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Case Notes

CASE NOTES

Administrative Law—Selective Service—Registrant Denied I-O Classification Without Basis In Fact Cannot be Convicted for Failure to Submit to Pre-Induction Physical.—Despite appellant's claim that he was a conscientious objector,[1] his local draft board classified him I-A[2] and, despite his request for a reopening of his classification in order to detail his conscientious objection to war, retained him in that category. Thereafter, the local board erroneously construed appellant's request for a personal appearance as a request for an appeal,[3] and an appeal board upheld his earlier classification. Subsequent to these board actions, appellant returned his classification notice to the board, explaining that he had surrendered his draft card to the Attorney General and refused to further cooperate with the Selective Service System " 'in any way'."[4] On the advice of the State Director of Selective Service, appellant was declared delinquent[5] and ordered for priority induction.[6] After appellant failed to report for induction, he was indicted for failure to report under the Universal Military Training and Service Act,[7] but was acquitted.[8] Appellant's local board, although notified of this proceeding,[9] subsequently reclassified appellant I-A after he

1. Appellant made such claim by his response to questions contained in Series VIII, Selective Service Form 100, Classification Questionaire. United States v. Hayden, 445 F.2d 1365, 1367 n.1 (9th Cir. 1971).

2. "In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board . . . that he is eligible for classification in another class." 32 C.F.R. § 1622.10 (1971).

3. 445 F.2d at 1368. The Selective Service System Regulation controlling the determination of what shall be a request for an appeal is quite liberal, requiring a simple statement such as "I appeal." The board is required to go to great lengths to construe a request for an appeal so as to protect the registrant. 32 C.F.R. § 1626.11 (1971).

4. 445 F.2d at 1368.

5. Id. "Whenever a registrant has failed to perform any duty or duties required of him under the selective service law . . . the local board may declare him to be a delinquent." 32 C.F.R. § 1642.4(a) (1971).

6. Priority induction was a method used by the System as a punishment for delinquents. It involved processing the registrant and ordering him for induction before his turn would normally have come up. For a description of this practice, see Gutknecht v. United States, 396 U.S. 295 (1970), which disapproved of it as being unauthorized by Congress. Id. at 302.

7. 50 U.S.C. App. § 462(a) (1971) (renamed Military Selective Service Act of 1967, 50 U.S.C. App. § 451(a) (1971)).

8. 445 F.2d at 1368. The trial judge pointed out that there was no basis in fact for the classification and that the registrant " '[was] a true, dogmatic, ordinary, routine conscientious objector. . . .' " Id. (quoting the lower court).

9. Id. at 1368 n.3. Both the registrant and the United States Attorney sent copies of the opinion to the local board. Under 32 C.F.R. § 1642.43 (1971), the State Director is required to "request the United States Attorney to advise the local board . . . when he finally disposes of a case which has been reported to him on [a] Delinquent Registrant Report." A local board must "receive and consider all information, pertinent to the classi-

refused to attend an "informal interview."[10] When the appellant failed to appeal or report for a pre-induction physical, he was again declared delinquent and ordered for priority induction. Upon his failure to report, he was indicted and convicted on counts of failure to report for a pre-induction physical and failure to report for induction under the Universal Military Training and Service Act.[11] The United States Court of Appeals for the Ninth Circuit reversed both convictions and stated that a registrant could not be convicted for failure to report for a pre-induction physical where his I-O classification was denied without basis in fact. *United States v. Hayden*, 445 F.2d 1365 (9th Cir. 1971).

The Selective Service System is a broad administrative body endowed with extensive control over all persons subject to its jurisdiction. From the time a registrant enters the system at age 18 until he finally passes draft age or is placed in a permanently non-draftable category, he incurs a "continuing duty" to comply with the orders and procedures of the System,[12] even in the face of what he considers to be incorrect action.[13] The local board, which originally classifies the registrant, and which in all but rare instances will be the registrant's permanent contact with the System,[14] has the power to declare the registrant delinquent if he should fail to act in compliance with the dictates of the System.[15] Until recently, one declared "delinquent" could be called for induction prior to

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fication of a registrant, presented to it." 32 C.F.R. § 1622.1(c) (1971); see United States v. Prescott, 301 F. Supp. 1116 (D.N.H. 1969); cf. United States v. Pollero, 300 F. Supp. 808 (S.D.N.Y. 1969).

10. 445 F.2d at 1368. These interviews were authorized by Local Board Memorandum No. 41 (issued Nov. 30, 1961), as amended, (July 30, 1968) (rescinded Aug. 27, 1970). A registrant should not be prejudiced for failure to distinguish between a courtesy interview and a personal appearance. United States v. Baker, 1 S.S.L.R. 3017 (E.D.N.Y. 1968). Classification is "not an adversary proceeding between Board and registrant in which the slightest mis-step mechanically penalizes registrants." United States v. Greene, 220 F.2d 792, 794 (7th Cir. 1955). See also United States v. Smith, 291 F. Supp. 63 (D.N.H. 1968); United States v. Bryan, 263 F. Supp. 895 (N.D. Ga. 1967). A local board conclusion that the registrant is insincere based on negative inferences has no weight absent supporting evidence. United States ex rel. Healy v. Beatty, 300 F. Supp. 843 (S.D. Ga. 1969), aff'd, 424 F.2d 299 (5th Cir. 1970); United States v. Bryant, 293 F. Supp. 922 (W.D. Ark. 1968); United States v. St. Clair, 293 F. Supp. 337 (E.D.N.Y. 1968). In fact, these informal interviews have been halted because they fail to provide the safeguards required by 32 C.F.R. §§ 1624.1-24.3 (1971). See Local Board Memorandum No. 41 (rescinded Aug. 27, 1970).

11. 50 U.S.C. App. § 462(a) (1970).

12. 32 C.F.R. § 1642.2 (1971). "When it becomes the duty of a registrant . . . to perform an act . . . the duty or obligation shall be a continuing duty . . . from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty." Id.

13. United States v. Dombrouski, 445 F.2d 1289 (8th Cir. 1971). Contra, United States v. Hayden, 445 F.2d 1365 (9th Cir. 1971).

14. 32 C.F.R. §§ 1613.11, 1613.42, 1623.9 (1971).

15. Id. § 1642.4(a).

his normal turn.[16] In 1970, however, the Supreme Court invalidated that practice in *Gutknecht v. United States*.[17] There the conviction of the petitioner for failure to report for induction was reversed on the ground that the Selective Service System had no power under the Act to accelerate induction.[18] Post-*Gutknecht* delinquents, although not subject to administrative punishment in the form of priority induction, may still suffer criminal prosecution for failure to comply with board requirements.[19]

Should a registrant wish to seek the aid of the courts in contesting his classification, he is hindered by a number of limitations upon the reviewability of a Selective Service System administrative decision.[20] In 1944 the basic rule of "exhaustion of administrative remedies" was applied to Selective Service cases in *Falbo v. United States*,[21] which stated that prior to the availability of judicial review of a registrant's classification, he would have to exhaust all of the remedies which were available to him within the Selective Service System.[22]

There are two different, but very much related, interpretations of this rule. The first concerns the *time* at which a registrant may attack a Selective Service order. It calls for the registrant to comply with all of the required steps of the induction process, up to the very last act of taking the oath and the final step

16. In United States v. Hertlein, 143 F. Supp. 742 (E.D. Wis. 1956), the court held that the board had a duty to order a delinquent to report for immediate induction under the Selective Service Regulations then in effect.

17. 396 U.S. 295 (1970).

18. Id. at 307-08. In Gutknecht, the Court found that since an early call-up (priority induction) was not authorized by Congress, any Selective Service Regulation or administrative action supporting priority inducton was void. In the Court's opinion, such punishment should be imposed in accordance with criminal law and not administrative action for which there was no statutory standard. "Standards would be needed by which the legality of a declaration of 'delinquency' could be judged and the regulations, when written, would be subject to the customary inquiries as to infirmities on their face or in their application, including the question whether they were used to penalize or punish the free exercise of constitutional rights." Id.

19. 50 U.S.C. App. § 462 (1971); 32 C.F.R. § 1642.4 (1971).

20. McKart v. United States, 395 U.S. 185, 192-96 (1968).

21. 320 U.S. 549 (1944).

22. Id. at 553; see United States v. Smogor, 411 F.2d 501 (7th Cir.), cert. denied, 396 U.S. 972 (1969); Fleming v. United States, 406 F.2d 1247 (5th Cir. 1969); United States v. McNeil, 401 F.2d 527 (4th Cir. 1968), vacated, 395 U.S. 463 (1969); Soranno v. United States, 401 F.2d 534 (9th Cir. 1968), vacated, 395 U.S. 461 (1969); Campbell v. United States, 396 F.2d 1 (5th Cir. 1968); Fults v. United States, 395 F.2d 852 (10th Cir. 1968); Edwards v. United States, 395 F.2d 453 (9th Cir.), cert. denied, 393 U.S. 845 (1968); DuVernay v. United States, 394 F.2d 979 (5th Cir. 1968), aff'd mem., 394 U.S. 309 (1969); United States v. Dyer, 390 F.2d 611 (4th Cir. 1968); Thompson v. United States, 380 F.2d 86 (10th Cir. 1967). The rationale for the rule is analogous to that which prohibits interlocutory appeals, i.e., forcing a litigant to use all of his administrative remedies may well provide him with a perfectly satisfactory result, thus making the issue moot in a judicial forum.

forward, before recourse to the courts is available to him.[23] On this score, the exhaustion doctrine might better be referred to as a "ripeness for review" doctrine.[24] The other, and broader interpretation, applies generally to all transactions with the Selective Service System. In essence, it requires that before coming into the courts, a registrant must present his claim for a deferment to state and local boards and take advantage of any right he may have to appeal their decision pursuant to the administrative procedures established by the Act.[25] A registrant's failure to pursue administrative remedies[26] has caused a number of boards and courts to conclude that he has tacitly waived review of the board's classification procedure.[27]

At one time the failure to exhaust administrative remedies precluded registrants from raising misclassification as a defense in later criminal actions arising out of their failure to submit to induction.[28] The exhaustion doctrine, however, has been tempered by numerous exceptions[29] as a result of a series of cases in which the courts have allowed registrants to raise such a defense, thereby allowing pre-induction judicial review.[30] Thus in 1946, the Supreme Court, in *Estep v. United States*,[31] provided that judicial review of board action could be obtained

23. Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549 (1944). As was stated by one commentator, "[b]y doing that, [the registrant] would have given the Selective Service System and the Department of Defense every possible opportunity to rule him ineligible for service and thereby make resort to the courts unnecessary." S.S.L.R. Practice Manual ¶ 2454, at 1158 (1968) [hereinafter cited as Practice Manual]. However, there are exceptions to this rule. For example, the 1967 amendment to section 10(b)(3) of the Act reads in pertinent part: "'No judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution instituted under section 12 of this title . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . .'" Act of June 30, 1967, Pub. L. No. 90-40 § 8(c), 81 Stat. 104, amending 50 U.S.C. App. § 460(b)(3) (1964) (codified at 50 U.S.C. App. § 460(b)(3) (1970)). Another exception concerns "errors of law." See text accompanying notes 36-44 infra.

24. Practice Manual ¶ 2454, at 1158.

25. Estep v. United States, 327 U.S. 114 (1946). For a general discussion of exhaustion see McKart v. United States, 395 U.S. 185 (1968); Practice Manual ¶ 2441, at 1152-53.

26. "If the registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege." 32 C.F.R. § 1641.2(b) (1971).

27. The rule that a registrant waives judicial review by his failure to "exhaust" his administrative remedy was first stated in Falbo v. United States, 320 U.S. 549 (1944), and has recently been stated in cases cited at note 22 supra.

28. Estep v. United States, 327 U.S. 114 (1946).

29. For an enumeration of these exceptions see McKart v. United States, 395 U.S. 185 (1968); Clark v. Gabriel, 393 U.S. 256 (1968); Oestereich v. Selective Service Local Bd. No. 11, 393 U.S. 233 (1968).

30. See, e.g., Sicurella v. United States, 348 U.S. 385 (1955); Dickinson v. United States, 346 U.S. 389 (1953); Estep v. United States, 327 U.S. 114 (1946); United States v. Tichenor, 403 F.2d 986 (6th Cir. 1968); United States v. Carroll, 398 F.2d 651 (3d Cir. 1968).

31. 327 U.S. 114 (1946).

if there was "no basis in fact for the classification which it gave the registrant."[32] This exception was extended in *Dickinson v. United States*[33] when the burden was shifted to the board to show "some affirmative evidence . . . that a registrant [had] not painted a complete or accurate picture of his activities"[34] in order to sustain a classification or act on the part of the local boards once the registrant had made out a prima facie case for misclassification.

In two cases concerning conscientious objector claimants, *Witmer v. United States*[35] and *United States v. Seeger*,[36] the Court required the board to make a subjective interpretation of the registrant's beliefs. Under these decisions it was the task of the court to study the Selective Service file of a registrant in order to decide whether or not the board indeed had a basis in fact for its action in connection with the classification of the registrant in question.[37]

The courts have also ruled that judicial review is warranted in cases when an incorrect standard of law is applied to a registrant's application.[38] In *Sicurella v. United States*[39] the Justice Department applied an incorrect standard in evaluating a claim for conscientious objector classification.[40] The Supreme Court held this to be error as to law and therefore reviewable.[41] Thereafter the scope of the "error of law" doctrine was expanded from the facts of *Sicurella*[42] to cases where the board made a determination which could not have been based upon

32. Id. at 122-23 (footnote omitted).

33. 346 U.S. 389 (1953). In this case a registrant's conviction for failure to submit to induction was reversed. The Court found that there was no basis in fact for the board's refusing him a ministerial exemption. Id. at 396.

34. Id.

35. 348 U.S. 375 (1955).

36. 380 U.S. 163 (1965). Cases following the Seeger standard include: Bates v. Commander, 413 F.2d 475 (1st Cir. 1969); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); United States v. Haffner, 301 F. Supp. 828 (D. Hawaii 1969); Morin v. Grade, 301 F. Supp. 614 (W.D. Wis. 1969); United States v. Dale, 2 S.S.L.R. 3197 (D.N.H. 1969); United States v. Titterud, 2 S.S.L.R. 3283 (D. Minn. 1969).

37. In United States v. Washington, 392 F.2d 37, 39, 41 (6th Cir. 1968), the court determined that the effect of Witmer and Seeger upon the determination of a request for a conscientious objector exemption was to require a subjective study of all relevant evidence bearing upon the possible classification. Id. at 39. The Selective Service System Regulations require that the board study the situation of the registrants and classify each registrant in the lowest possible category in which he is entitled to be placed (the highest being I-A and the others being non-draftable categories). 32 C.F.R. § 1623.2 (1971).

38. Sicurella v. United States, 348 U.S. 385 (1955); United States v. Carroll, 398 F.2d 651 (3d Cir. 1968); United States v. Stepler, 258 F.2d 310 (3d Cir. 1958).

39. 348 U.S. 385 (1955).

40. Id. at 391.

41. Id. at 392.

42. Sicurella was a Jehovah's Witness and the board held that he was not opposed to war in any form. The Court stated that he need only be opposed to "real shooting wars." Id. at 391.

the evidence before it,[43] where the board treated the standards for determining a conscientious objector as precatory rather than mandatory,[44] and where the board denied a classification request on a basis, " 'not in accord with the law and the regulations.' "[45] Under this expanded doctrine, "[t]he evidence of an erroneous standard may be found in memoranda in the file, or perhaps even proven by testimony concerning what the board members said and did during a personal appearance, if the evidence would show that they were misapplying the law."[46]

Another exception to the exhaustion doctrine is the reviewability of board procedural errors, since such errors result in a form of denial of due process.[47] These mistakes may include anything from the failure to send required forms[48] to the failure of the board to use those investigatory powers which it is under a responsibility to exercise.[49] The availability of the infringement on the "procedural due process"[50] exception is tempered by two obstacles: de novo review and the "harmless error" rule.[51] The theory of de novo review states that procedural irregularities at the local board level may be cured by subsequent action at administrative appellate levels.[52] It is countered, however, by the theory

43. E.g., United States v. Hawley, 310 F. Supp. 929 (D. Minn. 1969), where the registrant refused to submit for induction and the court reversed his conviction, finding that the board erred in its determination that since the registrant's religion did not demand conscientious objection, his opposition to war had to be based on some personal moral code, such motivation being statutorily insufficient. Id. at 937.

44. E.g., United States v. Carroll, 398 F.2d 651, 653 (3d Cir. 1968), where the lower court refused the registrant's request for a I-O classification. This denial of classification was based upon a precatory interpretation of 32 C.F.R. § 1622.14 (1971), rather than on a mandatory interpretation. Id.

45. United States v. Stepler, 258 F.2d 310, 314 (3d Cir. 1958). The board incorrectly denied a request for classification as a minister on the ground that a member of Jehovah's Witnesses did not qualify. Id.

46. Practice Manual ¶ 2409, at 1150 (footnote omitted). See United States v. Peebles, 220 F.2d 114 (7th Cir. 1955); Niznik v. United States, 173 F.2d 328 (6th Cir.), cert. denied, 337 U.S. 925 (1949); United States ex rel. Wilkerson v. Commanding Officer, 286 F. Supp. 290 (S.D.N.Y. 1968).

47. United States v. Walsh, 279 F. Supp. 115, 121 (D. Mass. 1968); see text accompanying notes 78-83 infra.

48. In Boswell v. United States, 390 F.2d 181 (9th Cir. 1968), appellant alleged that a clerk refused to allow him to have or to file a conscientious objector form on the day before his scheduled induction. The court found that such a refusal would have been a denial of due process. Id. at 183.

49. United States v. Brown, 290 F. Supp. 542 (D. Del. 1968); United States v. Simms, 285 F. Supp. 981 (D. Del. 1968); cf. 32 C.F.R. §§ 1621.14(a), 1621.15, 1625.1(c) (1971).

50. See United States v. Walsh, 279 F. Supp. 115, 121 (D. Mass. 1968).

51. Clay v. United States, 397 F.2d 901 (5th Cir.), vacated and remanded on other grounds sub. nom. Giordano v. United States, 394 U.S. 310 (1968) (de novo review); accord, Practice Manual ¶ 2410, at 1150-51; cf. Knox v. United States, 200 F.2d 398 (9th Cir. 1952) (dictum) (harmless error).

52. Comment, The Selective Service, 76 Yale L.J. 160, 171 (1966). The rationale here is that on appeal the registrant begins with a clean slate.

that a registrant deserves a "fair hearing"[53] at all levels of the system. The "harmless error" rule states that there are some errors which do not prejudice the final decision with respect to the classification of an individual registrant.[54] However, once an error in the administrative process is shown, the government must prove beyond a reasonable doubt that the registrant has not been prejudiced.[55]

Another relaxation of the exhaustion rule appears in civil suits brought to enjoin induction where an administrative appeal would be futile.[56] In such cases administrative remedies need not be taken.[57] The futility may obviate itself in those cases where the Selective Service System displays a propensity to foreclose, consistently foreclose, or display such prejudice that foreclosure of the registrant's claim is rendered inevitable. If the registrant's claim fits one of these categories of foreclosure, he may not need to utilize the administrative mechanism.[58]

The most significant case in which the Supreme Court allowed review despite the fact that the registrant failed to use all of his administrative remedies is *McKart v. United States*.[59] In that case a registrant holding a IV-A[60] deferment was reclassified I-A upon the death of his mother since, in the opinion of the local board, the "family unit" had become non-existent.[61] The registrant failed to appeal and was ordered to report for a pre-induction physical. When he failed to report, he was declared delinquent and ordered to report for induction. Upon his failure to report, he was indicted and convicted.[62] On appeal the Supreme Court reversed the conviction, holding that, in this instance, the failure to appeal did not foreclose judicial review.[63] The Court stated that there were a number of exceptions to the exhaustion doctrine[64] and that the doctrine should be tailored to fit the needs of the System, noting that in this area the interpretation of the System was not uniform. Thus, the Court formulated the

53. United States v. Peebles, 220 F.2d 114 (7th Cir. 1955); Niznik v. United States, 173 F.2d 328 (6th Cir.), cert. denied, 337 U.S. 925 (1949). See also Shattuck, Record Keeping Obligations of Local Boards, 1 S.S.L.R. 4015, 4025 (1968).

54. See Knox v. United States, 200 F.2d 398, 401 (9th Cir. 1952).

55. Chapman v. California, 386 U.S. 18 (1967). See also Practice Manual ¶ 2410, at 1151.

56. In Wolff v. Selective Service Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967), the court found that "no purpose would [have been] served by relegating [the registrant] to [his] administrative remedies." Id. at 825. It should be noted here that this case involved action by the System which the court considered to have a chilling effect on the exercise of first amendment rights. This important consideration is not usually present in cases involving draft classifications.

57. Id.

58. Id. See also McKart v. United States, 395 U.S. 185 (1969).

59. 395 U.S. 185 (1969).

60. Sole surviving son. 32 C.F.R. § 1622.40(a)(10) (1971).

61. 395 U.S. at 189-92.

62. Id. at 189.

63. Id. at 192-203.

64. Id. at 193.

"*McKart* exception"[65] to the exhaustion doctrine: where the matter in dispute is such that an administrative decision will not add any light, or where no administrative skill is required to analyze the dispute, exhaustion is not a prerequisite of judicial review.[66] In *McKart* the administrative decision was a product of an unsettled area in the System's administration, the board acted contrary to the legislative intent underlying the establishment of the IV-A deferment,[67] and the issue was a question of statutory interpretation. Thus, the Court held that the registrant's failure to exhaust his administrative remedies did not preclude review in this case.[68]

The *McKart* decision pertained only to the failure of a IV-A registrant to report for induction, and thus the law applicable to registrants indicted for failure to report for a pre-induction physical remained unsettled. Furthermore, even if *McKart* was applicable to other registrants in this type of situation, it would seem to have no applicability to I-O registrants since by order of the Selective Service System they are treated differently by the local boards than other registrants. When any other registrant fails to appear for a physical examination he is liable to prosecution.[69] The position of the Selective Service System concerning a I-O registrant who "fail[s] to report for or to submit to an armed forces physical examination appears to be that [he should] . . . be treated in all respects as if [he] had taken such an examination and been found to be medically acceptable."[70] Thus, because of this position of the Selective Service System, the I-O registrant is not to be declared delinquent upon his failure to report for a pre-induction physical.[71] One commentator has noted that prior to 1968 "there [had been] . . . no decided case raising, as an objection to an armed forces physical, a claim that the registrant should have been I-O, and . . . would not be required to attend the physical. However, it appear[ed] to be a perfectly reasonable defense . . . ."[72]

However, in *United States v. Zmuda*,[73] the United States Court of Appeals for the Third Circuit held that although Zmuda may have been entitled to a I-O classification, he was not entitled to use the fact of his improper classification as a defense to an indictment for failure to submit to a pre-induction

65. C. First, Attorney's Guide to Selective Service and Military Case Law 68 (1969).

66. 395 U.S. at 197-99.

67. The Court pointed out that the legislative intent was to prevent the extinction of an entire family line. Therefore, the "family unit" was irrelevant. Id. at 189-92.

68. Id. at 192-203.

69. Military Selective Service Act of 1967, 50 U.S.C. App. § 462(a) (1970).

70. United States v. Hayden, 445 F.2d 1365, 1370 (9th Cir. 1971) (emphasis omitted); accord, 32 C.F.R. § 1660.20(a) (1971); Local Board Memorandum No. 14, para. 3(b) (issued Nov. 19, 1948), as amended, (March 17, 1969). See also United States v. Mendoza, 295 F. Supp. 673 (E.D.N.Y. 1969); United States v. Walsh, 279 F. Supp. 115 (D. Mass. 1968).

71. Local Board Memorandum No. 64, para. 3(a) (issued March 1, 1962), as amended, (Sept. 12, 1968).

72. Practice Manual ¶ 2477, at 1160-61.

73. 423 F.2d 757 (3d Cir.), cert. denied, 398 U.S. 960 (1970).

physical.[74] Instead, Zmuda should have used the review procedures available within the Selective Service System for rectification of an improper classification. The court stated that, since "Congress ha[d] designated an administrative agency as the initial forum for the adjudication of contested rights, only a clear demonstration that recourse to the agency would be futile, self-defeating or judicially wasteful [would] justify the abandonment of the exhaustion requirement."[75]

Thus, in *Zmuda*, even though the court, applying *Gutknecht*, reversed the conviction for failure to report for induction because priority induction was used,[76] it upheld a conviction for failure to report for a physical examination. The court followed dictum in *McKart* that such a misclassification would not be a defense to a charge of failure to report,[77] even though registrants classified I-O are treated differently as to physical examinations.

In *United States v. Walsh*,[78] the right of a registrant to refuse to submit to a physical examination was recognized as an important procedural consideration.[79] Walsh, a registrant classified as I-A-O,[80] was charged with failure to report for an armed forces pre-induction physical examination. When he received notice to appear for the examination he immediately attempted to have his record reopened and classification changed to I-O on the ground that his religious beliefs made him a conscientious objector even as to undergoing a pre-induction physical examination. When the board refused to reopen the matter, he refused to report for the examination.[81] Walsh's local board chairman was not aware that the Selective Service System exempted I-O registrants from the necessity of undergoing the physical. Therefore, the local board never considered such an exception as playing a role in the final classification of Walsh. In effect, he never received a fair hearing on the matter.[82] The district court reasoned that he was denied an important procedural right and therefore acquitted him.[83]

In *United States v. Hayden*,[84] the Ninth Circuit, in rejecting *Zmuda*, asserted that where a person is invalidly denied a I-O classification, he is denied an important right—the right of one classified I-O not to participate in a pre-induction physical.[85] The court reasoned that the *Zmuda* court had incorrectly relied

74. Id. at 759.

75. Id. at 761.

76. Id. at 758.

77. Id. at 759, citing McKart v. United States, 395 U.S. 185, 189 (1969).

78. 279 F. Supp. 115 (D. Mass. 1968).

79. See id. at 120.

80. Objector to combatant service only. 32 C.F.R. § 1622.11 (1971).

81. 279 F. Supp. at 119-22.

82. The board was required, under 32 C.F.R. § 1604.52a(d) (1971), to meet and consider whether the newly asserted facts warranted a reopening of Walsh's classification. In fact, no meeting took place. 279 F. Supp. at 121.

83. 279 F. Supp. at 121.

84. 445 F.2d 1365 (9th Cir. 1971).

85. Id. at 1372. The court reversed the conviction for failure to report for induction based upon Gutknecht v. United States, 396 U.S. 295 (1970). Although the decision in Gutknecht came subsequent to the refusal of Hayden to report for induction, Gutknecht

upon *McKart*, since *McKart* involved a IV-A registrant while *Zmuda* involved a I-O registrant.[86] Relying on *Walsh*, the Ninth Circuit pointed out that the right of a I-O registrant not to be examined was a substantial right,[87] and therefore not one to be dismissed by analogy.

The court decided that there was no basis in fact for the board's classification of Hayden as I-A.[88] Although the board was not bound by the decision rendered at the first trial, it was required to pay significantly more attention to it than it did.[89] Furthermore, the court pointed out that a board's "mere disbelief in the sincerity of a registrant, grounded on no objective evidence of insincerity, will not suffice to deny [him] an exemption as a conscientious objector."[90]

The only possible post-trial display of insincerity was Hayden's refusal to submit to an informal interview.[91] Hayden, however, had not merely ignored the invitation to attend the interview; he had politely informed the board that he would not attend because he felt such an interview could not, at that point, serve any useful purpose. Moreover, the board had never informed Hayden that his failure to appear would allow a negative inference to be drawn. Hayden, in fact, had no duty to appear, and these interviews are no longer authorized.[92]

Although the court may well have found other reasons to question the validity of the board's classification procedure,[93] it avoided the exhaustion problem by finding that there was "no basis in fact."[94] The court decided that "[t]he [b]oard [could] not abrogate procedural rights by arbitrary action. If Hayden was entitled to a I-O classification, he was also entitled to all the attendant rights and attributes of that classification, including exemption from the duty to take an armed forces physical examination."[95]

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has been given retroactive applicability. United States v. Pennington, 439 F.2d 145 (9th Cir. 1971); United States v. Browning, 423 F.2d 1201 (9th Cir. 1970); Gregory v. United States, 422 F.2d 1323 (9th Cir. 1970).

86. 445 F.2d at 1369-70. "The Zmuda court cited no other authority than McKart, nor did it further discuss the point. This is regrettable, for our very close examination convinces us that McKart does not support the position ascribed to it in Zmuda and here taken by the Government." Id.

87. Id. at 1370. "As to [I-O] registrants, misclassification may deprive them of a substantial right—the right not to submit to a physical examination." Id.

88. Id. at 1372. The Ninth Circuit stated: "Our review of the record, including the opinion of [the district court,] convinces us that there was absolutely no basis in fact for the rejection of Hayden's claim for conscientious objector exemption." Id.

89. Id. at 1373.

90. Id.

91. Id. at 1374.

92. Id. "Hayden's failure to appear should not be equated with an uncooperative attitude of defiance." Id; see note 9 supra.

93. For example the court could have questioned the board's procedural errors such as its failure to send proper forms (445 F.2d at 1367), its treating a personal appearance as an appeal (Id. at 1368), or its failure to keep records properly (Id. at 1368 n.3).

94. Id. at 1372.

95. Id. The dissenting opinion stated that the majority had "usurp[ed] the function of the administrative agency . . . ." Id. at 1378. In reasoning that the court should never

Hayden has clarified the position of conscientious objector claimants. Such registrants, when wrongfully denied the I-O classification, may have grounds for refusing to submit to a pre-induction physical—an action which would otherwise render them liable to prosecution under the *Zmuda* case. Furthermore, they may be able to use their misclassification as a defense in a subsequent action based on such a refusal, provided their misclassification fits one of the exceptions to the exhaustion doctrine.[96] The *Hayden* decision, although perhaps result oriented, thus represents a further exercise of judicial control over the Selective Service System. Such control may act as a deterrent to abuse of the System[97] by state and local boards in the future.

Condominiums—Member of Unincorporated Association of Condominium Owners Permitted to Bring Personal Injury Action Against Association for Negligent Maintenance of Common Areas.—Plaintiff, an apartment owner in a condominium project consisting of sixty units, tripped over a sprinkler which a grounds keeper had negligently left on a walkway leading to the project's swimming pool.[1] He brought a personal injury action against the condominium association, Merrywood Apartments, which maintained the common areas of the project.[2] The Court of Appeal for the Second District of California reversed a dismissal of the claim, holding that a condominium association can be sued by one of its members for negligent maintenance of the common areas. *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Dist. Ct. App. 1971).

The attractiveness of condominium living arises from the fact that the tenant-owner benefits from many of the psychological and monetary advantages of home ownership without the bothersome responsibilities generally associated with the upkeep of premises.[3] Management of the condominium, including its

have reviewed the conviction for failure to submit to a physical examination, the dissent agreed with the Zmuda opinion. Thus, although concurring with the majority in its reversal of the conviction as to priority induction, the dissenting judge noted that the "appellant failed to avail himself of the review procedures available . . . ." Id. at 1376. The dissent, therefore, advocates a more traditional approach to the problem whereby the exhaustion doctrine would be strictly applied pursuant to a more conservative interpretation of the decisions relied upon by the majority. Id. at 1378.

96. Contra, United States v. Dombrouski, 445 F.2d 1289 (8th Cir. 1971) (here the facts were different and the misclassification did not fit an exhaustion exception).

97. For a descriptive and critical analysis of the Selective Service System, see National Advisory Commission on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? (1967). See also Tatum and Tuchinsky, Guide to the Draft (3d ed. 1970).

1. Brief for Appellant at 1, White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Dist. Ct. App. 1971).

2. White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Dist. Ct. App. 1971).

3. See Berger, Condominium: Shelter on a Statutory Foundation, 63 Colum. L. Rev. 987, 990-95 (1963); Ellman, Fundamentals of Condominium and Some Insurance Problems, 1963

common areas, is ordinarily carried out by the association of unit owners.[4] Each member of the association has the right to vote for a board of directors[5] which then elects officers who may in turn appoint a professional manager to carry out the day to day affairs of the project.[6] Typically, the condominium enabling statutes provide that management is empowered to acquire personal property for the benefit of unit owners,[7] to enforce restrictions,[8] to maintain the common areas,[9] to insure the owners[10] and to make reasonable assessments for authorized expenditures.[11]

In the ordinary multiple dwelling situation, the landlord, as an occupier of land, owes a duty to his tenants as invitees to keep areas retained under his control in a reasonably safe condition.[12] Thus, a landlord would be liable

Ins. L.J. 733, 734-35; Reskin, Overview and Comparison with Cooperatives, in Cooperatives and Condominiums 219, 222-32 (J. McCord ed. 1969).

4. 1 A. Ferrer & K. Stecher, Law of Condominium § 7, at 4 (1967) [hereinafter cited as Ferrer & Stecher]; 1 P. Rohan & M. Reskin, Condominium Law and Practice § 6.02[3], at 6-14 (1965) [hereinafter cited as Rohan & Reskin].

5. 1 Ferrer & Stecher § 7, at 4. Quorum requirements, if any, vary by states. Some condominium enabling statutes require that the bylaws of the project state what percentage is needed for a quorum. E.g., Fla. Stat. Ann. § 711.11 2(b) (1969). Some others simply provide that the bylaws may state the quorum requirements. E.g., Miss. Code Ann. § 896-09 (A) (Supp. 1971). Others expressly state that a quorum shall consist of fifty-one percent or more of the basic value of the property as a whole. E.g., Ark. Stat. Ann. § 50-1002(c), (f) (Supp. 1969). Some statutes require a majority to adopt any decision. E.g., S.C. Code Ann. § 57-509(b) (Supp. 1970). Other enabling acts require a higher percentage of approval for certain actions. E.g., N.Y. Real Prop. Law § 339-v(1)(j) (McKinney 1968) (no less than sixty-six and two-thirds percent in number and common interest must approve amendment of bylaws).

6. The hiring of a professional manager is recommended to combat the many problems associated with maintaining a condominium project. 1 Ferrer & Stecher § 472, at 313; 1 Rohan & Reskin § 13.03[1], at 13-18.

7. E.g., Cal. Civ. Code § 1358 (West Supp. 1971); Miss. Code Ann. § 896-13 (Supp. 1971).

8. E.g., Cal. Civ. Code § 1355(b)(1) (West Supp. 1971); Miss. Code Ann. § 896-09(B)(1) (Supp. 1971); N.D. Cent. Code § 47-04.1-08 (Supp. 1971).

9. E.g., Cal. Civ. Code § 1355(b)(3) (West Supp. 1971); Miss. Code Ann. § 896-09(B)(3) (Supp. 1971); N.H. Rev. Stat. Ann. § 479-A:18(VI) (1968). It has been suggested that the degree of specificity of the provision for maintenance of the common elements may determine whether a court will find that a duty is imposed on management by statute or merely that a contractual relation exists between the unit owner and the management. If the former, then a personal injury action may lie for the breach of the statutory duty. 4A R. Powell, The Law of Real Property ¶ 633.24[2], at 858 n.9 (P. Rohan ed. 1971). Compare N.H. Stat. Ann. § 479-A:18(I), (VI) (1968), which states that the bylaws may provide how the board is to be elected and how the common areas will be maintained, with Pa. Stat. Ann. tit. 68, § 700.306(1) (1965), which includes maintenance of the common elements among the "duties" of management.

10. E.g., Cal. Civ. Code § 1355(b)(2) (West Supp. 1971); Miss. Code Ann. § 896-09(B)(2) (Supp. 1971); Ohio Rev. Code Ann. § 5311.16 (Page 1970).

11. E.g., Cal. Civ. Code § 1355(e)(1) (West Supp. 1971); Miss. Code Ann. § 896-09(E)(1) (Supp. 1971); N.D. Cent. Code § 47-04.1-07 (Supp. 1971).

12. United Shoe Mach. Corp. v. Paine, 26 F.2d 594 (1st Cir. 1928); Primus v. Bellevue

to a tenant injured due to the landlord's negligence in maintaining the common areas of the building.[13] In the condominium[14] situation, however, the apartment dwellers own the common areas as tenants in common, either with an equal interest in those areas[15] or, more frequently, as holders of an interest in the common areas proportionate in value to that of their apartments.[16] Tenants in common have a common duty to keep the premises in a safe condition, the breach of which is imputable to all tenants.[17] This duty has been held to be nondelegable,[18] and therefore all cotenants would be jointly and severally liable for the torts of servants hired to maintain the common estate.[19] Furthermore, the tort of one tenant in common renders his cotenants jointly and severally liable if the tort is committed while the tortfeasor is acting in their behalf.[20] It would follow then that a unit owner injured in the common areas

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Apts., 241 Iowa 1055, 44 N.W.2d 347 (1950); Rosenberg v. Chapman Nat'l Bank, 126 Me. 403, 139 A. 82 (1927); Whitcomb v. Mason, 102 Md. 275, 62 A. 749 (1905); Wool v. Larner, 112 Vt. 431, 26 A.2d 89 (1942); Schedler v. Wagner, 37 Wash. 2d 612, 225 P.2d 213 (1950).

13. United Shoe Mach. Corp. v. Paine, 26 F.2d 594 (1st Cir. 1928); Johnston v. De La Guerra Properties, Inc., 28 Cal. 2d 394, 170 P.2d 5 (1946); O'Hanlon v. Grubb, 38 App. D.C. 251 (D.C. Ct. App. 1912); B. Shoninger Co. v. Mann, 219 Ill. 242, 76 N.E. 354 (1905); Hartnett v. Boston Housing Auth., 346 Mass. 242, 191 N.E.2d 125 (1963); Sciolaro v. Asch, 198 N.Y. 77, 91 N.E. 263 (1910); Davies v. Kelley, 112 Ohio St. 122, 146 N.E. 888 (1925); Wolk v. Pittsburgh Hotels Co., 284 Pa. 545, 131 A. 537 (1925); Quisenberry v. Gulf Prod. Co., 63 S.W.2d 248 (Tex. Civ. App. 1933), aff'd, 128 Tex. 347, 97 S.W.2d 166 (1936).

14. "In recent years . . . 'condominium' has come to refer specifically to a multiunit dwelling, each of whose residents (unit owners) enjoys exclusive ownership of his individual apartment or unit, holding a fee simple title thereto, while retaining an undivided interest, as a tenant in common, in the common facilities and areas of the building and grounds which are used by all the residents of the condominium." 15 Am. Jur. 2d Condominiums and Cooperative Apartments § 1 (1964) (footnotes omitted).

15. E.g., Cal. Civ. Code § 1353(b) (West Supp. 1971); Miss. Code Ann. § 896-07(B) (Supp. 1971); Nev. Rev. Stat. § 117.040(2) (1968).

16. E.g., Ala. Code tit. 47, § 291(a) (Supp. 1969); Alaska Stat. § 34.07.160(b) (1971); Ind. Ann. Stat. § 56-1207(a) (Supp. 1971); Ohio Rev. Code Ann. § 5311.04(A), (B). See generally 1 Ferrer & Stecher § 115, at 163-68.

17. The liability of a tenant in common for negligence is similar to the liability of party wall owners. See, e.g., Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897). See also Prosser, Joint Torts and Several Liability, 25 Calif. L. Rev. 413, 431 (1937).

18. See Brown v. George Pepperdine Foundation, 23 Cal. 2d 256, 143 P.2d 929 (1943) (elevator accident where specialist had been hired to maintain elevator); Tippecanoe Loan & Trust Co. v. Jester, 180 Ind. 357, 101 N.E. 915 (1913); Prosser, Torts § 61, at 395 (4th ed. 1971).

19. See Chicago & N.W. Ry. v. Snyder, 128 Ill. 655, 21 N.E. 520 (1889); Williams v. Southern Ry., 102 Miss. 617, 59 So. 850 (1912); Illinois Cent. R.R. v. King, 69 Miss. 852, 13 So. 824 (1892); Terry v. Burford, 131 Tenn. 451, 175 S.W. 538 (1915).

20. Elliott v. McKay, 49 N.C. 69 (1856) (per curiam). See also Bryant v. Welles, 65 Fla. 355, 61 So. 748 (1913); Low v. Mumford, 14 Johns. 426, 7 Am. Dec. 469 (N.Y. Sup. Ct. 1817); Katz v. Preston, 73 Ohio App. 154, 55 N.E.2d 141 (1943); 86 C.J.S. Tenancy in Common § 143 (1954); 37 Annot. Cas. 1144 (1915). However, if only one of several tenants in common is occupying the common estate at the time of the alleged negligence, his cotenants

of a condominium could not recover from fellow unit owners since the maintenance of the common areas is as much his responsibility as it is theirs.[21] It would also follow that an association of unit owners would have the defense of contributory negligence regardless of how much actual control the injured unit owner exercised over the upkeep of the common areas.[22]

Another impediment to suit by the injured tenant-owner[23] may be the fact that he is a member of an unincorporated association.[24] At common law unincorporated associations[25] could not be sued by members or third persons because they were not regarded as legal entities separate from their members.[26] Thus, courts insisted that the members should be named individually if the claim asserted a wrong allegedly committed by the association.[27] In *United*

need not be joined as defendants. Baker v. Fritts, 143 Ill. App. 465 (1908); Myles v. Butler, 202 Tenn. 290, 304 S.W.2d 306 (1957).

21. Rohan, Problems in the Condominium Field, in Cooperatives and Condominiums 292, 316 (J. McCord ed. 1969); Ross, Condominium in California—The Verge of an Era, 36 S. Cal. L. Rev. 351, 363 (1963); Comment, Community Apartments: Condominium or Stock Cooperative?, 50 Calif. L. Rev. 299, 312-14 (1962); see Stallings v. Corbett, 42 Am. Dec. 388 (S.C. 1844), where the court denied recovery to a cotenant for damage to the common estate because he, as well as his cotenants, had failed to make needed repairs.

22. Since the duty is non-delegable, it would not help the injured unit owner to have a corporation maintain the common areas. 1 Rohan & Reskin § 10A.03[1], at 10A-6. However, it has been cautiously suggested that if condominium statutes were to be amended to allow ownership of the common areas by a separate corporation, the imputation of liability against a unit owner could be avoided. Note, Condominiums: Incorporation of the Common Elements —A Proposal, 23 Vand. L. Rev. 321, 338-41 (1970).

23. See notes 34-43 infra and accompanying text.

24. The unincorporated association is the form most frequently used in condominum management. 1 Ferrer & Stecher § 474, at 314-15 & n.9; Berger, Condominium: Shelter on a Statutory Foundation, 63 Colum. L. Rev. 987, 1007 (1963); Note, Condominiums: Incorporation of the Common Elements—A Proposal, 23 Vand. L. Rev. 321, 330 (1970).

25. "An 'association' is a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for the prosecution of some common enterprise." 7 C.J.S. Associations § 1 (1937); see Penrod Drilling Co. v. Johnson, 414 F.2d 1217, 1222 (5th Cir. 1969), cert. denied, 396 U.S. 1003 (1970), where this definition was adopted by the court. See also People v. Brander, 244 Ill. 26, 31, 91 N.E. 59, 60 (1910) ("[The term 'association'] is a word of vague meaning . . . ."); H. Oleck, Non-Profit Corporations, Organizations, and Associations § 226, at 469 (2d ed. 1965) ("[Unincorporated associations] are analogous to partnerships, and yet not partnerships; analogous to corporations, and yet not corporations; analogous to joint tenancies, and yet not joint tenancies; analogous to mutual agency, and yet not mutual agency.").

26. E.g., Grand Grove of United Ancient Order of Druids v. Garibaldi Grove, No. 71, United Ancient Order of Druids, 130 Cal. 116, 119, 62 P. 486, 487 (1900) ("In suits where they [unincorporated associations] are apparently parties, the real parties are the members of the association . . . ."). See generally Sperry Prods., Inc. v. Association of Am. R.R., 132 F.2d 408, 410 (2d Cir. 1942), cert. denied, 319 U.S. 744 (1943); Comment, Liability of Members and Officers of Nonprofit Unincorporated Associations for Contracts and Torts, 42 Calif. L. Rev. 812 (1954); Note, Hazards of Enforcing Claims Against Unincorporated Associations in Florida, 17 U. Fla. L. Rev. 211 (1964).

27. E.g., Baskins v. UMW, 150 Ark. 398, 234 S.W. 464 (1921); Schmidt v. Gunther, 5

Mine Workers of America v. Coronado Coal Co.,[28] however, this rule was abrogated by the Supreme Court with respect to a tort claim against an unincorporated labor union by an employer whose property had been destroyed by strikers.[29] The Court found that requiring the victim to sue each member of the union as an individual rather than allowing him to sue the union itself as an entity would leave him without an effective remedy.[30]

The common law rule has now been repudiated by the Federal Rules of Civil Procedure[31] and by a number of state legislatures[32] in statutes giving unincorporated associations the right to sue and be sued. However, these statutes merely give outsiders the right to sue the association and do not affect the substantive question of whether a member can recover against his association in tort.[33] In such a situation the majority rule has remained that the injured member may not recover.[34] Thus, in *Martin v. Northern Pacific Beneficial Association*,[35] plaintiff's intestate, a member of the defendant association which was formed to provide health care for workers of the Northern Pacific Railroad,[36] injured his foot, was removed to the defendant's hospital, and died under the care of physicians hired by the association.[37] The court held that the plaintiff's estate could not recover in tort because "[t]he deceased was a member of the association, [and] he must be deemed to have been . . . a party to the selection of the physicians and nurses . . . ."[38]

Daly 452 (C.P.N.Y.C. 1874); Simpson v Grand Int'l Bhd. of Locomotive Eng'rs, 83 W. Va. 355, 98 S.E. 580, cert. denied, 250 U.S. 644 (1919). See also S. Wrightington, The Law of Unincorporated Associations and Business Trusts § 70, at 425-44 (2d ed. 1923).

28. 259 U.S. 344 (1922).

29. Id. at 391.

30. Id. at 388-89.

31. Fed. R. Civ. P. 17(b).

32. E.g., Cal. Civ. Pro. Code § 388 (West Supp. 1971); N.Y. C.P.L.R. § 1025 (McKinney 1963); Ohio Rev. Code Ann. § 1745.01 (Page 1964). See also H. Oleck, Non-Profit Corporations, Organizations, and Associations § 20 (2d ed. 1965).

33. Sperry Prods., Inc. v. Association of Am. R.R., 132 F.2d 408 (2d Cir. 1942), cert. denied, 319 U.S. 744 (1943); Jardine v. Superior Court, 213 Cal. 301, 321, 2 P.2d 756, 764 (1931); Huth v. Humboldt Stamm, 61 Conn. 227, 23 A. 1084 (1891); Koogler v. Koogler, 127 Ohio St. 57, 186 N.E. 725 (1933); Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941).

34. Goins v. Missouri Pac. Sys. Fed'n, MWEU, 272 F.2d 458 (8th Cir. 1959); Gilbert v. Crystal Fountain Lodge, 80 Ga. 284, 4 S.E. 905 (1887); Martin v. Northern Pac. Beneficial Ass'n, 68 Minn. 521, 71 N.W. 701 (1897); Koogler v. Koogler, 127 Ohio St. 57, 186 N.E. 725 (1933); De Villars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950); Roschmann v. Sanborn, 315 Pa. 188, 172 A. 657 (1934); Duplis v. Rutland Aeire, No. 1001, Fraternal Order of Eagles, 118 Vt. 438, 111 A.2d 727 (1955); Carr v. Northern Pac. Beneficial Ass'n, 128 Wash. 40, 221 P. 979 (1924); Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941).

35. 68 Minn. 521, 71 N.W. 701 (1897).

36. Id. at 522, 71 N.W. at 701.

37. Id. at 522-23, 71 N.W. at 701.

38. Id. at 523-24, 71 N.W. at 702. Accord, Carr v. Northern Pac. Beneficial Ass'n, 128 Wash. 40, 221 P. 979 (1924).

Other courts have reached similar results by expressing the "general rule"[39] that the conduct which caused the plaintiff's injury was part of a joint enterprise, every member being the agent of all his fellow members.[40] In *Gilbert v. Crystal Fountain Lodge*[41] the court equated an unincorporated mutual aid society with a partnership and denied recovery, finding that the plaintiff was in effect suing himself.[42] However, the "co-principal" doctrine[43] which evolved from these cases has met with vigorous criticism from commentators who maintain that it is unrealistic to charge the injured member with responsibility because he frequently has no effective control over the operations of the association.[44]

Several recent decisions against labor unions[45] and one against a medical society[46] have severely curtailed this co-principal doctrine. Some courts have adopted the view that where the tort is intentional and is ratified by the association's governing board, the association will be liable to an injured member.[47] Other courts have stated that an injured member should be able to recover from the labor union for negligence as well as intentional torts, just as a shareholder would be able to do against a corporation.[48] Dicta in several of these cases indicate a strong disposition on the part of courts to

39. United Ass'n of Journeymen v. Borden, 328 S.W.2d 739, 741 (Tex. 1959); 6 Am. Jur. 2d Associations and Clubs § 31 (1963).

40. Koogler v. Koogler, 127 Ohio St. 57, 186 N.E. 725 (1933); De Villars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950); Roschmann v. Sanborn, 315 Pa. 188, 172 A. 657 (1934).

41. 80 Ga. 284, 4 S.E. 905 (1887).

42. Id. at 285, 4 S.E. at 905.

43. "It is the well-established law that while a principal may sue an agent for dereliction of duty, he may not sue his co-principals for the dereliction of their common agent." Hromek v. Gemeinde, 238 Wis. 204, 209, 298 N.W. 587, 589 (1941).

44. H. Oleck, Non-Profit Corporations, Organizations, and Associations § 226 (2d ed. 1965); Crane, Liability of Unincorporated Association for Tortious Injury to a Member, 16 Vand. L. Rev. 319 (1963).

45. Inglis v. Operating Eng'rs Local 12, 58 Cal. 2d 269, 373 P.2d 467, 23 Cal. Rptr. 403 (1962) (per curiam); Marshall v. Longshoremen's Local 6, ILWU, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962); Miazga v. International Union of Operating Eng'rs, 2 Ohio App. 2d 153, 196 N.E.2d 324 (1964), aff'd, 2 Ohio St. 2d 49, 205 N.E.2d 884 (1965); United Ass'n of Journeymen v. Borden, 328 S.W.2d 739 (Tex. 1959); Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 101 N.W.2d 782 (1960) (dictum).

46. Higgins v. American Soc'y of Clinical Pathologists, 51 N.J. 191, 238 A.2d 665 (1968).

47. Id.; United Ass'n of Journeymen v. Borden, 328 S.W.2d 739 (Tex. 1959). "There is . . . at least one exception to the general rule that a union representative is to be regarded as an agent for all of its members in everything he does. The wrongful act will not be imputed to an injured member if committed in the course of an undertaking that is strictly adverse to the latter's interests. This is simply another version of the agency rule that a principal is not liable for the torts committed by his agent while acting adversely to him." Id. at 742 (citations omitted).

48. Marshall v. Longshoremen's Local 6, ILWU, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962); Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 101 N.W.2d 782 (1960) (dictum) (recognizing the ability of a member to sue a union for negligence, but requiring plaintiff to avail himself of his intra-union remedy).

hold any large and elaborately organized association liable to a member in tort.[49] In addition, one court has held that even a partnership may be liable to one of its members for property damage caused by the negligence of partnership servants acting in the course of their employment.[50]

White v. Cox[51] is the first case to deal with the tort liability of the condominium association to its unit owners arising from the maintenance of the common areas. In *White* the Court of Appeal for the Second District of California concluded that "unincorporated associations are now entitled to general recognition as separate legal entities and that as a consequence a member of an unincorporated association may maintain a tort action against his association."[52] The court then went on to explain that a condominium qualified for treatment as an unincorporated association,[53] citing *Marshall v. International Longshoremen's and Warehousemen's Union, Local 6*,[54] a landmark California case which held a labor union liable for negligence to a member.[55] The court construed *Marshall* as providing a dual test to determine the tort liability of an association to its member.[56] First, if the association in reality possessed an existence separate from its members, and secondly, if the members retained no direct control over the operations of the association, then the association would be liable to its members in tort.[57] As evidence of the fact that a condominium and its ruling board of directors did indeed assume an existence separate from its members, the court pointed to the condominium enabling statutes[58] which set up a separate managing body with virtually unbridled discretion, *i.e.*, the board of directors.[59] Furthermore, the court pointed to the condominium plan

49. See Marshall v. Longshoremen's Local 6, ILWU, 57 Cal. 2d 781, 371 P.2d 987, 23 Cal. Rptr. 211 (1962); Miazga v. International Union of Operating Eng'rs, 2 Ohio App. 2d 153, 196 N.E.2d 324 (1964), aff'd, 2 Ohio St. 2d 49, 205 N.E.2d 884 (1965). In Marshall the court stated that the rule against a member suing an association was an application of principles developed in the law of partnership. "When these concepts are transferred bodily to other [non-partnership] forms of voluntary associations such as fraternal organizations, clubs and labor unions, which act normally through elected officers and in which the individual members have little or no authority in the day-to-day operations of the association's affairs, reality is apt to be sacrificed to theoretical formalism." Marshall v. Longshoremen's Local 6, ILWU, supra at 783-84, 371 P.2d at 989, 22 Cal. Rptr. at 405.

50. Smith v. Hensley, 354 S.W.2d 744 (Ky. 1962). The court compared the situation in this case to the situation where a partner discharges a partnership obligation. The court noted that in the latter case the partner is entitled to have his partners contribute their just share, and saw no reason for denying reimbursement when the loss was incurred through tort. Id. at 745. See generally Annot., 98 A.L.R.2d 345 (1964).

51. 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Dist. Ct. App. 1971).

52. Id. at 828, 95 Cal. Rptr. at 261.

53. Id. at 829-30, 95 Cal. Rptr. at 262.

54. 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962), noted in 50 Calif. L. Rev. 90 (1962), 12 De Paul L. Rev. 333 (1963), and 1963 Duke L.J. 197.

55. 57 Cal. 2d at 787, 371 P.2d at 991, 22 Cal. Rptr. at 215.

56. 17 Cal. App. 3d at 829, 95 Cal. Rptr. at 262; see note 49 supra.

57. 17 Cal. App. 3d at 829, 95 Cal. Rptr. at 262.

58. See notes 7-11 supra.

59. 17 Cal. App. 3d at 830, 95 Cal. Rptr. at 263.

of the defendant association, which gave the individual unit owner no recourse against unsatisfactory management,[60] as an indication that the unit owner retained no direct control over the maintenance of the common areas. Thus, finding that the *Marshall* test was satisfied, the court ruled that the injured tenant-owner could sue the condominium association for negligence.[61]

Presiding Justice Roth, in his concurring opinion, tackled a question which the majority had specifically left open:[62] How was any judgment arising out of the plaintiff-tenant's action to be satisfied?[63] The presiding justice suggested that the condominium permit, issued by the Commissioner of Corporations and empowering the board of governors to obtain liability insurance, denoted an agreement among unit owners to limit their tort claims against the association to the amount covered by the insurance policy.[64] Thus, an injured unit owner would not be allowed to recover against the other unit owners individually, but would have a right of recovery against the association, albeit contractually limited to the amount of the insurance policy.[65] This reasoning avoids the theoretical problem of the plaintiff being liable for part of his own judgment, since in no event would anything but insurance money be used to satisfy such judgments.[66]

60. Id.

61. Id.

62. Id. at 830 n.3, 95 Cal. Rptr. at 263 n.3.

63. Id. at 831, 95 Cal. Rptr. at 264. Some states have enacted provisions limiting the unit owner's liability for tort claims in connection with the common areas to a percentage of the judgment equal to his percentage interest in the common elements. Alaska Stat. § 34.07.260 (b) (1971); Mass. Ann. Laws ch. 183A, § 13 (1969); Wash. Rev. Code Ann. 64.32.240 (1966). Florida and Mississippi have decreed that unit owners have no personal liability for damages caused by acts of the association in connection with the common areas. Fla. Stat. Ann. § 711.18(2) (1969); Miss. Code Ann. § 896-15(B) (Supp. 1971). See generally Kerr, Condominium—Statutory Implementation, 38 St. John's L. Rev. 1, 41-42 (1963).

64. 17 Cal. App. 3d at 833, 95 Cal. Rptr. at 265.

65. Id.

66. Id. On the problem of unlimited personal liability of unit owners arising in the common areas, some commentators have recommended that condominium statutes require management to obtain an insurance policy tailor-made to suit the needs of the condominium. 1 Rohan & Reskin § 10A.05[2][a], at 10A-13-14. See also Ellman, Fundamentals of Condominium and Some Insurance Problems, 1963 Ins. L.J. 733, 738. The policy, paid for by the unit owners as part of their common expenses, would cover the unit owners and managing agents for all tort claims by other unit owners or third persons in connection with the common areas. 1 Rohan & Reskin supra. The proposal would allow unrestricted personal liability only where the unit owner's conduct makes him personally responsible for the tort. Id. Finally, the insurer, under the plan, would waive its subrogation right to sue the unit owner after a judgment has been lodged against the association. Id. As an alternative it has been suggested that if no effective "master" policy can be drawn, the same carrier can insure both the association and the unit owners in separate policies "to avoid troublesome issues of contribution, subrogation and legal representation." Id. at 10A-15 n.30. See generally D. Clurman & E. Hebard, Condominiums and Cooperatives 96-102 (1970); Rohan, Disruption of the Condominium Venture: The Problems of Casualty Loss and Insurance, 64 Colum. L. Rev. 1045, 1070-72 (1964).

The *White* case indicates that, in dealing with condominiums, courts will not be bound by out-dated concepts developed in cases pertaining to other types of organizations[67] and other varieties of concurrent ownership. The court recognized by implication[68] that the condominium unit owner could not be equated with the ordinary homeowner, who would have no one to blame but himself if he were injured due to a defect on his premises. It would certainly be reasonable for a unit owner in a large condominium project to believe that it was not his but the association's duty to keep the common areas safe.[69] The *White* case, then, stands for two propositions: First, a unit owner will not be prevented from suing his condominium association simply because he is a member; and, second, the member's co-ownership of the common areas and his attendant duty to keep these areas safe will not preclude his recovery against the association for its negligent maintenance of the premises.

Constitutional Law—Civil Rights—Section 1985(3) of Title 42, United States Code Permits Civil Action Against Private Individuals Who Conspire to Deny Another's Constitutional Rights.—Plaintiffs, while driving on a public highway in Mississippi, were stopped and beaten by the defendants, private citizens, who mistakenly believed the driver to be a civil rights worker. Plaintiffs brought a civil action in the United States District Court for the Southern District of Mississippi under section 1985(3)[1] of Title 42, United States Code, seeking damages for the alleged racially motivated assault and conspiracy[2] to interfere with rights of national citizenship. The district court

67. See, e.g., cases cited in note 34 supra.

68. The court did not specifically deal with the question of whether the plaintiff should be allowed to recover in light of the fact that he himself was a co-owner of the common areas, although the issue was raised. Brief for Respondent at 6, White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Dist. Ct. App. 1971). See generally notes 17-22 supra and accompanying text.

69. It was argued that the court should examine the intent of the unit owner as a guide to the extent of his duty. Brief for Appellant at 5, White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Dist. Ct. App. 1971).

1. 42 U.S.C. § 1985(3) (1970) provides in pertinent part: "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

2. To bring an action under § 1985(3), it is necessary that there be: 1) a conspiracy,

dismissed for failure to state a cause of action.[3] The Court of Appeals for the Fifth Circuit affirmed,[4] citing an earlier case[5] which held that section 1985(3) applied only to conspiracies involving state action. On appeal, the United States Supreme Court reversed and remanded, holding that a cause of action exists under section 1985(3) for private conspiracies which interfere with the right of interstate travel. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

The predecessor[6] to section 1985(3) of Title 42, United States Code was part of a series of laws passed in 1871 by the Reconstruction Congress to provide both criminal and civil remedies for the denial of the constitutional rights of emancipated Negro slaves.[7] Enacted in response to the Ku Klux Klan's terrorist activities,[8] the entire statute was popularly known as the Ku Klux Act of 1871.[9] Since the Reconstruction Congress interpreted the fourteenth amendment as providing the legislative branch with plenary powers to protect the rights of national citizenship,[10] it vested in the President the authority to declare martial law[11] and to suspend habeas corpus in order to combat the Klan.[12]

Because of the common origin and wording of the civil and criminal provi-

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2) intent to deny the plaintiff equal protection of the laws or of equal privileges and immunities under the law, 3) injury or deprivation to the plaintiff. Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959); Scolnick v. Winston, 219 F. Supp. 836 (S.D.N.Y. 1963), aff'd per curiam sub nom. Scolnick v. Lefkowitz, 329 F.2d 716 (2d Cir.), cert. denied, 379 U.S. 825 (1964); Rhodes v. Houston, 202 F. Supp. 624 (D. Neb.), aff'd, 309 F.2d 959 (8th Cir. 1962), cert. denied, 372 U.S. 909 (1963). See generally C. Antieau, Federal Civil Rights Acts § 105 (1971).

3. The decision of the district court is unreported.

4. Griffin v. Breckenridge, 410 F.2d 817 (5th Cir. 1969), rev'd, 403 U.S. 88 (1971).

5. Collins v. Hardyman, 341 U.S. 651 (1951), noted in 100 U. Pa. L. Rev. 121 (1951). See also Frantz, The New Supreme Court Decisions on the Federal Civil Rights Statutes, 11 Law Guild Rev. 142 (1951).

6. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.

7. Id.

8. See Collins v. Hardyman, 341 U.S. 651, 662 (1951); President Grant's Message to Congress, March 23, 1871, Cong. Globe, 42d Cong., 1st Sess. 236 (1871); Id. at App. 67-73. See also Avins, The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment, 11 St. Louis U.L.J. 331 (1967).

9. 1 B. Schwartz, Statutory History of the United States: Civil Rights 591 (1970) [hereinafter cited as Schwartz].

10. Cong. Globe, 42d Cong., 1st Sess. 382-83, 475-76, 478, App. 14-40, 46-50, 67-315 (1871). Also expressed was the view that Congress could legislate against private acts when widespread lawlessness rendered a state helpless to enforce its own laws. Cong. Globe, 42d Cong., 1st Sess., 485-86. Furthermore, it was believed that Congress had power to regulate private conduct regardless of the condition of state law enforcement. Id. at 334. See also Avins, supra note 8.

11. Act of April 20, 1871, ch. 22, § 3, 17 Stat. 14.

12. Id. § 4. See generally Schwartz 606. In a Presidential Proclamation issued on May 3, 1871, President Grant made clear that while he was reluctant to use the Ku Klux Act powers, he would not hesitate to use them "for the purpose of securing to all citizens . . . the peaceful enjoyment of the rights guaranteed to them by the Constitution and laws." IX Bureau of National Literature, Messages and Papers of the Presidents 4088 (1897). The President invoked the Act in South Carolina by Presidential Proclamation on Oct. 17, 1871. Id. at 4090-92.

sions of the Ku Klux Act,[13] it is only natural that the interpretation given the criminal provisions by the courts would influence their interpretation of the civil sections.[14] When Congress compiled the Revised Statutes in 1875, however, the various civil and criminal provisions were separated.[15] It was in this separated form that the constitutionality of the Ku Klux Act was first tested in 1882.

In *United States v. Harris*[16] twenty defendants were indicted for conspiring to beat four Tennessee prisoners. On certificate[17] from the circuit court,[18] the Supreme Court, citing the *Slaughterhouse Cases*,[19] declared one of the Ku Klux Act's criminal provisions, Revised Statutes section 5519, unconstitutional because its coverage exceeded the scope of national citizenship rights.[20]

Foreshadowing the "state action" requirement announced a term later in the *Civil Rights Cases*,[21] the *Harris* court also pointed out that "there [was] no intimation that the State of Tennessee ha[d] passed any law or done any act forbidden by the Fourteenth Amendment."[22] Thus the Court struck down this

13. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13. The first legislation providing a remedy for conspiracy to interfere with the rights of national citizenship was a criminal statute passed during the initial stage of the Civil War. Act of July 31, 1861, ch. 33, 12 Stat. 284. This statute provided for either imprisonment or a fine from $500 to $5000, or both. Id. Civil penalities were added by the 1871 law. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 14. With the compilation of the Revised Statutes in 1875 the criminal and civil remedies were separated. Rev. Stat. § 5519 (1875) (repealed by Act of March 4, 1909, ch. 321, § 341, 35 Stat. 1154), a criminal statute, omitted civil penalties and the necessity for an overt act. This section was declared unconstitutional in United States v. Harris, 106 U.S. 629 (1883). Rev. Stat. § 1980 (1875) (now 42 U.S.C. § 1985 (1970)), a civil statute, omitted criminal penalties but was otherwise identical in wording to Rev. Stat. § 5519. Section 1980 was codified in 8 U.S.C. § 47(3) (1946) and in 42 U.S.C. § 1985(3) (1970).

14. 403 U.S. at 104-05.

15. Rev. Stat. §§ 1980 & 5519 (1875). See note 13 supra.

16. 106 U.S. 629 (1883).

17. Id. "The old circuit courts could certify a case when the two judges before whom it was heard were divided in opinion, and frequently the judges would disagree deliberately in order to bring a question to the Supreme Court." C. Wright, Federal Courts § 105 (2d ed. 1970).

18. 106 U.S. at 644.

19. 83 U.S. (16 Wall.) 36 (1873).

20. 106 U.S. at 644; accord, 83 U.S. at 79-80. See generally Abernathy, Expansion of the State Action Concept under the Fourteenth Amendment, 43 Cornell L.Q. 375 (1958); Du Bois, The Thirteenth, Fourteenth and Fifteenth Amendments, 9 Law. Guild Rev. 92 (1949); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949); Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 S. Cal. L. Rev. 208 (1957); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960).

21. 109 U.S. 3 (1883). See also Silard, A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee, 66 Colum. L. Rev. 855 (1966).

22. 106 U.S. at 639-40. Similarly in the Civil Rights Cases, 109 U.S. 3 (1883), the Court said: "[I]t is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported

criminal provision of the Ku Klux Act because, in its opinion, there was no basis for it in the fourteenth amendment which was directed at state rather than individual action.[23] Congress had in fact gone beyond its constitutional power when it attempted to prevent private individuals from violating the rights of others when those rights were derived from state law.

Another defect in Revised Statute section 5519, *i.e.*, its coverage of both federal and state rights, was omitted when Congress enacted section 241 of Title 18, United States Code,[24] which provided criminal penalties for conspiracies to violate federal rights. For seventy years following the *Harris* decision, the cases brought under the remaining criminal provisions of the Ku Klux Act involved rights founded upon a federal statute[25] or rights necessary for the proper functioning of the national government.[26]

Any doubts that remained concerning the constitutionality of section 241—the closest remaining criminal analogue to section 1985—were dispelled in 1951 by the Supreme Court opinion in *United States v. Williams*.[27]

In *Williams* the Supreme Court, by a plurality decision, affirmed reversals of criminal convictions of private investigators who had obtained confessions by physical force.[28] Stating that the criminal section covered only conspiracies involving national citizenship rights,[29] Mr. Justice Frankfurter concluded that the *Williams* defendants had not interferred with any such right.[30] Significantly, Mr. Justice Frankfurter also stated that the section was intended "to reach private action rather than officers of a State acting under its authority."[31]

While an analogy can be drawn between the Ku Klux Act's criminal provi-

by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong . . . ." Id. at 17.

23. 106 U.S. at 639.

24. 18 U.S.C. § 241 (1970). "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—They shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ." Id. The predecessor to section 241, Rev. Stat. § 5508 (1875) has been held constitutional. Ex parte Yarbrough, 110 U.S. 651 (1884). See also United States v. Mosley, 238 U.S. 383 (1915); Baldwin v. Franks, 120 U.S. 678 (1887); United States v. Waddell, 112 U.S. 76 (1884).

25. E.g., United States v. Waddell, 112 U.S. 76 (1884) (depriving a citizen of rights under the Homestead Act).

26. E.g., In re Quarles, 158 U.S. 532 (1895) (conspiracy to kill a citizen informing a United States Marshal of liquor violations); Smith v. United States, 157 F. 721 (8th Cir. 1907), cert. denied, 208 U.S. 618 (1908) (right to be free from involuntary servitude).

27. 341 U.S. 70 (1951).

28. Id. at 82.

29. Id. at 77-78. See also Feuerstein, Civil Rights Crimes and the Federal Power to Punish Private Individuals for Interference with Federally Secured Rights, 19 Vand. L. Rev. 641 (1966); Comment, Collins v. Hardyman: More on the Civil Rights Act, 46 Ill. L. Rev. 931 (1952).

30. 341 U.S. at 82.

31. Id. at 76.

sions and its civil counterpart, the *Williams* rationale was ignored when the Supreme Court considered the Ku Klux Act's civil remedies in *Collins v. Hardyman*[32] on the very same day. In *Collins*, a Los Angeles Democratic club called a public meeting to protest the Marshall Plan and to initiate a petition campaign. The meeting was broken up and the participants assaulted by persons wearing the "disguise" of members of the American Legion.[33] Plaintiffs brought an action for the denial of their constitutional rights under then section 47(3) of Title 8, United States Code,[34] the direct predecessor of section 1985(3). By construing the statute as applying only in cases where there was state involvement, the Supreme Court avoided ruling on its constitutionality.[35] While stating that "private discrimination [was] not inequality before the law unless there [was] some manipulation of the law . . . ."[36] the Court recognized the possibility of instances where the section would be applicable to private citizens.[37]

Dissenting in *Collins*, Mr. Justice Burton criticized the application of the state involvement theory to the Ku Klux Act's civil provision.[38] He pointed out that "[w]hen Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms."[39]

Thus, as a result of the *Collins* decision, it was generally thought that a civil action under section 1985(3) for violation of an individual's civil rights was

32. 341 U.S. 651 (1951). Following the appellate court's decision in Collins, 183 F.2d 308 (9th Cir. 1950), another lower court also disagreed with the view that the predecessor of 42 U.S.C. § 1985(3) (1970) was inapplicable to individuals in the absence of state action. In Robeson v. Fanelli, 94 F. Supp. 62 (S.D.N.Y. 1950), Paul Robeson, the controversial black singer, was granted a cause of action for damages arising out of the 1949 Peekskill riots which occurred when his concert was interrupted by local residents opposing his political views. Contra, Downie v. Powers, 193 F.2d 760 (10th Cir. 1951). "It follows that there can be no conspiracy of private citizens to . . . deprive a person of his constitutionally protected rights, unless such conspiracy results in a complete breakdown of law and order in which the conspirators take the law into their own hands, thereby converting the law of the mob into the law of the State. Then, and then only . . . can redress be given . . . ." Id. at 765.

33. 341 U.S. at 654.

34. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13, as amended, 42 U.S.C. § 1985(3) (1970). See 341 U.S. at 652.

35. 341 U.S. at 662.

36. Id. at 661.

37. Id. at 662. "We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation . . . of equal privileges and immunities under laws. Indeed, the post-Civil War Ku Klux Klan, against which this Act was fashioned, may have, or may reasonably have been thought to have, done so." Id. The Collins Court also stated that it was leaving open the question whether Congress could provide a legislative remedy against private acts of discrimination. Id. at 662-63.

38. Id. at 663-64.

39. Id. at 664. Attorneys involved in the civil rights movement were disappointed by the holding in Collins. See, e.g., Colley, Civil Actions for Damages Arising out of Violations of Civil Rights, 17 Hastings L.J. 189 (1965). "For all practical purposes, we must consider civil actions for damages against private persons under the Federal Civil Rights Act to be outside the realm of litigation in which success may be anticipated." Id. at 215.

possible only if the conspiracy was committed under color of state law[40]—either by a state government official,[41] a private citizen cooperating with a state official,[42] or by a conspiracy of private individuals which impairs the enforcement power of local police authorities.[43]

However, there were lower federal courts that refused to follow the Supreme Court's requirement of state involvement. The Court of Appeals for the Seventh Circuit in *Miles v. Armstrong*[44] declared that the civil section included conspiracies of private individuals "irrespective of whether the conspirators proceed under color of authority of the state or otherwise."[45] In 1959, the Court of Appeals for the Second Circuit in *Spampinato v. M. Breger & Co.*[46] also concluded that "[s]ection 1985 of the Civil Rights statutes applie[d] to a conspiracy of private persons . . . ."[47]

By its decision in *Griffin v. Breckenridge*[48] the Supreme Court has now removed the "state involvement" requirement and has in fact adopted the lower federal court views expressed in *Miles* and *Spampinato*. In *Griffin* the question presented to the Court was whether section 1985(3) reached a private conspiracy and whether Congress possessed the power to enact such a statute.[49]

Mr. Justice Stewart, speaking for the Court, declared that the statute's wording fully encompassed the conduct of private persons.[50] Referring to companion legislation[51] which included specific references to "state action," Mr. Justice Stewart noted that "the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985 (3) of all deprivation of 'equal protection of the laws' . . . whatever their source."[52]

40. See C. Antieau, Federal Civil Rights Acts § 102 (1971). See generally Henig v. Odorioso, 385 F.2d 491, 494-95 (3d Cir. 1967), cert. denied, 390 U.S. 1016 (1968); Williams v. Yellow Cab Co., 200 F.2d 302, 307 (3d Cir. 1952), cert. denied, 346 U.S. 840 (1953); Bryant v. Donnell, 239 F. Supp. 681, 686-87 (W.D. Tenn. 1965); Swift v. Fourth Nat'l Bank, 205 F. Supp. 563, 566 (M.D. Ga. 1962).

41. E.g., Burt v. New York, 156 F.2d 791 (2d Cir. 1946) (conspiracy of state officials to deny architect's application for a particular construction permit).

42. E.g., Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) (health commissioner and union officials conspired to have doctor removed from city hospital); Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958) (conspiracy by railroad and public service commission to maintain segregated facilities); McShane v. Moldovam, 172 F.2d 1016 (6th Cir. 1949) (justice of the peace, constable and witness conspiring to deny plaintiff's right to fair trial).

43. E.g., Clemmons v. CORE, 201 F. Supp. 737 (E.D. La. 1962), rev'd, 323 F.2d 54 (5th Cir. 1963), cert. denied, 375 U.S 992 (1964) (civil disobedience and encouragement of outside agitators).

44. 207 F.2d 284 (7th Cir. 1953).

45. Id. at 286.

46. 270 F.2d 46 (2d Cir. 1959), cert. denied, 361 U.S. 944 (1960).

47. Id. at 49.

48. 403 U.S. 88 (1971).

49. Id. at 92-93.

50. Id. at 99.

51. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, as amended, 42 U.S.C. § 1983 (1970).

52. 403 U.S. at 97 (emphasis deleted).

The Court also referred to the similarity between the statute's wording and that of the fourteenth amendment and concluded that the wording had caused the Court's attention to focus "upon identifying the requisite 'state action' and defining the offending forms of state law and official conduct."[53] The Court stated, however, that "there [was] nothing inherent in the [statute] that require[d] the action working the deprivation to come from the State."[54]

The Court did not view the fourteenth amendment as the sole basis for congressional authority[55] in this area although the Act was originally entitled: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[56] In the Court's opinion Congress also received its authority to enact section 1985(3) from the thirteenth amendment[57] and the federally protected right of interstate travel[58]—although the Court did not exclude other bases for congressional power.

It now appears that, in the light of *Griffin*, there is a new weapon to counter private racial discrimination.[59] The approach of the Supreme Court during the last twenty years to the other civil rights statutes enacted during Reconstruction has been to " 'accord [them] a sweep as broad as [their] language.' "[60] To single out section 1985 for different treatment would be especially indefensible in view of the Court's attitude toward section 241 of Title 18.[61] *Griffin* will provide relief in those cases where the state courts are not receptive to civil actions brought by a member of a racial minority.[62] Previously under

53. Id.

54. Id.

55. Id. at 106-07.

56. Act of April 20, 1871, ch. 22, 17 Stat. 13.

57. 403 U.S. at 105. Referring to its decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court termed the conduct which the Ku Klux Act was intended to remedy as badges and incidents of slavery. 403 U.S. at 105. "We can only conclude that Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." Id.

58. 403 U.S. at 105. The right of interstate travel does not depend on the fourteenth amendment and is assertable against private individuals as well as against "state action." Id. Mr. Justice Harlan, in his concurring opinion, found it unnecessary to rely on this right. Id. at 107.

59. See Niles, Civil Actions for Damages Under the Federal Civil Rights Statutes, 45 Tex. L. Rev. 1015 (1967); Shapo, Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond, 60 Nw. U.L. Rev. 277 (1965); Comment, Federal Civil Action Against Private Individuals for Crimes Involving Civil Rights, 74 Yale L.J. 1462 (1965); 23 Vand. L. Rev. 413 (1970).

60. 403 U.S. at 97 (citations omitted).

61. 18 U.S.C. § 241 (1970).

62. For discussion of state remedies for discrimination see, e.g., Auerbach, The 1969 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioner's Model Anti-Discrimination Act: A Comparative Analysis and Evaluation, 55 Minn. L. Rev. 259 (1970); Page, State Law and the Damages Remedy under the Civil Rights Act: Some Problems in Federalism, 43 Denver L. Rev. 480 (1966); Poole, Statutory Remedies for the Protection of Civil Rights, 32 Oregon L. Rev. 210 (1953); Comment, Private Remedies

federal and state criminal statutes the initiative for prosecution was upon the government.[63] Now, it is no longer necessary for the individual to depend upon the government. The plaintiff has recourse to the federal courts to satisfy his grievance in a tort action. The Court's reliance on the federally protected right to travel[64] may mark a new direction in the Court's view of the extent of civil rights legislation. This decision may well open the way for action by other minorities—not necessarily racial—to remedy by civil action acts of discrimination against them as a group.

Constitutional Law—Closing of All Municipal Pools Held Not Violative of Equal Protection Even Where Integration is Thereby Avoided.—In 1962 three Negro plaintiffs brought a class action claiming that certain public facilities in Jackson, Mississippi had been closed to them because of their race. The district court entered a judgment declaring that such segregation deprived the plaintiffs of their right to use unsegregated public facilities,[1] but declined to issue an injunction ordering integration.[2] Upon conclusion of the appellate procedures,[3] the city began to integrate its public recreational facilities. However, it chose not to integrate its swimming pools. Rather, it closed the four pools that it owned and surrendered its lease to the one pool that it had rented. Plaintiffs brought an action to compel the city to reopen the pools on an integrated basis, claiming that the closings denied them equal protection of the law. The district court

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under State Equal Rights Statutes, 44 Ill. L. Rev. 363 (1949). See generally MacDonald, Race Relations and Canadian Law, 18 U. Toronto Faculty L. Rev. 115 (1960); Vines, Southern State Supreme Courts and Race Relations, 18 W. Pol. Q. 5 (1965). "The decision record of state courts justifies the unfavorable perceptions which led Negroes in large part to avoid them." Id. at 17. During the 1954-63 period, only 29.2% of race relation cases in the South were decided favorably to Negro parties. Id. at 9. Mississippi was below the average with 23.8%. Id. at 11. Likewise, of those cases reversed by a higher state court, 93.8% had favored Negroes in the lower court. Id. at 17. By contrast, Negroes received substantially better treatment from the federal courts in the South. Vines, Federal District Judges and Race Relations Cases in the South, 26 J. Pol. 337 (1964).

63. Criminal statutes by definition are enforced by the government. See generally R. Perkins, Criminal Law § 1(b) & (c) (2d ed. 1969).

64. See Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966), noted in 80 Harv. L. Rev. 124 (1966). See also Frantz, Federal Power to Protect Civil Rights: The Price and Guest Cases, 4 Law in Transition Q. 63 (1967); Poehner, Fourteenth Amendment Enforcement and Congressional Power to Abolish the States, 55 Calif. L. Rev. 293 (1967). See generally Du Bois, The Thirteenth, Fourteenth and Fifteenth Amendments, 9 Law. Guild Rev. 92 (1949).

1. Clark v. Thompson, 206 F. Supp. 539, 542 (S.D. Miss. 1962), aff'd per curiam, 313 F.2d 637 (5th Cir.), cert. denied, 375 U.S 951 (1963).

2. Id. at 542. The court was of the opinion that the individual defendants in the case were "all outstanding, high class gentlemen and . . . [would] not violate the terms of the declaratory judgment issued . . . ." Id. at 543.

3. Clark v. Thompson, 313 F.2d 637 (5th Cir.), cert. denied, 375 U.S. 951 (1963).

found that the closings were justified on the grounds of public safety and that "the pools could not be operated economically on an integrated basis."[4] The court of appeals affirmed.[5] On certiorari, the Supreme Court affirmed, holding that the city of Jackson could constitutionally close its pools even though it thereby avoided integrating them. *Palmer v. Thompson*, 403 U.S. 217 (1971).

After the Court held in *Brown v. Board of Education*[6] that segregated school facilities violated the equal protection clause, that rationale was quickly extended in succeeding cases to public recreational facilities.[7] Some public officials have employed various techniques to avoid the impact of these decisions, including the closing of schools ordered integrated,[8] the selling or closing of public recreational facilities[9] or the enactment of legislation making it more difficult for minority groups to achieve equality.[10]

In *Bush v. Orleans Parish School Board*,[11] a Louisiana district court questioned the validity of a series of Louisiana statutes which provided that the Governor of the state could close any school ordered integrated,[12] close all the schools in the state if one was integrated,[13] or close any school which he felt was threatened with disruption or violence.[14] The court declared these statutes unconstitutional since their sole purpose was to continue segregation in the schools.[15] The Supreme Court affirmed without opinion.[16] Undeterred by the *Bush* result, the Louisiana legislature again tried to maintain segregation in its public schools. This time it passed a statute allowing every local school board to close its schools after submitting the issue to a local election but making no mention of racial integra-

4. Palmer v. Thompson, 403 U.S. 217, 219 (1971).

5. Palmer v. Thompson, 419 F.2d 1222 (5th Cir. 1969), aff'd, 403 U.S. 217 (1971).

6. 347 U.S. 483 (1954).

7. E.g., Evans v. Newton, 382 U.S. 296 (1966) (public park); Watson v. City of Memphis, 373 U.S. 526 (1963) (parks, playgrounds, community centers, golf courses); New Orleans City Park Improvement Ass'n v. Detiege, 252 F.2d 122 (5th Cir.) (per curiam), aff'd per curiam, 358 U.S. 54 (1958) (city park); City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956), cert. denied, 353 U.S. 922 (1957) (beach and swimming pool).

8. E.g., Griffin v. County School Bd., 377 U.S. 218 (1964); Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (E.D. La. 1960) (per curiam), aff'd per curiam, 365 U.S. 569 (1961); see School Closing Plans, 3 Race Rel. L. Rep. 807 (1958).

9. E.g., City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960) (public parks closed); Walker v. Shaw, 209 F. Supp. 569 (W.D.S.C. 1962) (skating rinks closed); Wood v. Vaughan, 209 F. Supp. 106 (W.D. Va. 1962), aff'd, 321 F.2d 474 (4th Cir. 1963) (swimming pools closed); Tonkins v. City of Greenboro, 162 F. Supp. 549 (M.D.N.C. 1958), aff'd per curiam, 276 F.2d 890 (4th Cir. 1960) (swimming pool sold).

10. E.g., James v. Valtierra, 402 U.S. 137 (1971), noted in 40 Fordham L. Rev. 379 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

11. 187 F. Supp. 42 (E.D. La. 1960) (per curiam), aff'd per curiam, 365 U.S. 569 (1961).

12. No. 256, [1958] La. Acts 831 (repealed 1960).

13. No. 495, [1960] La. Acts 946 (repealed 1960).

14. No. 542, [1960] La. Acts 1004 (repealed 1960).

15. 187 F. Supp 42, 44-45.

16. 365 U.S. 569 (1961) (per curiam).

tion.[17] In *Hall v. St. Helena Parish School Board*,[18] the district court admitted that the statute seemed inoffensive on its face.[19] The court said, however, that no matter what the express terms of a statute may be, "particularly in the area of racial discrimination, courts must determine its purpose as well as its substance and effect."[20] It then held that the statute was part of a legislative scheme to continue segregation and was therefore unconstitutional.[21] The Supreme Court again affirmed without opinion.[22]

In *Griffin v. County School Board of Prince Edward County*,[23] the Supreme Court finally came to grips with the school closing issue. The State of Virginia, in order to avoid the consequences of the *Brown* decision, had enacted a legislative scheme similar to Louisiana's and instituted a so called "freedom of choice program."[24] Laws relating to compulsory school attendance were repealed;[25] instead school attendance was made a matter of local option.[26] The Supervisors of the County School Board of Prince Edward County decided not to levy school taxes[27] and as a result all the schools in the county were closed.[28] To fill the

17. La. Rev. Stat. § 17:350.1-.14 (1963).

18. 197 F. Supp. 649 (E.D. La. 1961) (per curiam), aff'd per curiam, 368 U.S. 515 (1962). The School Board of St. Helena Parish was under a court order to integrate its schools. In response to this order and similar orders directed at various other school boards, the state legislature enacted a local option law (La. Rev. Stat. § 17:350.1 (1963)) as part of a scheme which provided that after the schools were closed the board would lease the school buildings and facilities to educational cooperatives which had been specifically created for this purpose. These cooperatives would then operate the "private" schools which were financed by tuition grants payable from state and local funds. The local school board supervised the program by administering the grant-in-aid program. Id. at 653-54.

The district court declared that the law allowing schools to be closed was unconstitutional on two counts: First, it deprived children of their constitutional right to attend integrated public schools; and second, since the state was still operating public schools elsewhere, the application of the law to St. Helena parish alone constituted discrimination against all the residents of that parish. Id. at 651, 655-56.

19. Id. at 652.

20. Id.

21. Id. at 655.

22. 368 U.S. 515 (1962) (per curiam).

23. 377 U.S. 218 (1964).

24. Ch. 72, § 1, [1959] Va. Acts Ex. Sess. 170. This statute provided that a parent, instead of sending his child to a public school, could enroll him in a private school. A scholarship program was instituted whereby children attending private schools were entitled to a grant of $125 or $150 per school year. Ch. 448, § 2, [1960] Va. Acts 704. Local governing bodies were authorized to provide for similar grants. Id. § 3. In Griffin after the local public schools were closed, a private group began to operate private schools exclusively for white children. These schools were subsidized by state and local tuition grants. 377 U.S. at 223.

25. Ch. 2, [1959] Va. Acts Ex. Sess. 4.

26. Ch. 72, § 1, [1959] Va. Acts Ex. Sess. 170.

27. In 1962 the Supreme Court of Appeals of Virginia had held that neither the state constitution nor state statutes compelled the school board to levy taxes to support free public schools. Griffin v. Board of Supervisors, 203 Va. 321, 124 S.E.2d 227 (1962).

28. 377 U.S. at 222-23.

vacuum, a system of private segregated schools was formed.[29] These schools were the indirect recipients of financial assistance in the form of state and county tuition grants payable to the parents of students at those institutions.[30] At the same time, the public schools in all the other counties of Virginia remained open. The Court admitted that a state may treat one county differently from the others.[31] The implication seems to have been that had the schools in the county been closed for a legitimate governmental reason the act would have been constitutional.[32] The Court, however, went on to say that there was no question that the schools had been closed to avoid integrating them. It added: "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional."[33] Thus, the Court decided that under the circumstances the closing was in violation of the equal protection clause[34] and that the district court had the power to compel the school board to levy taxes to reopen and maintain the schools.[35]

States have also attempted to avoid the requirements of the equal protection clause in the area of housing. Thus, in 1964 California passed a constitutional amendment[36] which provided that the state could not deny or limit in any way the right of any person to sell or lease his real property to whomever he wished. This had the effect of invalidating California's extensive fair housing legislation.[37] In *Reitman v. Mulkey*[38] the United States Supreme Court, affirming the decision of the California supreme court, held that this provision violated the equal protection clause in that the immediate effect of the amendment was the authorization and the "encouragement" of private discrimination by the state.[39] The dissenters in *Reitman*, however, argued that a legislative enactment such as the one in question "should not be struck down by the judiciary under the Equal

29. Id. at 223.
30. Id.
31. Id. at 230.
32. Id. at 231.
33. Id.
34. Id. at 232.
35. Id. at 233. The Court had previously described the operation of public schools as "perhaps the most important function of state and local governments." Brown v. Board of Educ., 347 U.S. 483, 493 (1954).
36. Cal. Const. art. I, § 26.
37. Some of the statutes affected by the amendment were the Unruh Civil Rights Act, Cal. Civ. Code § 51 (West Supp. 1971), which guaranteed all citizens equal rights to all places of public accommodations, and the Rumford Fair Housing Act, Cal. Health & Safety Code §§ 35700-44 (West 1967), which prohibited, inter alia, discrimination in the sale or rental of a private dwelling containing more than four units. Id. § 35720(5). Since both of these statutes were directed at privately owned real property, the California supreme court stated that the amendment, by providing that the state could not enact such legislation, had invalidated these acts. Mulkey v. Reitman, 64 Cal. 2d 529, 534-35, 413 P.2d 825, 829, 50 Cal. Rptr. 881, 885 (1966), aff'd, 387 U.S. 369 (1967).
38. 387 U.S. 369 (1967).
39. Id. at 381.

Protection Clause without persuasive evidence of an invidious purpose or effect."[40] In their opinion no such persuasive evidence was present in *Reitman*. An examination of this decision, therefore, indicates that the majority and the minority differed not on the proper standard to apply but on whether the evidence in the case satisfied the "invidious purpose" standard.[41]

Two years later the Supreme Court struck down a similar legislative technique in *Hunter v. Erickson*.[42] The city charter of Akron, Ohio had been amended to provide that before any fair housing legislation could be enacted by the city council the approval of a majority of the voters in a regular or general election was required.[43] While the court noted that the law applied to all groups, it pointed out that the referendum requirement was restricted to fair housing legislation.[44] Furthermore, the Court observed that even though the law on its face treated all groups alike,[45] in reality its impact fell on a minority in violation of the equal protection clause.

In *Palmer v. Thompson*[46] the Supreme Court declined to follow the expansive trend of these recent equal protection cases by choosing to accept at face value the purported reasons for the state action[47] and refusing to scrutinize the validity thereof as it had done in prior cases.[48]

The plaintiffs in *Palmer* argued that decisions such as *Bush, Griffin* and *Reitman* indicated that the city of Jackson could not close its pools under the cir-

40. Id. at 391 (Harlan, Black, Clark & Stewart, JJ., dissenting).

41. See id. at 390-91 (dissenting opinion). The Supreme Court has used this standard to strike down discriminatory state action. See, e.g., Williams v. Illinois, 399 U.S. 235, 242 (1970) ("'[A] law nondiscriminatory on its face may be grossly discriminatory in its operation'" and thus prohibited by the equal protection clause.); Williams v. Rhodes, 393 U.S. 23, 30 (1968) ("'[I]nvidious' distinctions cannot be enacted without a violation of the Equal Protection Clause."); Levy v. Louisiana, 391 U.S. 68, 71 (1968) ("While a State has broad power when it comes to making classifications . . . it may not draw a line which constitutes an invidious discrimination against a particular class." (citation omitted)); Reynolds v. Sims, 377 U.S. 533, 563 (1964) ("[T]he Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'"). See also Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1087-1104 (1969).

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

43. Id. at 387.

44. Id. at 390-91.

45. Id.

46. 403 U.S. 217 (1971).

47. The fourteenth amendment of the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The amendment by its terms applies only to the states. Ever since the Civil Rights Cases, 109 U.S. 3 (1883), the Supreme Court has held that before a violation of this amendment can occur, state action must be found. While it can be argued that the requirement has been somewhat diluted (see, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)), it still stands. See generally Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960). In Palmer there was no question but that the closing of the pools constituted state action. 403 U.S. at 220.

48. 403 U.S. at 224-25.

cumstances.[49] Mr. Justice Black, writing for the majority, did not agree. In a footnote he denied the relevance of *Bush*[50] and distinguished that case by pointing out that the laws therein declared unconstitutional were not intended to defeat public education but to continue it on a segregated basis.[51] Justice Black treated the *Griffin* and *Reitman* decisions more extensively. While he agreed that these two cases could "plausibly support [the plaintiffs'] argument,"[52] he proceeded to distinguish them on factual grounds. He indicated that the state action declared invalid in *Griffin* was part of a total legislative scheme to continue segregated education. In that case the public officials had not totally withdrawn from the public education field but were instead assisting the allegedly private schools.[53] In *Palmer*, on the other hand, there was no evidence whatsoever that the city continued to be involved directly or indirectly in the operation of the pools; it had completely severed all its ties.[54] In addition, according to Justice Black, *Reitman* was not relevant to the case before the Court since, in that case, the state had encouraged private discrimination while in *Palmer* there was no such finding. Furthermore, there was no indication that the theory of state "encouragement" of racial discrimination had been considered by the lower court.[55]

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49. Id. at 221.

50. Id. n.6.

51. Id. Mr. Justice White, dissenting, replied that Bush was in no way predicated on the fact that education was an important public function. Id. at 262 n.16 (dissenting opinion). Even assuming that it was, he argued that there is no indication that public recreation is not also an important public function. Id. While Mr. Justice White did not specifically address himself to the second part of Justice Black's argument, he impliedly did so when he pointed out that one of the laws declared unconstitutional in Bush had authorized the Governor to close all the schools if one was integrated. Id. at 261. He also cited Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961) (per curiam), aff'd per curiam, 368 U.S. 515 (1962), in which the closing of all the schools in one particular district to avoid integration was declared unconstitutional. 403 U.S. at 262-63; see notes 18-22 supra and accompanying text.

52. 403 U.S. at 221.

53. Id. at 221-22.

54. Id. at 222. Again Mr. Justice White answered Mr. Justice Black's argument. He agreed that the Griffin case could be distinguished as Mr. Justice Black had done "but only if one ignore[d] its basic rationale and the purpose and direction of [the] Court's decisions since Brown." Id. at 264 (dissenting opinion). He stressed that Griffin indicated that the underlying reasons for official acts had to be examined in determining the constitutionality of the acts. Id. He added that Griffin stood for the proposition that fourteenth amendment rights could not be abrogated either directly or indirectly by " 'evasive schemes for segregation whether attempted 'ingeniously or ingenuously'.' " Id. at 265. He therefore concluded that "[s]tate action predicated solely on opposition to a lawful court order to desegregate is a denial of equal protection of the laws." Id.

55. Id. at 223. Mr. Justice White did not expressly reply to this argument. However, he did opine that by closing its pools the city had expressed its official position that "Negroes are so inferior that they are unfit to share with whites this particular type of public facility . . . ." Id. at 266 (dissenting opinion). He also considered it "an official endorsement of the notion that Negroes are not equal to whites . . . ." Id. at 266-67. This suggests that

It is evident that none of the cases so far discussed controlled the *Palmer* fact pattern. *Bush, Griffin, St. Helena, Hunter* and *Reitman* all dealt, in one form or another, with techniques designed to avoid the consequences of the equal protection requirement.[56] The crucial question thus became whether *Palmer* presented just one more evasive tactic or whether the pools were closed to achieve legitimate governmental goals.

As far back as 1949, it was pointed out that once the Supreme Court relied on the equal protection clause to invalidate discriminatory state action, it would be necessary for it to get "involved in the criticism of legislative purpose."[57] One commentator has recently remarked that in this area the Court has been guilty of a "traditional confusion" which has "achieved disaster proportions."[58] It would not be inaccurate to say that the majority opinion in *Palmer* partakes of this "traditional confusion." After conceding that the motives of the Louisiana legislature were considered in *Bush*,[59] the Court went on to state the traditional arguments against considering motivation: First, it would be difficult to determine legislative motivation,[60] and second, such an endeavor would be futile in view of the fact that a law once declared unconstitutional because of illicit motivation may very well be "valid as soon as the legislature or relevant governing body repassed it for different reasons."[61] Past cases[62] which seemed to have considered motivation were distinguished by the Court. Mr. Justice Black argued that those cases were concerned not with motivation but with "the actual effect of the enactments."[63] While he conceded that there was "[s]ome evidence in the record"[64] to support plaintiffs' argument that the pools were closed to avoid integration, he pointed out that there was "substantial evidence" to support the conclusion that the pools were closed simply because "they could not be operated safely and economically on an integrated basis."[65] He concluded that, in any event, it was "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."[66] Furthermore, the state action in *Palmer* affected blacks and whites in the same manner.[67] The record indicated

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Mr. Justice White believed that the Palmer fact pattern presented a strong case for a finding of state "encouragement" of private racial discrimination.

56. See notes 11-45 supra and accompanying text.

57. Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 357 (1949).

58. Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1207 (1970).

59. 403 U.S. at 221 n.6.

60. Id. at 224.

61. Id. at 225.

62. The Court cited Griffin v. County School Bd., 377 U.S. 218 (1964), and Gomillion v. Lightfoot, 364 U.S. 339 (1960).

63. 403 U.S. at 225.

64. Id.

65. Id.

66. Id.

67. Id.

that the city of Jackson was no longer maintaining public pools.[68] Hence, *Palmer* was not a case "where whites [were] permitted to use public facilities while blacks [were] denied access"[69] or "where a city [was] maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational . . . activities."[70]

In his dissenting opinion[71] in which Justices Brennan and Marshall joined, Mr. Justice White cited a series of cases in which proof of forbidden racial motivation was held to render a particular conduct unconstitutional.[72] In his opinion the *Griffin* holding demonstrated that "the reasons underlying certain official acts [were] highly relevant in assessing the constitutional validity of those acts."[73] Tracing the various techniques adopted by states to avoid the impact of *Brown*, Justice White pointed out that the city of Jackson in particular had consistently opposed integration. Thus, in 1963, the city was still claiming that segregated public facilities, if equal, were constitutional.[74] In view of the city's past conduct and public statements made by its mayor in reaction to the ruling by the district court that the pools could not be operated on a segregated basis,[75] it appeared clear to Mr. Justice White that closing the pools was just another evasive technique.[76]

Furthermore, Mr. Justice White was unpersuaded by the argument that the pool closings had an equal effect on blacks and whites, stressing that this argu-

68. Id.

69. Id. at 220.

70. Id. In Palmer the plaintiffs also argued that, as interpreted by the Court, the purpose of the thirteenth amendment was to prohibit slavery and all of its "badges and incidents" and that the denial of the right to swim in the same facilities as whites constituted a "badge or incident" of slavery proscribed by the thirteenth amendment. Id. at 226. The Court rejected this argument stating that to interpret the amendment in such a way as to invalidate the pool closings in Palmer "would severely stretch its short simple words and do violence to its history." Id. The Court denied that it had the authority under the thirteenth amendment to declare new laws for the operation of swimming pools throughout the land. It noted that by the terms of the amendment, Congress was authorized to outlaw "badges and incidents" of slavery and that Congress had passed no law controlling the operation of recreational activities. Id. at 227.

71. Id. at 240.

72. Id. at 241-43, citing Griffin v. Breckenridge, 403 U.S. 88 (1971); Younger v. Harris, 401 U.S. 37 (1971); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963).

73. 403 U.S. at 264 (dissenting opinion).

74. Id. at 247.

75. Mr. Justice White quoted at length from newspaper reports indicating that Mayor Thompson was completely committed to segregation in the city's public facilities. Id. at 250-51. The pools were originally closed in 1963, ostensibly due to some " 'minor water difficulty'." Id. at 251. However, when the present litigation was initiated, this " 'minor water difficulty' " was forgotten and Mayor Thompson and the city Parks Director submitted similar affidavits to the district judge, indicating that the pools were closed because they "could not be operated peacefully, safely or economically on an integrated basis." Id. at 253.

76. See id. at 241.

ment had been rejected by the Court on several occasions.[77] In his opinion, the pool closings were an official assertion that blacks were unfit to swim in the same facility as whites, and in effect, penalized blacks for having attacked segregation in public recreational facilities through legal channels.[78]

The concurring opinions of Chief Justice Burger and Mr. Justice Blackmun emphasized a different factor. Both Justices were disturbed by the fact that during oral argument an attorney for the plaintiffs stated that the city of Jackson would be "locked in" to its pool operations no matter what the economic losses.[79] Chief Justice Burger was of the opinion that the Court was being asked to hold that "the Constitution *requires* that public swimming pools, once opened, may not be closed."[80] This, understandably enough, he was unwilling to do. However, as Mr. Justice Marshall pointed out in his dissenting opinion, the Court was not "bound by any admission of an attorney at oral argument as to his version of the law."[81] Furthermore, as Mr. Justice White indicated, there would seem to be no problem in allowing a pool closing where a showing of good faith economic or other nonracial factors is made.[82]

Two basic factors seem to underlie the *Palmer* decision. First, swimming pools are not as important as public education[83] and second, the city of Jackson had completely withdrawn from the operation of the pools.[84] Although the first factor will exclude schools from the *Palmer* rationale, the case will have an impact on recreational facilities such as parks, libraries and golf courses. Under the *Palmer* reasoning a city may close all these facilities and by doing so, avoid integration. Thus it seems clear that *Palmer* signals a retreat[85] from the further expansion of the equal protection clause in the area of racial discrimination. While the Court has never stated that there is a constitutional right to recreation,[86] it has applied constitutional standards to the operation of recreational activities.[87] In analogous situations, the Court has imposed constitutional requirements upon the termina-

77. Id. at 265-66, citing Hunter v. Erickson, 393 U.S. 385 (1969), and Brief for Respondent at 57-84, Griffin v. County School Bd., 377 U.S. 218 (1964).

78. 403 U.S. at 268-69. Mr. Justice White did not respond directly to the "indicia" of slavery argument (supra note 70) but he did stress that the state action in Palmer stigmatized Negroes by branding them as inferior. Id. at 268.

79. Id. at 228, 230 (concurring opinions).

80. Id. at 228.

81. Id. at 273 (dissenting opinion).

82. Id. at 260.

83. Id. at 221 n.6; see text accompanying note 33 supra.

84. 403 U.S. at 222, 225.

85. Another recent case in which the Court has declined to interpret the equal protection clause broadly is James v. Valtierra, 402 U.S. 137 (1971). But see Graham v. Richardson, 403 U.S. 365 (1971).

86. See 403 U.S. at 220; Willie v. Harris County, 202 F. Supp. 549, 552 (S.D. Tex. 1962). But note that Mr. Justice Douglas in his dissent in Palmer suggested that while the right to recreation is not explicitly mentioned in the Constitution, it may very well be one of those "retained" rights alluded to in the ninth amendment. As such it cannot be unconstitutionally burdened. The state, therefore, cannot close its pools to resist integration. 403 U.S. at 233-40.

87. See cases cited in note 7 supra.

tion of benefits even though such benefits were not a matter of constitutional right.[88] In *Palmer* the Court has refused to apply constitutional standards at all, accepting instead the defendant's characterization of its actions as being economically motivated. Such acquiescence clearly marks a new milestone on the road away from judicial activism.

Constitutional Law—Libel—Expansion of the *New York Times Co. v. Sullivan* Standard to Include State Civil Libel Action Brought by a Private Individual Involved in an Event of General or Public Interest.—Petitioner, a distributor of nudist magazines in the Philadelphia metropolitan area, was arrested by the Philadelphia police for a violation of the municipal obscenity laws. He unsuccessfully sought to enjoin the state prosecution against him for dealing in obscene publications.[1] After subsequent acquittal of the criminal charges, he filed a civil diversity action against the respondent in the United States District Court for the Eastern District of Pennsylvania, seeking damages for libel.[2] The charge of libel stemmed from broadcasts by respondent's radio station of stories of petitioner's arrest and his lawsuit against city officials. The court of appeals reversed the jury verdict for petitioner, holding that the standard of *New York Times Co. v. Sullivan*[3] was applicable despite the fact that the petitioner was not a public figure, and that the petitioner's proof was inadequate as a matter of law.[4] The Supreme Court affirmed. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

The guarantee of freedom of speech and press in the Bill of Rights[5] is the most obvious manifestation of the unfavorable regard in which the law of libel has been held in this country.[6] Nonetheless the English common law of libel was continued in the common law of this country after the revolution,[7] and the

88. E.g., Goldberg v. Kelly, 397 U.S. 254 (1970), where the Court stated that even though the receipt of public assistance was a "privilege" and not a "right," procedural due process required a hearing before its termination. Id. at 262, 264. But note Mr. Justice Douglas' argument in Palmer that there is a constitutional right to recreation. Note 86 supra.

1. Outdoor American Corp. v. City of Philadelphia, 333 F.2d 963 (3d Cir.), cert. denied, 379 U.S. 903 (1964).

2. Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737 (E.D. Pa. 1968), rev'd, 415 F.2d 892 (3d Cir. 1969), aff'd, 403 U.S. 29 (1971).

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

4. Metromedia, Inc., v. Rosenbloom, 415 F.2d 892 (3d Cir. 1969), aff'd, 403 U.S. 29 (1971).

5. See U.S. Const. amend. I.

6. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Whitney v. California, 274 U.S. 357, 375-76 (1927), overruled, Brandenburg v. Ohio, 395 U.S. 444 (1969); Attorney General v. Zenger, 17 Howell's State Trials 675 (Sup. Ct. of Judicature of the Prov. of N.Y. 1735).

7. See C. Lawhorne, Defamation and Public Officials—The Evolving Law of Libel 39-56 (1971) [hereinafter cited as Lawhorne].

passage of the controversial Sedition Act of 1798[8] "gave official sanction to the idea that criticism of public officials was a crime."[9] Despite the apparent harshness of the Act, it did allow the defense of truth, a defense some states did not recognize at the time.[10] In part prompted by the Act, state courts during the period prior to the Civil War generally came to recognize truth as an absolute defense.[11]

In 1845 the Supreme Court gave impetus to the broad extension in the next half-century of another defense to a libel action, the defense of privilege. The Court held in *White v. Nicholls*[12] that a letter to the President voicing complaints about a customs collector was a privileged communication such that a showing of malice on the part of the defendant was required before the plaintiff could recover. This type of privilege is deemed to be only "qualified" or "conditional" since it may be overcome by the plaintiff's proof of the malicious intent of the defendant.[13] A privilege which cannot be overcome even by proof of the defendant's ill-will is said to be "absolute."[14] During and after the Civil War an increasing number of state courts granted the qualified privilege of criticizing and commenting on the actions of public officials, as long as such statements were made without malice.[15]

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8. Act of July 14, 1798, ch. 74, 1 Stat. 596.

9. Lawhorne 46.

10. Id. at 53-54.

11. Id. at 67-69.

12. 44 U.S. (3 How.) 266 (1845).

13. Id. at 291; W. Prosser, Torts § 115, at 785-86, 794-95 (4th ed. 1971). A conditional privilege may arise in the course of protecting one's own interests, e.g., Shenkman v. O'Malley, 2 App. Div. 2d 567, 157 N.Y.S.2d 290 (1st Dep't 1956) (one's reputation); or the interests of others, e.g., Browne v. Prudden-Winslow Co., 195 App. Div. 419, 186 N.Y.S. 350 (1st Dep't 1921) (warning customers against a salesman discharged for dishonesty); or common interests, e.g., Johns v. Associated Aviation Underwriters, 203 F.2d 208 (5th Cir.), cert. denied, 346 U.S. 834 (1953) (insurers to insured). Communications to one who may act in the public interest are usually granted at least a qualified privilege, e.g., Foltz v. Moore McCormack Lines, Inc., 189 F.2d 537 (2d Cir.), cert. denied, 342 U.S. 871 (1951) (information given to authorities in security clearance investigation).

14. See Barr v. Matteo, 360 U.S. 564 (1959): "The law of privilege as a defense by officers of government to civil damage suits for defamation and kindred torts has in large part been of judicial making, although the Constitution itself gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session. This Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, Bradley v. Fisher, [80 U.S.] 13 Wall. 335 [1871], and that a like immunity extends to other officers of government whose duties are related to the judicial process. Yaselli v. Goff, 12 F.2d 396 [(2d Cir. 1926)], aff'd per curiam, 275 U.S. 503 [(1927)], involving a Special Assistant to the Attorney General." Id. at 569 (italics omitted) (footnotes omitted).

15. Lawhorne 87; see Hallen, Fair Comment, 8 Texas L. Rev. 41 (1929); Smith, Are Charges against the Moral Character of a Candidate for an Elective Office Conditionally Privileged?, 18 Mich. L. Rev. 1, 104 (1919).

At the turn of the century, two leading cases expounding distinct theories as to the privilege gained the support of state courts around the country. The majority rule followed the "fair comment" privilege of *Post Publishing Co. v. Hallam*[16] which limited the privilege to opinion, comment or criticism about the official and did not extend to assertions of fact.[17] A minority of jurisdictions applied the rule of *Coleman v. MacLennan*[18] which held that a qualified privilege arose only when the defendant had an honest belief in the truth of his statement.[19]

Though freedom of speech and of the press was made applicable to the states by the Supreme Court in 1931,[20] and prior restraints were also proscribed that year,[21] defamatory utterances remained unshielded by the aegis of the first amendment.[22] The Supreme Court, which had always recognized certain common law privileges,[23] did not substantially begin to encroach on the law of libel by expansion of the privilege doctrine until 1959.[24] That year, in *Barr v. Matteo*,[25] the Court upheld the absolute privilege of a federal official even when acting at the outer perimeter of his duties and for an unworthy purpose, because of the public interest in not inhibiting "the fearless, vigorous, and effective administration of policies of government."[26] One dissenting justice in *Barr* would not have gone that far for fear that private individuals (whose privilege was at the time in most states only a qualified one) would be inhibited from freely expressing their views knowing that "in reply [government officials] may libel [them] with immunity . . . ."[27] This approach requires balancing the privileges between the public official and the private individual.

This balancing of privileges argument became an important consideration in the landmark decision of *New York Times Co. v. Sullivan*.[28] In that case, supporters of Dr. Martin Luther King placed an advertisement in the New York

16. 59 F. 530 (6th Cir. 1893).

17. Id. at 539-42.

18. 98 P. 281 (Kan. 1908).

19. Id. at 287.

20. Stromberg v. California, 283 U.S. 359 (1931).

21. Near v. Minnesota, 283 U.S. 697 (1931).

22. Beauharnais v. Illinois, 343 U.S. 250 (1952); Pennekamp v. Florida, 328 U.S. 331 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 697 (1931). See generally Konigsberg v. State Bar, 366 U.S. 36 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

23. See note 14 supra.

24. In Schenectady Union Publishing Co. v. Sweeney, 316 U.S. 642 (1942) (per curiam), the Court split 4-4 and hence did not resolve the question of whether there were constitutional limitations on damages that could be awarded to a public official in a libel action. This issue was not decided until New York Times Co. v. Sullivan, 376 U.S. 254 (1964). See text accompanying note 28 infra.

25. 360 U.S. 564 (1959).

26. Id. at 571.

27. Id. at 585 (Warren, C.J., dissenting).

28. 376 U.S. 254 (1964).

Times[29] for the purpose of raising money. Its text catalogued instances of alleged mistreatment of civil rights demonstrators at the hands of Montgomery, Alabama, authorities.[30] Though essentially truthful, certain particulars of the advertisement were incorrect—something which a check of the Times' own files would have revealed.[31] Sullivan, a commissioner of Montgomery in charge of the police, though unnamed by the advertisement, was awarded a half-million dollar libel judgment against the Times and the sponsors of the advertisement.[32]

The Supreme Court, rejecting the respondent's arguments that the advertisement was for commercial purposes[33] and that the fourteenth amendment applied only to state and not to private action,[34] held that in order for a public official to maintain a libel action against critics of his official conduct he must show that the libel was published by the critic either with knowledge of its falsity or in reckless disregard of the truth.[35] The basis of the decision was twofold: The need to balance the public official's absolute privilege, which had been sustained in *Barr*, against that of a qualified one for the private individual,[36] and the public interest in promoting vigorous and uninhibited debate on public issues in an atmosphere free of self-censorship.[37] Three justices thought that the privilege-balancing theory demanded an equal absolute privilege for the citizen-critic of government.[38]

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29. N.Y. Times, March 29, 1960, at 25.

30. Id.

31. 376 U.S. at 261.

32. Id. at 256.

33. Id. at 265-66. Sullivan contended that since the libelous statements were part of a paid advertisement, they were not protected by the first amendment, citing Valentine v. Chrestensen, 316 U.S. 52 (1942). The Court distinguished Chrestensen on its facts. 376 U.S. at 265-66.

34. 376 U.S. at 265. Sullivan maintained that the fourteenth amendment is directed against state and not private action and that therefore the first amendment freedoms of speech and press as made applicable to the states by the fourteenth amendment did not affect his private civil suit. The Court brushed this argument aside noting that "the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." Id. (citations omitted).

35. Id. at 280.

36. Id. at 282.

37. Id. at 279; see, e.g., Smith v. California, 361 U.S. 147 (1959); Speiser v. Randall, 357 U.S. 513 (1958).

38. 376 U.S. at 295, 298. Mr. Justice Black, concurring in an opinion joined in by Justice Douglas, said: "In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty." Id. at 295. In a separate concurring opinion Justice Goldberg expressed the same thought. "In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege

Though the real basis for the decision in *New York Times* was the Court's assessment that the first amendment was designed to promote open public discussion unrestrained by fear of libel actions,[39] the qualification that the target of the libel be a public official was an obvious limitation on the citizen-critic's privilege. Moreover, two members of the Court considered the standard of "reckless disregard of the truth" a gaping loophole through which determined judges and juries might seek revenge on publishers.[40] Only two plaintiffs, however, have managed to successfully negotiate this loophole,[41] and the public official limitation proved to be merely the starting point on the list of permitted targets.[42]

The Court quickly narrowed the definition of recklessness in *Garrison v. Louisiana*.[43] In addition to applying the *New York Times* yardstick to criminal libel actions, the Court said that the recklessness standard meant that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."[44] In the 1965 case of *Henry v. Collins*[45] the Court further defined recklessness to mean an actual intent on the part of the defendant to harm the plaintiff through falsehood.[46] The holding of *Garrison* was re-asserted in *Saint Amant v. Thompson*,[47] where reckless disregard of the truth was equated to the situation where "the publisher was aware of the likelihood that he was circulating false information,"[48] or where he "in fact entertained serious doubts as to the truth of his publication."[49]

More recently in *Time, Inc. v. Pape*[50] the Deputy Chief of Detectives of Chicago charged Time magazine with libel for publishing allegations of brutality against him as if they were the factual conclusions of the 1961 Report of the

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to criticize official conduct despite the harm which may flow from excesses and abuses." Id. at 298.

39. See Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L.Q. 581 (1964). "The real basis, the sound basis, for the Times decision is found in the Court's proposition that 'freedom of expression upon public questions is secured by the First Amendment . . . .'" Id. at 591.

40. 376 U.S. at 294-95 (Black & Douglas, JJ., concurring). See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 171 (1967) (Black, J., dissenting); Time, Inc. v. Hill, 385 U.S. 374, 401-02 (1967) (Douglas, J., concurring).

41. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970). See notes 66 & 95 infra and accompanying text.

42. See notes 55, 59, 66 & 79-82 infra and accompanying text.

43. 379 U.S. 64 (1964).

44. Id. at 74.

45. 380 U.S. 356 (1965).

46. Id. at 357; cf. Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967).

47. 390 U.S. 727 (1968).

48. Id. at 731.

49. Id.

50. 401 U.S. 279 (1971).

Civil Rights Commission.[51] Although the Time reporter admitted she was aware of the omission of the word "alleged,"[52] the Supreme Court held that "Time's omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document [the Report of the Commission] that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times*."[53]

Meanwhile, the "public official" limitation was also crumbling, despite some bolstering in a few lower courts.[54] In *Rosenblatt v. Baer*,[55] the Court overturned a New Hampshire decision in a case which involved the defamation in a newspaper column of the ex-supervisor of a state-operated ski area. Rejecting at the outset the argument that the question of whether the plaintiff was or was not a public official should be decided according to New Hampshire law,[56] the Court said "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[57] More importantly, this decision reaffirmed the Court's commitment to the open forum of public debate and diminished the importance of the theory of privilege-balancing.[58]

Time, Inc. v. Hill[59] presented an interesting development in this line of cases. Hill and his family were terrorized by a group of escaped convicts in 1952 and their experiences became front page news.[60] A book was written about their plight which considerably embellished their experiences, and later a play and a movie based on the book were produced.[61] In reviewing the play, Life magazine gave the impression that the fictionalized version of the story was the true one, and Hill brought an action for invasion of privacy under the New York Civil Rights statute.[62] Three justices felt that no blind application of the *New York Times* standard could be made since it was an action for invasion of privacy, not

51. [1961] Comm'n on Civil Rights Rep., pt. VII, at 20-21.

52. 401 U.S. at 283.

53. Id. at 290.

54. Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966); Faulk v. Aware, Inc., 14 N.Y.2d 954, 202 N.E.2d 372, 253 N.Y.S.2d 990 (1964), cert. denied, 380 U.S. 916 (1965). But see cases cited in notes 78 & 81 infra.

55. 383 U.S. 75 (1966).

56. Id. at 84.

57. Id. at 85 (footnote omitted).

58. "For similar reasons we reject any suggestion that our references in New York Times . . . and Garrison . . . to Barr v. Matteo mean that we have tied the New York Times rule to the rule of official privilege. The public interests protected by the New York Times rule are interests in discussion, not retaliation, and our reference to Barr should be taken to mean no more than that the scope of the privilege is to be determined by reference to the functions it serves." Id. at 84-85 n.10 (italics omitted) (citations omitted).

59. 385 U.S. 374 (1967).

60. Id. at 378.

61. Id.

62. N.Y. Civ. Rights Law §§ 50-51 (McKinney 1970).

for libel. Yet by independent consideration of the case under the first amendment, the *New York Times* standard did apply if the intent of the statute was "to redress false reports of matters of public interest."[63] Justices Black and Douglas, true to their absolutist view of the first amendment,[64] considered the opening of a new play to be a matter of public interest; therefore any comment about it was ipso facto completely privileged.[65]

But since *Hill* was an invasion of privacy case, the equation between "public figure" and "public official" under the *New York Times* ruling was not confirmed until a decision was rendered in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[66] In the former case Butts, athletic director at the University of Georgia, sued Curtis for libel in printing a feature article charging that Butts had disclosed to Paul "Bear" Bryant, football coach at the University of Alabama, information about the game plan of the Georgia team. Butts produced convincing evidence that the accusation was false and that the defendant ran no check on the reliability of its reporter or his information, even though his story was not "hot news" and hence there was time for a thorough investigation of the serious charges.[67]

Associated Press v. Walker turned on the report by the news agency of the actions of retired General Edwin A. Walker at a riot on the University of Mississippi campus. Walker, who by his political activism "could fairly be deemed a man of some political prominence,"[68] brought forth far less evidence than Butts that the news report allegedly libeling him was untrue.[69] Here the nature of the story as "hot news" did influence the Court in its reversal of the libel judgment entered against the Associated Press. The plurality opinion felt that since news of the riot required immediate dissemination, the Associated Press was justified in relying on the trustworthiness and competence of their reporter.[70] The Court split 5-4 in favor of Butts while overturning the judgment for Walker by a vote of 9-0.[71]

Interest in these cases, however, centers on the three different positions taken by the members of the Court with regard to the burden of proof to be met by a public figure (who was not a public official) in a libel action.[72] Justices Black and Douglas, maintaining their absolutist position,[73] believed neither plaintiff should

63. 385 U.S. at 388.

64. Justices Black and Douglas have consistently insisted in this line of cases that all publications about matters of public interest are absolutely privileged. See notes 38 & 40 supra and accompanying text.

65. 385 U.S. at 398-402.

66. 388 U.S. 130 (1967).

67. Id. at 157-58.

68. Id. at 140.

69. Id. at 158-59.

70. Id.

71. Id. at 133, 162, 170, 172.

72. See Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267, 275-78.

73. See note 64 supra. See generally notes 38 & 40 supra and accompanying text.

recover because both cases were concerned with issues of public interest.[74] Justice Harlan, joined by Justices Clark, Fortas and Stewart, felt that the "public figure" was not to be held to a standard of proof identical to that of a "public official" and that Butts had met the less stringent standard but Walker had not.[75] Chief Justice Warren, joined by Justices Brennan and White, could not find any logical differentiation between the "public figure" and "public official;" therefore they applied the *New York Times* test.[76] Hence the result was that a majority of five justices believed that a "public figure" came under a standard at least as rigid as that expressed in *New York Times*.[77] Certainly this was how the lower courts interpreted the decision,[78] and the "public figure" became fused with the "public official" under the banner of *New York Times Co. v. Sullivan*.

After *Butts* and *Walker*, lower courts began to emphasize the public's legitimate interest in the subject matter rather than the personality of the plaintiff. In *Time, Inc. v. McLaney*[79] the fact that the plaintiff had earned his notoriety in a foreign country and was publicly unknown in the United States proved no bar to application of the *New York Times* standard. The court in *Bon Air Hotel, Inc. v. Time, Inc.*[80] found that the public had a rightful interest in quasi-public businesses (in this case a hotel) which necessitated application of the *New York Times* criteria. The hotel had not sought the publicity, but rather had received unflattering treatment in an article in Sports Illustrated about the city of Augusta, Georgia, at the time of the Masters' Golf Tournament.[81]

74. 388 U.S. at 170-72.

75. Id. at 155-56. "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Id. at 155.

76. Id. at 163-64 (Warren, C.J., concurring in Butts and Walker). However, although Justices Brennan and White agreed with Chief Justice Warren that the Times standard should be applied in both Butts and Walker, they disagreed with him as to the result in Butts, voting to overturn the judgment. Id. at 172-73. Thus the decision in Butts was sustained 5-4, four votes coming from the justices that applied Justice Harlan's standard (see note 75 supra) and one from Chief Justice Warren who applied the Times standard.

77. See Kalven, supra note 72, at 277-78.

78. See Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), cert. denied, 395 U.S. 922 (1969); United Medical Labs., Inc. v. CBS, Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969); Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966), cert. denied, 388 U.S. 909 (1967); Arizona Biochemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y. 1969).

79. 406 F.2d 565 (5th Cir.), cert denied, 395 U.S. 922 (1969).

80. 426 F.2d 858 (5th Cir. 1970).

81. Id. at 860. Numerous other cases have applied the New York Times standard on the basis of public interest. Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir.), cert. denied, 398 U.S. 940 (1970); United Medical Labs., Inc. v. CBS, Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969); Holmes v. Curtis Publishing Co., 303 F. Supp. 522 (D.S.C. 1969); Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Cal. 1969); Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla. 1969), aff'd, 427 F.2d 219 (5th Cir. 1970); Arizona Biochemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y. 1969); DeSalvo v.

It was, therefore, not surprising when in *Rosenbloom v. Metromedia, Inc.*[82] the plurality composed of Justice Brennan, Chief Justice Burger and Justice Blackmun, abandoned the "public" versus "private" person distinction in favor of the public interest test in order to determine whether the plaintiff would have to meet the *New York Times* burden of proof. Justice Brennan noted a factual undercurrent among the previous libel cases: "Common to all the cases was a defamatory falsehood in the report of an event of 'public or general interest.' "[83] This led him to the conclusion "that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases."[84]

Having acknowledged the total collapse of the dividing line between the public figure and the private individual, the plurality drew a more rational division based on each man's right to privacy:

> We have recognized that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community." . . . Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. . . . Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" that are not in the area of public or general concern.[85]

In again rejecting a negligence standard in a civil libel case, the plurality stressed the possibility of an erroneous verdict being entered against a defendant exercising his first amendment rights based on a mere preponderance of the evidence.[86] "[T]he possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate."[87]

Justice White was not willing to go quite as far as the plurality, and in his

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Twentieth Century-Fox Film Corp., 300 F. Supp. 742 (D. Mass. 1969); Sellers v. Time, Inc., 299 F. Supp. 582 (E.D. Pa. 1969), aff'd on other grounds, 423 F.2d 887 (3d Cir.), cert. denied, 400 U.S. 830 (1970); Cullen v. Grove Press, Inc., 276 F. Supp. 727 (S.D.N.Y. 1967); All Diet Foods Distribs., Inc. v. Time, Inc., 56 Misc. 2d 821, 290 N.Y.S.2d 445 (Sup. Ct. 1967).

82. 403 U.S. 29 (1971).

83. Id. at 30-31 (footnote omitted).

84. Id. at 44-45.

85. Id. at 47-48 (citations omitted) (footnotes omitted).

86. Id. at 50. "In the normal civil suit where this standard is employed, 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.' " Id., quoting In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

87. Id. See Monitor Patriot Co. v. Roy, 401 U.S. 265, 270 (1971).

concurring opinion he sought to limit the holding to the extent that the publication had to be a report or comment upon the "official actions of public servants."[88] Although Justice Douglas took no part in the consideration or decision of the case, it may be assumed that he would have concurred with Justice Black[89] who again voiced his view that "the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false."[90]

In his dissent, Justice Harlan reiterated his faith in the soundness of the *New York Times* decision but thought that the private individual need show only negligence on the part of the publisher. However, Justice Harlan would require a plaintiff to prove actual damages.[91] Agreeing with Justice Harlan's standard, Justice Marshall, in a separate dissent joined by Justice Stewart, questioned the ability of the Court and lower courts to measure on an ad hoc basis the area of public or general concern, and to balance the interest of the public's right to know against the individual's right to privacy.[92]

Though in respect to the public figure-private figure distinction *Rosenbloom v. Metromedia, Inc.* represents the end of the line of cases following *New York Times*, it still leaves unmarked the boundaries of the area of public interest and the sanctuary of privacy.[93] This naturally poses uncertainty for future litigants who desire to escape the burden of proving knowing or reckless disregard of the truth on the part of the defendant.[94]

Nevertheless there have been recoveries for plaintiffs[95] despite the stringency of the *Times* test; furthermore, as some members of the Court have noted, juries do not apply standards of proof as rigorously as judges might hope.[96]

88. 403 U.S. at 62.

89. See note 64 supra.

90. 403 U.S. at 57 (Black, J., concurring).

91. Id. at 62-64 (Harlan, J., dissenting).

92. Id. at 81 (Marshall & Stewart, JJ., dissenting).

93. Id. at 44 & n.12. "We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities not within the area of public or general interest." Id.

94. Justice Marshall recognized this difficulty. "The plurality's doctrine also threatens society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation. This danger exists since all human events are arguably within the area of 'public or general concern.'" Id. at 79 (dissenting opinion).

95. Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970).

96. Justice Fortas, dissenting in Time, Inc. v. Hill, 385 U.S. 374 (1967), commented: "But a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from a trial judge to a jury of ordinary people, entitled to be appraised in terms of its net effect. Instructions are to be viewed in this commonsense perspective, and not through the remote and distorting knothole of a distant appellate fence." Id. at 418.

Thus the shadows of privilege-balancing, the bad faith of the defendant, the position of the plaintiff, and the nature of the libel—parameters rejected by the Supreme Court as irrelevant under the *New York Times* doctrine[97]—may still haunt the lower courts and influence a jury in reaching its decision under a *Times* charge. While this latest and broadest extension of *New York Times* in *Rosenbloom* is certainly a boon to the press and the citizen-critic, it does not entirely preclude the possibility of a jury's redressing a grave injustice by using what Justice Douglas called the "elusive exception"[98] of the knowing-or-reckless-falsity standard. Consequently, though the task of the plaintiff in a libel action is more formidable than ever, those facts of his case which are not strictly pertinent to the standard of reckless disregard may aid him in discharging his heavy burden of proof under *New York Times*. In addition, should he be able to show that the defamatory matter intruded upon his private life,[99] he might be able to buttress his case with the assertion of his own right to privacy.[100]

Constitutional Law—Requisite Congressional Approval of Vietnam War Inferred From Mutual Participation of Congress with President in Conduct Thereof.—After receiving orders to report for transfer to Vietnam, Malcolm A. Berk and Salvatore Orlando, enlistees in the United States Army, commenced separate actions seeking to enjoin the Secretary of the Army, the Secretary of Defense and their respective commanding officers from enforcing their deployment orders on the ground that those officers had exceeded their constitutional authority by ordering them to participate in a war not properly authorized by Congress.[1] The district court denied Berk's application for a preliminary injunction[2] and held Orlando's motion for the same relief in abeyance pending a de-

See also New York Times Co. v. Sullivan, 376 U.S. 254, 294-95 (1964) (Black & Douglas, JJ., concurring).

97. See notes 43-49, 58 & 82 supra and accompanying text. As to the nature of the libel see Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), where the plaintiff had been accused of "blackmail" at a public meeting. The Court held that the term taken in its context did not charge the plaintiff with criminal activity as a matter of law. Id. at 13.

98. Time, Inc. v. Hill, 385 U.S. 374, 401-02 (1967) (Douglas, J., concurring).

99. Convincing the Supreme Court of this has not been easy. In Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971), the Court held that as a matter of law a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or candidate's fitness for office and therefore the rule of New York Times applies. The Court has also proclaimed that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . . ." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). As to the possible extent of a constitutional right to privacy see Griswold v. Connecticut, 381 U.S. 479 (1965).

100. See note 85 supra and accompanying text.

1. Orlando v. Laird, 443 F.2d 1039, 1040 (2d Cir.), cert. denied, 404 U.S. 869 (1971).

2. Id. at 1040.

cision on Berk's appeal.[3] The Second Circuit Court of Appeals affirmed and remanded the case for a hearing on Berk's application for a permanent injunction, holding, *inter alia*, that his claim that orders to fight must be authorized by joint executive-legislative action was justiciable.[4] The district court reconsidered Berk's application and held his deployment orders valid.[5] A similar judgment was entered in Orlando's case.[6] The Second Circuit affirmed both decisions, holding that congressional approval of the war could be inferred since there was some mutual participation of both Congress and the President in the conduct of the war but that the form of such participation or authorization was a matter of policy suitable for congressional determination and thus outside the sphere of judicial scrutiny. *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

The constitutionality of the Vietnam War has been challenged in suits by taxpayers,[7] men who refused to submit to induction,[8] and men prosecuted for willful

3. Id.

4. Berk v. Laird, 429 F.2d 302 (2d Cir. 1970). The court directed that Berk be allowed an opportunity to provide a method for resolving the question of what specific joint executive-legislative action would be sufficient to authorize the military activity in question. Id. at 305.

5. Berk v. Laird, 317 F. Supp. 715, 730 (E.D.N.Y. 1970), aff'd sub nom. Orlando v. Laird, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971).

6. Orlando v. Laird, 317 F. Supp. 1013, 1020 (E.D.N.Y. 1970), aff'd, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971).

7. Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970) (claim for refund of federal income taxes on ground they were used to finance the war); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970) (taxpayer who challenged the constitutionality of the Vietnam War on the grounds that it jeopardized his liberty, contributed to serious inflation, diminished funds available for social welfare, and resulted in the death and wounding of countless numbers of Americans, including a relative of his, was denied standing); Kalish v. United States, 411 F.2d 606 (9th Cir.), cert. denied, 396 U.S. 835 (1969) (action for refund of federal excise tax on ground that the Tax Adjustment Act of 1966, Pub. L. No. 89-368, § 202(a), 80 Stat. 66, was unconstitutional in that the motive of Congress was to raise funds for use in the war).

8. United States v. Pratt, 412 F.2d 426 (6th Cir. 1969), cert. denied, 401 U.S. 1012 (1971); Ashton v. United States, 404 F.2d 95 (8th Cir. 1968), cert. denied, 394 U.S. 960 (1969); United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), cert. denied, 386 U.S. 972 (1967); accord, United States v. Bolton, 192 F.2d 805 (2d Cir. 1951). In each of these cases the court held that a claim that the war was illegal was no defense to a prosecution for failure to submit to induction. Contra, United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968), appeal dismissed on other grounds, 399 U.S. 267 (1970), where Judge Wyzanski maintained that one who had refused induction had standing to object to the constitutionality of the Vietnam War for two reasons: First, since draft calls were to a great extent determined by military demands in Vietnam, the risk of being drafted was magnified by the Vietnam War; second, although it was previously hypothesized that one who was drafted could raise the question of whether he could constitutionally be required to serve in Vietnam, "it is indisputable that today there is no clear right of a soldier once he is in the armed forces to get a judicial ruling on the right of the Army to require him to serve in Vietnam." Id. at 512-13.

destruction and mutilation of draft cards.[9] In each instance the plaintiff was denied standing to raise the issue.[10] On the other hand, it would appear that a member of the Armed Services who has been given orders to participate in a specified military engagement has standing to question the legality of that effort.[11] Thus, "soldiers seeking to avoid participation in the Vietnam war do satisfy the criteria functionally required to have standing."[12] One basis for this standing is a soldier's compliance with the test enunciated in *Baker v. Carr*[13] which requires a "personal stake in the outcome of the controversy" in order to assure that concrete adverseness necessary for a serious presentation of the issues.[14] Furthermore, a soldier is in the best position to show "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[15] The interests of soldiers in "not having their lives put in jeopardy or being faced with the necessity of taking other lives"[16] appear to be sufficient to satisfy the requirement that the person bringing the action have a serious personal stake in its outcome.

Even when courts have afforded soldiers who had been given orders to fight

9. United States v. O'Brien, 391 U.S. 367 (1968); United States v. Rehfield, 416 F.2d 273 (9th Cir. 1969), cert. denied, 397 U.S. 996 (1970).

10. See notes 7-9 supra.

11. In Berk v. Laird, 429 F.2d 302 (2d Cir. 1970), the Second Circuit implied that a soldier ordered to Vietnam to fight in an "undeclared war" did have standing to question the legality of the order. Id. at 306. Other cases have allowed soldiers to question the constitutionality of the war without challenging their standing to do so. E.g., Mora v. McNamara, 387 F.2d 862 (D.C. Cir.) (per curiam), cert. denied, 389 U.S. 934 (1967); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967), aff'g 252 F. Supp. 819 (D.D.C. 1966) (suits brought by members of the Armed Forces against the Secretary of Defense and the Secretary of the Army to enjoin them from sending appellants to Vietnam). In United States v. Bolton, 192 F.2d 805 (2d Cir. 1951), appellant was convicted of violating the Selective Service Act by refusing to report for induction during the Korean War. Appellant contended that the Act was unconstitutional because men were being drafted to serve in Korea without a declaration of war by Congress and without its consent. Id. at 806. The court affirmed the conviction but added: "Any question as to the legality of an order sending men to Korea to fight in an 'undeclared war' should be raised by someone to whom such an order has been directed, not by the appellant, who might never be ordered abroad for military duty, even if he reported for induction." Id.

12. Schwartz & McCormack, The Justiciability of Legal Objections to the American Military Effort in Vietnam, 46 Texas L. Rev. 1033, 1039 (1968) [hereinafter cited as Schwartz & McCormack].

13. 369 U.S. 186 (1962).

14. Id. at 204.

15. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

16. Schwartz & McCormack 1039. Commentators frequently cite the Nuremberg principles embodied in the Agreements of London as an additional ground for granting standing to these soldiers. Id. at 1040; see Faulkner, The War in Vietnam: Is it Constitutional?, 56 Geo. L.J. 1132, 1142 (1968). But see Comment, The Legality of the United States' Involvement in Vietnam—A Pragmatic Approach, 23 U. Miami L. Rev. 792, 793 (1969).

in Vietnam an opportunity to challenge the legality of the war, they have refused to decide whether or not the Vietnam conflict is constitutional on the ground that it involves a political question.[17]

It has been stated that in foreign relations the President is the sole agent of the federal government[18] and "[t]here are sweeping statements to the effect that all questions touching foreign relations are political questions."[19] Despite this, the courts have taken cases to decide whether a particular resolution was an unconstitutional delegation of legislative power to the executive,[20] whether the President overstepped his constitutional powers in the field of foreign relations by entering into trade agreements with foreign countries,[21] whether a particular branch of government has exceeded its constitutional authority,[22] the proper allocation of power between Congress and the President,[23] and the constitutional limits of the war power.[24]

In *Baker v. Carr*,[25] the Supreme Court recognized that not every case or controversy which involves the conduct of foreign relations lies beyond the scope of judicial scrutiny.[26] Each case must be analyzed in terms of the "particular question posed . . . the history of its management by the political branches, of its susceptibility to judicial handling . . . and of the possible consequences of judicial action."[27] The Court then proceeded to set up guidelines to determine

17. Mora v. McNamara, 387 F.2d 862 (D.C. Cir.) (per curiam), cert. denied, 389 U.S. 934 (1967); Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), aff'd, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967).

18. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

19. Baker v. Carr, 369 U.S. 186, 211 (1962) (footnote omitted). See, e.g., Oetjen v. Central Leather Co., 246 U.S. 297 (1918), where the Supreme Court pointed out that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Id. at 302.

20. E.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

21. E.g., United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955). The circuit court there stated that although the President enjoys certain inherent powers, such as that of Commander-in-Chief of the Army and Navy, he has no power to regulate foreign commerce since that is not a power incident to the office of President but is expressly granted to Congress by the Constitution. Id. at 659.

22. E.g., Powell v. McCormack, 395 U.S. 486 (1969).

23. E.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952).

24. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Ex Parte Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

25. 369 U.S. 186 (1962).

26. Id. at 211. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." Id.

27. Id. at 211-12.

exactly what constituted a political question[28] and concluded that a political question involved at least one of the following:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[29]

The Court added that the issue was one of "political questions" not "political cases."[30] Furthermore, a controversy did not automatically present a political question merely because it involved the enforcement of a political right.[31]

The next authoritative statement by the Court on political questions appeared in *Powell v. McCormack*,[32] where the Court examined the power of Congress to judge the qualifications of its own members. There the Court held that Representative Powell had been unlawfully excluded from Congress[33] and stated:

Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.[34]

On the basis of the Court's statements in *Baker* and *Powell*, it would appear that the question of whether or not the Executive branch has exceeded its constitutional authority in sending soldiers to Southeast Asia would not be considered a political question. What is being questioned is not whether there should be a war, but rather whether the constitutional mandate that Congress shall declare war has been fulfilled.[35] Federal courts, however, have consistently avoided the issue by invoking the political question doctrine.[36]

In *Luftig v. McNamara*,[37] a member of the United States Army brought suit

28. Id. at 217.

29. Id.

30. Id.

31. Id. at 209.

32. 395 U.S. 486 (1969).

33. Id. at 550.

34. Id. at 549 (footnote omitted).

35. U.S. Const. art. I, § 8, provides that Congress shall have the power to declare war. One article separates the issues arising from the Vietnam War into two categories: Those acceptable for judicial determination and those that are not. The authors admit that several of the issues in the Vietnam controversy, such as the nature of the parties involved, the gravity of the danger presented and the immediacy of action to be taken, lie outside the sphere of judicial action. However, they proceed to point out that the basic question of whether the "executive exceeded its powers when it undertook the present military involvement without a congressional declaration of war" is not a political question. Schwartz & McCormack 1043.

36. See text accompanying notes 37-45 infra.

37. 252 F. Supp. 819 (D.D.C. 1966), aff'd, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967).

against the Secretary of Defense and the Secretary of the Army to enjoin them from transferring him to Vietnam for combat duty.[38] The District of Columbia Circuit Court of Appeals held that the separation of powers established by the Constitution precluded judges from "overseeing the conduct of foreign policy or the use and disposition of military power; these matters [were] plainly the exclusive province of Congress and the Executive."[39]

In *Mora v. McNamara*,[40] petitioners were drafted into the Army and ordered to a replacement station for transfer to Vietnam. Suit was brought against the Secretary of Defense and the Secretary of the Army to prevent them from enforcing the orders.[41] The circuit court, in a per curiam opinion, affirmed the denial of an application for an injunction, citing the decision in *Luftig* as controlling.[42]

In *United States v. Sisson*,[43] the appellant, who was prosecuted for refusing to submit to induction, claimed that there was no constitutional authority to draft him to serve in a war not authorized by Congress.[44] In holding for the government, the federal district court stated that the "distinction between a declaration of war and a cooperative action by the legislative and executive with respect to military activities in foreign countries is the very essence of what is meant by a political question."[45]

Despite this reliance by the courts on the political question doctrine in order to avoid hearing the constitutional issues surrounding the Vietnam War, Mr. Justice Douglas, dissenting from the Supreme Court's refusal to allow a state to bring an original action in *Massachusetts v. Laird*,[46] pointed out that the standards for justiciability expounded in *Baker* did not bar an action seeking to declare the war unconstitutional.[47] Since there was no textually demonstrable constitutional committment of the issue to a coordinate branch of the government, a decision as to whether Congress alone has the power to determine the form of

38. Id.

39. 373 F.2d at 666.

40. 387 F.2d 862 (D.C. Cir.) (per curiam), cert. denied, 389 U.S. 934 (1967).

41. 389 U.S. at 934 (dissenting opinion).

42. 387 F.2d at 862.

43. 294 F. Supp. 511 (D. Mass. 1968), appeal dismissed on other grounds, 399 U.S. 267 (1970).

44. Id. at 512.

45. Id. at 515.

46. 400 U.S. 886 (1970). In this case, the Supreme Court denied leave to file a bill of complaint in an action brought by the state of Massachusetts under the Act of April 2, 1970, ch. 174, § 1, [1970 Supp.] Mass. Ann. Laws 10, which provides that no inhabitant of Massachusetts inducted into the military forces of the United States shall be compelled to serve "outside the territorial limits of the United States in the conduct of armed hostilities not an emergency and not otherwise authorized in the powers granted to the President . . . unless such hostilities were initially authorized or subsequently ratified by a congressional declaration of war . . . ." Id. Section 2 of the statute enables the attorney general of the commonwealth to bring actions in the Supreme Court on behalf of any citizen required to serve in violation of Section 1.

47. 400 U.S. at 891-900.

its authorization to conduct the war should be reserved until the Supreme Court has conducted a full hearing on the merits of the case.[48] Furthermore, Justice Douglas contended that judicially manageable and discoverable standards for resolving the issue were not lacking since the determination to be made was whether certain acts of Congress were equivalent to a declaration of war.[49] He then went on to argue that it is more important to "be respectful to the Constitution than to a coordinate branch of government;"[50] and that the potentiality of embarassment to the government should be subordinated to the protection of life.[51]

Finally, in *Berk v. Laird*,[52] a federal court for the first time stated that it would be willing to consider the question of the Vietnam War's constitutionality on the basis of whether or not there was sufficient action by Congress to satisfy the requirements of article I, section 8 of the United States Constitution.[53] The Second Circuit Court of Appeals pointed out that since, in some circumstances, proper authorization from both the executive and legislative branches was required before orders to fight could issue, "executive officers [were] under a threshold constitutional 'duty [which could] be judicially identified and its breach judicially determined.' "[54] In that case, however, the court pointed to the standards established in *Baker*[55] and stated that, in order to avoid the political question doctrine, it was necessary for the appellant to establish a set of manageable standards for "resolving the question of when specified joint legislative-executive action [was] sufficient to authorize various levels of military activity . . . ."[56] Thus, the court did not reach the constitutional question but remanded the case to the district court for further proceedings consistent with its opinion.[57]

Subsequently, in *Orlando v. Laird*,[58] the Second Circuit concluded that the "judicially manageable standard" to be applied was whether there was "any action by the Congress sufficient to authorize or ratify the military activity in question."[59] Appellants argued that the congressional action required by the Con-

48. Id. at 892.

49. Id. at 892-93.

50. Id. at 894.

51. Id. at 896-99. Pointing to the Prize Cases, 67 U.S. (2 Black) 635 (1862), and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Justice Douglas concluded: "In those cases a private party was asserting a wrong to him: his property was being taken and he demanded a determination of the legality of the taking. Here the lives and liberties of Massachusetts citizens are in jeopardy. Certainly the Constitution gives no greater protection to property than to life and liberty." 400 U.S. at 899 (emphasis deleted).

52. 429 F.2d 302 (2d Cir. 1970).

53. Id. at 305.

54. Id., citing Baker v. Carr, 369 U.S. 186, 198 (1962).

55. 369 U.S. at 217.

56. 429 F.2d at 305.

57. Id. at 306.

58. 443 F.2d 1039 (2d Cir. 1971).

59. Id. at 1042.

stitution was "an express and explicit congressional authorization of the Vietnam hostilities though not necessarily in the words, 'We declare that the United States of America is at war with North Vietnam.' "[60] The court, however, took the position that "[t]he form which congressional authorization should take [was] one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary . . ."[61] and that "[t]he framers' intent to vest the war power in Congress [was] in no way defeated by permitting an inference of authorization from legislative action . . . ."[62]

The *Orlando* court thus proceeded to look at three Congressional acts relating to the war in Southeast Asia. First the court stated that the Tonkin Gulf Resolution[63] was "expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia, and as might be required in the future 'to prevent further aggression.' "[64] The court also found that Congress had ratified the Executive's

60. Id. at 1041; brief for Appellant Berk at 20, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971). Commentators agree that a declaration of war does not require the words "we declare war" so long as the "broad consensual basis" required by the Constitution is present in the manner of authorization Congress chooses to use. Schwartz & McCormack 1035-36 n.12.

61. 443 F.2d at 1043. In order to provide a set of manageable standards by which the court could determine when specific congressional action fulfilled the constitutional requirement that Congress shall declare war, Berk's attorneys had set forth in his brief three levels of military activity and the respective authorization required for each: (1) military activity not requiring explicit congressional approval; (2) military activity requiring explicit congressional approval through a declaration of general or limited war or by treaty, law or resolution; and (3) military activity requiring prior explicit congressional approval either through a declaration of general or limited war or by treaty, law or resolution. Brief for Appellant Berk at A-1-2, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971).

62. 443 F.2d at 1043.

63. Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (repealed Dec. 31, 1970): "[T]he Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom."

64. 443 F.2d at 1042. Opponents of the war, however, do not agree with the interpretation given by the court to the Tonkin resolution. They feel that the resolution did not express as clearly the "Congressional state of mind" as the court said it did, and contend that the resolution was merely a response to an emergency situation, that the government misrepresented the facts concerning the incidents in the Gulf of Tonkin, and that even at the time of its passage there was much disagreement over the limits of the power it conferred. They further contend that, if the resolution did mean what the court

actions by appropriating billions of dollars to the Defense Department for support of the troops in Vietnam.[65] By providing for these troops, Congress had approved of their being there.[66] Finally, the court determined that Congress had expressed its support for Presidential policy "by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill 'the substantial induction calls necessitated by the current Vietnam buildup.' "[67]

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in this case interpreted it to mean, it would be an unconstitutional delegation of congressional power to the President due to the lack of sufficient standards to guide Presidential action. See Lawyers Comm. on American Policy Toward Vietnam, American Policy Vis-a-Vis Vietnam, Memorandum of Law, in 112 Cong. Rec. 2666, 2672-73 (1966); Malawer, The Vietnam War Under the Constitution: Legal Issues Involved in the United States Military Involvement in Vietnam, 31 U. Pitt. L. Rev. 205, 228-30 (1969); Velvel, The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable, 16 U. Kan. L. Rev. 449, 472-79 (1968); Note, Congress, The President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771, 1803-05 (1968). The Executive branch itself has admitted that it did not consider the Tonkin Gulf Resolution supportive of its military policy in Vietnam: "[T]he administration does not consider the continued existence of these resolutions as evidence of congressional authorization for or aquiescence in any new military efforts or as a substitute for the policy of appropriate and timely congressional consultation to which the administration is firmly committed." Letter from H. G. Torbet, Jr., Acting Assistant Secretary for Congressional Relations to Senator J. William Fulbright, quoted in S. Rep. No. 91-872, 91st Cong., 2d Sess. 20 (1970). Furthermore, statements by various members of Congress made at the time both houses were considering the resolution are evidence that a number of Congressmen did not consider the resolution an advance declaration of war. 110 Cong. Rec. 18407 (1964) (statements of Senator Fulbright); id. at 18410-11 (statements of Senator Russell); id. at 18539 (statements of Rep. Morgan); id. at 18548-49 (statements of Rep. Fascell).

65. 443 F.2d at 1042. For a complete history of these appropriation bills see Berk v. Laird, 317 F. Supp. 715, 724-27 (E.D.N.Y. 1970).

66. 443 F.2d at 1042. Critics of the war, however, declare that motives other than approval of executive policy in Southeast Asia may lie behind these congressional appropriations. Thus, for example, Senator Fulbright has stated: "Although I think the pending bill has a significance as to our overall policy, it authorizes money to carry on the war, and is not a policy statement. . . .

. . .

I hereby state that I do not mean by voting for this [appropriations] bill that I endorse the military or political policies that are being followed . . . ." 112 Cong. Rec. 4382 (1966). "Regardless of whether a Congressman agrees or disagrees with the executive's policy, as a matter of common morality, as well as political survival, he cannot vote to deny bullets and food to American soldiers . . . ." Velvel, supra note 64, at 465.

67. 443 F.2d at 1042 (footnote omitted). On June 4, 1971, the decision in Orlando was read into the Congressional Record. 117 Cong. Rec. 8320-22 (1971). Senator Fulbright stated that in light of the interpretation of past draft laws he could no longer vote for an extension of the law. Id. at 8322. Senator Stennis pointed out that the court had misinterpreted the meaning of the draft laws by assuming that a vote to extend those laws was a vote in support of the Vietnam War: "But the court did not point out, now, how we could maintain our services, our ICBM's, our Polaris submarines, our nuclear carriers,

"Beyond determining that there [had] been *some* mutual participation between the Congress and the President . . . with action by the Congress sufficient to authorize or ratify the military activity at issue,"[68] the court was willing to go no further. In its opinion, "the constitutional propriety of the means by which Congress [had] chosen to ratify and approve the protracted military operations in Southeast Asia"[69] was committed to the discretion of Congress rather than the judiciary since there were no "intelligible and objectively manageable standards" by which such actions could be judged.[70]

Although the court's statement that "[t]here is . . . no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war,"[71] may appear reasonable to many, the evidence, as the appellants pointed out in their respective briefs, does not require such a conclusion.[72] The acts relied upon by the court are in and of themselves ambiguous since it is not clear that Congress, by these acts, intended to authorize the war. Thus the *Orlando* decision, the first interpretation of the meaning of the Constitutional mandate that Congress shall declare war in the context of the military actions in Southeast Asia,[73] stands for the proposition that the constitu-

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without manpower of some kind. When you vote for a bill, there are a lot of ingredients in it, and for the court to single out that this vote as an endorsement of the war, it seems to me, misses the mark and is too broad by any standard." Id.

68. 443 F.2d at 1043.

69. Id.

70. Id. at 1043-44.

71. Id. at 1042.

72. Brief for Appellant Berk at 14-65, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); Brief for Appellant Orlando at 11-31, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); see notes 64-67 supra.

73. The Second Circuit reiterated its opinion in Orlando when it handed down a per curiam decision in Da Costa v. Laird, 448 F.2d 1368 (2d Cir. 1971). The appellant, a draftee in the United States Army, received orders for assignment to Vietnam and brought an action in the district court to enjoin the Secretary of the Army, the Secretary of Defense, and others from carrying out these orders on the ground they were "in disregard of the Constitution." Id. at 1369. The district court granted summary judgment for the defendants, based on the authority of Orlando, and the Second Circuit affirmed. Id. at 1370. Two factors were present here that were not present in Orlando. First, at the time the action was begun, the Gulf of Tonkin resolution had been repealed. The court, however, found that sufficient legislative action could be found in the extension of the Selective Service Act and in the continuation of appropriations regardless of the repeal of the resolution. Id. at 1369. Second, the court refused to look at the appellant's claim that the "Pentagon Papers" showed that there was no congressional participation in the war since they were not a part of the record in the case. Id. at 1370.

On October 21, 1971, the United States Court of Appeals for the First Circuit also decided a case involving the constitutionality of the Vietnam War. Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971). Plaintiffs were members of the Armed Forces and citizens of Massachusetts and the State of Massachusetts acting in accordance with an act of that Commonwealth prohibiting the induction of citizens of that state into the armed forces to serve in a nonemergency situation, outside the territorial limits of the United States, without a Congressional declaration of war and empowering the Attorney General of the

tional requirements are satisfied by any evidence from which it can be inferred that Congress had intended to authorize military action,[74] notwithstanding the fact that other inferences are equally rational.[75]

Contracts—Consumer Fraud Act—State Attorney General Authorized to Initiate Class Action in Instances of Price Unconscionability.—The Attorney General of New Jersey brought a class action pursuant to the Consumer Fraud Act[1] seeking injunctive and other affirmative relief against the defendant who engaged in door-to-door sales of purportedly educational materials. The trial court found the defendant guilty of fraudulently selling worthless materials[2] but limited the applicability of the relief granted to those persons whose testimony was taken at trial on the grounds that price could not constitute fraud per se, that the Consumer Fraud Act provided no remedy in cases of unconscionability and that the unconscionability provision of the New Jersey Uniform Commercial Code (UCC)[3] contained no provision for class actions.[4] The Supreme Court of New Jersey modified and remanded,[5] holding that price may constitute un-

state to bring an action on behalf of any citizen whose right not to serve had been violated. The Supreme Court had previously denied leave to file a similar complaint as an original action in that Court. Massachusetts v. Laird, 400 U.S. 886 (1970); see note 46 supra. The court of appeals stated: "All we hold here is that in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached. The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed." 451 F.2d at 34.

74. One may even wonder whether the mere existence of military action might not be sufficient to satisfy the test since the court argues that the Executive could not maintain a war without the "concurrence and cooperation" of the Congress. 443 F.2d at 1042-43.

75. Thus the Tonkin Resolution could be interpreted as merely a response to an emergency situation and not a substitute for a congressional declaration of war. See note 64 supra. Likewise the motives behind the appropriations bills may not be support of the war itself but support for and protection of the troops that are fighting it. See note 66 supra. The reason for the extension of the Selective Service Act may not be to add to the number of soldiers fighting in Southeast Asia but to provide manpower for our military bases both in the United States and in foreign countries other than Vietnam. See note 67 supra.

1. N.J. Stat. Ann. §§ 56:8-1 to -14 (1964), as amended, (Supp. 1971). The Act provides in part that "[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, . . . in connection with the sale . . . of any merchandise or with the subsequent performance . . . is declared to be an unlawful practice . . . ." Id. § 56:8-2 (Supp. 1971).

2. Kugler v. Romain, 110 N.J. Super. 470, 478, 266 A.2d 144, 148 (Essex County Ct. 1970), modified, 58 N.J. 522, 279 A.2d 640 (1971).

3. N.J. Stat. Ann. § 12A:2-302 (1962).

4. 110 N.J. Super. at 481, 266 A.2d at 150.

5. See note 85 infra.

conscionability per se and that, since unconscionability is implicit in the Consumer Fraud Act, a class action could properly be maintained. *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971).

Much of the common law of contracts developed concomitantly with the growth of capitalism in England.[6] Inherent in this developing body of law was the concept of inviolate freedom to bargain and contract.[7] In the United States this concept was embodied in the Constitution, which provides that there shall be no "law impairing the obligation of contracts."[8] A corollary of this principle is the general rule that "any detriment no matter how economically inadequate will support a promise."[9] Recognizing that harsh results are possible through strict application of this rule,[10] the courts have "not wholly refused to pay heed to inequalities of exchange."[11] Torn between a high regard for freedom to contract and the need for mitigation of otherwise inequitable results, judges have for decades resorted to methods which "surreptitiously invalidated" unconscionable contracts.[12]

The courts have not stood alone in their concern for consumer protection. Legislative disdain for deceptive practices in consumer transactions, particularly in the modern market place where consumer bargaining power has in many cases been relegated to a mere yes/no proposition,[13] has resulted in legislation designed to effect an equitable increase in the consumer's limited market leverage.[14] In New Jersey, the Consumer Fraud Act,[15] the Home Repair Financing Act[16] and the Retail Installment Sales Act[17] evidence a "[c]ontinued and increased legis-

6. See Pollock, Contracts in Early English Law, 6 Harv. L. Rev. 389 (1893). For a much broader history of the development of English contract law see 2 F. Pollock & F. Maitland, The History of English Law 184 (2d ed. 1898).

7. See Williston, Freedom of Contract, 6 Cornell L.Q. 365 (1921).

8. U.S. Const. art. I, § 10.

9. J. Calamari & J. Perillo, Contracts § 55, at 107 (1970).

10. In the classic case of Haigh v. Brooks, 113 Eng. Rep. 119 (K.B. 1839), the defendant was required to pay £10,000 for a worthless piece of paper. See also Black Indus., Inc. v. Bush, 110 F. Supp. 801 (D.N.J. 1953); Brooks v. Ball, 18 Johns. 337 (N.Y. Sup. Ct. 1820); Judy v. Louderman, 48 Ohio St. 562 (1891).

11. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 788 (1969). See cases cited note 12 infra.

12. Spanogle, Analyzing Unconscionability Problems, 117 U. Pa. L. Rev. 931, 934 (1969), citing Nicolls v. Wetmore, 174 Iowa 132, 156 N.W. 319 (1916) (lack of mutuality); Austin Co. v. Tillman Co., 104 Ore. 541, 209 P. 131 (1922) (failure of consideration); Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P.2d 1272 (1937) (construction of terms); and American Agric. Chem. Co. v. Kennedy & Crawford, 103 Va. 171, 48 S.E. 868 (1904) (lack of mutuality).

13. Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 632 (1943).

14. See B. Curran, Trends in Consumer Credit Legislation (1965); Curran, Legislative Controls as a Response to Consumer-Credit Problems, 8 B.C. Ind. & Com. L. Rev. 409 (1967).

15. N.J. Stat. Ann. §§ 56:8-1 to -14 (1964), as amended, (Supp. 1971).

16. Id. §§ 17:16C-62 to -103 (1970).

17. Id. §§ 17:16C-1 to -61.9 (1970).

lative purpose to protect [the] consumer . . . from being victimized . . . ."[18] This concern is in no way limited to New Jersey,[19] for on all fronts "[t]he law is beginning to fight back against those who once took advantage of the [consumer]."[20] The vanguard of the arsenal of consumer protection appears to be the unconscionability doctrine[21] which has been incorporated in the UCC.[22]

In *Henningsen v. Bloomfield Motors, Inc.*[23] the New Jersey supreme court clearly demonstrated its pre-Code posture by setting aside as unconscionable[24] the disclaimer and limited liability clauses[25] of the standard contract employed in the auto industry. Freedom of contract notwithstanding, "in the framework of modern commercial life and business practices"[26] the court would not permit a seller's "use [of] grossly disproportionate bargaining power."[27] The use of disproportionate bargaining power was further limited in *Unico v. Owen.*[28] Inventive sellers, to avoid the consequences of *Henningsen*, had in many cases incorporated a "waiver of defenses" clause[29] in consumer contracts. In *Unico* the

18. General Inv. Corp. v. Angelini, 58 N.J. 396, 408, 278 A.2d 193, 199 (1971).

19. See B. Curran, supra note 14.

20. Jones v. Star Credit Corp., 59 Misc. 2d 189, 191, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969).

21. The concept is generally credited to Lord Hardwicke in Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82 (Ch. 1750). The history of the doctrine is discussed in Comment, Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC, 42 Tul. L. Rev. 193 (1967).

22. In New Jersey the provision is codified at N.J. Stat. Ann. § 12A:2-302 (1962). Forty-seven states have adopted the provision. West, Unconscionability: A State by State Survey, 5 Clearinghouse Rev. 61 (1971).

23. 32 N.J. 358, 161 A.2d 69 (1960).

24. Id. at 404, 161 A.2d at 95.

25. The objectionable language stated: "It is expressly agreed that there are no warranties, express or implied, made by either the dealer or the manufacturer on the motor vehicle, chassis, or parts furnished hereunder except as follows:

'The manufacturer warrants each new motor vehicle . . . chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof . . . this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.'" Id. at 367, 161 A.2d at 74 (emphasis deleted).

26. Id. at 386, 161 A.2d at 84.

27. Id. at 404, 161 A.2d at 95.

28. 50 N.J. 101, 232 A.2d 405 (1967).

29. Basically such a clause exacts the buyer's promise not to assert any defense he might have available against the seller in an action by any assignee of the seller. In the instant case the clause provided: "Buyer hereby acknowledges notice that the contract may be assigned and that assignees will rely upon the agreements contained in this paragraph, and agrees that the liability of the Buyer to any assignee shall be immediate and absolute and not affected by any default whatsoever of the Seller signing this contract; and in order to induce assignees to purchase this contract, the Buyer further agrees not to set up any claim against such Seller as a defense, counterclaim or offset to any action by any assignee for the upaid balance of the purchase price or for possession of the property." Id. at 106, 232 A.2d at 408.

court found such a clause to be unconscionable under the UCC.[30] Refusing to enforce the contract, the court noted that consumer contracts are "so fraught with opportunities for misuse that the purchasers must be protected against oppressive and unconscionable clauses."[31] Decisions of comparable import are becoming increasingly common in numerous other jurisdictions.[32]

Since the leading case of *American Home Improvement, Inc. v. MacIver*[33] held a contract requiring payment of $2,568.60 for goods valued at $959.00 to be unconscionable per se,[34] exorbitant price has gained status as an index of unconscionability.[35] In *State v. ITM, Inc.*[36] a New York court found that "excessively high prices [two to six times maximum value] constituted 'unconscionable contractual provisions' . . . ."[37] Similarly in *Jones v. Star Credit Corp.*[38] a contract price nearly five times retail value was held unconscionable as a matter of law.[39] Continuing New Jersey's leadership in the field of consumer protection, two lower courts of that state have also found unconscionability per se where price exceeded value by a factor of nearly three.[40]

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30. Id. at 125-26, 232 A.2d at 418.

31. Id. at 125, 232 A.2d at 418.

32. See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Steele v. J.I. Case Co., 197 Kan. 554, 419 P.2d 902 (1966); Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969). For an excellent compilation of such cases see West, supra note 22.

33. 105 N.H. 435, 201 A.2d 886 (1964).

34. Id. at 439, 201 A.2d at 889. The decision was based on a violation of a New Hampshire disclosure statute, N.H. Rev. Stat. Ann. §§ 399-B:1-:8 (1968), but the court alternatively held that there was price unconscionability under the New Hampshire UCC, N.H. Rev. Stat. Ann. § 382-A:2-302 (1961). 105 N.H. at 439, 201 A.2d at 888-89.

35. See Braucher, The Unconscionable Contract or Term, 31 U. Pitt. L. Rev. 337 (1970); Morley, Commercial Decency and the Code—The Doctrine of Unconscionability Vindicated, 9 Wm. & Mary L. Rev. 1143 (1968). See also cases cited notes 36, 38-40 infra. For a criticism of the doctrine of price unconscionability as a non-analytical, result-oriented abuse of the UCC see Murray, Unconscionability: Unconscionability, 31 U. Pitt. L. Rev. 1 (1969). Murray contends that price per se cannot conclusively evidence the absence of true bargaining. Id. at 66.

36. 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

37. Id. at 53, 275 N.Y.S.2d at 321.

38. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

39. Id. at 191-92, 298 N.Y.S.2d at 266; accord, Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (Civ. Ct. 1967); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), rev'd as to damages, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (2d Dep't 1967). But cf. Star Credit Corp. v. Molina, 59 Misc. 2d 290, 298 N.Y.S.2d 570 (Civ. Ct. 1969), noted in 38 Fordham L. Rev. 595 (1970), where the court refused to declare price unconscionability absent proof of the actual value of the product involved.

40. Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), aff'd on other grounds, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970) (home freezer); Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78 (Dist. Ct. 1970) (refrigerator-freezer).

No less indicative of the growing concern for consumer protection is the increasing advocacy of the class action in this area of the law.[41] Since its development in equity to avoid a multiplicity of actions at law,[42] support for the class action has been premised on several logical propositions. First, modern marketing techniques are demonstratively public in impact, thus necessitating a public remedy in instances of wrongdoing.[43] Second, the disadvantaged and uneducated poor, those most frequently victimized by unscrupulous sellers,[44] are those least able to cope with the cost and effort of individual litigation.[45] Third, private action is often impractical because the amount of recovery would be insufficient to justify the cost of a separate action.[46] Fourth, individual actions in incidents of widespread harm would require "an unrealistic expenditure of judicial energy . . . ."[47] Crowded court calendars make this a particularly cogent argument.[48] Finally, "[o]ne cannot think of a more . . . frustrating course than to seek to regulate goods or 'contract' quality through repeated lawsuits against inventive 'wrongdoers.' "[49] The psychological and deterrent value of such an unsystematic remedy would be exceedingly small.[50]

In *Vasquez v. Superior Court*[51] the California supreme court apparently be-

41. Starrs, The Consumer Class Action—Parts I & II. 49 B.U.L. Rev. 211 & 407 (1969); Travers & Landers, The Consumer Class Action, 18 Kan. L. Rev. 811 (1970).

42. Starrs, supra note 41, at 231. See, e.g., Yuba Consol. Gold Fields v. Kilkeary, 206 F.2d 884 (9th Cir. 1953).

43. Tydings, The Private Bar—Untapped Reservoir of Consumer Power, 45 Notre Dame Law. 478, 478-79 (1970).

44. Comment, Consumer Legislation and the Poor, 76 Yale L.J. 745 (1967).

45. Id. at 752-53.

46. Eckhardt, Consumer Class Actions, 45 Notre Dame Law. 663 (1970); Wright, The Cost-Internalization Case for Class Actions, 21 Stan. L. Rev. 383 (1969).

47. Speidel, Unconscionability, Assent and Consumer Protection, 31 U. Pitt. L. Rev. 359, 364 (1970).

48. See, e.g., Annual Report of the Director of the Administrative Office of the United States Courts, Reports of the Proceedings of the Judicial Conference of the United States 203-401 (1970).

49. Leff, Unconscionability and the Crowd—Consumers and the Common Law Tradition, 31 U. Pitt. L. Rev. 349, 356 (1970).

50. Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 435 (1960). Ample evidence of this may be seen in the present automobile industry sales contract where, in spite of the decision in Henningsen, standardized limited liability and disclaimer clauses persist. For example, a contract commonly employed in 1969 contained the following provision: "There are no warranties, expressed or implied, made by the seller herein, or the manufacturer, on the vehicle or chassis described on the face hereof except that in the case of a new vehicle or chassis the printed General Motors new vehicle warranty delivered to purchaser with such vehicle or chassis shall apply and the same is hereby made a part hereof as though fully set forth herein. The new vehicle warranty is the only warranty applicable to such new vehicle or chassis and is expressly in lieu of all other warranties, express or implied, including any implied warranty of merchantability or fitness for a particular purpose." Retail Order for a Motor Vehicle, General Motors form GM-692, cl. 9, (May 1969).

51. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

lieved that consumer protection was of sufficient importance to warrant a liberal interpretation of class action requirements.[52] In *Vasquez* a group of 37 consumers who had contracted for the purchase of frozen food and freezers sought rescission for themselves and all persons similiarly situated on the basis of fraudulent misrepresentations made to induce their making of the contracts.[53] The court held that if the plaintiffs could show the substantial identity of the alleged misrepresentations, a common interest sufficient to justify a class action would exist.[54]

Kugler v. Romain[55] presented the New Jersey supreme court with a typical array of consumer swindle elements: high pressure door-to-door sales,[56] low income urban target markets,[57] a worthless package of "educational materials"[58] and an exorbitant price.[59] At trial the Attorney General called 24 witnesses on behalf of the class of all customers.[60] Although the trial court found that the "proofs abundantly support the finding [of] deceptive and fraudulent practices . . ."[61] relief was limited to those 24 customers.[62] The trial court reasoned that an unconscionable price was not sufficient to establish fraud under the Consumer Fraud Act, which does not specifically use the term unconscionable,[63] and that unconscionability under the UCC was a matter for purely private action.[64]

The New Jersey supreme court emphasized that these statutes must be read with "a sensitive awareness of the climate of our time,"[65] a climate of "ever-increasing state and national anxiety"[66] over the problems of consumer protection. Deception, misrepresentation and unconscionable practices by professional sellers seeking mass distribution of consumer goods are public problems,[67] particularly in the milieu of the ghetto.[68] Stressing the inferiority of private remedial actions as compared with the prophylactic efficacy of the class action, the court stated that private remedies "provide little therapy for the overall public aspect of the problem."[69] One legislatively created remedy, noted the court, is the Con-

52. See id. at 821, 484 P.2d at 977-78, 94 Cal. Rptr. at 809-10.
53. Id. at 805-06, 484 P.2d at 966-67, 94 Cal. Rptr. at 798-99.
54. Id. at 814, 484 P.2d at 972, 94 Cal. Rptr. at 804.
55. 58 N.J. 522, 279 A.2d 640 (1971).
56. Id. at 527, 279 A.2d at 643.
57. Id. at 528, 279 A.2d at 643.
58. Id. at 530-31, 279 A.2d at 644-45.
59. Id. at 528-29, 279 A.2d at 643-44. The price was $279.95, while defendant's cost was approximately $40.00. Id.
60. Id. at 531, 279 A.2d at 645.
61. 110 N.J. Super. at 478, 266 A.2d at 148.
62. Id. at 487, 266 A.2d at 153.
63. Id. at 482, 266 A.2d at 150. See note 1 supra.
64. Id. at 481, 266 A.2d at 150.
65. 58 N.J. at 535, 279 A.2d at 647.
66. Id.
67. Id. at 536, 279 A.2d at 648.
68. See id.
69. Id. at 537, 279 A.2d at 648.

sumer Fraud Act which "clearly empower[s] the Attorney General to police consumer practices and contracts."[70] The Act not only provides for injunctive relief,[71] but also for "orders . . . necessary to restore to any person in interest any moneys or property . . . which may have been acquired by [unlawful] means . . . ."[72] Thus the court identified a legislative intent "to confer on the Attorney General the broadest kind of power to act in the interest of the consumer public . . ."[73] including "authority to bring action . . . either on behalf of specifically named buyers . . . or in the nature of a class action . . . ."[74]

At trial the court had dismissed the argument that the unconscionable price per se constituted the "deception, fraud, false pretense, misrepresentation or knowing material omission condemned by [the Act]."[75] Undefined by the UCC[76] and unmentioned by the Act, unconscionability must a priori be liberally interpreted "so as to effectuate the public purpose, and to pour content into it on a case-by-case basis."[77] That purpose is to "make realistic the assumption of the law that the agreement has resulted from *real* bargaining . . . ."[78] In the instant case the bargaining standard adopted was "good faith, honesty in fact and observance of fair dealing,"[79] a standard unequivocally ignored by the defendant. In this setting of fact and policy the court concluded that "unconscionability must be equated with the concepts of deception, fraud, false pretense, misrepresentation, concealment and the like . . . ."[80]

Unconscionability thus having been read into the Act, the court expeditiously

70. Id. It is significant that the court included within the purview of the Act what Leff termed "procedural unconscionability" and "substantive unconscionability." Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 487 (1967). Leff strongly criticized the UCC for apparently failing to adequately distinguish the pre-contract negotiations from the resulting contract. Another view is that the UCC adequately handles the problem in terms of unfair surprise and oppression. Comment, Unconscionable Sales Contracts and the Uniform Commercial Code, 45 Va. L. Rev. 583 (1959).

71. N.J. Stat. Ann. § 56:8-8 (1964).

72. Id.

73. 58 N.J. at 537, 279 A.2d at 648.

74. Id. at 539, 279 A.2d at 649.

75. Id. at 542, 279 A.2d at 651.

76. See N.J. Stat. Ann. § 12A:2-302 (1962). Some critics find this detrimental to commercial certainty. Leff, supra note 70, at 558-59. A better view is that to define unconscionability is to limit it unnecessarily. Comment, The Doctrine of Unconscionability, 19 Maine L. Rev. 81, 90 (1967). The absence of a definitive explanation of the term was clearly by design. As Professor Llewellyn pointed out at the hearings before the New York Law Revision Commission, lawyers tend to draft to the edge of the possible. [1954] N.Y. Law Revision Comm'n Rep., Record of Hearings on the Uniform Commercial Code 177. The provision thus makes such drafting a dangerous proposition and encourages a more meaningful negotiation of contract terms.

77. 58 N.J. at 543, 279 A.2d at 651 (footnote omitted).

78. Id. at 544, 279 A.2d at 652 (emphasis added).

79. Id. For a comprehensive evaluation of the UCC's good faith requirements see Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195 (1968).

80. 58 N.J. at 544, 279 A.2d at 652.

provided the commonality requisite for a class action, *i.e.*, price unconscionability. The court held that "the price for the book package was unconscionable in relation to defendant's cost and the value to the consumers and was therefore a fraud within the contemplation of [the Act]."[81]

Although the court liberally cited precedent for the holding of price unconscionability,[82] its clear, rational analysis indicates no resort to a simplistic rule.[83] Acknowledging that price generally constitutes but one element of unconscionability, the court declared the gross disparity in price and value in the instant case to be price unconscionability per se. While it may be argued that this interposes the court between contracting parties as a price arbiter in consumer sales contracts, and that the results would have been different had a more sophisticated class of consumers been involved, a better view seems to be that the court is merely policing extreme conditions. Since price is a common contractual element, the class interest was established without the additional burden of proof required in the otherwise liberal *Vasquez* decision where the court was constrained by a Code which does not include an unconscionability provision.[84]

It would be axiomatic to say that the flagrantly deceptive practices employed by the defendant in the instant case justified the result.[85] But in a larger sense the court has rendered a decision of substantial overall consistency and import.[86] Linking price unconscionability to the concept of fraud, the court has done far more than bring this case within the statutory provisions for class action. In the continuing war on deceptive consumer practices, the court has put the seller on notice that in the future the law's assumption that a contract is the result of arm's-length bargaining will be tempered by the proviso that the court will measure the arm.

81. Id. at 547, 279 A.2d at 654.

82. Id. at 535-48, 279 A.2d at 647-54 passim. Although prior cases talked in terms of price unconscionability, the courts seemed to temper this concept with considerable discussion of such other elements as overreaching, unfair surprise, and the financial and educational status of the buyer. Here the court has unequivocally stepped into the area of contract price regulation where the price/value disparity is so large as to be unconscionable.

83. See note 35 supra.

84. The version of the UCC adopted in California does not contain the unconscionability provision. Cal. Comm. Code § 2302 (West 1964) (not enacted).

85. The court provided that all judgments and contracts were to be cancelled and all monies refunded—even where a complete return of the books was not possible. Defendant was also enjoined from engaging in further illegal practices and fined under the provisions of the Act. 58 N.J. at 533, 279 A.2d at 646. The dramatic effect of this provision is best measured against the relief granted in Frostifresh Corp. v. Reynoso, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (2d Dep't 1967), where the court held that the seller should receive cost plus a reasonable profit. Id. at 120, 281 N.Y.S.2d at 965. Without the possibility of rescission, sellers may continue their unfair practices secure in the knowledge that they will recover at least cost plus a reasonable profit. The sweeping remedy in the instant case should preclude this result, and probably put this defendant out of this scurrilous business in New Jersey.

86. Extension of the logic demonstrated in the instant decision to other jurisdictions, without Consumer Fraud Acts authorizing class action, poses an interesting future UCC issue.

Criminal Procedure—Search and Seizure—Police Inventory of Items Beyond Plain View During Search of Automobile Stored After Accident Violative of Fourth Amendment.—Following an automobile collision, which resulted in the petitioner's immediate hospitalization, her car was removed from the highway and prepared for storage pursuant to statute.[1] Standard police procedure required an inventory of the contents of the automobile prior to such storage.[2] An unlocked suitcase resting on the rear seat of the automobile was found to contain a quantity of marijuana, and as a result the petitioner was indicted for possession of the drug. Petitioner's motion to suppress the evidence was denied by the trial court,[3] whereupon a writ of mandamus was sought in the Supreme Court of California to compel suppression of the evidence. The court granted the writ, holding that the inventory was a search within the meaning of the fourth amendment, and that anything beyond a plain view search was an unreasonable intrusion into the petitioner's constitutionally protected area of privacy. *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

The clearest example of a reasonable and valid search is the situation where express or implied consent has been given by the individual to be searched.[4] In doubtful cases, the Supreme Court has declared its preference for searches made pursuant to a warrant.[5] As a result of the fourth amendment mandate that "no

1. The Cal. Vehicle Code § 22651 (West 1971), provides in part that: "Any member of the [Highway Patrol, sheriff's office or police department] . . . may remove a vehicle from a highway under the following circumstances:

. . .

(b) When any vehicle is left standing upon a highway in such a position as to obstruct the normal movement of traffic or in such a condition as to create a hazard to other traffic upon the highway.

. . .

(g) When the person or persons in charge of a vehicle upon a highway are by reason of physical injuries or illness incapacitated to such an extent as to be unable to provide for its custody or removal."

Cal. Vehicle Code § 22850 (West 1971), provides: "Whenever an officer or employee removes a vehicle from a highway, or from public or private property . . . he shall take the vehicle to the nearest garage or other place of safety or to a garage designated or maintained by the governmental agency of which the officer or employee is a member, where the vehicle shall be placed in storage."

2. Mozzetti v. Superior Court, 4 Cal. 3d 699, 702, 484 P.2d 84, 85, 94 Cal. Rptr. 412, 413 (1971).

3. Id. at 703, 484 P.2d at 85, 94 Cal. Rptr. at 413.

4. Wren v. United States, 352 F.2d 617 (10th Cir. 1965), cert. denied, 384 U.S. 944 (1966). The apparent simplicity of a consensual search is deceptive. The battle is often not whether one has consented, but whether the consent was in fact valid. Id.; Simmons v. Bomar, 349 F.2d 365 (6th Cir. 1965). The Supreme Court has stated that the prosecution "has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968) (footnotes omitted).

5. Jones v. United States, 362 U.S. 257, 270-71 (1960). In United States v. Ventresca, 380 U.S. 102 (1965), the Court cited the Jones dictum, pointing out "that in a doubtful

Warrants shall issue, but upon probable cause,"[6] there has arisen a conflict over the meaning of the phrase "probable cause."[7] One of the few points of agreement is that to establish probable cause "the items sought [must be] in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched."[8]

In addition to consent and warrant searches, the courts have upheld the constitutionality of searches incident to arrest[9] and searches arising from exigent circumstances.[10] The common justification for these two categories is reasonableness. In particular, the category of searches arising from exigent circumstances is justified by predicating reasonableness on circumstances such as fear that the suspect possesses a weapon,[11] hot pursuit of a suspected felon,[12] or, in the case of an automobile, its rapid mobility.[13] All of these circumstances would

or marginal case a search under a warrant may be sustainable where without one it would fall." Id. at 106. For a recent case upholding an automobile search pursuant to a warrant, see United States v. Evans, 447 F.2d 129 (8th Cir. 1971).

6. U.S. Const. amend. IV.

7. Probable cause exists when "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925). Probable cause and reliable information have been found to exist on the basis of observations of government officers (United States v. Ventresca, 380 U.S. 102 (1965)), as well as on the basis of hearsay when somewhat corroborated. Jones v. United States, 362 U.S. 257 (1960). Probable cause and reliable information have been found lacking when the officer's affidavit does not meet the Supreme Court requirements that "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that [contraband items] were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable.'" Aguilar v. Texas, 378 U.S. 108, 114 (1964) (citation omitted). See Spinelli v. United States, 393 U.S. 410 (1969).

8. Comment, Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, 28 U. Chi. L. Rev. 664, 687 (1961). See United States v. Old Dominion Warehouse, Inc., 10 F.2d 736 (2d Cir. 1926).

9. Ker v. California, 374 U.S. 23 (1963); Harris v. United States, 331 U.S. 145 (1947), overruled, Chimel v. California, 395 U.S. 752 (1969); People v. Lujan, 475 P.2d 700 (Colo. 1970); People v. Smith, 31 App. Div. 2d 863, 297 N.Y.S.2d 225 (3d Dep't 1969); Kirkpatrick v. Commonwealth, 211 Va. 269, 176 S.E.2d 802 (1970).

10. Swan v. Superior Court, 8 Cal. App. 3d 392, 87 Cal. Rptr. 280 (Dist. Ct. App. 1970); People v. Neth, 5 Cal. App. 3d 883, 86 Cal. Rptr. 12 (Dist. Ct. App. 1970); People v. Sanders, 52 Misc. 2d 989, 277 N.Y.S.2d 487 (Sup. Ct. 1967).

11. In Chambers v. Maroney, 399 U.S. 42 (1970), the defendants were apprehended in their car after fleeing the scene of a robbery, but the car was not searched until removed to the police station. The search was deemed too far removed in time and space to be justified as incident to an arrest, but was justified since the police possessed probable cause to believe that the suspects carried guns. Id. at 47.

12. E.g., Warden v. Hayden, 387 U.S. 294 (1967); United States v. McDonnell, 315 F. Supp. 152 (D. Neb. 1970); People v. Superior Court, 6 Cal. App. 3d 379, 85 Cal. Rptr. 803 (Dist. Ct. App. 1970). See also State v. Kohuth, 287 Minn. 520, 176 N.W.2d 872 (1970).

13. Carroll v. United States, 267 U.S. 132, 153 (1925); accord, Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221 (1968).

justify the *complete search* of an automobile, as would the arrest of one in an automobile at the time of the search.[14]

The history of automobile searches has been plagued by a number of significant problems, not the least of which has been the vehicle's capability of being moved rapidly from one jurisdiction to another. In *Carroll v. United States*,[15] which involved a search under exigent circumstances, the Supreme Court upheld the search of an automobile without a warrant and the seizure of contraband liquor found inside.[16] The Court distinguished the necessity for procuring a warrant when searching a home, and held this requirement inapplicable to a vehicle when probable cause existed since the "vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[17]

Not all vehicle searches arise out of exigent circumstances, since in many cases the vehicle is in police custody when searched. In *Preston v. United States*[18] the defendants were arrested for vagrancy and the car they were in was removed from the scene of arrest and impounded by the police,[19] thus eliminating the justification of exigent circumstances since there was no possibility that the car might be removed from the jurisdiction. Subsequently the automobile was searched by the police at the garage where it had been placed in storage and was found to contain loaded revolvers, a forged license plate, and stocking masks.[20] The Supreme Court reversed the defendants' conviction and held the fruits of the search inadmissible. The justifications of search incident to an arrest and under exigent circumstances "are absent where a search is remote in time or place from the arrest."[21] The holding in *Preston* was modified in *Cooper v. California*,[22] where a police search of the defendant's impounded car[23] a week after

14. United States v. Berryhill, 445 F.2d 1189 (9th Cir. 1971), distinguishing Chimel v. California, 395 U.S. 752 (1969). In Chimel, the Court defined the reasonable limit of the area to be searched as the defendant's "person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him." Id. at 768. Chimel overruled the earlier case of Harris v. United States, 331 U.S. 145 (1947), which had articulated a broad policy that a search incident to an arrest of virtually the entire premises on which the suspect was found could be conducted without a warrant. Id. at 151-52.

15. 267 U.S. 132 (1925).

16. Id. at 162.

17. Id. at 153.

18. 376 U.S. 364 (1964).

19. Id. at 365.

20. Id. at 365-66.

21. Id. at 367. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).

22. 386 U.S. 58 (1967).

23. The California statute authorizing such forfeiture reads: "Any peace officer of this State, upon making or attempting to make an arrest for a violation of this division, shall seize any vehicle used to unlawfully transport any narcotic or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof, or which is used to facilitate the unlawful possession of a narcotic by an occupant thereof, and shall immediately deliver such vehicle to the Division of Narcotic Enforce-

his arrest for a narcotics violation revealed heroin in the car's glove compartment.[24] The Supreme Court upheld the search and seizure of the contraband since it was reasonable to inventory a car where the inventory was directly related to the crime involved.[25]

Harris v. United States[26] involved police custody of a vehicle which had been seen at the location of a robbery and was to be used as evidence against the defendant.[27] The Court held that the evidence found as a result of searching and securing the vehicle pursuant to police regulations was admissible, stating that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."[28]

In *Chambers v. Maroney*,[29] the defendants were arrested for robbery and their car was taken to a police station. A search of the vehicle revealed evidence of the robbery.[30] Basing its decision on *Carroll v. United States*,[31] the Supreme Court concluded that the vehicle's mobility justified the continuing existence of probable cause.[32] The circumstances in this case, however, would not appear to be as exigent as those in *Carroll* since the vehicle was in custody at the police station.[33] On the other hand, the Court clearly went further than *Cooper* or *Harris*, since the vehicle in this case was not impounded by the police. Thus

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ment of the Department of Justice to be held as evidence until a forfeiture has been declared or a release ordered." Law of June 23, 1955, ch. 1209, § 2, [1955] Cal. Laws 2224 (repealed 1967).

24. 386 U.S. at 58.

25. Id. The Court stated that though " 'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it,' . . . the reason for and nature of the custody may constitutionally justify the search." Id. at 61 (citations omitted). See United States v. Edge, 444 F.2d 1372 (7th Cir. 1971).

26. 390 U.S. 234 (1968).

27. Id. at 235; see, e.g., People v. Harris, 256 Cal. App. 2d 455, 63 Cal. Rptr. 849 (Dist. Ct. App. 1967) (car held as potential evidence for hit and run offense).

28. 390 U.S. at 236. See also People v. LaBelle, 37 App. Div. 2d 135, 322 N.Y.S.2d 746 (3d Dep't 1971).

29. 399 U.S. 42 (1970).

30. Id. at 44. Search incident to an arrest or under exigent circumstances could not justify admission of the evidence since "these justifications are absent where a search is remote in time or place from the arrest." Preston v. United States, 376 U.S. 364, 367 (1964); see People v. Burke, 61 Cal. 2d 575, 579, 394 P.2d 67, 69, 39 Cal. Rptr. 531, 533 (1964).

31. 267 U.S. 132 (1925); see text accompanying note 15 supra.

32. 399 U.S. at 48. The Court concluded that: "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." Id. at 52. Justice Harlan, concurring and dissenting, urged that the Constitution intended a magistrate, not a police officer, to judge the issue of reasonableness and issue a warrant except in extreme circumstances which were not present here. Id. at 61-63.

33. The extent of the police custody is not readily ascertainable; apparently the vehicle had not been impounded and would have been removed from the police station.

a new category of search incident to legal police custody was created and, in general, state courts have followed the rationale set forth in *Cooper*[34] and *Chambers*.[35]

In California, police custody has been used as the basis for an inventory search in a number of situations other than use of the vehicle as evidence. California appellate courts have allowed inventory searches of impounded automobiles which were suspected of being stolen,[36] found abandoned on a public street,[37] or blocking a street after an accident.[38] A basic justification for an inventory search, not specifically provided for by the statute authorizing the impounding,[39] is that since "an automobile is lawfully in the custody of a peace officer, such contraband articles as are contained in it are legally in the possession of such officer . . . ."[40]

A second justification acknowledged by the courts is that the police have become bailees of the subject vehicle[41] and consequently must take protective precautions to avoid liability.[42] "Having such a responsibility it has now been widely recognized that police may properly inventory the contents of cars rightfully in

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34. See People v. Cook, 24 Mich. App. 401, 180 N.W.2d 354 (Mich. Ct. App. 1970); Dorsey v. State, 243 So. 2d 550 (Miss. 1971); Breckenridge v. State, 460 S.W.2d 907 (Tex. Crim. App. 1970).

35. See State v. Holmes, 160 Conn. 140, 274 A.2d 153 (1970); Aaron v. State, 275 A.2d 791 (Del. 1971); State v. Hammonds, 459 S.W.2d 365 (Mo. 1970).

36. People v. Myles, 189 Cal. App. 2d 42, 10 Cal. Rptr. 733 (Dist. Ct. App. 1961). See also People v. Koposesky, 25 App. Div. 2d 777, 269 N.Y.S.2d 484 (2d Dep't 1966); People v. Smith, 62 Misc. 2d 473, 308 N.Y.S.2d 909 (Sup. Ct. 1970).

37. People v. Laursen, 264 Cal. App. 2d 932, 71 Cal. Rptr. 71 (Dist. Ct. App. 1968). See also People v. Harper, 26 Ill. 2d 85, 185 N.E.2d 865 (1962), cert. denied, 372 U.S. 966 (1963); People v. James, 46 Misc. 2d 138, 259 N.Y.S.2d 241 (Sup. Ct. 1965).

38. People v. Roth, 261 Cal. App. 2d 430, 68 Cal. Rptr. 49 (Dist. Ct. App. 1968); People v. Norris, 262 Cal. App. 2d Supp. 897, 68 Cal. Rptr. 582 (Super. Ct. 1968). See also Milburn v. State, 50 Wis. 2d 53, 183 N.W.2d 70 (1971).

39. See, e.g., Cal. Vehicle Code § 22850 (West 1971); N.Y. Veh. & Traf. Law § 1642(a)20 (McKinney 1970); Tex. Rev. Civ. Stat. Ann. art. 6701d § 94 (1969).

40. People v. Ortiz, 147 Cal. App. 2d 248, 251, 305 P.2d 145, 147 (Dist. Ct. App. 1956) (citations omitted); accord, People v. Nebbitt, 183 Cal. App. 2d 452, 460-61, 7 Cal. Rptr. 8, 14 (Dist. Ct. App. 1960).

41. People v. Andrews, 6 Cal. App. 3d 428, 85 Cal. Rptr. 908 (Dist. Ct. App. 1970); People v. Roth, 261 Cal. App. 2d 430, 68 Cal. Rptr. 49 (Dist. Ct. App. 1968); see State v. Wallen, 185 Neb. 44, 173 N.W.2d 372, cert. denied, 399 U.S. 912 (1970); Heffley v. State, 83 Nev. 100, 423 P.2d 666 (1967); Warrix v. State, 50 Wis. 2d 368, 184 N.W.2d 189 (1971).

42. The degree of liability is dependent on the type of bailee that the police have become according to statute. If they are involuntary bailees—i.e., if they have obtained the property by accident and without the owner's negligence—then they must only use slight care in preserving the thing deposited. Cal. Civ. Code §§ 1815, 1816, 1846 (West 1954). However, since Cal. Vehicle Code § 22851 (West 1971), provides that a lien shall be placed on the vehicle for storage charges, the bailee is a depositary for hire and must exercise at least ordinary care to preserve whatever was deposited. Cal. Civ. Code §§ 1851-52 (West 1954).

their custody. Such an inventory protects the owner of the vehicle from theft or other loss of its contents; it also protects the police or garage custodian from unfounded claims of loss of property."[43]

California appellate courts have also sought to justify a warrantless intrusion into an automobile by distinguishing a search from a police inventory.[44] In *People v. Roth*[45] a police officer discovered marijuana in a coat while making an inventory prior to the storage of a vehicle that had been involved in an accident.[46] The appellate court deemed the evidence admissible, holding that "the discovery of the contraband was not the result of a search but of a routine measure . . . ."[47] The court noted that the officer was not searching for contraband, had no cause to believe contraband was in the vehicle, did not suspect the occupants of having committed a crime, and that no arrests had been made.[48] The court in *People v. Norris*[49] also relied heavily on "[the] requirement that a search implies a seeking for contraband or evidence of guilt which has been concealed to use it in the prosecution of a criminal action . . . ."[50] In both of these cases, the California courts drew a semantic distinction, which had been expressly rejected by the Supreme Court on several occasions,[51] suggesting that the term "search" could only apply to the seeking of evidence that would produce a criminal conviction.[52]

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43. People v. Andrews, 6 Cal. App. 3d 428, 433, 85 Cal. Rptr. 908, 911-12 (Dist. Ct. App. 1970). See Cooper v. California, 386 U.S. 58, 61-62 (1967); People v. Harris, 256 Cal. App. 2d 455, 461, 63 Cal. Rptr. 849, 853 (Dist. Ct. App. 1967); People v. Garcia, 214 Cal. App. 2d 681, 684, 29 Cal. Rptr. 609, 611 (Dist. Ct. App. 1963); People v. Ortiz, 147 Cal. App. 2d 248, 250, 305 P.2d 145, 147 (Dist. Ct. App. 1956).

44. E.g., People v. Roth, 261 Cal. App. 2d 430, 68 Cal. Rptr. 49 (Dist. Ct. App. 1968); People v. Norris, 262 Cal. App. 2d Supp. 897, 68 Cal. Rptr. 582 (Super. Ct. 1968).

45. 261 Cal. App. 2d 430, 68 Cal. Rptr. 49 (Dist. Ct. App. 1968).

46. Id. at 434, 68 Cal. Rptr. at 51.

47. Id., 68 Cal. Rptr. at 52.

48. Id. at 434-35, 68 Cal. Rptr. at 52.

49. 262 Cal. App. 2d Supp. 897, 68 Cal. Rptr. 582 (Super. Ct. 1968). The defendant's truck had been in an accident and was blocking traffic. Since the defendant had been removed by ambulance, a tow-truck was called to remove and impound the vehicle. A police inventory revealed a revolver in the glove compartment. Id. at 898, 68 Cal. Rptr. at 583.

50. Id. at 898-99, 68 Cal. Rptr. at 583.

51. In Camara v. Municipal Court, 387 U.S. 523 (1967), the Court said: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Id. at 530. The Court has also stated that "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security . . . ." Terry v. Ohio, 392 U.S. 1, 17-18 n.15 (1968). "'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'fullblown search.'" Id. at 19.

52. 261 Cal. App. 2d at 434-35, 68 Cal. Rptr. at 52; 262 Cal. App. 2d Supp. at 898-99, 68 Cal. Rptr. at 583.

Finally, in *Mozzetti*,[53] the Supreme Court of California has followed the precedents set by the United States Supreme Court in holding that a police inventory must be held to constitutional standards of reasonableness,[54] thereby eliminating the distinction made by *lower* state courts that a police inventory is not a search or seizure within the meaning of the fourth amendment.[55]

In *Mozzetti* the prosecution argued that since the police were to receive remuneration for the storage of the vehicle and were considered depositories for hire,[56] they were required to exercise ordinary care.[57] This exercise of ordinary care would include an examination of the suitcase and its contents to provide complete protection of the vehicle's contents against loss and to protect the police and storage bailee from unfounded tort claims. This action would still conform to the standards of reasonableness required by the fourth amendment.[58] The *Mozzetti* court, on the basis of *Harris v. United States*,[59] rejected this argument and held that only items in plain view may be taken into custody.[60] In the situation presented, a reasonable action would be no more than "rolling up the windows, locking the vehicle doors and returning the keys to the owner. The owner himself, if required to leave his car temporarily, could do no more to protect his property."[61] Nor would unfounded tort claims ensue, since "even a duty of ordinary care does not require the storage bailee to inventory contents not in plain sight in automobiles he retains."[62]

The *Mozzetti* court also rejected what it referred to as a "bootstrapping doctrine," *i.e.*, if a vehicle is lawfully and validly in police custody, then its contents must also be lawfully in their possession.[63] The court pointed out "that mere legal custody of an automobile by the police [did] not create some new possessory right to justify the search of that vehicle."[64] Furthermore, there was no basis on which a warrant could be issued since the police were looking for "nothing

53. 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971); accord, Mayfield v. United States, 276 A.2d 123 (D.C. Ct. App. 1971).

54. 4 Cal. 3d at 706, 484 P.2d at 88, 94 Cal. Rptr. at 416.

55. See text accompanying notes 47 & 50 supra.

56. See note 42 supra.

57. 4 Cal. 3d at 709, 484 P.2d at 90, 94 Cal. Rptr. at 418; see Cal. Civ. Code § 1852 (West 1954).

58. 4 Cal. 3d at 707, 484 P.2d at 88, 94 Cal. Rptr. at 416. "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

59. 390 U.S. 234 (1968); see text accompanying notes 26-28 supra.

60. 4 Cal. 3d at 707, 484 P.2d at 89, 94 Cal. Rptr. at 417; see 390 U.S. at 236.

61. 4 Cal. 3d at 707, 484 P.2d at 89, 94 Cal. Rptr. at 417.

62. Id. at 709-10, 484 P.2d at 90, 94 Cal. Rptr. at 418.

63. See text accompanying note 40 supra.

64. 4 Cal. 3d at 710, 484 P.2d at 91, 94 Cal. Rptr. at 419. The court relied on Cooper v. California, 386 U.S. 58 (1967), wherein the Supreme Court stated that " 'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it,' [but it is] the reason for and nature of the custody [which] may constitutionally justify the search." Id. at 61 (citation omitted).

in particular and everything in general."[65] The court argued that this was exactly the type of invasion of privacy which the fourth amendment had been designed to prevent.[66]

Contemporaneously with the interpretation given the fourth amendment by the court in *Mozzetti*, the New York Court of Appeals, facing the same problem in *People v. Sullivan*,[67] reached the opposite result. In that case, the defendant's illegally parked car was removed from a tow-away zone pursuant to statute.[68] Normal police procedure resulted in the inventory of a brief case discovered in the automobile. The case was found to contain a loaded pistol, whereupon the defendant was indicted for possession of a loaded weapon. The court of appeals held the evidence admissible.[69] The majority, mentioning *Mozzetti* only in passing and commenting that the California supreme court had given federal law too restrictive an interpretation, relied heavily on the fact that the car was legally in police custody[70] and argued that an inventory was not a search.[71] The fact that the police were not in pursuit of evidence to be used in a criminal conviction was also used to bolster the majority's opinion.[72]

As demonstrated by *Mozzetti* and *Sullivan*, the permissible boundaries of inventory searches are not easily determined. "[T]he central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" provides the

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65. 4 Cal. 3d at 711, 484 P.2d at 92, 94 Cal. Rptr. at 420.

66. Id. Mozzetti has been given retrospective effect by the California Second District Court of Appeal. People v. Heredia, 97 Cal. Rptr. 488 (Dist. Ct. App. 1971). The First District Court of Appeal, however, in People v. Superior Court, 97 Cal. Rptr. 548 (Dist. Ct. App. 1971), has held that Mozzetti is to be applied only prospectively.

67. 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971); accord, People v. Robinson, 36 App. Div. 2d 375, 320 N.Y.S.2d 665 (2d Dep't 1971); see People v. Baer, 37 App. Div. 2d 150, 322 N.Y.S.2d 534 (3d Dep't 1971).

68. N.Y. Veh. & Traf. Law § 1204(b)(1) (McKinney 1970).

69. 29 N.Y.2d at 77, 272 N.E.2d at 469, 323 N.Y.S.2d at 952.

70. Id. The court's dependence on Cooper v. California, 386 U.S. 58 (1967), circumvented the fact that Cooper had involved an arrest for a narcotics violation—not a mere traffic violation—and ignored the Supreme Court's emphasis that "the reason for and the nature of the custody" justified the search, not the mere possession of the automobile. Id. at 61; see note 64 supra.

71. 29 N.Y.2d at 77, 272 N.E.2d at 469, 323 N.Y.S.2d at 952. The dissent in Sullivan was quick to point out that "[a] search is no less a search, a seizure no less a seizure, because termed an 'inventory.'" Id., 272 N.E.2d at 469, 323 N.Y.S.2d at 952. See also Terry v. Ohio, 392 U.S. 1, 17-18 n.15 & 19 (1969).

72. 29 N.Y.2d at 77, 272 N.E.2d at 469, 323 N.Y.S.2d at 952. The validity of this distinction was expressly denied in Camara v. Municipal Court, 387 U.S. 523, 530 (1967); see note 51 supra. The dissent provided a much more convincing application of precedent in stressing "the automobile owner's countervailing interest in preserving the privacy of his personal effects . . . . [and that] the authority to tow away and impound the vehicle does not entitle law enforcement officers to conduct a warrantless search of its contents." 29 N.Y.2d at 79, 272 N.E.2d at 470, 323 N.Y.S.2d at 954.

standard.[73] The United States Supreme Court has authorized the search of an automobile: (1) where there was probable cause to believe that the car contained contraband and exigent circumstances existed,[74] (2) where the automobile was impounded, subject to forfeiture, and the inventory was directly related to the crime involved,[75] (3) where the automobile was to be used as evidence of the felony and only evidence in plain view was seized,[76] and (4) where there was continued existence of probable cause to search after an arrest due to the vehicle's mobility.[77] The California supreme court in *Mozzetti* has refused to enlarge these categories to include an inventory search beyond plain view of an automobile impounded for a traffic violation. The New York Court of Appeals has reached the opposite result in *Sullivan*, yet that case did not come within any of the categories sanctioned by the Supreme Court. One possible solution, if more lenient standards are desired, is to require that anyone operating a vehicle within the jurisdiction must submit it to a thorough police inventory whenever it is legally in police custody.[78] Until this is done, however, *Mozzetti* should be looked upon as providing the more correct interpretation of the law.

Criminal Procedure—Search and Seizure—Sufficiency of Showing of Probable Cause in Supporting Affidavit Which Relies on Unidentified Informer's Tip—Evidence of Prior Credibility Not Necessary Under "Totality of Circumstances" Test.—A federal magistrate issued a warrant authorizing the search of defendant Harris' premises based on the supporting affidavit of a federal tax investigator. Charged with possession of non-tax-paid liquor as a direct consequence of a fruitful search, Harris made an unsuccessful attempt to suppress the evidence, contending that the supporting affidavit was insufficient to establish probable cause.[1] He was convicted by a jury and sentenced to two years imprisonment.[2] The United States Court of Appeals for the Sixth Circuit reversed the conviction,[3] holding that the affidavit failed to establish probable cause when

73. Terry v. Ohio, 392 U.S. 1, 19 (1968). See also Wyman v. James, 400 U.S. 309 (1971), noted in 40 Fordham L. Rev. 150 (1971).

74. Carroll v. United States, 267 U.S. 132 (1925); see text accompanying notes 15-17 supra.

75. Cooper v. California, 386 U.S. 58 (1967); see text accompanying notes 22-25 supra.

76. Harris v. United States, 390 U.S. 234 (1968); see text accompanying notes 26-28 supra.

77. Chambers v. Maroney, 399 U.S. 42 (1970); see text accompanying notes 29-32 supra.

78. This type of reasoning has been used in the case of welfare searches. Wyman v. James, 400 U.S. 309 (1971), noted in 40 Fordham L. Rev. 150 (1971).

1. United States v. Harris, 403 U.S. 573, 576 (1971).

2. Id.

3. United States v. Harris, 412 F.2d 796, 797 (1969) (per curiam), rev'd, 403 U.S. 573 (1971).

viewed in the light of *Aguilar v. Texas*[4] and *Spinelli v. United States*.[5] A five-man majority of the Supreme Court reversed and reinstated the conviction holding that, when viewed in their totality, the various allegations of the affidavit established probable cause notwithstanding the fact that the informer had not previously supplied accurate information to law enforcement officers. *United States v. Harris*, 403 U.S. 573 (1971).

The fourth amendment guarantees that the people shall be secure "against unreasonable searches and seizures" and that warrants shall issue only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[6] The English common law authorized governmental search and seizure of private property under certain circumstances[7] and the fourth amendment has been held to continue this authorization.[8] It is the "unreasonable" search which is unconstitutional.[9]

The Supreme Court, in an early case, decided that the "probable cause" which would render a search and seizure "reasonable" did not require full-fledged proof of guilt or even prima facie evidence thereof.[10] A later decision confirmed the

4. 378 U.S. 108 (1964).

5. 393 U.S. 410 (1969).

6. U.S. Const. amend. IV.

7. See Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765). According to this much quoted case, the search warrant crept into the law and was limited to a search for stolen goods and tethered to certain procedural requirements: an oath as to the theft, location, and description of the goods; the owner's attendance at the execution of the warrant; and the executing officer's verification that the goods answered the description. Id. at 818. See also 79 C.J.S. Searches and Seizures § 2 (1952).

8. E.g., in Gouled v. United States, 255 U.S. 298 (1921), the fourth amendment was interpreted as an affirmative authorization as well as a prohibition: "Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them . . . ." Id. at 308; see Warden, Md. Pen. v. Hayden, 387 U.S. 294 (1967); Carroll v. United States, 267 U.S. 132 (1925); Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962); Burke v. Kingsley Books, Inc., 208 Misc. 150, 142 N.Y.S.2d 735 (1955), aff'd sub nom. Brown v. Kingsley Books, Inc., 1 N.Y.2d 177, 134 N.E.2d 461, 151 N.Y.S.2d 639 (1956), aff'd, 354 U.S. 436 (1957).

There are exceptions to the rule enunciated in Gouled, supra, which allow searches to be made without a warrant: (1) where there are "exceptional circumstances" present (United States v. Jeffers, 342 U.S. 48 (1951) (dictum); Johnson v. United States, 333 U.S. 10 (1948) (dictum)); (2) if the search is incident to a valid arrest (Chimel v. California, 395 U.S. 752 (1969); United States v. Rabinowitz, 339 U.S. 56 (1950)); (3) search of an automobile where it is not practicable to secure a warrant because the vehicle can be easily moved (Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925)); (4) where valid consent for the search is given. McDonald v. United States, 307 F.2d 272 (10th Cir. 1962).

9. Warden, Md. Pen. v. Hayden, 387 U.S. 294, 301 (1967); Gouled v. United States, 255 U.S. 298, 308 (1921); Boyd v. United States, 116 U.S. 616, 622 (1886); see 79 C.J.S. Searches and Seizures § 8 (1952).

10. Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813). For a recent reaffirmation of this principle see Spinelli v. United States, 393 U.S. 410, 419 (1969).

founding fathers' wariness[11] of the power of search and seizure by holding illegally obtained evidence inadmissible in federal courts.[12]

The few cases decided, however, did not crystallize exactly what was necessary to make out the probable cause required before any warrant could issue. It was not until 1933, in *Nathanson v. United States*,[13] that the validity of a search and seizure was challenged squarely on the sufficiency of the supporting affidavit's showing of probable cause for the issuance of a warrant. The affiant swore that he had " 'cause to suspect and [did] believe' "[14] that the defendant was in possession of foreign liquors brought into the United States illegally. The Court held that "mere affirmance of suspicion or belief is not enough"[15] to establish probable cause for the search of a private dwelling under the fourth amendment. To establish probable cause, the issuer of the warrant must look to "*facts or circumstances* presented to him under oath or affirmation."[16]

With the *Nathanson* decision, the Court clearly established what was *not* sufficient for probable cause. Predictably, the subsequent cases called for a refinement of what *would* be sufficient to establish probable cause if "suspicion or belief" were inadequate.[17]

To establish probable cause,[18] the facts and circumstances must have a rea-

11. See Henry v. United States, 361 U.S. 98, 100-01 (1959); Boyd v. United States, 116 U.S. 616, 625 (1886). For a brief summary of the history and purpose of the fourth amendment see Warden, Md. Pen. v. Hayden, 387 U.S. 294, 312-25 (1967) (Douglas, J., dissenting); Armentano, The Standards for Probable Cause Under the Fourth Amendment, 44 Conn. B.J. 137, 137-41 (1970) [hereinafter cited as Armentano].

12. Weeks v. United States, 232 U.S. 383 (1914). The fourth amendment applies to the states and is enforced against them by the exclusion of evidence. Mapp v. Ohio, 367 U.S. 643 (1961), overruling Wolf v. Colorado, 338 U.S. 25 (1949). The federal standard of probable cause applies to the states, but the state rule may be stricter than the federal rule. Ker v. California, 374 U.S. 23, 34 (1963).

13. 290 U.S. 41 (1933).

14. Id. at 44.

15. Id. at 47.

16. Id. (emphasis added).

17. E.g., Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959); Giordenello v. United States, 357 U.S. 480 (1958).

18. Probable cause is constitutionally required for the issuance of both a search warrant (by the specific language of the fourth amendment), and an arrest warrant. Giordenello v. United States, 357 U.S. 480 (1958). The constitution requires probable cause for a warrantless arrest (Beck v. Ohio, 379 U.S. 89, 91 (1964)), apparently regardless of whether there is a concomitant search; and search incident to arrest requires probable cause to arrest. Id.; Draper v. United States, 358 U.S. 307 (1959). Probable cause is not required for stop-and-frisk (Terry v. Ohio, 392 U.S. 1 (1968)) or for a border search (Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967); Denton v. United States, 310 F.2d 129 (9th Cir. 1962); see Comment, Border Searches and the Fourth Amendment, 77 Yale L.J. 1007 (1968)). There is a probable cause requirement for an administrative search but it would appear to be a different standard than that used in the criminal law. See Camara v. Municipal Court, 387 U.S. 523, 538 (1967). For a discussion of "probable cause" as a sliding scale standard that varies depending on the privacy invaded and the governmental interest involved see Armentano 161-80, which identifies six and possibly seven standards in a "probable cause calculus."

sonably trustworthy source and must be sufficient "to warrant a man of reasonable caution" to believe that an offense has been or is being committed.[19] As to who shall make the determination concerning the habits of the reasonably cautious man, the Court has consistently displayed a decided preference for the magistrate issuing the warrant, as opposed to the officer providing the supporting affidavit.[20] *Giordenello v. United States*[21] held that an affidavit which merely recites the elements of the offense charged, without more, does not afford the magistrate a basis on which to exercise his judgment.[22] As *Nathanson* made apparent, the reasonably cautious man does not act on the conclusions of others; he must know the underlying facts and circumstances.

But what if the affiant supplies underlying facts and circumstances that are not his own personal observations: Does the reasonably cautious man credit hearsay when issuing a warrant? This issue, skirted in *Giordenello* and long dividing the lower courts,[23] was met squarely in *Jones v. United States*.[24] The

19. Carroll v. United States, 267 U.S. 132, 162 (1925). This definition also appears in Berger v. New York, 388 U.S. 41 (1967); Brinegar v. United States, 338 U.S. 160 (1949); and Husty v. United States, 282 U.S. 694 (1931).

20. E.g., Whiteley v. Warden, Wyo. St. Pen., 401 U.S. 560, 566 (1971); United States v. Ventresca, 380 U.S. 102, 106, 109 (1965); Aguilar v. Texas, 378 U.S. 108, 110-11 (1964); Jones v. United States, 362 U.S. 257, 270 (1960); Johnson v. United States, 333 U.S. 10, 13-14 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

21. 357 U.S. 480 (1958). Although Giordenello involved an arrest warrant, the Court indicated that the same standards would apply to a search warrant. Id. at 485-86; see note 18 supra.

22. 357 U.S. at 486-87. Whether or not a magistrate, in practice, actually makes an independent determination of probable cause has been questioned, especially as to arrest warrants. LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich. L. Rev. 987, 992 (1965) [hereinafter cited as LaFave & Remington]. "As a general proposition, there is greater judicial concern over the issuance of search warrants than over the issuance of arrest warrants." Id. at 993.

In some communities it is possible that the magistrate issuing the warrant may not be aware of the Supreme Court guidelines. See 20 Drake L. Rev. 205 (1970), noting State v. Spier, 173 N.W.2d 854 (Iowa 1970), where the issuing magistrate was a justice of the peace; cf. Evans v. United States, 242 F.2d 534 (6th Cir.), cert. denied, 353 U.S. 976 (1957).

Despite the Supreme Court's continued reference to "magistrates," it is quite possible that the Court would approve the imposition of some other official if sufficiently detached from the arrest and search process itself. See Berger v. New York, 388 U.S. 41 (1967) (dictum), which stated that a New York statute, permitting the probable cause determination to be made by the attorney general, the district attorney, or a police officer above the rank of sergeant, satisfied fourth amendment requirements. Id. at 54. But see Mancusi v. DeForte, 392 U.S. 364, 371 (1968).

23. Compare In re Rosenwasser Bros., 254 F. 171 (E.D.N.Y. 1918), with Davis v. United States, 35 F.2d 957 (5th Cir. 1929), and Salata v. United States, 286 F. 125 (6th Cir. 1923), and Owens v. Commonwealth, 309 Ky. 478, 218 S.W.2d 49 (1949), and Coleman v. Commonwealth, 219 Ky. 139, 292 S.W. 771 (1927).

24. 362 U.S. 257 (1960). This decision was prefigured a year earlier by Draper v. United States, 358 U.S. 307 (1959), which held that evidence inadmissible at trial, including hearsay, could be considered in determining whether there was probable cause for a warrantless

Court held that hearsay may be the basis of a warrant, but it must not be merely the belief or conclusion of the informer.[25] Since *Nathanson* held that belief of the affiant was not enough to establish probable cause, "[*a*] *fortiori* this is true of an affidavit which states only the belief of one not the affiant."[26] Thus, the *Jones* Court decided that a hearsay affirmation can establish probable cause "so long as a substantial basis for crediting the hearsay is presented."[27]

In *Jones* the hearsay tip was based on personal knowledge since the informant claimed to have purchased narcotics from the defendant and the affidavit implied that he had seen the contraband hidden in certain places in the defendant's apartment.[28] The Court questioned whether this alone would be enough to establish probable cause, but then went on to find that the affiant-policeman's statement also contained a "substantial basis" for the magistrate's acceptance of the informant's story.[29] Three factors evidently combined to establish the

arrest and subsequent search. Id. at 311-12. Draper has been construed as authority for the proposition that a tip might be "self-verifying" because of the kind and amount of detail included. Spinelli v. United States, 393 U.S. 410, 416-17, 425 (1969) (plurality opinion and White, J., concurring). The tip in Draper included a precise description of defendant's physical attributes, clothing, accoutrements, gait, and location; and the search incident to arrest produced the expected heroin. 358 U.S. at 308-09. However, Draper contains a variety of factors that might possibly distinguish it from other cases involving probable cause for the issuance of warrants: the informer was named; he had previously given information that had proved reliable; the considerable detail was corroborated fully before the probable cause was said to be established, and finally, it is a search incident to arrest without warrant, and not a search warrant case. Though this last factor is theoretically irrelevant at the present time (Beck v. Ohio, 379 U.S. 89, 96 (1964); Wong Sun v. United States, 371 U.S. 471, 479-80 (1963); see note 18 supra), it is quite possible that the Draper Court believed that there was no time to obtain a warrant, or that the Court may have been "subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, supra at 96. See generally L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime 101-02, 105 (1967) (indicating that police find other procedures more convenient than search warrants); Armentano; LaFave & Remington (indicating that judges do seem to consider arrest warrants differently from search warrants, whatever the theoretical identity); Pringle & Garfield, The Expanding Power of Police to Search and Seize: Effect of Recent U.S. Supreme Court Decisions on Criminal Investigation, 40 U. Colo. L. Rev. 491, 501 (1968) (indicating that a less stringent test may be applied to a warrantless arrest and search than to an arrest or search pursuant to warrant).

25. 362 U.S. at 271.

26. Id. at 269.

27. Id. Whether or not there is a "substantial basis" for crediting the hearsay is basically a factual question for determination by the trial court. Cf. Ker v. California, 374 U.S. 23 (1963); United States v. Rabinowitz, 339 U.S. 56 (1950), overruled, Chimel v. California, 395 U.S. 752 (1969); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). But the decision should be made "in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of [the Supreme] Court applying that Amendment." Ker v. California, supra at 33.

28. 362 U.S. at 267-68 n.2.

29. Id. at 271.

substantial basis,[30] but there is no way of determining whether each factor was necessary for the finding.[31] Nevertheless, the fundamental criterion suggested was that the affidavit besides containing allegations which, if true, would create probable cause, must also provide a basis for crediting the story.[32]

The Court articulated this "two-pronged" test four years later in *Aguilar v. Texas*:[33] First, the magistrate must be presented with some of the underlying circumstances from which the informant concluded that the contraband is located where he claims it is;[34] and second, the magistrate must be presented with some of the underlying circumstances from which the affiant concluded that the informant is credible or[35] his information trustworthy.[36] The Court pointed out that if this information was not supplied by the officer-affiant, the determination as to probable cause would actually be in the hands of the officer[37] or the in-

30. The three factors were: (1) the informant had previously given accurate information; (2) his story was corroborated by other sources of information; and (3) the defendant was known to the police as a user of narcotics. Id.

31. The Court did comment on the relevancy of the final two factors, supra note 30, indicating that they tended to reduce skepticism towards the informant's story. "Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history." 362 U.S. at 271. The language of the Court has a distinctly negative flavor here, i.e., these latter two factors reduce resistance to the tale. This is not necessarily the same thing as "establishing" probable cause which would, presumably, require a positive showing. Jones, therefore, might be interpreted as allowing consideration of factors such as defendant's reputation and hearsay corroboration only when the substantial basis has already been shown in some positive way, e.g., the informant in Jones had previously given accurate information. Such a reading of Jones would now appear to be all but foreclosed by United States v. Harris, 403 U.S. 573 (1971), where four members of the Court read Jones as unfettered authority for the consideration of defendant's reputation in determining probable cause. Id. at 582.

32. See 362 U.S. at 271-72.

33. 378 U.S. 108 (1964).

34. Id. at 114.

35. Presumably, by the use of the alternative "or" the Court recognized that a "non-credible" informant might be the basis of probable cause if the affiant had independent verification of the reliability of his tale. E.g., United States v. Irby, 304 F.2d 280 (4th Cir.), cert. denied, 371 U.S. 830 (1962); United States v. Woodson, 303 F.2d 49 (6th Cir. 1962), cert. denied, 373 U.S. 941 (1963); United States v. Williams, 219 F. Supp. 666 (S.D.N.Y. 1963), aff'd per curiam, 336 F.2d 183 (2d Cir.), cert. denied, 379 U.S. 857 (1964).

36. 378 U.S. at 114.

37. Although this has been frequently reiterated by the Court and the formulation has not been directly challenged, the officer's role in the determination of probable cause would seem to be a central issue underlying search and seizure. Cf. Whiteley v. Warden, Wyo. St. Pen., 401 U.S. 560, 572-73 (1971) (dissent). If the policemen-affiants were completely reliable and unfailingly accurate in their asessment of probable cause, etc., it is obvious that, upon the sworn statement of an officer-affiant that an informer was "reliable" and his information "credible," there would be no need for further inquiry into the source of the officer's information.

However, in addition to the possibility that a well-meaning policeman might be mistaken in his judgment of the facts, it is also possible that such a policeman might distort the facts

formant[38] rather than the magistrate.[39]

In *Spinelli v. United States*[40] the Court further refined the issue of probable

so as to "manufacture" probable cause to bring about the apprehension of one he thinks a criminal. "[T]he policeman sees his job as one of catching criminals, not of enforcing the Constitution. Once he has caught someone who really is a criminal, he does not feel that it is wrong for him to vary the facts in order to comply with the legal rules." Chevigny, Police Abuses in Connection With the Law of Search and Seizure, 5 Crim. L. Bull. 3, 5 (1969) [hereinafter cited as Chevigny]; cf. J. Skolnick, Justice Without Trial 228 (1967). This police tendency has shown up in comparisons of "dropsy" allegations (officer claims defendant dropped and therefore abandoned contraband) before and after Mapp v. Ohio, 367 U.S. 643 (1961) (illegal search requires supression of evidence in state courts). Following the Mapp ruling, it became clear that the fruit of a successful search made without probable cause would be suppressed whereas the "abandonment" or dropping of the contraband would constitute probable cause for seizure and subsequent arrest. Chevigny 8.

For examples of police-affiants stretching the truth in order to create probable cause see, e.g., id. at 5-7 (changing defendant's location to position "in plain view"); cf. United States v. Elgisser, 334 F.2d 103 (2d Cir.), cert. denied, 379 U.S. 881 (1964) (FBI agent testified that informer was reliable, but admitted that he did not know his identity); United States v. Pearce, 275 F.2d 318 (7th Cir. 1960) (no previous contacts with "reliable" informer by either affiant or agent who had received communication); Lerner v. United States, 151 A.2d 184 (D.C. Mun. Ct. App. 1959) (affidavit stated that information was received within preceding month whereas in fact it was received in the previous year); see Comment, Informer's Word as the Basis for Probable Cause in the Federal Courts, 53 Calif. L. Rev. 840, 848 n.40 (1965) (gathering above cases). See generally A. Beisel, Control Over Illegal Enforcement of the Criminal Law: The Role of the Supreme Court (1955); S. Brodsky, Search Warrants, Hearsay Evidence, and the Federal Constitution: A Critique Based on California Experience 40 (1965) [hereinafter cited as Brodsky]; A. Deutsch, The Trouble With Cops (1954); E. Hopkins, Our Lawless Police (1931); Younger, The Perjury Routine, The Nation, May 8, 1967, at 596-97.

The weight given such possibilities will obviously affect the persistence with which the Court requests that the source and basis of the probable cause be made known to the magistrate. The Court is aware of the possibility of police subterfuge. See Aguilar v. Texas, 378 U.S. 108, 114 n.4 (1964); McDonald v. United States, 335 U.S. 451, 454-55 (1948). As to the relevancy of empirical findings concerning police estimates of probable cause in street situations see generally Chevigny 12.

38. Law enforcement has depended on informers for centuries. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L.J. 1091 (1951). Yet there is a strong potentiality for abuse bred by an informant system. Id. at 1094 (double agent, drug addict, etc.). Commentators have set forth various motives for lying by informants. Brodsky 34, 41-45; M. Harney & J. Cross, The Informer in Law Enforcement 33-39 (1962). It is also suggested that even when accurate information is supplied, the informant system leads to unequal law enforcement practices (since the informant's group will be protected at the expense of another group) and therefore a net loss to society's interests. Brodsky 45.

39. 378 U.S. at 113. The Aguilar affidavit merely stated that the affiants believed narcotics were being kept at the defendant's premises, and that they had "'received reliable information from a credible person.'" Id. at 109. The Court found that it failed the two pronged test and was inferior to either the Nathanson or Giordenello affidavits since there was no indication or personal knowledge by either affiant or informant. Id. at 113.

40. 393 U.S. 410 (1969).

cause in deciding whether a tip insufficient under the *Aguilar* test could be salvaged by virtue of other averments of the affiant.[41] Mr. Justice Harlan, writing for five members of the Court,[42] examined the affidavit[43] from three different perspectives and found it wanting under each. First, the affidavit did not establish probable cause independent of the informer's tip;[44] and second, the informer's tip in and of itself failed to satisfy both of the *Aguilar* standards.[45] There remained only the possibility that probable cause might be established by the cumulative effect of the allegations, *i.e.*, by the "totality of the circumstances."[46]

Though found persuasive by the court of appeals,[47] the rationale that allegations insufficient in themselves should be allowed through unionization to raise themselves to the respectability of "probable cause" was rejected by the Supreme Court.[48] The majority held that a corroborating report by the FBI[49] took on no "sinister color" in light of the informant's tip, and that the allegation that Spinelli was a known gambler should receive no weight at all in the computation.[50]

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41. Id. at 418.

42. Justices Douglas, Brennan, Warren, and White joined Justice Harlan. Justice White joined the opinion of the Court but very tentatively: "Pending full-scale reconsideration of [Draper] . . . or of the Nathanson-Aguilar cases . . . I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court." Id. at 429.

43. The extended affidavit in Spinelli contained essentially four items, based on an informant's tip and an independent FBI investigation: (1) the FBI had kept track of Spinelli's movements, followed him across state lines to St. Louis, Mo., and eventually to a specific apartment; (2) the apartment contained two telephones listed in someone else's name; (3) Spinelli was known as a bookmaker to the police; and (4) an anonymous "reliable" informant supplied the FBI with correct information as to the telephone numbers Spinelli was using, and stated that he was using these numbers to conduct a bookmaking operation. Id. at 420-22.

44. Id. at 414. Exclusion of the tip would leave for consideration the FBI investigation connecting Spinelli to an apartment with two phones listed under another's name and Spinelli's reputation with the local police as a bookmaker. Justice Harlan concluded that the FBI investigation divulged only information which was highly consistent with innocent activity, and that the allegation that Spinelli was known as a bookmaker was merely a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." Id.

45. Id. at 416. Though the affiant swore the informer was reliable, he did not include any of the "underlying circumstances" upon which he based this judgment. There was no indication from the affidavit as to whether the informant drew his conclusion that Spinelli was running a bookmaking operation from personal knowledge, from reasonable inferences, or from hearsay. Id.

46. See id. at 418.

47. Spinelli v. United States, 382 F.2d 871, 882 (8th Cir. 1967), rev'd, 393 U.S. 410 (1969).

48. "We believe, however, that the 'totality of circumstances' approach taken by the Court of Appeals paints with too broad a brush." 393 U.S. at 415.

49. See note 43 supra.

50. 393 U.S. at 418-19. "But just as a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause, we do not believe it may be used to give additional weight to allegations that would otherwise be insufficient." Id. This

Now, two years after *Spinelli*, in *United States v. Harris*,[51] the Court has, in effect, shown itself willing to give much broader scope to the concept of "totality of the circumstances" than is suggested by the holdings in *Spinelli* or *Aguilar*.

The *Harris* affidavit included five different types of allegations: (1) the informant's description of Harris' activities based primarily upon personal observation;[52] (2) the affiant's remarks concerning the informant's credibility;[53] (3) the fact that the local constable had located a sizeable stash of whiskey on Harris' premises within the previous four years; (4) hearsay corroboration "from all types of persons"; and (5) Harris' reputation with the agent-affiant.[54]

The Court unanimously[55] agreed that the magistrate was presented with sufficient information to make an independent judgment as to the validity of the informant's conclusion that a search of Harris' premises would reveal contraband.[56] Thus, one element of the "two-pronged" *Aguilar* test was unquestionably satisfied.

As to the informant's credibility, the court of appeals had emphasized that the affiant had not even stated that his informant was "truthful" but merely that he was "prudent"—signifying "that he [was] circumspect in the conduct of his affairs," but revealing nothing as to his credibility.[57] The Court rejected this

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finding has recently been questioned by United States v. Harris, 403 U.S. 573, 583 (1971); see note 64 infra and accompanying text. However, it's standing even within the four corners of Spinelli is somewhat insecure. Three justices joined in Mr. Justice Harlan's opinion. Mr. Justice White joined in the opinion of the Court to establish the five-man majority. But the language of Justice White's concurring opinion indicates that he might have been willing to allow Spinelli's reputation to become a relevant factor entitled to some weight in totalling the probabilities. "The Draper approach [358 U.S. 307 (1959); see note 24 supra] would reasonably justify the issuance of a warrant in this case, particularly since the police had some awareness of Spinelli's past activities." 393 U.S. at 428 (concurring opinion). The dissenting opinions of Justices Black, Fortas, and Stewart all contain language indicating that the defendant's reputation increases the probative force of the application for a search warrant. Id. at 431, 438, 439. Thus, it could be argued that despite the clear language in the plurality opinion discounting the defendant's reputation, the eight-man Spinelli Court was equally divided on this issue.

51. 403 U.S. 573 (1971).

52. According to the affiant, the informer said he had purchased illicit whiskey from Harris for a period of more than two years; that he had made such a purchase within the past two weeks; that he had seen Harris go to an outbuilding on the property to obtain the whiskey; that liquor was consumed at the outbuilding; and that he had personal knowledge of another who made a purchase of illicit whiskey from Harris within the past two days. Id. at 575-76.

53. The affiant, a federal tax investigator, had interviewed the informant, obtained a sworn verbal statement, and judged him a "prudent" person. Id. at 575.

54. Id.

55. The five justices who affirmed the conviction assented to this proposition by implication. Id. at 581. The four dissenting justices assented expressly. Id. at 589.

56. Id. at 581, 589.

57. United States v. Harris, 412 F.2d 796, 797-98 (6th Cir. 1969) (per curiam), rev'd, 403 U.S. 573 (1971).

interpretation of the affidavit as too restrictive.[58] Beyond this, however, the Court in *Harris* was far from unanimous and the case is somewhat deceptive in its holdings since no one rationale carried a majority of the justices.

Four members[59] of the Court relied heavily on *Jones* to distinguish both *Aguilar* and *Spinelli* and concluded "that the affidavit . . . [contained] an ample factual basis for believing the informant which, when coupled with his own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant."[60] This rationale quite obviously employs a "totality of the circumstances" criterion and seems to purposely eschew a precise analysis of the factors which entered into the conclusion.[61]

The second rationale set forth in *Harris*, in which only three justices joined, spoke directly to the issue of whether such factors as reputation or hearsay corroboration of an informant's story should be considered in a totality of the circumstances approach.[62] In language that smacks strongly of overruling *Spinelli*, the justices joining in the second rationale concluded that these factors are relevant when supported by other information.[63] At least three justices, therefore, refused to follow as precedent *Spinelli's* holding that the defendant's reputation with the police is entitled to no weight in determining probable cause.[64]

The third rationale of the majority opinion, using the vehicle of an informant's statements against penal interest,[65] marshalled the support of four justices[66] and skirted the issue of exactly what factors were entitled to consideration in the determination of probable cause. Again, however, the abstention of one of the other justices who held for conviction[67] leaves in question the effect of this ra-

58. 403 U.S. at 579, 591 n.4. Mr. Justice White agreed by implication.

59. Justices Black, Blackmun, and Stewart joined the Chief Justice.

60. 403 U.S. at 579-80.

61. Since the "ample factual basis" was to be "coupled" with the affiant's knowledge of Harris' reputation, it evidently did not include this factor. Whether the informant's tale itself was included in the determination of his credibility is not clear at all. Cf. id. at 593 (dissenting opinion). If it was, the "double" test of Aguilar would seem to exist in name only, since the underlying factors used in determining whether the informant's story, if true, would establish probable cause, could also be used to determine the credibility of the informant. If the allegations of the informant's tale in Harris were not considered in establishing his credibility under this rationale, then the factual basis consisted of two elements: (1) corroboration by " 'numerous information [sic] from all types of persons' "; and (2) the fact that a constable located illicit whiskey on defendant's premises within the previous four years. See id. at 575.

62. Id. at 580-83 (Berger, C. J., Black & Blackmun, JJ., joining).

63. Id. at 583.

64. 393 U.S. at 418-19. See note 50 supra for a discussion of the weight to be given this holding in Spinelli.

65. 403 U.S. at 583.

66. Justices Black, Blackmun, and White joined the Chief Justice.

67. Justice Stewart did not join in the third rationale.

tionale's conclusion that a statement against penal interest "without more, implicated that property[68] and furnished probable cause to search."[69]

Mr. Justice Harlan, joined by Justices Douglas, Brennan, and Marshall, dissented in *Harris*, reaffirming the basic thrust of *Spinelli*—that a "totality of the circumstances" criterion could not bypass independent analysis of each factor to ascertain if it was entitled to be weighed in the determination of probable cause.[70] Justice Harlan admitted that the source of the informant's conclusion, personal observation, satisfied the *Aguilar* standard.[71] However, while not specifically denouncing "totality of the circumstances," he maintained that the informant's story was "analytically severable" from his credibility.[72]

Given the fractured quality of the Court's opinion, the question arises as to how, besides reinstating the defendant's conviction, *United States v. Harris* actually affects the law of search and seizure warrants. In the main, *Harris* has replaced the restrictive "analytically severable" variety of "totality of the circumstances" test[73] with a much more expansive "totality" test. In practice, therefore, the holdings of *Spinelli*,[74] while not overruled by *Harris*, have been relegated to a legal limbo depending upon in what *combinations* the allegations in any warrant appear. If the reputation of the defendant is alleged together with a factor that draws a fifth justice to conclude that probable cause is estab-

68. The language of the third rationale may foreshadow an interesting departure from the policy that the standard of probable cause for arrest is the same as that for search and seizure. "Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. . . . Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that property and furnished probable cause to search." Id. at 583-84. This passage suggests that while an admission against penal interest validates hearsay as to defendant's property, it might not validate hearsay as to defendant's criminal activity and provide probable cause to arrest.

69. Id. at 584 (footnote added). The dissent disapproved of the theory that a statement against penal interest should enhance the credibility of hearsay, though it declined to take the opportunity to decide the question. Id. at 594-95. Thus, a majority of the Court has not yet ruled on this issue.

70. Id. at 596-98 (dissenting opinion).

71. Id. at 589.

72. Id. at 597. The dissenting justices also treated each of the remaining factors as analytically severable. In effect, they examined each of the allegations that might have gone to the issue of the informant's credibility separately. Id. at 596-97. This can be seen clearly in the discussion of reputation. Mr. Justice Harlan first concluded that the constable's discovery of illicit whiskey within the past four years could not "seriously be suggested" as relevant. Id. He then met the objection that Nathanson merely held that reputation, standing alone, was insufficient, by saying: "this is the precise problem here—only the respondent's reputation has been seriously invoked to establish the credibility of the informant, an element of probable cause entirely severable from the requirement that the confidant's source be reliable." Id. at 597.

73. See note 72 supra.

74. See notes 43-50 supra and accompanying text.

lished, it will, as in *Harris*, be considered in the totality of the circumstances. Consequently, such factors as the defendant's reputation, statements against the informant's penal interest, and the personal observations of the informant all have a high probability of influencing a court as to the sufficiency of the affidavit despite the fact that a majority of the Supreme Court has yet to agree on their precise legal status.

With such confusion prevailing on the high Court, it is much more likely that lower courts will indulge their own notions as to the relative weight to be assigned factors such as reputation and statements against penal interest and to merely approve or disclaim probable cause based on a broad notion of "totality of the circumstances."[75]

Eminent Domain—Delay in Condemnation Proceedings Does Not Constitute a De Facto Condemnation.—Claimant, J. W. Clement Co., a large printing concern in Buffalo, New York, whose plant was located within the Buffalo Redevelopment Project, was informed by city officials, as early as 1954, that the city would complete condemnation of its property no later than May 1963. Claimant relied on the statements of these city officials and completed relocation in April 1963, the impending condemnation being a major factor underlying its actions. Due to bureaucratic delays, however, the city did not acquire title to the property until 1968. Prior to that date, the neighborhood fell into disrepair due to the widely publicized, but still uninitiated condemnation. The property remained vacant, unusable and unrentable; the claimant, as owner, continued to pay realty taxes[1] and insurance, maintaining the property at his own expense. In the condemnation proceedings, claimant urged that the property had been taken as of April 1, 1963, the date on which it relocated to its new facilities. The trial court agreed and the appellate division affirmed, holding that there had been a de facto condemnation as of that date.[2] The court of appeals, however, modified, holding, *inter alia*, that there was no taking in the constitutional sense prior to the actual vesting of title in the city of Buffalo. The court held that there is a de facto taking of property, when, absent de jure vesting of title in the condemnor, the condemnor deprives the owner of the beneficial use and free enjoyment of his property or imposes restraints upon such use that materially affect its value or when the condemning authority has physically intruded upon the property prior to the date upon which title is to vest. *City of Buffalo* v. *J.W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

"Eminent domain is the power of the sovereign to take property for public

75. Cf. United States v. Manning, (2d Cir. July 15, 1971), in 166 N.Y.L.J., Aug. 30, 1971, at 1, col. 8.

1. However, as early as 1959, the city began to lower property assessments in the redevelopment area. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 249, 269 N.E.2d 895, 900, 321 N.Y.S.2d 345, 352 (1971).

2. City of Buffalo v. J.W. Clement Co., 34 App. Div. 2d 24, 311 N.Y.S.2d 98 (4th Dep't 1970), modified, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

use without the owner's consent."[3] Condemnation, on the other hand, is the process by which such property is taken for public use upon the award and payment of a just compensation.[4] Although the origins of eminent domain cannot be accurately traced,[5] the power to condemn property for a public use was recognized as a governmental prerogative well before the law began to protect the title of individual property owners.[6] Eventually, the common law came to recognize and protect the right of private ownership of property by requiring a proceeding in the nature of the exercise of eminent domain known as the "inquest of office."[7] In the American colonies the power of eminent domain was, due to the common law heritage, based on the English inquest of office,[8] but was rarely used due to the expanse of virgin wilderness.[9] Since eminent domain is a right

3. 1 P. Nichols, Eminent Domain § 1.11, at 4 (rev. 3d ed. J. Sackman 1964). See also United States v. Jones, 109 U.S. 513 (1883); Boom Co. v. Patterson, 98 U.S. 403 (1878); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937).

4. In re City of New York, 195 Misc. 842, 82 N.Y.S.2d 55 (Sup. Ct. 1948); N.Y. Condem. Law §§ 4 (McKinney 1950) (as amended, Supp. 1971), 11 (McKinney 1950).

5. 1 P. Nichols, Eminent Domain § 2, at 4 (2d ed. 1917) [hereinafter cited as Nichols]. It is debatable whether eminent domain existed in early Rome due to the high regard in which its law held the rights of the Roman citizen. More likely than not, the state exercised a power similar to eminent domain to sate its needs for aqueducts and military roads. Id. at 4-5. There was no need for eminent domain in feudal Europe due to a basic tenet of the feudal system which recognized that the sovereign alone owned all the land within his domain. Id.

6. Id. at 4. The English common law recognized the right of the sovereign to enter upon private property for the purpose of constructing national defense works and lighthouses. Id. at 5-6. The sovereign also had the right to enter upon private property to seize, without the owner's permission, supplies for the sovereign's household. It is said that this right to seize supplies had a very strong resemblance to the modern concept of eminent domain. Id. at 6. See also Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S.W. 792 (1887).

7. Nichols § 2, at 6-7. The "inquest" was an inquiry by selected jurors into any concern that entitled the sovereign to take possession of another's property. This proceeding not only permitted the sovereign to appropriate private land for a public use, but also attempted to give some protection to the individual property owners from arbitrary action by the sovereign. The basic purpose of the "inquest" was to determine whether the sovereign was, in that instance, possessed of a right of ownership in another's goods, and if so, the extent of damages suffered by that individual. Id. at 7. The inquest was initiated by the issuance out of chancery of a writ of ad quod damnum which ordered the county sheriff to empanel a jury to inquire into the rights and privileges of all parties involved. The resulting proceeding was ex parte and in many instances the condemnee never knew of the proceedings and thus could not be heard in opposition or on the issue of his injuries. Id. at 7-8.

8. Id. § 3. It appears that Massachusetts was the first colony to enact a provision dealing with eminent domain. The statute, enacted in 1639, provided for the condemnation of property in order to facilitate the construction of public highways. Following the English procedure, the commission, a creature of the statute, was authorized to condemn property and to assess the owner's damages. Although the property owner was not notified of the pendency of this proceeding, he was permitted to petition the county court for a re-evaluation. 1 Laws of Colony of New Plymouth 64 (1836); Nichols § 3, at 14-15.

9. Nichols § 3, at 14.

of the sovereign, it requires no constitutional recognition.[10] An express limitation on that right was, however, inserted in the United States Constitution[11] in order to insure the award of just compensation and to prevent arbitrary action by the government.[12]

A condemnation is de jure when the state, following an established procedure,[13] acquires legal title to the condemned property upon the payment of compensation.[14] De facto condemnation, on the other hand, occurs when the state, by its actions, has appropriated the land without any award of compensation.[15] Many states[16] as well as the federal courts[17] adhere to the doctrine of de facto condemnation.

De facto condemnation has been recognized in New York since 1844.[18] In

10. United States v. Carmack, 329 U.S. 230 (1946); United States v. Lynah, 188 U.S. 445 (1903); United States v. Jones, 109 U.S. 513, 518 (1883); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

11. U.S. Const. amend. V. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." See N.Y. Const. art. I, § 7(a). "Private property shall not be taken for public use without just compensation." New York also has a statute specifically governing the taking of private property for a public use which establishes the procedure to be followed. N.Y. Condem. Law §§ 4 (McKinney 1950) (as amended, Supp. 1971), 11 (McKinney 1950). See also Comment, The Growing Crisis in New York Condemnation Law: Deficiencies of the Present System and Recent Proposals for its Modification and Reform, 21 Syracuse L. Rev. 1193 (1970).

12. Nichols §§ 23-24, 39.

13. E.g., Ill. Ann. Stat. ch. 47, §§ 2.1, 5 (Smith-Hurd 1969); N.Y. Condem. Law §§ 4 (McKinney 1950) (as amended, Supp. 1971), 11 (McKinney 1950); Ohio Rev. Code Ann. §§ 163.05, 163.07 (Page 1969).

14. United States v. Dow, 357 U.S. 17 (1958); Danforth v. United States, 308 U.S. 271 (1939); Van Etten v. City of New York, 226 N.Y. 483, 124 N.E. 201 (1919); In re People, 81 Misc. 324, 142 N.Y.S. 949 (Sup. Ct. 1913); N.Y. Condem. Law § 4 (McKinney 1950), as amended, (Supp. 1971).

15. See, e.g., Leeds v. State, 20 N.Y.2d 701, 229 N.E.2d 446, 282 N.Y.S.2d 767 (1967) (mem.); Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966); Oswego & S.R.R. v. State, 226 N.Y. 351, 124 N.E. 8 (1919); Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893).

16. E.g., People v. Peninsula Title Guar. Co., 47 Cal. 2d 29, 301 P.2d 1 (1956); Consumers Holding Co. v. County of Los Angeles, 204 Cal. App. 2d 234, 22 Cal. Rptr. 106 (Dist. Ct. App. 1962); Public Bldg. Comm'n v. Continental Ill. Nat'l Bank & Trust Co., 30 Ill. 2d 115, 195 N.E.2d 192 (1963); County of Winnebago v. Kennedy, 60 Ill. App. 2d 408, 208 N.E.2d 612 (1965); State v. Jordan, 247 Ind. 361, 215 N.E.2d 32 (1966); State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970); City of Houston v. McCarthy, 464 S.W.2d 381 (Tex. Ct. Civ. App. 1971).

17. E.g., United States v. Dow, 357 U.S. 17 (1958); Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968); R.J. Widen Co. v. United States, 357 F.2d 988 (Ct. Cl. 1966) (per curiam); Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965); United States v. 551.03 Acres of Land, 249 F. Supp. 253 (E.D. Ill. 1966); United States v. 1,060.92 Acres of Land, 215 F. Supp. 811 (W.D. Ark. 1963).

18. E.g., In re Rogers Ave., 22 N.Y.S. 27 (Sup. Ct. 1885); People ex rel. Utley v. Hayden, 6 Hill 359 (N.Y. Sup. Ct. 1844). Historically, the colony of New York, while it was in Dutch hands, recognized the power of eminent domain but not the right to compensation. However,

People ex rel. Utley v. Hayden[19] the state had entered upon the plaintiff's property and began construction of a canal. The work was, however, eventually abandoned.[20] The supreme court held the property to have been condemned and the owner entitled to compensation as of the time the state took possession of the property.[21] The *Hayden* court stated:

[A]ppropriation takes place as soon as the state has surveyed and settled upon the route, and entered upon and taken permanent and exclusive possession of the lands, preparatory to the commencement of the work; or at all events, as soon as the public agents have taken possession and commenced the execution of the work.[22]

Subsequently, in *Forster v. Scott*,[23] the New York City Department of Parks filed a map of a proposed street which incorporated plaintiff's property. A statute[24] provided that once a map was filed no subsequently built structure could be utilized to determine the extent of claimant's damages.[25] The court of appeals held that the statute deprived the claimant of the use and enjoyment of his property without due process and just compensation,[26] stating that "[w]henever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution."[27] The New York courts have generally adhered to the holdings of *Hayden* and *Scott*.[28] However, in *Oswego & Syracuse R.R. v. State*,[29] the court of appeals was confronted with a clear-cut act of appropriation[30] which was not readily cognizable under the earlier precedents.

a jury of burgomasters usually awarded compensation. Nichols § 3, at 17. In 1691, the colony, then in English hands, was given the right to condemn property, provided just compensation was awarded. 1 Colonial Laws of New York 269 (1894); Nichols § 3, at 17-18.

19. 6 Hill 359 (N.Y. Sup. Ct. 1844).

20. Id.

21. Id. at 361-62.

22. Id. at 360-61. This case was the first New York case to use the concept of a physical invasion by the state in order to find a de facto condemnation.

23. 136 N.Y. 577, 32 N.E. 976 (1893).

24. Law of July 1, 1882, ch. 410, § 677, II [1882] N.Y. Laws 105th Sess. 191.

25. See id.; 136 N.Y. at 581-82, 32 N.E. at 976-77.

26. 136 N.Y. at 584, 32 N.E. at 977. "It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner." Id.

27. Id.

28. E.g., Waller v. State, 144 N.Y. 579, 39 N.E. 680 (1895); Niagara Frontier Bldg. Corp. v. State, 33 App. Div. 2d 130, 305 N.Y.S.2d 549 (4th Dep't 1969), aff'd mem., 28 N.Y.2d 755, 269 N.E.2d 912, 321 N.Y.S.2d 368 (1971). In Waller, the court of appeals held that mere words of appropriation, absent possession or restraint, would not constitute a taking of the property. 144 N.Y. at 599, 39 N.E. at 685. In Niagara, supra, there was evidence of extensive bureaucratic delays and the plaintiff alleged de facto condemnation which resulted in great economic injury by virtue of the defendant's words of appropriation. The appellate division, relying on Waller, held that mere words of appropriation are not sufficient to constitute a de facto condemnation. 33 App. Div. 2d at 132-33, 305 N.Y.S.2d at 551-52.

29. 226 N.Y. 351, 124 N.E. 8 (1919).

30. Id. at 359, 124 N.E. at 11. "To destroy a bridge is to appropriate it." Id.

In that case a state authority ordered the plaintiff to destroy its bridge to make way for a canal. The plaintiff complied and filed for compensation upon the state's refusal to construct a new bridge.[31] The state had not physically intruded upon the plaintiff's property nor had it restrained its use by operation of law. The court, in equating the property owner's submission to authority with physical invasion,[32] found that the owner had become an agent of the state[33] since his acts were in response to a state order. The court stated:

> The state might have destroyed this bridge by its own agents or contractors. Instead of doing that, it ordered destruction by the owner. The act of the owner was not voluntary. It was submission to authority, backed by power. . . . The result was the same as if the work of destruction had been done by the state itself.[34]

The court of appeals first considered the possibility that official delay could operate as a de facto taking in *Keystone Associates v. Moerdler*.[35] In that case, the court of appeals held that a delay in demolition,[36] caused by the state through its control of demolition licensing, was an appropriation of property because it deprived the owners of the "beneficial use" of their property.[37] The court held that the state's act was an undue restraint on property materially affecting its value since "the owners may continue to use the building for the purpose desired by the Legislature or they can let the building stand idle and suffer the loss."[38] Refusing to equate the six month delay in the issuance of a demolition license with a valid exercise of the state's police power,[39] the court pointed out that the state's action was deceptive in that it attempted to appropriate plaintiff's property indirectly.[40]

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31. Id. at 355-56, 124 N.E. at 9-10.

32. Id. at 359, 124 N.E. at 11.

33. Id.

34. Id. (citations omitted). This case was subsequently followed in American Woolen Co. v. State, 195 App. Div. 698, 187 N.Y.S. 341 (4th Dep't 1921). The court, citing Oswego, equated the destruction of water rights with a physical appropriation of property. Id. at 704, 187 N.Y.S. at 345. The court went on to say that "if property is actually taken by the State for a public use, and the owner is excluded from its possession and loses the rights and benefits to which he was theretofore entitled, then there is an appropriation of the property . . . ." Id.

35. 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966).

36. The Metropolitan Opera Association vacated its historic quarters and moved to Lincoln Center. The Association leased the property to plaintiff for fifty years. Under the lease plaintiff was to demolish the opera house and construct an office building. On the same day plaintiff filed for a demolition license, the state legislature passed a statute to preserve the opera house. The statute created The Old Met Opera House Corporation and empowered the Buildings Department to delay issuance of a demolition license for one hundred and eighty days upon the request of the Corporation and upon the deposit of $200,000. The security was not posted but the Buildings Department nevertheless delayed issuance of the permit in order to permit the Corporation sufficient time to raise funds. Id. at 85-86, 224 N.E.2d at 701, 278 N.Y.S.2d at 186-87.

37. Id. at 88, 224 N.E.2d at 703, 278 N.Y.S.2d at 189.

38. Id. at 87, 224 N.E.2d at 702, 278 N.Y.S.2d at 188.

39. Id. at 88, 224 N.E.2d at 703, 278 N.Y.S.2d at 189.

40. Id. at 87-88, 224 N.E.2d at 702-03, 278 N.Y.S.2d at 188-89. "What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against

Thus, at the time the *Clement* case came to the court of appeals, the law of New York in regard to de facto condemnation was fairly clear. In the absence of a physical invasion[41] or a deprivation of the use and enjoyment of one's property by operation of law[42] or the imposition of restraints that materially affected the property's value,[43] the law would not recognize a de facto taking.[44]

In *City of Buffalo v. J.W. Clement Co.*,[45] the claimant contended that the city, by dint of its unofficial pronouncements relating to the impending condemnation of the claimant's property, had completed a de facto taking on the date of Clement's relocation to its new facility. Clement cited the protracted administrative delay—a period of approximately five years had passed between the original projected date of condemnation and the actual de jure vesting of title[46]—as evidence of the city's taking.[47]

The New York Court of Appeals had never before passed on a case in which the plaintiff attempted to support an allegation of de facto taking by entering evidence of extensive delays in bringing the condemnation to fruition. The unaminious court acknowledged the novelty of the question presented,[48] but felt bound by precedent,[49] and held that there had been no de facto taking of the Clement property.[50] Noting that the concept of de facto condemnation was

insidious approaches as an open and direct attack." Id. at 88, 224 N.E.2d at 702-03, 278 N.Y.S.2d at 189.

41. People ex rel. Utley v. Hayden, 6 Hill 359 (N.Y. Sup. Ct. 1844); cf. Oswego & S.R.R. v. State, 226 N.Y. 351, 124 N.E. 8 (1919).

42. Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966); Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893).

43. Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966).

44. Leeds v. State, 20 N.Y.2d 701, 229 N.E.2d 446, 282 N.Y.S.2d 767 (1967); Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966); Waller v. State, 144 N.Y. 579, 39 N.E. 680 (1895); Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893); Niagara Frontier Bldg. Corp. v. State, 33 App. Div. 2d 130, 305 N.Y.S.2d 549 (4th Dep't 1969), aff'd mem., 28 N.Y.2d 755, 269 N.E.2d 912, 321 N.Y.S.2d 368 (1971); People ex rel. Utley v. Hayden, 6 Hill 359 (N.Y. Sup. Ct. 1844). But see Oswego & S.R.R. v. State, 226 N.Y. 351, 124 N.E. 8 (1919). This case deviated from this rule in that there was no physical invasion and no deprivation by operation of law. The case, however, contained an obvious act of appropriation. The court, in an attempt to reconcile this case with New York precedent, used an agency principle to equate the state's ordering the owner to destroy the property with physical invasion. See notes 29-34 supra and accompanying text.

45. 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971) (Scileppi, J., wrote the opinion for a unanimous court).

46. Id. at 247-51, 269 N.E.2d at 899-901, 321 N.Y.S.2d at 351-54.

47. See id. at 248-52, 269 N.E.2d at 899-901, 321 N.Y.S.2d at 351-54.

48. Id. The court itself said "[t]his is a case of first impression . . . . Specifically, we have before us the question of whether there can be a de facto taking absent a physical invasion or the imposition of some direct legal restraint." Id. at 247, 269 N.E.2d at 899, 321 N.Y.S.2d at 351 (emphasis omitted).

49. Id. at 247-48, 269 N.E.2d at 899, 321 N.Y.S.2d at 351. "[T]he dictates of precedent, practicality and public policy guide us in seeking a just result." Id.

50. Id. at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357. "The facts herein fail to disclose any act upon the part of the condemning authority which could possibly be construed as an assertion of dominion and control." Id.

traditionally "limited to situations involving a direct invasion of the condemnee's property or a direct legal restraint on its use . . ."[51] the court cautioned that a relaxation of these rules would "do violence to a workable rule of law."[52] The court defined a de facto taking as "a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition . . . ."[53] Indicating a further limitation on the applicability of the doctrine, the court warned that a finding that de facto condemnation has occurred should be made only where the "most obvious injustice compels such a result."[54] Specifically addressing itself to the city's delay in proceeding with the condemnation, the court held that the

> mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a *taking* so as to warrant awarding compensation.[55]

Noting the ubiquity of urban renewal throughout the nation, the court stated that "strong public policy considerations"[56] prevented a finding of de facto condemnation in these circumstances.[57] The court then contended that a finding of a de facto taking due to the mere "*announcement* of the impending condemnation,"[58] even if the condemnee was directly informed of such by government officials, would result in the imposition of an " 'oppressive' and 'unwarranted' burden"[59] on both the condemnor and the property owner.[60] To hold the condemnor liable in such a case would, according to the court,

> penalize the condemnor for providing appropriate advance notice to a property owner. And to so impede the actions of the municipality in preparing and publicizing plans

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51. Id. at 253, 269 N.E.2d at 902, 321 N.Y.S.2d at 356 (citations omitted). Contra, Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), aff'd, 405 F.2d 138 (6th Cir. 1968) (The city filed a lis pendens and initiated condemnation proceedings in 1950. The surrounding area was acquired and razed in 1954. In 1955 the Federal Housing Authority issued a stop order on the project and in 1960 the city lifted the lis pendens. The city again initiated condemnation proceedings in 1961. The plaintiff claimed, and the court held, that there had been a de facto taking in 1950); see In re Urban Renewal, Elmwood Park Project, 376 Mich. 311, 136 N.W.2d 896 (1965).

52. 28 N.Y.2d at 253, 269 N.E.2d at 902, 321 N.Y.S.2d at 356.

53. Id. at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357.

54. Id. at 253, 269 N.E.2d at 902, 321 N.Y.S.2d at 356. Thus, the court of appeals continued to adhere to the law as set down in the early New York cases of Hayden and Scott. See notes 19-22 and 23-27 supra and accompanying text.

55. 28 N.Y.2d at 257, 269 N.E.2d at 904, 321 N.Y.S.2d at 359.

56. Id. at 256, 269 N.E.2d at 904, 321 N.Y.S.2d at 358.

57. Id.

58. Id.

59. Id., citing the dissenting opinion of Judge Gabrielli in City of Buffalo v. J.W. Clement Co., 34 App. Div. 2d 24, 38-39, 311 N.Y.S.2d 98, 114 (4th Dep't 1970), modified, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

60. Id. at 256, 269 N.E.2d at 904, 321 N.Y.S.2d at 358.

for the good of the community, would be to encourage a converse policy of secrecy which 'would but raise [greater] havoc with an owner's rights.'[61]

The court, however, did acknowledge the fact that the value of claimant's property had decreased, but distinguished between acts of appropriation and those value-depressing acts which constituted "condemnation blight."[62] While de facto condemnation requires a physical ouster or a legal interference with the use of one's property, the concept of condemnation blight relates only to the effect of certain value-depressing acts on the property's value.[63] Condemnation blight does not, in the court's view, "[import] a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding."[64] Thus the court, while denying the claimant damages for a de facto taking,[65] did permit the claimant a recovery based on the true value of its property prior to the value-depressing acts.[66] Thus, the "property should be evaluated not on its diminished worth caused by the condemnor's action, but on its value except for such 'affirmative value-depressing acts' of the appropriating sovereign."[67]

Eminent domain is, by its very nature, an area of the law in which the rights of the individual are subordinated to those of society.[68] Hence, extrapolating from this basic policy determination, the *Clement* court could not consistently adopt the claimant's contention that the mere announcement of a future condemnation would constitute a de facto taking. Such a holding would impose intolerable burdens on the condemning authority in that it could not render

61. Id., citing the dissenting opinion of Judge Gabrielli in City of Buffalo v. J.W. Clement Co., 34 App. Div. 2d 24, 39, 311 N.Y.S.2d 98, 114 (4th Dep't 1970), modified, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

62. Id. at 254, 269 N.E.2d at 902-03, 321 N.Y.S.2d at 356.

63. Id. at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357. See also 2 J. Lewis, Eminent Domain § 745, at 1329-30 (3rd ed. 1909); Anderson, Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?, 5 Santa Clara Law. 35 (1964); Comment, Recovery for Enhancement and Blight in California, 20 Hastings L.J. 622 (1969).

64. 28 N.Y.2d at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357.

65. Id. "[I]t cannot be said that the city, by its actions, either directly or indirectly deprived Clement of its possession, enjoyment or use of the subject property. We simply have a manifestation of an intent to condemn and such, even considering the protracted delay attending final appropriation, cannot cast the municipality in liability upon the theory of a 'taking' for there was no appropriation of the property in its accepted legal sense." Id.

66. Id. at 258, 269 N.E.2d at 905, 321 N.Y.S.2d at 359. The court denied claimant interest on the recovery for the period up to the date of de jure taking since there was no de facto taking in April, 1963. Interest was permitted on the recovery from the time of entry or payment of the award, whichever occurred first. Id. at 265, 269 N.E.2d at 910, 321 N.Y.S.2d at 366. The court also denied claimant recovery for its counsel fees and additional costs other than those costs that were granted by statute. Id. at 262-65, 269 N.E.2d at 908-09, 321 N.Y.S.2d at 364-66. See N.Y. C.P.L.R. §§ 8101 (McKinney 1963), 8303 (McKinney 1963), as amended, (Supp. 1971).

67. 28 N.Y.2d at 258, 269 N.E.2d at 905, 321 N.Y.S.2d at 360.

68. U.S. Const. amend. V; Nichols § 2, at 4-7.

meaningful public notice of its plans without taking the property involved.[69] But the court of appeals could not ignore the very substantial harm which would most certainly have befallen Clement if the city's position was adopted. The court's solution to this dilemma was an eminently practical one. By adopting the city's orthodox theory of de facto condemnation,[70] and denying its scheme of evaluation,[71] the court was at once able to effect an equitable reconciliation of these competing interests.[72] As a result a condemnor may publicize a projected condemnation to that extent deemed necessary to protect the interests of all the parties. In doing so, however, it must realize that any delay, whether the result of bureaucratic guile or inefficiency,[73] will not benefit it in any way and that any reduction in property value caused by such a delay will be restored to the owner in the form of a condemnation award.[74] Confronted with such clear-cut liabilities, public authorities might now be more favorably inclined to plan and expedite condemnations so as to eliminate unnecessary delays. Such a result will benefit not only the private parties involved but, in keeping with the ultimate thrust of eminent domain, the public as well.

Immigration Law—Statute Excluding Aliens for Mere Belief in and Advocacy of Subversive Doctrines Held Violative of First Amendment.— Plaintiff, a citizen of Belgium, editor-in-chief of the Belgian Left-Socialist weekly *La Gauche*, and author of *Marxist Economic Theory*, was refused a visa to visit the United States for a proposed speaking tour of several major Ameri-

69. See text accompanying notes 55-60 supra. But see, e.g., Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), aff'd, 405 F.2d 138 (6th Cir. 1968), and In re Urban Renewal, Elmwood Park Project, 376 Mich. 311, 136 N.W.2d 896 (1965), both of which found a taking.

70. See notes 56-61 supra and accompanying text.

71. See notes 62-67 supra and accompanying text.

72. However, it is arguable that the interest award on the recovery for the period of time after a de jure taking denies the claimant a fair return on his investment for the period of an alleged de facto taking. See Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), aff'd, 405 F.2d 138 (6th Cir. 1968); In re Urban Renewal, Elmwood Park Project, 376 Mich. 311, 136 N.W.2d 896 (1965). The Clement court itself acknowledged that the purpose of the interest award is to insure just compensation. 28 N.Y.2d at 266, 269 N.E.2d at 910, 321 N.Y.S.2d at 367. It should be noted, however, that the United States Supreme Court, in Danforth v. United States, 308 U.S. 271 (1939), in which claimant argued that the mere enactment of the condemnation power resulted in a decrease in value of his property, stated that "[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership." Id. at 285.

73. It should be noted that, in the subject case, the city had indicated its good faith by reducing the tax rate on the claimant's property. 28 N.Y.2d at 249, 269 N.E.2d at 900, 321 N.Y.S.2d at 352.

74. See U.S. Const. amend. V; N.Y. Const. art. I, § 7(a).

can universities. His visa application was denied on the grounds that section 212 (a)(28) of the Immigration and Nationality Act of 1952[1] excludes from entry into the United States any alien who is or at any time has been associated with certain leftist or extremist political doctrines. The Attorney General refused to grant plaintiff a waiver of these restrictions[2] whereupon Mandel, an alien, and some of the persons who had invited him to participate in university events brought suit seeking a judgment declaring the invalidity of the statute. A three judge district court[3] held that section 212(a)(28) violated the first amendment to the United States Constitution. *Mandel v. Mitchell*, 325 F. Supp. 620 (E.D.N.Y. 1971), *prob. juris. noted*, 40 U.S.L.W. 3314 (U.S. Jan. 10, 1972) (No. 71-16).

It is a recognized principle of international law that every sovereign nation has the inherent power to forbid the entrance of foreigners to areas within its dominion or to admit them only upon conditions which it may prescribe.[4] Although the Constitution of the United States does not specifically delegate the exercise of this power to any branch of the government, the Supreme Court has consistently held that Congress possesses the authority to deny admission to any alien whose presence it considers undesirable.[5] In 1967 the Supreme Court reaffirmed its position, stating: "It has long been held that Congress has plenary power . . . to exclude those who possess those characteristics which Congress has forbidden."[6]

The first statute denying admission to the United States to aliens because of

1. 8 U.S.C. § 1182(a)(28) (1970) provides in part: "Except as otherwise provided . . . classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States: . . . (28) . . . (D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of World communism . . . . (G) Aliens who write or publish . . . (v) the economic, international, and governmental doctrines of world communism . . . ."

2. The Attorney General is given discretion to waive these restrictions. Id. § 1182(d)(3)(A).

3. Under 28 U.S.C. §§ 2282, 2284 (1970), a three-judge court must be convened to hear injunctive actions wherein the unconstitutionality of a federal statute is alleged. Appeal from the decision of such a court may be taken directly to the Supreme Court. These three-judge courts have recently been severely criticized. Representative Emanuel Celler, Chairman of the House Judiciary Committee, has introduced H.R. 3805 (Feb. 8, 1971) to amend § 2282 to eliminate the three-judge court requirement in most cases. For an analysis of the problem see Ammerman, Three-Judge Courts: See How They Run!, 52 F.R.D. 293 (1971).

4. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); C. Bouvé, A Treatise on the Law Governing the Exclusion of Aliens in the United States 3 (1912); IV J. Moore, A Digest of International Law § 550 (1906); 1 J. Westlake, International Law 210 (2d ed. 1910).

5. See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

6. Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967).

their subversive beliefs was passed in 1903.[7] In that year[8] Congress provided for the exclusion of "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law . . . ."[9] The constitutionality of this statute was soon challenged in *United States ex rel. Turner v. Williams*.[10] Turner was a British subject who had come to this country to promote the interests of organized labor.[11] In an address in New York on October 23, 1903, Turner described himself as an anarchist and advocated a general strike which would spread throughout the industrial world.[12] As a result of this speech the government began proceedings to have Turner deported, claiming that since he was an "anarchist" his presence in the United States violated the immigration laws.[13] Turner's attorney argued that the immigration act was an unconstitutional abridgement of the freedom of speech provision of the first amendment.[14] However, the Supreme Court decided that the 1903 act was "not open to constitutional objection."[15] Mr. Chief Justice Fuller, writing for the majority, explained that even if "anarchist" was interpreted to include mere political philosophers with no evil intent, the act was still constitutional.[16] In reaching this conclusion the Court stated that there were two separate bases on which the act was immune from constitutional challenge: First, the accepted principle of international law that every sovereign nation has the inherent power to forbid the entrance of foreigners,[17] or, second, the power given to Congress to regulate commerce includes the power to regulate immigration.[18]

In 1917 the policy of excluding anarchists was reaffirmed and expanded when

7. Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1214. Congress had previously manifested its concern over the presence of subversive aliens in 1798 when it passed the Alien Act. Act of June 25, 1798, ch. 58, 1 Stat. 570. This act, adopted as part of the Alien and Sedition Laws, gave the President power to deport any alien he deemed "dangerous to the peace and safety of the United States." Id. at 571. However, the Alien Act controlled only those subversive aliens already living in the United States and erected no barriers to the admission of any aliens. The Act proved so unpopular that it was allowed to expire after two years. Report of the President's Comm. on Immigration and Naturalization, Whom We Shall Welcome 217 (1953).

8. This Act must be placed in its historical context. It was passed as a result of the assassination in the fall of 1901 of President William McKinley by Leon Czolgosz, an anarchist terrorist. M. Bennett, American Immigration Policies 24 (1963); M. Konvitz, Civil Rights in Immigraton 28 (1953).

9. Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1214.

10. 194 U.S. 279 (1904).

11. Id. at 282-83.

12. Id. at 283.

13. Id. at 280. See note 9 supra and accompanying text.

14. 194 U.S. at 286.

15. Id. at 290.

16. Id. at 294.

17. Id. at 290; see note 4 supra and accompanying text.

18. 194 U.S. at 290.

Congress banned any alien who might "be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy . . . ."[19] Both the Anarchist Act of 1918,[20] and its 1920[21] amendment further enlarged the class of excludable aliens by encompassing any aliens who wrote or published material expressing opposition to organized forms of government. Section 2 of this Anarchist Act provided for the deportation of "any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated . . . ."[22] The interpretation of this section was the central question in *Kessler v. Strecker*.[23]

Strecker entered the United States in 1912 and twenty years later became a member of the Communist Party.[24] Though he was a dues-paying member of the Party for only a few months and his membership had ended prior to his arrest, the Immigration and Naturalization Service claimed that there was a sufficient basis to deport Strecker under section 2 of the Anarchist Act of 1918.[25] However, the Supreme Court ruled that the Act was not "a clear and definite expression" of an intent on the part of Congress to deport an alien who at some past time had been a member of a proscribed organization.[26] The Court concluded that it was only present membership or present affiliation which barred admission or required deportation.[27]

From 1903, when Congress first excluded subversive aliens,[28] until 1939 there was a continuing enlargement of the class of aliens who could be denied entry. Although the Supreme Court decision in *Kessler* appeared to mark the beginning of a less restrictive policy, Congress clearly did not intend to change its course. The year after *Kessler* was decided the immigration laws were amended to include "any alien who, at any time, shall be or shall have been" a member of a proscribed class.[29] Congress continued to expand the classes of aliens who could be excluded for their political beliefs in subsequent legislation.

The Subversive Activities Control Act of 1950[30] was the next major piece of

19. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889.

20. Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012. It has been argued that this act reflected congressional concern over the triumph of Bolshevism in Russia. See Konvitz, Civil Rights in Immigration 29 (1953). However, the Supreme Court rejected this view in Kessler v. Strecker, 307 U.S. 22, 26 n.2 (1939).

21. Act of June 5, 1920, ch. 251, 41 Stat. 1008.

22. Act of Oct. 16, 1918, ch. 186, § 2, 40 Stat. 1012.

23. 307 U.S. 22 (1939).

24. Id. at 23-24.

25. Id. at 27-28.

26. Id. at 30.

27. Id.

28. See note 7 supra and accompanying text.

29. Act of June 28, 1940, ch. 439, § 23(a), 54 Stat. 673. Thus Congress was making a "clear and definite expression" so that the Supreme Court could not misconstrue its intent. See note 26 supra and accompanying text.

30. Subversive Activities Control Act of 1950, ch. 1024, tit. I, 64 Stat. 987.

congressional legislation to deal with the exclusion of subversive aliens.[31] For the first time Congress expressly named the Communist Party in an immigration statute.[32] In addition to excluding Party members, the Act banned the entry of aliens who advocated "the economic, international, and governmental doctrines of world communism . . . ."[33]

Two years later, Congress decided to consolidate all the scattered statutes regulating immigration into a single piece of legislation,[34] the Immigration and Nationality Act of 1952, commonly known as the McCarran-Walter Act.[35] This act incorporated almost verbatim the exclusionary provisions of the Subversive Activities Control Act of 1950,[36] thus retaining the sanctions against aliens who merely believed in or taught the doctrines of world communism.[37] These provisions became the basis of section 212(a)(28) of the Immigration and Nationality Act of 1952, the constitutionality of which was challenged in *Mandel*.[38]

Ernest Mandel, the plaintiff, applied in Brussels for a visa to visit the United States for six days to participate in a conference on "Technology and the Third World" at Stanford University.[39] Although he asserted that he was not a member of the Communist Party or its affiliates,[40] Mandel described himself as an exponent of the theories of Karl Marx, and had written and espoused the

31. This Act was passed in the era of Senator Joseph McCarthy when "[a] spirit of fear and dread blanketed the nation." G. Myers, History of Bigotry in the United States 448 (1960). Congress felt compelled to strengthen laws against anyone who advocated communism and "in the panic that [saw] a Red behind every visa" the first amendment protections were overshadowed. J. Bruce, The Golden Door: The Irony of Our Immigration Policy 154 (1954). Mr. Justice Black saw the period as a difficult time for preserving first amendment liberties. Dennis v. United States, 341 U.S. 494, 581 (1951) (dissenting opinion).

32. Subversive Activities Control Act of 1950, ch. 1024, tit. I, 64 Stat. 987.

33. Id., § 22, 64 Stat. 1006.

34. "The Immigration and Nationality Act of 1952 codifies for the first time the many pieces of immigration legislation enacted since 1917, and to that extent supplies a document long needed." Report of the President's Comm. on Immigration and Naturalization, Whom We Shall Welcome 5 (1953). It has been suggested that the increasing number of immigration problems which followed World War II necessitated this consolidation. Note, 66 Harv. L. Rev. 643, 646 (1953).

35. 66 Stat. 163, as amended, 8 U.S.C. § 1182(a)(28) (1970). The Act was passed over President Truman's veto. The President had characterized the Act as a "step backwards." 98 Cong. Rec. 8082 (1952) (veto message).

36. 64 Stat. 1006, as amended, 8 U.S.C. § 1182(a)(28) (1970).

37. The only significant difference affecting subversive aliens is that in the 1952 Act the definition of "totalitarian party" is limited to "an organization which advocates the establishment in the United States . . . of totalitarianism" whereas the 1950 Act did not so restrict it. Compare 8 U.S.C. § 1101(a)(37) (1970), with Subversive Activities Control Act of 1950, ch. 1024, tit. I, § 3(15), 64 Stat. 990.

38. 325 F. Supp. 620, 622 (E.D.N.Y. 1971), prob. juris. noted, 40 U.S.L.W. 3314 (U.S. Jan. 10, 1972) (No. 71-16).

39. Id. at 623-24.

40. Id. at 623. The government did not challenge this assertion. Id.

doctrines of world communism.[41] Thus Mandel was within one of the classes proscribed by the Immigration and Nationality Act[42] and, accordingly, the government refused to grant him a visa.[43] Although the exclusionary provisions of the Act may be waived in the discretion of the Attorney General,[44] the requested waiver was refused.[45] Thus unable to obtain permission to visit the United States, Mandel brought this suit to have the provisions of the Immigration and Nationality Act under which he was excluded declared unconstitutional as violative of the first amendment.[46]

Clearly, an American citizen's teaching and advocacy of subversive doctrines would be protected by the freedom of speech provision of the first amendment.[47] In *Brandenburg v. Ohio*[48] the Supreme Court stated that its "later decisions have fashioned the principle that the constitutional guarantees of free speech and

41. Id.; see E. Mandel, Marxist Economic Theory (1968).

42. See notes 1 & 34-37 supra and accompanying text.

43. Although his 1969 application was denied, Mandel had twice before, in 1962 and 1968, applied for and received permission to enter the United States. On these occasions Mandel had also been found politically ineligible but, without his knowledge, there had been an exercise of the Attorney General's discretion in his favor under § 212(d)(3) to waive the restrictions of § 212(a)(28). 325 F. Supp. at 623. See note 2 supra.

44. See notes 2 & 43 supra and accompanying text.

45. The government contended that the Attorney General did not have to support or justify this refusal since waiver of exclusion is purely a matter of grace. 325 F. Supp. at 625.

46. An argument can be made that the court should never have reached the merits of this case because the plaintiffs lacked the requisite standing to sue. Mandel himself was not only an alien but a non-resident alien and the test "of the right to sue, which has been universally adopted, is residence, and not nationality . . . ." Krachanake v. Acme Mfg. Co., 175 N.C. 435, 437, 95 S.E. 851, 852-53 (1918). Thus Mandel, alone, had no standing. The plaintiffs other than Mandel were not asserting any personal rights other than their right to participate in meetings with Mandel. Following decisions such as Massachusetts v. Mellon, 262 U.S. 447 (1923), it could be contended that Mandel's co-plaintiffs were equally without standing for they were trying to assert the rights of another.

Nevertheless, this court dismissed the standing problem as "unreal." Relying on New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the court viewed the first amendment not as an express grant of rights but rather as the total retention by the people of all unsurrendered rights. Therefore, Mandel's status as a party did not rest on any individual right to enter the country but rather on the American citizens' unsurrendered "right to hear." In conclusion, the Mandel court found "[t]he special relation of plaintiffs to Mandel's projected visit", reinforced by the American citizens' right to hear, "abundantly satisfies 'standing' requirements." 325 F. Supp. at 631-32. For other cases on the "right to hear" see Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); Smith v. University of Tennessee, 300 F. Supp. 777, 780 (E.D. Tenn. 1969); Snyder v. Board of Trustees, 286 F. Supp. 927, 932 (N.D. Ill. 1968). But see Judge Bartel's dissent in Mandel, 325 F. Supp. at 641 n.2.

47. See Brandenburg v. Ohio, 395 U.S. 444 (1969); United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Dennis v. United States, 341 U.S. 494 (1951).

48. 395 U.S. 444 (1969).

free press do not permit a State to forbid or proscribe advocacy of the use of force or violation of law except where such advocacy is directed to inciting or producing imminent lawless action . . . ."[49] Since section 212(a)(28) was explicitly directed against mere belief and advocacy,[50] its strictures would be unconstitutional if applied to a citizen. In *Mandel*, however, the court had to determine whether the same test of constitutionality was to apply in the case of an alien.[51] Dictum in *Turner*[52] had indicated that a different and less strict standard of first amendment validity could be applied in alien exclusion cases.[53] "[T]hose who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens . . . ."[54] Mr. Justice Murphy concurring in *Bridges v. Wixon*,[55] reaffirmed this position, stating "[t]he Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores."[56]

However, the majority in *Mandel* found that regardless of the *Turner* dictum that case no longer controlled in light of more recent Supreme Court decisions.[57] In *Dennis v. United States*[58] the Supreme Court applied a "clear and present danger" test[59] to the activities of the Communist Party in the United States. Under this standard the advocacy or teaching of subversive doctrines is fully protected by the first amendment unless it constitutes incitement to action that would pose an immediate threat to the established order.[60] In the opinion of the *Mandel* court the test of *Dennis* was to be applied to aliens as well as citizens[61] because the Supreme Court in *Harisiades v. Shaughnessy*,[62] an alien deportation case, had relied on the "clear and present danger" standard.[63] Since the constitu-

49. Id. at 447.

50. 325 F. Supp. at 625.

51. Id. at 627.

52. See notes 10-18 supra and accompanying text.

53. 194 U.S. at 292.

54. Id.

55. 326 U.S. 135 (1945).

56. Id. at 161 (concurring opinion).

57. 325 F. Supp. at 628.

58. 341 U.S. 494 (1951).

59. This test was evolved from Justice Holmes' dissent in Gitlow v. New York, 268 U.S. 652, 672-73 (1925). See Rogat, The Judge as Spectator, 31 U. Chi. L. Rev. 213, 215 (1964).

60. Dennis v. United States, 341 U.S. 494, 508-10 (1951); see Antieau, The Rule of Clear and Present Danger: Scope of Its Applicability, 48 Mich. L. Rev. 811 (1950); Schmandt, The Clear and Present Danger Doctrine: A Reappraisal in the Light of Dennis v. United States, 1 St. Louis U.L.J. 265 (1951).

61. 325 F. Supp. at 628.

62. 342 U.S. 580 (1952). In Harisiades the Supreme Court held that the United States may constitutionally deport a resident alien whose membership in the Communist Party had terminated before enactment of the Alien Registration Act of 1940. See The Supreme Court, 1951 Term, 66 Harv. L. Rev. 89, 105-06 (1952); Review of Recent Supreme Court Decisions, 38 A.B.A.J. 590-91 (1952).

63. 342 U.S. at 591-92.

tionality of section 212(a)(28) was now to be judged by *Dennis* principles, it was clearly invalid.[64] The *Mandel* dissent was of the opinion that the *Harisiades* precedent had been misapplied. Although the majority had assumed that *Harisiades* governed the area of both alien deportation and alien exclusion cases,[65] that decision in fact, dealt exclusively with an alien resident and made no mention of those aliens excluded. While resident aliens have been held to possess certain constitutional rights,[66] no such rights have been extended to nonresidents. The Supreme Court has explained that the alien's presence within this country is the determinative factor.[67] As Mr. Justice Murphy remarked: "[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."[68]

Having accepted this distinction between resident aliens and aliens who have been denied entry, the dissent rejected *Harisiades* as precedent in *Mandel*, concluding: "Neither [*Harisiades*] nor any other authority supports the conclusion that the *Turner* principle no longer defines the exclusion power."[69] If *Turner* were controlling, "political philosophers innocent of evil intent" could be excluded and an act providing for their exclusion would be constitutional.[70] The dissent also based its opinion on considerations of national security and foreign policy.[71]

In holding that alien exclusion statutes are to be judged by the standards of *Dennis, Mandel* has expanded the grounds on which an alien denied entry can object to his exclusion. Thus *Mandel* might mark the beginning of a less restrictive policy towards subversive aliens. However, it must be noted that *Strecker* also seemed to point in the same direction but Congress denied that decision any real potency.[72] Therefore, whether or not *Mandel* will be a turning point in our policy towards subversive aliens depends on the subsequent actions of both the Supreme Court and the Congress.

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64. 325 F. Supp. at 622, 632.

65. Id. at 628.

66. The due process provision of the fourteenth amendment was extended to resident aliens in Yick Wo v. Hopkins, 118 U.S. 356 (1886). Resident aliens are also entitled to the protections of the fifth and sixth amendments regulating procedure in criminal cases. Wong Wing v. United States, 163 U.S. 228 (1896). See also Comment, Extent of Constitutional Protection Afforded Resident Aliens, 19 Albany L. Rev. 62 (1955).

67. See, e.g., Johnson v. Eisentrager, 339 U.S. 763, 770-71 (1950); Japanese Immigrant Case, 189 U.S. 86, 101 (1903); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

68. Bridges v. Wixon, 326 U.S. 135, 161 (1945) (concurring opinion).

69. 325 F. Supp. at 638.

70. 194 U.S. at 294.

71. 325 F. Supp. at 639-47. A recent law review article, foreseeing that just such objections would be made in an alien exclusion case, urged that "courts should look beyond the facade of 'political question' and 'foreign relations' and adjudicate the constitutional issue." Note, Opening the Floodgates to Dissident Aliens, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 141, 153 (1970).

72. See notes 23-29 supra and accompanying text.

Remedies—Attorney's Fees Recoverable for Violation of Civil Rights Act of 1866.—Defendant, Southern Home Sites Corporation, as part of a promotional campaign for a real estate development, dispatched form letters to members of the public offering to sell a piece of property to each recipient. These letters stated that only a member of the white race could take advantage of the offer. Complainant Lee, after receiving one of these letters, appeared at Southern's office with the cash purchase price of a lot. However, Southern refused to sell to Lee because he was a Negro. Lee brought a class action in the district court under section 1982 of Title 42, United States Code, part of the Civil Rights Act of 1866.[1] The court awarded an injunction against future discrimination and ordered Southern to sell Lee a lot under the terms of the offer. However, plaintiff's motion for an award of attorney's fees was denied. Although the Court of Appeals for the Fifth Circuit otherwise affirmed the decision, it remanded the case for further consideration, with instructions that the district court make findings of fact on the issue of attorney's fees.[2] The district court again concluded that an award of such fees would be inappropriate. The court of appeals reversed, holding that reasonable attorney's fees were recoverable in an action brought under section 1982. *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971).

In England prior to the reign of Edward I a successful plaintiff could, in some damage actions, obtain compensation from the defendant which included the expense of litigation.[3] In 1278, the Statute of Gloucester[4] granted a plaintiff the opportunity to recover costs, including attorneys' fees, in a wide range of cases.[5] Subsequently, English courts were empowered to extend the same benefit to successful defendants.[6] Eventually the rule became established in English common law courts that a victorious party would recover the costs of the litigation, except in those cases involving trivial damages.[7] At present these costs, which include fees paid to both solicitor and barrister, are governed by court rules and are awarded in the discretion of the court.[8]

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1. 42 U.S.C. § 1982 (1970).

2. Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970).

3. C. McCormick, Damages § 60 (1935) [hereinafter cited as McCormick]; 2 F. Pollock & F. Maitland, The History of English Law 597 (2d ed. 1959).

4. 6 Edw. 1, c. 1 (1278). While this statute was limited to the costs of the "writ purchased," it was construed from the beginning to include the cost of an attorney. Goodhart, Costs, 38 Yale L.J. 849, 852 (1929) [hereinafter cited as Goodhart].

5. Goodhart 853-54.

6. Statute of Westminster, 4 Jac. 1, c. 3 (1607); McCormick § 60; Goodhart 851-54.

7. McCormick § 60; McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931).

8. McCormick § 60; Goodhart 851-54. In cases tried before a jury, the costs of the action are recovered by the prevailing party unless good cause exists for refusing them. In non-jury cases, the judge has discretion over the awarding of costs. Where a party in a non-jury case successfully enforces his rights without engaging in misconduct, the judge will award him his costs. If a party brings an unnecessary action, however, the judge may order him to pay the costs of the other side even though he may be successful in the action. Goodhart 860-62.

The English notion that the prevailing party should receive full compensation for the expenses of litigation has never been widely accepted in the United States.[9] In 1796, the Supreme Court decided that a successful litigant generally could not recover the expense to which he was put in retaining an attorney.[10] This became the rule and has since been consistently followed.[11] In an attempt to emulate the English practice, some states enacted statutes providing for the award of fees as costs in certain actions.[12] However, since the statutory fee limits remained static while the value of money declined, recoveries under these statutes eventually became nominal.[13] A variety of federal statutes[14] now explicitly provide for the granting of attorney's fees in certain cases. Unlike earlier state statutes, these laws often avoid the problem caused by fluctuations in the value of money by providing that "reasonable" fees may be awarded. Apart from these statutory exceptions, the American rule remains that the expense of an attorney is not granted as compensation to the prevailing litigant in actions at law.[15]

Various reasons have been offered in defense of this rule.[16] The Supreme Court

9. McCormick § 60.

10. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). Goodhart notes that the original American departure from the English practice, occurring some time after the revolution, may be accounted for at least in part by the disrespect in which lawyers were held and by the general feeling that the law was an easily accessible body of rules, the comprehension of which required no special expertise. Goodhart 873. Different considerations are today suggested as justifying the retention of the rule. See notes 16 & 19 infra and accompanying text.

11. Stewart v. Sonneborn, 98 U.S. 187, 197 (1878); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872); Day v. Woodworth, 54 U.S. (13 How.) 362, 371-72 (1851); Fox v. City of W. Palm Beach, 383 F.2d 189, 195 (5th Cir. 1967); Washington Aluminum Co. v. Pittman Constr. Co., 383 F.2d 798, 805 (5th Cir. 1967); Wolf v. Cohen, 379 F.2d 477, 480 (D.C. Cir. 1967); Luckett v. Cohen, 169 F. Supp. 808, 809 (S.D.N.Y. 1956); Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 444, 136 N.E.2d 484, 487, 154 N.Y.S.2d 10, 14 (1956); Davis Acoustical Corp. v. Hanover Ins. Co., 22 App. Div. 2d 843, 254 N.Y.S.2d 14, 16 (3d Dep't 1964) (mem.). In Manko v. City of Buffalo, 271 App. Div. 286, 65 N.Y.S.2d 128 (4th Dep't 1946), aff'd mem., 296 N.Y. 905, 72 N.E.2d 623 (1947), the court, dealing with the "age old controversy" of whether costs fully compensate a litigant, conceded they did not, but noted that "it has been the public policy of this State, from time immemorial, to regard them as adequate." Id. at 302, 65 N.Y.S.2d at 143.

12. E.g., Mass. Ann. Laws ch. 261, § 23 (1968); Mich. Comp. Laws Ann. § 600.7107 (1968); Pa. Stat. Ann. tit. 17, § 1635 (1962); S.D. Compiled Laws Ann. § 21-16-11 (1967).

13. McCormick § 60.

14. E.g., Civil Rights Act of 1964 § 204(b), 42 U.S.C. § 2000a-3(b) (1970); Interstate Commerce Act § 16, 49 U.S.C. § 16(2) (1970).

15. McCormick § 61.

16. It has been argued that the cost of an attorney is too remote to be considered as part of the damages resulting from defendant's wrongful act. It has also been contended that there is no adequate method for determining a proper fee and that the principle of fee awards will stimulate increased charges by attorneys. McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619, 639-40

has pointed out that if fees were to be awarded to the successful party, a special court or master might have to be appointed to determine the amount of the fee.[17] This "grafted litigation" might be more contentious and delayed than the original cause which produced it.[18] It has recently been argued that the rule ensures that an impecunious party will not be discouraged from entering a court because he might be required to pay the opposing party's legal fees.[19] These arguments, however, have been subjected to severe criticism in recent years.[20]

While the American rule has prevented the award of fees in common law actions, American courts have invoked the inherent power of equity to grant fees without express statutory authorization[21] in certain limited types of cases.[22]

(1931); Note, Attorney's Fees as an Element of Damages, 15 U. Cin. L. Rev. 313, 314 (1941). It has also been suggested that an allowance of fees would threaten the attorney-client relationship. Id.

17. Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872).

18. Id. at 231.

19. Farmer v. Arabian Am. Oil Co., 324 F.2d 359, 370 (2d Cir. 1963) (Clark, J., dissenting), rev'd, 379 U.S. 227, 239 (1964) (Goldberg, J., concurring); Conte v. Flota Mercante del Estado, 277 F.2d 664, 672 (2d Cir. 1960). In Conte, the court directly relied on Goodhart 872-77 for support of the proposition that the American rule was continued because of a belief that the English system favored the wealthy. The Conte court did not point out, however, that in Goodhart's view the American belief was in fact only a "vague feeling" that was incorrect and "due to a confusion . . . ." Goodhart 874.

20. See Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Note, Attorney's Fees as an Element of Damages, 15 U. Cin. L. Rev. 313, 314-15 (1941); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie, 20 Vand. L. Rev. 1216 (1967); Note, Distribution of Legal Expense Among Litigants, 49 Yale L.J. 699 (1940). The traditional rule assumes that the poor have access to courts to enforce their legal rights. These articles point out, however, that the poor, and increasingly the middle class, will make no effort to enforce their rights because the benefits to be derived often fail to justify the considerable cost of hiring an attorney. The present rule, it is argued, operates in such a manner as to discourage the enforcement of challenged or violated rights. It is contended that, as a practical matter, all that "the law now offers the little man . . . is charity. Legal aid, rather than legal right." Ehrenzweig, supra, at 796.

21. See Cato v. Parham, 403 F.2d 12, 16 (8th Cir. 1968); Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965); Rogers v. Paul, 345 F.2d 117, 125 (8th Cir.), vacated on other grounds, 382 U.S. 198 (1965).

22. See Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164-67 (1939); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473, 481 (4th Cir. 1951); Buchhalter v. Rude, 54 F.2d 834, 838 (10th Cir.), modified, 286 U.S. 451 (1932); Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233, 244 (8th Cir. 1928), rev'd for misapplication of principle, 281 U.S. 1 (1930). The view that equity's power is inherent has been challenged by the assertion that the power is derived from statute. Stallo v. Wagner, 245 F. 636, 638 (2d Cir. 1917), citing 17 Rich. 2, c. 6 (1393).

This power is typically exercised when an equitable fund is involved[23] or when the losing party has acted improperly in prosecuting his case.[24]

A court's equitable power to make an award of fees to one party when the extraordinary misconduct of his adversary requires it has been historically established.[25] However, a court's discretionary power to do so is limited to exceptional cases[26] in which "dominating reasons of justice"[27] require the award. Such reasons have been found in cases of obnoxious conduct by the defendant[28] and in vexatious suits.[29] In several recent cases involving desegregation, for example, obstinacy or evasion on the part of the defendants resulted in the imposition upon them of the complainants' attorney's fees.[30]

Equity also permits a party to recover his expenses when he produces or protects a fund for himself and others,[31] since it is considered that the class which receives the benefit should bear the burden of the litigation which produced the fund.[32] This exception is well established[33] and has been extended to permit a

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23. See notes 31-38 infra and accompanying text.

24. See notes 25-30 infra and accompanying text.

25. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164, 166 (1939). The allowance of litigation expenses, such as attorney's fees, which are not included in ordinary taxable costs "is part of the historic equity jurisdiction of the federal courts." Id. at 164.

26. Smoot v. Fox, 353 F.2d 830, 832 (6th Cir. 1965), cert. denied, 384 U.S. 909 (1966); Brisacher v. Tracy-Collins Trust Co., 277 F.2d 519, 524 (10th Cir. 1960); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473, 481 (4th Cir. 1951).

27. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939).

28. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923) (award imposed on party guilty of contempt).

29. In re Swartz, 130 F.2d 229 (7th Cir. 1942). A recovery of fees was allowed in admiralty suits where a party was put to expense as the result of a wrongful seizure (The Apollon, 22 U.S. (9 Wheat.) 362 (1824)) and where the opposing party made no effort to investigate a complainant's claim for maintenance and cure, thereby resulting in unnecessary litigation. Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962). Where a union obligated to protect the interests of certain complainants' instead subjected them to discriminatory and oppressive conduct, causing them to resort to the courts, attorneys' fees were imposed upon the union. Rolax v. Atlantic Coast Line R.R., 186 F.2d 473, 481 (4th Cir. 1951).

30. Hill v. Franklin County Bd. of Educ., 390 F.2d 583, 585 (6th Cir. 1968); Bradley v. School Bd., 345 F.2d 310, 321 (4th Cir.), vacated per curiam on other grounds, 382 U.S. 103 (1965); Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1962), noted in 77 Harv. L. Rev. 1135 (1964). The principle of a fee award was affirmed in several other cases, although an award was not granted because the facts of the cases did not, in the courts' view, require it. Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969) (per curiam), cert. denied, 396 U.S. 1061 (1970); Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965); Rogers v. Paul, 232 F. Supp. 833, 843-44 (W.D. Ark. 1964), aff'd, 345 F.2d 117, 125-26 (8th Cir.), vacated per curiam on other grounds, 382 U.S. 198 (1965).

31. Trustees v. Greenough, 105 U.S. 527, 532-33 (1881).

32. Id.; accord, Holthusen v. Edward G. Budd Mfg. Co., 55 F. Supp. 945, 946 (E.D. Pa. 1944). The burden is distributed to the class by removing the fees from the fund, thereby reducing the amount of each member's share, or by proportional contribution from

recovery of fees in stockholder's derivative suits on behalf of a corporation and suits on behalf of shareholders.[34] Several cases have turned on the notion that the plaintiff's suit need not create a fund but must produce an actual pecuniary benefit to the corporation or class.[35] Some courts have now departed from even this requirement, holding that neither a fund nor a direct pecuniary benefit is required[36] so long as some form of benefit is produced and that benefit is sub-

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those who accept the benefits of the suit. Trustees v. Greenough, 105 U.S. 527, 532-33 (1882). To deny an award would be unjust to the party who produced the fund and would give an unfair advantage to the beneficiaries of the suit. Id. at 532; Hornstein, The Counsel Fee in Stockholder's Derivative Suits, 39 Colum. L. Rev. 784, 787 (1939).

33. See Meddaugh v. Wilson, 151 U.S. 333 (1894); Dodge v. Tulleys, 144 U.S. 451 (1892); Central R.R. v. Pettus, 113 U.S. 116 (1885); Powell v. Pennsylvania R.R. & Banking Co., 267 F.2d 241, 243 (3d Cir. 1959); Buchhalter v. Rude, 54 F.2d 834, 839 (10th Cir.), modified, 286 U.S. 451 (1932); Jacksonville, T. & K.W. Ry. v. American Constr. Co., 57 F. 66, 70 (5th Cir. 1893); In re Continental Vending Machine Corp., 318 F. Supp. 421, 424 (E.D.N.Y. 1970) (mem.); In re Hidden, 243 N.Y. 499, 515, 154 N.E. 538, 543 (1926) (dictum); Woodruff v. New York, L.E. & W.R.R., 129 N.Y. 27, 31, 29 N.E. 251, 254 (1891).

34. See, e.g., Harris v. Chicago Great W. Ry., 197 F.2d 829 (7th Cir. 1952); Winkelman v. General Motors Corp., 48 F. Supp. 504 (S.D.N.Y. 1942), aff'd per curiam, 136 F.2d 905 (2d Cir. 1943); Ripley v. International Rys. of Cent. Am., 16 App. Div. 2d 260, 227 N.Y.S.2d 64 (1st Dep't), aff'd mem., 12 N.Y.2d 814, 187 N.E.2d 131, 236 N.Y.S.2d 64 (1962); Waterman Corp. v. Johnston, 204 Misc. 587, 122 N.Y.S.2d 695 (Sup. Ct. 1953), modified, 283 App. Div. 768, 128 N.Y.S.2d 573 (1st Dep't 1954) (mem.). For a statement of the basis of fee awards in these suits see Murphy v. North Am. Light & Power Co., 33 F. Supp. 567, 570 (S.D.N.Y. 1940). Professor Hornstein notes that "[a]lmost half of the states have at least one reported holding in a suit by a stockholder, and all uniformly recognize and apply the rule that, if a stockholder sues on behalf of all the stockholders, for the benefit of his corporation, and if his suit is successful and the corporation benefits thereby, the complaining stockholder is entitled to reimbursement for all proper expenditures made or liabilities necessarily incurred in the prosecution of the suit." Hornstein, The Counsel Fee in Stockholder's Derivative Suits, 39 Colum. L. Rev. 784, 788 (1939) (footnotes omitted).

35. E.g., Burley Tobacco Co. v. Vest, 165 Ky. 762, 178 S.W. 1102 (1915). Compare Hempstead v. Meadville Theological School, 286 Pa. 493, 134 A. 103 (1926), with Abrams v. Textile Realty Corp., 97 N.Y.S.2d 492 (Sup. Ct. 1949) (opinion of Tuttle, Referee). In Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939), a plaintiff who sued for herself alone and whose suit established the claims of others but did not produce a fund was held to be entitled to recover counsel fees. The Supreme Court stated that when "a fund is for all practical purposes created for the benefit of others, the formalities of the litigation —the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation." Id. at 167 (italics deleted).

36. E.g., Saks v. Gamble, 38 Del. Ch. 504, 154 A.2d 767 (1958); Berger v. Amana Soc'y, 253 Iowa 378, 111 N.W.2d 753 (1961); Martin Foundation, Inc. v. Phillips-Jones Corp., 283 App. Div. 729, 127 N.Y.S.2d 649 (2d Dep't) (mem.), aff'd mem., 306 N.Y. 972, 120 N.E.2d 230 (1954). In Bosch v. Meeker Coop. Light & Power Ass'n, 257 Minn. 362, 101 N.W.2d 423 (1960), a plaintiff-stockholder was permitted to recover attorney's fees

stantial.[37] It should be noted that, while in these cases the expenses of the litigation are paid by the corporation or class which received the benefit and which would have had to bear the expense had it brought the suit itself, under the English rule and in cases of misconduct they are paid by the unsuccessful party,[38] whoever that may be.

In *Mills v. Electric Auto-Lite Co.*[39] the plaintiff sued derivatively to dissolve a merger of his corporation with another company, alleging that the directors had obtained favorable proxies by means of a material misrepresentation.[40] The

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in a suit which successfully prevented certain directors of the defendant corporation from engaging in ultra vires acts, even though no pecuniary benefit to the corporation or its stockholders resulted. It is sometimes held that in suits of this type neither a fund nor a specific pecuniary benefit is required because the award of fees depends basically upon "the production of the benefit and not upon the form that the benefit may take." Bysheim v. Miranda, 45 N.Y.S.2d 473, 475 (Sup. Ct. 1943). In Abrams v. Textile Realty Corp., 97 N.Y.S.2d 492 (Sup. Ct. 1949) (opinion of Tuttle, Referee), the court found the benefit to consist of "full observance of the law" and concluded that such a form of benefit was sufficient to justify an award. Id. at 496. For New York cases indicating that the production of a specific fund is unnecessary see New York Cent. R.R. v. New York & H.R.R., 275 App. Div. 604, 608-09, 90 N.Y.S.2d 309, 315 (1st Dep't 1949), aff'd mem., 301 N.Y. 567, 93 N.E.2d 451 (1950); Edelman v. Goodman, 47 Misc. 2d 8, 9, 261 N.Y.S.2d 618, 619 (Sup. Ct. 1965); Christie v. Fifth Madison Corp., 35 Misc. 2d 570, 575, 231 N.Y.S.2d 541, 546 (Sup. Ct. 1962); Bysheim v. Miranda, 45 N.Y.S.2d 473, 475 (Sup. Ct. 1943); Allen v. Chase Nat'l Bank, 180 Misc. 259, 265-67, 40 N.Y.S.2d 245, 251-52 (Sup. Ct. 1943). In Martin Foundation, Inc. v. Phillips-Jones Corp., 204 Misc. 120, 123 N.Y.S.2d 222 (Sup. Ct. 1953), modified, 283 App. Div. 729, 127 N.Y.S.2d 649 (2d Dep't), aff'd mem., 306 N.Y. 972, 120 N.E.2d 230 (1954), sufficient benefit was found in the bringing of an action and the obtaining of a temporary injunction. New York provided that where a stockholder brought an action against corporate officers or directors on the corporation's behalf, the reasonable expenses of a party plaintiff or party defendant, including attorney's fees, would be paid by the corporation. Law of April 14, 1941, ch. 350, § 1, [1941] N.Y. Laws 164th Sess. 1034-35. To the extent that this law applied to parties plaintiff, it was held to be declaratory of the common law. Bysheim v. Miranda, 45 N.Y.S.2d 473 (Sup. Ct. 1943); Neuberger v. Barrett, 180 Misc. 222, 39 N.Y.S.2d 575 (Sup. Ct. 1942). As a result, the law was considered unnecessary and was repealed. Act of April 18, 1945, ch. 869, § 2, [1945] N.Y. Laws 168th Sess. 1972. New York presently provides that if a plaintiff brings a stockholder's derivative action from which anything is recovered or obtained, the court may award the plaintiff reasonable expenses, including attorney's fees, out of the proceeds, and may direct the plaintiff to account to the corporation for the remainder. N.Y. Bus. Corp. Law § 626(e) (McKinney 1963).

37. Schechtman v. Wolfson, 244 F.2d 537, 540 (2d Cir. 1957); Bosch v. Meeker Coop. Light & Power Ass'n, 257 Minn. 362, 101 N.W.2d 423 (1960). The benefit is required to be substantial in order to prevent the institution of "strike suits of great nuisance and no affirmative good." Schechtman v. Wolfson, 244 F.2d 537, 540 (2d Cir. 1957).

38. Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658 (1956).

39. 396 U.S. 375 (1970), noted in 11 B.C. Ind. & Com. L. Rev. 1024 (1970); 80 Yale L.J. 107 (1970).

40. 396 U.S. at 377.

Supreme Court stated that the fact that the suit had been brought under a statute[41] did not prevent an award of attorney's fees since the statute was not intended to "circumscribe the courts' power to grant appropriate remedies."[42] The Court noted that exceptions to the general American rule on fee awards had been developed when "overriding considerations indicate[d] the need for such a recovery."[43] Among the exceptions was one in which a plaintiff "successfully maintained a suit, usually on behalf of a class, that benefit[ed] a group of others in the same manner as himself."[44] In the opinion of the Court, *Mills* presented such a situation and an award of attorney's fees was proper, even though the suit produced no monetary recovery from which fees could be paid.[45] In light of the congressional policy favoring fair corporate suffrage, the petitioners in *Mills* had clearly rendered a "substantial service to the corporation and its shareholders."[46] Suits of the kind brought in *Mills*, said the Court, " 'involve corporate therapeutics' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute."[47]

Prior to *Mills*, the Supreme Court had made a strong statement of the reasons underlying an award of fees in *Newman v. Piggie Park Enterprises*.[48] In *Newman* the plaintiffs brought a class action under Title II of the Civil Rights Act of 1964[49] to enjoin racial discrimination at restaurants operated by the defendants.[50] The court of appeals had reversed the district court's refusal to grant an injunction and instructed the district court to award the plaintiffs counsel fees, but only to the extent that the defendants had advanced defenses in bad

41. Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970).

42. 396 U.S. at 391. The Court reached a different conclusion in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). In Fleischmann, the Court decided that Congress had provided all remedies available in a Lanham Act suit in section 35 of that Act, 15 U.S.C. § 1117 (1970). Since an award of fees had not been provided for by the Act, the Court was not free to order one. 386 U.S. at 720-21. The decision in Fleischmann puts an end to the practice of granting fee awards in spite of the fact that such awards were not included in the remedies enumerated in the statute. See, e.g., Baker v. Simmons Co., 325 F.2d 580, 583 (1st Cir. 1963), aff'd on remand, 342 F.2d 991 (1st Cir.), cert. denied, 382 U.S. 820 (1965); Youthform Co. v. R.H. Macy & Co., 153 F. Supp. 87, 95 (N.D. Ga. 1957)

43 396 U.S. at 391-92 (footnote omitted).

44. Id. at 392.

45. Id.

46. Id. at 396.

47. Id. (footnotes omitted), citing Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658, 659, 662-63 (1956). Mr. Justice Black dissented from the Court's holding on the issue of attorney's fees. "The courts are interpreters, not creators, of legal rights to recover and if there is a need for recovery of attorneys' fees to effectuate the policies of the Act here involved, that need should in my judgment be met by Congress, not by this Court." 396 U.S. at 397.

48. 390 U.S. 400 (1968).

49. 42 U.S.C. § 2000a-3(a) (1970).

50. 390 U.S. at 400.

faith as a delaying measure.[51] In modifying the decision of the court of appeals, the Supreme Court stated that the standard set by the lower court had not properly effectuated the counsel fee provision of the Act.[52] Since it was clear, in the Court's view, that enforcement of the Act depended upon private litigation, a suit under Title II was private in form only.[53] A plaintiff could not recover damages; therefore, if he obtained an injunction, he did so as a " 'private attorney general.' "[54] If plaintiffs were required to carry the burden of their attorneys' fees, said the Court, few parties would seek to "advance the public interest" by obtaining injunctive relief.[55] Congress enacted the counsel fee provision not merely as a penalty for defendants, but also to encourage individuals to seek relief under the Act.[56] Therefore, the Court concluded, one who obtains an injunction under Title II should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[57]

Unlike the statute in *Newman*, section 1982, the statute under which the plaintiff brought suit in *Lee v. Southern Home Sites Corp.*, contains no express provision for an award of counsel fees, but merely declares that all citizens shall have an equal right to buy and sell property.[58] This section had lain dormant until the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*[59] In *Jones* the Court held that section 1982 barred purely private racial discrimination in the sale of housing.[60] When the court of appeals remanded *Lee* for findings of fact,[61] the district court examined the record in light of the traditional obnoxious conduct test.[62] The district judge found that defendant Southern was unaware of the decision in *Jones* when it mailed the letter to Lee and therefore concluded that Southern had not acted so maliciously or offensively as to justify an award of fees. On consideration of these findings, the court of appeals noted in passing[63] that Southern was put on notice of section 1982 when the complaint was served. Thus, the court observed, defendant's counsel must have been aware of the

51. Newman v. Piggie Park Enterprises, 377 F.2d 433 (4th Cir. 1967), rev'g 256 F. Supp. 941 (D.S.C. 1966), modified, 390 U.S. 400 (1968).

52. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), modifying 377 F.2d 433, 437 (4th Cir. 1967).

53. Id. at 401.

54. Id. at 402.

55. Id.

56. Id.

57. Id.

58. Id. Section 1982 provides in its entirety that: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1970).

59. 392 U.S. 409 (1968), noted in 37 Fordham L. Rev. 277 (1968); The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 95 (1968).

60. 392 U.S. at 413.

61. Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970).

62. See notes 25-30 supra and accompanying text.

63. 444 F.2d at 144.

Supreme Court's decision regarding section 1982 when he filed the defendant's answer three months later. Mere continuation of the litigation thereafter constituted " 'unreasonable, obdurate obstinacy.' "[64] Although the Fifth Circuit was apparently willing to justify an award of attorney's fees on the basis of the traditional obnoxious conduct test,[65] the court chose to base its holding on a "broader ground"[66]—although section 1982 is simply declarative of certain rights,[67] federal courts "have a duty to fashion an effective remedy to carry out the purpose of the statute,"[68] and awards of attorney's fees form part of that remedy.[69]

The *Lee* court then turned to a consideration of the *Mills* case. In the court's view, *Mills* demonstrated that federal courts may properly award attorney's fees "when this remedy effectuates congressional policy."[70] The *Mills* Court had considered the attorney's fee award as a remedy necessary to further the corporate therapeutics which the congressional policy favoring fair corporate suffrage demanded.[71] That Court had indicated that the situation resembled the typical derivative action in which the corporation ought to pay the fees since it received the benefit of the suit.[72] But, in the opinion of the *Lee* court, the benefit which the Court in *Mills* had examined was conferred on all shareholders in the country and for that reason "established derivative action considerations do not seem to apply to the [present] situation."[73] The *Mills* decision is "better understood," therefore, as "resting heavily on its acknowledgement of 'overriding considerations,' . . . ."[74] that is, on the recognition that private suits are necessary to give effect to congressional policy and that the encouragement of such suits requires awards of attorney's fees.[75]

The statute in *Lee*, like that in *Mills*, evidenced a "strong congressional policy behind the rights" involved.[76] Since, in light of the holding in *Jones v. Alfred H. Mayer Co.*, this policy could only be effectuated by private action, the *Lee* court determined that an award of fees to successful plaintiffs was appropriate "as a

64. Id.

65. See notes 25-30 supra and accompanying text.

66. 444 F.2d at 144.

67. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-14, 414 n.13 (1968). The Court in Jones declared that the fact that section 1982 is "couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy . . . ." Id. at 414 n.13.

68. 444 F.2d at 144.

69. Id.

70. Id.

71. Id. at 145.

72. Id.

73. Id.

74. Id.

75. Id. In support of this interpretation the court relied upon The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 216-17 (1970); Comment, The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co., 38 U. Chi. L. Rev. 316, 323-28 (1971).

76. 444 F.2d at 145.

means of carrying out the aims of the statute."[77] The court, in devising an appropriate remedy for the old statute involved, looked to more recent legislation and concluded that an effective remedy under section 1982 should include an award of attorney's fees similar to that provided for in the Fair Housing Law.[78] The court noted that *Newman v. Piggie Park Enterprises*[79] supported its decision, even though the statute in *Newman*, unlike section 1982, expressly provided for fee awards as a remedy. As in *Newman*, there was involved in *Lee* a strong congressional policy which could only be enforced by private litigation. Furthermore, damages in a section 1982 suit[80] may be difficult to prove or, as in *Lee*, nonexistent. Fees must be available, the *Lee* court concluded, to ensure that individuals will be "willing to act as 'private attorneys general' to effectuate the public purposes of the statute . . . ."[81]

An immediate effect of the decision in *Lee* is to add strength to the once moribund section 1982. The possibility of a recovery of attorney's fees may provide an incentive to persons who previously would have been unable to bear the cost of enforcing their rights under the statute. The result was achieved by a broad interpretation of *Mills*, although the *Lee* court might have limited the application of the *Mills* ruling to cases in which a resemblance to the standard derivative action could be shown. Furthermore, the *Lee* court might have resisted the line of precedent formed by *Mills* and prior stockholder derivative suits[82] on the basis of a distinction between the nature of the two fee awards. In the stockholder suits, the successful plaintiff is awarded fees as compensation either out of the fund produced or from the corporation in return for the benefits accruing to it as a result of the efforts of the plaintiff, while in *Lee* the plaintiff's recovery of fees from the defendant resembles an actual damage award and is awarded although the plaintiff produced no benefit accruing to the defendant. The *Lee* court ignored this distinction even though it relied heavily on *Mills* in reaching its decision.[83]

The *Lee* court understood *Mills* to declare that fees may properly be imposed when required by "overriding considerations." The need to provide private citizens with effective means for the enforcement of congressional policy is such

77. Id. at 146.

78. Fair Housing Law § 812(c), 42 U.S.C. § 3612(c) (1970).

79. 390 U.S. 400 (1968).

80. Damages may be awarded under § 1982. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238-240 (1969).

81. 444 F.2d at 148. The court in Lee ruled that fees should be "as available as under 42 U.S.C. § 3612(c)." Id. This statute grants courts the power to award reasonable attorney's fees, provided that the court considers the plaintiff to be financially unable to bear them himself.

82. See notes 31-38 supra and accompanying text.

83. The Lee court may have ignored this distinction because, though Mills was concerned with a reimbursement, more than half of the shareholders who were forced to pay the counsel fees in Mills were opposed to the position of the plaintiff. See Comment, The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co., 38 U. Chi. L. Rev. 316, 333 (1971).

a consideration, as *Newman* demonstrated.[84] *Lee*, involving a broad interpretation of *Mills* and *Newman*, constitutes strong support for an evolving positive basis[85] for shifting the cost of retaining a lawyer to the losing party. Awarding fees in cases where the opposing party engages in obstinate conduct[86] is a punitive measure which works to compensate the innocent party for the wrongs done him. Awarding fees when a plaintiff produces a "benefit" for a class or corporation[87] is justified basically as an attempt at compensating him for his efforts in producing a benefit when fairness requires that all beneficiaries contribute to bearing the cost of such production. Although the traditional theories may have the effect of fostering certain conduct, the justification for imposing one party's legal expenses upon his opponent which derives from *Lee* is directly based upon the notion that fees should be used not as bare compensation but as a positive encouragement to the enforcement of public policy. It would be in keeping with this policy to extend the holding in *Lee* to cases in which the plaintiff sues only on his own behalf. Likewise, it would be logical to apply the *Lee* ruling to cases where a clear public policy is involved, even though it has not been given statutory expression by the legislature. Indeed, the positive theory suggested by *Lee* at least justifies a reexamination of the entire general rule, if not an abolition thereof. It has been strongly argued that the general rule operates to discourage the enforcement of rights and rarely permits complete compensation for injuries suffered.[88] If awards are justified by the overriding consideration that they are needed to encourage the enforcement of public policy, then the general rule ought to be changed because it fosters precisely the opposite result. Persons now abstain from enforcing their rights because they recognize that any compensation they recover will be incomplete if it fails to meet the expenses of an attorney. Yet *Lee* declares that awards are justified by the need to stimulate enforcement of public policy. It would appear that such need may also justify the abolition or restriction of the American rule for both plaintiffs and defendants.

84. "Although Newman involved interpretation of a statute making specific reference to attorneys' fees, the Court's recognition of a dual policy in attorneys' fees cases—punishment to violators and encouragements to litigants—serves as a general guide to statutes . . . where there is no mention of attorneys' fees. The rule emerging from Newman is that in the absence of special circumstances rendering such an award unjust, litigants obtaining an injunction should be awarded full attorneys' fees." Larson, The New Law of Race Relations, 1969 Wis. L. Rev. 470, 493-94 (emphasis deleted); accord, Cato v. Parham, 293 F. Supp. 1375, 1378 (E.D. Ark.) (mem.), aff'd, 403 F.2d 12 (8th Cir. 1968).

85. See Comment, The Allocation of Attorney's fees After Mills v. Electric Auto-Lite Co., 38 U. Chi. L. Rev. 316, 328-29 (1971).

86. See notes 25-30 supra and accompanying text.

87. See notes 31-38 supra and accompanying text.

88. See note 20 supra.

Securities Regulation—Rule 10b-5—Equitable Defenses of *In Pari Delicto* and Unclean Hands Denied to Tipper as Against Tippee.—Plaintiff tippee received inside information from defendant concerning the proposed merger of two corporations. Defendant broker, a controlling or substantial shareholder in each corporation, assured the plaintiff that, upon consummation of the proposed merger, the stock of TST Industries, Inc. would be exchanged on a one-for-one basis for the stock of Elgin National Watch Company.[1] Relying on this information, the plaintiff purchased a substantial amount of TST securities, anticipating a twofold appreciation of his investment.[2] When the merger was completed, however, the tip proved false, the exchange ratio being two and one half shares of TST for each share of Elgin. Seeking to recover both his losses and punitive damages, the plaintiff brought a claim alleging that the defendant had violated Rule 10b-5 in that it had fraudulently misrepresented the exchange ratio. Defendant moved for summary judgment, claiming that plaintiff was barred from recovery under the doctrine of *in pari delicto* since the plaintiff had also violated Rule 10b-5 by failing to disclose to his sellers all relevant information in conjunction with the transaction, including the exchange ratio. In denying the motion, the district court held that the public policy favoring enforcement of Rule 10b-5 through private rights of action overrode the equitable defenses of *in pari delicto* and unclean hands. *Nathanson v. Weis, Voisin, Cannon, Inc.*, 325 F. Supp. 50 (S.D.N.Y. 1971).

Protecting the investing public is a major objective of the federal securities laws.[3] Congress, examining the causes of the financial debacle of 1929, concluded that certain speculative and manipulative practices occurring in national securities exchanges, over-the-counter markets and private transactions had a deleterious effect on the general economy and on the investing public.[4] The Securities Exchange Act of 1934 attempts to prevent inequitable practices and insure fairness in security transactions.[5] Section 10(b) of the Act delegated to the Securities and Exchange Commission (SEC) the broad power to prescribe "rules . . . necessary

1. Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50, 51 (S.D.N.Y. 1971). At the time these alleged false statements were made the market value of TST stock was approximately $8 per share, while the market value of Elgin stock was $17 per share. Id.

2. Id. at 52 n.5. The plaintiff purchased 5,000 shares of TST common stock on the New York Stock Exchange through the defendant broker and also made a direct purchase from the defendant corporation of 12 units consisting of 12 TST $1,000 bonds, 2,400 shares of TST common stock, and 1,200 TST warrants. Id.

3. See 1 L. Loss, Securities Regulation 121–29 (2d ed. 1961) [hereinafter cited by volume as Loss]. Professor Loss quotes President Franklin D. Roosevelt's message to Congress concerning the proposed Securities Act of 1933. It read in part: "This proposal adds to the ancient rule of caveat emptor the further doctrine 'let the seller also beware'. . . . The purpose of the legislation . . . is to protect the public with the least possible interference to honest business. This is but one step in our broad purpose of protecting investors and depositors. . . ." Id. at 127.

4. Securities Exchange Act of 1934 § 2(4), 15 U.S.C. § 78b(4) (1970).

5. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 875 (2d Cir.), cert. denied, 394 U.S. 976 (1968).

or appropriate . . . for the protection of investors."[6] Pursuant to this authority the SEC promulgated Rule 10b-5[7] which, by establishing a policy of equal disclosure, purports to insure to all trading parties equal access to information affecting their decisions.[8] The duty to make such disclosures is imposed upon corporate insiders such as officers and directors,[9] shareholders,[10] key employees of the corporation,[11] and brokers,[12] as well as outsiders.[13] Possessors of such material information, be they insiders or outsiders, are required to refrain from any transactions in securities wherein such information gives them a superior

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6. 15 U.S.C. § 78j(b) (1970).

7. 17 C.F.R. § 240.10b-5 (1971) provides: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interestate [sic] 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."

8. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963); Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir.), cert denied, 394 U.S. 976 (1968).

9. The courts are divided on the common law duty of disclosure owed by an officer or director of a corporation in purchasing the stock of his corporation. 3 Loss 1446. However, jurisdictions following the "strict rule" (imposing a fiduciary duty on corporate officers and directors only when they are acting on behalf of the corporation (Carpenter v. Danforth, 52 Barb. 581 (N.Y. 1868))) have expanded the obligation through the "special circumstances" doctrine. See Strong v. Repide, 213 U.S. 419 (1909). This brings the "strict rule" jurisdictions to results substantially similar to those reached in the minority or "broad rule" jurisdictions (imposing a fiduciary duty on directors and officers and requiring disclosure of all material facts (Oliver v. Oliver, 118 Ga. 362, 45 S.E. 232 (1903); Stewart v. Harris, 69 Kan. 498, 77 P. 277 (1904))). See 3 Loss 1446–48. Rule 10b-5 continues this responsibility in officers, directors and controlling stockholders. 3 Loss 1450 and cases cited therein; see Myzel v. Fields, 386 F.2d 718, 739 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968); Ross v. Licht, 263 F. Supp. 395, 409 (S.D.N.Y. 1967); SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 279 (S.D.N.Y. 1966), aff'd in part and rev'd in part, 401 F.2d 833 (2d Cir.), cert. denied, 394 U.S. 976 (1968).

10. Speed v. Transamerica Corp., 99 F. Supp. 808, (D. Del. 1951). In Speed, the court said: "It is unlawful for an insider, such as a majority stockholder, to purchase the stock of minority stockholders without disclosing material facts affecting the value of the stock . . . ." Id. at 828–29.

11. Schoenbaum v. Firstbrook, 405 F.2d 215, 219 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969); Kohler v. Kohler Co., 319 F.2d 634, 638 (7th Cir. 1963); Cochran v. Channing Corp., 211 F. Supp. 239, 242 (S.D.N.Y. 1962).

12. List v. Fashion Park, Inc., 340 F.2d 457, 461 (2d Cir.), cert. denied, 382 U.S. 811 (1965).

13. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir.), cert. denied, 394 U.S. 976 (1968); Myzel v. Fields, 386 F.2d 718, 739 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968); see Richland v. Crandall, 259 F. Supp. 274, 279 (S.D.N.Y. 1966); Cochran v. Channing Corp., 211 F. Supp. 239, 242 (S.D.N.Y. 1962).

advantage with respect to the uninformed investing public.[14] To enforce this rule, the SEC may seek an injunction restraining a fraudulent or deceptive practice.[15] Also, individual plaintiffs have a judicially implied right to maintain a civil action when they incur damages incident to a violation of Rule 10b-5.[16] Such actions are deemed a necessary adjunct to the enforcement efforts of the SEC.[17]

Difficulties have arisen, however, where a private plaintiff has attempted to recoup losses stemming from a false tip given him by the defendant.[18] In such cases the plaintiff has himself violated Rule 10b-5 by trading in the security, thereby placing himself *in pari delicto*[19] with the defendant in that each has attempted to take advantage of the less knowledgeable investor.[20] Since the plaintiff's injuries are occasioned by his own misdeeds the courts, guided by the equitable maxim, "[h]e who comes into equity must come with clean hands,"[21] are inclined, upon appropriate motion, to dismiss the cause of action.[22] These equitable considerations are limited in application, especially where there is an overriding public policy which will be furthered by suspending their operation.[23]

14. The court in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir.), cert. denied, 394 U.S. 976 (1968), summed up the duty as follows: "The core of Rule 10b-5 is the implementation of the Congressional purpose that all investors should have equal access to the rewards of participation in securities transactions. . . . [A]ll members of the investing public should be subject to identical market risks . . . ." Id. at 851–52. This is not to say an insider is always foreclosed from investing because of his superior analysis or familiarity with corporate operations. Id. at 848. Nor is an insider obligated to disclose information to the detriment of the corporation, so long as he refrains from trading or recommending such securities while such information remains undisclosed. Id. Rather, Rule 10b-5 concerns that information which could reasonably be calculated to have an affect on an investor's choice. Id. at 849.

15. Securities Exchange Act of 1934 § 21(e), 15 U.S.C. § 78u(e) (1970).

16. Kardon v. National Gypsum Co., 73 F. Supp. 798 (E.D. Pa. 1947), was the earliest case recognizing a private right of action under Rule 10b-5. 3 Loss 1457. Such private causes of action have been recognized by ten of the eleven courts of appeals and have the implied approval of the Supreme Court. See J.I. Case Co. v. Borak, 377 U.S. 426 (1964); 6 Loss 3870–71 (Supp. 1969).

17. J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

18. Kuehnert v. Texstar Corp., 412 F.2d 700 (5th Cir. 1969); Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50 (S.D.N.Y. 1971); Wohl v. Blair & Co., 50 F.R.D. 89 (S.D.N.Y. 1970).

19. The equitable defenses of in pari delicto and unclean hands bar recovery to a plaintiff whose cause of action has arisen out of circumstances occasioned by his own misconduct. Unclean hands is a broad defense which, if strictly construed, would bar a plaintiff's cause of action no matter how slight in his moral guilt. On the other hand, in pari delicto is more limited; it weighs the equities and will not be applied where the plaintiff is not so morally tainted with guilt as to be undeserving of the aid of the court. J. Pomeroy, 2 Equity Jurisprudence §§ 397–98 (5th ed. 1941) [hereinafter cited as Pomeroy].

20. See Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50, 52–53 ((S.D.N.Y. 1971).

21. 2 Pomeroy § 397, at 91.

22. Kuehnert v. Texstar Corp., 412 F.2d 700 (5th Cir. 1969).

23. "If relief is denied, it is because of the desirability of protecting public interests, which

If the equities were given full sway, the protection afforded the investing public by the deterrent aspect of private suits would be frustrated and their value as a supplement to SEC enforcement would be diminished.[24] On the other hand, their complete suspension would amount to a judicial warranty and condonation of a tippee's otherwise unsuccessful attempt to defraud the investing public.[25]

A significant insight into the resolution of this conflict is found in the Supreme Court's interpretation of congressional securities enactments.[26] In *SEC v. Capital Gains Research Bureau, Inc.*[27] the Court refused to apply the common law interpretation of fraud and deceit[28] to the conduct proscribed by the Investment Adviser's Act of 1940.[29] It had held that such an application would inhibit the broad, remedial intent of Congress.[30] Moreover, in its opinion in *J.I. Case Co. v. Borak*,[31] the Court recognized that judicially implied private actions provide a necessary supplement to SEC enforcement,[32] and charged the lower federal

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may require a denial of relief even though, as between the parties, there is both unjust deprivation and unjust enrichment." Restatement of Restitution § 140, comment a at 562 (1937); 2 Pomeroy § 403; see Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50 (S.D.N.Y. 1971).

24. This was the position of the dissent in Kuehnert v. Texstar Corp., 412 F.2d 700, 705 (5th Cir. 1969). This decision has stimulated many commentators to call for the rejection of the doctrines of in pari delicto and unclean hands in Rule 10b-5 violations. One commentator argued: "As a matter of legislative policy, sound reasoning, and apart from any case precedent, these common law doctrines should be excluded to avoid undue confusion and possible misapplication in the context of the federal securities acts." Bell, How to Bar an Uninnocent Investor—The Validity of Common Law Defenses to Private Actions Under the Securities Exchange Act of 1934, 23 U. Fla. L. Rev. 1, 21 (1970). See also 50 B.U.L. Rev. 87 (1970); 54 Minn. L. Rev. 878 (1970); 47 N.C.L. Rev. 984 (1969); 44 Tulane L. Rev. 618 (1970).

25. Kuehnert v. Texstar Corp., 412 F.2d 700, 705 (5th Cir. 1969). Contra, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Pearlstein v. Scudder & German, 429 F.2d 1136, 1141 (2d Cir. 1970), cert. denied, 401 U.S. 1013 (1971), noted in 39 Fordham L. Rev. 782 (1971).

26. See generally Bell, supra note 24.

27. 375 U.S. 180 (1963). The lower courts denied an injunction requested by the SEC to enforce its order compelling an investment adviser to reveal to his clients his practice of purchasing securities on his own account shortly before recommending the same securities to them as long term investments and subsequently selling his securities upon the rise in market value which followed his recommendation. They required the SEC to plead and prove fraud and deceit as established by the common law. This imposed a heavy burden of proof upon the SEC. It would have had to plead and prove that a material misrepresentation of fact was knowingly made with the intent to induce reliance thereon and which was in fact relied upon, thereby resulting in actual damage. See W. Prosser, Torts § 105, at 685-86 (4th ed. 1971).

28. 375 U.S. at 192.

29. 15 U.S.C. §§ 80a-51 to 80b-21 (1970).

30. 375 U.S. at 195.

31. 377 U.S. 426 (1964).

32. Id. at 432.

courts with fashioning appropriate relief in the absence of statutory remedies.[33] Such a broad remedial interpretation of congressional intent challenges the propriety of adhering to such common law defenses as *in pari delicto* and unclean hands[34] in the area of securities regulation.

The Supreme Court was confronted with a similar problem, albeit in an antitrust context, in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[35] wherein a retailer brought an antitrust action for treble damages against his manufacturer. The retailer's claim centered around illegal tying restrictions in the underlying contract which yielded substantial profits to the manufacturer. The manufacturer claimed the retailer's cause of action was barred by the retailer's complicity in the illegal agreement. The district court and the Seventh Circuit upheld this defense under the equitable doctrines of *in pari delicto* and unclean hands.[36] The Supreme Court reversed, holding ". . . the doctrine of *in pari delicto* . . . is not to be recognized as a defense to an antitrust action."[37] One consideration in reaching this decision was the lack of evidence of Congressional intent to permit such defenses in private treble-damage actions.[38] The Court recognized that this decision allowed a windfall to a less-than-innocent plaintiff, but noted that such a party remained civilly and criminally liable for his individual conduct.[39] Holding that the public policy favoring fair competition must prevail over the equities between the parties, the Court stated that to bar an errant plaintiff would undermine the usefulness of private actions as a means of enforcement.[40]

Approximately one year after *Perma Life* the Fifth Circuit Court of Appeals considered an alleged violation of Rule 10b-5 based on facts similar to the instant

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33. Id. at 433. In Borak, a shareholder complained of a consummated merger authorized through the use of proxies obtained on the basis of solicitation material allegedly containing false and misleading statements. Such conduct violates § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1970) and Rule 14a-9(a), 17 C.F.R. § 240.14a-9(a), which prohibit the inclusion of false or misleading statements in or the omission of material facts from proxy solicitations. The Seventh Circuit reversed a district court holding that a federal court's power to grant relief was, absent a statutory remedy, limited to a declaratory judgment and approved an award of rescission and damages. Borak v. J.I. Case Co., 317 F.2d 838 (7th Cir. 1963), aff'd, 377 U.S. 426 (1964).

34. Bell, supra note 24, at 11.

35. 392 U.S. 134 (1968).

36. 15 Trade Reg. Rep. (1966 Trade Cas.) ¶ 71,801, at 82,704 (N.D. Ill.), aff'd, 376 F.2d 692 (7th Cir. 1967), rev'd, 392 U.S. 134 (1968).

37. 392 U.S. at 140.

38. Id. at 138.

39. Id. at 139.

40. Id. "The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." Id. (citation omitted).

case. In *Kuehnert v. Texstar Corp.*[41] the court held that a plaintiff in violation of Rule 10b-5 was barred from recovery.[42] The court viewed *Perma Life* as an exception to the rule of *in pari delicto* and limited it to its facts.[43] In adopting the public policy approach,[44] the court in *Kuehnert* did not view the degree of public interest in Rule 10b-5 to be comparable to that in treble-damage antitrust actions.[45] The court reasoned that this policy is best served by invoking these equitable defenses against the tippee, thus discouraging him from acting upon inside information which may prove false.[46] To allow such a suit, according to the court, would give the tippee an enforceable warranty that the information was true.[47] Having resolved the issue of the availability of these equitable defenses, the *Kuehnert* court justified their application against a tippee whose guilt lay in his fraudulent intent toward his sellers.[48]

The Court of Appeals for the Second Circuit took the opposite tack in *Pearlstein v. Scudder & German.*[49] The *Pearlstein* court considered the effect of an investor's alleged wrongful conduct upon his private cause of action arising out of his broker's violation of federal margin requirements.[50] The plaintiff sought

41. 412 F.2d 700 (5th Cir. 1969), aff'g 286 F. Supp. 340 (S.D. Tex. 1968).

42. Id. at 702.

43. Id. at 704.

44. Id. "The question must be one of policy: which decision will have the better consequences in promoting the objective of the securities laws by increasing the protection to be afforded the investing public." Id. (citations omitted).

45. Id. at 703. But cf. J.I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1964).

46. 412 F.2d at 705-06. Judge Godbold, dissenting, questioned whether the majority's decision really enhanced the protection afforded to the investing public. "The tippee may be no more than the unsophisticated odd-lot purchaser who is told by his broker over the telephone of 'confidential' data on the company and buys a few shares of listed stock relying thereon. The tippee is subject to liability to those with whom he deals without revealing what he knows. . . . [T]o strengthen the restraint against him by insulating from responsibility the insider-tipster seems . . . precisely the wrong way effectually to restrain tips from circulating." Id. at 706 (dissenting opinion).

47. Id. at 705.

48. Id. at 704. This analysis has been criticized as unnecessary in light of Perma Life. See Bell, supra note 24, at 20-21. "Since the circuit court conditioned the application of the common law defenses upon what decision would best promote the purposes of the securities laws, why should such common law concepts be considered in any way other than [as] analogies helping to buttress the policy decision? Why utilize and rest a decision upon such nebulous concepts if in fact it rests upon completely different considerations?" Id. at 21; Comment, Rule 10b-5: The In Pari Delicto and Unclean Hands Defenses, 58 Calif. L. Rev. 1149, 1166 (1970).

49. 429 F.2d 1136 (2d Cir. 1970), cert. denied, 401 U.S. 1013 (1971), noted in 39 Fordham L. Rev. 782 (1971).

50. Id. at 1141-42. Earlier cases had held that mere unknowing participation by an otherwise innocent plaintiff in a violation committed by a lender would not bar the plaintiff's cause of action. This was first enunciated in the landmark case establishing civil liability in margin regulation violations, Remar v. Clayton Securities Corp., 81 F. Supp. 1014, 1017 (D. Mass. 1949); see Junger v. Hertz, Neumark & Warner, 426 F.2d 805 (2d Cir.),

to recover losses he sustained due to the drop in value of his securities between the time the defendant should have sold the securities in compliance with federal margin requirements and the time when the defendant actually sold them. The plaintiff purchased securities from the defendant broker but failed to pay the balance due within seven business days. Although the defendant was required by administrative edict to sell these securities when he did not obtain payment,[51] he refrained, upon persistent requests by the plaintiff, from liquidating the plaintiff's account. The court reasoned that since brokers, not investors, were statutorily charged with knowledge and observance of margin regulations, the subjective knowledge of an investor (at best, difficult to prove) was immaterial.[52] Furthermore, the employment of *in pari delicto*, according to the court, did "not appear desirable in the securities area here involved, even when the investor may be shown to have had [actual] knowledge of margin requirements."[53] Unlike the Fifth Circuit in *Kuehnert*, the court in *Pearlstein* was not dissuaded by the fact that it was, in effect, allowing a windfall to accrue to an unscrupulous investor.[54] This residual effect was "outweighed by the salutary policing effect which the threat of private suits for compensatory damages can have upon brokers and dealers above and beyond the threats of governmental action by the Securities and Exchange Commission."[55]

In *Nathanson v. Weis, Voisin, Cannon, Inc.*[56] the disgruntled tippee sought recovery for losses he sustained in reliance upon false information given him by his tipper.[57] Judge Weinfeld noted at the outset of his opinion that the basic

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cert. denied, 400 U.S. 880 (1970). Later cases limited a defendant's liability where the plaintiff had himself engaged in some wrongful conduct. In Moscarelli v. Stamm, 288 F. Supp. 453 (E.D.N.Y. 1968), recovery was denied to a plaintiff who conspired with his defendant's employees to obtain credit in excess of maximum loan values. Furthermore, the court in Serzysko v. Chase Manhattan Bank, 290 F. Supp. 74 (S.D.N.Y. 1968), aff'd, 409 F.2d 1360 (2d Cir.), cert. denied, 396 U.S. 904 (1969), held that fraudulent statements made in a loan application were sufficient to bar recovery; to rule otherwise would encourage such fraudulent practices, thereby prejudicing observance of the margin requirements. Id. at 90.

51. 12 C.F.R. § 220.4(c)(2) (1971), promulgated pursuant to the Securities Exchange Act of 1934 § 7(a), 15 U.S.C. § 78g(a) (1970), provides in part: "In case a customer purchases a security (other than an exempted security) in the special cash account and does not make full cash payment for the security within 7 days after the date on which the security is so purchased, the creditor shall . . . promptly cancel or otherwise liquidate the transaction or the unsettled portion thereof."

52. 429 F.2d at 1141.

53. Id.; cf. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

54. In his dissent, Judge Friendly viewed this as placing the plaintiff in the enviable position of "heads-I-win tails-you-lose." 429 F.2d at 1148; see Kuehnert v. Texstar Corp., 412 F.2d 700, 705 (5th Cir. 1969).

55. 429 F.2d at 1141 (footnote omitted); see J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1963).

56. 325 F. Supp. 50 (S.D.N.Y. 1971).

57. Id. at 52.

question to be considered was not the relative merits of the equities between the litigants, but rather whether allowing these defenses would best further the primary purpose of the securities laws, *i.e.*, the protection of the investing public.[58] Basing his decision on the premise that the prophylactic purpose of Rule 10b-5 is to restrict disclosure of inside information until it is available to the investing public,[59] the court held that such a purpose is best furthered by discouraging the initial selective disclosure.[60] Judge Weinfeld concluded that the defenses of *in pari delicto* and unclean hands should be unavailable to the defendant tipper[61] "in order to secure effective enforcement of the anti-fraud provisions of the securities acts by discouraging insiders, brokers and others with superior market information from disclosing such information to a favored group before it is made available to the public."[62]

The rationale in *Nathanson* is the inverse of that in *Kuehnert*. While the latter sought to protect the investing public by deterring the tippee from acting on his inside information, the former seeks to prevent the initial disclosure by the tipper. Though the *Kuehnert* rule might discourage a few tippees from acting on their tip, as a practical matter, most tippees anticipate a quick profit, not lengthy litigation.[63] By denying the tipper a valuable defense, Judge Weinfeld's decision will provide added effectiveness to the private policing of securities regulations, particularly Rule 10b-5. Aware of potential litigation should his tip prove unfruitful, the would-be tipper will be deterred from making any selective disclosure of inside information, thereby encouraging a keener observation of his fiduciary responsibilities.[64]

58. Id. at 52-53.

59. Id. at 57. The foundation for this premise lies in the case of SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir.), cert. denied, 394 U.S. 976 (1968). The Second Circuit found the underlying congressional intent of the Securities Exchange Act of 1934 designed "to prevent inequitable and unfair practices . . . in securities transactions . . . ." Id. at 848. The court viewed Rule 10b-5 as an attempt to fulfill this purpose by guaranteeing all investors equal access to material inside information. Id.

60. 325 F. Supp. at 57.

61. As between the parties, the defendant broker-dealer represented a greater potential harm to the investing public than the plaintiff, since "the broker-dealer is at the fountainhead of the confidential information, whereas the tippee or the customer may be only one of many who innocently or otherwise receives a tip . . . ." Id. Furthermore, Judge Weinfeld regarded the availability of such common law defenses in securities regulations cases as seriously undermined by the decisions of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) and Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970), cert. denied, 401 U.S. 1013 (1971). 325 F. Supp. at 56.

62. 325 F. Supp. at 53 (footnote omitted).

63. Comment, supra note 48, at 1159.

64. 325 F. Supp. at 58.