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Case Notes

CASE NOTES

Constitutional Law—Capital Punishment—Death Penalty As Presently Administered Held Unconstitutional.—Two petitioners were found guilty of rape and a third was found guilty of murder.[1] In each case, the question of whether the death penalty should be imposed was left to the discretion of the jury and in each case, petitioner was sentenced to death. On a consolidated appeal, the United States Supreme Court vacated the judgments insofar as they ordered the petitioners to be put to death. The Court held that the death penalty as it presently exists violates the Constitution's prohibition of cruel and unusual punishments contained in the eighth amendment and made applicable to the states through the fourteenth amendent. *Furman v. Georgia*, 408 U.S. 238 (1972).

The eighth amendment to the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[2] While this clause received "very little debate" at the time of its proposed adoption,[3] there is general agreement that it was intended by the framers to bar the imposition of inherently torturous forms of punishment.[4] It is also generally agreed[5] that the framers did not consider death to be such a punishment.[6] The historical background of the clause thus presented a solid obstacle to those who sought to use it as a vehicle for the abolition of capital punishment.[7]

The cruel and unusual punishments clause was practically ignored by the

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1. Furman v. State, 225 Ga. 253, 167 S.E.2d 628 (1969) (murder); Jackson v. State, 225 Ga. 790, 171 S.E.2d 501 (1969) (rape); Branch v. State, 447 S.W.2d 932 (Tex. Crim. App. 1969) (rape).

2. The words of the eighth amendment were taken almost verbatim from the English Bill of Rights of 1689, 1 W. & M., c. 2, § 10, at 69 (1689); see Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 840 (1969).

3. Weems v. United States, 217 U.S. 349, 368 (1910).

4. Granucci, supra note 2, at 841-42; see Powell v. Texas, 392 U.S. 514, 531-32 (1968); Wilkerson v. Utah, 99 U.S. 130, 134 (1878). See also, S. Rubin, The Law of Criminal Correction 367-69 (1963). The framers of the American Constitution may have misinterpreted the English clause which was designed to prohibit unauthorized punishments and those that were excessive in proportion to the offense. Granucci, supra at 859-65.

5. McGautha v. California, 402 U.S. 183, 226 (1971) (separate opinion); see Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878).

6. "[T]he punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." In re Kemmler, 136 U.S. 436, 447 (1890); see Robinson v. California, 370 U.S. 660, 676 (1962) (concurring opinion). This view receives further support from the fifth and fourteenth amendments to the Constitution, which forbid deprivation of life "without due process of law." See Furman v. Georgia, 408 U.S. 238, 418-19 (1972) (Powell, J., dissenting).

7. See generally Furman v. Georgia, 408 U.S. 238, 336-41 (1972) (Marshall, J., concurring).

Supreme Court until 1878.[8] In that year, it was held in *Wilkerson v. Utah*[9] that public execution by shooting was not a cruel and unusual punishment.[10] Twelve years later in *In re Kemmler*,[11] the Court, in dictum,[12] condoned electrocution as a permissible mode of punishment, noting that while this punishment was unusual, it had been adopted for a humane purpose and was therefore not cruel.[13] Subsequently, in *O'Neil v. Vermont*,[14] the Court shifted its attention from the acceptability of the punishment itself to the question of the necessity of some proportionality between the punishment and the crime.[15] In a strong dissent, which foreshadowed future developments,[16] Justice Field stated that the imposition of an excessively harsh punishment for a comparatively minor offense violated the prohibition against cruel and unusual punishments.[17]

Perhaps the case that was most influential in freeing the clause from its historical shackles was *Weems v. United States*,[18] in which a punishment consisting of an imaginative combination of hard labor and loss of civil rights[19] was held to violate the clause. At a number of points, the *Weems* Court made it clear that in deciding whether or not a punishment is cruel and unusual, the test to be applied is broader than whether the Founding Fathers had this type of punishment in mind when they drafted the clause. After stating its belief that "a principle to be vital must be capable of wider application than the mischief

8. In one of the few pre-1878 cases to deal with the cruel and unusual punishments clause, the Supreme Court held that it did not apply to the states. Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 479-80 (1867).

9. 99 U.S. 130 (1878).

10. Id. at 135. The opinion stated: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." Id. at 135-36.

11. 136 U.S. 436 (1890).

12. The Court reaffirmed its prior holding that the cruel and unusual punishments clause was not applicable to the states. Id. at 446; see Furman v. Georgia, 408 U.S. 238, 323 (1972) (Marshall, J., concurring); McElvaine v. Brush, 142 U.S. 155 (1891).

13. 136 U.S. at 447. But cf. Comment, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1338-39 (1968).

14. 144 U.S. 323 (1892).

15. Id. at 331. O'Neil had been sentenced to fifty-four years in prison in the event that he could not pay a fine for the illegal sale of alcoholic beverages. The Court affirmed, holding that the eighth amendment did not apply to the states. Id. at 332.

16. See, e.g., Robinson v. California, 370 U.S. 660 (1962); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972).

17. 144 U.S. at 338-40; see id. at 371 (Harlan & Brewer, JJ., dissenting).

18. 217 U.S. 349 (1910). The crime was fraudulent alteration of United States government cashbooks.

19. Weems was sentenced to fifteen years of hard labor with chains at his ankles and loss of all marital, guardianship, and property rights. He was also required to notify surveillance authorities of any change in his domicile and to submit to periodic inspections. Id. at 358, 364-66.

which gave it birth,"[20] the Court added that the cruel and unusual punishments clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becames enlightened by a humane justice."[21] It followed from the *Weems* rationale that the death penalty could be cruel and unusual punishment within the meaning of the Constitution in spite of the fact that the Founding Fathers had not considered it to be so.

Another major decision involving the cruel and unusual punishments clause was not handed down until 1947. In that year, the Court, in *Louisiana ex rel. Francis v. Resweber*,[22] approved the sending of a prisoner to the electric chair for a second time, the first execution having failed due to a mechanical difficulty. The Court based its decision on the accidental nature of the incident, emphasizing that the eighth amendment protects against intentionally inflicted cruel punishments.[23] In *Trop v. Dulles*,[24] a 1958 case, the challenged punishment was intentionally inflicted, and the Court was given an opportunity to apply the *Weems* rationale. Explicitly relying on that case,[25] the Court held that denationalization was an unconstitutional punishment, even for wartime desertion. The thrust of the *Trop* decision was on the inherent cruelty of statelessness as a punishment and its unanimous rejection by civilized nations.[26] The Court felt that no crime was so heinous as to warrant its infliction.[27] To quiet any feeling that similar reasoning could be used to strike down the death penalty, the Court went out of its way to state that the death penalty was not unconstitutional, because it, unlike denationalization, was a traditional and accepted mode of punishment.[28] Nevertheless, the Court seemed to strengthen the arguments against the death penalty when it went on to say that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[29] In his dissent, Justice Frankfurter understandably found it difficult to fathom how the Court could find denationalization more offensive to human dignity than execution.[30]

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20. Id. at 373.

21. Id. at 378.

22. 329 U.S. 459 (1947).

23. "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment . . . . There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." Id. at 464.

24. 356 U.S. 86 (1958).

25. Id. at 100-01.

26. Id. at 102.

27. Id. at 101-02.

28. The court stated, "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment —and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishments short of death within the limit of its imagination." Id. at 99.

29. Id. at 100.

30. Id. at 125.

The contradictions in *Trop* were not resolved by the two most recent cases on cruel and unusual punishment considered by the Supreme Court—*Robinson v. California*[31] and *Powell v. Texas*.[32] In *Robinson*, the Court struck down a California statute making it a crime to be addicted to narcotics. In applying the cruel and unusual punishments clause to a state for the first time,[33] the Court said that its meaning must be determined "in the light of contemporary human knowledge,"[34] thus lending more support to the view of the clause as an evolving standard. In *Powell*, the Court held that the standard had not evolved to such a point that it would render punishment for the crime of public drunkenness cruel and unusual.[35] Other recent cases,[36] however, have relied heavily on the progressive interpretation of the clause, and the California Supreme Court has gone so far as to declare the death penalty unconstitutional under its state constitution.[37] While it can thus be said that the courts have become more liberal in their construction of the cruel and unusual punishments clause during the last hundred years, the decision handed down by the Supreme Court last term in *Furman v. Georgia*[38] still represents an abrupt and drastic departure from precedent.

To determine what the Court actually held in *Furman* is an onerous task in its own right.[39] The nine separate opinions issued by the Court can be divided into three groups for the purpose of simplification. The first group consisted of Justices Brennan and Marshall who stated that capital punishment in itself amounts to a cruel and unusual punishment and can never be inflicted without violating the Constitution.[40] Their reasons for arriving at such a conclusion differed considerably, however. The basis of Justice Brennan's opinion was the inherent barbarity of the death penalty which, he felt, offended human dignity.[41] On the other hand, at the core of Justice Marshall's opinion was what he con-

31. 370 U.S. 660 (1962).

32. 392 U.S. 514 (1968).

33. Applicability of the clause to the states had been assumed in Louisiana ex rel Francis v. Resweber, 329 U.S. 459 (1947).

34. 370 U.S. at 666.

35. 392 U.S. at 532-33.

36. See, e.g., Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (dissenting opinion); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

37. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, application for a stay of judgment denied, 405 U.S. 983 (1972).

38. 408 U.S. 238 (1972).

39. The Court's decision was stated in a per curiam opinion as follows: "The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. at 239-40. Hereinafter when the opinions of the individual justices are cited, all footnotes are omitted.

40. Id. at 257-306 (Brennan, J., concurring); id. at 314-74 (Marshall, J., concurring).

41. See text accompanying notes 52-56 infra. Justice Brennan also based his opinion on the arbitrariness and excessiveness of the death penalty and on its rejection by contemporary society. He related these factors to his central concept of human dignity. 408 U.S. at 305.

sidered to be the excessiveness of capital punishment— its failure to serve any socially useful purpose.[42] This is a more limited rejection of the death penalty than Justice Brennan's since it relies on the introduction of extrinsic factors and seems to suggest that the death penalty would be constitutional if it were ever proven that its existence benefited society.

The second group, constisting of Justices Stewart, White, and Douglas, stated that the imposition of the death penalty could be unconstitutional under some circumstances and that such circumstances existed in these cases, as well as in most other capital cases.[43] Specifically, what these Justices found repugnant to the Constitution was the arbitrary manner in which they felt the death penalty was being inflicted. Justice Stewart espoused the theory that an arbitrarily inflicted death penalty was inherently cruel,[44] while Justice White emphasized that its arbitrariness and infrequency of imposition rendered the death penalty virtually useless for any purpose.[45] Justice Douglas equated arbitrary infliction with a denial of equal protection and stated that equal protection requirements were implicit in the cruel and unusual punishments clause.[46]

The third group consisted of the dissenters—Chief Justice Burger and Justices Blackmun, Powell and Rehnquist.[47] They were in virtual agreement in claiming that the majority had ventured too far into the domain of the legislature and had placed personal feelings above their sense of judicial duty.[48]

The meaning of the *Furman* decision may be clarified through a more detailed examination of some of the arguments advanced by the various justices. The classical argument for declaring any punishment to be violative of the eighth amendment is that it is inherently cruel and barbarous.[49] The modern form of this argument as it relates to capital punishment is that the death penalty, while not considered barbaric at one time,[50] must be considered so at present in view of the much greater value placed on human life by modern society.[51] Justice Brennan espoused this view, pointing to the incredible severity of the death penalty as compared with any other contemparary form of punishment.[52] His

42. See text accompanying notes 79-81 infra. Justice Marshall also saw capital punishment as unconstitutional because "it is morally unacceptable to the people of the United States at this time in their history." 408 U.S. at 360.

43. Id. at 306-10 (Stewart, J., concurring); id. at 310-14 (White, J., concurring); id. at 240-57 (Douglas, J., concurring).

44. See text accompanying note 89 infra.

45. See note 95 infra and accompanying text.

46. See text accompanying notes 96-98 infra.

47. 408 U.S. at 375-405 (Burger, C. J., dissenting); id. at 405-14 (Blackmun, J., dissenting); id. at 414-65 (Powell, J., dissenting); id. at 465-70 (Rehnquist, J., dissenting).

48. See text accompanying notes 109-12 infra.

49. See, e.g., Wilkerson v. Utah, 99 U.S. 130, 136 (1878) and text accompanying note 4 supra.

50. See In re Kemmler, 136 U.S. 436, 447 (1890).

51. Weems, of course, held that such evolving standards were constitutionally relevant. 217 U.S. at 378. But see McGautha v. California, 402 U.S. 183, 226 (1971) (separate opinion), emphasizing the framers' acceptance of the death penalty.

52. "Death is today an unusually severe punishment, unusual in its pain, in its finality,

contention is supported by the existence of special procedural protections in capital cases,[53] both in the past and at present, and by the paramount importance attached by defense attorneys to the avoidance of the death penalty.[54] For Brennan, the cruel and unusual punishments clause essentially protects "the dignity of man."[55] The death penalty offends that dignity, he stated, because it "treat[s] members of the human race as nonhumans, as objects to be toyed with and discarded."[56] Choosing not to brood over human dignity, the dissenters in *Furman* concluded that there are punishments that are more barbarous than the infliction of death as such[57] and, in so doing followed a long line of precedent including *Kemmler*[58] and *Trop*.[59] Despite such legal precedent, it may truly be questioned whether there is any punishment which exceeds death itself in barbarity in the mind of the prisoner who, after all, must undergo the punishment.[60]

Another argument supporting the position that the death penalty is unconstitutional per se asserts that capital punishment "has been almost totally rejected by contemporary society."[61] Justices Brennan and Marshall saw an

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and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." 408 U.S. at 287. It has been found that even modern, "humane" methods of execution result in physical torture. See Comment, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1338-42 (1968). In addition, the condemned man may be subjected to torturous mental suffering. Medley, 134 U.S. 160, 172 (1890); Note, Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L. Rev. 814 (1972). In Solesbee v. Balkcom, 339 U.S. 9 (1950) (dissenting opinion), it was noted that "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." Id. at 14.

53. See Williams v. Florida, 399 U.S. 78, 103 (1970) (special jury requirements); Reid v. Covert, 354 U.S. 1, 77 (1957) (concurring opinion) (procedures generally); Bute v. Illinois, 333 U.S. 640, 674 (1948) (right to counsel); Betts v. Brady, 316 U.S. 455 (1942), overruled, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel); cf. Williams v. Georgia, 349 U.S. 375 (1955); Stein v. New York, 346 U.S. 156, 196 (1953), overruled, Jackson v. Denno, 378 U.S. 368 (1964); Andres v. United States, 333 U.S. 740, 752 (1948).

54. "As all practicing lawyers know, who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty." Griffin v. Illinois, 351 U.S. 12, 28 (1956) (Burton & Minton, JJ., dissenting).

55. Trop v. Dulles, 356 U.S. 86, 100 (1958), quoted in Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

56. 408 U.S. at 272-73. Brennan goes on to say: "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." Id. at 290.

57. "[Capital punishment] is not a punishment such as burning at the stake that everyone would ineffably find to be repugnant to all civilized standards." 408 U.S. at 385 (1972) (Burger, C. J., dissenting).

58. 136 U.S. at 447. See notes 11-13 supra and accompanying text.

59. 356 U.S. at 99. See notes 24-30 supra and accompanying text.

60. Cf. Commonwealth v. Elliott, 371 Pa. 70, 79-80, 89 A.2d 782, 787 (1952) (dissenting opinion).

61. 408 U.S. at 295 (Brennan, J., concurring). Justice Marshall stated that "the average citizen would, in my opinion, find it shocking to his conscience and sense of justice." Id. at

historical trend toward absolute abolition of the death penalty.[62] This trend is relevant in view of the holding in *Weems* that public opinion serves to clarify the meaning of the cruel and unusual punishments clause[63] and in view of the fact that such a trend accentuates the cruelty of the executions that continue to take place.[64] Popular rejection of the death penalty is by no means a foregone conclusion, however. Capital punishment has recently been approved by a majority of the people in public referenda in several states.[65] Although it may be argued that referenda and public opinion polls are meaningless in this context, because people are generally uninformed on the shortcomings of capital punishment,[66] such an argument lends no support to the contention that capital punishment is totally rejected by contemporary society. Justice Powell cited recent federal legislation providing for the death penalty for certain crimes[67] as further evidence that the death penalty is not "virtually unanimously repudiated and condemned by the conscience of contemporary society."[68]

In view of the strong antipathy toward capital punishment prevalent in many circles, it would seem that the death penalty has some redeeming qualities which have enabled it to withstand the onslaughts of those who would abolish it. One of these qualities is its efficacy in giving retribution to those who have committed abominable acts. According to Justice Stewart, retribution is essential to the preservation of the social order and its essentiality stems from the very nature of man.[69] Retribution, however, is no longer a popular goal of punishment.

369. See also Kasper v. Brittain, 245 F.2d 92, 96 (6th Cir.), cert. denied 355 U.S. 834 (1957); United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir.), cert. denied 344 U.S. 838 (1952).

62. 408 U.S. at 295-99 (Brennan, J., concurring); id. at 333-42 (Marshall, J., concurring); see Black, The Crisis in Capital Punishment, 31 Md. L. Rev. 289, 303 (1971) ("The ecumenical movement of history is strongly and unambiguously against the retention of capital punishment.").

63. 217 U.S. at 378.

64. "In the United States, even before the recent judicial stays, capital punishment had become vestigial—a token payment, as it were, to some sinister lurking creditor, made at fearful cost to a few." Black, supra note 62, at 303.

65. Justice Powell cited referenda in Oregon (1964), Colorado (1966), Massachusetts (1968), and Illinois (1970). 408 U.S. at 438-39. Following the Furman decision, a public opinion poll showed that the people of California overwhelmingly favored the retention of the death penalty. N.Y. Times, Sept. 8, 1972, at 67, col. 3. In a recent nationwide Gallup poll, 57% of those surveyed favored the death penalty for murderers, the highest figure in almost twenty years. N.Y. Times, Jan. 16, 1973, at 6, col. 4.

66. 408 U.S. at 361-62 (Marshall, J., concurring).

67. Presidential Assassination Statute, 18 U.S.C. § 1751 (1970); Congressional Assassination Statute, 18 U.S.C. § 351 (1970); Aircraft Piracy Statute, 49 U.S.C. § 1472(i) (1970).

68. Transcript of Oral Argument, at 21, Aikens v. California, 406 U.S. 813 (1972), quoted in Furman v. Georgia, 408 U.S. 238, 441 (Powell, J., dissenting). Justice Powell noted that juries returned over one thousand death sentences during the 1960's. 408 U.S. at 441.

69. 408 U.S. at 308. In his concurring opinion, Justice Stewart remarked: "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable

Justice Marshall described retribution as "purposeless vengenance,"[70] a vestige of a more primitive stage of our history.[71] Those who take Marshall's view emphasize that other goals of punishment now occupy the paramount position once held by retribution,[72] and assert that retribution is an indefensible ground for the execution of a human being.[73]

A penal goal more generally accepted than retribution is deterrence,[74] and one would suppose that the death penalty is a more effective deterrent than any other punishment a prospective criminal faces. Strangely, however, the available statistics do not bear this out.[75] "[T]here is no clear evidence in any of the figures that the abolition of the death penalty has ever led to an increase in the rate of homicide or that its restoration has ever led to a fall."[76] Although a number of studies have been made, their results are largely inconclusive; the only basis for asserting that capital punishment is a superior deterrent remains an intuitive one.[77] In view of the lack of any conclusive evidence that capital punishment has a greater deterrent effect than its less gruesome counterparts, theories have been advanced to explain why the prospect of death should not be expected to deter a murderer any more than the prospect of a life behind bars. The crux of these theories is that the last thing a murderer thinks about, if he is capable of thinking about anything at all at the time of the murder, is the price he will pay for his crime.[78] This is, of course, sheer speculation, but speculation rather than knowledge dominates this area.

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to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." Id. Chief Justice Burger added that "[t]here is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements . . . ." Id. at 394. Justice White assumed the existence of a need for retribution. Id. at 311.

70. Id. at 363.

71. See id. "Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society." Id. at 343; see Reichert, Capital Punishment Reconsidered, 47 Ky. L.J. 397, 399 (1959).

72. See, e.g., Williams v. New York, 337 U.S. 241, 248 (1949).

73. Reichert, supra note 71, at 399.

74. A third major purpose of sentencing, rehabilitation, is obviously not advanced by the death penalty. A fourth purpose, isolation of dangerous individuals, does not require it. See generally J. Hall, General Principles of Criminal Law 297-309 (2d ed. 1960).

75. Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw. U.L. Rev. 433, 456 (1957).

76. Id.; see 408 U.S. at 349-53 (Marshall, J., concurring).

77. Hochkammer, The Capital Punishment Controversy, in Capital Punishment 68 (J. McCafferty ed. 1972); see Comment, The Death Penalty Cases, 56 Calif L. Rev. 1268, 1275-92 (1968). The Furman decision will probably spawn a fresh supply of statistics.

78. 408 U.S. at 354-55 n.125 (Marshall, J., concurring). "[M]urder is committed to a very large extent either by persons who, though sane, do not in fact count the cost, or are so mentally deranged that they cannot count it." Hart, supra note 75, at 459. There are exceptions to the rule. Soon after the Furman decision, an armed bank robber threatening to kill his hostages was quoted as saying: "The Supreme Court will let me get away with this. . . . There's no death penalty. It's ridiculous. I can shoot everyone here, then throw my gun down and walk out and they can't put me in the electric chair." N.Y. Times, Aug. 23, 1972, at 45, col. 3.

The disagreement concerning whether capital punishment should be used as a vehicle of retribution and the confusion over its value as a deterrent give rise to the more general question of whether capital punishment does have any legitimate penal purpose. Justice Marshall argued that it does not and that it is therefore unconstitutional, independently of its inherent cruelty or its general unpopularity, because it is excessive.[79] Excessiveness for Marshall transcended the narrow concept of disproportionality between crime and punishment[80] and encompassed all situations where the punishment inflicted simply furthered no end.[81] Marshall's conception of excessiveness as it relates to the eighth amendment was practically an original one,[82] and Chief Justice Burger did not hesitate to point this out, asserting that "[t]he Eighth Amendment . . . was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy."[83] Not only did the Chief Justice attack the view that the cruel and unusual punishments clause is concerned with "social utility"[84] but he felt that under such a view, all punishments would be constitutionally suspect as no more of a deterrent than some lesser punishment. The courts, the Chief Justice concluded, would be unable to deal with questions such as these.[85] If Marshall's own test of excessiveness is indeed unworkable, it is difficult to see how the death penalty can be considered excessive under the traditional test, i.e., disproportionality, in view of the current restriction of the death penalty to cases involving the most serious of crimes.[86]

The per se unconstitutionality of the death penalty, espoused so vigorously by Justices Brennan and Marshall, was not even considered by the three other concurring justices. As Justice Stewart phrased it, "[t]he constitutionality of

79. 408 U.S. at 331. Marshall relied on the entire eighth amendment: "It should also be noted that the 'cruel and unusual' language of the Eighth Amendment immediately follows language that prohibits excessive bail and excessive fines. The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'" Id. at 332 (italics omitted). But see note 4 supra and accompanying text.

80. O'Neil v. Vermont, 144 U.S. 323, 338-40 (1892) (Field, J., dissenting); see Robinson v. California, 370 U.S. 660 (1962).

81. Marshall's excessiveness approach resembles the "irrationality" argument used to strike down laws under fourteenth amendment substantive due process. See Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1074 (1964).

82. Most cases that have stricken down punishments as excessive have involved disproportionality. See, e.g., Rudolph v. Alabama, 375 U.S. 889 (1963) (dissenting opinion); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972), (holding that the death penalty is excessive for rape where the rapist did not threaten or endanger the life of his victim).

83. 408 U.S. at 391.

84. Id.

85. Id. at 396.

86. "Since today the death penalty is rarely imposed for crimes in which human life is in no way threatened, the Supreme Court could well hold the proportionality requirement to be valid without solving the truly important problems of capital punishment which are of current concern." Comment, The Supreme Court and Capital Punishment—From Wilkerson to Witherspoon and Beyond, 14 St. Louis U.L.J. 463, 472 (1970). See also C. Tiedeman, A Treatise on the Limitations of Police Power in the United States § 11, at 21-22 (1886).

capital punishment in the abstract is not, however, before us in these cases."[87] Justices White and Douglas agreed,[88] choosing to limit their opinions to the constitutionality of the death penalty as it is presently administered. The conclusion they reached lay at the heart of the *Furman* decision and was best expressed by Justice Stewart:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.[89]

The death penalty was thus found unacceptable because it was inflicted arbitrarily, as evidenced by the extremely low rate of executions in proportion to the number of cases where the death penalty was available.[90] Although Justice Burger argued that the low rate is attributable to careful juries,[91] a recent study has indicated that juries do not follow rational patterns in imposing the death sentence.[92] This is exemplified by the case of Furman himself, who took the life of another under circumstances which were not exceptionally horrible or outrageous.[93]

The relationship between arbitrary punishments and the cruel and unusual punishments clause is not entirely clear. Justice Stewart's "struck by lightning" analogy seemed to suggest that an arbitrary punishment is unconstitutional by virtue of its very nature.[94] Justice White adopted a more practical view. He

87. 408 U.S. at 308. Earlier in his opinion (408 U.S. at 306), Justice Stewart cited Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), which stated that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'" and that "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Id. at 346-47.

88. Justice White stated: "That question [the per se constitutionality of the death penality] is not presented by these cases and need not be decided." 408 U.S. at 311. Justice Douglas likewise does not reach the broader question. Id. at 257.

89. Id. at 309-10 (footnotes omitted).

90. "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system." Id. at 293 (Brennan, J., concurring).

91. "The very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases." Id. at 402.

92. Note, A Study of the California Penalty Jury in First-Degree-Murder Cases, 21 Stan. L. Rev. 1297 (1969). The study also indicated that the juries did follow some irrational patterns; for instance, they were more lenient with white collar workers than with blue collar workers. Id.

93. The evidence established that Furman killed his victim in the course of committing a felony (burglary) but did not establish that he did so intentionally. Furman v. State, 225 Ga. 253, 254, 167 S.E.2d 628, 629 (1969).

94. See text accompanying note 89 supra. But cf. Howard v. Fleming, 191 U.S. 126,

believed that an arbitrary punishment neither satisfies society's need for retribution nor acts as an appreciable deterrent.[95] Justice Douglas took the most daring approach, asserting that "the basic theme of equal protection is implicit in 'cruel and unusual' punishments" and that any arbitrarily imposed punishment necessarily violates equal protection.[96] The reasoning behind this view is that one who is arbitrarily chosen to receive the punishment is not receiving the same protection as one in the same position who is arbitrarily not chosen. The argument becomes clearer when members of an identifiable group tend to be burdened with a particular penalty. Justice Douglas felt that the poor, the black, and the underprivileged were saddled with the death penalty, while rich whites were virtually exempt.[97] The apparent weakness in his position is that these "persecuted minorities" are the very people who commit most capital crimes. There is statistical evidence, however, that blacks, at least, have been discriminated against in death sentencing solely on the basis of race.[98] In reply to this, Justice Powell argued that discrimination which may have existed in the past does not justify the elimination of all present death sentences, since it does not prove discrimination in these particular cases.[99] Discrimination in a given case, however, is not susceptible to proof.[100]

Arbitrariness in infliction of the death penalty has not come about through

135-36 (1903), where the Court said: "[t]hat for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one."

95. 408 U.S. at 311-12. "[I]ts imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Id. at 312. The resemblance to Justice Marshall's "excessiveness" argument for the per se abolition of capital punishment is unmistakable. See text accompanying notes 79-81 supra. See also 408 U.S. at 303-05 (Brennan, J., concurring).

96. 408 U.S. at 249; cf. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (disparate punishments for similar crimes).

97. 408 U.S. at 255-56. "A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, or those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same." Id. at 256 (footnote omitted). A law which is fair on its face may be administered in such fasion as to amount to a denial of equal protection. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). Justice Marshall also saw capital punishment as an instrument of discrimination. 408 U.S. at 363-66.

98. Bedau, Death Sentences in New Jersey 1907-1960, 19 Rutgers L. Rev. 1, 18-21 (1964); see Bennett, The Death Penalty, in Capital Punishment 145 (J. McCafferty ed. 1972).

99. 408 U.S. at 450; see id. at 310 (Stewart, J., concurring); Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).

100. Justice Powell did not suggest another way to demonstrate such discrimination, although he stated that if discrimination were found, "a constitutional violation might be established." 408 U.S. at 449.

some insidious defect in our criminal justice system. On the contrary, arbitrariness is mandated by our laws—laws that provide no definite standards for determining whether one convicted of a capital offense shall live or die but which simply leave the question to the jury.[101] In *McGautha v. California*,[102] the Court held that the due process clause of the fourteenth amendment did not militate against the practice of leaving the question of whether to impose the death penalty "to the untrammeled discretion of the jury"[103] and even suggested that this was the most desirable method.[104] *McGautha*, however, was decided strictly on due process grounds;[105] *Furman* demonstrated that what is not a violation of due process may nevertheless be cruel and unusual punishment. The dissenters saw the *Furman* holding as an attack upon the jury system[106] insofar as it divested the jury of the power to "express the conscience of the community on the ultimate question of life or death."[107] They also raised the possibility that the decision would cause the return of the mandatory death penalty which, the Court has implied, may be the only constitutional form of capital punishment.[108] That, of course, would be the epitome of irony.

In the face of these multiple assaults upon the constitutionality of the death penalty, the dissenters in *Furman* relied most heavily on one fundamental argument—that the question of whether capital punishment should be eliminated is a legislative rather than a judicial one.[109] Stare decisis, they claimed, dictates adherence to the traditional case by evaluation of penalties as opposed to the

101. "[O]f the nearly 4,000 executions in this country since 1930 no more than ten percent have been for crimes which carry a mandatory death penalty." Bedau, The Courts, the Constitution and Capital Punishment, 1968 Utah L. Rev. 201, 204.

102. 402 U.S. 183 (1971).

103. "[W]e find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." Id. at 207.

104. "For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete." Id. at 208.

105. The grant of certiorari was limited to the question of whether a death sentence imposed at the absolute discretion of the jury violated the due process clause. McGautha v. California, cert. granted, 398 U.S. 936 (1970), aff'd 402 U.S. 183 (1971). In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court held that it violated due process to leave the defendant's fate to a jury from which all those with any qualms about capital punishment had been systematically excluded. While striking down the "hanging jury," the Court approved of the discretionary death penalty in general. Id. at 519-20.

106. 408 U.S. at 402 (Burger, C. J., dissenting).

107. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

108. Justice Powell noted that existing statutes that provide for mandatory death sentences (e.g., Rhode Island's statute for murder by a life prisoner) are not struck down by the Court's holding. 408 U.S. at 417 n.2. Justice Blackmun saw the Furman holding as dictating an elimination of the element of mercy from any acceptable capital punishment statute. Id. at 413. In effect, the dissenters were accusing the apparently more liberal majority of encouraging regressive legislation.

109. See, e.g., 408 U.S. at 383, 396 (Burger, C. J., dissenting).

elimination of an entire class of punishments with one fell swoop.[110] The *Furman* decision appeared to them to be in callous disregard of well established principles of judicial restraint[111]—"not an act of judgment, but rather an act of will."[112]

To argue, as the dissenters have done, that the majority's decision has usurped the function of the legislature is to miss the point entirely. The cruel and unusual punishments clause is a shifting standard molded by the moral values of contemporary society.[113] It may come about that the legislature will provide for a penalty that is in fact cruel and unusual in order to serve what it feels are the ends of society. Yet the Constitution expressly condemns the imposition of such punishment, notwithstanding that the legislators and even the people are willing to impose them. It is therefore the function of the Court to determine whether the penalty has touched upon the prohibition of the clause.[114]

What *Furman* has held is that the death penalty has become cruel and unusual under a set of circumstances which give rise to the inference of arbitrary infliction. As to the constitutional status of capital punishment in the absence of these circumstances, all that *Furman* tells us is that four justices[115] would sustain the death penalty and two would not.[116] The future of capital punishment, then, should hinge on the reactions of Justices Douglas, Stewart, and White to statutes that provide a mandatory death penalty for a strictly limited class of crimes;[117] the passage of such laws seems almost certain.[118] Although

110. See id. at 430-31 (Powell, J., dissenting). But see id. at 329-30 (Marshall, J., concurring).

111. See Trop v. Dulles, 356 U.S. 86, 128 (1958) (dissenting opinion); Blodgett v. Holden, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring). "[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." United States v. Butler, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting).

112. 408 U.S. at 468 (Rehnquist, J., dissenting).

113. See Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910).

114. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

115. Justices Burger, Blackmun, Powell and Rehnquist.

116. Justices Brennan and Marshall.

117. Statutes providing for a death sentence imposed by a jury acting under guiding instructions seem less likely because of the difficulty of formulating proper instructions. However, even if such statutes were enacted, their effect would be similar to that of statutes providing for a mandatory death penalty, since in either case the death penalty would be imposed under a rigidly prescribed set of circumstances. See generally McGautha v. California, 402 U.S. 183 (1971).

118. The Florida legislature has recently passed a law reinstating capital punishment for premeditated murder, felony murder, child rape, and the sale of heroin resulting in death. "The bill also requires that a jury will issue an advisory sentence of life or death and a circuit judge will then approve or reverse the jury's recommendation." N.Y. Times, Dec. 2, 1972, at 21, cols. 4-5. Since it does not provide for a mandatory death penalty, the constitu-

the general tenor of Justice Douglas' opinion and his strong liberal inclination suggest that he would reject a mandatory death penalty, the same cannot be said of Justices Stewart and White. On the contrary, their repeated statements in *Furman* that they are not ruling on the constitutionality of capital punishment per se as well as their acceptance of the goal of retribution lead one to believe that they would not hold a mandatory death penalty unconstitutional. Of course, such a decision by either one of them would probably result in the return of the death penalty[119] along with a definitive statement by the Court that death is not cruel and unusual punishment, at least within the meaning of the eighth amendment.

Constitutional Law—Due Process—Neither Statement of Reasons nor Administrative Hearing Required Before Nonrenewal of Nontenured Teacher's Contract.—Plaintiff, hired by Wisconsin State University as an assistant professor for one academic year, was notified by the university president that he would not be retained for the subsequent academic year. Since he was not tenured[1] he was offered neither reasons for his nonretention nor an opportunity for a hearing. Plaintiff then brought an action in a federal district court under section 1983 of Title 42, United States Code,[2] alleging that his nonretention was occasioned by his criticism of the university administration and consequently that it was in violation of his constitutional rights. This constitutional claim was never decided because the district court, affirmed by the Court of Appeals for the Seventh Circuit, held that minimal procedural due process required both a statement of reasons and a hearing.[3] The Supreme Court reversed, holding that the plaintiff was not entitled to these safeguards because he had not "shown that he

tionality of this law is highly questionable. It also appears likely that the death penalty will soon be reinstated for certain federal crimes. See N.Y. Times. Jan. 5, 1973, at 1, col. 8.

119. A resolution recommending a mandatory death penalty for specified offenses was recently approved by the National Association of Attorneys General. N.Y. Times, Dec. 7, 1972, at 30, col. 4.

1. Law of Jan. 6, 1966, ch. 497, § 1, [1966] Wis. Laws 779, as amended, Wis. Stat. Ann. § 37.31 (Supp. 1972). Under the statute then in force tenured teachers were entitled to a statement of charges and a hearing, but no similar protection was afforded a probationary teacher. In fact, Board of Regents Rules specifically provided that no reasons or review need be given in the case of nonretention of a probationary teacher. See Board of Regents v. Roth, 408 U.S. 564, 566-68 n.4 (1972).

2. 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."

3. Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970), aff'd, 446 F.2d 806 (7th Cir. 1971), rev'd, 408 U.S. 564 (1972).

was deprived of liberty or property protected by the Fourteenth Amendment."[4] *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Tenure statutes which have been enacted in most states[5] usually provide that after a public school teacher has been employed on probation for a specified number of years, he is entitled to tenure and thereafter can be dismissed only for cause. The term "cause" itself implies the availability of procedural safeguards to establish cause.[6] Probationary teachers, however, are often afforded no procedural safeguards.[7]

Some states provide a hearing for a probationary teacher who is dismissed in the middle of a school year. A New York court, however, held that a school teacher could be dismissed without a formal hearing before the expiration of his probationary period.[8] Other states require no procedures other than timely notice prior to the end of the school year.[9] Some states require that a statement of reasons be given to the probationary teacher,[10] but this requirement is not meant to imply that justification of the reasons must also be given.[11] Other states have

4. Board of Regents v. Roth, 408 U.S. 564, 579 (1972).

5. For a listing of tenure statutes see Note, Non-Tenured Teachers and Due Process: The Right to a Hearing and Statement of Reasons, 29 Wash. & Lee L. Rev. 100, 100-01 n.2 (1972). See also Frakt, Non-Tenure Teachers and the Constitution, 18 U. Kan. L. Rev. 27, 28-32 (1969) [hereinafter cited as Frakt].

6. See Shurtleff v. United States, 189 U.S. 311, 314 (1903); Reagan v. United States, 182 U.S. 419, 425 (1901); Freeman v. Gould Special School Dist., 405 F.2d 1153, 1159 (8th Cir.), cert. denied, 396 U.S. 843 (1969).

7. See, e.g., note 1 supra.

8. Butler v. Allen, 29 App. Div. 2d 799, 287 N.Y.S.2d 197 (3d Dep't 1968). New York law provides that a probationary teacher can be dismissed at any time during his probationary period by a majority vote of the board of education, upon a recommendation from the superintendent of schools. N.Y. Educ. Law §§ 2573(1), 3012(1) (McKinney Supp. 1972). However, an interesting situation has arisen in New York City. Due to the decentralization of the city's school system, greater procedural safeguards were needed for the protection of probationary teachers. A New York court called attention to the fact that termination of a probationary teacher resulted in revocation of his teaching license. Before decentralization, the dismissal of a teacher prevented him from obtaining employment in any of the city schools, so the revocation of his teaching license was a redundant act. However, after decentralization, if a teacher were dismissed by one district, he could still be reemployed by any of the other community districts provided he had a license. Therefore, the revocation of his license now deprived the teacher of a substantial interest. Accordingly, the court held he was entitled to a full hearing to protect this interest. Greenwald v. Community School Bd., 69 Misc. 2d 238, 329 N.Y.S.2d 203 (Sup. Ct. 1972).

9. Mich. Comp. Laws Ann. § 38.83 (1967); N.H. Rev. Stat. Ann. § 189:14-a (1964); Ohio Rev. Code Ann. § 3319.11 (Page 1972).

10. Ariz. Rev. Stat. Ann. § 15-259 (1956); Ill. Ann. Stat. ch. 122, § 24-11 (Smith-Hurd Supp. 1972); Ore. Rev. Stat. § 342.513 (1971).

11. The Arizona statute was interpreted by that state's highest court as meaning that although a nonretention notice was invalid without a statement of reasons, such a statement only had to be general in scope in order to give the teacher a notice of his inadequacies. The court made it clear that the school board would not have to demonstrate that good cause existed for the termination. School Dist. v. Superior Ct., 102 Ariz. 478, 433 P.2d 28 (1967).

adopted informal safeguards. Nevada, for example, provides that a teacher be advised of the reasons for the recommendation of nonretention and be given an opportunity to reply prior to formal school board action.[12] The Alaska statute entitles a probationary teacher to a statement of reasons and an informal hearing,[13] but prior to an amendment in 1968, the probationary teacher was entitled to the same full hearing as the tenured teacher.[14] Connecticut requires not only a statement of reasons and a hearing with a right to counsel but also access to administrative reports in the teacher's record.[15] The California statute mandates a statement of reasons and an opportunity for a hearing at which cause must be shown for the nonretention decision.[16] Though no formal tenure system has been legislated in Delaware and Washington, both states require that a statement of reasons and a hearing be given all nonretained teachers.[17]

The various state statutory schemes have sought to strike a balance between the teacher's interest in retaining his job or knowing the reasons for his nonretention, and the school board's interest in having extensive discretion in rehiring or not rehiring probationary teachers with a view toward maintaining a high quality faculty. But when and under what circumstances must a nonretained teacher be accorded a hearing or at least a statement of reasons for his dismissal? When do the procedural safeguards of due process of law become his as of right?

The U.S. Supreme Court in *Cafeteria Workers Local 473 v. McElroy*[18] dealt not with a state school teacher but with a cook in a food concession on a military installation who was denied a security clearance and thereby deprived of access to her place of employment. The Court held that she was not entitled to a hearing respecting the reasons for the denial of a security clearance[19] because she was deprived of the right to work at but one specific job and was not deprived of "the right to follow a chosen trade or profession."[20] The Court, applying a

12. Nev. Rev. Stat. § 391.3197 (1971).

13. Alaska Stat. § 14.20.175 (1970).

14. Id. (ed. comment), § 14.20.180 (ed. comment).

15. Conn. Gen. Stat. Ann. §§ 10-151, 10-151a (Supp. 1973). See Drown v. Portsmouth School Dist., 435 F.2d 1182, 1185 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971), for a discussion of the advisability of providing the teacher with access to these reports.

16. Cal. Educ. Code § 13443 (West 1969). In construing this code provision, the Supreme Court of California recently decided that a probationary teacher facing dismissal must be accorded an opportunity at an "administrative hearing to present evidence tending to show that he was dismissed not for reasons stated in the accusation but for the exercise of constitutional rights, [and that this] evidence must be received substantively and findings must be made concerning it." Bekiaris v. Board of Educ., 6 Cal. 3d 575, 592, 493 P.2d 480, 491, 100 Cal. Rptr. 16, 27 (1972).

17. Del. Code Ann. tit. 14, §§ 1410, 1413 (Supp. 1970); Wash. Rev. Code Ann. § 28A.67.070 (1970).

18. 367 U.S. 886 (1961).

19. Id. at 897-98.

20. Id. at 895-96. The Cafeteria Workers case represented a departure from the decision in Greene v. McElroy, 360 U.S. 474 (1959), where the Court held that an aeronautical engineer was entitled to a full-blown hearing because "the revocation of security clearance . . . has seriously affected, if not destroyed, his ability to obtain employment in the aeronautics field."

balance test, concluded that her interest in keeping one specific job was not sufficient to outweigh contravening governmental security interests.[21]

This balancing test was greatly emphasized in teacher nonretention cases in three different circuits,[22] with different results in each case. In *Orr v. Trinter*,[23] the Court of Appeals for the Sixth Circuit held that a probationary teacher's interest in receiving a statement of reasons and a hearing respecting his nonretention was outweighed by the school board's interest in discretionary hiring practices.[24]

In *Drown v. Portsmouth School District*,[25] the First Circuit required a statement of reasons, but not a hearing. The court considered at length the competing interests of the teacher and the school board. It noted that a statement of reasons could give the teacher an opportunity to convince the school board that its decision was based on mistaken facts, or it could provide him with evidence that his dismissal was in violation of his constitutional rights. This statement could also inform him of his shortcomings for subsequent self-improvement, or could possibly even serve as a recommendation to a future employer, where for example, the stated reasons cited the teacher as too innovative.[26] The court concluded that the slight administrative burden imposed upon the school board in furnishing a statement of reasons and affording the teacher access to evaluation reports was outweighed by the enumerated interests of the probationary teacher.[27]

Id. at 492. The Greene case was distinguished by the Cafeteria Workers Court on other grounds, 367 U.S. at 889-90; but it could also have been distinguished on the ground of opportunity for similar employment. Id. at 898-99 & n.10. For a comparison of these two cases, see Comment, Constitutional Problems in the Nonretention of Probationary Teachers, 1971 U. Ill. L.F. 508, 509-11.

21. 367 U.S. at 895-96. This balancing test requires that a determination of "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Id. at 895.

22. Roth v. Board of Regents, 446 F.2d 806, 809 (7th Cir. 1971), rev'd, 408 U.S. 564 (1972); Orr v. Trinter, 444 F.2d 128, 135 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972); Drown v. Portsmouth School Dist., 435 F.2d 1182, 1184-88 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971).

23. 444 F.2d 128 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972).

24. 444 F.2d at 135.

25. 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971).

26. Id. at 1184-85.

27. Id.; see Frakt, supra note 5, at 52. However, the fear has been expressed that a statement of reasons will lead inevitably to a defense of these reasons before various administrative panels and courts. Kahn & Solomon, Untenured Professors' Rights to Reappointment, 20 Clev. State L. Rev. 522, 531 (1971). This argument can be rebutted by the experience of the many states that have enacted statutes requiring a statement of reasons. See, e.g., note 10 supra and accompanying text. The American Association of University Professors was concerned that a nonretention notice with a statement of reasons would be confused with a dismissal for cause and erode the distinction between tenured and probationary teachers. Nevertheless, it "concluded that the reasons in support of the faculty member's being informed outweigh the countervailing risks." Committee A on Academic Freedom and Tenure,

On the other hand, the court, again balancing interests, refused to mandate a hearing. Administrators might be inclined to tolerate incompetent, or marginally competent, teachers rather than encounter the expense and discomfort of a hearing. And they might be unwilling to hire innovative teachers who could be the cause of future trouble.[28] The court stated that, although a teacher's allegation of a violation of constitutional rights would not be adequately answered by a statement of reasons, the teacher, unburdened by double hearings,[29] would have adequate recourse to the federal courts.

In *Roth v. Board of Regents*,[30] the Court of Appeals for the Seventh Circuit upheld the district court's determination that the balancing test required a hearing as well as a statement of reasons.[31] The district court had found that the plaintiff's interest in his teaching position was greater than the corresponding interest of the cook in the *Cafeteria Workers* case.[32] It had also decided that the government's interest in authoritarian control of its military bases was greater than a state's interest in authoritarian control of its schools.[33] It further ruled that a nonretention decision could not be made on a "basis wholly unsupported in fact, or on a basis wholly without reason."[34] This language was adopted by the

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American Ass'n of Univ. Professors Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, 56 A.A.U.P. Bull. 21, 23 (1970).

28. 435 F.2d at 1186. The Court of Appeals for the Fifth Circuit expressed a similar concern that the requirement of a hearing "would nullify the probationary system, whose purpose is to provide the school board a short-term test period during which the fledgling teacher may be examined, evaluated, and, if found wanting for any constitutional reason, not rehired." Thaw v. Board of Pub. Instr., 432 F.2d 98, 100 (5th Cir. 1970); accord, Roth v. Board of Regents, 446 F.2d 806, 812 (7th Cir. 1971), rev'd, 408 U.S. 564 (1972) (Duffy, J., dissenting); Orr v. Trinter, 444 F.2d 128, 134-35 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972); Freeman v. Gould Special School Dist., 405 F.2d 1153, 1160 (8th Cir.), cert. denied, 396 U.S. 843 (1969); Note, Non-Tenure Teachers: Procedural Rights Upon Dismissal, 3 Loyola U.L.J. 114, 131 (1972).

29. 435 F.2d at 1186-87. However, action subsequent to termination might be too little to protect the teacher's interests. See Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841, 858 [hereinafter cited as Van Alstyne]. Professor Van Alstyne's reasoning is that court litigation may be too costly for the individual teacher, and the inherent delay in judicial proceedings may prevent him from resuming his duties at the same institution since a final judgment may not be reached until years after the teacher has been separated from his position. Id. at 859-60. However, there is precedent for the proposition that the teacher could get a temporary court injunction staying the nonretention until final judgment in the § 1983 action. Mailloux v. Kiley, 436 F.2d 565, 566 (1st Cir. 1971); see Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); 85 Harv. L. Rev. 1327, 1335 (1972).

30. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971), rev'd, 408 U.S. 564 (1972).

31. Id. at 809.

32. Roth v. Board of Regents, 310 F. Supp. 972, 978 (W.D. Wis. 1970), aff'd, 446 F.2d 806 (7th Cir. 1971), rev'd, 408 U.S. 564 (1972). The court also felt that "non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." Id. at 979.

33. Id. at 978.

34. Id. at 979. The court noted that the basis for dismissal did not have to be as severe as the standard of "cause" for tenured teachers and the courts would "be bound to respect

Court of Appeals for the Seventh Circuit[35] in affirming the district court's decision. The underlying issue of whether, in fact, the plaintiff had been illegally dismissed because of his exercise of the right of free speech had not been litigated in the district court.[36] Nevertheless, the Seventh Circuit suggested, as an additional reason for requiring a pre-termination hearing, that "it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights."[37]

The Supreme Court has heretofore ruled that a teacher cannot be dismissed *because* of his exercise of constitutional rights[38] unless it can also be shown that his comments or actions substantially interfere with the orderly operation of the school.[39] A violation of this rule would undoubtedly give the teacher a right to an action under section 1983 of Title 42, United States Code;[40] however, the question remained whether it would also entitle him to an administrative hearing as of right upon a mere allegation of such a constitutional violation.[41]

In *Freeman v. Gould Special School District*,[42] the Court of Appeals for the Eighth Circuit stated that since the plaintiff teachers had failed to prove racial discrimination in their termination, there was no federal question remaining in their contention that they were arbitrarily denied due process under the fourteenth amendment.[43] The applicable Arkansas statute[44] provided no safeguard other than notice a specified time before nonretention; there was no requirement of a hearing as of right. The court reasoned that "[absent civil service or tenure] provisions a public employee has no right to continued public employment, except insofar as he may not be dismissed or failed [sic] to be rehired for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution."[45]

The court cited the need for school board discretion, which was recognized by state statute, and concluded, contrary to the Seventh Circuit in *Roth*, that absent

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bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons." Id.

35. 446 F.2d at 808.

36. 310 F. Supp. at 983.

37. 446 F.2d at 810; cf. Sindermann v. Perry, 430 F.2d 939, 944 (5th Cir. 1970).

38. See Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952). The Shelton and Keyishian decisions were specifically concerned with the situation of nontenured teachers whose contracts were not renewed because of their exercise of first and fourteenth amendment rights.

39. See Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 509 (1969) (plaintiffs were students, not teachers); Pickering v. Board of Educ., 391 U.S. 563, 572-73 (1968); Frakt, supra note 5, at 32; Van Alstyne, supra note 29, at 848-54.

40. See note 2 supra.

41. See text accompanying notes 73-76 infra.

42. 405 F.2d 1153 (8th Cir.), cert. denied, 396 U.S. 843 (1969).

43. Id. at 1156-57.

44. Ark. Stat. Ann. § 80-1304(b) (Supp. 1971); see 405 F.2d at 1160 n.6.

45. 405 F.2d at 1159.

the civil rights issue there was no general due process right under the fourteenth amendment on a claim of arbitrary nonretention.[46]

In *Jones v. Hopper*,[47] the Tenth Circuit ruled that a teacher had a right of action under section 1983 only if he had been deprived of guaranteed "rights, privileges, or immunities secured by the Federal Constitution and laws."[48] The plaintiff had maintained that he was deprived of his right of "expectancy to continued employment"[49] when he was allegedly not retained for a third year because of his exercise of free speech. The court, however, held that any expectancy right must arise from the conditions of previous appointment; and the plaintiff had no such right in this case because he was hired without a contract under a statutory provision which vested complete discretion in the college board of trustees to deny reemployment to teachers.[50] The court cited the need for such discretion and concluded that the exercise of this discretion could not constitute a violation of section 1983[51] in the absence of "unreasonable conditions . . . imposed upon the granting of public employment."[52]

The "expectancy of reemployment" concept was further developed in two Fifth Circuit decisions. In *Ferguson v. Thomas*,[53] it was applied to require a statement of reasons and a hearing for a nonretained professor who had been employed at the same institution for nine years on one-year contracts with no tenure provisions. The expectancy was created by the prevailing practices of the institution which required a demonstration of cause for the nonretention of such a professor.[54] In *Lucas v. Chapman*,[55] the court held that continuous employment for eleven years on short-term contracts was sufficient to give a teacher the "necessary expectancy of reemployment that constituted a protectible interest."[56]

With its decisions in *Board of Regents v. Roth*,[57] and the companion case of *Perry v. Sindermann*,[58] the Supreme Court has now eliminated some of the confusion resulting from the conflicts among the circuits. In *Roth*, the Court discarded or avoided the *Cafeteria Workers* balancing test,[59] changing the emphasis

46. Id. at 1160-61.
47. 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991 (1970).
48. 410 F.2d at 1326.
49. Id. at 1327.
50. Id. at 1328-29.
51. Id. at 1329.
52. Id. at 1328. The court stated that no "unreasonable conditions" were alleged in the case. Id. Apparently the court would require that explicit conditions be imposed upon the "granting" of employment. The mere allegations of an unconstitutional termination that were made in this case were not considered sufficient to establish jurisdiction under § 1983, absent a protectible interest in continued employment. See notes 64-66 & 73-76 infra and accompanying text.
53. 430 F.2d 852 (5th Cir. 1970).
54. Id. at 856.
55. 430 F.2d 945 (5th Cir. 1970).
56. Id. at 947.
57. 408 U.S. 564 (1972).
58. 408 U.S. 593 (1972).
59. See note 21 supra.

from the relative weights of the interests involved to the very nature of the interests themselves.[60] Mr. Justice Stewart reasoned that an individual is entitled to procedural due process protection of his interests only "if the interest is within the Fourteenth Amendment's protection of liberty and property."[61] A weighing of interests would be appropriate only to determine the form of a hearing once it has been determined that a hearing is required.[62]

The Court then concluded that the plaintiff's interest in retention for the next school year was neither a "liberty" nor "property" right under the fourteenth amendment. His liberty had not been infringed since he suffered neither a serious attack on his reputation[63] nor a loss of subsequent employment opportunities.[64] He had no property right in retention because the terms of his employment gave him none. The Court stated that protectible "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an *independent source such as state law*—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[65]

60. 408 U.S. at 570-71. This shift in emphasis enabled the Court to avoid a decision on whether or not the professional and economic interests of a teacher in retaining his position are greater than the interests of a school board in maintaining complete discretion over the appointment and retention of its faculty members. See notes 26-29 supra and accompanying text.

61. 408 U.S. at 571. See Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972).

62. 408 U.S. at 570 & n.8. See Morrissey v. Brewer, 408 U.S. 471, 481 (1972), wherein the Court held that the flexibility of due process "is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure."

63. 408 U.S. at 573. The Court maintained that one would have a due process right to a hearing if his reputation were attacked. Wisconsin v. Constantineau, 400 U.S. 433 (1971) (poster identifying people as excessive drinkers); Wieman v. Updegraff, 344 U.S. 183 (1952) (disqualification of members of "communist-front" organizations from state employment when no distinction was made between innocent and knowing activity). Similarly, in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), it was held that due process forbade the designation of organizations as communist without first affording these organizations notice and a hearing. Id. at 143 (Black, J., concurring), 165-72 (Frankfurter, J., concurring), 186 (Jackson, J., concurring) (separate opinions). See United States v. Lovett, 328 U.S. 303, 316-18 (1946) (withholding of pay upon a Congressional finding of disloyalty without the due process guarantee of judicial trial). See also Cumming v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866) (bill of attainder).

64. The Court stated that there was no direct state action to prevent plaintiff from finding other employment as a teacher within the state. 408 U.S. at 573-74. A state could not exclude a person from an entire "occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) (footnote omitted). But the respondent was only excluded from one position and the Court reasoned that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." 408 U.S. at 575. See note 20 supra; Freeman v. Gould Special School Dist., 405 F.2d 1153, 1159 (8th Cir.), cert. denied, 396 U.S. 843 (1969).

65. 408 U.S. at 577 (emphasis added).

The plaintiff, however, had no contractual or statutory provision nor any university policy or rule that gave him a property interest in retaining his job.[66] The facts in the *Roth* case were thus readily distinguishable from those in *Sindermann* where the plaintiff was employed in the state university system for a period of ten years under explicit "rules and understandings, promulgated and fostered by state officials, that may [have justified] his legitimate claim of entitlement to continued employment absent 'sufficient cause.' "[67] Sindermann, therefore, had a property interest in reemployment similar to that of a tenured teacher who could only be dismissed for cause, and consequently was entitled to the due process requirement of a hearing.[68] Mr. Justice Stewart made it clear, however, that the expectancy of reemployment rule adopted by the Fifth Circuit[69] could not be sustained on a merely subjective basis, but could be sustained only when the expectancy is nurtured by the institution's rules and policies.[70]

The basic issue of whether a nonretained teacher is entitled to a statement of reasons and a hearing is in many cases complicated by accompanying allegations that the termination was occasioned by adverse reactions to the teacher's exercise of constitutional rights.[71] Even though a nontenured teacher is not entitled to a

66. Id. at 578. Roth's employment contract contained no renewal provision. The Wisconsin tenure statute gave him no property interest in reemployment. See note 1 supra. The Court cited its opinion in Goldberg v. Kelly, 397 U.S. 254 (1970), wherein a welfare recipient was held to be entitled to a hearing before his benefits could be terminated. These benefits were considered the property of the qualified recipient because he was entitled to them by statute. Id. at 262. See generally Sherbert v. Verner, 374 U.S. 398 (1963) (termination of unemployment compensation); Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemption). Similarly, the Court held that a tenured professor could not be summarily dismissed, but instead was entitled to a "proper inquiry" to show the inconsistency of continued employment with a real interest of the state. Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956).

67. Perry v. Sindermann, 408 U.S. 593, 602-03 (1972). The Court cited the tenure guidelines adopted by the Coordinating Board of the Texas College and University System which provided in part that " '[b]eginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education.' " Id. at 600 n.6.

68. Id. at 602-03. By recognizing the possibility of Sindermann's proving a property interest in his teaching position, the Court served to undermine still further the holding that "[g]overnment employ is not 'property' . . . . We are unable to perceive how it could be held to be 'liberty'. Certainly it is not 'life'." Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951). This case was one of the modern foundations for the so-called "right-privilege" distinction which asserted that government employ was merely a privilege, not a right, and so was not protected by procedural due process standards. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968), for a discussion of how this distinction has been gradually eroded.

69. See notes 53-56 supra and accompanying text.

70. 408 U.S. at 603.

71. E.g., Ferguson v. Thomas, 430 F.2d 852, 857 (5th Cir. 1970). This allegation was also made in the Roth and Sindermann cases. On the other hand, the Orr case (444 F.2d at

pretermination hearing in the absence of a protectible "liberty" or "property" interest, he does have an action under section 1983 when he presents a clear issue of nonretention "as a reprisal for the exercise of constitutionally protected rights."[72] The issue of whether either Roth or Sindermann had, in fact, been illegally dismissed because of their exercise of free speech had not been litigated in either district court. Therefore, the basic issue of an illegal dismissal in violation of the first amendment was not before the Court. Nevertheless, the Court made it clear[73] that both circuits were in error in suggesting that a pre-termination hearing was required simply by virtue of allegations that the nonretention decisions were predicated upon their exercise of free speech rights.[74]

The *Roth* Court stated that one may be entitled to a hearing before a state can directly infringe upon his first amendment interest.[75] There must, however, be a direct infringement upon these interests, such as by "a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job . . . is not itself a free speech interest."[76]

Mr. Justice Douglas, however, ever conscious of personal liberty and first amendment freedoms, argued that since government cannot "[condition] renewal of a teacher's contract upon surrender of First Amendment rights,"[77] a teacher alleging that a nonrenewal decision was made in violation of these rights should be entitled to a hearing and a statement of reasons so that his rights may in fact be protected.[78] Even apart from first amendment rights, a teacher's liberty interests in renewal should still entitle him to procedural safeguards since "[n]onrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State."[79]

Mr. Justice Marshall would extend the concepts of "liberty" and "property" still further to hold that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment."[80] Thus, it appears that both dissenting Justices believe that due

134), as well as the Drown case, (435 F.2d at 1183), involved no collateral free speech issues. In the Freeman case, the issue of racial discrimination was dropped on appeal. 405 F.2d at 1157.

72. Sindermann v. Perry, 430 F.2d 939, 943 (5th Cir. 1970), aff'd, 408 U.S. 593 (1972); see Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); United States v. Robel, 389 U.S. 258, 263-64 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Baggett v. Bullitt, 377 U.S. 360, 380 (1964); Cramp v. Board of Pub. Instr., 368 U.S. 278, 288 (1961); Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952).

73. Board of Regents v. Roth, 408 U.S. 564, 575 n.14 (dictum); Perry v. Sindermann, 408 U.S. 593, 599 n.5 (dictum).

74. See note 37 supra and accompanying text.

75. 408 U.S. at 575 n.14.

76. Id.

77. Id. at 583 (Douglas, J., dissenting); see note 75 supra and accompanying text.

78. Id. at 585.

79. Id.; see note 64 supra for the majority's discussion.

80. 408 U.S. at 588 (Marshall, J., dissenting). Justice Marshall was persuaded that the

process should require a statement of reasons and a hearing in all nonretention cases.

In resolving the *Roth* case, the Court was faced with a statutory system[81] under which the state legislature had deliberately vested extensive discretion in the school boards for rehiring probationary teachers.[82] The Court was unwilling to rewrite, by judicial fiat, state tenure statutes. Thus, tenure statutes, teaching contracts, and academic hiring practices and procedures remain in the province of state legislatures and state administrators, as the Court was ready to recognize.[83]

It is now likely that the Supreme Court will leave subsequent problems in this area to the decisions of the state courts. Indeed, Chief Justice Burger, concurring in *Sindermann* and *Roth*, argued that federal courts should abstain from deciding whether a teacher is entitled to a prior hearing until the state courts can determine whether he has a property interest under an ambiguous state law.[84]

Teachers will continue to be entitled to access to the federal courts in all nonretention cases when the dismissal is in violation of a constitutional right or is a clear abrogation of "property" or "liberty" interests. But a nonretained teacher must first establish one of these claims in order to state a federal cause of action. The Court of Appeals for the Seventh Circuit recently affirmed the dismissal of a teacher's complaint for failure to allege sufficient facts to establish a "liberty" or "property" interest under the *Roth* and *Sindermann* standards.[85] On the other hand, the Court of Appeals for the Fourth Circuit reversed the dismissal of a claim on the ground that the circumstances of the teacher's employment for 29 years were sufficient to state a "property" claim under the fourteenth amendment.[86] But it is apparent that a teacher will not be able to state a federal claim on the mere ground that his nonretention was arbitrary.[87]

The *Roth* Court chose to avoid a further federal entrenchment into an area that is better left to the discretion of the states and the universities themselves. State legislatures are in a better position to assess the effects of their own tenure

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requirement of procedural safeguards for applicants as well as for present employees would not be too burdensome upon the government because reasons could readily be given where they actually existed. Furthermore, he argued that giving reasons would, in fact, aid governmental functions by helping to prevent slipshod or erroneous decisions. Id. at 591-92.

81. Law of Jan. 6, 1966, ch. 497, § 1, [1966] Wis. Laws 779, as amended, Wis. Stat. Ann. § 37.31 (Supp. 1972).

82. Board of Regents v. Roth, 408 U.S. 564, 567 (1972).

83. See note 65 supra and accompanying text.

84. 408 U.S. at 604 (Burger, C.J., concurring).

85. Lipp v. Board of Educ., No. 71-1912 (7th Cir., Nov. 27, 1972). The teacher had alleged the failure to provide him with a copy of an unfavorable efficiency report violated his due process rights under the fourteenth amendment. Id. at 2.

86. Johnson v. County School Bd., No. 71-1590 (4th Cir., Nov. 20, 1972). Unfortunately, the court appears to have misread the Roth Court's determination of what constitutes a protectible interest in "liberty." Id. at 8-9. Mere employment for a long period of time would not establish a "liberty" interest in the absence of an attack on one's reputation or the loss of subsequent employment opportunities. See notes 63-64 supra.

87. See notes 34-35 & 46 supra and accompanying text.

systems. The issue of academic freedom should not only inure to the benefit of teachers, but should also safeguard university and school governing boards from unnecessary governmental interference with the use of discretion in maintaining a quality faculty. State legislatures are in a position to check excesses of such discretion in the state school systems; and the rather recent advent of labor unions upon the academic scene will have a mitigating effect on administrative abuses which may be found in both public and private institutions. There is no real reason why there should be greater procedural safeguards for teachers than for secretaries, accountants, or any other employees who are not given contractual job security. Remedies are available for violations of constitutional rights and the deprivation of "liberty" and "property" interests. But apart from these circumstances, there is room for discretion and for diversified systems of education. There is no compelling reason for the federal courts to interfere.

In conclusion, it should be pointed out that the *Roth* decision is also significant because of its recognition of conceptual boundaries in the determination of what is "property" and what is "liberty" as those terms are used in the fourteenth amendment. The present Court appears to be unwilling to expand the scope of those terms beyond the informal guidelines established by precedent.[88] Although the Court has not attempted a precise definition of liberty and property, it has demonstrated an intent to construe those terms more narrowly than they have been interpreted in the past. Therefore, the decision contains implications that the Court in the future may tighten the reins on the further expansion of individual rights under the fourteenth amendment.

Constitutional Law—Equal Protection—Racial Discrimination by Private Club Held Not State Action Despite State Issued Liquor License and Accompanying Regulations.—Plaintiff, a Negro, entered the dining room and bar of defendant Moose Lodge, the Harrisburg chapter of the national fraternal organization, as the guest of a member. Defendant's employees refused to serve plaintiff solely on the basis of his race.[1] He then brought an action[2] for injunctive

88. 408 U.S. at 572. See notes 63-66 supra and accompanying text.

1. The Constitution of the Supreme Lodge, to the provisions of which local chapters were bound, required that: "The membership of the lodges shall be composed of male persons of the Caucasian or White race . . . not married to someone of other than the Caucasian or White race . . . ." Irvis v. Scott, 318 F. Supp. 1246, 1247 (M.D. Pa. 1970), rev'd sub nom. Moose Lodge v. Irvis, 407 U.S. 163 (1972). The district court found that local chapters "accordingly maintain a policy and practice of restricting membership to the Caucasian race and permitting members to bring only Caucasian guests on lodge premises, particularly to the dining room and bar." Id. Further, the court found as a fact that plaintiff had been refused service "solely because he is a Negro." Id.

2. Plaintiff originally complained to the Pennsylvania Human Relations Committee which held that the dining room of Moose Lodge was a "place of public accommodation" within the meaning of the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, § 953 (1961), and that defendant Lodge had been guilty of unlawful discrimination. 318 F. Supp. at 1247.

relief under the provisions of section 1983 of Title 42, United States Code,[3] alleging that since the lodge had been issued a liquor license by the state Liquor Control Board[4] and was subject to its extensive regulations,[5] racial discrimination by it constituted state action in violation of the fourteenth amendment's equal protection clause.[6] A three-judge district court, convened at plaintiff's request under section 2281 of Title 28, United States Code,[7] invalidated the club's liquor license.[8] On appeal, the Supreme Court of the United States reversed in a 6-3 decision, holding that the Control Board's license and regulatory scheme did not "sufficiently implicate" the state in the lodge's discriminatory policies so as to constitute state action and an equal protection violation.[9] *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

It was early established that the equal protection clause of the fourteenth amendment offers no recourse against wholly private acts.[10] As the Supreme

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The Court of Common Pleas of Dauphin County reversed the Commission on appeal, concluding that the dining room was not a "place of public accommodation" under the provisions of the aforementioned act. Pennsylvania Human Relations Comm. v. Loyal Order of Moose (C.P. Dauphin County, Mar. 6, 1970) (unreported).

3. Section 1983 provides in part: "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 [a] . . . suit in equity . . . ." 42 U.S.C. § 1983 (1970).

4. The Pennsylvania Liquor Control Board exists as "an independent administrative board" by the terms of Pa. Stat. Ann. tit. 47, § 2-201 (1969). Its discretion with respect to the issuance of club liquor licenses is outlined in Pa. Stat. Ann. tit. 47, § 4-404 (1969).

5. See generally Pennsylvania Liquor Code, Pa. Stat. Ann. tit. 47, §§ 1 et seq. (1969).

6. The fourteenth amendment provides, in pertinent part, that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

7. Section 2281 provides that injunctive relief "restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges . . . ." 28 U.S.C. § 2281 (1970).

8. 318 F. Supp. at 1251-52.

9. The Court did restrain enforcement of § 113.09 of the Regulations of the Pennsylvania Liquor Control Board (June 1970 ed.) which required that "every club licensee shall adhere to all the provisions of its constitution and by-laws." Id. The Court found appellee "entitled to a decree enjoining the enforcement of § 113.09 of the regulations promulgated by the . . . Control Board insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and bylaws containing racially discriminatory provisions." Moose Lodge v. Irvis, 407 U.S. 163, 179 (1972).

10. In the 1875 case of United States v. Cruikshank the Supreme Court declared: "The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not . . . add any thing to the rights which one citizen has under the Constitution against another." 92 U.S. 542, 554-55

Court noted in the *Civil Rights Cases*:[11] "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[12] Despite strong feeling against this limitation on the scope of the amendment's guarantees,[13] the requirement of a finding of state action has persisted.[14] Nonetheless, the dimensions of the state action concept are as yet unsettled.[15]

Perhaps the most obvious form of state action is that involving the conduct of state officials. In the 1879 case *Ex Parte Virginia*[16] the Supreme Court refused to invalidate the indictment of a county court judge who had been accused of excluding blacks from jury lists made out by him.[17] In so doing it established

(1875). See also United States v. Harris, 106 U.S. 629 (1882); Virginia v. Rives, 100 U.S. 313, 318 (1879); Strauder v. West Virginia, 100 U.S. 303 (1879).

11. 109 U.S. 3 (1883). The Civil Rights Cases consisted of five separate challenges to the Civil Rights Act of 1875, 18 Stat. 335 (1875), consolidated into a single appeal. The Supreme Court declared the Act unconstitutional because it compelled "privately owned and operated facilities" to cease discrimination. Allowing the Act to stand, the majority reasoned, would empower Congress to enact laws governing the conduct of individuals regardless of whether they act in any type of official capacity. 109 U.S. at 13-14.

12. Id. at 11.

13. In his famous dissenting opinion Justice Harlan declared that "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting). See also United States v. Harris, 106 U.S. 629 (1882) (Harlan, J., dissenting); R. Carr, Federal Protection of Civil Rights 36 (1947); H. Flack, Adoption of the Fourteenth Amendment (1908); Watt & Orlikoff, The Coming Vindication of Mr. Justice Harlan, 44 Ill. L. Rev. 13 (1949).

14. See Moose Lodge v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Pkg. Auth., 365 U.S. 715 (1961).

15. See, e.g., Burton v. Wilmington Pkg. Auth., 365 U.S. 715 (1961); Williams v. United States, 341 U.S. 97 (1951); Nixon v. Condon, 286 U.S. 73 (1932). See generally P. Kauper, Civil Liberties and the Constitution 127-68 (1962); Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment, 43 Cornell L. Rev. 375 (1958); Barnett, What is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?, 24 Ore. L. Rev. 227 (1945); Karst & Van Alstyne, Comment: Sit-Ins and State Action—Mr. Justice Douglas, Concurring, 14 Stan. L. Rev. 762 (1962); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960); Schubert, State Action and the Private University, 24 Rutgers L. Rev. 323 (1970); Silard, A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee, 66 Colum. L. Rev. 855 (1966); Williams, The Twilight of State Action, 41 Texas L. Rev. 347 (1963).

16. 100 U.S. 339 (1879).

17. Since the acts in question also violated state law, it was further established that any act of a state official was state action regardless of his motives or the nature of the act. "There can be no doubt at least since Ex Parte Virginia, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Monroe v. Pape, 365 U.S. 167, 171-72 (1961) (illegal search by police held to be under color of state law); Williams v. United States, 341 U.S. 97 (1951) (private detective's beating of suspects held to be state action because he had been issued a

the principle that "[w]hoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition . . . ."[18]

State action has also been found by the Court where persons or entities, though formally comprising no part of state government, perform a governmental function. Thus in *Nixon v. Condon*[19] the Court in 1932 held that state party executive committees, although not official state agencies, had become "organs of the State itself, the repositories of official power."[20] The exclusion by them of blacks from party primaries was, therefore, a denial of equal protection.[21]

Another area in which state action has been found to exist is in respect of private persons who perform no public function but whose action is fostered or encouraged by the state. Thus in *Peterson v. City of Greenville*[22] a city ordinance requiring segregated lunch counters was held unconstitutional since by virtue of it the state had "effectively determined that a person owning, managing or controlling an eating place . . . segregate his white and Negro patrons."[23] In *Lombard v. Louisiana*,[24] following the reasoning of the *Peterson* case, speeches by a mayor and superintendent of police against "sit-ins" were said to have the force of an ordinance, and state action was thus predicated upon this official coercion of private discrimination.[25]

special police officer's badge); United States v. Classic, 313 U.S. 299 (1941) (ballot-box stuffing by primary officials was state action).

18. 100 U.S. at 347. As a result of this reasoning those bodies whose action would now constitute state action were greatly extended. See, e.g., Hamilton v. University of California Regents, 293 U.S. 245 (1934) (education board); Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913) (municipal corp.); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907) (tax board); Reagan v. Farmer's Loan & Trust Co., 154 U.S. 362 (1894) (public service comm'n). See also Henry v. Greenville Airport Comm'n, 279 F.2d 751 (4th Cir. 1960).

19. 286 U.S. 73 (1932). The result in this case was the same as in Nixon v. Herndon, 273 U.S. 536 (1927), in which the Texas legislature had passed a statute that expressly prohibited Negroes from voting in primaries. The statute was declared unconstitutional. Id. at 541.

20. 286 U.S. at 84-85.

21. Id. at 89. Reitman v. Mulkey, 387 U.S. 369 (1967), strengthened the Condon reasoning by deciding that whenever a state has "taken affirmative action designed to make private discriminations legally possible" the fourteenth amendment has been violated. Id. at 375. In that case, pursuant to an initiative and referendum an article had been added to the California state constitution giving private parties the right to sell or lease property with complete discretion. The Supreme Court felt that the law would "significantly encourage" private discrimination and involve the state therein to such an extent as to constitute state action. Id. at 381. See also Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949).

22. 373 U.S. 244 (1963).

23. Id. at 248.

24. 373 U.S. 267 (1963).

25. Id. at 273-74. Three situations that often overlap into more than one category of state action are: state financial aid to private institutions (Norris v. Mayor & City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948); state aid other than money to private institu-

In 1961 the Supreme Court added to the already great body of case law on the subject of state action its landmark decision in *Burton v. Wilmington Parking Authority*.[26] In Burton racial discrimination by a private restaurant which leased its premises from an agency of the state of Delaware was held violative of the equal protection clause.[27] An extensive review of the facts led the Court to conclude that the state had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."[28] Declining to "fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause,"[29] the Court, speaking through Justice Clark, observed that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[30]

This reluctance to announce a rule was not lost on critics of the Court's approach.[31] Indeed, Justice Harlan, dissenting, declared that it "seems to me to leave completely at sea just what it is in this record that satisfies the requirement of 'state action.' "[32] However, to those who wished the demise of the state action limitation itself, the *Burton* result was deemed a great step forward.[33]

Of particular note in *Burton* is the terminology employed. In reaching its decision the Court did not use the words "state action" but spoke instead of state "involvement" and "interdependence."[34] To its equal protection vocabulary the Court added still another term, "entwinement", in the 1966 case of *Evans v. Newton*.[35] There it was held that a park[36] which had for many years been

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tions (Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950)); and state inaction (Baker v. Carr, 369 U.S. 186 (1962); Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943)).

26. 365 U.S. 715 (1961). See generally Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957); Lewis, Burton v. Wilmington Parking Authority—A Case Without Precedent, 61 Colum. L. Rev. 1458 (1961); Lewis, supra note 15, at 1101-02; Williams, supra note 15, at 382-84.

27. 365 U.S. at 726.

28. Id. at 725.

29. Id. at 722.

30. Id; accord, Kotch v. Pilot Comm'rs, 330 U.S. 552 (1947). "The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task." Id. at 556.

31. See St. Antoine, Color Blindness but not Myopia, 59 Mich. L. Rev. 993, 1005-06 (1961).

32. 365 U.S. 715, 728 (1961) (Harlan, J., dissenting).

33. See, e.g., Williams, supra note 15.

34. 365 U.S. at 725.

35. 382 U.S. 296, 299 (1966).

36. The tract of land on which the park was situated had been devised to the Mayor and City Council of Macon, Georgia with the instruction that it be segregated. After it

public did not lose its public character by the substitution of private for public directors—thus it could not be open "for white people only."[37] Speaking for the majority Justice Douglas noted: "Conduct that is formally 'private' may become so *entwined* with governmental policies . . . as to become subject to the constitutional limitations placed upon state action."[38]

The three-judge district court in *Irvis* relied heavily on the *Burton* case in reaching its conclusion that the discriminatory policy of the defendant Lodge was indeed unlawful.[39] After considering the "uniqueness" and "all-pervasiveness"[40] of the regulatory scheme imposed upon the Lodge by the licensing authority, the Court felt that "[a]s in *Burton* the state has 'insinuated itself into a position of interdependence' with its club licensees . . . ."[41] It also noted that "[i]t would be difficult to find a more pervasive interaction of state authority with personal conduct."[42]

The idea of discerning in a license the basis, at least in part, for a finding of state action—or of Burtonesque "interdependence" and "interaction"—was not novel to the court's decision. The same had been intimated by the first Justice Harlan dissenting in the *Civil Rights Cases*[43] and had been proposed explicitly by Justice Douglas in several decisions.[44] However, no court had ever found state action from the mere issuance of a license of any kind.[45] Recognizing this, the district court in *Irvis* emphasized that an accompanyment of the liquor license issued to Moose Lodge had been "[t]he unique power which the state enjoys in this area, which . . . has been exercised in a manner which reaches intimately and deeply into the operation of the licensees."[46]

The Supreme Court was not persuaded by this argument. While recognizing

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was concluded that the city could not maintain the facility on a segregated basis, and the park opened to persons of all races, suit was brought to have title to the devise transferred to private trustees who could then carry out the terms of the trust. 382 U.S. at 297-98.

37. Id. at 301.

38. Id. at 299 (emphasis added).

39. 318 F. Supp. at 1251-52.

40. Id. at 1248. "We believe the decisive factor is the uniqueness and the all-pervasiveness of the regulation . . . ." Id. For a listing of the various regulations see id. at 1249-50.

41. Id. at 1251.

42. Id. at 1250.

43. 109 U.S. 3, 26 (1883). Here, Justice Harlan declared that "railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State . . . ." Id. at 58.

44. See Garner v. Louisiana, 368 U.S. 157, 176 (1961) (Douglas, J., concurring). "I do not believe that a State that licenses a business can license it to serve only whites . . . ." Id. at 184. See also Lombard v. Louisiana, 373 U.S. 267, 274 (1962) (Douglas, J., concurring).

45. See Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959); Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 72 N.E.2d 697, cert. denied, 332 U.S. 761 (1947); State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958). See generally P. Freund, On Law and Justice 17-18 (1968); Lewis, The Sit-In Cases: Great Expectations, 1963 S.C. Rev. 101; 47 Va. L. Rev. 105, 115 (1961); 46 Va. L. Rev. 123, 127 (1960).

46. 318 F. Supp. at 1250.

the pervasiveness of the State Board's scheme the Court nevertheless felt that it did not "sufficiently implicate" the state in the discriminatory policies of the Lodge so as to constitute state action.[47]

In reaching a result opposite to that of the district court, the Supreme Court nevertheless relied for the most part upon the same precedent, *i.e.*, the *Burton* case. In so doing, it thus substantiated to some degree Justice Harlan's reservations as to the uncertainty of the *Burton* Court's holding.[48] Following literally *Burton*'s reliance on "sifting facts and weighing circumstances" for discovery of state involvement, the Court found the facts and circumstances surrounding the *Irvis* case to be distinguishable.[49] Whereas, it concluded, the restaurant in *Burton* had been public and located in a public building, Moose Lodge was "a private social club in a private building."[50] More importantly, the state in the instant case did not enjoy with the Lodge the "symbiotic relationship" which had obtained between lessor and lessee in *Burton*.[51]

As was pointed out in *Burton*:

> It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. Guests of the restaurant are afforded a convenient place to park their automobiles. . . . Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities. Should any improvements effected in the leasehold . . . become part of the realty, there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency. Neither can it be ignored . . . that profits earned by discrimination not only contribute to, but also are indispensible elements in, the financial success of a governmental agency.[52]

The Court in *Irvis* felt that absent such relationship the State was not "in any realistic sense a partner or even a joint venturer in the club's enterprise"[53] and that therefore the equal protection clause had not been violated.[54]

In reaching its conclusion, the Court also denied that an effect of the quota which the Control Board had established with respect to liquor licenses issued in the Harrisburg area had been to award the Lodge a limited monopoly on liquor dispensation.[55] It was this contention which formed the crux of Justice Douglas'

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47. 407 U.S. at 177.

48. See note 32 supra and accompanying text.

49. 407 U.S. at 175.

50. Id. The case did not discuss what precisely is meant by the "private club" classification. In Daniel v. Paul, 395 U.S. 298 (1969) the Court decided that advertising practices of a so-called 'private club' as well as its great membership rendered it a public facility. See also United States v. Northwest La. Rest. Club, 256 F. Supp. 151 (W.D. La. 1966); 15 Vill. L. Rev. 466 (1970).

51. 407 U.S. at 175.

52. 365 U.S. at 724.

53. 407 U.S. at 177.

54. Id. at 178-79.

55. Id. at 177. The Court declared: "The limited effect of the prohibition against obtaining additional club licenses when the maximum number of retail licenses allotted to a municipality has been issued, when considered together with the availability of liquor from hotel,

dissenting opinion. According to Douglas, since the license quota had long been filled, this "state-enforced scarcity" of licenses had the effect of discouraging formation of non-discriminatory clubs[56] and in turn of "putting the weight of . . . [the state's licenses] behind racial discrimination."[57] Furthermore, the particular character of the license in question had the effect of distinguishing Moose Lodge from the other clubs "not in the public domain."[58] With this note Justice Douglas made explicit a problem which, although not mentioned specifically in the majority opinion, must be viewed as underlying any appraisal of the extent of state action in this case: that of encroachment upon the right of association which is guaranteed by the first amendment.[59] Perhaps the *Irvis* Court feared that a practical consequence of affirming the district court's decision would be a hampering of the operations of many private associations. It may have felt further that no limiting of the opinion to its peculiar facts could have avoided the establishment of a dangerous precedent.

If anything, the *Irvis* decision testifies to the continuing vitality of the state action requirement.[60] A more complex problem lies in ascertaining its effect upon the meaning of state action. The state in *Irvis* was not sufficiently implicated in Moose Lodge's discriminatory policies because it was not with it a "partner" or "joint-venturer". While these terms probably do not envision a literal partnership or joint venture—such not having been apparent in *Burton*, the relied upon precedent—very little else may be said about them other than that they contemplate the existence at least of a "symbiotic relationship". What is a "symbiotic relationship"? *Burton*, we are told, is an example of one; *Irvis* is not.[61] Perhaps the most concrete conclusion to be drawn from the *Irvis* case is that the trend toward liberalization of state action which was so remarkable in the years of the Warren Court has, for the moment, been halted.

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restaurant, and retail licensees, falls far short of conferring upon club licensees a monopoly in the dispensing of liquor in any given municipality or in the State as a whole." Id.

56. Id. at 182-83. The situation discouraged non-discriminatory clubs, or any club, from forming since without a liquor license any "fraternal organization would be hard pressed to survive." Id. at 183.

57. Id. at 183. See Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); P. Kauper, supra note 15, at 162-63; Karst & Van Alstyne, supra note 15, at 775.

58. 407 U.S. at 180.

59. Moose Lodge was characterized as a "private" club. This is important because once its nature had been determined to be private the first amendment's freedom of association attached and all interferences became suspect. This is the so-called "reverse presumption of constitutionality." United States v. CIO, 335 U.S. 106, 129 (1948) (Rutledge, J., concurring). It should be noted that in a rehearing the Pennsylvania court reclassified the Lodge as a "public accommodation" because of its policy of admitting guests. See N.Y. Times, Dec. 12, 1972, at 27, col. 2.

60. 407 U.S. at 172-73. After the Burton decision it was at least possible to view the state action requirement of the fourteenth amendment as gone. See generally Williams, supra note 15.

61. It has been ventured that indeed a "symbiotic relationship" did exist as between the State of Pennsylvania and its licensee, Moose Lodge; see The Supreme Court, 1971 Term, 86 Harv. L. Rev. 52, 73-74 (1972). However, any such relationship was certainly not commensurate in extent with that which existed in Burton.

Constitutional Law—Equal Protection—Sex-Based Discrimination in Section 712(b) of the Family Court Act Held Unconstitutional.—Mrs. Ethel A. filed a petition in New York Family Court alleging that her sixteen-year-old daughter, Patricia, a high school drop-out and suspected drug user,[1] was a Person in Need of Supervision, generally referred to as PINS, pursuant to section 712(b) of the Family Court Act.[2] If Patricia had been a male, the family court would not have had jurisdiction over the matter since the PINS statute gives the court jurisdiction over males less than sixteen years old and females less than eighteen years old. At a Family Court hearing, Patricia was adjudicated a PINS and put on probation.[3] On appeal she challenged the PINS statute on both equal protection and vagueness[4] grounds. The appellate division upheld the family court adjudication without opinion[5] but the New York Court of Appeals reversed holding that section 712(b) irrationally discriminated on the basis of sex in violation of the equal protection clause of the fourteenth amendment.[6] *Patricia A. v. City of New York*, 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972).

Quasi-criminal statutes applicable only to women for the purpose of "protection" against criminal prosecution are neither new[7] nor unique to New York

1. The petition alleged that Patricia had engaged in various anti-social conduct—she had played hooky, associated with suspected drug users, stayed out after curfew, and finally left home to live with an aunt. Brief for Appellant at 3, Patricia A. v. City of New York, 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972).

2. N.Y. Family Ct. Act § 712(b) (McKinney Supp. 1972) defines a person in need of supervision as "a male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accord with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." Id.

3. After a PINS adjudication, the family court has the power to discharge the respondent with a warning, suspend judgment, put the respondent on probation, or place the respondent in a suitable home or state institution for an initial period of 18 months. N.Y. Family Ct. Act §§ 754-57 (McKinney Supp. 1972).

4. Appellant contended that the PINS statute was too vague in that it failed to give potential offenders notice of the proscribed conduct and it failed to provide adequate standards for judicial application. 31 N.Y.2d at 86, 286 N.E.2d at 433, 335 N.Y.S.2d at 35 (1972).

5. 39 App. Div. 2d 648, 332 N.Y.S.2d 375 (2d Dep't), rev'd, 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972).

6. The court disposed of the vagueness claim in a conclusory fashion, stating that the terms defining PINS are easily understood and citing in support of its conclusion decisions in other jurisdictions upholding equally broad language in juvenile statutes. See, e.g., In re S., 10 Cal. App. 3d 944, 89 Cal. Rptr. 685 (4th Dist. 1970); State in the Interest of L.N., 109 N.J. Super. 278, 263 A.2d 150 (App. Div.), aff'd, 57 N.J. 165, 270 A.2d 409 (1970), cert. denied, 402 U.S. 1009 (1971); E.S.G. v. State, 447 S.W.2d 225 (Tex. Ct. Civ. App. 1969), cert. denied, 398 U.S. 956 (1970). But see Comment, California's Predelinquency Statute: A Case Study and Suggested Alternatives, 60 Calif. L. Rev. 1163, 1194-95 (1972). The Supreme Court has declined to review the court's conclusion as to vagueness. Tomasita N. v. City of New York, 30 N.Y.2d 927, 287 N.E.2d 377, 335 N.Y.S.2d 683, appeal dismissed, 41 U.S.L.W. 3329 (U.S. Dec. 11, 1972) (No. 72-5529).

7. In New York, as early as 1910 a separate night court for women was established where

State.[8] In 1951 the New York State legislature passed the Girls' Term Court Act[9] which established a special term of the New York City Civil Court with exclusive jurisdiction over girls between the ages of sixteen and twenty-one. Because criminal liability attached at sixteen[10] for both men and women in New York State, the Girls' Term jurisdiction was an adjunct to, and did not replace, the jurisdiction of the criminal courts over women aged sixteen to twenty-one. Therefore, despite the fact that the Act's purpose[11] was to protect delinquent girls from the stigma attached to prosecution in the criminal courts, its effect was to incarcerate women for non-criminal conduct,[12] that, if committed by a male would not be censured.[13] Although the state was concerned with the effect of the girl's behavior on society,[14] nowhere in the Act or the legislative history was there any indication that immoral, non-criminal conduct on the part of girls was more prevalent or more dangerous to society than that of boys the same age.[15]

When the New York State court system was reorganized[16] in 1962, the Family Court was established to replace the Girls' Term, the New York City Domestic Relations Court, and the County Children's Courts. The purpose[17] of this con-

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the younger and less hardened women criminals (presumably prostitutes) were separated from the more experienced women criminals. Law of June 25, 1910, ch. 659, § 77, [1910] N.Y. Laws 1795-96 (repealed 1962).

8. Many other states have laws similar in purpose. See, e.g., the statutes and cases in other jurisdictions discussed in notes 39-43 infra and accompanying text.

9. Law of Apr. 11, 1951, ch. 716, [1951] N.Y. Laws 1655 (repealed 1962).

10. See N.Y. Penal Law § 30.00 (McKinney 1967). This 1967 revision of the penal law reenacted in substance the prior law of New York.

11. Law of Apr. 11, 1951, ch. 716, § 1, [1951] N.Y. Laws 1655 (repealed 1962).

12. In 1962 the Joint Legislative Committee on Court Reorganization, in its appraisal of the Girls' Term Court, found that "[t]he basis for the adjudication with few exceptions is not prostitution. With only isolated exceptions, it is not the commission of any crime." Report of Joint Legislative Committee on Court Reorganization, No. 2—The Family Court Act, 1962 N.Y. Sess. Laws 3428, 3439 [hereinafter cited as Committee Report].

13. If, as in some states, the protective statute actually did give girls favored treatment, juvenile boys would be denied equal protection of the laws. For example, an Oklahoma law that set the age of criminal responsibility at eighteen for females and at sixteen for males was recently overturned in Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972).

14. Law of Apr. 11, 1951, ch. 716, § 1, [1951] N.Y. Laws 1655 (repealed 1962). "A specialized girl's court term . . . is deemed necessary and desirable for the purpose of alleviating and correcting conditions which threaten, and in many instances actually jeopardize the health, safety, welfare and security of the people of the state." Id.

15. On the contrary, research indicates that delinquency is primarily a boys' problem. See W. Lunden, Statistics on Delinquents and Delinquency 70 (1964); President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 56 (1967); Gold, Equal Protection for Juvenile Girls in Need of Supervision in New York State, 17 N.Y.L.F. 570, 580-89 (1971).

16. The reorganization was completed pursuant to N.Y. Const. art. VI which was adopted by state-wide vote in November of 1961.

17. See Dembitz, Ferment and Experiment in New York: Juvenile Cases in the New Family Court, 48 Cornell L.Q. 499 (1963).

solidation was to place in one court jurisdiction over the variety of actions rooted in family relationships—such as adoptions, paternity, support, child custody, and juvenile proceedings—that, traditionally, had been divided among a number of civil and criminal courts.

In conjunction with the establishment of a new court structure, the substantive law of juvenile delinquency was also revised, with section 712 of the Family Court Act defining the categories of juveniles over whom the court would have jurisdiction. In addition to the traditional juvenile delinquency category, covering criminal conduct committed by minors under the age of sixteen,[18] the new Persons in Need of Supervision (PINS) category was established to cover antisocial but non-criminal conduct committed by males younger than sixteen and females younger than eighteen.[19]

The new PINS category, like the former Girls' Term jurisdiction, was intended to protect juveniles who had not committed crimes, but who were nevertheless found to be in need of supervision, from the stigma of a juvenile delinquency determination.[20] Women were granted this "protection" for two years longer than men. Yet, despite the fact that the PINS definition discriminated on the basis of sex, the Committee that drafted the legislation viewed it as an improvement of the Girls' Term Court Act that preceded it because it reduced the maximum jurisdictional age for women from twenty-one to eighteen.[21]

Although the Committee's aim was to make the old law more equitable, it did not rationalize the need for the different treatment of male and female juveniles. There was no research to determine whether female juveniles actually needed more reform, rehabilitation, or supervision than males,[22] nor did the Committee give any reason for the state's interest in restricting the liberty of females longer than that of males.[23] This is especially surprising since the Committee had

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18. N.Y. Family Court Act § 712(a) (McKinney 1963). "' Juvenile delinquent' means a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." Id.

19. N.Y. Family Court Act § 712(b) (McKinney Supp. 1972). For the text of § 712(b) see note 2 supra.

20. Committee Report 3434-35. The Committee found that "'Juvenile Delinquent' is now a term of disapproval. The judges . . . are aware of this and are also aware that government officials and private employers often learn of an adjudication of delinquency.

. . . .

The Committee therefore proposes to retain, but redefine, the category of juvenile delinquency and add the new category of person in need of supervision. Though there is no certainty about these judgments, the Committee expects that this pattern will reduce the instances of stigma . . . ." Id.

21. Committee Report 3440. The Committee stated that "under the laws of New York State, 18 is the age of consent. This pattern reflects a legislative determination that a young woman should be free to exercise a considerable discretion in shaping her life so long as she complies with the law of the land. If she does not comply with the law, she should be treated accordingly." Id.

22. See note 15 supra.

23. The traditional reason, and the one advanced by the city in the noted case, was the

found that few if any of the adjudications in the Girls' Term had been for criminal conduct.[24] Thus, the justification for sex discriminatory "protective" legislation seemed unfounded. In short, the legislative reform that resulted in the Family Court Act made only superficial improvements in the law and did not deal with the practical problems, much less the constitutional questions raised by the differing treatment of male and female juveniles.

This failure to deal with the sex discrimination problem is consistent with the historical interpretation of the equal protection clause as applied to women. Although the equal protection clause does not deny the states the power to treat different classes of persons in different ways,[25] it does require, at the very least,[26] that the discrimination be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the [state action] . . . ."[27] In other words, the classification must have a rational basis.

However, until recently, the application of this "rational basis test" had invariably resulted in the conclusion that sex-based discrimination is rational. Until 1971, the Supreme Court had never overturned a statute that discriminated against women on equal protection grounds. In fact, earlier Supreme Court decisions seemed to convey the idea that discrimination between the sexes was rational per se.

In *Bradwell v. Illinois*,[28] the first case construing women's rights under the newly passed fourteenth amendment, the Supreme Court, in affirming an Illinois decision barring women from the practice of law, gave a clear example of the

fear of sexual promiscuity and pregnancy in female juveniles. 31 N.Y.2d at 88, 286 N.E.2d at 435, 335 N.Y.S.2d at 37.

24. See note 12 supra.

25. See, e.g., McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Barbier v. Connolly, 113 U.S. 27 (1885).

26. Since the state statute enjoys a presumption of validity, the burden of showing irrationality is generally on the party alleging unconstitutionality. However, the Warren Court developed a "new equal protection" where the burden of proof was reversed and the state had to show not merely rationality, but a compelling state interest when the statute involved either a suspect classification, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy); Loving v. Virginia, 388 U.S. 1 (1967) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin); or a fundamental right, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (right to procreate). Although a state court has declared that sex is a suspect category thereby invoking the stricter test, Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), the Supreme Court has never so held. It has been suggested that this two-tiered approach to equal protection is now being modified by the Burger Court. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

27. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

28. 83 U.S. (16 Wall.) 130 (1873).

traditional view which extolled the rationality and even divine purpose of discrimination between the sexes:

> The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things . . . . [I]n view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men . . . .[29]

The belief that women must be especially protected because of their "unique destiny" was accepted by the Court for many years, culminating in the landmark decisions[30] during the early 1900's that permitted state regulation of the labor contract. Although these cases certainly furthered needed reforms in the field of labor relations, they implied that because of the physical differences between the sexes, sex-based discrimination was rational per se.

For example, in *Muller v. Oregon*,[31] the Court upheld a maximum work hours statute for women,[32] basing its decision on the physical differences between the sexes: "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[33] The Court's ruling that the physical difference between the sexes "justifies a difference in legislation"[34] seemed to imply that sex discrimination is always rational and has been used by many courts as a rule of thumb to uphold a wide variety of sexually discriminatory laws that were unrelated to physical endurance.[35]

However, despite this precedent, there has recently been some movement in the state and lower federal courts towards expansion of women's rights under the equal protection clause, especially in the criminal area. The gains for women in

29. Id. at 141-42 (concurring opinion). Since this case was decided one day after the Supreme Court had limited the scope of the fourteenth amendment to the newly freed slaves in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873), it was inevitable that a woman's claim under the privileges and immunities clause would fail. Nevertheless Justice Bradley's famous concurring opinion is often cited as an example of the Court's early view towards women's rights.

30. See e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Radice v. New York, 264 U.S. 292 (1924); Bosley v. McLaughlin, 236 U.S. 385 (1915); Muller v. Oregon, 208 U.S. 412 (1908).

31. 208 U.S. 412 (1908).

32. A similar statute applicable to both male and female employees had been held unconstitutional three years earlier in Lochner v. New York, 198 U.S. 45 (1905).

33. 208 U.S. at 421.

34. Id. at 423.

35. See, e.g., Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912) (licensing of occupations); Commonwealth v. Welosky, 276 Mass. 398, 414, 177 N.E. 656, 664 (1931), cert. denied, 284 U.S. 684 (1932) (jury exclusion); People v. Case, 153 Mich. 98, 101, 116 N.W. 558, 560 (1908); State v. Hunter, 208 Ore. 282, 288, 300 P.2d 455, 458 (1956) (licensing of occupations); Allred v. Heaton, 336 S.W.2d 251 (Tex. Ct. Civ. App.), cert. denied, 364 U.S. 517 (1960); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Ct. Civ. App. 1958), cert. denied, 359 U.S. 230 (1959) (exclusion of women from a state supported college).

this area probably result from the influence of *In re Gault*,[36] a due process case involving a male juvenile. Although there was no equal protection claim asserted by Gault, the Court had to destroy many of the myths concerning protective statutes in order to reach Gault's claim. The Court found that the concept of *parens patriae, i.e.*, the notion that the state should act like a parent to protect minors and those incapable of taking care of themselves, presumably including women,[37] was not a valid reason to deprive minors of their constitutional rights.[38] Once *parens patriae* had been rejected as far as minors were concerned, it would be difficult to resurrect the concept as far as women were concerned.

Several months after *Gault* was decided, two courts found that protective statutes in the criminal sentencing process that discriminated on the basis of sex violated the equal protection clause. In *Commonwealth v. Daniel*,[39] the Pennsylvania Supreme Court overturned a state law[40] which mandated that women convicts be sentenced to confinement in the State Industrial School for an indefinite term. The judge, under this law, had no discretion, as he did with men, to set a maximum sentence that was less than the statutory maximum for each crime. The court found that such discrimination had no rational basis.

Similarly, in *United States ex rel. Robinson v. York*,[41] a federal district court found that a Connecticut law which provided that women be sent to the State Farm, a so-called reformatory, for indefinite terms that might last longer than those imposed on men, was unconstitutional. Relying on *Gault*, the court rejected the idea that because the institution was called a "farm" or "reformatory" and because its aim was rehabilitation, the state could "protect" women by imprisoning them for longer periods of time than men.[42] Several months later, the *Robinson* court held that the statute as applied to a juvenile girl involved the same denial of equal protection.[43]

Though these cases provided the New York Court of Appeals with precedent which challenged the "rationality" of protective statutes, the most important impetus to the court's decision in *Patricia* appears to have been a trio of recent equal protection cases— *Reed v. Reed*,[44] *Stanley v. Illinois*,[45] and *Eisenstadt v. Baird*[46]—handed down by the Supreme Court several months before *Patricia* was decided.

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36. 387 U.S. 1 (1967).

37. For a discussion of the theory behind the married woman's legal disabilities at common law see L. Kanowitz, Women and the Law, The Unfinished Revolution 35-38 (1969).

38. "The Latin phrase [parens patriae] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance." 387 U.S. at 16.

39. 430 Pa. 642, 243 A.2d 400 (1968).

40. The Muncy Act, Pa. Stat. Ann. tit. 61, § 566 (1964), as amended, (Supp. 1972).

41. 281 F. Supp. 8 (D. Conn. 1968).

42. Id. at 15.

43. United States ex rel. Sumrell v. York, 288 F. Supp. 955 (D. Conn. 1968).

44. 404 U.S. 71 (1971).

45. 405 U.S. 645 (1972).

46. 405 U.S. 438 (1972).

In *Reed*, the Court overruled an Idaho law[47] which gave men preference over women in administering decedents' estates. Since this was the first time the high Court had overturned a sex-based statute on equal protection grounds, there was an immediate reaction from the press concluding that *Reed*, the "women's rights case," was a landmark.[48] However, the opinion itself was very narrowly drawn. Plaintiff's counsel and numerous amici curiae had urged the Court to declare that sex was a suspect category thereby invoking the "strict scrutiny" test.[49] However, Chief Justice Burger, speaking for a unanimous Court, chose to exercise restraint; the Court refrained from deciding whether sex discrimination is suspect since the statute in question was arbitrary and unconstitutional on traditional rational basis grounds.[50]

This holding, although it certainly was a "first" for women's rights, made no radical change in the law. Since the statute was not a "protective" one, the Court did not have to confront a controversial challenge to woman's traditional role. In overturning a statute that discriminated against women for no other reason than governmental expediency,[51] the Court was merely upholding the traditional view that a discriminatory classification must serve some legitimate state purpose.

Moreover, the fact that the Court refrained from dealing with the question of sex as a suspect category led many legal commentators to the conclusion that *Reed* was a conservative opinion that would not be used to expand women's rights.[52] However, this early apprehension appears to have been unfounded. Four months later, in the *Eisenstadt* and *Stanley* cases, the Court did deal with equal protection challenges to traditional sexual and moral roles. In *Eisenstadt*, the Court overturned a Massachusetts law that prohibited the distribution of contraceptives to unmarried persons, finding that the deterrence of premarital sex could not be a reasonable basis for the statute.[53] In *Stanley*, an Illinois law which excluded unwed fathers, but included unwed mothers, from its definition of "parents" for the purpose of child custody proceedings was declared unconstitutional. Many lower courts[54] have seized upon these decisions, in con-

47. Idaho Code Ann. § 15-314 (1947) ch. 111, § 5, [1971] Idaho Laws (repealed effective July 1, 1972) which provided that "[o]f several persons claiming and equally entitled to administer, males must be preferred to females . . . ."

48. See, e.g., N.Y. Times, Nov. 23, 1971, at 1, col. 7.

49. See note 26 supra.

50. 404 U.S. at 77.

51. The state had argued that the purpose of the statute was to reduce the workload on its probate courts by resolving an issue that would otherwise require a hearing on the merits. Id. at 76.

52. See, e.g., Hoades, A Disgruntled Look at Reed v. Reed From the Vantage Point of the Nineteenth Amendment, Women's Rights L. Rep. 9 (Spring 1972); 25 Vand. L. Rev. 412, 416 (1972); 1972 Wis. L. Rev. 626, 632-33.

53. The Court found "that the deterrence of premarital sex may [not] reasonably be regarded as the purpose of the Massachusetts law.

It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . . ." 405 U.S. at 448.

54. See, e.g., Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972)

junction with *Reed*, to expand equal protection arguments against sex discrimination, as exemplified in the *Patricia* case.

In *Patricia*, the government had argued that

> discrimination against females on the basis of age is justified because of the obvious danger of pregnancy in an immature girl and because of out-of-wedlock births which add to the welfare relief burdens of the State and city. . . . .[55]

Thus, according to the government's view, the statute was rational since, as distinguished from the statute in *Reed*, it dealt with woman's unique physical characteristics. However, the court rejected this argument on two grounds. First, rather than accept the legislative purpose at face value according it a presumption of validity, the court examined whether control of sexual conduct could have been the actual purpose for the statute.[56] It concluded that such a purpose could not have been intended because it would make the statute overbroad—since it covered "far more than acts of sexual misconduct."[57] Second, even assuming that the legislation had been prompted by such considerations, the court found that

> there would have been no rational basis for exempting, from the PINS definition, the 16 and 17-year-old boy responsible for the girl's pregnancy or the out-of-wedlock birth. As it is, the conclusion seems inescapable that lurking behind the discrimination is the imputation that females who engage in misconduct, sexual or otherwise, ought more to be censured, and their conduct subject to greater control and regulation, than males.[58]

In reaching this conclusion, the court relied on *Stanley* and *Eisenstadt* wherein "similar moral presumptions had been squarely rejected as a basis or excuse for sexually discriminatory legislation."[59] However, it seems that this conclusion must rest, if at all, on a very loose reading of *Stanley* and *Eisenstadt*. Although the Court in *Eisenstadt* did reject a moral presumption as the basis for a dis-

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(motion for preliminary injunction granted); Williams v. Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972) (motion for preliminary injunction granted); Commonwealth Alcoholic Beverage Control Bd. v. Burke, 481 S.W.2d 52 (Ky. Ct. App. 1972); Pittsburgh Press Co. v. Comm'n on Human Relations, 4 Pa. Commw. 448, 287 A.2d 161, cert. granted, U.S.L.W. 3312 (U.S. Dec. 4, 1972) (No. 72-419); J.S.K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600 (Wash. Ct. App. 1972).

55. 31 N.Y.2d at 88, 286 N.E.2d at 435, 335 N.Y.S.2d at 37.

56. This type of scrutiny into the legislative purpose is inconsistent with the traditional rational basis test that accepted without inquiry any "valid legislative purpose" put forward by the government. It suggests a new approach to equal protection problems. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). Professor Gunther argues that the Burger Court had used this type of "means-scrutiny" as an avoidance technique to overturn legislation despite the traditional presumption of legislative validity. When the legislative purpose is found to be over or underinclusive, the Court has relied on this narrow ground to avoid the necessity of considering extending the strict scrutiny test to new areas.

57. 31 N.Y.2d at 88, 286 N.E.2d at 435, 335 N.Y.S.2d at 37.

58. Id. at 88-89, 286 N.E.2d at 435, 335 N.Y.S.2d at 37.

59. Id. at 89, 286 N.E.2d at 435, 335 N.Y.S.2d at 37.

criminatory regulation,[60] the discrimination was not sex-based. Whereas in *Stanley*, the Court was clearly faced with a controversial challenge to accepted sexual roles—*i.e.*, whether it is rational for a state to discriminate between unwed parents on the basis of sex.[61] However, the Court avoided analysis of the question by finding a due process violation and fitting it into an equal protection rubric. First, the *Stanley* Court found that all parents were entitled to a hearing on their fitness under the due process clause.[62] Then, it reasoned, the "failure to afford [Stanley] a hearing on his parental qualifications while extending it to other parents denied him equal protection of the laws."[63] This distorted reasoning process[64] makes *Stanley* questionable equal protection precedent for future women's rights cases. Nevertheless, the *Patricia* court seized on its holding to find that the PINS discrimination was irrational. Thus, the New York Court of Appeals has interpreted the recent Supreme Court equal protection cases in a liberal light as far as sex discrimination is concerned.

Therefore, *Patricia* should be a consolation to those who were disappointed with the *Reed*[65] decision. Although it appears that few courts will be willing to declare sex a suspect category after *Reed*,[66] adoption of the strict scrutiny test

60. The Eisenstadt Court rejected the idea that unmarried persons had no right to use contraceptives: "If under Griswold [381 U.S. 479 (1965)] the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453 (emphasis omitted).

61. Chief Justice Burger's dissent met the question squarely, concluding that the discrimination was rational: "Illinois' different treatment of [unwed fathers and unwed mothers] is part of that State's statutory scheme for protecting the welfare of illegitimate children. In almost all cases, the unwed mother is readily identifiable . . . . Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare . . . .

. . . I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter." 405 U.S. at 665.

62. Id. at 657-58.

63. Id. at 658.

64. Chief Justice Burger was highly critical of this reasoning. He said that "[t]his 'method of analysis' is, of course, no more or less than the use of the Equal Protection Clause as a shorthand condensation of the entire Constitution: a State may not deny any constitutional right to some of its citizens without violating the Equal Protection Clause through its failure to deny such rights to all of its citizens." Id. at 660 (emphasis omitted).

65. 404 U.S. 71 (1971).

66. Appellant's counsel had half-heartedly urged the court to find a suspect classification in the instant case but the court found this unnecessary. Other courts have shown considerable confusion in applying the correct test in sex discrimination cases since Reed. Although they have not openly stated that sex is a suspect category, they have often employed the terminology of the strict scrutiny test. See, e.g., Wark v. Robbins, 458 F.2d 1295 (1st Cir. 1972); Pittsburgh Press Co. v. Comm'n on Human Relations, 4 Pa. Commw. 448, 287 A.2d

may not be essential for progress in combatting sex discrimination. Furthermore, there are indications that the Supreme Court under Chief Justice Burger may be modifying the two-tiered equal protection approach developed by the Warren Court.[67] While refusing to extend the strict scrutiny test to new areas, the Court during its last term has shown an unprecedented willingness to overturn discriminatory legislation using the rational basis test.[68]

In *Patricia*, the New York Court of Appeals has followed this new method of analysis and applied it to a controversial area. First, the *Patricia* court, like the Supreme Court in *Eisenstadt*, questioned the legitimacy of the legislative purpose advanced by the government despite the presumption of legislative validity.[69] Second, although declining to consider whether the stricter test was necessary, it found that a regulation designed to discriminate against women in order to protect them from sexual activity—a subject that the Supreme Court has not yet dared to consider—was unconstitutional on traditional grounds.

This new approach, although not what the women's movement had hoped for, should result in decisions favorable to women's rights. Since the legislative purpose is now open to investigation and the physical differences between the sexes, as emphasized in cases like *Muller*,[70] are no longer enough to sustain discriminatory legislation, the state must now give convincing data to support its discrimination.[71] In *Patricia*, the New York Court of Appeals was unimpressed with the conventional wisdom that young women more than young men should be protected from sexual activity. By labeling this truism irrational, the court has recognized the sexual equality of male and female juveniles and in so doing has given encouragement, as well as precedent, for future women's rights cases in New York.

Constitutional Law—Immunity Statutes—Statute Granting Use and Derivative Use Immunity Sufficiently Broad to Compel Testimony.—Petitioners were subpoenaed to appear before a United States grand jury. Believing that the petitioners were likely to assert their fifth amendment right against self-incrimination,[1] the Government applied to the district court for an order which

161 cert. granted, 41 U.S.L.W. 3312 (U.S. Dec. 4, 1972) (No. 72-419); J.S.K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600 (Wash. Ct. App. 1972).

67. See Gunther, The Supreme Court, 1971 Term—Forword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

68. See, e.g., James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

69. See note 56 supra and accompanying text.

70. 208 U.S. 412 (1908).

71. This amounts to a shift in the burden of proof in sex discrimination cases; see, e.g., Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972).

1. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.

would compel such testimony under a grant of immunity pursuant to the Federal Witness Immunity Act.[2] Petitioners refused to testify, claiming that the scope of the immunity provided by the statute[3] was not coextensive with the protection afforded by the privilege against self-incrimination.[4] The district court rejected this contention, and ordered the petitioners to testify. Upon continued refusal to testify, petitioners were adjudicated in contempt of court.[5] The holding was affirmed by the United States Court of Appeals for the Ninth Circuit.[6] The Supreme Court affirmed, holding that the statute, which provides a witness with "use" and "derivative use" immunity was sufficiently broad to compel testimony. In so holding, the Court stated that transactional immunity, the former standard, "afford[ed] the witness considerably broader protection than [required by] the Fifth Amendment . . . ."[7] *Kastigar v. United States*, 406 U.S. 441 (1972).

Though the power of the government to compel testimony is firmly rooted in Anglo-American jurisprudence,[8] it is not absolute. There are a number of exceptions, the most important of which is the privilege against self-incrimination.[9] However, when the legislature extends to the witness a grant of immunity which is coextensive with that required by the Constitution, testimony concerning self-incriminating matters may be elicited.[10] Until the eighteenth century there were no immunity statutes which afforded the sovereign the power to compel testimony over the assertion of the privilege against self-incrimination. During this period governments had little occasion to compel private disclosures, since the regulatory

2. 18 U.S.C. §§ 6001-05 (1970).

3. Id. The statute provides in pertinent part that a witness "may not refuse to comply with the order [to testify] on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ." Id. § 6002.

4. If the immunity granted is not as comprehensive as the protection afforded by the privilege, the refusal to testify is justified. McCarthy v. Arndstein, 266 U.S. 34, 42 (1924).

5. See Kastigar v. United States, 406 U.S. 441, 442 (1972). The contempt order was issued pursuant to 28 U.S.C. § 1826 (1970).

6. Stewart v. United States, 440 F.2d 954 (9th Cir. 1971), aff'd sub nom. Kastigar v. United States, 406 U.S. 441 (1972).

7. Kastigar v. United States, 406 U.S. 453 (1972).

8. Id. at 443. It has been said that "[a]mong the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies." Murphy v. Waterfront Comm'n, 378 U.S. 52, 93-94 (1964) (White, J., concurring). See also 8 J. Wigmore, Evidence §§ 2190-93 (J. McNaughton rev. ed. 1961) [hereinafter cited as Wigmore]; Lilienthal, The Power of Governmental Agencies to Compel Testimony, 39 Harv. L. Rev. 694, 694-95 (1926).

9. See note 1 supra.

10. The privilege may be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). The privilege protects against any disclosures which the witness reasonably believes could be used, either directly or indirectly, in a future criminal prosecution against him. Hoffman v. United States, 341 U.S. 479, 486 (1951); Mason v. United States, 244 U.S. 362, 365 (1917); see Blau v. United States, 340 U.S. 159, 161 (1950).

problems prior to the industrial era were relatively simple.[11] With the rise of the industrial era and the corresponding governmental regulation of business, fuller powers to compel disclosure became necessary.[12] Accordingly, the first American immunity statute was passed in 1857.[13] To secure needed testimony which otherwise could have been withheld under the protection of the privilege against self-incrimination, Congress immunized any witness "before either House of Congress or any committee of either House" as to "any fact or act touching which he shall be required to testify."[14] However, the broad language of the act led to its exploitation by the guilty since its effect was to provide "immunity baths" for all witnesses before congressional committees.[15] This abuse led to the passage of further legislation—the 1862 Act[16] and the 1868 Act[17]—which limited a witness' protection to the exclusion of the actual testimony given, rather than the complete barring of prosecution based on that testimony.[18]

The Supreme Court first reviewed this legislation in the landmark case of *Counselman v. Hitchcock*.[19] In that case, the petitioner, asserting his fifth amendment privilege, declined to answer certain questions concerning an alleged Interstate Commerce Commission violation, notwithstanding a grant of immunity under the 1868 Act.[20] The Supreme Court reversed the contempt conviction,[21]

11. Lilienthal, supra note 8, at 695-96.

12. See G. Henderson, The Federal Trade Commission v (1924).

13. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155. England had passed a limited version of an immunity statute in 1562. Statute of Elizabeth, 5 Eliz. I, c. 9, § 12, at 192 (1562). However, this apparently applied only to civil cases. Wigmore § 2190, at 67. The right was later extended to include criminal cases. See Statute of 1695-96, 7 & 8 Will. III, c. 3, § 7.

14. Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155, 156.

15. All a witness had to do to gain complete protection was to speak before a committee and confess his crimes. One such incident was largely responsible for the eventual reform movement. Messrs. Russell and Floyd, two clerks at the Department of the Interior, embezzled $2,000,000 in government bonds, and, after arranging to testify before a House committee, disclosed their misdeed. When the government attempted to prosecute, it was held that they had gained immunity. Cong. Globe, 37th Cong., 2d Sess. 364 (1862).

16. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333. Law enforcement officials could base their investigation on the testimony given, and the prosecution could use any new evidence which was the "fruit" of any investigation. Cong. Globe, 37th Cong., 2d Sess. 429 (1862).

17. Act of Feb. 25, 1868, ch. 13, 15 Stat. 37. See note 20 infra for text of statute.

18. This immunity was held sufficient to permit the compulsion of testimony in several lower federal courts. See United States v. McCarthy, 18 F. 87, 89 (S.D.N.Y. 1883); United States v. Williams, 28 F. Cas. 670 (No. 16,717) (C.C. S.D. Ohio 1872); United States v. Brown, 24 F. Cas. 1273 (No. 14,671) (D. Ore. 1871); In re Phillips, 19 F. Cas. 506 (No. 11,097) (D. Va. 1869). But see Commonwealth v. Emery, 107 Mass. 172 (1871).

19. 142 U.S. 547 (1892).

20. The statute provided in pertinent part that "no answer . . . from any . . . witness . . . shall be given in evidence, or in any manner used against such party or witness, or his property . . . in any court of the United States . . . in respect to any crime, or for the enforcement of . . . any act or omission of such . . . witness . . . ." Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

21. Petitioner was adjudicated in contempt and was taken into custody until he would answer. In re Counselman, 44 F. 268 (C.C. N.D. Ill. 1890), rev'd sub nom. Counselman v. Hitchock, 142 U.S. 547 (1892).

holding that a federal immunity statute is valid only if the protection it provides is coextensive with the scope of the privilege against self-incrimination.[22] The premise that the immunity granted must be "coextensive" with the privilege[23] was interpreted by the Court to bar any future prosecution for the offense to which the compelled testimony related.[24] The Court stated:

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. [The immunity statute under consideration] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional prohibition, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.[25]

The protection afforded by the statute was clearly narrower than this standard required, and was therefore held invalid.[26] However, the Court did suggest that an immunity statute, if properly framed, would be valid.[27] The overly broad language in *Counselman* is in a great way responsible for the subsequent confusion as to the necessary breadth required by the Constitution for enactment of a valid immunity statute.[28]

In response to the *Counselman* decision, Congress hastily drafted legislation which provided for compulsory immunity from penal sanctions based upon evidence given by a witness before the Interstate Commerce Commission or in proceedings under the Interstate Commerce Act.[29] The constitutionality of this statute, which provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, con-

22. 142 U.S. at 585. The "coextensive" requirement is predicated on the theory that if the immunity statute removes the harm which the privilege is meant to protect, then there is no need for the privilege. Hale v. Henkel, 201 U.S. 43, 67 (1906).

23. See, e.g., Murphy v. Waterfront Comm'n, 378 U.S. 52, 54, 78 (1964); United States v. Williams, 28 F. Cas. 670, 671 (No. 16,717) (C.C. S.D. Ohio 1872).

24. 142 U.S. at 586.

25. Id. at 585-86.

26. Id.

27. Id. at 586.

28. See text accompanying note 25 supra where the Court stated that only transactional immunity can supplant the fifth amendment privilege. This statement has generally been cited as the holding of the case. See, e.g., Adams v. Maryland, 347 U.S. 179, 182 (1954); United States v. Bryan, 339 U.S. 323, 335-37 (1950); United States v. Murdock, 284 U.S. 141, 149 (1931); Glickstein v. United States, 222 U.S. 139, 141 (1911). However, earlier in Counselman, the Court, in giving its reasons for striking down the statute, stated that it "could not, and would not, prevent the use of [the witnesses'] testimony to search out other testimony to be used in evidence against him . . . ." 142 U.S. at 564. This would seem to indicate that use and derivative use immunity would comply with the constitutional mandate, since the act in question was invalidated for its failure to prohibit the use, against the witness, of evidence obtained from his compelled testimony.

29. Counselman was handed down on Jan. 11, 1892; the act in question was passed on Jan. 27, 1892. 23 Cong. Rec. 573 (1892).

cerning which he may testify,"[30] was upheld by the Supreme Court in *Brown v. Walker*.[31] However, the Court specifically limited the privilege so that it would only protect a witness from being compelled to furnish evidence that could result in his subjection to criminal sanctions.[32]

In *Brown*, the Court noted that the fifth amendment to the Constitution is susceptible of two interpretations: literal and practical.[33] To interpret the protection against self-incrimination clause literally would permit a witness to refuse to disclose any fact which might tend to disgrace or embarrass him.[34] This interpretation would, in effect, prohibit any compelled testimony, for the witness alone would be the judge as to whether his answers would have that tendency.[35] A practical interpretation, however, would "secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure . . . ."[36] The Court chose the latter interpretation, basing its decision in part on the need of such legislation to effectively enforce the Interstate Commerce Act.[37]

Thus, it was presumed after *Counselman* and *Brown* that the validity of an immunity statute would be upheld only if the statute provided transactional immunity—the proscription of any future prosecutions for the offense or transaction to which the compelled testimony related.[38] The Supreme Court first cast

30. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, 444, repealed by Pub. L. No. 91-452, § 245, 84 Stat. 931. It has been suggested that this statute was an overreaction to the Counselman decision. Comment on Immunity Provisions, Working Papers of the Nat'l Comm'n of Reform of Fed. Crim. Laws 1405, 1412 (1970).

31. 161 U.S. 591 (1896).

32. Id. at 595.

33. Id.

34. Id.

35. Id. The dissenters implied that the privilege could not be replaced by anything less than repeal of the amendment, since they interpreted the protection to extend to the effects of disgrace and abhorrence. Id. at 620-21, 628. Accord, United States v. James, 60 F. 257, 264 (N.D. Ill. 1894). Some commentators argue that the penalties and forfeitures contemplated by the privilege against self-incrimination include social consequences such as "expulsion from labor unions, loss of employment, discrimination in housing and schooling, and public opprobrium." Boudin, The Immunity Bill, 42 Geo. L.J. 497, 519 (1954) (footnote omitted). However, the privilege has traditionally been limited to criminal sanctions. See, e.g., Brown v. Walker, 161 U.S. 591, 598 (1896), wherein the Court stated that the design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he can secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. Accord, Smith v. United States, 337 U.S. 137, 147 (1949).

36. 161 U.S. at 595.

37. This conclusion is based in part on the following language of the Brown Court: "If . . . witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts . . . would become impossible . . . ." 161 U.S. at 610. See also Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L.J. 1568, 1574 (1963).

38. "The 1893 statute has become part of our constitutional fabric." Ullmann v. United

doubt upon this presumption in *Murphy v. Waterfront Commission.*[39] The major holding of the Court in *Murphy* was that the federal government could not, absent an immunity provision, compel a witness to give testimony which might incriminate him under the laws of another jurisdiction.[40]

But the *Murphy* Court went beyond this, to consider whether the fifth amendment required an absolute bar to any future prosecutions, as *Counselman* and *Brown* had apparently held, or whether it was sufficient to merely prohibit the use of the compelled testimony or its fruits.[41] Narrowly construing *Counselman*, the *Murphy* Court held that a grant of immunity was sufficiently broad if it prohibited use of the compelled testimony and its fruits.[42] The majority of cases decided after *Murphy* appeared to support this narrow construction.[43] However, there has also been some recent language which appears to require the broader *Counselman* and *Brown* standard.[44]

States, 350 U.S. 422, 438 (1956). It has been included "in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government." Shapiro v. United States, 335 U.S. 1, 6 (1948) (footnote omitted).

39. 378 U.S. 52 (1964).

40. Id. at 79. This decision overruled a long line of cases which had held that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination." United States v. Murdock, 284 U.S. 141, 149 (1931); accord, Knapp v. Schweitzer, 357 U.S. 371, 379-80 (1958); Hale v. Henkel, 201 U.S. 43, 69 (1906).

41. The "fruits" of testimony refers to information gained as a result of using the compelled testimony. See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), which held that any information gained from inadmissible evidence is likewise inadmissible.

42. Mr. Justice Goldberg, speaking for the majority, quoted extensively from passages in Counselman which suggested that an exclusionary rule is sufficient. 378 U.S. at 78-79. Any reference to the passages in Counselman which appear to require absolute immunity were omitted. But see the concurring opinion of Mr. Justice White. Id. at 106-07.

It has been suggested that the Court viewed Counselman as stating no more than "a preclusionary rule of evidence." 33 Fordham L. Rev. 77, 80 (1964). Another reason advanced is that since the Court has extended the fifth amendment privilege to the states, Malloy v. Hogan, 378 U.S. 1 (1964), an expansive reading of the privilege could have a far more serious impact than was true in the days of Counselman. Stevens v. Marks, 383 U.S. 234, 250 (1966) (Harlan, J., concurring).

43. See, e.g., Gardner v. Broderick, 392 U.S. 273, 276 (1968): "Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result may be self-incriminatory, and the need fully to implement its guaranty. . . . Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying." (citations omitted). This has been interpreted as permitting subsequent state or federal prosecutions on independent evidence after the witness had received federal immunity. Comment on Immunity Provisions, supra note 30, at 1431.

44. See, e.g., Stevens v. Marks, 383 U.S. 234, 244-45 (1966); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 80 (1965). The limited restriction has also been held inapplicable on statutory grounds. See, e.g., Haynes v. United States, 390 U.S. 85 (1968) (the Gun Registration Case); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968) (the Bookie Tax Cases).

In *Kastigar v. United States*,[45] the Supreme Court was faced with the problem of resolving this long-standing confusion, and squarely determining the breadth necessary to enact a valid immunity statute.[46] The petitioners in *Kastigar*, appearing before a United States grand jury, refused to answer questions, notwithstanding a grant of immunity conferred pursuant to the Organized Crime Control Act of 1970.[47] The Act provided for "use" and "derivative use" immunity.[48] It prohibited the use of the compelled testimony and evidence derived directly or indirectly therefrom, but would permit a subsequent prosecution based on independent evidence.

The petitioners alleged that such a statute was not sufficiently broad to compel testimony.[49] They argued that an immunity statute[50] must, as a minimum, grant full transactional immunity, *i.e.*, prohibit all future prosecutions for offenses to which the compelled testimony related.[51] In support of this proposition, the petitioners relied heavily on the broad language of the *Counselman* decision,[52] which had arguably dictated the necessity of transactional immunity.[53] Mr.

45. 406 U.S. 441 (1972).

46. See note 28 supra.

47. See 406 U.S. at 442.

48. See note 3 supra.

49. See note 4 supra. The scope that immunity statutes must have to be constitutional was a question that the Supreme Court had never squarely entertained. 406 U.S. at 457-58. Most of the post-Counselman statutes which the Court had passed on fell into two categories: they either followed the 1893 Act in providing transactional immunity (See, e.g., Ullmann v. United States, 350 U.S. 422 (1956); Smith v. United States, 337 U.S. 137 (1949); United States v. Monia, 317 U.S. 424 (1943)), or they were deficient for failing to prevent the use of all the evidence obtained from the compelled testimony (See, e.g., Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 80 (1965); Arndstein v. McCarthy, 254 U.S. 71, 73 (1920)). This is not to say, however, that the Court had not previously had the opportunity to resolve the question of the necessary scope of immunity statutes. They specifically skirted the issue in Piccirillo v. New York, 400 U.S. 548 (1971) (per curiam), over the dissents of Justices Douglas, Marshall, Brennan and Black. The issue was also left unresolved in United States v. Freed, 401 U.S. 601, 606 n.11 (1971), and Stevens v. Marks, 383 U.S. 234, 244-45 (1966).

50. Petitioners' initial assertion that no immunity statute, however drawn, could furnish a lawful basis for compelling incriminating testimony was summarily rejected by the Court. 406 U.S. at 448. It is, however, the opinion of Mr. Justice Douglas that "the framers put it beyond the power of Congress to compel anyone to confess his crimes." Id. at 467 (dissenting opinion) (emphasis omitted). See Ullmann v. United States, 350 U.S. 422, 440 (1956) (dissenting opinion). Accordingly, he feels that Brown v. Walker, 161 U.S. 591 (1896), and other cases upholding immunity statutes, should be overruled. 350 U.S. at 440, 455 (Douglas, J., dissenting).

51. Transactional immunity may be illustrated as follows: An individual testifying before a grand jury investigating narcotics acknowledges the murder of an informant. If the individual had been given transaction immunity, subsequent prosecution of that witness for murder could not be undertaken, even if there were other wholly independent evidence. See note 67 infra.

52. 142 U.S. 547 (1892).

53. See note 28 supra and accompanying text.

Justice Powell, for the majority, rejected the contention of the petitioners and chose to construe *Counselman* narrowly, as had the Court in *Murphy v. Waterfront Commission*.[54] The broad language of *Counselman* was, in the Court's view, "unnecessary" to that decision, and could not be considered binding authority.[55] Accordingly, the *Kastigar* Court felt that "both the reasoning . . . in *Murphy* and the result reached compel the conclusion that use and derivative use immunity is constitutionally sufficient to compel testimony over a claim of the privilege."[56]

The Court expressly stated that its decision was consistent with the conceptual basis of *Counselman*.[57] The deficiency in the *Counselman* statute, the present Court noted, was its failure to prohibit the use, against the witness, of evidence which was obtained from his compelled testimony. The *Counselman* Court repeatedly stated that the statute "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . . ."[58] Since that statute "failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony,"[59] it was invalid.

Since the goal of an immunity statute is to leave the witness and prosecutor in substantially the same position as if the witness had claimed his fifth amendment privilege,[60] the Court felt it necessary to answer the petitioners' allegations that use and derivative use immunity would not bar the use of the compelled testimony as an "investigatory lead;"[61] for example, the prosecution may obtain

54. 378 U.S. 52 (1964). Mr. Justice Douglas suggested that Counselman was overruled, sub silentio, by Murphy. 406 U.S. at 463 (dissenting opinion).

55. 406 U.S. at 455. Whether this language is the dictum of Counselman is uncertain. It has traditionally been thought that Counselman held that transactional immunity is required by the Constitution. See, e.g., Adams v. Maryland, 347 U.S. 179, 182 (1954); United States v. Monia, 317 U.S. 424, 428 (1943); United States v. Murdock, 284 U.S. 141, 149 (1931). However, later cases have interpreted this statement as merely the dictum of Counselman, and would interpret it narrowly. Cf. Gardner v. Broderick, 392 U.S. 273, 276 (1968); Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation, 392 U.S. 280 (1968).

Professor Dixon, who was instrumental in the drafting of the new statute, is in agreement with the later interpretation. He has stated that "the essence of Counselman is its use restriction language, and not the additional loose statement from which the absolute immunity has been derived." Comment on Immunity Provisions, supra note 30, at 1430.

56. 406 U.S. at 458. Murphy had prohibited the use of the compelled testimony and its fruits by federal officials after two states had given the witness immunity. 378 U.S. at 79. However, this would not preclude a subsequent federal prosecution, but the federal authorities would have the burden of showing that their evidence was not tainted by the previous testimony. Id. n.18. If transactional immunity had been deemed necessary, this would have precluded any subsequent federal prosecution. Mr. Justice Douglas felt that Murphy was irrelevant to the present case, inasmuch as no interjurisdictional problems presented themselves. 406 U.S. at 464 (dissenting opinion).

57. 406 U.S. at 453.

58. 142 U.S. at 564. Similar statements are found at 564 and 586. See also 406 U.S. at 454.

59. Ullmann v. United States, 350 U.S. 422, 437 (1956).

60. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

61. See, e.g., Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 80 (1965).

"leads, names of witnesses, or other information not otherwise available that might result in a prosecution."[62]

Relying on *Murphy*,[63] the Court stated that the prosecution has the "affirmative duty to prove that the evidence it proposes to use [in the subsequent prosecution] is derived from a legitimate source wholly independent of the compelled testimony."[64] Thus, *Kastigar* specifically holds what the Court had recently expressed by way of dictum,[65] and what commentators had for a long time argued[66]—that transactional immunity which grants full immunity from prosecution for the offense to which the compelled testimony relates[67] is considerably broader than the protection guaranteed by the fifth amendment.

However, a closer examination of this opinion reveals that while it does resolve the problem of the necessary breadth required for valid immunity legislation, it also leaves some questions in this area unresolved, or answers them in an unpersuasive manner.

The majority opinion stated that, in the event of an attempted subsequent prosecution, the government will have the burden of proving that the evidence to be used is in no way derived from the compelled testimony.[68] However, as Mr. Justice Marshall pointed out in his dissent, this burden may rest, in actuality, on the defendant.[69] The prosecution will have no difficulty in meeting its burden of proof by mere assertions if the witness is unable to produce contrary evi-

62. 406 U.S. at 459.

63. 378 U.S. at 79 n.18. There have been other federal cases supporting the shift of the burden to the prosecution. See Marchetti v. United States, 390 U.S. 39, 59 (1968); United States v. Pappadio, 235 F. Supp. 887, 890 (S.D.N.Y. 1964), aff'd, 346 F.2d 5 (2d Cir. 1965), vacated sub nom. Shillitani v. United States, 384 U.S. 364 (1966). See also United States v. Wallack, 231 F. Supp. 733, 736 (S.D.N.Y. 1964). This rule is analogous to that used to regulate violations of wiretap acts; once an improper act on the part of the government is proved (here a compulsion to testify), the burden shifts to it to prove that all or the remainder of its evidence has not been derived from the improper act. United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950); United States v. Goldstein, 120 F.2d 485, 488 (2d Cir. 1941), aff'd on other grounds, 316 U.S. 114 (1942).

64. 406 U.S. at 460.

65. See notes 42-43 supra and accompanying text.

66. Wigmore states: "Immunity statutes providing against 'use' of the compelled testimony could easily and properly be construed to proscribe not only direct use of the evidence, but indirect use as well. That is, they could be construed to proscribe use of the 'fruit of the tree,' a doctrine sufficing in the areas of search and seizure and wiretap. Such a construction would render the statutes valid, the immunity being as broad as, but not wastefully broader than, the privilege." Wigmore § 2283 at 524-25 (footnotes omitted) (emphasis omitted). Accord, C. McCormick, Evidence § 135 at 285-86 (1954).

67. Under transactional immunity, a witness obtains immunity for those crimes to which his testimony relates, not for all crimes of which he may be guilty at the time he is compelled to testify. Himmelfarb v. United States, 175 F.2d 924, 935-36 (9th Cir.), cert. denied, 338 U.S. 860 (1949).

68. 406 U.S. at 461-62.

69. See 406 U.S. at 468-69 (Marshall, J., dissenting).

dence.[70] Since the question of taint is solely within the knowledge of the prosecution, a witness who believes that his compelled testimony served as the catalyst for future investigations and/or prosecutions "will be hard pressed indeed to ferret out the evidence necessary to prove it."[71] Accordingly, when a subsequent prosecution is attempted, "[t]he good faith of the prosecuting authorities [could represent] the sole safeguard of the witness' rights."[72] While some commentators believe that the good faith of the prosecutor offers the witness sufficient protection,[73] even a prosecutor acting in the best of faith cannot be certain that somewhere during the investigation there was not some prohibited use of compelled testimony.[74] Thus, placing the burden of proof on the government may be merely illusory.

Assuming that the "affirmative duty" imposed on the prosecution to prove that the evidence it intends to use in a subsequent prosecution originated from a source "wholly independent of the compelled testimony"[75] affords the defendant real, not merely illusory protection, the Court made no mention of the degree of proof required to discharge the prosecution's burden. The question remains whether this burden will be met by a preponderance of evidence, clear and convincing evidence, or proof beyond a reasonable doubt. While lower federal courts have stated that clear and convincing evidence is required, this question cannot be considered resolved.[76]

Finally, one must examine the practical effects of a holding which permits subsequent prosecutions based upon independently obtained evidence. It is reasonable to expect a court to find that any evidence discovered after compelled testimony is the fruit of the compelled testimony;[77] it would thus appear that it is virtually impossible for the prosecution to discharge the burden of showing that the previous testimony did not, in some manner, aid in the subsequent investiga-

70. Id. at 469.

71. Id. See 61 Nw. U.L. Rev. 654, 663-64 (1966).

72. 406 U.S. at 469.

73. See 61 Nw. U.L. Rev. 654, 666 (1966).

74. See 406 U.S. at 469 (Marshall, J., dissenting); cf. Giglio v. United States, 405 U.S. 150 (1972); Santobello v. New York, 404 U.S. 257 (1971).

75. 406 U.S. at 460.

76. In United States v. Pappadio, 235 F. Supp. 887, 890 (S.D.N.Y. 1964), aff'd, 346 F.2d 5 (2d Cir. 1965), vacated sub nom. Shillitani v. United States, 384 U.S. 364 (1966), the court stated: "Should the Government try the witness under the pending indictment, the burden would be on the Government to prove, clearly and convincingly, that all of its proof is derived from sources completely independent of the witness's grand jury testimony, and any clues or leads derived from such testimony." This standard was cited with approval in United States v. Birrell, 269 F. Supp. 716, 725 n.13 (S.D.N.Y. 1967).

77. See Hoffman v. United States, 341 U.S. 479, 486 (1951), where the Court stated that "[t]he privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant . . . ." Accord, United States v. Trigilio, 255 F.2d 385 (2d Cir. 1958); United States v. Costello, 222 F.2d 656 (2d Cir. 1955); United States v. Doto, 205 F.2d 416 (2d Cir. 1953).

tion.[78] While it has been suggested that the only situation in which this burden could be discharged is one in which the evidence has been acquired before the witness testified,[79] some writers feel that even this situation would not permit the prosecutor to sustain his burden of proof.[80]

A careful reading of both *Kastigar* and *Counselman* must also lead one to question whether the present decision is consistent with the conceptual basis of *Counselman*, as was asserted by the majority of the Court,[81] or whether the present case too easily concluded that *Counselman* did not intend to fix a rule of transactional immunity. If one is to read *Counselman* for the proposition that an immunity statute must protect the witness to the same extent that a claim of the privilege would protect him, then the conceptual harmony of *Kastigar* and *Counselman* can be preserved. However, if one interprets *Counselman*, as the Supreme Court has, as espousing that "nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege,"[82] then it is indeed difficult to see how *Kastigar* can stand consistent with *Counselman*.

It would appear that *Kastigar's* impact will be more theoretical than practical. While the decision is correct in principle, it appears to be highly unworkable.[83] Nevertheless, "[t]he fact that there is only a slight possibility that a jurisdiction would be able to prosecute a witness without the use of such [compelled] testimony or its fruits should not force that possibility to be ignored."[84] Only time will determine how real that possibility is.

Constitutional Law—Right to Counsel—Rationale of *Gideon v. Wainwright* Extended to All Criminal Prosecutions at Which Accused Is Deprived of His Liberty.—Petitioner, an indigent, was charged with carrying a concealed weapon, an offense punishable under Florida law by up to six months imprisonment and a $1,000 fine.[1] After a non-jury trial, at which petitioner was not represented by counsel, he was convicted and sentenced to 90 days in jail. He then brought a habeas corpus action in the Florida Supreme Court alleging that, as an indigent layman without counsel, he had been unable to properly present an adequate defense to the charge. Following logic

78. Comment, Self-Incrimination and the States: Restriking the Balance, 73 Yale L.J. 1491, 1495 (1964)

79. 33 Fordham L. Rev. 77, 80 (1964). See United States v. Keilly, 445 F.2d 1285, 1287 n.1 (2d Cir. 1971), cert. denied, 406 U.S. 962 (1972)

80. Comment, Self-Incrimination and the States: Restriking the Balance, 73 Yale L.J. 1491, 1495 (1964).

81. 406 U.S. at 453.

82. United States v. Monia, 317 U.S. 424, 428 (1943).

83. See Comment, Self Incrimination and the States: Restriking the Balance, 73 Yale L.J. 1491, 1495 (1964).

84. 61 Nw. U.L. Rev. 654, 662 (1966) (footnote omitted). See 378 U.S. at 106 (concurring opinion).

1. Law of July 5, 1969, ch. 69-30b, § 2, [1969] Fla. Laws 1106.

which had been applied in *Duncan v. Louisiana*[2] to the jury trial guarantee, the Florida Supreme Court dismissed the writ. It held that the right to court-appointed counsel extends only to trials "for non-petty offenses punishable by more than six months imprisonment."[3] After granting certiorari, the United States Supreme Court unanimously reversed, rejecting the analogy to *Duncan* and holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[4] *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

The question to what extent the Due Process Clause of the fourteenth amendment[5] requires that in state criminal prosecutions an indigent accused be afforded counsel, unless waived, is one which has long perplexed the federal courts. In the 1932 case of *Powell v. Alabama*[6] the Supreme Court decided, in the context of an appeal from death sentences imposed at the infamous trial of the "Scottsboro Boys," that failure to assign effective counsel had been a denial of "a necessary requisite of due process of law."[7] Recognizing the importance to a defendant of representation by counsel the Court remarked:

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2. 391 U.S. 145 (1968). In Duncan the Supreme Court had found that due process requires availability of the jury trial option in prosecutions for serious offenses and that, without drawing a specific line between serious and petty offenses, the facts before it (a sentence of two years imprisonment) indicated that a serious and not petty offense had been charged. Id. at 161-62. Thereafter, in Frank v. United States, 395 U.S. 147 (1969), the Court made clearer its conception of what is a petty offense by applying the definition of "petty offense" enacted by Congress—i.e., any misdemeanor the penalty for which does not exceed six months imprisonment, a fine of not more than $500, or both. The Court held that defendant, who had been given a suspended jail sentence and probation upon conviction for criminal contempt had not been deprived of a constitutional right by being tried without a jury. 395 U.S. at 150-52. See also Bloom v. Illinois, 391 U.S. 194 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

3. State ex rel. Argersinger v. Hamlin 236 So. 2d 442, 443 (Fla. 1970), rev'd 407 U.S. 25 (1972).

4. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

5. The fourteenth amendment provides in part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § I. The sixth amendment provides in part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. While the sixth amendment does not directly apply to state criminal prosecutions (and there is no similarly worded provision that does), the "due process" clause of the fourteenth amendment has been used as a vehicle for achieving that effect. See Powell v. Alabama, 287 U.S. 45, 66-67 (1932). Initially, the test was that enunciated in Twining v. New Jersey, 211 U.S. 78 (1908); i.e., that due process guaranteed only those rights, otherwise found in the Bill of Rights, which were of a "fundamental" nature. Id. at 106; see 287 U.S. at 67. Later, however, it became accepted that what the sixth amendment guaranteed as regards right to counsel is coterminous with the requirements of due process. See Gideon v. Wainwright, 372 U.S. 335 (1963), noted in 32 Fordham L. Rev. 358 (1963).

6. 287 U.S. 45 (1932); see 13 B.U.L. Rev. 92 (1933); 32 Colum. L. Rev. 1430 (1932); 31 Mich. L. Rev. 245 (1932).

7. 287 U.S. at 71.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[8]

Despite this rather broad language the Court in *Powell* limited its holding at least to capital cases,[9] explicitly reserving decision as to whether the right granted would be recognized "in other criminal prosecutions."[10]

A decade later, in *Betts v. Brady*,[11] the Court declined to extend the rationale of *Powell* to non-capital cases. In *Betts*, it was held that the absence of counsel was not necessarily a denial of the "fundamental fairness" required by due process and that therefore the fourteenth amendment did not inexorably bind the states to provide counsel in all criminal prosecutions.[12] The Court noted: "Every [state] court has power, *if it deems proper*, to appoint counsel where that course seems to be required in the interest of fairness."[13] The conviction of Betts, who had struggled to present his own defense in a Maryland criminal court at his trial for robbery, was affirmed.[14]

In 1963 another defendant, Clarence Earl Gideon, whose situation was remarkably similar to that of Betts, was confronted with the same problem which had vexed Betts 20-odd years before. Like Betts, Gideon had been convicted of a state felony charge before a court which had refused his request for the

8. Id. at 68-69.

9. Id. at 71. The Court declared: "[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel . . . ." Id. Literally, it seems that what the court's holding required for appointment of counsel was a capital case and some sort of disability on the part of the defendant.

10. Id. at 71. The Court stated: "Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine." Id.

11. 316 U.S. 455 (1942), overruled, Gideon v. Wainwright 372 U.S. 335 (1963); see 21 Chi.-Kent L. Rev. 107 (1942); 17 Tul. L. Rev. 306 (1942); Wis. L. Rev. 118 (1943).

12. 316 U.S. at 473. Said the Court: "[T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." Id.

13. Id. at 471-72 (emphasis added).

14. Id. at 472-73. Qualifying factors, perhaps, were the Court's further notation that defendant was "not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue [the truth of his alibi]" and its assurance that "in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction." Id.

appointment of counsel. Like Betts, Gideon maintained that he had been deprived of a constitutional right.[15] In the interim, however, things had changed. More states had come to recognize the importance of counsel, whether by legislative guarantee or by actual practice;[16] and the rule of *Betts* had become eroded through the application of a "special circumstances" exception which through the years had become more and more enlarged.[17]

In *Gideon v. Wainwright*,[18] the Supreme Court reconsidered its holding in *Betts v. Brady* and specifically overruled it. Declaring *Betts* "an abrupt break with its own well-considered precedents"[19] as well as a departure "from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested,"[20] the Court stated in *Gideon* that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[21]

The *Gideon* decision provided the impetus for a great broadening of the protections afforded defendants in a variety of state criminal proceedings. In particular, the Court mandated the presence of counsel, unless waived after appraisal of the right thereto, in custodial interrogations,[22] line-ups,[23] preliminary hearings,[24] probation revocation hearings,[25] on appeal,[26] and, in

15. The colloquy which took place between the court and the defendant, as reproduced in part in the Supreme Court's decision, was as follows: "'The Court: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. . . .

The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel.'" Gideon v. Wainwright, 372 U.S. 335, 337 (1963).

16. See A. Lewis, Gideon's Trumpet 132 (1964); Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused, 30 U. Chi. L. Rev. 1, 16-17 (1962).

17. See 372 U.S. at 350 (Harlan, J., concurring); Carnley v. Cochran, 369 U.S. 506 (1962); Hudson v. North Carolina, 363 U.S. 697 (1960); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956).

18. 372 U.S. 335 (1963); see The Supreme Court, 1962 Term, 77 Harv. L. Rev. 62, 103 (1963); 16 Vand. L. Rev. 1228 (1963).

19. 372 U.S. at 344. The Court noted: "Twenty-two States, as friends of the Court, argue that Betts was 'an anachronism when handed down' and that it should now be overruled. We agree." Id. at 345.

20. Id. at 345.

21. Id. at 344.

22. Miranda v. Arizona, 384 U.S. 436 (1966), in which the Court ruled that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . ." Id. at 469. See also Escobedo v. Illinois, 378 U.S. 478 (1964).

23. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967). In these cases the Court based its decision on sixth amendment grounds as made applicable to the states by the fourteenth amendment. The Wade-Gilbert rule has recently been limited to post-indictment line-ups, and held not applicable to pre-indictment confrontations. Kirby v. Illinois, 406 U.S. 682, 690 (1972).

24. Coleman v. Alabama, 399 U.S. 1 (1970) (sixth amendment grounds).

25. Mempa v. Rhay, 389 U.S. 128 (1967) (sixth amendment grounds).

26. Douglas v. California, 372 U.S. 353 (1963) (fourteenth amendment due process and equal protection grounds).

the case of minors, delinquency proceedings.[27] With respect to the right to counsel *at trial*, however, the Court in *Gideon* did not make explicit to which classes of cases its holding applied.[28] The question whether due process required that counsel be provided in the trial of non-felony cases was left open; and it was not to be answered by the Court in the 1960's.[29]

In 1963, in *Patterson v. Warden*,[30] the Court did apply the *Gideon* rule to misdemeanors punishable by felony-length imprisonment. Subsequent cases, however, in which certiorari was denied, seemed to indicate a reluctance on the part of the Court to provide a broader solution.[31] In 1971 the issue appeared to be resolved with the promulgation by the Court of rules of procedure[32] which suggested strongly that *no* right to assigned counsel existed for petty federal offenses.[33] Though the term "petty offenses" was not defined in these rules, presumably the Court was adopting the federal statutory definition:[34] *viz.*, "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . . ."[35]

The above rules were barely in force when the Court granted certiorari[36] to review the case of *State ex rel. Argersinger v. Hamlin*.[37] In *Argersinger*, the Florida Supreme Court had held that an indigent defendant charged with a misdemeanor was entitled to assigned counsel only where there existed the

27. In re Gault, 387 U.S. 1 (1967) (fourteenth amendment due process grounds).

28. One commentator noted: "The Court left unanswered, however, the question of whether the holding is applicable to all criminal cases, or, as Mr. Justice Harlan in his concurring opinion intimated, to cases which 'carry the responsibility of a substantial prison term.'" 32 Fordham L. Rev. 358, 361-62 (1963).

29. See L. Hall, Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 112-13 (3d ed. 1969); Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685 (1968), in id. at 114-16.

30. 372 U.S. 776 (1963) (per curiam). The Court remanded the case back to the lower courts "for further consideration in light of Gideon v. Wainwright." Id. Cf. The Council of State Governments, Increased Rights for Defendants in State Criminal Prosecutions 30 (1963).

31. Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), cert. denied, 385 U.S. 907 (1966); State v. Heller, 4 Conn. Cir. Ct. 174, 228 A.2d 815 (1966), appeal denied, 154 Conn. 743, 226 A.2d 521, cert. denied, 389 U.S. 902 (1967); State v. DeJoseph, 3 Conn. Cir. Ct. 624, 222 A.2d 752, cert. denied, 385 U.S. 982 (1966).

32. Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, in 400 U.S. 1037-42 (1971).

33. 400 U.S. at 1031-34 (Black, J., dissenting). Justice Black concluded from analysis of Rules 2 and 3 that no right to assigned counsel for petty offenses existed. Rule 2 provides that a defendant charged with other than a petty offense must be advised "'of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel.'" Id. at 1032. Rule 3 provides that a defendant accused of a petty offense shall be informed merely of his "'right to counsel.'" Id.

34. Newell v. State, 277 A.2d 731, 736-38 (Me. 1971); see 400 U.S. at 1032 (dissenting opinion).

35. 18 U.S.C. § 1(3) (1970).

36. 401 U.S. 908 (1971).

37. 236 So. 2d 442 (Fla. 1970), rev'd, 407 U.S. 25 (1972).

possibility of a penalty of more than six months imprisonment.[38] The Supreme Court of the United States reversed, holding that "absent a knowing and intelligent waiver, no person may be imprisoned for *any* offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[39] In reaching its conclusion the Court, speaking through Justice Douglas, commenced by disposing of the argument that since the right to trial by jury had been limited by *Duncan v. Louisiana* to trials where punishment of imprisonment for six months or more impended,[40] the same limitation should apply with respect to the right to counsel. While both the jury trial and counsel guarantees derive from the sixth amendment, still other guarantees in the same amendment—*e.g.*, public trial, confrontation of witnesses, compulsory process for obtaining witnesses[41]—had not been limited "to felonies or to lesser but serious offenses."[42] Furthermore the rights to trial by jury and representation of counsel were separate and independent in their development and in the historical commitments which had been made to them.[43] The Court therefore rejected the premise "that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer."[44]

More importantly the Court found, harking back to the *Powell* and *Gideon* decisions, that "assistance of counsel is often a requisite to the very existence of a fair trial"[45] and that in fact "[t]he requirement of counsel may well be necessary for a fair trial *even in a petty-offense prosecution.*"[46] Such prosecutions present, often enough, legal and constitutional issues no less complex than those arising where stiffer penalties might be imposed.[47] And the potential

38. 236 So. 2d at 443.

39. 407 U.S. at 37 (emphasis added).

40. 391 U.S. 145, 159 (1968). See note 2 supra.

41. See 407 U.S. 28-29. As the Court noted, the sixth amendment "provides specified standards for 'all criminal prosecutions.'" Id. at 27. Thus in In re Oliver, 333 U.S. 257 (1948), it had held that the right to a "public trial" obtained in a state proceeding even though a sentence of only 60-days imprisonment was involved. See also Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process to obtain witnesses in one's favor); Pointer v. Texas, 380 U.S. 400 (1965) (right of confrontation); District of Columbia v. Clawans, 300 U.S. 617 (1937) (right of cross-examination).

42. 407 U.S. at 28.

43. Id. at 29-30. The Court observed that "there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases' . . . ." Id. at 30, citing Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 980-82 (1926) and James v. Headley, 410 F.2d 325, 331-32 (5th Cir. 1969); cf. Kaye, Petty Offenders Have No Peers!, 26 U. Chi. L. Rev. 245 (1959). The Court also noted, however, that "there is no such support for a similar limitation on the right to assistance of counsel." 407 U.S. at 30, citing Powell v. Alabama, 287 U.S. 45, 60, 64-65 (1932). See also Baldwin v. New York, 399 U.S. 66 (1970).

44. 407 U.S. at 30-31.

45. Id. at 31.

46. Id. at 33 (emphasis added).

47. Id., citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Powell v.

for injustice is, if anything, greater, given the "obsession for speedy dispositions" which tends to develop from the sheer volume of misdemeanor cases—"far greater in number than felony prosecutions."[48] Thus the Court adopted the imprisonment-in-fact standard previously announced by the Supreme Court of Oregon, which, in *Stevenson v. Holzman*,[49] had ruled that: " 'The denial of the assistance of counsel will preclude the imposition of a jail sentence.' "[50]

One of the major arguments against this expansion of the right to counsel is the increased burden which it will place upon the legal profession.[51] As the Chief Justice pointed out in his concurring opinion in *Argersinger*:

> This will mean not only that more defense counsel must be provided, but also additional prosecutors and better facilities for securing information about the accused as it bears on the probability of a decision to confine.[52]

While concern for this burden was shared by all of the Justices—judging from the majority opinion and concurrences—there was distinct disagreement as to its gravity. Certainly the six Justices who joined in the opinion of the Court appear to believe that implementation of the rule announced will not exceed the "Nation's legal resources."[53] The feeling of Justice Powell, joined by Justice Rehnquist, was, however, to the contrary.[54] In their view at least a substantial possibility exists of "short-term 'chaos' " and "long-term adverse effects."[55]

Texas, 392 U.S. 514 (1968); In re Gault, 387 U.S. 1 (1967); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Thompson v. City of Louisville, 362 U.S. 199 (1960).

48. 407 U.S. at 34. See The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 128 (1967); Hellerstein, The Importance of the Misdemeanor Case on Trial and Appeal, 28 The Legal Aid Briefcase 151, 152 (1970); Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L. Rev. 1249, 1261 (1970).

49. 254 Ore. 94, 458 P.2d 414 (1969).

50. 407 U.S. at 38, quoting Stevenson v. Holzman, 254 Ore. at 102, 458 P.2d at 418; accord, State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967); cf. In re Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967) (denial of counsel precludes substantial jail sentence). Other jurisdictions have statutorily foreclosed imprisonment where an accused is denied counsel. See, e.g., Ill. Ann. Stat. ch. 38, § 113-3(b) (Smith-Hurd Supp. 1972). See generally Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 734 (1968).

51. See Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 392-94 (1966); 1 L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 123-26 (1965).

52. 407 U.S. at 43 (Burger, C.J., concurring).

53. Id. at 37 n.7. As expressed in the opinion of the Court: "We do not share Mr. Justice Powell's doubt that the Nation's legal resources are insufficient to implement the rule we announce today. It has been estimated that between 1,575 and 2,300 full-time counsel would be required to represent all indigent misdemeanants, excluding traffic offenders. . . . These figures are relatively insignificant when compared to the estimated 355,200 attorneys in the United States . . . , a number which is projected to double by the year 1985." Id. (emphasis omitted) (citations omitted).

54. See id. at 56-60 (Powell, J., concurring).

55. Id. at 62 (Powell, J., concurring).

In part this view rests upon the prognosis that "although the new rule is extended today only to the imprisonment category of cases, the Court's opinion foreshadows the adoption of a broad prophylactic rule applicable to all petty offenses."[56] The argument is not without merit. As was aptly pointed out by Justice Powell's concurrence, the *Argersinger* majority, similar to that in *Gideon* and *Powell*, did not foreclose extension of its ruling beyond the facts before it. Recalling perhaps the words of the majority that "[w]e need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved,"[57] Justice Powell reasoned that "[t]he logic . . . advance[d] for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed."[58]

The Powell-Rehnquist concurrence bolstered its misgivings as to the *effect* of the *Argersinger* holding with doubts as to its judicial sensibleness,[59] if not as to its constitutionality.[60] As an alternative to the "new inflexible rule" the exercise of discretion "on a case-by-case basis" in petty offense prosecutions was offered.[61] The case-by-case approach, however, is itself not without difficulty. For one thing, it may place too much discretion in the hands of the trial judge. Furthermore, if it does (as it seems to) constitute an answer to the "burden on legal resources" problem envisioned in the majority rule, then it can only be viewed

56. Id. at 52 (Powell, J., concurring).

57. Id. at 37.

58. Id. at 52 (Powell, J., concurring). According to this concurrence, "[t]he rule adopted today does not go all the way. It is limited to petty offense cases in which the sentence is some imprisonment. The thrust of the Court's position indicates, however, that when the decision must be made, the rule will be extended to all petty offense cases except perhaps the most minor traffic violations. If the Court rejects on constitutional grounds, as it has today, the exercise of any judicial discretion as to need for counsel if a jail sentence is imposed, one must assume a similar rejection of discretion in other petty offense cases. It would be illogical—and without discernible support in the Constitution—to hold that no discretion may ever be exercised where a nominal jail sentence is contemplated and at the same time endorse the legitimacy of discretion in 'non-jail' petty offense cases which may result in far more serious consequences than a few hours or days of incarceration." Id. at 51.

59. Id. at 52-54 (Powell, J., concurring).

60. The Powell concurrence raised the possibility that the Court's ruling might result in equal protection problems. Specifically, "[t]here may well be an unfair and unequal treatment of individual defendants, depending on whether the individual judge has determined in advance to leave open the option of imprisonment." Id. at 54. A different sort of discrimination was foreseen, moreover, in cases where a judge predetermines that no sentence of imprisonment will be imposed and the statute under which the defendant is being tried prescribes alternative punishment of sentence or fine. Here, the concurrence insists, the non-indigent defendant will be disadvantaged for, able to pay, he will suffer his punishment—in contrast to the indigent defendant who in effect will be let off. Id.

61. Id. at 63-66 (Powell, J., concurring). Factors considered significant in making a case-by-case determination were: the complexity of the offense charged; probable sentence if conviction ensues; and peculiarities of each case, such as the competency of the individual defendant to defend himself. Id. at 54-55.

as contemplating the appointment of counsel in far fewer instances. Implicit within the approach is thus a very different conception of the necessity for counsel in non-felony cases—and one which the majority has presumably rejected on "fairness" grounds.[62]

Of the other approaches which have been suggested, the "petty offense-serious offense" standard for appointment of counsel is considered the least viable, given among other things the disparities in offense classification from state to state.[63] The "imprisonment-in-law" approach, which would allow counsel where the statutory provision under which a defendant is being tried provides for a jail sentence,[64] would seem even more burdensome than the rule announced by the Court in *Argersinger*, for at least in the latter case a judge may determine that, although imprisonment may be imposed, it will not be.

The most cogent criticism of the *Argersinger* holding is that it does, in effect, require a judge to make a pre-trial determination regarding sentence: appointment of counsel at that time being a precondition for the imposition of a jail term.[65] Can a judge effectively separate determinations of guilt and sentence? To put it another way, can he, having decided upon sentence, approach the question of guilt without prejudice?

The *Argersinger* case certainly represents a landmark expansion of the *Gideon* rationale that due process requires the presence of an attorney where an accused stands to suffer a substantial deprivation. The Court in *Argersinger* has determined that any deprivation of liberty is sufficiently substantial. It only remains to be seen what effect this holding will have on our criminal justice system. The next few years will provide the answer.

Parole—Sentencing—Fixing Sentence at the Statutory Maximum and Refusing to Consider Future Parole, Solely Because of the Nature of the Crime Involved, Held an Abuse of Discretion but not Violative of Due Process.—The petitioner, Norman Minnis, was convicted of possession of restricted dangerous drugs for sale[1] and was sentenced to an indeterminate period

62. See text accompanying notes 43-46 supra.

63. See Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 65 (1963); Comment, Continuing Echoes of Gideon's Trumpet—The Indigent Defendant and the Misdemeanor, 10 S. Tex. L.J. 222, 241 (1968). Some jurisdictions classify offenses as either felonies, misdemeanors, or violations. See, e.g., N.Y. Penal Law § 10.00 (McKinney 1967). Other jurisdictions categorize as felonies, gross misdemeanors, or petty misdemeanors. See, e.g., Minn. Stat. Ann. § 609.02 (1964), (Supp. 1973). Furthermore, what is classified in one state as a felony may in another state be regarded as a misdemeanor or as no crime at all. See generally Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L. Rev. at 1253.

64. See Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 709 (1968).

65. See 407 U.S. at 53 (Powell, J., concurring).

1. Cal. Health & Safety Code § 11911 (West Supp. 1972).

of from six months to three years.[2] The Adult Authority[3] fixed his sentence at the three year maximum and further stipulated that "future applications for fixing petitioner's term at less than maximum or for parole would not be considered."[4] The petitioner contended that the Adult Authority's decision was based solely on the nature of his crime and was not the result of an individual evaluation of the petitioner, which amounted to a violation of his rights to due process and an abuse of that agency's discretion.[5] The California Supreme Court held that the Adult Authority had abused its discretion by its arbitrary action and ordered the agency to reconsider its decision in conformity with legislative intent. The court, however, denied petitioner's due process argument. *In re Minnis*, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972).

In California, as in many other states,[6] an indeterminate sentencing system was enacted to eliminate the rigidity of traditional sentencing procedures.[7] The California system limits the sentencing power of the trial judge by requiring him to impose only an indeterminate period of imprisonment as prescribed by statute for the crime committed.[8] Subsequent determinations concerning the actual term of imprisonment are made by the Adult Authority, a non-judicial administrative agency which oversees both the indeterminate sentencing system and the parole system.[9] The agency fixes the exact length of time to be served within the indeterminate period and sets the minimum duration of imprisonment before parole eligibility.[10] Notwithstanding the seriousness of these decisions, the

2. In re Minnis, 7 Cal. 3d 639, 642, 498 P.2d 997, 999, 102 Cal. Rptr. 749, 751 (1972).

3. The Adult Authority is the administrative agency which fixes sentences and grants parole under California's indeterminate sentencing laws. Cal. Penal Code § 5077 (West 1970). See note 10 infra and accompanying text.

4. 7 Cal. 3d at 642, 498 P.2d at 999, 102 Cal. Rptr. at 751.

5. Id.

6. See, e.g., Conn. Gen. Stat. Ann. § 53a-35 (1972); N.J. Stat. Ann. 30:4-123.40 (1964); N.Y. Penal Law § 70.00 (McKinney 1967); Wis. Stat. Ann. § 973.01 (1971). See also Model Penal Code § 6.06 (Proposed Official Draft 1962).

7. See In re Lee, 177 Cal. 690, 171 P. 958 (1918) wherein the court stated: "They [the indeterminate sentence laws] seek to make the punishment fit the criminal rather than the crime." Id. at 692, 171 P. at 959.

8. Cal. Penal Code § 1168 (West 1970) provides in pertinent part: "Every person convicted of a public offense, for which imprisonment in any reformatory or state prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a state prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment." The constitutionality of this provision was upheld in In re Collins, 198 Cal. 508, 245 P. 1089 (1926).

9. Cal. Penal Code § 3020 (West 1970) provides: "[T]he Adult Authority may determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned . . . ." For a discussion of the power of the Authority under this section see Johnson, Multiple Punishment and Consecutive Sentences: Reflections On the Neal Doctrine, 58 Calif. L. Rev. 357, 379-89 (1970).

10. Cal. Penal Code § 5077 (West 1970) provides: "The granting and revocation of parole and the fixing of sentences shall be determined by the Adult Authority; provided, that the Adult Authority or one member thereof shall interview each prisoner at least

California legislature did not promulgate specific guidelines for the Authority's determinations. As a result, the decisions are primarily committed to Agency discretion.[11]

The type of discretionary powers given California's Adult Authority are not unique to that jurisdiction;[12] parole boards, the Authority's counterpart in other states, generally enjoy a good deal of liberty in making determinations concerning the freedom of those incarcerated.[13] The justification for permitting such agencies wide discretionary power is based on several theories of parole, all of which conclude that the prospective parolee has no preexisting right to a parole release.[14] Courts also lend support to the theory that parole is not a right, but merely a privilege, and for that reason refuse to apply due process standards to the procedures for granting parole.[15]

Although the due process rights of the accused in the criminal justice system have been greatly increased in the last decade,[16] those seeking parole release have not been affected to the same extent by the extension of these rights.[17] Having concluded that prospective parolees are not entitled to the same due

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once before the Adult Authority determines his sentence." This procedure was held to be sufficient in People v. Kostal, 159 Cal. App. 2d 444, 323 P.2d 1020 (2d Dist. 1958).

11. See Johnson, supra note 9, at 381. "The Penal Code provides no standards to guide the Adult Authority in exercising its vast discretion to release a prisoner or to confine him indefinitely." Id.

12. See note 6 supra.

13. For a more detailed discussion see Moreland, Model Penal Code: Sentencing, Probation and Parole, 57 Ky. L.J. 51 (1968); Comment, Due Process: The Right to Counsel in Parole Release Hearings, 54 Iowa L. Rev. 497 (1968); Comment, Parole: A New Approach, 18 Loyola L. Rev. 87 (1971-72); Comment, Rights Versus Results: Quo Vadis Due Process for Parolees, 1 Pacific L.J. 321 (1970); Comment, The Parole System, 120 U. Pa. L. Rev. 282 (1971).

14. There are five generally accepted theories behind the concept of parole: grace, contract, custody, exhausted rights, and parens patriae. For a discussion of these theories see Comment, The Parole System, supra note 13, at 286-300. But cf. Biddle v. Perovich, 274 U.S. 480, 486 (1927) wherein the Court stated that a pardon "is not a private act of grace." Id.

15. See, e.g., Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971); Ott v. Ciccone, 326 F. Supp. 609 (W.D. Mo. 1970); Bell v. Oswald, 305 F. Supp. 878 (S.D.N.Y. 1969).

16. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury); United States v. Wade, 388 U.S. 218 (1967) (right to counsel guaranteed at critical confrontations before trial); In re Gault, 387 U.S. 1 (1967) (counsel required in a juvenile proceeding); Specht v. Patterson, 386 U.S. 605 (1967) (right to counsel and a hearing at sentencing); Miranda v. Arizona, 384 U.S. 436 (1966) (warnings required concerning right to counsel at interrogation prior to trial); Griffin v. California, 380 U.S. 609 (1965) (right to freedom from self-incrimination).

17. See note 15 supra and accompanying text. But cf. Morrissey v. Brewer, 408 U.S. 471 (1972); United States ex rel. Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079 (2d Cir.), vacated, 404 U.S. 879 (1971).

process protections as the criminally accused,[18] the decision making procedures have been delegated to non-judicial agencies.[19]

In *Hannah v. Larche*[20] Chief Justice Warren subscribed to a due process standard for the procedures of non-judicial governmental agencies, stating:

> [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.[21]

In 1969, the Supreme Court applied the *Hannah* rationale in *Jenkins v. McKeithen*[22] and held that since the state's Labor-Management Commission made binding determinations, it had to insure that individuals subject to those determinations were afforded due process protection.[23]

Despite the rulings by the Supreme Court in *Hannah-McKeithen* situations, the courts have thus far refused to grant prospective parolees due process protections at the release stage.[24] This position has been severely criticized by legal writers, who have argued that the parole release determination is binding, rather than investigative, and under the reasoning of *Hannah-McKeithen* persons subject to those decisions should be afforded due process protection.[25] However, this theory has not received judicial recognition.

In support of the position that individuals subject to parole release determi-

18. See, e.g., In re Martinez, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382, cert. denied, 400 U.S. 851 (1970), wherein the court stated: "Although we recognize, of course, that such evidence would not be admissible in a court of law, we believe that an agency whose delicate duty is to decide when a convicted offender can be safely allowed to return to and remain in society is in a different posture than the court which decides his original guilt." Id. at 650, 463 P.2d at 740, 83 Cal. Rptr. at 388, and 59 Am. Jur. 2d Pardon and Parole § 79 (1971): "Parole is not a constitutional right; it is a right bestowed by legislative grace, and the subject of parole is within the legislative authority given by a state constitution to the legislature." Id. (footnote omitted). See notes 14 & 15 supra and accompanying text.

19. See notes 6 & 9 supra and accompanying text. It may be argued that the simple denial of a judicial hearing to prospective parolees is, in itself, a deprivation of due process rights.

20. 363 U.S. 420 (1960).

21. Id. at 442.

22. 395 U.S. 411 (1969).

23. Id. at 427. The agency in McKeithen had the power to make binding criminal determinations in a non-judicial setting. Id. See Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961) in which the Court noted that in reaching the determination whether due process must be granted, there is a need to balance the particular governmental function with the private interest affected.

24. See note 15 supra.

25. See, e.g., Cohen, Sentencing, Probation, the Rehabilitative Ideal: The View From Mempa v. Rhay, 47 Tex. L. Rev. 1 (1968); Comment, Constitutional Law: Parole Status and the Privilege Concept, 1969 Duke L.J. 139; Comment, Due Process: The Right to Counsel in Parole Release Hearings, 54 Iowa L. Rev. 497 (1968); Comment, Rights Versus Results: Quo Vadis Due Process for Parolees, 1 Pacific L.J. 321 (1970); Comment, The Parole System, 120 U. Pa. L. Rev. 282 (1971).

nations are not entitled to due process protections, reliance may be placed on decisions such as *Menechino v. Oswald*,[26] which view parole as a privilege rather than a right.[27] The *Menechino* majority distinguished parole release from parole revocation and conceded that there may be due process requirements in the latter.[28]

A year later, in *United States ex rel. Bey v. Connecticut State Board of Parole*,[29] the Second Circuit formally concluded that parole revocation hearings require the observance of minimal due process standards.[30] The *Bey* court distinguished parole revocation from parole release by stating:

> It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.[31]

In 1972, the United States Supreme Court was faced with the same question in *Morrissey v. Brewer*,[32] and accepted the *Bey* rationale. In support of its conclusion, the Court said:

> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[33]

The Court modified the impact of this holding by declaring that the rights afforded a parolee in a revocation proceeding are not as great as those possessed by a defendant in a criminal prosecution.[34]

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26. 430 F.2d 403 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971).

27. Id. at 408-09. "It is questionable whether a Board of Parole is even required to hold a hearing on the question of whether a prisoner should be released on parole." Id. at 409 (footnote omitted).

28. Id. "[T]he [parole release] determination to be made differs from revocation of parole, where plausible reasons might be advanced in favor of minimum procedural due process. It may be argued that a parolee, having been released, enjoys a liberty akin to a private interest, and that the Board is seeking to deprive him of that liberty . . . ." Id.

29. 443 F.2d 1079 (2d Cir.), vacated, 404 U.S. 879 (1971).

30. Id. "Unlike a prisoner being considered for parole release, a parolee facing reimprisonment stands to lose a 'presently enjoyed' interest in his conditional freedom . . . ." Id. at 1086.

31. Id. at 1086.

32. 408 U.S. 471 (1972).

33. Id. at 482. It is important to note that the Court, in reaching its conclusion, stated that the traditional view of parole being a "privilege" would not operate to limit a parolee's right to limited due process in the parole revocation situation. This departure from the traditional view may well serve as a basis for an argument to grant similar rights to those seeking a parole release.

34. Id. at 480. The Court enumerated the procedural requirements: "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence

Attempts to secure similar due process protections for persons seeking parole release have been unsuccessful.[35] One argument for the application of due process standards to parole release procedures is based on a view of parole as an extension of the sentencing procedure.[36] Proponents of this argument rely on those decisions which have held that sentencing is a "critical stage" of the criminal process and, at such a stage, the adjudicatory body must afford the convicted person certain due process guarantees.[37] *Mempa v. Rhay*,[38] in which the Supreme Court held that a person subjected to sentencing following probation revocation is entitled to representation by counsel,[39] has been cited in support of applying these standards to the parole release procedures.[40] However, this theory was dismissed in *Menechino*; the court stating:

> We do not accept [the] contention that a parole release determination is simply a continuation or deferment of sentencing. The prisoner's sentence has already been finally decreed by the court and cannot be changed. A parole Board's determination as to release, on the other hand, is not final and may be reviewed and changed at any time in the Board's discretion.[41]

In a strong dissent, Judge Feinberg took exception to the majority's reasoning.[42] He noted that there has been a decrease in responsibility on the part of the trial judge in the sentencing procedure, while the parole board's responsibility has increased.[43] If the actual term of the sentence was decided at the trial stage, as it traditionally was, the accused would be granted the full spectrum of due process rights; however, this determination is now delayed to a post-conviction

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against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parol." Id. at 489.

35. See note 15 supra. See also Walker v. Oswald, 449 F.2d 481 (2d Cir. 1971).

36. See Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971) where the petitioners attempted unsuccessfully to use this argument. For an in depth discussion of the argument see Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803 (1961).

37. See, e.g., Specht v. Patterson, 386 U.S. 605 (1967) in which the Supreme Court held that the petitioner was entitled to fourteenth amendment due process protection which included right to counsel, right to confront witnesses against him, and the right to offer evidence when sentence was being considered; Townsend v. Burke, 334 U.S. 736 (1948) wherein the Court held that sentencing the petitioner in the absence of counsel amounted to a due process violation. See also note 34 supra. But see Comment, The Right to Counsel in Parole Release Hearings, 54 Iowa L. Rev. 497 (1968).

38. 389 U.S. 128 (1967).

39. Id. at 137.

40. See, e.g., Walker v. Oswald, 449 F.2d 481 (2d Cir. 1971); Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971).

41. 430 F.2d 403, 410 (2d Cir. 1970).

42. Id. at 412-19.

43. Id. at 414.

proceeding where these due process protections are not available. The dissent concluded that a prisoner is entitled to the same due process protections in parole release proceedings as in sentencing proceedings.[44] Judge Feinberg's view of the post-conviction status of prisoners is illustrated by his statement that "[t]he criminal process does not end abruptly with the clang of the prison gate; society has a pervading interest in what happens to the prisoner thereafter."[45]

The extension of sentencing contention raised by the petitioner in *Menechino* appears more tenable when applied to California's indeterminate sentencing system. The procedures of the Adult Authority, unlike those in a traditional parole system, are quite similar to the procedures discussed in *Mempa*. The trial judges in *Mempa*, as in California, were bound by statutory law to fix a prescribed sentence.[46] Pursuant to the procedures in *Mempa* and those of California, an administrative agency makes the actual sentencing determination based on its own investigation and the recommendations of the trial judge and prosecutor.[47] In *Mempa*, the Supreme Court held that the petitioner was entitled to representation by counsel when his probation was revoked and sentence imposed.[48] In support of its holding the Court stated:

> [W]e do not question the authority of the State . . . to provide for a deferred sentencing procedure coupled with its probation provisions. . . . All we decide here is that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing.[49]

Although the California courts have not been confronted with this precise issue, there is a line of cases involving due process and the indeterminate sentence laws which shed light on the direction in which California might go. It was held in *In re McLain*[50] that a prisoner had no due process right to a hearing when his sentence was redetermined to a greater length by the Adult Authority because of the prisoner's alleged misconduct during imprisonment.[51] The court stated:

> The provisions for determining or redetermining sentence and for granting, suspending or revoking parole do not violate due process because of the absence of a requirement for notice or hearing. The notice of a hearing was given and required to be given in the proceedings which resulted in the original conviction. Those proceedings resulted in a conviction and the imposition of a sentence that was indeterminate, and until fixed, amounted to a maximum sentence provided for the crime in question. When the

44. Id. Judge Feinberg went on to state, "[f]or the defendant before . . . the Parole Board, the stakes are exactly the same: on the one hand, freedom to remain in or to return to society and on the other, incarceration . . . ." Id.

45. Id. at 413 (footnote omitted).

46. 389 U.S. at 135. For a discussion of California's system see notes 8-11 supra and accompanying text.

47. 389 U.S. at 135.

48. Id. at 137.

49. Id.

50. 55 Cal. 2d 78, 357 P.2d 1080, 9 Cal. Rptr. 824 (1960).

51. Id.

Authority reduces a maximum sentence, its action, in the very nature of things, is tentative and may be changed for cause.[52]

In *Sturm v. California Adult Authority*,[53] a federal court confronted with a *McLain*-type issue was not persuaded by petitioner's arguments that the Adult Authority's action was a denial of due process.[54] The majority simply reiterated the position taken by the California Supreme Court in *McLain*.[55] In a concurring opinion, Judge Browning agreed that the Adult Authority had the power to redetermine a prisoner's sentence, but maintained that the redetermination procedures must provide some due process protection for the prisoner.[56]

Sturm was distinguished in *Hester v. Craven*,[57] in which the Adult Authority was ordered to grant the petitioner a hearing with respect to the redetermination of his sentence in lieu of the issuance of a writ of habeas corpus.[58] The *Hester* court relied heavily on Judge Browning's concurrence in *Sturm* and concluded that the petitioner was denied due process under the fourteenth amendment since he was not permitted to confront and cross-examine witnesses.[59]

In California, the due process requirements which were stated by Judge Browning and by the *Hester* court for redetermination of sentences have not been extended to the initial sentence determination by the Adult Authority. Although this initial determination is clearly "state action" as required by the fourteenth amendment, the courts have yet to construe it as a "deprivation of liberty."[60] The California Supreme Court was presented with an opportunity to

52. Id. at 85, 357 P.2d at 1085, 9 Cal. Rptr. at 829 (citations omitted).

53. 395 F.2d 446 (9th Cir. 1967), cert. denied, 395 U.S. 947 (1969). In Sturm, the Adult Authority redetermined the prisoner's sentence from 6 years to 10½ years without a hearing based on charges that the prisoner had broken prison rules.

54. Id. at 448-49.

55. Id. at 448.

56. Id. at 449. Judge Browning argued: "When the California Adult Authority entered its order of July 3, 1962, refixing appellant's sentence at ten and one-half years, it substantially extended the prison term which appellant would be required to serve. Appellant's challenge to the constitutionality of that order cannot be answered by pretending that nothing really occurred, merely because a State court, five years earlier, had entered an order fixing appellant's maximum term at life. The action of the Board was State action. It deprived appellant of liberty; if it did so 'without due process of law,' or denied appellant 'the equal protection of the laws,' it offended the Fourteenth Amendment." Id.

57. 322 F. Supp. 1256 (C.D. Cal. 1971).

58. Id. at 1266. Sturm was distinguished on the ground that the court was not confronted with the issue of due process. Id. at 1260.

59. Id. at 1265-66. In Hester the petitioner had been on parole and his parole revocation and sentence redetermination were based on conduct outside of prison. The Adult Authority had denied him the opportunity to confront witnesses that had testified against him. Id.

60. See note 46 supra. U.S. Const. amend. XIV, § 1 provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

consider this question when a due process challenge to the Adult Authority's initial sentencing procedures was put forth in *In re Minnis*.[61]

The petitioner in *Minnis* challenged the Adult Authority's determination that he would have to remain incarcerated for the statutory maximum and would not be considered for parole at any time during his term of imprisonment.[62] The petitioner maintained that the determination was the result of the Adult Authority's " 'policy' that prisoners who have sold drugs or narcotics 'purely for profit' should be retained in prison for the maximum term permissible."[63] The Adult Authority's action was attacked both as a denial of due process and as an abuse of discretion.[64] The court ordered the Adult Authority to reconsider petitioner's application for parole and to determine if his sentence should be fixed at less than the maximum.[65] The court stated:

> Although we reject petitioner's contentions based upon claims of constitutional infirmities, we agree that the Authority did abuse its discretion in the present case.[66]

The *Minnis* court examined the purposes of the indeterminate sentence laws as construed by past decisions[67] and concluded that the Adult Authority was created to provide prisoners with individualized treatment.[68] The court emphasized that the indeterminate sentence laws, in conjunction with the parole system, have as their main purpose and object the rehabilitation and reform of the prisoner.[69] The court found the Authority's action in this case repugnant to those purposes.[70]

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61. 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972).

62. Id. at 642, 498 P.2d at 999, 102 Cal. Rptr. at 751.

63. Id.

64. Id.

65. Id. at 651, 498 P.2d at 1005, 102 Cal. Rptr. at 757.

66. Id. at 642, 498 P.2d at 999, 102 Cal. Rptr. at 751.

67. Id. at 644, 498 P.2d at 1000, 102 Cal. Rptr. at 752. The court cited In re Lee, 177 Cal. 690, 171 P. 958 (1918), in which it was held that the indeterminate sentence laws were enacted to reform the criminal justice system by making "the punishment fit the criminal rather than the crime." This decision was also relied on to illustrate the emphasis on reformation of the prisoner. Id. at 692, 171 P. at 959. The court also cited People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964), wherein the legislative intent for the indeterminate sentence laws was described: "In the general field of criminal law the Legislature has abandoned the ancient notion of catagorical punishment, the infliction of fixed terms for certain crimes, and substituted the indeterminate sentence, leaving to the Adult Authority the judgment of the period of incarceration. The Authority does not fix that period pursuant to a formula of punishment, but in accordance with the adjustment and social rehabilitation of the individual analyzed as a human composite of intellectual, emotional and genetic factors." Id. at 642-43, 388 P.2d at 39-40, 36 Cal. Rptr. at 207-08 (footnotes omitted).

68. 7 Cal. 3d at 644-45, 498 P.2d at 1000, 102 Cal. Rptr. at 752.

69. Id. at 644, 498 P.2d at 1000-01, 102 Cal. Rptr. at 752. The court relied on Roberts v. Duffy, 167 Cal. 629, 140 P. 260 (1914) which held: "The purpose and object of a parole system is to mitigate the rigor of the old, and while requiring the punishment of a prisoner by actual confinement for a fixed period of his term of sentence, still to provide a more

The *Minnis* court noted that the Authority's unilateral policy that *all* persons convicted of "selling narcotics for profit" would be incarcerated for the maximum statutory period and denied review for parole directly affronted the legislative intent for the Authority's creation and amounted to an abuse of discretion.[71] The decision stated that the Authority erroneously disregarded the prisoner's conduct while incarcerated.[72] The categorical refusal on the part of the Authority to consider the petitioner's conduct while incarcerated was viewed by the court as a flagrant disregard of the State's interest to encourage prisoners to strive for rehabilitation and to maintain good conduct.[73]

Several cases were cited by the court as illustrative of its long standing positions favoring compliance with legislative intent and opposing arbitrary action by governmental agencies. *In re M.*[74] was mentioned as an example of the court's policy to discourage actions in defiance of legislative purposes.[75] In that case a juvenile court's decision to detain a minor because of the nature of the offense charged was reversed because it had not examined the merits of the individual case as mandated by the legislature.[76] The court manifested its disfavor with arbitrary action in parole cases, noting *Roberts v. Duffy*,[77] which had ordered the board of prison authorities to abandon its policy of not reviewing applications for parole until the prisoner served half of his term of sentence.[78]

The Adult Authority's "refusal in advance to consider future applications"

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humane management and prison discipline under which there is extended to those who may show a disposition to reform and whose reformation may reasonably be expected, a hope and prospect of liberation from the prison walls under the restrictions and conditions of a parole." Id. at 634, 140 P. 261-62.

70. 7 Cal. 3d at 645, 498 P.2d at 1001, 102 Cal. Rptr. at 753.

71. Id.

72. Id.

73. Id. The court cited Johnson, supra note 9, at 382, wherein the author outlined the objectives of the Adult Authority: "First, it reduces inconsistency in sentencing. Although the Authority may be and is inconsistent itself, it is unlikely that a single administrative agency could ever approach the spectacular disharmony inevitable if sentences were imposed by hundreds of judges spread over a vast state. Second, the system obviously puts enormous pressure upon inmates hopeful of release to behave themselves and to take advantage of such rehabilitational programs as are offered. Third, it does allow early release for the rehabilitated and indefinite confinement for the unrehabilitated, within the usually broad statutory limits." Id. (footnote omitted). See note 81 infra and accompanying text.

74. 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970).

75. 7 Cal. 3d at 645-46, 498 P.2d at 1001-02, 102 Cal. Rptr. at 753-54.

76. 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970), wherein the court stated: "The decision to take a minor away from his home, his parents, and his friends in [sic] fraught with such grave consequences that the juvenile court cannot establish mechanical 'policies' for automatic detention. The Legislature has indicated that children should be released except under certain specific conditions of 'immediate and urgent necessity.'" Id. at 30-31, 473 P.2d at 747-48, 89 Cal. Rptr. at 43-44 (footnote omitted).

77. 167 Cal. 629, 140 P. 260 (1914).

78. Id. The petitioner in Roberts was a "first termer" and complained that the board of prison authorities should review his application for parole at the end of one year of

filed by Minnis was considered arbitrary since the legislature had enacted an indeterminate sentence for the crime in question rather than a "fixed" sentence.[79] This action was construed as defeating the purpose of the indeterminate sentence law.[80] The court pointed out that the arbitrariness and disregard for legislative intent was further indicated by the unique character of the petitioner.[81] The court, however, insisted that the Adult Authority could have legitimately fixed petitioner's sentence at the maximum in light of the report submitted by the district attorney; in any event, Minnis was entitled to have his parole application "duly considered."[82]

Having concluded that the Adult Authority abused its discretion, the court turned to constitutional issues raised by the petitioner. Notwithstanding the court's initial statement that its decision was *not* based on the constitutional infirmities complained of by the petitioner, the court stated:

> Although a prisoner may not have a right to be released on parole, parole cannot be withheld unless by means *consonant with due process*.[83]

What the court meant by "consonant with due process" is not ascertainable; it merely cited the leading Supreme Court decisions dealing with due process in administrative governmental determinations.[84]

The petitioner had contended that section 1203.1 of California's Penal Code was violative of due process, since it permits the district attorney to file a statement which is taken into consideration when the Adult Authority makes its sentencing and parole determinations.[85] In dismissing this contention, the court enunciated that the section was not violative of due process because the in-

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incarceration. The court granted this request but denied petitioner's claim that he was entitled to parole as a matter of "right." Id.

79. 7 Cal. 3d at 646-47, 498 P.2d at 1002, 102 Cal. Rptr. at 754.

80. Id. at 648, 498 P.2d at 1003, 102 Cal. Rptr. at 755.

81. Id. at 643, 498 P.2d at 999, 102 Cal. Rptr. at 751. The court stated: "Furthermore, the record supports an inference that petitioner's application did not receive individualized consideration. He has not suffered any prior convictions. Before his arrest, he frequently participated in and assisted with charitable activities. Since his imprisonment, he has been in minimum security institutions. The record is devoid of any suggestions that he has been a disciplinary problem and the administrator of a prison camp where petitioner spent several months has stated that petitioner 'does have a lot to offer.'" Id. (emphasis omitted).

82. Id. at 646-50, 498 P.2d at 1002-04, 102 Cal. Rptr. at 754-56. In his report, the District Attorney stated that the petitioner sold large quantities of drugs though he himself was a non-user of narcotics and was well educated. Id. at 649 n.10, 498 P.2d at 1004 n.10, 102 Cal. Rptr. at 756 n.10.

83. Id. at 648, 498 P.2d at 1004, 102 Cal. Rptr. at 756 (emphasis added).

84. Id. The court cited Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961), Hannah v. Larche, 363 U.S. 420 (1960), and Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) in support of its declaration that some due process requirements are present in parole release proceedings. Id.

85. Id. at 649-50, 498 P.2d at 1003-04, 102 Cal. Rptr. at 755-56. For a summary of the District Attorney's report see note 82 supra.

formation in the district attorney's statement served a legitimate purpose.[86] The court concluded that the procedures accompanying the statement were adequate, and stated:

> Under the terms of the statute, copies of the district attorney's statement are sent to the defendant and the defense counsel. The defense counsel can immediately reply in writing to the opinions of counsel for the People and the defendant can respond in writing or orally at the pre-term-fixing interview . . . .[87]

The petitioner also challenged the sentencing and parole procedures as a denial of due process.[88] He based his charge on the fact that he was not provided with counsel and on his belief that the subsequent sentencing determination by the Adult Authority violated the proscription against double jeopardy.[89] The court discarded these contentions as being without substance because they were predicated on the petitioner's erroneous view of the Adult Authority's proceedings as a trial.[90] The Adult Authority's activities were described by the court as administrative rather than judicial[91] and the court concluded that "due process takes on a different significance in evaluating that agency's determination on term-fixing and parole-granting than it had at trial."[92] Though the court never clarified the "different significance" due process takes on in the Adult Authority's proceedings, it did, however, specifically exclude the right to counsel in such proceedings.[93]

The *Minnis* court distinguished *Morrissey v. Brewer*[94] since that case had dealt with parole revocation and not parole release.[95] The *Morrissey* court had reversed a state parole board determination and enumerated specific due process

86. 7 Cal. 3d at 650, 498 P.2d at 1004-05, 102 Cal. Rptr. at 756-57.

87. Id. The interview is mandated by § 5077 of the California Penal Code. See note 10 supra.

88. 7 Cal. 3d at 650, 498 P.2d at 1005, 102 Cal. Rptr. at 757.

89. Id.

90. Id. "[J]udicial proceedings terminate when conviction is announced and sentence, albeit for an indeterminate period, is imposed." Id. In support of this conclusion the court cited In re Sandel, 64 Cal. 2d 412, 412 P.2d 806, 50 Cal. Rptr. 462 (1966), in which it was stated: "Upon conviction it is the duty of the court to pass sentence on the defendant and impose the punishment prescribed. Under our indeterminate sentence law, of course, the Adult Authority is empowered to determine as an administrative matter 'what length of time' a person sentenced to prison shall serve; but the actual imposition of that sentence for the term prescribed by law remains a judicial function which can be performed only by a court." Id. at 415, 412 P.2d at 809, 50 Cal. Rptr. at 465 (emphasis omitted) (citations omitted).

91. 7 Cal. 3d at 650, 498 P.2d at 1005, 102 Cal. Rptr. at 757. In a prior decision, In re Schoengarth, 66 Cal. 2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967), the court stated: "[P]roceedings of the Adult Authority are wholly administrative in nature, and that agency's determination of length of sentence or conditions of parole is not a judicial act." Id. at 304, 425 P.2d at 206, 57 Cal. Rptr. at 606.

92. 7 Cal. 3d at 650, 498 P.2d at 1005, 102 Cal. Rptr. at 757.

93. Id.

94. 408 U.S. 471 (1972). See notes 32-34 supra and accompanying text.

95. 7 Cal. 3d at 650 n.12, 498 P.2d at 1005 n.12, 102 Cal. Rptr. at 757 n.12.

procedural guarantees which must be afforded individuals.[96] Unfortunately, the *Minnis* court failed to enumerate similar standards, therefore limiting the impact of its decision.

It is clear that the *Minnis* court, although fashioning a remedy for the inequity at hand, avoided the attendant constitutional issues. The formulation of a viable due process argument that states must enact parole procedures for *all* crimes punishable by imprisonment is presently improbable. Nevertheless, once a state enacts parole procedures for a given crime, it will probably be necessary for it to execute those procedures in conformity with federal due process requirements.

Securities—Merger Proposals—Naked Allegations of Unfairness in Merger Ratios Present No Cognizable Federal Claim Under Section 10(b) or Rule 10b-5 Where There is Full Disclosure.—Plaintiff, a stockholder in Bell Intercontinental Corporation, commenced a derivative action to enjoin the proposed merger of Bell and its two subsidiaries into The Equity Corporation, the majority stockholder in Bell.[1] Plaintiff alleged the merger ratios were unfair to the minority stockholders of Bell. Although there had been complete disclosure of the merger terms,[2] he contended that Equity and various of its officers

96. See note 34 supra.

1. Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972). Equity owned 51.7% of Bell's common stock. Bell, in turn, as a holding company owned 66.1% of the common stock of Frye Industries and approximately 81% of the voting stock of The Wheelabrator Corporation. Bell and its two subsidiaries were Delaware corporations, as is Equity. Id. at 716.

2. The complaint alleged no misrepresentation or nondisclosure. Plaintiff did not contend that the proxy statement (issued after the suit was initiated) was in any way misleading. Before the district court he did assert one material misrepresentation had been made, but he argued, for the purposes of the summary judgment motion only, that there had been full and fair disclosure. In his brief on appeal, plaintiff inserted allegations that the proxy statement was false and misleading. Brief for Appellant at 30-32; see Popkin v. Bishop, 464 F.2d at 718 n.9. The appeals court dismissed the contentions of the brief, noting there had been a concession below, no pressing of the issue and no parallel allegation in the complaint. 464 F.2d at 718 n.9.

The court of appeals decided the case on June 29, 1972. On August 8, 1972, plaintiff filed a new complaint. Popkin v. Wheelabrator-Frye, Inc., Civil No. 72-3354 (S.D.N.Y., filed Aug. 8, 1972). In the revised complaint, Popkin alleged violations of § 10(b) as before, but added numerous charges of failure to disclose material information pursuant to the dictates of § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a) (1970), the proxy provision. Thus, plaintiff alleged trading in the Bell shares was "distorted in anticipation of the Merger" which, he said, Equity manipulated at "grossly unfair" terms. Civil No. 72-3354, at 3. He also said Equity caused the members of the boards of directors of the other three corporations to enter into the agreement. Id. at 6. Furthermore, plaintiff contended Equity forced Dillon Reed, the independent firm that evaluated the exchange ratio, to acquiesce in its (Equity's) proposal, even though Dillon Reed's valuation study was inconsistent with that proposal. Id. at 17. The complaint was replete with charges of proxy violations. Id. at 7-18. Finally, the plaintiff brought a charge of violation of fiduciary duties on the part of the corporate officers under a pendant jurisdiction theory. Id. at 18.

had breached fiduciary duties by proposing the allegedly unfair ratios, thereby entitling plaintiff and other minority stockholders to injunctive relief under rule 10b-5. The district court granted defendant's motion to dismiss the complaint for failure to state a claim under section 10(b) of the Securities Exchange Act of 1934[3] or rule 10b-5[4] promulgated thereunder, on the basis of a prior state proceeding[5] that had approved the merger ratios as fair and reasonable as to Bell and its stockholders. The United States Court of Appeals for the Second Circuit affirmed, holding that, once a plaintiff admits full and fair disclosure, claims for injunctive relief under section 10(b) must fail.[6] *Popkin v. Bishop*, 464 F.2d 714 (2d Cir. 1972).

Section 10(b) of the Securities Exchange Act of 1934 was only a small part—and one of the least controversial[7]—of the remedial legislative package which culminated more than two years of extensive investigation into the securities exchanges. Although evidence is scant,[8] what there is supports the view that its drafters designed section 10(b) as an expansive antifraud device.[9] The Act was

3. 15 U.S.C. § 78j(b) (1970) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

4. 17 C.F.R. § 240.10b-5 (1972) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

5. See note 1 supra.

6. However, the court specifically stated that its holding was reached without determining whether Popkin would be collaterally estopped from litigating the fairness of the merger exchange ratios in state courts. 464 F.2d at 720-21. A prior state proceeding had found the ratios fair and had ordered the merger. See id. at 716, citing Kaufman v. Jeffords, Index No. 01615-67 (Sup. Ct. 1967).

7. A. Bromberg, Securities Law: Fraud—SEC Rule 10b-5, § 2.2, at 22.2 (1971) [hereinafter cited as Bromberg].

8. Id. at 22.2-.3. "Of nearly a thousand pages of hearings in the House, the combined references to § 10(b) (then § 9(c)) would scarcely fill a page. Much the same is true in the Senate.

"The several committee Reports merely paraphrase the language of the several bills and add little or nothing to the evidence on intent. . . .

. . . .

"The floor debates are no more enlightening." Id.

9. See, e.g., Hearings on H.R. 7852 and H.R. 8720 Before the House Comm. on Inter-

aimed at the "single seamless web" comprised of "[s]peculation, manipulation, faulty credit control, investors' ignorance, and *disregard of trust relationships by those whom the law should regard as fiduciaries.*"[10]

Though actions based on the section 10(b) provisions abound, the Supreme Court did not consider a section 10(b) case until 1969.[11] Since then, in one of its rare pronouncements on such a case, the Court has stated that Congress intended the courts to construe the securities regulations "not technically and restrictively," but flexibly to effectuate their remedial purposes.[12]

To avoid an unmanageable amount of rule 10b-5 litigation, the federal district and circuit courts have developed a number of qualifications on the use of the federal securities provisions.[13] For years, *Birnbaum v. Newport Steel Corp.*[14] presented the primary hurdle for plaintiffs seeking redress under section 10(b) and rule 10b-5. In *Birnbaum*, minority shareholders contended that the defendant directors violated section 10(b) when they made alleged misrepresentations while negotiating the sale of a controlling interest in the corporation.[15] The court held that the section protected only sellers and purchasers of securities and that it could not be invoked to redress mere "fraudulent mismanagement of

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state and Foreign Commerce, 73d Cong., 2d Sess., 115 (1934), for testimony of Thomas G. Corcoran explaining that the section was intended to prevent "any other cunning devices." Bromberg has termed the section an "acknowledged catchall." Bromberg 22.4.

10. H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6 (1934) (emphasis added). The House Committee indicated it hoped the disclosure provision would "encourage the voluntary maintenance of proper fiduciary standards." Id. at 13. Moreover, the legislation was intended merely as a skeletal framework within which administrative discretion would work to fill the gaps expectable in so complex a system as the marketplace. Id. at 6-7. See also Bloomenthal, From Birnbaum to Schoenbaum: The Exchange Act and Self-Aggrandizement, 15 N.Y.L.F. 332, 334 (1969) [hereinafter cited as Bloomenthal]. See generally S. Rep. No. 792, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1838, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933); Hearings on H.R. 7852 and H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934).

11. SEC v. National Securities, Inc., 393 U.S. 453, 465 (1969). Perhaps the dearth of Supreme Court rulings in the area, and the consequent lack of guidance to the lower federal courts, is at least in part responsible for the confused state of the law in the field. On the other hand, it is arguable that the Court tacitly has approved the mushrooming development of the 10b-5 action by declining to grant certiorari in almost all cases, except where rule 10b-5 relief has been denied.

12. Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971). Similarly, the Securities and Exchange Commission has said that in "considering [the elements of the antifraud provisions] we are not to be circumscribed by fine distinctions and rigid classifications." Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961).

13. The courts have considered the federal securities regulations as a complement to, rather than a preemption of, state business corporation laws. However, where state laws tend to impede the congressional purpose of the federal regulations, the former must accede. See J. I. Case Co. v. Borak, 377 U.S. 426, 434 (1964); Vine v. Beneficial Finance Co., 374 F.2d 627, 635-36 (2d Cir.), cert. denied, 389 U.S. 970 (1967); Fleischer, "Federal Corporation Law": An Assessment, 78 Harv. L. Rev. 1146, 1168-70 (1965).

14. 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952).

15. Id. at 462.

corporate affairs."[16] Thus, the narrow construction of the section 10(b) provisions in *Birnbaum* established a two-fold test: plaintiff had to be a purchaser or seller of securities and to have been defrauded.

Although it is now settled that a shareholder in a corporation subject to a merger does qualify under the rule;[17] nevertheless, a plaintiff in a court strictly applying what is left of *Birnbaum* would still be denied 10b-5 recovery unless he could prove he had been defrauded. Since the *Birnbaum* court did not define the "fraud" requisite for standing, to avoid an unconscionable result, courts have variously drawn fraud categories to fit a plaintiff's case. The erosion of the second *Birnbaum* test has not, however, been a one-way process and today there is no clear-cut rule as to the extent to which rule 10b-5 allows redress for corporate mismanagement.[18]

The Sixth Circuit, as early as 1954, held, in *Seagrave Corp. v. Mount*,[19] that minority stockholders could sue derivatively to enjoin a proposed purchase of stock where the personal interests of the controlling directors of the corporation interfered with the fair judgment to which the plaintiffs were entitled. The court noted that a dominant or controlling shareholder, like a director, is a fiduciary.[20] Furthermore, where good faith and full disclosure eliminate the question of actual fraud, the court ruled "equity will still act to enforce the fiduciary obligation under circumstances amounting to *constructive fraud*."[21]

16. Id. at 464.

17. Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967); see Popkin v. Bishop, 464 F.2d at 718 n.8. The process of chiseling away at the purchaser-seller rule in other areas as well has been an arduous one. See, e.g., Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 798 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970); Knauff v. Utah Constr. & Mining Co., 408 F.2d 958, 961 (10th Cir.), cert. denied, 396 U.S. 831 (1969); Comment, The Purchaser-Seller Rule: An Archaic Tool for Determining Standing Under Rule 10b-5, 56 Geo. L.J. 1177 (1968), especially at 1179 n.18, wherein it is stated that the Securities and Exchange Commission had urged rejection of the rule as "too narrow."

In Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir.), cert. denied, 389 U.S. 977 (1967), the court discussed the Act's use of the word "sale" and summed up the position saying: "[A]n acquisition or disposition of securities in exchange for other securities falls within the statutory definitions and . . . this reasoning applies to a case of merger. . . . [T]he legislative history and the purpose of the securities laws indicate that an exchange of securities incidental to a merger is subject to their antifraud protections." 380 F.2d at 266. See also id. at 269 (Fairchild & Cummings, JJ., concurring), wherein it was pointed out that the SEC urged the rejection of the Birnbaum rule as to shareholders affected by a merger.

18. Part of the problem revolves around the confusion of common law "fraud" concepts and those embodied in the securities regulations. See 3 L. Loss, Securities Regulation, 1430-44 (2d ed. 1961). For discussion of the evolution of the fraud concept relative to rule 10b-5 actions, see generally 6 L. Loss, Securities Regulation, 3631-45 (Supp. 1969); Bloomenthal; Lowenfels, The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5, 54 Va. L. Rev. 268 (1968); Comment, Schoenbaum v. Firstbrook: The "New Fraud" Expands Federal Corporation Law, 55 Va. L. Rev. 1103 (1969).

19. 212 F.2d 389 (6th Cir. 1954).

20. Id. at 396.

21. Id. at 397 (emphasis added). The court defined constructive fraud as "acts which

By way of dictum, the Third Circuit appears to have adopted this more expansive view of the section 10(b) provisions. In *McClure v. Borne Chemical Company*[22] the court stated: "Section 10(b) imposes broad fiduciary duties on management vis-à-vis the corporation and its individual stockholders. As implemented by Rule 10b-5 . . . Section 10(b) provides stockholders with a potent weapon for enforcement of many fiduciary duties."[23]

On the other hand, the United States District Court for the District of Minnesota adopted a contrary position in the 1961 case of *Honigman v. The Green Giant Co.*[24] There, the court refused a claim which alleged that a recapitalization plan was unfair, stating that in the absence of *actual* fraud, misleading statements or omission of statements of material facts, there was no cognizable federal claim.[25]

Thus, there appear to be at least two disparate views of the scope of section 10(b). The one allows invocation of the rules to redress breaches of fiduciary duty and to combat constructive fraud; the narrower view dictates quiescence of the provisions absent a clear allegation of fraud, deception, misrepresentation or nondisclosure of material facts.

Beginning in 1964 the Second Circuit, the source of much section 10(b) case law, decided a number of seemingly inconsistent cases. The first, *Ruckle v. Roto American Corp.*,[26] held that any failure by directors to disclose information pertaining to a proposed issuance of stock, even where the nondisclosure was only as to other directors, constituted a fraud upon the corporation and rendered section 10(b) provisions applicable.[27] Twenty-five days thereafter, however, a panel from the same court held in *O'Neill v. Maytag*[28] that no federally cognizable claim under section 10(b) was presented in the absence of allegations of deception, misrepresentation or nondisclosure. Plaintiff in *O'Neill* was a shareholder in National Airlines who claimed that the defendants had violated fiduciary duties (thereby giving rise to a section 10(b) claim) in using $1.8 million of the airline's assets to acquire a more favorable control position for themselves in a series of stock exchanges with Pan American World Airways. The court rejected the federal claim, notwithstanding the dictum in *Ruckle*,[29] stating that a plaintiff could sue in state courts on a theory of common law breach of fidu-

may have been done in good faith, with no purpose to harm the corporation, but which are done by one who has placed himself in a position of conflict between a fiduciary obligation and his own private interests." Id.

22. 292 F.2d 824 (3d Cir.), cert. denied, 368 U.S. 939 (1961).

23. Id. at 834.

24. 208 F. Supp. 754 (D. Minn. 1961), aff'd, 309 F.2d 667 (8th Cir. 1962), cert. denied, 372 U.S. 941 (1963).

25. Id. at 766.

26. 339 F.2d 24 (2d Cir. 1964).

27. Id. Notably, the court also stated in dictum that it was possible for "even the entire board of directors" to defraud the corporation. Id. at 29.

28. 339 F.2d 764 (2d Cir. 1964). The lone dissenter was Judge Hays who filed a one sentence statement.

29. See note 27 supra.

ciary duty.[30] In so holding, the court also rejected specifically the dictum in *McClure*[31] and the amicus curiae position taken by the Securities and Exchange Commission,[32] preferring instead the rationale that a corporation could only be deceived through its officers or agents who constituted its personality and that, if they were not deceived, the corporation was not.[33]

Though courts in the Second Circuit initially followed *O'Neill*,[34] it was not long before discomfiture with the decision became evident. In a string of cases, culminating in the en banc reversal of *Schoenbaum v. Firstbrook*,[35] the New York federal courts reevaluated the positions asserted in the earlier cases and, by implication at least, overruled many of them.[36] The onslaught began with *A.T. Brod & Co. v. Perlow*.[37] There, plaintiff, a stockbroker, sought damages under section 10(b) for the defendant's fraudulent failure to pay for securities. Citing the Supreme Court decision in *SEC v. Capital Gains Research Bureau, Inc.*,[38] the court reversed the district court's dismissal of the complaint, stating:

We believe that § 10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden

30. 339 F.2d at 767.

31. Id. at 768. See note 22 supra and accompanying text.

32. Id. The Commission had urged that a claim under rule 10b-5 is stated by allegations that controlling directors cause a corporation to acquire a large block of its own stock at an excessive price for the purpose of removing the threat to the directors' control. Id.

33. Id. It is noteworthy that the O'Neill court relied on Birnbaum. Id. Professor Loss tries to harmonize Ruckle and O'Neill in opining that the "pendulum began to swing back." 6 L. Loss, Securities Regulation 3637 (Supp. 1969). Query: does the pendulum swing so wide in 25 days?

34. See Entel v. Allen, 270 F. Supp. 60 (S.D.N.Y. 1967) (denying section 10(b) relief for failure to allege deception and reliance); Schoenbaum v. Firstbrook, 268 F. Supp. 385 (S.D.N.Y. 1967), rev'd, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969); Cohen v. Colvin, 266 F. Supp. 677 (S.D.N.Y. 1967) (stating that a section 10(b) claim must allege more than breach of general fiduciary duty); Barnett v. Anaconda Co., 238 F. Supp. 766 (S.D.N.Y. 1965) (elaborating O'Neill in holding minority shareholders in a 73% controlled corporation had no section 10(b) claim since they could not prove the alleged deception caused their injury.) In 1965 the Delaware district court served notice that, in a proper case, it would pay obeisance only to the O'Neill line of cases. Voege v. American Sumatra Tobacco Corp., 241 F. Supp. 369 (D. Del. 1965). By convoluted reasoning the court managed to find fraud, causation and reliance, thereby enabling plaintiff to proceed. Id. at 375-76.

35. 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969).

36. See text accompanying note 42 infra. But see Loeb v. Whittaker Corp., 333 F. Supp. 484, 487 (S.D.N.Y. 1971), where it was stated that there is some debate within the Second Circuit as to whether Schoenbaum v. Firstbrook overruled the Barnett v. Anaconda Co. analysis discussed at note 34 supra.

37. 375 F.2d 393 (2d Cir. 1967). Two weeks earlier in Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967), the court had chipped away at the O'Neill inspired requirement of reliance, saying such an element of proof was not needed where "no volitional act is required and the result of a forced sale is exactly that intended by the wrongdoer." 375 F.2d at 635.

38. 375 U.S. 180 (1963).

type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.[39]

With this language, the court seemed to be adopting the more expansive view of rule 10b-5 while paying lip service to the *O'Neill* position that actual fraud was required.

Soon thereafter, Judge Bonsal in the Southern District of New York felt compelled to reconsider and reverse his decision in *Entel v. Allen*.[40] Initially, he relied on *O'Neill* and *Birnbaum*[41] to find no federally cognizable claim, though the facts established a state cause of action for breach of fiduciary duty. On reargument, he reversed, stating: "Since the court's decision, the Court of Appeals has handed down two decisions reversing this court [*Vine* and *Brod*], which seriously challenge, if not overrule, its decisions in *Birnbaum* and *O'Neill*."[42] While the court expressed a reluctance to expand the scope of rule 10b-5, it concluded: "If an undisclosed scheme to breach State contract law is encompassed by Section 10(b) and Rule 10b-5, then an undisclosed scheme to breach State corporate fiduciary law must also be covered."[43]

While district courts within the Second Circuit continued to wrestle with the various theories of section 10(b) fraud, the court of appeals, sitting en banc, decided the landmark case of *SEC v. Texas Gulf Sulphur Co.*[44] Most significant about the case was, of course, its holding that anyone possessing material inside information might be deemed an "insider" and subjected to statutory sanctions for trading in a particular security without prior disclosure. However, in reaching this result, the court examined the purposes of section 10(b), noting that a primary purpose was to protect the *public* from fraud. The Second Circuit thus paved the way for the expansion of the use of rule 10b-5 into the area of corporate mismanagement, stating: "[I]t would seem elementary that the Commission has a *duty to police management* so as to prevent corporate practices which are reasonably likely fraudulently to injure investors."[45]

Though the district courts did not immediately seize upon *Texas Gulf Sul-*

39. 375 F.2d at 397. It is noteworthy that in reaching this conclusion, the court stated that the rules and regulations were promulgated by the commission both for the public interest and the protection of investors. Id. at 396. See also the text of section 10(b) at note 3 supra.

40. 270 F. Supp. 60 (S.D.N.Y. 1967).

41. Id. at 64-65.

42. Id. at 69 (italics added).

43. Id. at 70. The court stated that while this SEC-urged position was apparently rejected in O'Neill, it seemed to have been adopted in Brod. Id.

About this time, the Third Circuit took a middle ground in Pappas v. Moss, 393 F.2d 865 (3d Cir. 1968). The court there upheld a rule 10b-5 claim where plaintiffs alleged the sale of corporate stock at far below its contemporaneous value constituted a fraud, stating that while "deception" was a necessary element of proof the "definition of 'deception' may vary with the circumstances." Id. at 869.

44. 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969).

45. Id. at 861 (emphasis added). But see Birnbaum v. Newport Steel Corp., 193 F.2d 461, 464 (2d Cir.), cert. denied, 343 U.S. 956 (1952) (discussed at note 16 supra and accompanying text).

phur,[46] the Second Circuit Court of Appeals tarried little in asserting that section 10(b) provisions were to be expanded to new areas. In *Schoenbaum v. Firstbrook*[47] plaintiff sued derivatively to recover under section 10(b) for damages resulting from sales in Canada of Banff Oil Ltd. treasury stock to defendants Aquitaine of Canada, Ltd., and Paribas Corporation. Defendants, it was maintained, had violated the section 10(b) provisions by causing Banff to issue shares of stock to them at the then current market price knowing that the undisclosed news of the oil find would greatly enhance the value of the stock. Initially, a divided panel affirmed dismissal of the complaint because it alleged only a breach of fiduciary duty, rather than fraud.[48] Judge Hays dissented,[49] citing *Hooper v. Mountain States Securities Corporation*[50] for the proposition that section 10(b) was aimed at *all* fraudulent schemes, tricks, devices and forms of manipulation. There was no reason, he said, to distinguish the fiduciary breach from fraud since "such a breach of fiduciary duty as is here alleged clearly constitutes fraud."[51] Judge Hays went on to indicate that it would be sufficient to show the majority shareholders had deceived others by withholding from them information which would have revealed the true worth of the treasury stock, and concluded:

> What we have here then is a scheme by which the directors of Banff gave to the controlling stockholder and an affiliated corporation some millions of dollars worth of the corporation's property. A plainer case of fraud would be hard to find.[52]

Thus, while the majority seemed preoccupied with nondisclosure, Judge Hays was concerned with the "fraud" perpetrated by the *controlling* shareholders.

After *Texas Gulf Sulphur*, the Second Circuit reconsidered en banc, and reversed *Schoenbaum*. Judge Hays, writing for the majority, had several decisional alternatives,[53] but he chose to go beyond his dissenting opinion in the three-

46. See, e.g., Christophides v. Porco, 289 F. Supp. 403 (S.D.N.Y. 1968) (denying section 10(b) relief to minority shareholders who protested the granting of a premium to controlling shareholders). In Christophides, the court reasserted the requirement for fraud, deception or manipulation, stating that a section 10(b) action did not lie to remedy a breach of fiduciary relationship. Id. at 405. On rehearing, Judge Pollack said, inter alia, that Texas Gulf Sulphur did not help the plaintiffs. Id. at 407.

47. 405 F.2d 200, rev'd en banc, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969).

48. 405 F.2d at 211.

49. Id. at 214. See note 28 supra and accompanying text. As in O'Neill, Chief Judge Lumbard wrote the majority opinion. With him was Judge Medina, who had written the majority opinion in Ruckle.

50. 282 F.2d 195, 202 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961).

51. 405 F.2d at 214.

52. Id. at 215 (footnote omitted).

53. Bloomenthal 346-47, wherein it is said: "The court had five ways it could have gone in Schoenbaum: (1) Adopt the Friendly suggestion that this was an area effectively regulated by state corporate law and hold Rule 10b-5 inapplicable. This would have been a repudiation of Ruckle and Hooper. (2) Adopt the position of the original majority opinion that there may be both a violation of fiduciary duties and Rule 10b-5, but the latter is

judge panel. Citing *Ruckle* and *Hooper*, while relying on subsection (c) of rule 10b-5,[54] he stated:

> [I]t is alleged that Aquitaine exercised a controlling influence over the issuance to it of treasury stock of Banff for a wholly inadequate consideration. If it is established that the transaction took place as alleged it constituted a violation of Rule 10b-5, subdivision [(c)] because Aquitaine engaged in an "act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[55]

To the consternation of those who would later apply his rule, however, Judge Hays did not stop there, but continued: "Moreover, Aquitaine and the directors of Banff were guilty of deceiving the stockholders of Banff (other than Aquitaine)."[56] Thus, the crux of the decision, either the exercise of a controlling influence over the issuance of stock for a wholly inadequate consideration or nondisclosure, was unclear. The latter is consistent with the circuit's earlier decisions narrowly interpreting the fraud requirement, while the former clearly expands the bounds of rule 10b-5. The more logical reading, it is submitted, is that the essential concern in the en banc decision was the exercise of controlling influence to the detriment of minority stockholders. Such a conclusion is consistent with the sequence of the court's considerations and with the use of the transitional element "moreover," which suggests that the actual grounds for the holding have preceded.[57]

Subsequently, in the Fifth Circuit, Judge Ainsworth decided a pair of consolidated cases which generously enlarged the scope of rule 10b-5. *Shell v. Hensley* and *Love v. Hensley*[58] were cases in which minority stockholders in an

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inapplicable if the transaction is approved by a disinterested majority of the directors. (3) Adopt the position that the majority of the directors were not in reality disinterested and on this basis find that the transaction was subject to ratification by shareholders, and without an informed ratification the shareholders had been defrauded. (4) Adopt the position of Hays' dissenting opinion that the corporate fiction should be disregarded and view the transaction as a fraud on the shareholders. (5) Adopt the position that for a controlling shareholder to cause the corporation to issue shares to it at an unfair price operated as a fraud even in the absence of deception."

54. See note 4 supra.

55. 405 F.2d at 219-20.

56. Id. at 220 (citing to Pappas v. Moss, 393 F.2d 865 (3d Cir. 1968), discussed at note 43 supra).

57. This reading is reinforced by the apocalyptical statement in the dissent that: "What this amounts to is giving carte blanche to every holder of a few shares in any corporation whose stock is traded on the New York or American stock exchanges to give his imagination full rein in the making of any sort of extravagant charges . . . ." 405 F.2d at 221 (Medina, Lumbard & Moore, JJ., dissenting) (emphasis omitted). For other views of Schoenbaum consistent with this reading, see Bloomenthal 347-48; Comment, Schoenbaum v. Firstbrook: The "New Fraud" Expands Federal Corporation Law, 55 Va. L. Rev. 1103, 1113-14 (1969).

58. 430 F.2d 819 (5th Cir. 1970). At the same time, Judge Ainsworth decided the related cases of Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970), and Herpich v. Wilder, 430 F.2d 818 (5th Cir. 1970), cert. denied, 401 U.S. 947 (1971). The issues presented in the

Alabama corporation sought damages resulting from the purchase of control of the Alabama National Life Insurance Company by an Arizona-based complex of insurance companies. The court decided the extent to which proof of deception would be necessary to show violation of rule 10b-5.[59] The court first addressed itself to the argument advanced by the Second Circuit in *O'Neill* that a corporation could be deceived only through its officers or agents. It rejected this approach, declaring that in effectuating the broad remedial purposes of section 10(b), the "[c]onceptual analysis of corporate relationships must bow" to the purposes of the section 10(b) provisions.[60] In place of the *O'Neill* rule, the court formulated the following:

> When the other party to the securities transaction controls the judgment of all the corporation's board members or conspires with them or the one controlling them to profit mutually at the expense of the corporation, the corporation is no less disabled from availing itself of an informed judgment than if the outsider had simply lied to the board. In both situations the determination of the corporation's choice of action in the transaction in question is not made as a reasonable man would make it if possessed of all the material information known to the other party to the transaction.[61]

The court thus seems to have adopted a rule that if securities transactions are orchestrated *by a controlling stockholder, to the detriment of the minority stockholders,* a fortiori, the latter cannot have had the benefit of full disclosure as mandated by the section and may, therefore, have redress under section 10(b). In this analysis, causal deceit ceases to be the rule; rather, it is replaced by a query as to whether the minority stockholders have been harmed by the exercise of a controlling influence. Given the broad remedial purposes of the Act, such a test would appear reasonable.

The Supreme Court has given its approval to the *Hensley* cases by its decision in *Superintendent of Insurance v. Bankers Life and Casualty Co.*[62] There, the Court[63] reversed the Second Circuit's affirmance[64] of the district court's dismissal of a complaint for failure to state a claim.[65] In so doing, the Court rejected

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Herpich cases were similar, but the opinions dealt primarily with the purchaser-seller requirement.

59. 430 F.2d at 821.

60. Id. at 827. This approach parallels the intermediate position urged by Judge Hays in his dissent in the three-judge opinion in Schoenbaum. See text accompanying notes 51-52 supra.

61. 430 F.2d at 827.

62. 404 U.S. 6 (1971).

63. The case was decided before Justices Powell and Rehnquist took their seats on the Court.

64. 430 F.2d 355 (2d Cir. 1970), rev'd, 404 U.S. 6 (1971). The court of appeals had relied on Birnbaum. Id. at 360. Again, Judge Hays dissented, while Chief Judge Lumbard was in the majority with the author, Judge Blumenfeld of Connecticut, sitting by designation. Id. at 356. Citing Ruckle, Vine, Brod, Texas Gulf Sulphur and Schoenbaum, Judge Hays chastised the majority for failing to interpret rule 10b-5 broadly so as to find a fraud "'in connection with the purchase or sale of any security.'" Id. at 362 (dissenting opinion).

65. 300 F. Supp. 1083 (S.D.N.Y. 1969).

the Second Circuit's premise that the Act was intended *only* to preserve the integrity of the securities markets,[66] noting that Congress had declared that "disregard of trust relationships" by fiduciaries was to be regarded as a part of the "single seamless web" that included manipulation.[67] While the Court stated that "Congress . . . did not seek to regulate transactions which constitute no more than internal corporate mismanagement,"[68] it did not subscribe to the *Birnbaum* view that rule 10b-5 could not be invoked to redress mere "*fraudulent* mismanagement of corporate affairs."[69] Instead it noted:

> [W]e read § 10(b) to mean that Congress meant to bar deceptive devices and contrivances in the purchase or sale of securities . . . . The controlling stockholder owes the corporation a fiduciary obligation—one "designed for the protection of the entire community of interests in the corporation . . . ."
>
> The crux of the present case is that [plaintiff's predecessor in interest] suffered an injury as a result of deceptive practices *touching* its sale of securities as an investor.[70]

Consequently, the Court, acknowledging that rule 10b-5 includes within its breadth the protection of fiduciary relationships, held that rule 10b-5 relief was appropriate,[71] at least in so far as a trial on the merits was ordered.

Against this background of judicial uncertainty—an atmosphere replete with inconsistent holdings and dicta from various circuits and a noteworthy paucity of Supreme Court precedent—Irwin Popkin's challenge reached the Court of Appeals for the Second Circuit. The principal elements of Popkin's complaint were: (1) that the merger exchange ratio proposed by Equity was unfair;[72]

66. See 430 F.2d at 360-61.

67. 404 U.S. at 11-12; see note 10 supra and accompanying text.

68. 404 U.S. at 12.

69. 193 F.2d at 464 (emphasis added).

70. 404 U.S. at 12-13 (citation omitted) (emphasis added).

71. The Second Circuit reversed its original holding in Drachman v. Harvey, 453 F.2d 722, 736 (2d Cir. 1972) (en banc), after the Supreme Court handed down Bankers Life. The three-judge Drachman panel, in affirming dismissal, relied on the circuit's similar handling of Bankers Life and referred approvingly to the Birnbaum line of cases. See, e.g., id. at 730 n.41. The en banc opinion cited Schoenbaum and Hooper. Id. at 737. While this emphasis might lead one to suspect that the court was recognizing the demise of Birnbaum, the opinion specifically declined the opportunity either to overrule the old case or to review the "present limits of Birnbaum or Schoenbaum or the nature or extent of relief which the facts as developed may require." Id. at 738. Thus, the full bench in Drachman set the stage for a later court to set the permissible bounds for rule 10b-5 actions.

72. Plaintiff contended: "[E]quality of treatment was exactly what Equity Corp. did not want. By establishing an exchange ratio whereby only three shares of Equity Corp. were given to the public shareholders of Bell, Equity Corp. so structured the transaction as to retain for itself, at the expense of Bell's public stockholders, a grossly disproportionate share of Bell's assets." Brief for Appellant at 9, Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972). See also id. at 10 (chart). Defendant countered by stating that plaintiff's attack was a "mere exercise in mathematics entirely unrelated to the realities of the merger itself." Brief for Appellee at 41, Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972).

At least two circuit courts have adjudicated the fairness of merger exchange ratios in the context of rule 10b-5 complaints. See Levin v. Great Western Sugar Co., 406 F.2d 1112

(2) that by proposing the unfair ratio, Equity and various officers and directors of Bell breached fiduciary duties; (3) that Equity was in a position to orchestrate the merger, and (4) that the combination of these factors entitled plaintiff to rule 10b-5 relief, despite defendant's full disclosure.[73]

The court stipulated that it was willing to assume Popkin's allegation of unfairness was correct.[74] Moreover, the court stated that Equity's controlling position[75]—mathematically eliminating any possibility of causation—could not in itself defeat plaintiff's federal claim. Yet the court found appellant's action was properly dismissed as there was no contention[76] of "any misrepresentation by defendants or of a failure on their part to disclose any material fact in connection with the merger proposal."[77] The court in so holding rejected plaintiff's contention that minority shareholders were entitled to rule 10b-5 protection "against overreaching by majority shareholders and directors '[w]hether the facts remain hidden from the minority or are ultimately revealed in a Proxy statement.' "[78]

To arrive at this conclusion, the court held that disclosure was the essence of rule 10b-5.[79] The court acknowledged that in decisions such as *Schoenbaum, Vine* and *Ruckle,* it had construed rule 10b-5 to extend beyond traditional stock transactions and into corporate board rooms.[80] However, the court chose to distinguish those cases on the ground that state law did not demand prior stockholder approval of such corporate self-dealing and therefore, as a practical

(3d Cir.), cert. denied, 396 U.S. 848 (1969); Knauff v. Utah Constr. & Mining Co., 408 F.2d 958 (10th Cir.), cert. denied, 396 U.S. 831 (1969).

73. 464 F.2d at 716.

74. Id. at 717. On an appeal from a dismissal of a complaint for failure to state a claim on which relief may be given, the court views the allegations as true. See, e.g., Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174-75 (1965); Coffee v. Permian Corp., 434 F.2d 383, 384 (5th Cir. 1970).

75. See note 1 supra.

76. At least there was no contention of nondisclosure appropriately pressed as an issue throughout the proceedings. See note 2 supra.

77. 464 F.2d at 718.

78. Id. Plaintiff had argued that the section 10(b) provisions were sweeping antifraud devices. He pointed to the Supreme Court's pronouncement in SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963) that securities regulations be flexibly construed and stated that the Court had accepted as a definition of the fraud the securities legislation sought to combat " 'all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious [sic] advantage is taken of another.' " 375 U.S. at 194 (footnote omitted).

Plaintiff then drew from Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6 (1971), A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967), and Cady, Roberts & Co., 40 S.E.C. 907 (1961). Brief for Appellant at 20-22, Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972).

79. The Second Circuit, per Judge Friendly, had left this question open in Rosenblatt v. Northwest Airlines, Inc., 435 F.2d 1121 (2d Cir. 1970).

80. 464 F.2d at 718.

matter, full and fair disclosure would rarely occur in such instances.[81] The *Popkin* court glossed over the *Schoenbaum* en banc holding that, regardless of disclosure, exercise of a controlling influence over the issuance of stock for an inadequate consideration violated rule 10b-5.[82] Instead, the court quoted from Judge Hays' less expansive dissenting opinion in the three-judge consideration of the case,[83] and his curious addendum[84] to the en banc holding, concluding that "it seems clear that our emphasis on improper self-dealing did not eliminate non-disclosure as a key issue in Rule 10b-5 cases."[85] True, *Schoenbaum* did not *eliminate* disclosure as a key element in rule 10b-5 cases. But to suggest that *Schoenbaum* established full disclosure as the sole requisite of the rule, as the *Popkin* court does, is a unique reading of the opinion.[86] The court demonstrated the incongruity of so limiting the breadth of the section 10(b) provisions by ascribing to them as a principal purpose the imposition of the "duty to disclose and inform rather than to become enmeshed in passing judgments on information elicited."[87] Clearly, the two provisions sought disclosure, but they were also intended as broad anti-fraud devices[88]—heavy guns in Congress' attack on the "single seamless web"[89] that surrounded the securities markets to the detriment of investors and the public interest. Consequently, if in order to combat fraud it is necessary for a court to become enmeshed in judgments on disclosed information, so be it.

The *Popkin* decision also is disturbing for the manner in which it accomplishes the retrenchment of the "new fraud" action. The court began with the premise that "[w]here Rule 10b-5 properly extends, it will be applied regardless of any cause of action that may exist under state law."[90] However, the court proceeded to base its denial of relief on the rationale that a complaining minority shareholder had available a state right of appraisal.[91] Furthermore, the court failed to discuss adequately the issues presented in the light of the legislative history of the 1934 Act[92] or the case law under section 10(b) that spawned the "new

81. Id. at 719.

82. See note 55 supra and accompanying text.

83. See notes 49-52 supra and accompanying text.

84. See note 56 supra and accompanying text.

85. 464 F.2d at 719.

86. See note 57 supra.

87. 464 F.2d at 719-20. Indeed, one is struck by the analogousness of this contention to the circuit's erroneous construction of the purposes of the section 10(b) provisions, an analysis the Supreme Court rejected in Bankers Life. See notes 66-71 supra and accompanying text.

88. See note 9 supra and accompanying text.

89. H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6 (1934); see note 10 supra and accompanying text. See also Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 11-12 (1971) (as discussed at note 67 supra and accompanying text).

90. 464 F.2d at 718.

91. Id. at 720 n.16. In the Popkin case, Delaware law governed, as all four corporations were incorporated in that state. Id. at 716; see note 1 supra. Therefore, shareholders opposing a merger plan had a right to appraisal. See, e.g., David J. Greene & Co. v. Schenley Indus., Inc., 281 A.2d 30 (Del. Ch. 1971).

92. Discussion of the section 10(b) provisions' intent is limited to a single sentence.

fraud" action. Despite its assumption that the merger ratio was unfair, the court denied the existence of a proper claim—choosing to disregard the adjudication of similar issues in two other circuits.[93] Similarly, the court failed to mention the finding in *Bankers Life* that the disregard of trust relationships was within the ambit of rule 10b-5.[94]

As a practical matter[95] the retrenchment achieved by the *Popkin* court may be deemed a desirable result. However, until the Supreme Court in the fullness of time delineates the proper limits of the "new fraud" action under rule 10b-5, such restrictions on that growth preferably should be accomplished only within the contours of thorough discussion of the design of section 10(b) provisions and the decisional law thereunder. While the slice of the "new fraud" action that the *Popkin* court chose to eliminate was admittedly small,[96] the decision leaves minority shareholders in a controlled corporation who are confronted with a proposed merger at unfair exchange ratios without federal recourse if the majority shareholders make full disclosure. The decision misinterprets the Second Circuit's own handling of *Schoenbaum*, is against the weight of decisions in the Third and Fifth Circuits, and appears contrary to the inclinations expressed by the Supreme Court in *Bankers Life*.[97]

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464 F.2d at 719-20. But see Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 9-12 (1971). See also notes 7-10 supra and accompanying text.

93. See note 72 supra.

94. See note 67 supra and accompanying text. It is also noteworthy that the Court concluded its discussion of the broad purposes of the provisions, saying: "Since there was a 'sale' of a security and since fraud was used 'in connection with' it, there is redress under § 10(b), whatever might be available as a remedy under state law." 404 U.S. at 12. The Popkin court chose to ignore this sweeping language, choosing instead to distinguish the two cases on the basis of the particularity of the fraud alleged in the Bankers Life case. 464 F.2d at 718.

95. The court took notice of the proliferation of section 10(b) cases and waved the red flag of the floodgates argument, stating: "[W]hen there has been such disclosure of a merger's terms, it seems unwise to invoke federal injunctive power, particularly since doing so might well encourage resort to the federal courts by any shareholder dissatisfied with a corporate merger." 464 F.2d at 720.

96. See 464 F.2d at 720 where the court states: "We realize that cases based upon Rule 10b-5 in which a court can properly find full and fair disclosure may not be frequent since self-dealing schemes and transactions are by nature secretive. Certainly, concessions by plaintiffs that defendants made such disclosure will be even rarer." The court also left open the question whether plaintiff could litigate the fairness of the exchange ratios in state courts, notwithstanding the previous state court proceedings. See note 6 supra.

97. Popkin was before the court of appeals following the dismissal of a complaint. Since the exchange of shares during a merger has been deemed within the statutory definition of a sale, and in light of the allegations in the complaint which the court should view as true given the posture of the case, it would seem that the case should have fallen within the bounds of the Bankers Life rule; to wit, that one might invoke rule 10b-5 if he suffered an injury as the result of a deceptive practice touching the sale of securities. The court might well have found the injury in the inadequate exchange ratio, the deceptive practice in the orchestration of the merger by Equity in furtherance of retaining a disproportionate share, and the "sale" of securities in the exchange pursuant to the merger.