.R. § 240.10b-5 (1972).

64. See 1 A. Bromberg, Securities Law: Fraud (SEC Rule 10b-5) § 2.6(1), at 50 n.135 (1971).

65. Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970). See note 10 supra; Rheem Mfg. Co. v. Rheem, 295 F.2d 473, 475 (9th Cir. 1961).

66. It is paradoxical that Mr. Justice Stewart who as a circuit judge was a forerunner in the adoption of a more realistic approach to section 16(b) should revert back to a literal interpretation of the law. See Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), cert. denied, 359 U.S. 927 (1959).

67. Blau v. Lehman, 368 U.S. 403 (1962).

68. Id. at 408-10.

69. Under the Internal Revenue Code, securities must be held for six months in order to qualify for capital gains treatment. Internal Revenue Code of 1954 § 1222(3), 26 U.S.C. § 1222(3) (1970).

70. Original draft provisions of section 16(b) allowed the recovery of profits from anyone who received information from an insider. See Blau v. Lehman, 368 U.S. 403, 411-12 (1962); Smolowe v. Delendo Corp., 136 F.2d 231, 236 (2d Cir. 1943).

holder who buys or sells without the benefit of the insider's knowledge, is afforded no remedy under section 16(b), since only the issuer may recover the insider's profits.[71] Finally, the section has become "a trap and a snare"[72] for the unwary while the experienced investor will follow the letter of the law and take all precautions to avoid liability.[73]

These numerous defects have brought forth calls for revision,[74] repeal[75] and broader judicial construction of the statute.[76] To let the section stand and rely on the courts to apply it to an increasing number of situations, where there is abuse of inside information, would be the least helpful solution since myriad suits and varying interpretations of the statutory language would make the section an even worse snare for unwary, innocent investors. Repeal of the section and reliance on the ever expanding Rule 10b-5[77] has received some support but is also not a totally satisfactory solution, since 10b-5 actions require proof of intent and of abuse of inside information, requirements which the drafters of section 16(b) expressly sought to eliminate.

Revision appears to be the only truly effective solution. One revision might be the inclusion in section 16(b) of a rebuttable presumption which would make all insider purchases and sales within a longer statutory period violative of the section.[78] Innocent investors would have an opportunity to prove they did not abuse their position and that they lacked the required intent. Obvious speculators would be hard pressed to prove their good faith and would have to hold their shares for a longer period of time to relieve themselves of the presumption. Plaintiffs would not be forced, as under Rule 10(b), to prove intent or actual abuse.

The initial reaction of the Securities Exchange Commission to the *Reliance* decision makes it seem likely that the agency will soon present the issue to Congress.[79]

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71. He does, however, receive his pro rata share of the money returned to the corporate treasury as a shareholder of the corporation.

72. Lowenfels, supra note 31, at 63.

73. The businessman who intends only to purchase a company may find himself caught in a defensive merger where he is forced to liquidate his shares within the six-month period and incur unexpected section 16(b) liability.

74. Munter, Section 16(b) of the Securities Exchange Act of 1934: An Alternative to "Burning Down the Barn in Order to Kill the Rats", 52 Cornell L.Q. 69 (1966) (footnote omitted).

75. Professor Henry G. Manne raises the interesting theory that not only should the section be abolished but also that inside trading is helpful and should be encouraged. H. Manne, Insider Trading and the Stock Market (1966).

76. Lowenfels, supra note 31, at 63-64.

77. See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); In re Cady, Roberts & Co., 40 S.E.C. 907, 910-14 (1961).

78. A proposal almost identical to this was made in 1966. Munter, supra note 74, at 89-101.

79. 135 BNA Sec. Reg. & L. Rep. A-4 (Jan. 19, 1972).