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# Notes

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# NOTES

## Bankruptcy—Liquidating Agents and the Fifth Act of Bankruptcy

Before a creditor can place a debtor into involuntary bankruptcy, he must allege and prove that the debtor has committed an act of bankruptcy.[1] While this requirement has been criticized as being detrimental to the achievement of bankruptcy objectives,[2] it continues to be an essential element in creditors' attempts to invoke bankruptcy proceedings. Section 3a[3] of the Bankruptcy Act[4] lists the six different acts that permit creditors to file a petition in involuntary bankruptcy.[5] If a person, "while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property,"[6] he has committed the fifth act of bankruptcy. In *Blair & Co. v. Foley*[7] the Court of Appeals for the Second Circuit held that the appointment of a liquidating agent under a private liquidation agreement did not constitute the appointment of a receiver or trustee within the meaning of section 3a(5). In so doing, the Second Circuit appears to have given section 3a(5) a construction not intended by Congress.

Because of operating losses and capital shrinkage, Blair & Co., a member of the New York Stock Exchange, decided to undertake a self-liquidation program. To prevent losses to its customers, Blair sought the aid of the Special Trust Fund,[8] established by the New York

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1. This is not the only requirement. The petition for involuntary bankruptcy must be filed by three creditors holding provable claims of at least $500 against a debtor owing $1,000 or more, and the debtor must also be susceptible to an involuntary petition under Bankruptcy Act § 4b, 11 U.S.C. § 22(b) (1970). *See* D. COWANS, BANKRUPTCY LAW AND PRACTICE § 882 (1963) [hereinafter cited as COWANS].

2. *See* J. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY §§ 64-66 (1956); Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189 (1938) [hereinafter cited as TREIMAN]; Note, *"Acts of Bankruptcy" in Perspective*, 67 HARV. L. REV. 500 (1954).

3. 11 U.S.C. § 21(a) (1970).

4. Bankruptcy Act is the short title given to 11 U.S.C. §§ 1-1255 (1970), which governs all bankruptcy proceedings.

5. An act of bankruptcy is not to be confused with the Bankruptcy Act or any other piece of legislation dealing with bankruptcy. It simply refers to one of the six enumerated events which must have occurred before involuntary proceedings can be brought against a debtor. For a discussion of the origins of the act of bankruptcy requirement see TREIMAN.

6. Bankruptcy Act § 3a(5), 11 U.S.C. § 21(a)(5) (1970).

7. 471 F.2d 178 (2d Cir. 1973), *cert. granted*, 93 S. Ct. 1901 (1973) (No. 1154).

8. *See* Constitution of the New York Stock Exchange, art. XIX, § 1, 2 CCH NEW YORK STOCK EXCHANGE GUIDE § 1841 (1972).

Stock Exchange to assist member firms in avoiding bankruptcy. In exchange for loans and guarantees from the Fund, the trustees of the New York Stock Exchange were given the right to appoint a liquidator of their own choosing. The agreement entered into by Blair with the New York Stock Exchange gave the liquidator effective control of the corporation for the purpose of completing the liquidation process.[9] Shortly after the appointment, creditors of Blair filed an involuntary petition in bankruptcy against the corporation in which they alleged that Blair's consent to the agreement constituted the fifth act of bankruptcy.[10] The creditors' motion for summary adjudication was granted by the referee and upheld by the district court.[11] On appeal the Second Circuit reversed, holding that the appointment of a liquidator did not constitute an appointment of a "receiver or trustee" within the meaning of section 3a(5) of the Act.

The appointment of a receiver or trustee to administer the property of an insolvent person was not specified as an act of bankruptcy in section 3a of the Bankruptcy Act of 1898.[12] However, a few courts liberally construed a clause in that section to find that the appointment of such an individual amounted to an assignment for the benefit of creditors (the fourth act of bankruptcy).[13] Expressing approval of these

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9. Paragraph VIII of the agreement described the powers and duties of the liquidating agent as set forth below.

> Immediately following his appointment by the Exchange, the Liquidator shall take control of the business and property of the Corporation for the purpose of liquidating the business of the Corporation and shall proceed as follows in connection with the liquidation:
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> i.) he shall promptly take such steps as he may deem practicable to reduce the Corporation's operating expenses and to dispose of the Corporation's salable assets;
>
> ii.) he shall have power to retain independent public accounts, consultants, counsel and other agents and assistants and shall have power to augment and reduce or eliminate the staff of the Corporation;
>
> iii.) he shall, as soon as practicable, assert and collect or settle all claims and rights of the Corporation;
>
> iv.) he shall pay any claim against the Corporation considered by him to be a valid claim of any customer of the Corporation;
>
> v.) he shall take such other steps as he deems necessary or appropriate to liquidate the business of the Corporation.
>
> It is agreed that consistent with the duty of the Liquidator to effect a fair and orderly liquidation of the business of the Corporation to enable prompt settlement with its customers, the Liquidator shall act in accordance with what he deems to be good business practice.

471 F.2d at 179-80 n.1.

10. Two other acts of bankruptcy were also alleged in the petition but were dismissed by the court as no serious effort had been made to support them before the referee, before the district court, or on appeal to the Second Circuit. *Id.* at 180 & n.2.

11. *Id.* at 180.

12. Ch. 541, § 3a, 30 Stat. 546 (1898).

13. Scheuer v. Smith & Montgomery Book & Stationery Co., 112 F. 407 (5th Cir.

minority decisions, Congress amended section 3a in 1903 specifically to include the appointment of a receiver or trustee as an act of bankruptcy;[14] but the wording of the 1903 amendment created several new problems. It distinguished between voluntary and involuntary receivers, required an examination in some cases of why the receivers were appointed, and left unclear whether insolvency was used in the bankruptcy sense (greater liabilities than assets) or the equity sense (inability to pay one's debts as they mature). In an attempt to remedy these problems, section 3a was once more amended in 1926.[15] Congress again failed to clarify the definition of insolvency, however, which allowed many failing businesses to use equity receiverships to avoid bankruptcy administration. To correct this abuse, Congress put section 3a(5) into its present form by including both definitions of insolvency in the Chandler Act of 1938.[16]

A receiver is typically defined as a person who is appointed by a court for the purpose of collecting, caring for, and administering the property of another, and he is usually regarded as an officer of the court.[17] The normal definition of a trustee is a person who holds legal title for another.[18] Because Blair's liquidator was privately appointed and did not maintain legal title to the property and because a review of the amendments dealing with the fifth act revealed no intent on the part of Congress to extend the words "receiver or trustee" beyond their normally understood definitions, the court reasoned that it could not construe section 3a(5) to include the appointment of a liquidating agent. The court found further support for its reading of section 3a (5) in two other sections of the Bankruptcy Act, section 2a(21)[19] and section 69d.[20] Both sections refer to liquidating agents as well as re-

1901); *In re* Macon Sash, Door & Lumber Co., 112 F. 323 (S.D. Ga. 1901), *rev'd sub nom.* Carling v. Seymour Lumber Co., 113 F. 483 (5th Cir. 1902).

14. Act of Feb. 5, 1903, ch. 487, § 2, 32 Stat. 797.

15. Act of May 27, 1926, ch. 406, § 3, 44 Stat. 662-63.

16. Ch. 575, § 3(a), 52 Stat. 844-45 (codified at 11 U.S.C. § 21(a)(5) (1970)).

17. 1 R. CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS § 11a (3d ed. 1959). There are other types of receivers, but the court in *Blair* chose to interpret the word to mean a court-appointed receiver. For a discussion of the different kinds of receivers see *id.* at §§ 11-45.

18. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 2, 3(3) (1959).

19. 11 U.S.C. § 11(a)(21) (1970). This section authorizes the bankruptcy court to "[r]equire receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control" to the bankruptcy court.

20. 11 U.S.C. § 109(d) (1970). The relevant portion reads as follows: "Upon the filing of a petition under this Act, a receiver or trustee, appointed in proceedings not under this Act, of any of the property of a bankrupt, an assignee for the benefit of

ceivers and trustees, indicating to the court that when "the draftsmen desired to cover such an agent, they considered it necessary to say so and knew how to do it."[21]

The Blair court's construction of "receiver or trustee" is a study in contrast to other decisions interpreting section 3a(5). The concern of prior decisions has been with the scope of the appointee's powers and the purpose for which he was put in charge of the debtor's assets. To this end, courts have uniformly defined "receiver" to be simply one who is appointed over all the debtor's property for the purpose of liquidation.[22] Thus, where the receiver was placed in charge of only a portion of the debtor's property[23] or where the receivership was to foreclose on a mortgage or to enforce a lien on particular property,[24] the appointment was held not to constitute an act of bankruptcy under section 3a(5).[25] The courts have likewise defined "trustee" to mean someone who has effective control of a debtor's assets for the purpose of liquidation.[26] In fact, many courts use the words "trustee" and "receiver" interchangeably in discussing section 3a(5).[27]

Significantly, the vesting of legal title does not seem to be crucial to the definition of trustee under the fifth act of bankruptcy. A leading case in this respect is *Bramwell v. United States Fidelity & Guaranty Co.*[28] in which the assets of a bank were placed, by resolution of its directors, under the control of the State Superintendent of Banking for the purpose of liquidation. The United States Supreme Court held that

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creditors of a bankrupt, or an agent authorized to take possession of or to liquidate any of the property of a bankrupt shall be accountable to the bankruptcy court . . . ."

21. 471 F.2d at 183.

22. *E.g.*, Stearns & Foster Co. v. Pacific Bowling & Billiard Co., 391 F.2d 750, 752 (9th Cir. 1968) (noting that the Supreme Court had reserved a ruling on this issue on three separate occasions); Otis Elevator Co. v. Monks, 191 F.2d 1000, 1002 (1st Cir. 1951); Elfast v. Lamb, 111 F.2d 434, 436 (2d Cir. 1940). *But see In re* 211 East Delaware Place Bldg. Corp., 14 F. Supp. 96, 101-02 (N.D. Ill. 1936).

23. Tatum v. Acadian Prod. Corp., 35 F. Supp. 40, 48 (E.D. La. 1940).

24. Central Fibre Prod. Co. v. Hardin, 82 F.2d 692, 694 (5th Cir. 1936); Standard Accident Ins. Co. v. E.T. Sheftall & Co., 53 F.2d 40, 41 (5th Cir. 1931); *cf.* Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 222-23 (1935).

25. It also seems where the purpose of a receiver is to force removal of the present management of a corporation rather than to liquidate the corporation, the appointment will not be deemed an act of bankruptcy. 1 COLLIER ON BANKRUPTCY ¶ 3.502 n.2, at 499 (14th ed. J. Moore & L. King 1971) [hereinafter cited as Collier].

26. *Id.* ¶ 3.502, at 501; C. NADLER, THE LAW OF BANKRUPTCY § 461 (2d ed. S. Nadler & M. Nadler 1965).

27. C. NADLER, *supra* note 26, § 461; *see, e.g.*, Haubtman & Loeb Co. v. Dunbar Molasses Co., 13 F.2d 335, 336 (5th Cir. 1926); Bramwell v. United States Fidelity & Guar. Co., 299 F. 705, 709 (9th Cir. 1924), *aff'd*, 269 U.S. 483 (1926); *In re* Metallic Bedstead Co., 98 F. 981, 982 (2d Cir. 1899).

28. 269 U.S. 483 (1926).

in so doing the bank had committed the fifth act of bankruptcy. The Court said that the State Superintendent constituted a trustee within the meaning of section 3a(5) because "[a]ppellant's duties were in substance the same as those of a trustee having the legal title of property for the purpose of converting it into money to be paid over to specific persons. . . . Appellant had a power that for present purposes had the same effect as a title, and that is enough."[29]

As in *Bramwell*, Blair's liquidator had the "power that for present purposes had the same effect as a title." He was given complete control of the corporation for the purpose of liquidation and had the power to pass legal title of all the corporation's assets.[30] Under the facts of *Blair* the Second Circuit could have construed "trustee" to include a liquidating agent whose powers were as extensive as Blair's liquidator.

*Blair's* reluctance to construe section 3a(5) liberally stemmed from its interpretation of the policy underlying the requirement of an act of bankruptcy as a condition precedent to involuntary proceedings. The purpose of the requirement, according to the court, is to afford "protection against arbitrary or unjust interference with the property of the debtor by providing that he shall not be amenable to bankruptcy at the instance of creditors unless he has done, or suffered to be done, certain acts, principally concerning his property."[31] The court seemed to fear that if it held Blair's liquidator to be within the scope of section 3a(5), it would be intruding on Blair's right to deal freely with its corporate assets. But once a debtor becomes insolvent, there are other considerations that suggest that a liberal construction of section 3a(5) would be appropriate. One of the principal objectives of the Bankruptcy Act is to preserve the bankrupt's assets in order to provide an equitable distribution of the assets among the bankrupt's creditors through a uniform proceeding administered by the bankruptcy courts.[32] Once insolvent, a debtor's property becomes susceptible to rapid dismemberment by creditors seeking to recover their interests. This typically results in a "first come, first served" liquidation process in which the insolvent's assets are taken by the larger, more efficient creditors at the expense of the smaller ones. If an act of bankruptcy has occurred,

29. *Id.* at 491.
30. *See* note 9 *supra.*
31. 471 F.2d at 180, *quoting* 1 COLLIER ¶ 3.03, at 403.
32. *See, e.g.*, Young v. Higbee Co., 324 U.S. 204, 210 (1945); Lewis v. Fitzgerald, 295 F.2d 877, 878 (10th Cir. 1961); District of Columbia v. Greenbaum, 223 F.2d 633, 636-37 (D.C. Cir. 1955).

the debtor has manifested that he is no longer able or willing to protect his creditors' rights in his property.[33] Thus, one purpose for enumerating the six acts of bankruptcy in section 3a was to provide objective criteria for determining when the debtor should be required to submit to bankruptcy jurisdiction.[34]

The appointment of Blair's liquidator was an indication that the interests of Blair's creditors were endangered. The corporate assets were being liquidated under the control of a representative of the trustees of the New York Stock Exchange[35] whose interest in a failing member firm would be considerably different than the interests of the firm's creditors. The liquidation of an insolvent business was being conducted without the safeguards and uniformity provided by Congress in the Bankruptcy Act for the protection of creditors. If the act requirements are to serve as indicators that creditors' interests are endangered, as well as to protect the debtor's free use of his property, a liberal construction of section 3a(5) appears preferable and more likely to achieve the objectives of the Bankruptcy Act. Such a conclusion was reached twenty years ago in *In re Bonnie Classics, Inc.*[36] In that case the directors of a corporation filed, as required by New York law, for a certificate of dissolution and were appointed trustees of the business for the purpose of making proper distribution of the corporate assets to creditors and shareholders. The directors opposed a petition for involuntary bankruptcy on the grounds that their appointment did not come within the meaning of section 3a(5). The court concluded:

> Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a "trustee to take charge of his property" under § 3, sub. a(5) . . . . Any other construction would defeat the objectives of the Bankruptcy Act and abort the broad powers of the courts of bankruptcy intended for the uniform administration of insolvent estates.[37]

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33. *Cf.* 1 COLLIER ¶ 3.03, at 402-03: "These acts usually amount either to actual or constructive frauds on creditors, or are tantamount to declarations of insolvency."

34. *See* COWANS § 1063; 1 H. REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 109 (5th ed. 1950); Moore & Tone, *Proposed Bankruptcy Amendments: Improvement or Retrogression?*, 57 YALE L.J. 683, 708 (1948).

35. *See* paragraph VIII of the agreement between Blair & Co. and the Special Trust Fund cited note 9 *supra.*

36. 116 F. Supp. 646 (S.D.N.Y. 1953).

37. *Id.* at 648. The *Blair* court distinguished *Bonnie Classics* by noting that there the directors were given legal title, while Blair's liquidator was not. *But see* text accompanying notes 28-30 *supra.*

The *Blair* court may have felt compelled to define "receiver" and "trustee" narrowly because of its analysis of the history of section 3a (5) and its interpretation of sections 2a(21) and 69d.[38] However, the differences between sections 3a(5), 2a(21), and 69d do not necessarily evidence a Congressional intent to distinguish between receivers, trustees, and liquidating agents. The references to receivers, trustees, assignees, and liquidating agents in both section 2a(21) and section 69d were added to the Bankruptcy Act to clarify the bankruptcy courts' jurisdiction and authority over these non-bankruptcy appointed "liquidation officers."[39] At the time of these legislative additions, there were no reported decisions holding that a privately appointed liquidating agent, who otherwise met the qualifications of section 3a (5), did not come within the meaning of "receiver or trustee."[40] In the absence of uncertainty in regard to section 3a(5) and liquidating agents, such as that which existed in regard to section 2a(21) and section 69d, Congress may not have felt it necessary to amend the fifth act of bankruptcy.[41] The very fact that liquidating agents were grouped with receivers, trustees, and assignees in section 2a(21) and section 69d is significant in this respect. The appointment of any one of the latter three indicates the occurrence of the fourth or fifth act of bankruptcy.[42] This suggests that, in listing all four liquidation officers together, Congress indicated an understanding that the appointment of a liquidating agent was already within one of the acts of bankruptcy just as the other three were.

The Second Circuit adopted a strict construction of section 3a(5)

38. *See* notes 19-21 and accompanying text *supra.*

39. 1 COLLIER ¶ 2.77; 4 *id.* ¶ 69.01[3].

40. This may be due to the fact that many bankruptcy decisions are not appealed from the referee's decisions and thus go unreported.

41. While this might indicate carelessness on the part of Congressional draftsmen, failure to amend uniformly where there is no intent to create discrepancies in meaning is not untypical of the Bankruptcy Act amendments. Witness sections 2a (21) and 69d. Both sections are designed to deal with the same individuals; yet when Congress added liquidating agents to § 2a(21), it failed to do the same to § 69d. It was not until 1952 that Congress corrected this discrepancy. *See* 4 COLLIER ¶ 69.01[3]. There is other evidence suggesting that "receiver or trustee" can be defined to include liquidating agents though the words cannot be read to include such an agent when found in other sections of the Bankruptcy Act. Emil v. Hanley, 318 U.S. 515, 522 (1943) (the Court sanctioned a distributive definition of the word "receiver" when found in different sections of the Act when such an interpretation was necessary to prevent a misreading of Congressional intent). The wording of § 69d reveals further support. In § 69d "receiver" and "trustee" are defined to include a receiver or trustee appointed over only a *portion* of the debtor's property; whereas "receiver" and "trustee" have been defined by the courts to mean only a receiver or trustee put in charge of *all* the debtor's property. Cases cited note 22 *supra.*

42. 11 U.S.C. §§ 21a(4)-(5) (1970).

in *Blair* to conform with the specific policy that it perceived behind the fourth and fifth acts of bankruptcy.[43] Under the court's analysis a receiver is typically viewed as an appointed officer of the court and a trustee is considered to have legal title to the property he holds. Therefore if the debtor's property were in the possession of either individual, the debtor's creditors would be required to proceed in one manner or another against the receiver or trustee as well as the debtor himself. The court noted that this would also be true if there were a general assignment for the benefit of creditors, but not if the person possessing the property were merely an agent. The policy behind section 3a(4) and section 3a(5), the court said, is to allow creditors to invoke bankruptcy relief only if the debtor has allowed such an obstacle to be placed in the way of his creditor's claims.[44] Since the appointment of a liquidating agent has been held not to be an assignment for the benefit of creditors[45] and the policy behind the fourth and fifth acts was allegedly the same, the court failed to see why the appointment of a liquidating agent should constitute the fifth act.[46]

The problem with the court's analysis is that sections 3a(4) and 3a(5) are separate and distinct acts of bankruptcy. They are designed to cover two different events that affect the debtor's property. The conclusion that if a liquidating agent were not an assignee, he would also not be a receiver or trustee seems to ignore a distinction specifically recognized by Congress. The court's policy argument also suggests that the court believed creditors were in a stronger position than bankruptcy courts when it came to pursuing a claim against a debtor's liquidating agent, an opinion not shared by Congress. If a liquidator is truly nothing more than an agent of the debtor, the bankruptcy court's jurisdiction over the debtor would provide the requisite jurisdiction over his agent.[47] Yet sections 2a(21) and 69d were added to the Bankruptcy Act in 1938 because "there was a real necessity for stating clearly what status non-bankruptcy liquidation officers occupy . . . and the extent of the bankruptcy court's control over them."[48] If, as

43. 471 F.2d at 181-82.

44. *Id.*

45. *In re* Ambrose Matthews & Co., 229 F. 309 (D.N.J.), *aff'd*, 236 F. 539 (3d Cir. 1916). *But see In re* R.V. Smith, 38 F. Supp. 57 (W.D. Okla. 1941), which held that the appointment of a liquidating trustee was an assignment for the benefit of creditors. *Blair* found its reasoning unpersuasive but did not say why.

46. 471 F.2d at 181-82.

47. *See* Reifsnyder v. B. Levy & Sons, 88 F.2d 287 (3d Cir. 1937); *In re* Muncie Pulp Co., 139 F. 546 (2d Cir. 1905).

48. 4 COLLIER ¶ 69.01, at 1065.

*Blair* reasoned, a liquidating agent presents no obstacles to ordinary creditor's remedies, then one is left with the question of why Congress felt it necessary to give bankruptcy courts jurisdiction over liquidating agents. The answer appears to be that liquidating agents do present an obstacle to ordinary creditor remedies. As in the case of receivers, trustees, or assignees, Blair's liquidator had authority, by virtue of the agreement between the corporation and the Special Trust Fund, to liquidate the corporate assets as he saw fit and not according to Blair's dictates.[49] Therefore, it would seem reasonable to treat the appointment of a liquidating agent whose powers were as extensive as Blair's as the equivalent of a receiver or trustee.[50]

While private liquidation agreements of brokerage firms are not likely to present a section 3a(5) issue in the future,[51] the *Blair* decision appears to have opened a door to a procedure which will permit insolvent businesses to defeat the broad objectives of the Bankruptcy Act. The court's decision will permit insolvent businesses to place effective control of the business's assets in the hands of private liquidating agents and allow the liquidation process to be accomplished without the safeguards and uniformity of administration provided for by the Bankruptcy Act. The decision indicates that Congress will have to amend section 3a(5) if it wants to prevent the subversion through private liquidation agreements of the creditors' ability to invoke bankruptcy proceedings.

STUART WILLIAMS

## Civil Procedure—A Possible Solution to the Problem of "Sewer Service" in Consumer Credit Actions

Notice of a lawsuit is one of the most important elements of an individual's right to due process of law under the fourteenth amendment.[1] Nevertheless, each day in large cities thousands of default judgments

49. *See* note 9 *supra.*

50. *See* 1 COLLIER ¶ 3.503, at 503.

51. Future problems involving the insolvency of brokerage firms will be handled by the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-*lll* (1970). *See* Note, *The Securities Investor Protection Act of 1970: A New Federal Role in Investor Protection*, 24 VAND. L. REV. 586, 606-13 (1971).

1. *See* Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 313-16 (1950).

are entered against consumer-debtors who have never received notice of pending litigation.[2] Despite numerous attempts to solve the problem through changes in local rules of civil procedure,[3] licensing of process-servers,[4] and institution of criminal prosecutions,[5] "sewer service" continues unabated.[6] In November of 1972, however, the consent decree in *United States v. Brand Jewelers, Inc.*[7] established procedures that might provide a viable solution to the problem, if they were generally implemented in similar cases. This note will outline the procedures required by this decree and examine its intended effect on the practice of "sewer service."

## BACKGROUND

"Sewer service" has been defined as the "fraudulent service of a summons and a complaint, usually either by destroying it, by leaving it under a door or in a mailbox, or by leaving it with a person known not to be the defendant; and then executing an affidavit stating that the summons was personally delivered to and left with the defendant."[8] The practice is common in consumer-credit actions in areas of high-volume litigation involving relatively trivial amounts.[9] Studies have revealed its use in New York,[10] Washington,[11] Chicago,[12] Boston,[13] Detroit,[14] and Los Angeles.[15] Because of technicalities in the Civil Practice Laws

2. *See* text accompanying notes 10-16 *infra.*

3. *E.g.*, N.Y. CIV. PRAC. LAW § 308 (McKinney Supp. 1970); N.Y.C. CIVIL CT. ACT § 1402 (McKinney Supp. 1972).

4. N.Y. CITY, N.Y., LOCAL LAWS No. 80 § B32-451.0 (1969).

5. DeFeis, *Abuse of Process and its Impact Upon the Poor*, 46 ST. JOHN'S L. REV. 1, 11 (1971); *see* note 30 *infra.*

6. *See public Hearings on Debt Collection Practices Before the FTC*, (Sep. 13, 1971) (testimony of David Paget, Assistant United States Attorney for the Southern District of New York).

7. CIV. No. 70-179 (S.D.N.Y. Nov. 20, 1972).

8. *Public Hearings on Abuses in the Service of Process Before Louis J. Lefkowitz, Attorney General of the State of New York* 2 (1966) (testimony of Frank Pannizzo, Assistant Attorney General).

9. *See* Comment, *Sewer Service and Confessed Judgments: New Protection for Low-Income Consumers*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 414 (1971).

10. D. CAPLOWITZ, DEBTORS IN DEFAULT (1971).

11. *See Public Hearings Before the Nat'l Comm'n on Consumer Finance*, (June 22-23, 1970) (testimony of Maribeth Holloran, Attorney, Neighborhood Legal Services, Washington, D.C.) (hereinafter cited as 1970 *Hearings*).

12. D. CAPLOWITZ, *supra* note 10, at 11-7; 1970 *Hearings* (testimony of Judson H. Miner, Attorney, Chicago Council of Lawyers).

13. *See* 1970 *Hearings* (testimony of Blair C. Shick, Attorney, Nat'l Consumer Center, Boston College Law School).

14. D. CAPLOWITZ, *supra* note 10, at 11-7.

15. *See* Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 883, 926 (1969).

of New York,[16] the practice is more prevalent in New York City than anywhere else.

The causes of sewer service are myriad, but foremost among them is the very nature of the consumer-credit action. An attorney who conducts a collection practice necessarily operates on a high-volume, low-overhead basis and cannot afford to pay an adequate fee for private service in states where it is permitted by law.[17] The average fee of one dollar and fifty cents[18] for each service affected by a private process server is little incentive to that server to search diligently for an individual.[19] The fee is barely sufficient to pay for his transportation. In jurisdictions where service must be made by an officer of the court, such as North Carolina,[20] there is still strong incentive to use sewer service. The process server is usually the local law enforcement officer, who thus has no financial incentive but who is likely to feel that his time is too valuable to be spent in personally serving process on a consumer whom he feels will be likely to take a default judgment in any case. Consequently, there is pressure on both public and private process servers to take the "short-cut . . . to the nearest sewer."[21]

Sewer service is almost impossible to detect. The consumer-defendants are usually unaware of their rights and accept default judgments and wage garnishment because the amounts involved are less than the costs of hiring an attorney. Even if a defendant attempts to vacate a judgment on the ground that he was not served, he is faced with an almost impossible burden of proof: he must prove by clear and convincing evi-

16. *See* DeFeis, *supra* note 5, at 4-6 and statutes cited.

17. In only three of the six jurisdictions where studies have revealed the prevalence of sewer service is service by private party permitted in all cases. CAL. CIV. PRO. CODE § 414.10 (West 1971); MICH. STAT. ANN. Rule 103(1) (1972); N.Y. CIV. PRAC. LAW § 2103(a) (McKinney Supp. 1970). The remaining three require service to be completed by a public officer unless a private party is specifically designated by the court. D.C. CODE ANN. § 16-3902(a) (Supp. IV, 1971); ILL. ANN. STAT. ch. 110A, § 103(a) (Smith-Hurd Supp. 1971); MASS. ANN. LAWS ch. 223, § 27 (1971).

18. Tuekheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847, 861 (1972).

19. *See* note 21 *infra.*

20. N.C.R. CIV. PRO. 4(a).

21. Tuekheimer, *supra* note 18, at 868. Professor Tuekheimer feels that there are two temptations that lead process servers to improper conduct: first, the remote and disorganized nature of the victims; and secondly, the fact that "it is not easy for process servers, almost all of whom are white, to venture alone into black neighborhoods, find a specific person, inform him that he is being sued, and then hand him a piece of paper setting in operation machinery that may end with property attachment and income execution." *Id.* These temptations apply to both private and public process servers alike.

dence both that he was *never* served on that date[22] *and* that he has a valid defense to the creditor's claim.[23]

This burden might be easier to meet in a class action. Individual hearings usually result in a swearing contest between the consumer and the process server. Thus, a large number of consumers, all claiming not to have been served by a particular process-server, would serve as much stronger circumstantial evidence that sewer service actually occured. But any possibility of a class action in federal courts is foreclosed by *Snyder v. Harris*,[24] which prohibits accumulating claims to reach the jurisdictional amount in a class action. Likewise, in many states a consumer class action cannot be maintained on the theory that there is insufficient class interest.[25]

Action taken by the state and federal governments have been unsuccessful, for the most part, in alleviating this situation. Procedural reforms were instituted in New York expressly to remove the incentive for "sewer service," but these only led to new forms of abuses.[26]

A licensing ordinance was enacted in New York City to regulate process servers and to enforce complaints[27] but the New York Department of Consumer Affairs, whose responsibility it is to detect and punish infractions, was already over-burdened with consumer-credit and landlord-tenant suits and could not afford to devote adequate resources to enforce the ordinance.[28]

Criminal actions have been brought by the federal government against process servers under two statutes: for filing false affidavits of non-military service under the Soldiers' and Sailors' Civil Relief Act of 1940[29] or for wilfully depriving a person of his constitutional rights

22. Dineed v. Myers, 278 App. Div. 658, 102 N.Y.S.2d 596 (2d Dep't 1951); Denning v. Lettenty, 48 Misc. 2d 185, 186, 264 N.Y.S.2d 619, 621-22 (Sup. Ct. 1965); *see* United States v. Barr, 295 F. Supp. 889, 892 (S.D.N.Y. 1969).

23. *See, e.g.*, Roth v. Perry, 158 N.Y.S.2d 122 (Saratoga County Ct. 1957).

24. 394 U.S. 332 (1969).

25. *E.g.*, Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

26. Our experience in examining more than three hundred services reportedly made in compliance with this new amendment belies its projected remedial qualities. Thus we have discovered that some process servers alleging this form of service have consistently invented the names of fictitious people who they claim they left a copy of the summons and complaint with at the place of employment of the person being sued.

*Public Hearings on Debt Collection Practices before the FTC*, (Sep. 13, 1971) (testimony of David Paget, Assistant United States Attorney for the Southern District of New York).

27. N.Y. CITY, N.Y. LOCAL LAWS No. 80 § B32-451.0 (1969).

28. DeFeis, *supra* note 5, at 20.

29. 50 U.S.C. § 520(1) (1970) requires as a condition precedent to default judg-

under the 1866 Civil Rights Act.[30] These actions have been singularly unsuccessful; the majority have resulted in suspended sentences and relatively small fines[31] while only one has resulted in a prison sentence.[32]

In *United States v. Brand Jewelers, Inc.*[33] the federal government launched a different attack against sewer service. Brand, which had brought the third largest number of lawsuits of any plaintiff in the civil court of the City of New York, had been the subject of a study that revealed that it had engaged in a long-standing practice of predatory sales tactics.[34] Its salesmen would go from door to door, or to the factories on payday, selling overpriced watches and rings on "easy credit" terms with no downpayment required. Many of its customers never received a copy of the contract or even a payment book.[35] In 1964 Brand secured 5,360 default judgments, 97.7 percent of the total suits it brought. Often the first notice that consumer-debtors ever received of these actions was when their employers gave them notice of the execution of the judgment on their income.[36]

The United States brought suit[37] against Brand Jewelers, its at-

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ment that the plaintiff file an affidavit stating that the defendant is not a member of the armed forces. If the defendant is in the military, the act requires an attorney to be appointed for him. If the plaintiff is unable to ascertain whether or not the defendant is in the military, the court may require him to file a bond. If the plaintiff does not obtain such an affidavit, the judgment may be voided by the defendant.

50 U.S.C. § 520(2) (1970) makes it a misdemeanor to knowingly file a false affidavit under this section.

30. 18 U.S.C. § 242 (1970).

31. *E.g.*, United States v. Barr, 295 F. Supp. 889 (S.D.N.Y. 1969) (constitutional issues raised on motion to dismiss indictment); United States v. Lindsay, Cr. No. 68-994 (S.D.N.Y., filed and entered *nolle prosequi* June 30, 1971); United States v. Tauber, Cr. No. 70-25 (S.D.N.Y., Feb. 23, 1971) (pleaded guilty to four counts of mail fraud, fined $1000); United States v. Bialo, Cr. No. 68-888 (S.D.N.Y., Feb. 3, 1971) (one year suspended sentence); United States v. Kaufman, Cr. No. 70-406 (S.D.N.Y., Jan. 15, 1971) (one year suspended sentence); United States v. Rick, Cr. No. 68-994 (S.D.N.Y., Dec. 12, 1969) (one year suspended sentence); United States v. Wiseman, Cr. No. 68-994 (S.D.N.Y., May 16, 1969) (one year suspended sentence.

32. United States v. Siegel, Cr. No. 72-2416 (2d Cir., judgment affirmed Feb. 22, 1973 (6 month sentence for violation of 50 U.S.C. § 520: knowingly filing a false affidavit of non-military service.)

33. 318 F. Supp. 1293 (S.D.N.Y. 1970).

34. D. CAPLOWITZ, *supra* note 10, at 7-21 to 7-24.

35. *Id.* at 7-26.

36. *Id.* at 11-8.

37. The United States invoked the federal court's jurisdiction under 28 U.S.C. § 1345 (1970). The cause of action was extraordinary in that the government's standing was based on no specific federal statute, but rather on the general right of the federal government to resort to its own courts to vindicate a substantial federal interest. *See* Note, *The United States Government Has Standing to Sue for the Violation of Fourteenth Amendment Rights of an Individual*, 37 BROOKLYN L. REV. 426 (1971); Note, *Federal Government May Sue to Protect Due Process Rights of "Sewer Service" Vic-*

torney, and various process servers to vacate all unlawfully obtained default judgments, to obtain restitution,[38] and to enjoin the further use of "sewer service." The Government alleged that Brand and the other defendants, "as a matter of long-standing and systematic practice," had an understanding by which the process-serving defendants knew that personal service was "neither expected nor desired by Brand" and that Brand and its attorney knew or had reason to know of this practice.[39] Brand's motion to dismiss the suit for lack of standing was denied on two grounds. First, the court felt that the government had a sufficient interest since the alleged activities of the defendants had resulted in interference with interstate commerce. Alternatively, the court based standing upon the government's interest in ending "widespread deprivations (*i.e.*, deprivations affecting many people) of property through 'state action' without due process of law."[40] Brand did not appeal, and two years later the action was finally settled by the consent decree.[41]

## THE DECREE

The consent decree was divided into two sections. The first set forth a procedure for the vacation of all default judgments obtained from January 1, 1969, to December 31, 1971, while the second part attempted to insure proper notice of future litigation. The first section required the United States Attorney to write to each judgment debtor to inform him of his right to have the judgment vacated and to secure a trial on the merits. The debtor could secure these rights by simply returning a stamped postcard included in the letter from the Government. If the debtor requested a trial, Brand was to account for and return with interest any excess funds previously received.

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*tims*, 46 N.Y.U.L. REV. 367 (1971); Note, *United States Has Standing to Seek Injunction Against Practice of Obtaining Default Judgments Through False Affidavits Certifying Service of Process*, 24 VAND. L. REV. 829 (1971); Note, *A New Approach to Legal Assistence for Ghetto Residents or an Invitation to Executive Lawmaking?*, 17 WAYNE L. REV. 1287 (1971); Note, *Nonstatutory Standing to Sue on the Part of the United States Under the Commerce Clause and the Fourteenth Amendment*, 1971 WIS. L. REV. 665.

38. The federal government sought to require Brand Jewelers to bring the actions against consumers *de novo* in the state court. Brand Jewelers was to account for all amounts collected pursuant to the first judgment and repay amounts in excess of the new judgment to the consumers with 6% interest running from the date of collection. 318 F. Supp. at 1295.

39. Plaintiff's Memorandum of Law at 20-21, United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1969).

40. 318 F. Supp. at 1299.

41. Consent Decree, United States v. Brand Jewelers, Inc., Civ. No. 70-179 (S.D.N.Y. 1972) [hereinafter cited as Consent Decree].

The second part of the decree attempted to control the problem of sewer service in the future.[42] First, it imposed broad duties upon Brand's attorney to insure the correctness of service in all future consumer-credit suits, and secondly, it required him to follow specific procedures in monitoring the service of process and investigating allegations of fraudulent service.

Four duties were imposed upon the plaintiff's attorney under this plan. First, he must investigate every situation where he has "good cause to believe that service of process was not lawfully made or that the affidavit of service of process was not lawfully made or that the affidavit of service or of non-military service was fraudulently made."[43] Secondly, he has the duty to monitor the manner in which process is assigned and accomplished to ascertain whether all steps are being taken to insure proper service.[44] Thirdly, he must move to vacate any judgment when there is substantial evidence of unlawful service.[45] Finally, he must switch process-serving agencies when there is evidence that it is serving false affidavits.[46] The effect of these four provisions is to render Brand's attorney subject to criminal prosecution for the federal crimes of mail fraud[47] or of causing non-military affidavits to be filed with the knowledge that they were false,[48] by removing the defense of lack of knowledge.[49]

The decree prescribes specific steps to insure that the creditor-plaintiff's attorney complies with that duty. In order to understand how these proceedings have altered Brand's usual procedure for suing in consumer-credit transactions, it is expedient to trace a hypothetical suit brought under this new procedure.

Assume that Brand is owed one hundred dollars by consumer *C*, who has stopped making payments on this debt. Brand turns the customer's file over to its attorney, *A*, who files a complaint in civil court requesting judgment for the one hundred dollar debt plus costs. The clerk gives *A* a docket number, and *A* then takes the complaint and gives it to a private process-serving agency. The agency would norm-

42. This part of the decree is operative from January 1, 1973 until December 31, 1975, and may be extended for a period of 3 years if any party is judged in contempt. Consent Decree ¶ 23.

43. Consent Decree ¶ 10.

44. Consent Decree ¶ 11.

45. Consent Decree ¶ 12.

46. Consent Decree ¶ 13.

47. 18 U.S.C. § 1341 (1970).

48. 50 U.S.C. § 520(2) (1970).

49. *See* Tuekheimer, *supra* note 18, at 867.

ally take all responsibility for serving the process and for executing the affidavits of service and non-military service.[50] *A* would then file these as his proof of service, wait ten days, and move for default judgment.[51] Instead, under this decree, when *A* hands the docketed complaint over to an agency he must record in a log the name of the agency and the name and license number of the process server to whom the complaint is given for service. When service is completed, *A* must also enter the date, precise time and mode of service, and if substitute service is made on a person of suitable age and discretion, the name and address of the person served and his relationship to the party sued. When proof of service is filed, the affidavit must include the precise time of service.

If *C* suffers a default judgment as a result of sewer service the specificity of the information in the log and affidavit makes it simpler for *C* to refute the allegations of service in a hearing to vacate judgment.[52] Thus this procedure provides a means to rectify sewer service once it occurs. But if the decree stopped at this point, it would not have solved the problem of the vast majority of consumers who are entirely unaware of their rights, who are unable to afford an attorney, and who therefore never get as far as a hearing.

Again, assume that *A* has filed his proof of service. Normally he would merely wait the requisite ten days and then move for default judgment. Under this decree, however, within five working days from proof of service *A* must write a letter to *C* at the address where he was alleged to have been served. The letter must inform *C* in Spanish as well as English of the fact that he is being sued, of all the relevant details of the alleged service of process, and that if he has not been so

50. So long as there is no direct proof of knowledge by the attorney that sewer service has taken place, he is not criminally liable. *See* United States v. Kalkin, Cr. No. 69-864 (S.D.N.Y., Sep. 15, 1971) (conviction of attorney for mail fraud not directly related to sewer service when indictment under 1866 Civil Rights Act, 18 U.S.C. § 242 (1970), failed for lack of knowledge); United States v. Shenghit, Cr. No. 71-928 (S.D.N.Y., filed Aug. 26, 1971) (attorney pled guilty to charge of causing non-military affidavits to be filed with knowledge they were false).

51. N.Y.C. CIVIL CT. ACT § 402 (McKinney 1963).

52. Under current New York procedure, the affidavit of personal service need only state the date on which service was completed and, if substitute service is made on a person of suitable age and discretion at the defendant's place of work or residence, need not state the person's name, description, or even sex. Thus under current procedure, in order to prove he was not served, *C* must prove he was not home at all on the date service was alleged. *See* Tuekheimer, *supra* note 18, at 854-55. Moreover, if service was alleged on a person of suitable age and discretion, then *C* must prove that no one was home on that date. The information given by the logs that *A* must maintain limits the number of times at which and persons upon whom service might have been effected, and thus substantially reduces his burden of proof. See text accompanying note 22 *supra*.

served, he should indicate that fact by signing and mailing a postcard included in the letter. It also must explain his obligation to respond, the possibilities of default judgment and garnishment with their adverse effects on his credit rating, and the availability of free legal assistance.

There are then three possible events that could occur: *C* could receive *A*'s letter but not return the postcard; *C* could receive the letter and return the postcard to *A*; or the letter could be returned to *A* stamped "Addressee Unknown." The decree provides a separate procedure for each case.

In the first situation if *C* does not file an answer, *A* must wait thirty days from the date of the letter's delivery before filing his petition for default judgment. He must also file an affidavit swearing that he has mailed the letter as required by the decree. Under these circumstances it is safe to assume that *C* had decided to permit default judgment against him. The requirements of the Spanish translation, the deletion of the merchant's name from the envelope,[53] and the use of certified mail virtually insure that the letter was read and understood. *C* is thus in a position to know his rights and to be able to decide rationally whether or not to litigate the claim.

What if *C* receives the letter, but returns the postcard to *A* and claims that process was never served on him? Then the decree requires that *A* enter *C*'s name in a log of parties who have claimed that they were not properly served, along with the name of the process server who allegedly made the service. He must then discontinue the lawsuit and start again. However, since *A* may now safely assume that *C* is aware of his intent to sue, the decree does not require *A* to write *C* a letter in the second suit, but instead allows him to proceed, after proof of second service, to file an affidavit of compliance and petition for default judgment. This procedure assures that *C* is aware of his rights and is on notice that the merchant is suing him. At the same time the procedure prevents the possible abuse of *C*'s repeated return of the postcard to postpone the suit indefinitely.

What if *A*'s letter is returned stamped "Addressee Unknown"? When he receives a returned letter, the decree requires that *A* make a full investigation to ascertain what has occurred. *C* may have moved

53. Brand was found in Professor Caplowitz's study to have utilized insulting letters and phone calls, threats to contact and the actual contact of friends and relatives and, most frequently, employers. This provision assures that the consumer does not discard the letter, believing it to be another of these insulting letters. D. CAPLOVITZ, *supra* note 10, at 10-16.

since service was made, may have refused delivery, or may, in fact, have been the victim of sewer service. The lawsuit is to be delayed until *A* determines that *C* was indeed residing at the address appearing on the letter at the time the service was attempted and until *A* has made a good faith determination that there is no reason to believe that the party sued did not receive legal notice. *A* must enter the name and the address appearing on the returned letters in a journal that will be subject to periodic inspection by the United States Attorney's Office. *A* is also required to record the nature, details, and conclusions of every investigation made therein. Only when *A* has made this good faith determination that *C* has received notice may he file an affidavit of compliance and petition for default judgment.

Under current New York procedure, once *A* obtains a default judgment he may obtain an income execution.[54] He would then deliver the income execution to the City Marshall, who would give it to *C*'s employer.[55] Ordinarily *C* would not learn about execution until his paycheck was reduced by ten percent. Under the decree, however, *A* must write *C* at least ten days prior to income execution informing him in Spanish as well as in English of the pending proceedings. Thus *C* is given a final chance to pay the judgment or to contest it in a hearing to reopen the judgment.

The procedure of the decree discourages sewer service in two ways: by an *in terrorem* effect caused by greater enforceability of criminal sanctions against the process-server and Brand's attorney and by an economic effect caused by the increased costs to the plaintiff or bringing suit.

The procedures of the decree provide the state and federal authorities with an excellent source of evidence for use against the process-servers in criminal prosecutions.[56] By examining the records of process allegedly served by a particular process-server on a certain day, for example, it might be possible to show that the process-server claimed to have been in two places at the same time. The returned letters and subsequent investigations might reveal that he claimed personal service

54. N.Y. CIV. PRAC. LAW § 5231 (McKinney Supp. 1972).

55. *Id.*

56. A process-server who commits sewer service may be guilty of federal crimes: *e.g.*, aiding and abetting wilful subjection of an individual to the deprivation of his constitutional rights under 18 U.S.C. § 242 (1970), *see* United States v. Wiseman, 445 F.2d 792 (2d Cir.), *cert. denied*, 402 U.S. 967 (1971); mail fraud under 18 U.S.C. § 1341 (1970); filing a false affidavit of non-military service under 50 U.S.C. § 502(2) (1970). He may also be guilty of committing such state crimes as perjury and fraud.

upon someone who had been dead two years or was abroad on the date service was alleged.[57] These records have the advantage of ready availability and low cost to the authorities. The government may easily monitor the process-serving industry without great expense. Thus the process-servers have a strong incentive to make actual service.

Brand's attorney shares this incentive. Under the terms of the decree he may be punished by a contempt citation if he does not monitor the method by which process is served. But when he does monitor the method of service he is chargeable with knowledge of any sewer service that occurs and may be prosecuted under the 1866 Civil Rights Act[58] for wilfully depriving an individual of his constitutional rights.

The procedures of the decree are also designed to decrease the profits the process-serving agencies derive from utilizing "sewer service." An attorney involved in the collection of small debts from consumers would naturally desire to keep his transaction costs as low as possible.[59] Normally he would seek to minimize costs by employing the process-serving agency that gave the quickest, cheapest service—inevitably that which employed "sewer service" most frequently. The procdures under this decree effectively prohibit Brand's attorney from reducing his costs in this way by requiring him to put each agency on notice that he will change to another if he finds it to be employing sewer service.[60] The process-serving agency is thus given an economic incentive to complete service of process if it wishes to maintain its account with Brand.

The procedures of the decree, however, increase Brand's costs of litigation irregardless of its use of "sewer service." The agencies will charge Brand's attorney a higher fee for effecting service in the manner required. The amount of paperwork that Brand's attorney must complete to maintain the suit is greatly increased.[61] Ultimately Brand's attorney will pass these costs on to his client. Thus Brand will be required

57. Instances such as these are quite commonplace in New York and Chicago. *See Public Hearings on Debt Collection Practices Before the FTC,* (testimony of David Paget, Assistant United States Attorney, Southern District of New York) at 6-7; 1970 *Hearings* (testimony of Judson H. Miner, Attorney, Chicago Council of Lawyers) at 2-6.

58. 28 U.S.C. § 242 (1970).

59. *See* text accompanying note 17, *supra.*

60. Consent Decree ¶ 14.

61. The decree requires that four separate logs be maintained, and that letters be sent to each defendant. Each time a letter is returned unanswered it must be investigated, and the attorney must make a good faith determination of its results. Before a default judgment can issue, the attorney himself must review the case and swear in an affidavit that he has followed all the required procedures. Consent Decree ¶¶ 2, 7.

to bear this burden of higher costs for the duration of the decree, no matter how accurately its agents complete service. Since this will hardly serve in itself as an incentive for accurate service, it can only be justified as the cost necessary to implement the procedure.

### FUTURE APPLICATIONS OF THE PROCEEDINGS IN THE DECREE

This decree may prove useful in the future either as a model decree for similar litigation or as a model for a statute.[62] Although restricting its use to a model decree would have the advantage of preventing the burden of increased cost from falling on honest merchants, such a restricted use would have severe disadvantages. The problems of litigating each case are too great,[63] and sewer service is too widespread in that segment of the consumer-credit industry catering to low-income consumers[64] for a case-by-case attack to be effective.

If these procedures were applied by a narrowly drawn statute—for example, one applicable only to consumer-credit actions—the burden of increased costs would inevitably fall on some honest merchants, as well as those who employ "sewer service." Clearly, any legislature considering statutory adoption of these procedures would have to balance the burdens of increased costs against the benefits from the elimination of "sewer service."

There are several basic policies that would seem to support imposition of this burden upon the merchant. This burden would fall most heavily on those merchants who rely on default judgments and garnishment proceedings to collect their debts. These merchants are most likely to be engaged in high-risk credit sales to low-income individuals. Although it has long been thought desirable to stimulate trade,[65] public policy favors strict regulation and even discouragment of the "no money down," "easy credit" sales industry because of its predatory nature.[66] Furthermore, although the courts should be as accessible as possible to

62. *See* note 68 *infra.*

63. Proof of a "long standing and systematic practice" as was alleged in *Brand, see* text accompanying note 39 *supra,* requires an extensive study. In addition other jurisdictions may be unwilling to grant the federal government standing, *see* note 37 *supra.*

64. *See* notes 10-16 supra.

65. One major policy of the law of negotiable instruments under the U.C.C., for example, is to decrease the expense and increase the speed of actions for a creditor to secure payments. *See, e.g.,* UNIFORM COMMERCIAL CODE § 3-305.

66. *See* Peterson, *Representing the Consumer Interest in the Federal Government,* 64 MICH. L. REV. 1323 (1966).

litigants,[67] the court dockets are already much too crowded to require the courts to function as glorified collection agencies. Indeed, there is a very strong policy in favor of encouraging private settlement of disputes.[68] In any case, the burden would fall most heavily on those merchants who repeatedly resort to the courts. Consequently, the policy of encouraging private settlement would be furthered, while the courts would remain open to settle bona fide disputes.

Merchants will no doubt attempt to pass this burden on to the consumer who buy their products. The procedure of the decree incerases costs of those merchants who cater to low-income individuals more than those who sell to wealthier customers. This increase may in turn be passed on to high-risk consumers who are already plagued by higher-than-average prices, or it may discourage sales to these individuals altogether. The legislature should weigh this possibility as well in determining the desirability of enacting this procedure. Ultimately the decision should rest upon policy decisions based on empirical data gained from the results in the *Brand Jewelers* case.[69] If the experience gained from the *Brand Jewelers* decree shows that it is possible through its implementation to reduce "sewer service" without substantially increasing the costs of goods bought by the inhabitants of lower income neighborhoods and without unduly burdening the innocent merchant, then clearly these procedures would be well worth adopting on a statutory basis for all consumer-credit actions.[70]

JAMES STODDARD HAYES, JR.

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67. One major policy in the Federal Rules of Civil Procedure is to make the courts more open to all litigants. *See* Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

68. The U.C.C. reflects this policy in its encouragement of "cover" rather than suit. *Compare* UNIFORM COMMERCIAL CODE § 2-712 *with* UNIFORM COMMERCIAL CODE § 2-713.

69. The New York Bar Association Committee on Consumer Affairs is presently considering a proposal to codify the procedures outlined in this decree, but have postponed final determination until such time as the results of the Brand Jewelers Decree can be studied. Interview with David Paget, Chairman of the New York Bar Association Committee on Consumer Affairs, by telephone, February 5, 1973.

70. It is safe to state that the toll which sewer service and the default judgments and wage garnishments, which almost ineluctable follow in its wake, exact, demonstrably include the loss of employment, increased personal indebtedness, personal bankruptcies, disruption and splintering of family life, the fostering of fraudulent and predatory sales practices, the frustration and hindrance of numerous Government programs designed to aid the urban poor, the impairment of the integrity of the judicial system and an erosion in respect for the rule of law.

Plaintiff's Memorandum of Law, United States v. Brand Jewelers, Inc., Civ. No. 70-170 (S.D.N.Y. 1969).

## Civil Rights—Standing to Sue Under Title VIII of the Civil Rights Act of 1968

In *Trafficante v. Metropolitan Life Insurance Co.*,[1] the first case to construe standing under the enforcement sections of Title VIII of the Civil Rights Act of 1968,[2] the Supreme Court continued its recent trend of liberalizing the standing-to-sue doctrine by extending to a wide range of civil plaintiffs the right to challenge violations of the fair housing law.[3] Paul Trafficante, a white man, and Dorothy Carr, a black woman, were both tenants in a large San Francisco apartment complex. Neither alleged that they were the primary victims of discriminatory practices; instead, they claimed that their landlords, by various means,[4] had restricted the number of black tenants in the complex to less than one percent of the total number of tenants[5] in violation of section 804 of the Civil Rights Act of 1968.[6] As a result, petitioners Trafficante and Carr claimed to have felt the secondary effects of discrimination in the form of lost social, business, and professional relationships accruing from an integrated community and in the social stigma and economic damage occasioned by being forced to live in a "white ghetto."[7]

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1. 93 S. Ct. 364 (1972).

2. Civil Rights Act of 1968, §§ 801-31, 42 U.S.C. §§ 3601-31 (1970).

3. A number of authors have examined this trend. *E.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 N.Y.L.F. 911 (1972); Comment, *Standing of Private Parties to Vindicate the Public Interest*, 50 B.U.L. REV. 417 (1970); Comment, *The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier*, 41 U. COLO. L. REV. 96 (1969).

4. Petitioners alleged, *inter alia*, that their landlord was "making it known to them [the non-white rental applicants] that they would not be welcome at Parkmerced, manipulating the waiting list for apartments, delaying action on their applications, using discriminatory acceptance standards, and the like." 93 S. Ct. at 366.

5. *Id.* at n.5.

6. Civil Rights Act of 1968, § 804, 42 U.S.C. § 3604 (1970), which provides in relevant part:

> [I]t shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, or national origin.
>
> . . . .
>
> (d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling in fact is so available.

7. 93 S. Ct. at 366.

Pursuant to section 810 of the Civil Rights Act,[8] petitioners filed complaints with the Department of Housing and Urban Development (HUD) alleging discrimination. After failing to obtain satisfaction from their landlords through the efforts of HUD, petitioners then filed their complaints in the district court, which found that they were not "persons aggrieved" within the meaning of section 810(a) in that they were not the *direct* victims of the alleged discrimination.[9] The court of appeals affirmed.[10] The Supreme Court reversed, granted standing, and remanded the case to the district court for a hearing on the merits.[11] Mr. Justice Douglas, giving the opinion of the Court,[12] held that "[w]e can give vitality to § 810(a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities under the auspices of HUD."[13]

The Supreme Court has in the past considered problems of standing as being governed by a "rule of self-restraint," apart from the "case or controversy" limitation in Article III of the Constitution, because of the practical problems inherent in significantly increasing the number of persons eligible to bring controversies before the court.[14] The traditional test for standing required a showing of direct injury to a legal interest, "one of property, one arising out of contract, one pro-

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8. Civil Rights Act of 1968, § 810(a), 42 U.S.C. § 3610(a) (1970), which provides in relevant part:

> Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary [of Housing and Urban Development].

The Civil Rights Act of 1968, § 812, 42 U.S.C. § 3612 (1970), also provides for original jurisdiction in the federal courts without regard to the amount in controversy, but does not require the complainant to file first with HUD.

9. Trafficante v. Metropolitan Life Ins. Co., 322 F. Supp. 352 (N.D. Cal. 1971). The court held further that any "enforcement of the public interest in fair housing" should be accomplished by the Attorney General under the Civil Rights Act of 1968, § 813, 42 U.S.C. § 3613 (1970). The petitioners also claimed that their rights under 42 U.S.C. § 1982 (1970) had been violated; this claim was rejected by the court as being without merit. *Id.* at 353.

10. Trafficante v. Metropolitan Life Ins. Co., 446 F.2d 1158 (9th Cir. 1971).

11. 93 S. Ct. at 368.

12. Mr. Justice White in a concurring opinion joined by two other Justices expressed his doubt that, absent the statute relied upon here, the petitioners could otherwise present a "case or controversy" within the meaning of Article III of the Constitution. *Id.*

13. *Id.* Because standing was granted under § 810 of the Civil Rights Act of 1968, the Court found it unnecessary to reach the question of standing under 42 U.S.C. § 1982 (1970). 93 S. Ct. at 367 n.8.

14. Barrows v. Jackson, 346 U.S. 249, 255 (1953).

tected against tortious invasion, or one founded on a statute which confers such a privilege."[15] However, in at least one area, standing to sue under a statute, this limited view of standing has gradually been expanded, both by the Congress in drafting legislation and by the judiciary in applying it.

Draftsmen have increasingly made use of "persons aggrieved" provisions, such as the one involved in *Trafficante*,[16] as a "statutory aid" in conferring standing.[17] The Supreme Court first construed such a statute[18] in *FCC v. Sanders Brothers Radio Station*,[19] in which a radio station challenged the grant of a license by the FCC to a competing station, even though "under the Communications Act economic injury to a competitor is not a ground for refusing a broadcasting license . . . ."[20] However, the Court held:

> Congress had some purpose in enacting § 402(b)(2). It may have been of [the] opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.[21]

Even when Congress does not specifically provide for standing in a statute, such standing may be inferred when the purpose of the statute is found to evidence an intent to prevent the type of injury sustained by the complainant. In *Hardin v. Kentucky Utilities Co.*[22] a public utility alleged economic injury caused by expansion of the Tennessee Valley Authority (TVA) into its service area in violation of the Tennessee Valley Authority Act of 1933.[23] Even though the statute contained no express standing provision,[24] the Court found that the

15. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939) (private power company alleged economic injury caused by TVA competition; standing denied).

16. Civil Rights Act of 1968, § 810(a), 42 U.S.C. § 3610(a) (1970), quoted note 8 *supra*. A similar provision was included in the Civil Rights Act of 1964, § 204, 42 U.S.C. § 2000a-3 (1970).

17. Comment, 50 B.U.L. REV., *supra* note 3, at 420.

18. Communications Act of 1934, § 402(b)(2), 47 U.S.C. § 402(b)(6) (1970).

19. 309 U.S. 470 (1940). The competitive interest was also protected in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959); Clarksburg Publishing Co. v. FCC, 225 F.2d 511 (D.C. Cir. 1955).

20. 309 U.S. at 472.

21. *Id.* at 477.

22. 390 U.S. 1 (1968).

23. 16 U.S.C. § 831n-4 (1970).

24. 390 U.S. at 7.

Act was designed to protect private utilities from TVA competition, and held that "when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision."[25]

The *Hardin* test was later adopted and further refined in *Association of Data Processing Service Organizations, Inc. v. Camp*,[26] in which the statute construed did include a specific grant of standing. The petitioners, sellers of data processing services, protested an action by the Comptroller of the Currency granting to national banks the right to make such services available to other banks and their customers. They claimed standing under the Administrative Procedure Act, which grants standing to any person "aggrieved by agency action within the meaning of a relevant statute."[27] The Court held that a "person aggrieved" must meet two tests:[28] the first, derived from Article III of the Constitution, is "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise";[29] the second is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[30]

The "injury in fact" test was explained two years later in *Sierra Club v. Morton*,[31] which required "that the party seeking review be himself among the injured."[32] The Sierra Club alleged that the Department of the Interior had violated federal laws in allowing private use of land preserved as national forest and claimed to be a person aggrieved under the Administrative Procedure Act (APA).[33] Although

25. *Id.* at 6.
26. 397 U.S. 150, 155 (1970).
27. Administrative Procedure Act § 702, 5 U.S.C. § 702 (1970).
28. Although the *Data Processing* decision was nowhere cited in Trafficante v. Metropolitan Life Ins. Co., the two tests for standing that it established appear to be the basis for the reasoning in *Trafficante*. *See* text accompanying notes 44-46 *infra*. Its omission is curious in view of the Court's citation of two other cases involving standing under the Administrative Procedure Act, Sierra Club v. Morton, 405 U.S. 727 (1972), and Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970).
29. 397 U.S. at 152.
30. *Id.* at 153. The "zone of interests" test was criticized in a concurring opinion by Mr. Justice Brennan in Barlow v. Collins, 397 U.S. 159 (1970), as a "wholly unnecessary and inappropriate second step upon the constitutional requirement for standing," which should affect reviewability rather than standing. *Id.* at 169; *see* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).
31. 405 U.S. 727 (1972) (4-3 decision).
32. *Id.* at 735. Dissenting opinions urged that an exception to this general rule be made in environmental cases. *Id.* at 741-60; *cf.* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).
33. Administrative Procedure Act § 702, 5 U.S.C. § 702 (1970).

the Supreme Court recognized that the Club "is a large and long-established organization, with an historic commitment to the cause of protecting our Nation's natural heritage from man's depredations,"[34] the Court denied standing because the Club had failed to allege any injury to itself or its members: "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA."[35]

However, the Court also indicated clearly that economic injuries of the type alleged in the competitor's suits were not the only type of injuries to be recognized: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of our life in our society," and are no less "deserving of legal protection through the judicial process."[36] The lower federal courts have granted plaintiffs standing to assert a number of other noneconomic interests, including the quality of radio and television programming[37] and the treatment of persons displaced by urban renewal programs.[38] In *Shannon v. HUD*,[39] the Third Circuit acknowledged the right of residents in a neighborhood chosen by HUD to become the site of a low-income housing project to allege the adverse affect on "not only their investments in homes and businesses, but even the very quality of their daily lives."[40]

In *Trafficante*, petitioners alleged both economic and social injuries caused by being forced to live in a "white ghetto."[41] The Court refused to restrict the concept of "injury" to grant standing only to those who had themselves been refused housing. Instead, it reaffirmed the concept that the *nature* of the alleged injury is unimportant, so long as it is an injury that has in fact been sustained by the complainant[42] and that is sufficiently particular to meet the "case or controversy" test in Article III of the Constitution.[43]

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34. 405 U.S. at 739.
35. *Id.*
36. *Id.* at 734.
37. Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).
38. Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968).
39. 436 F.2d 809 (3d Cir. 1970).
40. *Id.* at 818.
41. 93 S. Ct. at 366.
42. *Id.* at 367; *see* text accompanying notes 31-40 *supra*.
43. 93 S. Ct. at 368; *see* Flast v. Cohen, 392 U.S. 83, 106 (1968).

*Data Processing* was nowhere mentioned in *Trafficante*; however, the *Data Processing* "zone of interests" test[44] appears to be the occasion for a finding by the Court that the "language of the Act is broad and inclusive"[45] and that the legislative history, albeit meager, would support a grant of standing to "those who were not the direct objects of discrimination."[46] Respondents argued, however, that in granting to the Attorney General only the authority to seek an injunction to bar a "pattern or practice" of discrimination,[47] Congress intended that *only* the Attorney General should have such power, which the petitioners were allegedly attempting to usurp. This argument was rejected upon a finding that, as a practical matter, the Attorney General with "less than two dozen lawyers" in the Housing Section of the Civil Rights division, was incapable of any effective, wide-ranging enforcement.[48] Private suits are therefore necessary where "the complainants act not only on their own behalf, but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.' "[49]

The "private attorney general" concept[50] has been utilized in situations where the government may be unwilling or, as in *Trafficante*, unable effectively to enforce a large number of violations of the law.[51] In *Allen v. State Board of Elections*[52] the Court dealt with a suit by a private citizen alleging violation of the Voting Rights Act of 1965.[53] As in *Trafficante*, the Attorney General was empowered to seek an injunction to halt violations,[54] but the Court recognized that because of

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44. *See* text accompanying note 30 *supra*.

45. 93 S. Ct. at 367. Precisely which language is relied upon is not known; however, the Court is apparently referring to the "person aggrieved" provision in § 810, quoted note 8 *supra*, and to the declaration of policy in § 801, which provides: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1970).

46. 93 S. Ct. at 367. The legislative history of the Act does not specifically discuss standing, but does lend some support to a finding that the Act was intended to remedy a broad range of ills resulting from discriminatory housing practices. *See Hearings on S. 1358, & S. 2280 Before the Subcomm. on Housing & Urban Affairs of the Senate Comm. on Banking & Currency*, 90th Cong., 1st Sess. (1967); 114 CONG. REC. 2706 (1968) (remarks of Senator Javits); 114 CONG. REC. 3472 (1968) (remarks of Senator Mondale); 114 CONG. REC. 9559 (1968) (remarks of Congressman Celler).

47. Civil Rights Act of 1968, § 813, 42 U.S.C. § 3613 (1970).

48. 93 S. Ct. at 367.

49. *Id.*

50. This phrase was first used in Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

51. *See* Tucker, *supra* note 3, at 939-40.

52. 393 U.S. 544 (1969).

53. 42 U.S.C. §§ 1973 to 1973p (1970).

54. Voting Rights Act of 1965, § 12(d), 42 U.S.C. § 1973j(d) (1970).

the large number of potential violations, "[t]he achievement of the Act's laudable goal would be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."[55]

In *Newman v. Piggie Park Enterprises, Inc.*,[56] a private citizen had successfully obtained an injunction under Title II of the Civil Rights Act of 1964,[57] which, like the statute in *Trafficante*, permitted the Attorney General to initiate suits only to remedy "patterns or practices" of discrimination.[58] The Court allowed full attorney's fees to the petitioner, reasoning that to do otherwise would discourage suits by aggrieved parties.[59] The Court further observed:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.[60]

Thus, the petitioners in *Trafficante*, once having met the dual *Data Processing* tests,[61] as refined by *Sierra Club v. Morton*,[62] were granted standing not only to seek a remedy for their own personal injuries, but also to protect the interests of the public.[63]

At the very least, then, *Trafficante* held that tenants in an apartment complex who claim to have suffered social and economic injuries caused by specific acts of discrimination to others, which are prohibited by section 804 of the Civil Rights Act, have standing under Section 810 to complain of such discriminatory acts. How much further the Supreme Court will travel in applying the *Trafficante* rationale remains to be seen. The existence of the "person aggrieved" provision, the inability of the Attorney General adequately to police viola-

55. 393 U.S. at 556; *see* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); *cf.* Perkins v. Mathews, 400 U.S. 379, 396 (1971).
56. 390 U.S. 400 (1968) (per curiam).
57. Civil Rights Act of 1964, §§ 201-07, 42 U.S.C. §§ 2000a to 2000a-6 (1970).
58. Civil Rights Act of 1964, § 206, 42 U.S.C. § 2000a-5 (1970).
59. 390 U.S. at 402.
60. *Id.* at 401-02.
61. *See* text accompanying notes 29-30 *supra.*
62. *See* text accompanying notes 31-40 *supra.*
63. *See* text accompanying notes 48-59 *supra.*

tions, and the existence of an opinion letter from the Assistant Regional Administrator of HUD, to which the Court attached "great weight,"[64] concluding that the petitioners were persons aggrieved under the Act, are all factors supporting the Court's holding. But one can only speculate whether any of these factors are vital as well as supportive since the opinion simply lists each without weighing them individually. Will the patron of any hotel, restaurant, or movie theater under Title II of the Civil Rights Act of 1964[65] now have standing to allege exclusion of others because of "race, color, religion or national origin,"[66] simply by alleging that he is socially stigmatized by this exclusion and by presenting a favorable agency opinion letter?[67] Although *Trafficante* might be distinguished in that tenants, once settled, cannot as a practical matter as easily relocate as can the hotel, restaurant, or theater patron, what if this is the only hotel or restaurant in town? The 1964 Act does not make such subjective distinctions, with the result that *Trafficante* would seem logically to support a grant of standing to a "stigmatized patron." Such questions have already been answered in the affirmative by the Equal Employment Opportunities Commission in construing Title VII of the Civil Rights Act of 1964.[68] The Commission interpreted the Act as granting standing to white employees to allege employer discrimination against minority job applicants, finding that "an employee's legitimate interest in the terms and conditions of his employment comprehends his right to work in an atmosphere free of unlawful employment practices and their consequences."[69] *Trafficante* would seem to bear out the Commission's interpretation.

64. 93 S. Ct. at 367; *see* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); United States v. City of Chicago, 400 U.S. 8, 10 (1970) (per curiam); Udall v. Tallman, 380 U.S. 1, 16 (1965). The finding in *Trafficante* is an example of how loosely "administrative construction" can be defined. The only "construction" by HUD in this case was a bare conclusion in a letter prepared *after* the complaint had already been filed in district court.

65. Civil Rights Act of 1964, §§ 201-07, 42 U.S.C. §§ 2000a to 2000a-6 (1970). The Act contains a "person aggrieved" provision, 42 U.S.C. § 2000a-3 (1970), and is sufficiently broad to make adequate enforcement by the Attorney General impossible. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (per curiam).

66. 42 U.S.C. § 2000a(a) (1970).

67. This suggests another aspect of the *Trafficante* holding that is implied by the facts of the case rather than by the opinion itself: should the *Trafficante* rationale be limited to allegations of racial discrimination? The broader language of the Civil Rights Act of 1968, § 804, 42 U.S.C. § 3604 (1970), suggests not. *See also* Peters v. Kiff, 407 U.S. 493 (1972) (opinion of White, J.).

68. Civil Rights Act of 1964, §§ 701-16, 42 U.S.C. §§ 2000e to 2000e-15 (1970).

69. Case Nos. NO 68-8-257E, NO 68-9-329E, 2 F.E.P. Cas. 79, 80 (EEOC 1969).

## CONCLUSION

While the *Data Processing* decision was not mentioned by the Court in *Trafficante*, the dual tests there enumerated appear to be the basis for the latter decision. The fact situation in *Trafficante* is yet another area in which the Supreme Court has loosened its increasingly flexible standing requirements by reaffirming that the nature of the injury alleged is unimportant so long as it constitutes "injury in fact" within the meaning of Article III of the Constitution. In cases like *Trafficante*, standing is conferred not only to remedy individual injuries, but perhaps more importantly, to protect the interests of society in obtaining fair and open housing.

The practical effects of *Trafficante*, however, are less certain. Although it expanded the class of persons entitled to allege denial of fair housing to include tenants, whether such an expansion will significantly increase the number of suits brought in this area is doubtful. Although a tenant may often be in a far better position to discover discrimination,[70] in the past nothing has prevented such a determined tenant from apprising potential minority applicants of this fact and encouraging action on their part. While the tenant's task was concededly greater before *Trafficante*, it was usually not an impossible one, as evidenced by the *Trafficante* case itself: soon after Trafficante was denied standing in the district court, five rejected minority applicants to the apartment complex filed suit.[71] Furthermore, in order to establish the necessary violations of section 804[72] at trial, the petitioners will probably have to call as witnesses the very persons whom the respondents claim are the only proper parties to bring the suit—the direct victims of the discriminatory acts. The prevention of possible harassment to civil defendants by unlimited access to the federal courts seems to be one concern implicit in recent Supreme Court considerations of the "case

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70. The petitioner argued:

> Unlike the individual minority applicant, who typically has only a limited awareness of or contact with his prospective landlord, residents have a continuity of association and contact which uniquely enables them to observe and discern both the racial character of their self-contained community and the way in which that character is maintained. This is of substantial significance, since a large apartment complex can easily conceal its discriminatory policies so that it is impossible for a minority applicant to determine with any certainty that he has been the victim of racial discrimination.

Brief for Petitioner at 38, Trafficante v. Metropolitan Life Ins. Co., 93 S. Ct. 364 (1972).

71. Burbridge v. Parkmerced Corp., No. C-71-378[AJZ] (N.D. Cal., filed Feb. 25, 1971) (filed fifteen days after the district court decision in Trafficante v. Metropolitan Life Ins. Co., 322 F. Supp. 352 (N.D. Cal. 1971) ).

72. Relevant parts of § 804 are quoted note 6 *supra*.

or controversy" requirement in Article III of the Constitution.[73] Thus, rather than significantly increasing the volume of litigation, *Trafficante's* promise of merely allowing tenants to do directly what they had previously been required to do indirectly may be one of the more persuasive, if as yet unarticulated, factors encouraging the Court to extend the *Trafficante* rationale to analogous situations.

DOUGLAS K. COOPER

## Constitutional Law—The Eighth Amendment and Prison Reform

The conditions within many American prisons have made the penal system a national disgrace. From time to time crisis situations have erupted, and the public has been made aware of the desperate need for reform of the practices and conditions of confinement of prison inmates. In the past several years the courts, and especially the lower federal courts, have begun to take a more active role in ameliorating abject prison conditions. The primary constitutional theory underlying these suits has been the eighth amendment prohibition against the infliction of cruel and unusual punishment.[1] Two recent cases, *Baker v. Hamilton*[2] and *Inmates of Boys' Training School v. Affleck*,[3] have emphasized the importance of social rehabilitation in finding the conditions of juvenile confinement unlawful. These cases suggest that in the future the eighth amendment might serve as the constitutional foundation for the precept that lawful confinement of adults as well as juveniles requires rehabilitative services. Although this possibility seems unlikely at the present time, the trend in the eighth amendment cases does provide a potential avenue for courts to follow if the essential purpose of the criminal justice system were to be changed from punishment to reformation. This note will discuss the evolution of the eighth

73. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972); Baker v. Carr, 369 U.S. 186, 204-08 (1962).

1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. 345 F. Supp. 345 (W.D. Ky. 1972).

3. 346 F. Supp. 1354 (D.R.I. 1972).

amendment as a device for prison reform[4] and will suggest that rehabiliation for the prisoner should be a right.

The text of the eighth amendment of the Constitution was taken from the English Bill of Rights of 1689.[5] The original purpose of the article was to eliminate the executions and tortures practiced by the Stuart monarchy. It was incorporated into the United States Constitution in 1791 after being adopted in nine colonial constitutions.[6] Initially and throughout the nineteenth century,[7] the amendment was interpreted to prohibit extreme forms of corporal punishment. The Supreme Court in *In re Kemmler*[8] found certain punishments to be manifestly cruel and unusual. Among these were crucifixion, burning on the stake, and breaking on the wheel.[9] A significant change in interpretation came in 1910 with *Weems v. United States.*[10] In that case the Supreme Court forbade infliction of *cadena temporal,*[11] a Spanish version of hard labor, upon a man convicted in the Philippines of falsifying entries in government records because the punishment was out of all proportion to the seriousness of the crime. The term of punishment was fifteen years. The Supreme Court held this statutory penalty unconstitutional under the Philippine bill of rights, which contained a prohibition against "cruel and unusual punishment."[12] *Weems* expressly recognized that this concept is flexible and responsive to social norms.[13]

Several other tests for determining whether a particular punishment is cruel and unusual have been suggested since the *Weems* decision. By far the more frequently recognized standard is to inquire whether the penalty administered "shocks the general conscience of

4. For a thorough treatment of the historical development of the "cruel and unusual" prohibition see Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

5. "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." 1. W. & M. 2, c.2, § 10.

6. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969).

7. *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

8. 136 U.S. 436 (1890).

9. *Id.* at 446-47.

10. 217 U.S. 349 (1910).

11. *Id.* at 364.

12. *Id.* at 365, 367-68.

13. The majority stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense," *id.* at 367, while also noting, "The clause of the Constitution . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378. It should be noted that the former notion of proportionality first appeared in the dissent to O'Neil v. Vermont, 144 U.S. 323, 340 (1892).

civilized society."[14] Another measurement, proposed by Justice Goldberg in *Rudolph v. Alabama*,[15] would gauge the relationship between the punishment inflicted and the penal aim sought to be achieved.[16] In *Trop v. Dulles*[17] Chief Justice Warren noted that the eighth amendment was not static and that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[18] These standards are at once vague and flexible.

Historically, the judiciary has been reluctant to involve itself in the operation of the correctional system on either the state or the federal level. The courts largely appear to believe that they have satisfied their responsibilities under the law once a decision has been rendered. Several reasons have been offered to support this "hands off" policy.[19] One prevalent explanation is based on the principle of the separation of powers:

> [I]nasmuch as Congress has placed control of the federal prison system under the Attorney General, and inasmuch as the control of a state prison system is vested in the Governor or his delegated representative, a federal court is powerless to intervene in the internal administration of this executive function even to protect prisoners from the deprivation of their constitutional rights.[20]

Another explanation is that the courts lack expertise in the field of penology and feel that they should leave corrections to knowledgeable prison administrators. Finally, the reluctance to become involved is sometimes explained by a fear that intervention will subvert internal prison discipline and therefore harm the criminal justice system.[21]

Slowly jurists have begun to realize that the courts and the prisons are components in a continuous system of administration of justice and that the court's responsibility continues beyond sentencing. Courts have found that prison regulations should not always supersede

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14. *E.g.*, Williams v. Field, 416 F.2d 483, 486 (9th Cir. 1969); Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965).

15. 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting); *accord*, Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966).

16. The Court in Robinson v. California, 370 U.S. 660, 667 (1962), held that imprisonment for the crime of "being" a drug addict was cruel and unusual.

17. 356 U.S. 86 (1957).

18. *Id.* at 101.

19. For the origin of this denomination *see* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 n.4 (1963).

20. Comment, *The Inadequacy of Prisoners' Rights to Provide Sufficient Protection for Those Confined in Penal Institutions*, 48 N.C.L. REV. 847, 849 n.8 (1970).

21. *See, e.g.*, Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969).

the personal rights of the convict.[22] Consequently, the Supreme Court in *Johnson v. Avery*[23] rejected the "hands off" policy in 1969. The abject conditions existing in the prisons and the mounting pressures for prison reform have led to this result.

Before reaching the question of the prisoner's right to rehabilitation it is important to examine the current eighth amendment cases that have found the daily living conditions within prisons to be "cruel and unusual." The most significant recent decision in this field is *Holt v. Sarver*,[24] in which the conditions at the Arkansas state prison farms were found to violate the eighth amendment. In that case the use of severely crowded open barracks, isolation cells, the trusty guard system[25] and corporal punishment, the lack of supervision, and the existence of unrestrained inmate brutality combined to make the operation of the state system cruel and unusual.[26]

The *Holt* court approached the problems of the Arkansas prisons in a comprehensive fashion. First, the court viewed the dictates of the eighth amendment as applying to the rights of the prison population as a whole and not solely to the treatment of one specific inmate.[27] Secondly, the general living conditions in the facilities, rather than any one practice of the administrators, were determined to constitute cruel and unusual punishment. Thirdly, the test of unlawful incarceration required the objectionable conduct to be "confinement . . . char-

22. The court in Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 225 U.S. 887 (1945), stated, "A prisoner retains all of the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion."

23. 393 U.S. 483, 486 (1969).

24. 309 F. Supp. 362 (D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1970). *But cf.* Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd*, 393 U.S. 266 (1968) (per curiam). *Wilson* found that work camps per se did not constitute cruel and unusual punishment. The important decision of Robinson v. California, 370 U.S. 660 (1962), incorporated the eighth amendment through the fourteenth amendment and made it applicable to the states.

25. The use of a particular trusty guard system was also found violative of the eighth amendment in Roberts v. Williams, 456 F.2d 819, 828 (5th Cir. 1971). *Contra*, George v. Sowers, 268 So. 2d 65 (La. App. 1972).

26. 309 F. Supp. at 372-82.

27. It appears to the Court, however, that the concept of "cruel and unusual punishment" is not limited to instances in which a particular inmate is subjected to a punishment directed at him as an individual. In the Court's estimation confinement itself within a given institution may amount to cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subjected to any disciplinary action.

*Id.* at 372-73.

acterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people . . . ."[28] That standard was recognized as changeable but would "broaden as society tends to pay more regard to human decency and dignity and becomes, or likes to think that it becomes, more humane."[29] Fourthly, the court adopted a continuing role in the supervision of the state penal institutions. After declaring that conditions in the Arkansas prison system constituted cruel and unusual punishment, the court ordered the state to improve the physical conditions and the supervisory practices at each work camp. The court specified that the Commissioner of Corrections was to submit a plan to ameliorate conditions and added what it considered to be minimal guidelines for operating prison facilities. As a sanction for noncompliance with the order, the court threatened to enjoin the use of the two work farms altogether. In addition, the court was to monitor the progress on a continuing basis by requiring periodic reports of prison conditions. Finally, recognizing both the financial burden of effecting such an extensive modification and the reluctance of the executive branch to appropriate funds, the court placed ultimate responsibility for change on the Commissioner of Corrections.[30] Obviously the *Holt* court viewed the absolute "hands off" policy as obsolete.

A year after the *Holt* decision an Ohio court encountered a similar situation in *Jones v. Wittenberg*.[31] The inmates of the Lucas County Jail, as a class, brought a federal civil rights action[32] alleging that severe overcrowding of the facility, inadequate sanitary conditions, poor interior lighting, inferior food and medical services, and improper custodial supervision had subjected them to cruel and unusual punishment. The district court agreed and found conditions constitutionally unacceptable.[33] In his subsequent order the trial judge listed the specific conditions to be improved and set the time within which the remedial action was to be taken.[34] The major difficulty confronting the

28. *Id.*

29. *Id.* at 380.

30. Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

*Id.* at 385.

31. 323 F. Supp. 93 (N.D. Ohio 1971).

32. *Id.* Most actions are brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970).

33. 323 F. Supp. at 99.

34. The size of the jail population, the interior lighting, the number and quality

court was to determine the source of funds for the project. Aware that the judiciary has no inherent power of taxation, the court ordered the sheriff and other officials to reallocate their budgeted funds to effect the enumerated rehabilitative changes.[35] The court was to retain continuing jurisdiction over the matter so that "the changes of methods and practices required will not be abandoned, forgotten, or neglected, but [will] become permanently established."[36]

In *Hamilton v. Schiro*[37] the prisoners of Orleans Parish Prison secured an injunction forbidding the operation of the prison facility. The living conditions within the institution were so inhumane and physically dangerous that the court, rather than attempt to fashion relief to reform the prison, enjoined its use altogether. The trial judge concluded his opinion tersely:

> Prison life inevitably involves some deprivation of rights, but the conditions of the plaintiff's confinement in Orleans Parish Prison so shock the conscience as a matter of elemental decency and are so much more cruel than is necessary to achieve a legitimate penal aim that such confinement constitutes cruel and unusual punishment . . . .[38]

The destructive conditions of inhumane prison confinement were comprehensively assessed in *Gates v. Collier*.[39] In that case, brought by the prisoners at the Mississippi State Prison at Parchman as a class action,[40] the court found conditions to be unlawful under state law[41] as well as under the eighth amendment. The opinion granted injunctive and declaratory relief to the plaintiffs. The cruel and unusual punish-

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of guards and other personnel, diet and food service, sanitation and personal hygiene, medical treatment, communications with visitors and attorneys, and available reading material were all included in special parts of the court order. Jones v. Wittenberg, 330 F. Supp. 707, 714-20 (N.D. Ohio 1971).

35. *Id.* at 713.

36. *Id.* at 721.

37. 338 F. Supp. 1016 (E.D. La. 1970). In addition, the court determined that suits under 42 U.S.C. § 1983 did not require the exhaustion of available state remedies as a necessary condition precedent to federal court action. *Id.* at 1019; *accord,* Wilwording v. Swenson, 404 U.S. 249 (1971); Monroe v. Pape, 365 U.S. 167 (1961).

38. 338 F. Supp. at 1019. In the court's "Findings of Fact," the adverse conditions of the prison were enumerated. It was noted that there were 900 prisoners in the space built for 400, that six to eight inmates inhabited a cell 13 feet by 8.5 feet by 7.5 feet in size, that sanitation facilities were inoperable, mattresses were never cleaned, exercise was only permitted once in twenty or thirty days, and that the kitchen, sanitation, and shower system were infested with rats, mice, and roaches. *Id.* at 1016-18.

39. 349 F. Supp. 881 (N.D. Miss. 1972).

40. The prisoners at Parchman brought suit under 42 U.S.C. §§ 1981, 1983, 1985, 1994 (1970).

41. MISS. CODE ANN. §§ 7930, 7942, 7959, 7968 (Supp. 1971).

ment found in *Gates* was composed of two parts: the deleterious effects of inhumane living conditions and the danger of prisoner mistreatment by armed trusty guards and other inmates.[42] The court carefully noted that public and official apathy regarding the state of incarcerated prisoners was a cause of the deficiencies at Parchman.[43] Basing its authority to act on the need to protect the constitutional rights of the prisoners, the court specifically set out the physical and administrative improvements required to meet constitutional standards and established the time in which to make them.[44] In addition, the order required prompt submission of a comprehensive plan for the guidance of future improvements.[45] The court was to retain jurisdiction over the project indefintely. Fortunately for the *Gates* court, the matter of funding was not a serious problem because of the immediate availability of federal assistance.[46]

Judge Keady in the *Gates* case expressed what had been an implicit development in the previous cases when he recognized that prisoners have a constitutional right to "adequate provision for their physical health and well-being . . . ."[47] The eighth amendment prohibition had traditionally been interpreted as forbidding certain intolerable practices. But imprisonment generally was not considered to be a proscribed punishment. The courts in the cases surveyed have had little difficulty in drawing the analogy between objectionable physical punishment and inhumane imprisonment conditions. The application of the cruel and unusual punishment standard in each case has established minimal requirements for lawful confinement. But surprisingly, the

42. The problem of inhumane living conditions was described in the court's findings in these terms: "The housing units at Parchman are unfit for human habitation under any modern concept of decency. The facilities at all camps for the disposal of human and other waste are shockingly inadequate and present an immediate health hazard." 349 F. Supp. at 887. As to the competency of the trusty guards the court stated, "Penitentiary records indicate that many of the armed trusties have been convicted of violent crimes, and that of the armed trusties serving as of April 1, 1971, 35% had not been psychologically tested, 40% of those tested were found to be retarded, and 71% of those tested were found to have personality disorders." *Id.* at 889.

43. *Id.* at 888.

44. *Id.* at 898-903.

45. *Id.* at 903-04.

46. The notoriety of the case had attracted sufficient federal interest to warrant a commitment to the Parchman prison of one million dollars by the Law Enforcement Assistance Administration of the United States Department of Justice. *Id.* at 892.

47. *Id.* at 894. This has been recognized previously by courts but apparently never utilized to guarantee prison rights. "The obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty." Johnson v. Dye, 175 F.2d 250, 256 (3d Cir. 1949), *rev'd per curiam on other grounds*, 338 U.S. 864 (1949).

historically vague constitutional prohibition has been used to secure extremely specific levels of decency for the treatment of convicts. Furthermore, the eighth amendment cases have delineated affirmative rights for prisoners.[48]

On the perimeter of the evolving eighth amendment theory of prisoner rights is the question of whether the denial of rehabilitative activities constitutes cruel and unusual punishment. This problem has not been squarely faced although several courts have placed vocational training among those factors to be considered in determining the constitutionality of prison conditions.[49] But no court, as yet, has invalidated a penal system solely because of the absence of rehabilitative programs.[50]

However, the lack of social rehabilitative programs was an important factor in two recent cases concerning juveniles. In *Inmates of Boys' Training School v. Affleck*[51] officials had transferred "problem" inmates from the Boys Home to maximum and medium security adult prison facilities and occasionally to the solitary confinement cells located there. The court enjoined the use of the adult prison for the non-criminal juvenile population of the Home. The opinion stressed the purpose of juvenile confinement, which under Rhode Island law is "instruction and reformation."[52] Because rehabilitation was the reason for confinement

48. A common issue in many eighth amendment cases is the adequacy of medical care. There has been a proliferation of cases finding that denial of medical care to individual prisoners violates the eighth amendment. *See* United States v. Fitzgerald, 466 F.2d 377, 380 (D.C. Cir. 1972); Newman v. Alabama, 349 F. Supp. 278, 280-81 (M.D. Ala. 1972); Lopez-Tijerina v. Ciccone, 324 F. Supp. 1265, 1268 (W.D. Mo. 1971); Owens v. Alldridge, 311 F. Supp. 667, 669 (W.D. Okla. 1970); Ramsey v. Ciccone, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

49. Jones v. Wittenberg, 323 F. Supp. 93, 97 (N.D. Ohio 1971).

50. Even the court in *Holt v. Sarver* refused to go that far:

> This Court knows that a sociological theory or idea may ripen into constitutional law; many such theories and ideas have done so. But, this Court is not prepared to say that such a ripening has occurred as yet as far as rehabilitation of convicts is concerned. Given an otherwise unexceptional penal institution, the Court is not willing to hold that confinement in it is unconstitutional simply because the institution does not operate a school, or provide vocational training, or other rehabilitative facilities and services which many institutions now offer.

309 F. Supp. at 379.

51. 346 F. Supp. 1354 (D.R.I. 1972). None of the youths in the Boys' Training School had been adjudicated as criminals. They comprised five classifications: 1) those committed by their parents, 2) those awaiting trial, 3) those convicted of delinquency, 4) those found to be wayward, and 5) those determined to be neglected or dependent. *Id.* at 1369.

52. R.I. GEN. LAWS ANN. §§ 13-4-1, -13, -15 (1956). Also the court noted that "[t]he Rhode Island legislature, in establishing its juvenile justice system, has specifically directed that it have rehabilitative, nonpenal, goals." 346 F. Supp. at 1364.

of juveniles, the court concluded that the conditions constituting cruel and unusual punishment need not be as grave as those found in the prior adult criminal imprisonment cases. The court in *Affleck* determined that the mixing of juveniles with the adult prison population was especially destructive of any attempt at reform. While access to reading matter, fresh air and exercise, educational and vocational training, outside visitors, and recreational diversion were all mentioned as being vital to the development of the youths, the court primarily based its decision on placing the youths in the same areas with the criminal adults. Although the eighth amendment was used to protect detained juveniles from the harshness of the physical conditions present in the criminal justice system, the court did not find an explicit right to those services and amenities thought necessary for effective rehabilitation.

*Baker v. Hamilton*[53] held that the selective confinement of juveniles within the criminal county jail for "shock value"[54] did in fact constitute cruel and unusual punishment. Citing the dilapidated physical condition of the jail, the lack of exercise and recreation, and the absence of any rehabilitative value in jail confinement, the court ordered the referral practice to cease. Once again, the fact that the county jail "is a penal institute designed primarily for punishment rather than rehabilitation"[55] weighed heavily. *Baker* did not provide a well-defined test for measuring impermissible confinement conditions for juveniles, but it did note that the severity of circumstances need not be as dire as those necessary for court action in an adult case.

The application of the eighth amendment in both of these juvenile confinement situations was closely limited to the physical conditions of the holding facility. Although rehabilitation was not required by the dictates of the Constitution, it was explicitly recognized as a duty by state statute.[56] These cases have underscored the judicial awareness of the importance of rehabilitation as the primary objective of the juvenile reformative process. This recognition reflects the accept-

53. 345 F. Supp. 435 (W.D. Ky. 1972).

54. *Id.* at 349.

55. *Id.* at 352. The fact that non-criminal juveniles were being placed into contact with hardened adult offenders was considered especially counter-rehabilitative since the juveniles, in the opinion of an expert witness, seek to identify with the older inmates and would learn the criminal trade. *Id.* at 348. In Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972), the court solely based its decision to force the closing of the Manida youth facility on the grounds that the institution presented a physical danger to its inhabitants. Rehabilitative treatment of the juveniles was not mentioned. *Id.* at 597.

56. 346 F. Supp. at 1367; 345 F. Supp. at 351.

ance of the theories of child psychologists and sociologists[57] and serves as a repudiation of the concept of penal juvenile confinement. Unfortunately, theoreticians for adult treatment have not met such a favorable response.

Modern penologists[58] have recognized social retraining of the adult criminal as the ultimate objective of the prison system and have discarded prior notions of deterrence, retribution, and isolation as the fundamental purposes for confining inmates. The changing emphasis views the prison as a place of correction rather than punishment—one which administers treatment instead of inflicting revenge.[59] Many rehabilitative theories are currently being discussed but few, if any, have been empirically examined.[60] Consequently, there is no unanimity in approaching the task of reforming the American criminal. Every scheme hopes to return the inmate to society as a well-adjusted and productive individual who will not subsequently re-enter prison. Spiraling crime rates[61] and staggering prisoner recidivism[62] have made the public and correctional officials painfully aware that the existing retributive system of punishment is not properly serving society.[63] Although popular opinion acknowledges the logic of attempting to reform criminals, no effective citizen's movement has yet mobilized to attack the problem and lobby for change. Extensive inmate rehabilitation pro-

57. Gough, *The Beyond-Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 ST. LOUIS L.J. 182 (1971); Note, *Non-Delinquent Children in New York: The Need for Alternatives to Institutional Treatment*, 8 COLUM. J.L. & SOC. PROB. 251 (1972).

58. *E.g.*, R. CLARK, CRIME IN AMERICA 220 (1970); CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 175-227 (R. Gerber & P. McAnany eds. 1972); J. MARTIN & D. WEBSTER, SOCIAL CONSEQUENCES OF CONVICTION 216-223 (1971); Leopold, *What's Wrong With the Prison System*, 45 NEB. L. REV. 33 (1966).

59. "The function of punishment must accordingly be directed to its social purpose . . . . [I]t is the future and not the past, not the crime committed, that sets the goal and the purpose sought." R. SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT 9 (1913).

60. One novel proposal combines the economic incentive of self-interest with prisoner reform. This amalgam of social work and business principles rewards socially desirable behavior with credits towards an early release. *See* Williams & Fish, *Rehabilitation and Economic Self-Interest*, 17 CRIME & DELINQUENCY 406 (1971).

61. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 22-31 (1967).

62. R. CLARK, *supra* note 56, at 215; N. MORRIS, THE HABITUAL CRIMINAL 1-29 (1951); Robison & Smith, *Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971).

63. MODEL PENAL CODE § 102(c) (Proposed Official Draft 1962). For a list of states recognizing the reformatory purpose of punishment see Singer, *Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment*, 39 U. CIN. L. REV. 650, 676 n.136 (1970).

grams would demand significant amounts of public funds. At present popular commitment to prison reform has not yet guaranteed humane living conditions, so there is no reason to believe that rehabilitation would be more favorably received.

Until now the eighth amendment has been used to forbid brutal forms of punishment and incarceration under abusive conditions. In order to establish rehabilitation as a protected right, confinement for purposes other than rehabilitation, even under decent conditions, must be declared "cruel and unusual." Such a step would represent a fundamental modification in the conventional view of the role of institutionalized punishment. The prior developments in eighth amendment theory have not necessitated elemental alterations in the criminal justice system. They have only accomplished reform by forcing the system to operate in the manner in which it was originally intended, yet without excessive cruelty. As such, these cases presented limited issues for the courts to deal with. State and federal statutes would undoubtedly be necessary to establish rehabilitation as the acknowledged purpose of the correctional system. If they were enacted, the court's primary concern would be the proper administration of the statutory objectives. With this statutory foundation, the judiciary might use the eighth amendment to secure rehabilitative treatment as a right. Secondarily, the constitutional principle might also establish rehabilitation as the paramount purpose of a criminal justice system in a recalcitrant jurisdiction. Here the amendment could be utilized to instigate change rather than to enforce stated goals. As long as society determines that punitive incarceration is a tolerable and desirable manner in which to manage the problems posed by criminal offenders, the eighth amendment will do little to provide for rehabilitation. The amendment's application merely reflects existing social notions of decency towards prisoners. Only when the public replaces the presently held penal objectives with the reformative purposes proposed by penologists will an affirmative role for the amendment exist.

The eighth amendment is currently being used to secure the right to humane living conditions for prisoners in various parts of the country. Whether public sensibilities will become enlightened to the point where the reformative nature of corrections is recognized remains a matter for conjecture. In any case, the courts have shown themselves to be ill-equipped for the task of managing and upgrading the American prison system. One major impediment is the lack of funds. Because of the separation of powers, the judiciary has limited authority to com-

pel the executive to increase the funding allotment for the penal system. To a large degree, the effectiveness of judicial intervention in the area of prison reform is circumscribed by the courts' inability to marshall financial commitments for that purpose. But the major difficulty confronting the courts and those who envision social rehabilitation as a constitutional right lies in changing the public conceptualization of the penal system. The eighth amendment can only reflect the normative values of the American people. The future of the eighth amendment rests not so much with thoughtful jurists but rather with an informed and concerned public.

RONALD H. ROSENBERG

## Constitutional Law—Evidence—Testimonial Reprieve for Newsmen in Civil Litigation

Until recently newsmen appeared to be fighting a losing battle to obtain a privilege to withhold confidential sources and information in legal proceedings. By mid-1972 only eighteen states had statutes granting an evidentiary privilege to newsmen,[1] and the Supreme Court had decided in *Branzburg v. Hayes*[2] that newsmen enjoy no first amendment right to withhold information from grand juries. After *Branzburg*, several newsmen who refused to divulge their sources were held in contempt, and a few journalists[3] were jailed.[4] Several news-

1. ALA. CODE tit. 7, § 370 (1960); ALASKA STAT. §§ 09.25.150, 09.25.160 (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West, 1966); ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1972); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. ANN. § 421.100 (1969); LA. REV. STAT. §§ 45:1451-54 (Supp. 1970); MD. ANN. CODE art. 35, § 2 (1971); MICH. STAT. ANN. § 28.945(10) (1954); MONT. REV. CODES ANN. §§ 93-601 to -602 (1964); NEV. REV. STAT. § 49.275 (1969); N.J. STAT. ANN. §§ 2A-84A-21,29 (Supp. 1969); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1970); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2739.12 (Page 1953); PA. STAT. ANN., tit. 28, § 330 (Supp. 1970).

2. 408 U.S. 665 (1972), reporting the disposition of three cases: Branzburg v. Pound, 461 S.W.2d 345 (Ky.), *cert. granted sub nom.* Branzburg v. Hayes, 402 U.S. 942 (1971); *In re* Pappas, 358 Mass. 614, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1971); and Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971).

3. Throughout this note, "journalist" appears interchangeably with the terms "newsman" and "reporter." The term "newsman" encompasses persons involved in all phases of journalism, including news reporting and editing. Whether a privilege should extend also to college newspaper reporters and editors or to authors of current

men still face subpoenas and possible imprisonment.[5] Yet despite *Branzburg*, or perhaps in reaction against that decision, the tide seems to have shifted in recent months. Federal, state, and local officials issued relatively fewer subpoenas in the latter part of 1972 and in the beginning of 1973.[6] Furthermore, approximately fifty-eight bills calling for some type of evidentiary privilege for newsmen have been introduced in Congress during the current session.[7] Since *Branzburg*,

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books, for example, is a hotly debated question. The extent of a reportorial privilege, however, is an issue beyond the scope of this note.

4. N.Y. Times, Feb. 28, 1973, at 38, col. 5; *id.*, Feb. 22, 1973, at 10, col. 4. Peter Bridge was held in contempt of court and jailed for 20 days for refusing to disclose confidential information relating to a story about official corruption that appeared in the Newark Evening News; Edwin Goodwin received a 30-day sentence, of which he served 44 hours, for refusing to deliver WBAI-FM tapes of a prison riot; William Farr spent 46 days in jail for refusing to disclose his source for a Los Angeles Times article about the Charles Manson murder trial. *See, e.g.*, NEWSWEEK, Oct. 16, 1972, at 60; TIME, Jan. 1, 1973, at 44; N.Y. Times, Feb. 19, 1973, at 46, cols. 5-7; *id.*, Feb. 8, 1973, at 19, col. 1.

John Lawrence, Washington bureau chief for the Los Angeles Times, was jailed briefly (2 hours) after his initial refusal to release recordings of an interview with a key figure in the Watergate bugging case. The contempt citation and the jail sentence ended when the source of the interview agreed not to bind the Times to its promise of confidentiality and when the newspaper consequently handed over the tapes to the court. NEWSWEEK, Jan. 1, 1973, at 58; TIME, Jan. 1, 1973, at 44; N.Y. Times, Dec. 22, 1973, at 1, cols. 1-3.

5. Among these reporters are Caldwell, Pappas, and Branzburg. No effort has yet been made to recall either Caldwell or Pappas before grand juries; but Branzburg is under a state six-month contempt sentence and refuses to return to Kentucky. He currently works for the Detroit Free Press. Governor Wendell Ford of Kentucky has moved to extradite him from Michigan. TIME, Oct. 16, 1972, at 44; Hume, *A Chilling Effect on the Press*, N.Y. Times, Dec. 17, 1972, § 6 (Magazine), at 79.

Other possible contempt proceedings confront South Carolina newsmen who were subpoenaed to testify about a story on misconduct by officials and guardians at a local detention center. Hume, *supra* at 82.

In Memphis, Tennessee, a reporter faces a contempt charge by a state legislative subcommittee for refusing to disclose the source of an article about the abuses of a state-operated home for retarded children. NEWSWEEK, Oct. 16, 1972, at 60; Hume, *supra* at 82.

6. THE NEW REPUBLIC, Feb. 24, 1973, at 6.

7. S.J. Res. 8, S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128, 93rd Cong., 1st Sess. (1973); H.R. 717, H.R. 1263, H.R. 1735, H.R. 1794, H.R. 1813, H.R. 1818, H.R. 1819, H.R. 1985, H.R. 2002, H.R. 2015, H.R. 2101, H.R. 2187, H.R. 2200, H.R. 2230, H.R. 2231, H.R. 2232, H.R. 2233, H.R. 2234, H.R. 2433, H.R. 2563, H.R. 2584, H.R. 2651, H.R. 3143, H.R. 3181, H.R. 3369, H.R. 3460, H.R. 3482, H.R. 3520, H.R. 3595, H.R. 3725, H.R. 3741, H.R. 3811, H.R. 3964, H.R. 3975, H.R. 4020, H.R. 4035, H.R. 4135, H.R. 4275, H.R. 4383, H.R. 4423, H.R. 4456, H.R. 4749, H.R. 5060, H.R. 5167, H.R. 5194, H.R. 5198, H.R. 5227, H.R. 5317, 93rd Cong., 1st Sess. (1973).

Bills range from those calling for absolute protection to those suggesting a qualified newsman's privilege. Many bills list crimes involving foreign aggression or threat to life as areas in which the newsman's immunity should not apply. A critical point of difference is also whether or not Congress should pre-empt state laws on newsmen's privilege. *See*, N.Y. Times, Feb. 23, 1973, at 5, col. 1.

two states have passed "shield" laws for newsmen,[8] most of the remaining states are pressing for similar legislation,[9] and the Commissioners on Uniform State Laws are working on a model law to protect newsmen.[10]

Lower courts may also choose to limit the application of *Branzburg*, as demonstrated by the Second Circuit in *Baker v. F & F Investment*,[11] which declined to extend the *Branzburg* rule to civil cases. The court recognized a newsman's first amendment right to withhold from discovery the identity of confidential news sources in limited circumstances. This note will examine *Baker* in the context of prior law on testimonial privilege for newsmen and will weigh its significance as one of the first circuit court decisions clearly to recognize a first amendment claim to a reportorial privilege.[12]

Unlike many reporters who have faced grand jury subpoenas, journalist Alfred Balk in *Baker* faced demands for disclosure of confidential sources in civil litigation. In a federal class action plaintiffs, Chicago blacks charged local realtors with discrimination in the sale of housing.[13] Several years before the Chicago suit, journalist Balk had written an article on housing discrimination in Chicago entitled "Confessions of a Block-Buster," which appeared in the *Saturday Evening Post*.[14] Information for the article was provided by a local realtor who agreed to describe Chicago "blockbusting" practices on the condition that his identity be kept secret. When Balk refused to reveal the identity of the Chicago realtor in a deposition taken in New York, plaintiffs moved for an order under Rule 37 of the Federal Rules of Civil Procedure to compel discovery. A federal district court in New York denied the motion,[15] and plaintiffs appealed the order to the Second Circuit.[16]

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8. N.D. CENT. CODE § 31-01-06.2 (1973); R.I. GEN. LAWS ANN. §§ 9-19.1-1 to -2 (1973).

9. N.Y. Times, Feb. 11, 1973, at 58, cols. 3-6.

10. Blasi, *The Justice and the Journalist*, THE NATION, Sept. 18, 1972, at 199.

11. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 93 S. Ct. 2147 (1973).

12. Two other circuit courts have recognized a qualified privilege for newsmen: Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

13. Contract Buyers League v. F & F Investment, Civil No. 69-15 (N.D. Ill. filed 1969).

14. July 14-21, 1962, at 15.

15. Baker v. F & F Investment, 339 F. Supp. 942 (S.D.N.Y. 1972).

16. Generally, interlocutory appeals from discovery orders are not permitted, *see, e.g.*, Alexander v. United States, 201 U.S. 117 (1906); Bordern Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969); United States v. Fried, 386 F.2d 691 (2d Cir. 1967). Orders

In a unanimous decision, the Second Circuit upheld the lower court's order. While declining to find either New York or Illinois "shield" laws[17] controlling in *Baker*, the court recognized the first amendment interests in the public's receiving news and in the newsman's gathering news implicit in those laws and held those interests controlling. The Second Circuit applied a conventional first amendment balancing approach, weighing the journalist's first amendment right to disseminate and gather information and the public's need to be informed against the plaintiffs' and the public's interest in compelling testimony in judicial proceedings. The court found no "overriding and compelling interest" to which the first amendment interests must yield.[18]

The Second Circuit distinguished *Branzburg* since it was confined to grand jury investigations of criminal activity.[19] The court in *Baker*

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compelling discovery in a district other than the district in which the main action is brought are ordinarily non-appealable interlocutory decisions, *see, e.g.*, National Nut Co. v. Kelling Nut Co., 134 F.2d 532 (7th Cir. 1943). An order denying discovery in an "outside" jurisdiction, however, is immediately reviewable. Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551 (2d Cir. 1967). *See also* Baker v. F & F Investment, 470 F.2d 778, 780 (2d Cir. 1972); 9 J. MOORE, FEDERAL PRACTICE ¶ 110.13[2], at 157 (2d ed. 1973).

17. N.Y. CIVIL RIGHTS LAW § 79-h (McKinney Supp. 1972) provides:

> Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity. . . .

ILL. ANN. STAT., ch. 51, §§ 111-19 (Smith-Hurd Supp. 1972) provide for a privilege only to withhold disclosure of confidential sources. Section 111 states: "No court may compel any person to disclose the source of any information obtained by a reporter during the course of his employment except as provided in this Act."

Further limitations restrict the privilege. Section 111 provides: "The privilege conferred by this Act is not available in any libel or slander action in which a reporter or news medium is a party defendant." Section 117 provides that the court may divest the privilege if it finds:

> (a) that the information sought does not concern matters, or details in any proceeding, required to be kept secret under the laws of this State or of the Federal government; and
>
> (b) that all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved.

18. 470 F.2d at 783.

19. The Supreme Court stated in *Branzburg:* "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682.

emphasized that "[n]o such criminal overtones color the facts in this civil case."[20] The Second Circuit also declined to follow *Garland v. Torre*,[21] the leading civil case concerning a journalist's first amendment claim to testimonial privilege. *Garland* had rejected the reporter's first amendment argument, but the *Baker* court contended that the case was distinguishable since the plaintiff in *Garland* had taken unsuccessful independent action to discover the identity of the defendant's source and the identity of the source was essential to the plaintiff's suit. In the *Baker* fact situation, persons other than Balk might have disclosed the identity of the source, yet the plaintiffs made no attempt to exhaust this possibility. Furthermore, the court asserted that the identity of Balk's source did not go to the heart of the case. Also, Balk was not a party to the underlying action.[22]

The ease with which the Second Circuit distinguished *Baker* from *Branzburg* and *Garland* and the court's facility in finding a basis in the first amendment for Balk's refusal to disclose his source should not mask the truly innovative approach of the *Baker* court. The court's finding first amendment grounds for reportorial "privilege" appears unusual in light of prior development of the law in this area.

The common-law rule recognizes no evidentiary privilege for newsmen similar to that enjoyed by physicians and attorneys in their professional capacities.[23] Thus, newsmen may be compelled to reveal information given to them in confidence and to disclose the identity of confidential sources. This rule is uniformly observed in all types of legal proceedings: grand jury investigations,[24] judicial investigations relating to grand jury proceedings,[25] criminal trials,[26] legislative investigations,[27] and civil litigation.[28] Generally, courts have been unreceptive to the newsman's argument that an evidentiary privilege is essential to the maintenance of the journalist's livelihood,[29] although courts

20. 470 F.2d at 784.
21. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).
22. 470 F.2d at 783-84.
23. *See* Annot., 7 A.L.R.3d 591 (1966).
24. Clein v. State, 52 So. 2d 117 (Fla. 1950) (en banc); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); People *ex rel.* Phelps v. Fancher, 2 Hun 226 (N.Y. Sup. Ct. 1874).
25. Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919).
26. People v. Durrant, 116 Cal. 179, 48 P. 75 (1897); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); Pledger v. State, 77 Ga. 242, 3 S.E. 320 (1887); *cf.* Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951).
27. *Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897) (per curiam).
28. Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957).
29. *See, e.g.*, Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).

regularly exclude relevant evidence as a method of protecting other confidential relationships (husband-wife, attorney-client, physician-patient, and informer-police).[30] Likewise, the Proposed Federal Rules of Evidence include no newsmen's privilege.[31]

Many cases that rely on the common-law rule give no reason for its application.[32] When a reason is given, the most frequent explanation for the rule denying a newsman's privilege is the superior interest of the public in compelling testimony over any private considerations that exist between newsmen and their sources.[33] The courts often cite Wigmore, who disfavors privileges as "so many derogations from a positive general rule [that everyone is obligated to testify when properly summoned]" and as "obstacle[s] to the administration of justice."[34]

Only twenty states so far have legislated evidentiary privileges for newsmen,[35] in derogation of the common-law rule. Even where statutes exist, however, journalists receive little protection, since many of these laws provide heavily qualified privileges.[36] Furthermore, "shield"

30. *See, e.g.*, People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936).

31. PROPOSED FED. R. EVID. (although the Supreme Court approved the new Federal Rules of Evidence on November 20, 1972, to become effective July 1, 1973, the Rules are still "Proposed" because Congress passed legislation which requires express Congressional approval before the Rules can become effective. Act of March 30, 1970, Pub. L. No. 93-12, 87 Stat. 9. At the time of this writing, Congress had not yet approved the Rules).

32. Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); People v. Durrant, 116 Cal. 179, 48 P. 75 (1897); Pledger v. State, 77 Ga. 242, 3 S.E. 320 (1887).

33. *See, e.g.*, Plunkett v. Hamilton, 136 Ga. 72, 83, 70 S.E. 781, 786 (1971); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936).

34. 8 J. WIGMORE, EVIDENCE § 2192, at 70, 73 (McNaughton rev. 1961).

35. *See* jurisdictions cited in notes 1 and 8 *supra.*

36. ALASKA STAT. §§ 09.25.160 (Supp. 1970) requires disclosure of sources if the withholding of testimony would result in a "miscarriage of justice" or is "contrary to the public interest." In Arkansas, under ARK. STAT. ANN. § 43-917 (1964), the newsman must disclose his source if his article containing confidential information was published "in bad faith, with malice, and not in the interest of the public welfare." In Illinois, ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1972) withdraws the newsman's privilege in libel and slander actions in which the newsman is a party defendant and may require disclosure of confidential sources if "the information sought does not concern matters . . . required to be kept secret" under state or federal law or if "all other available sources of information have been exhausted and disclosure . . . is essential to the protection of the public interest involved." In Louisiana, LA. REV. STAT. §§ 45:1451-54 (Supp. 1970) requires disclosure of confidential sources when "essential to the public interest." In New Mexico, under N.M. STAT. ANN. § 20-1-12.1 (Supp. 1970) disclosure of sources is required when "essential to prevent injustice."

In six states the newsman enjoys a privilege to withhold his source only after publication of an article based on confidential information. *See* ALA. CODE tit. 7,

laws in derogation of the common law are strictly construed; courts that have interpreted existing statutes have frequently denied the privilege altogether. Strict construction of newsmen's statutory privileges has been the rule in both criminal proceedings[37] and civil litigation.[38] In only a limited number of cases has the journalist been successful.[39] The present uncertainty as to the applicability of state law in federal courts poses another hazard to the journalist if the question of statutory privilege arises in federal question cases. *Baker*, for example, chose to ignore both the "shield" laws of Illinois (the forum state) and New York (the state where Balk's deposition was taken).[40]

The first amendment claim to a newsman's privilege was presented initially in *Garland v. Torre*,[41] a civil action in which actress Judy Garland brought suit against newspaper columnist Marie Torre

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§ 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); CAL. EVID. CODE ANN. § 1070 (West 1966); KY. REV. STAT. ANN. § 421.100 (1969); MD. ANN. CODE art. 35, § 2 (1971); N.J. STAT. ANN. §§ 2A-84A-21, -29 (Supp. 1969).

Three states protect *confidential communications* received from sources, *see* MICH. STAT. ANN. § 28-945(1) (1954); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1970); PA. STAT. ANN., tit. 28, § 330 (Supp. 1970). Other states which permit the newsman to withhold the identity of sources require disclosure of confidential communications.

37. Branzburg v. Hayes, 408 U.S. 665 (1972); State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943).

California's statute was strictly construed in the case of William Farr, when the court held the statute inapplicable. *See* note 4 *supra*. Peter Bridge was cited for contempt and jailed despite the New Jersey statutory privilege for newsmen. *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972), *cert. denied*, 93 S. Ct. 1500 (1973).

38. *In re* Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964) (Cal. statute); Deltec, Inc. v. Dun. & Bradstreet, Inc., 187 F. Supp. 788 (N.D. Ohio 1960) (Ohio statute); Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956); Beecroft v. Point Pleasant Printing & Publishing Co., 82 N.J. Super. 269, 197 A.2d 416 (1964).

39. *Ex parte* Sparrow, 14 F.R.D. 351, (N.D. Ala. 1953) (libel action, Alabama statute); *In re* Howard, 136 Cal. App. 2d 816, 289 P.2d 537 (1955) (labor dispute); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963) (grand jury investigation).

40. In deciding whether to apply the federal or state law on privilege, the rule is clear in cases arising in federal courts under diversity jurisdiction: state law is determinative, *see* Cervantes v. Time Inc., 464 F.2d 986, 989 (8th Cir. 1972). Courts are divided, however, as to the obligation of federal courts to follow state privilege rules when the underlying action arises in federal question cases. *See* Annot., 95 A.L.R.2d 320 (1964); Comment, *Evidentiary Privileges in the Federal Courts*, 52 CAL. L. REV. 640 (1964). Although the Second Circuit in *Baker* held state law nondeterminative, the Ninth Circuit ruled in Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960), that if state laws of privilege are regarded as not mere rules of evidence but as substantive rights, the *Erie* principle should apply and state law should be followed even in federal question cases. In the Proposed Federal Rules of Evidence, rule 501, however, the Advisory Committee's note indicates that federal law will henceforth control in cases arising under federal question jurisdiction, *i.e.*, newsmen will enjoy no evidentiary privilege.

41. 259 F.2d 545 (2d Cir. 1958).

for publishing defamatory remarks allegedly made by CBS officials. The plaintiff moved to compel Miss Torre to reveal the source of the alleged statements, but the columnist refused on the grounds that disclosure of confidential news sources would encroach upon freedom of the press. Miss Torre contended "it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public."[42] In dictum the court accepted the journalist's argument that compulsory disclosure of confidential news sources may entail an abridgement of press freedom. Nevertheless, the court rejected Miss Torre's claim to privilege in holding that first amendment considerations were not absolute and would yield under the Constitution "to a paramount public interest in the fair administration of justice."[43] The *Garland* rule, which has since become the majority view, resurfaced in two other civil cases: *In re Goodfader*[44] and *Adams v. Associated Press*.[45] In both cases the courts emphasized the importance of compulsory testimony as opposed to first amendment interests in nondisclosure.

At least seven decisions involving grand jury investigations have echoed similar rejections of a newsman's first amendment privilege,[46] the most important of which was the Supreme Court's ruling in *Branzburg*. Although journalists in these cases argued for a privilege based on the public's right to the news, the news editor in *State v. Buchanan*,[47] as well as reporters Branzburg, Pappas, and Caldwell, claimed a privilege also grounded on a newsman's right to gather news.[48] In rejecting this claim, the *Buchanan* court stated that a newsman has no constitutional right to information that is not accessible to the public generally and that granting special privileges to newsmen would violate notions of equal protection.[49] The Supreme Court reiterated this view

42. *Id.* at 547-48. The argument that the first amendment exists to preserve an "untrammeled press as a vital source of public information" has received Supreme Court approval, Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); *cf.* Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

43. 259 F.2d at 549.

44. 45 Hawaii 317, 367 P.2d 472 (1961).

45. 46 F.R.D. 439 (S.D. Tex. 1969).

46. Branzburg v. Hayes, 408 U.S. 665 (1972); Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971); *In re* Pappas, 358 Mass. 614, 266 N.E.2d 297 (1971); *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963); State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971).

47. 250 Ore. 244, 436 P.2d 729 (1968).

48. *Id.* at 247, 436 P.2d at 730.

49. *Id.* at 247-49, 436 P.2d at 731.

in *Branzburg*.[50] In rejecting newsmen's alternative first amendment claims based on the public's right to news, the courts either placed a higher value on the public's "right to everyman's evidence"[51] than on the public's "need to know" or considered the relationship between the protection of news sources and the gathering of news excessively tenuous.[52]

Prior to *Baker*, few decisions had granted newsmen a qualified right to withhold information.[53] Among those decisions, the opinion of the Ninth Circuit in *Caldwell v. United States*[54] was subsequently overturned by the Supreme Court. Two civil libel cases, *Alioto v. Cowles Communications, Inc.*[55] and *Cervantes v. Time, Inc.*,[56] although they affirmed reporters' first amendment claims of privilege, involved issues different than those that the *Baker* court confronted;[57] neither could serve as exact precedent to *Baker*.

In giving effect to qualified constitutional privilege, *Baker* seems to be a clear departure from the mainstream of law. Yet this case appears in some aspects to follow *Branzburg* and *Garland*. Although the *Branzburg* rule was strictly confined to grand jury investigations, the Supreme Court indicated that in general only "compelling" or "paramount" interests would override first amendment rights.[58] Similarly, *Garland* asserted that "compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom"[59] and that any infringement of first amendment rights would be justified only in view of an overriding public interest in compelling testimony.[60] The court in *Baker* could have easily reached its decision

50. 408 U.S. at 684.
51. *See* note 34 *supra*.
52. *See, e.g.*, 408 U.S. at 693-94.
53. Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970); Air Transport Ass'n v. Professional Air Traffic Controllers Organization, Crim. Nos. 70-400, -410 (E.D.N.Y. April 6, 1970 at 21, 38-39, 149-50) *cited in* Comment, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 318 n.7 (1970) [hereinafter cited as *Reporters*]; Alioto v. Cowles Communications, Inc., C.A. 52150 (N.D. Cal. Dec. 4, 1969 at 165-67) *cited in Reporters* 318 n.7; People v. Dohrn, Crim. No. 69-3808 (Cir. Ct. Cook Cty., Ill. May 20, 1970) *cited in Reporters* 318 n.7; People v. Rios, No. 75129 (Super. Ct. San Francisco Cty. 1970) *cited in Reporters* 318 n.7.
54. 434 F.2d 1081 (9th Cir. 1970).
55. C.A. 52150 (N.D. Cal. Dec. 4, 1969 at 165-67) *cited in Reporters* 318 n.7.
56. 464 F.2d 986 (8th Cir. 1972).
57. *See* text accompanying notes 86 and 87 *infra*.
58. 408 U.S. at 700.
59. 259 F.2d at 548.
60. *Id.*

within the framework of Justice Powell's concurring and controlling opinion in *Branzburg*,[61] which asserted the legitimacy of resisting demands that bear only a "remote and tenuous relationship to the subject of the investigation. . . ."[62] The identity of Balk's news source was tangential to the thrust of the *Baker* plaintiffs' complaint. The necessity for disclosing the confidential source was in no way "compelling" or "paramount." In fact, it paled in significance to the importance of unearthing information for grand jury investigations. According to this view, *Baker* reached a different result because it was factually distinguishable from *Branzburg*. The same conclusion may apply in comparing *Baker* to *Garland*. The court in *Baker* apparently accepted the view expressed in *Garland* that when disclosure of a newsman's confidential sources goes "to the heart of the . . . claim" a compelling need may be found sufficient to override first amendment interests.[63] The court may have affirmed the newsman's position because the identity of the news source "simply did not go to the heart of appellants' case. . . ."[64]

Nevertheless, the congruence between *Baker* on the one hand, and *Branzburg* and *Garland* on the other, is superficial and should not mask the real disparity between *Baker*'s language and approach and that of *Branzburg* or *Garland*. The court in *Baker* recognized what *Branzburg* and *Garland* accepted only as an hypothesis: "[c]ompelled disclosure of confidential sources *unquestionably* threatens a journalist's ability to secure information that is made available to him only on a confidential basis."[65] *Garland* postulated only an "hypothesis that compulsory disclosure of a journalist's confidential sources of information *may* entail an abridgment of press freedom by imposing some limitation upon the availability of news."[66] The Second Circuit at the time of the *Garland* decision was unconvinced that first amendment interests were involved. So was the Supreme Court in deciding *Branzburg*. It asserted that its decision in no way threatened the vast bulk of confidential relationships between reporters and their sources[67] and

61. 408 U.S. at 709-10. Since the Court was split five to four in its decision, Powell as the fifth and pivotal member of the majority carried, in his concurring opinion, the controlling view.
62. *Id.* at 710.
63. 470 F.2d at 783-84.
64. *Id.* at 783.
65. *Id.* at 782 (emphasis added).
66. 259 F.2d at 548 (emphasis added).
67. 408 U.S. at 691.

contended that the existing rules denying a newsman's privilege "have not been a serious obstacle to either the development or retention of confidential news sources by the press."[68] The Court ruled that the burden on news gathering that results from forced disclosures was at best uncertain.[69]

*Baker* went one step further than *Garland* or *Branzburg* by reaffirming the *Buchanan* claim that the press, independent of the public's right to information, has a constitutional right to gather news.[70] *Garland* had refused to elevate the press's interest beyond a mere private stake in withholding news, and *Branzburg* flatly rejected the notion of a newsman's right to gather news.[71] *Baker* further transformed the terms in the balancing analysis by relabelling the interests involved in civil litigation. *Garland* had asserted that the balancing test in civil actions pitted a *public* interest in compelled testimony against a newsman's *private* interest in withholding information.[72] *Baker*, on the other hand, alluded to the "public and private interests" in nondisclosure rivalling the litigants' "private interest" in compelled disclosure.[73]

*Baker* not only transformed the terms of the balancing equation but also modified the weight given those terms. Whereas *Garland* and *Branzburg* emphasized the "paramount public interest in the fair administration of justice,"[74] *Baker* stressed the preferred position of the first amendment.[75] Underlining the "paramount public interest in the maintenance of a vigorous, aggressive and independent press,"[76] *Baker* asserted that only in "rare" cases, "few in number," will first amendment rights yield to competing interests.[77] The contrary presumption prevails in both *Branzburg* and *Garland*.

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68. *Id.* at 699.
69. *Id.* at 693.
70. 470 F.2d at 782.
71. "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 408 U.S. at 684. If the Court's statement is a rejection of the newsman's private claim as a balancing test factor in *all* legal proceedings, the Second Circuit may have exceeded its jurisdiction by violating the Supreme Court's dictum. If, on the other hand, one accepts literally the Supreme Court's assertion that its opinion in *Branzburg* was strictly confined to grand jury proceedings, *Baker* may easily be distinguished from *Branzburg*. *Baker* may be viewed as recognizing a newsman's private first amendment interest in the context of *civil litigation* only.
72. 259 F.2d at 549.
73. 470 F.2d at 782, 785.
74. 259 F.2d at 549.
75. 470 F.2d at 783.
76. *Id.* at 782.
77. *Id.* at 783.

Most significantly, *Baker* demonstrates the potential of lower courts to limit *Branzburg* by refusing to apply its rule outside grand jury proceedings. Lower courts seeking to overcome the Supreme Court's ruling may do so not only because the Court confined its decision strictly to grand jury investigations,[78] but also because the first amendment balancing equation varies significantly with the legal context in which the newsman's claim is presented. The argument for a newsman's testimonial privilege has been asserted generally in five basic types of legal proceedings: (1) grand jury investigations, (2) criminal trials, (3) civil litigation, not including defamatory actions, (4) civil defamatory litigation, and (5) legislative hearings. Although the balance of interests that determines the success of a newsman's first amendment claim is decided on a case-by-case basis,[79] the character of the proceedings in which the claim is asserted will be a major determinant in the balancing test. Under that test, the claims on the newsman's side—the public's right to information and the newsman's interest in gathering news—are constant, independent of the nature of the legal proceedings. The interests on the opposite side of the scales vary, however, with the nature of the legal context.

In grand jury investigations the obligation to appear and testify is especially strong and the scope of permissible inquiry is broad.[80] The Supreme Court noted in *Branzburg* that the scope of inquiry is necessarily far-reaching because the task of the grand jury "is to inquire into the existence of possible criminal conduct and to return only well-founded indictments. . . ."[81] Grand jury investigations, it observed, are "constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes,"[82] and "[t]he adoption of the grand jury 'in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.' "[83]

In criminal trials since the prosecution's interest in compelling testimony approximates that of the prosecution in grand jury investigations, one may speculate that the scales will generally be weighted against the newsman. Another factor weighing against the newsman's

78. 408 U.S. at 682.
79. *Id.* at 710 (Powell, J., concurring).
80. *Id.* at 688.
81. *Id.*
82. *Id.* at 687.
83. *Id., quoting* Costello v. United States, 350 U.S. 359, 362 (1956).

first amendment claim is that the defendant in criminal cases has a constitutional right ". . . to have compulsory process for obtaining witnesses in his favor. . . ."[84]

In civil litigation the newsman stands a far greater chance of successfully arguing a constitutional testimonial privilege than in grand jury investigations or criminal trials. He may rely on the Supreme Court's assertion of the superior status of the grand jury in distinguishing his case. Also, in civil litigation, unlike grand jury investigations and criminal trials, the interest in compelling testimony is exclusively that of a private litigant.[85] Pitted against the newsman's argument in favor of a public right to nondisclosure, the private litigant in civil litigation may have difficulty in compelling confidential information from newsmen.

In civil defamatory action, however, the outcome of the balancing test is less clear. On one hand, recognition of a newsman's privilege in defamatory actions could destroy libel actions against news media. Plaintiffs are required to prove that news-defendants acted with "reckless disregard of the truth,"[86] a difficult requirement if newsmen can hide behind anonymous sources. On the other hand, if newsmen are denied a testimonial privilege in defamatory actions, the danger exists that public figures could get access to reporters' sources merely by filing libel suits.[87]

In legislative hearings the newsman must overcome a tradition of broad legislative investigatory powers, but he may point to the Court's assertion in *Branzburg* of the superior status of the grand jury in distinguishing his case. The newsman may also rely on a few cases that suggest first amendment limitations on legislative powers to investigate.[88]

*Baker* leaves at least two critical questions unanswered. First, should a qualified privilege for newsmen vary with the nature of the news reported? Arguably, the courts should grant greater protection

84. U.S. CONST. amend. VI.
85. Baker v. F & F Investment, 470 F.2d at 783, 785.
86. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).
87. *See* Blasi, *The Justice and the Journalist*, THE NATION, Sept. 18, 1972; Hume, *A Chilling Effect on the Press*, N.Y. Times, Dec. 17, 1972, § 6 (Magazine) at 82; *id.*, Feb. 22, 1973, at 10, cols. 4-5.
88. *See, e.g.*, DeGregory v. Attorney Gen., 383 U.S. 825 (1966); Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); Watkins v. United States, 354 U.S. 178 (1957) (dictum); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

to coverage of governmental misconduct, civil corruption, foreign aggression, and serious crimes, rather than to gossip items or articles covering the private lives of public figures, for example. On the other hand, this type of distinction could engage the judiciary in a dangerous arbitration of what news the public needs to know. Secondly, how can *Baker's* qualified privilege approach, which relies on such incalculable contingencies as whether the information sought "goes to the heart of . . . the case," whether the identity of the news source will be demanded in a civil trial or a grand jury investigation, or whether the party seeking confidential information will have recourse to another available source, help the newsman at the critical moment when the source is approached? Unless the newsman, who cannot know the answer to such variables prior to ligitation, is able to guarantee confidentiality, his source may refuse to talk.

Despite its shortcomings, *Baker* represents a judicial giant-step toward recognition that a newsman's privilege is today necessary to protect the free flow of information to the public. Events subsequent to *Branzburg* have shown that the Supreme Court's ruling has had a chilling effect on the press,[89] retarding precisely that type of reflective and socially relevant news coverage that the Second Circuit sought to protect in *Baker*. Hopefully, the *Baker* decision will serve as a model to lower courts in limiting *Branzburg*'s application and as a guide to federal and state legislatures in drawing up statutory privileges for newsmen. In the growing number of civil actions in which private litigants demand disclosure of confidential news sources,[90] *Baker* will have its greatest impact as precedent.

It would be misleading, however, to exaggerate *Baker*'s importance, since the question of privilege depends greatly on the factual nuances of each case. Uncertainty in the area of a constitutional testimonal privilege for newsmen outside grand jury investigations awaits resolution by the Supreme Court.

DIANA CARTER PRADKA

89. *See generally*, Hume, *A Chilling Effect on the Press*, N.Y. Times, Dec. 17, 1972), § 6 (Magazine), at 13.

Reporter Earl Caldwell has stated, for example: "From now on no newspaper can hope to cover effectively an organization such as the Panthers. I don't care how black a reporter is, he won't get close. He won't and he shouldn't try. He won't because he cannot be trusted as a reporter." *Ask me, I Know. I was the Test Case*, SATURDAY REVIEW, Aug. 5, 1972, at 5.

90. Blasi, *Privilege in a Time of Violence*, THE NATION, Dec. 21, 1970, at 655,

## Constitutional Law—Limiting the Use of Standardized Intelligence Tests for Ability Grouping[1] in Public Schools

Judge Peckham of the United States District Court for the Northern District of California faced a somewhat unusual allegation of *de facto* segregation in the case of *P. v. Riles*.[2] The *de facto* segregation allegedly existed not among individual schools of the local school district, but among classes within each individual school. Plaintiffs, who remained anonymous for their own protection, alleged that placement of blacks in classes for the educable mentally retarded (EMR classes) on the basis of I.Q. tests is a denial of equal protection.[3] The district court, noting the presence of cultural bias[4] in the I.Q. tests and the great proportion of blacks in the EMR classes,[5] agreed with the plaintiffs and granted a preliminary injunction prohibiting the use of I.Q. tests as the primary standard for placement in EMR classes or for reevaluating those already placed in EMR classes.[6] At the same time the court denied plaintiffs' request for a mandatory injunction "requiring the defendants to take affirmative action to compensate black students who have been wrongfully placed in EMR classes at some time in the past."[7] Plaintiffs had sought supplemental education for those students whose progress had been hindered by erroneous placement in EMR classes, hiring of black psychologists to insure that blacks were judged fairly, and establishment of a ratio limiting the percentage of blacks allowable in EMR classes.[8]

Judge Peckham found that wrongful placement of students in EMR classes warranted injunctive relief. He said, "[E]ven if a student remains in an EMR class for only one month, that placement is

1. The phrase "ability grouping" refers to the practice of dividing students according to their measured ability to learn at a certain level.

2. 343 F. Supp. 1306 (N.D. Cal. 1972).

3. In support of this allegation, plaintiffs further alleged that I.Q. tests were the primary standard used to place children in these classes, that many blacks scored low because of the cultural bias present in the test itself, and that as a result of this erroneous placement, these students were being deprived of an equal educational opportunity. *Id.* at 1308.

4. The phrase "cultural bias" refers to that factor present in certain tests that causes a particular child to perform poorly on the test because of his cultural or environmental background.

5. The complaint alleged that while only 28.5% of all students in the school district were black, 66% of all students in EMR classes were blacks. 343 F. Supp. at 1311.

6. *Id.* at 1314.

7. *Id.*

8. *Id.*

noted on his permanent record, his education is retarded to some degree, and he is subjected to whatever humiliation students are exposed to for being separated into classes for the educable mentally retarded."[9]

The most important question before the court was whether blacks were being wrongfully placed in EMR classes in violation of their rights to equal protection. At this point the court made a significant procedural decision. The traditional equal protection test places the burden on the plaintiff to show that no rational relationship existed between the method of classification used and the resulting classification.[10] Judge Peckham rejected this traditional test and ruled that the burden of persuasion would be shifted to the defendants on the establishment of a prima facie case by the plaintiffs.[11] Consequently, the plaintiffs needed only to show that the I.Q. tests resulted in a racial imbalance and the court would shift the burden of persuasion of a rational relationship to the defendants.[12]

The court relied on analogous cases in the areas of employment discrimination,[13] jury selection,[14] and school desegregation[15] to support this shift. In addition to these lines of case law, Judge Peckham delineated three policies behind the shift: 1) shifting the burden of proof is a reflection of the strong judical policy against racial discrimination;[16] 2) in a racial discrimination case there is sometimes said to exist an affirmative duty to implement integration in certain of our institutions;[17] and 3) an empirical assumption that native intelligence is randomly distributed among the population and that if an uneven classification on that basis is found, it is probably due to discrimination.[18]

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9. *Id.* at 1308. Plaintiffs' evidence consisted of the results of standard I.Q. tests administered by black psychologists with special emphasis on reducing the cultural bias in the test through the acceptance of non-standard answers and through rewording of some of the questions that tended to show that plaintiffs were mentally retarded. *Id.* Plaintiffs' irreparable injury allegedly flowed "from plaintiffs' placement in EMR classes because the curriculum is so minimal academically, teacher expectations are so low, and because other students subject EMR students to ridicule on account of their status." *Id.*

10. *Id.*

11. *Id.* at 1311.

12. *Id.*

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

14. Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971), *cert. denied,* 409 U.S. 929 (1972).

15. United States v. School Dist. 151, 286 F. Supp. 786 (N.D. Ill.), *aff'd,* 404 F.2d 1125 (7th Cir. 1968).

16. 343 F. Supp. at 1309.

17. *Id.* at 1310.

18. *Id.*

The court found that the statistical evidence alleged by plaintiff was sufficient to establish a racial imbalance. To establish the second element of their prima facie case, that I.Q. tests were the primary determinant in placement, plaintiffs relied mainly on the finding of *Hobson v. Hansen*[19] that I.Q. tests influence all of the other evaluations of a student made by school officials. Teacher evaluation was shown in *Hobson* to be especially tainted by knowledge of a student's I.Q. score.[20] In finding that the plaintiffs had presented a prima facie case of discrimination, the court relied on the influence argument of *Hobson* as well as language in the Education Code[21] stating that other evidence must "substantiate" the I.Q. score before a student could be placed in an EMR class.[22]

Once the burden of proving rationality had shifted to them, defendants argued that the racial imbalance was not a result of the tests or that the tests, though racially biased, were still rationally related to the classification because they were the only means of classification available.[23] The court made quick work of these arguments dismissing the first by observing that defendants had failed to produce any supporting evidence in its favor and dismissing the second by alluding to alternative methods of placing mentally retarded students in practice in New York and Massachusetts.[24]

After this dismissal of defendants' arguments, the court granted the preliminary injunction sought by the plaintiffs but rejected their other claims for mandatory relief in order to give defendants flexibility in formulating a corrective plan.[25] The narrow holding of the case was that the use of I.Q. tests as the primary basis for placing black students in classes for the educable mentally retarded that results in a significant racial imbalance in such classes is a denial of equal protection. This result was based on the absence of any evidence to establish

19. 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1969).
20. *Id.* at 484.
21. CAL. EDUC. CODE § 6902.085 (West Supp. 1973).
22. 343 F. Supp. at 1312. The court also found that the use of I.Q. scores by parents in signing required consent forms tainted the consent features of the Code so as to make the consent not a truly voluntary one. The court found that parents were overawed by the seemingly scientific significance of the I.Q. scores. *Id.* at 1313.
23. *Id.* The defendants also argued that the racial imbalance resulted from the "location of EMR classes in predominantly black schools prior to desegregation" and because more white parents of mentally retarded children put their children in private schools than did black parents of mentally retarded children. *Id.*
24. *Id.* The court cited the use of achievement tests and teacher evaluation in New York and the Massachusetts requirement of "psychological assessment." Both of these districts exclude the use of group I.Q. tests. *Id.* at 1314.
25. *Id.* at 1314-15.

that I.Q. tests were culture free[26] or that a reasonable rationale for the use of the present culturally biased text existed. Since defendants failed to carry their burden of proof/persuasion by producing evidence to show that the tests were culture free, the result might conceivably be different in future cases in which defendants are more diligent.

The question treated by the federal district court has never reached the Supreme Court, but it has been treated extensively by at least one other district court and incidentally by several other courts.[27] The right of school districts to separate students on the basis of learning ability was recognized in *Shuttlesworth v. Birmingham Board of Education.*[28] In *Jones v. School Board*[29] assignments were made to particular schools on the basis of I.Q. scores. The court held that this use of I.Q. tests was not unconstitutional *per se*; however, this standard must be "properly applied".[30] The court also stated that the school district could not consider racial factors in making assignment decisions. In contrast to *P. v. Riles,* the *Jones* court left the burden of proof of the issue of rational relationship on the plaintiff.[31]

In *Miller v. School District Number 2* [32] the issue of ability grouping was also raised. In that decision the district court explained that its primary concern was to prevent racial discrimination and that "the practice of separating study groups or classes into accelerated or slow sections is a matter for educators."[33]

Both of these earlier cases treated the use of I.Q. tests incidentally in the context of broader school desegregation questions. These courts were more concerned with the achievement of integration within a school district and the avoidance of blatant discrimination in school attendance than with unintentional intra-school segregation of the type resulting from the use of I.Q. tests in class placement. Ability grouping was regarded as an educational tool to be employed at the discretion of those in charge of operating the school system. Their decision

26. A culture free test is one that lacks the elements creating cultural bias. *See generally* P. Pascale, The Impossible Dream: A Culture-Free Test, 1971 (published on microfiche by Educ. Research Information Center, catalog no. ED 054 217).

27. See text accompanying notes 28-33 and 45-49 *infra.*

28. 162 F. Supp. 372 (N.D. Ala. 1958) (dictum), *aff'd,* 358 U.S. 101 (1958). "Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn . . . ." Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957), *quoted,* 162 F. Supp. at 378.

29. 278 F.2d 72 (4th Cir. 1960) (per curiam).

30. *Id.* at 75.

31. *Id.* at 77.

32. 256 F. Supp. 370 (D.S.C. 1966).

33. *Id.* at 375.

was final so far as the courts were concerned as long as race was not a criterion in placement. They seemed to have been unaware of the possibility of having *de facto* segregation arising totally from the use of I.Q. tests themselves.

The argument that discrimination might arise from the cultural bias of I.Q. tests finally emerged in the first extensive judicial treatment of ability grouping. Judge Skelly Wright wrote at length on this problem in *Hobson v. Hansen* in 1967. In the context of a major attack on segregation in the District of Columbia's school system, plaintiffs attacked the use of a track system by local school authorities that divided pupils into four tracks ranging from "basic" to "honors" based primarily on comparative I.Q. scores. The school officials acknowledged that the track system was developed as a "response to problems created by the sudden commingling of numerous educationally retarded Negro students with the better educated white students."[34] Judge Wright found that the "effect of this separation would be to insulate the more academically developed white student from his less fortunate black schoolmate, thus minimizing the impact of integration . . . ."[35] Despite no evidence of an intentional violation, the court held that the use of I.Q. tests to support a track system was a violation of equal protection since these tests were standardized on a white middle class level and thus were discriminatory against blacks.[36] To implement this conclusion, the court ordered the abolition of the track system.[37]

Judge Wright seemed especially concerned over the substantial risk that the intelligence of black children would be underestimated by the I.Q. tests and thus they would be undereducated.[38] The lack of flexibility in the system, the lack of movement upward, and the lack of any attempt to supplement the education of those blacks who were behind weighed heavily in the decision. A parallel concern of the court in *Hobson* was that in an urban school system blacks and whites though going to school together were not being taught together because of the track system.[39] Judge Wright seemed to be saying that integrated classrooms as well as integrated schools were needed to insure that blacks actually received an equal educational opportunity.

34. 269 F. Supp. at 442.
35. *Id.* at 443.
36. *Id.*
37. *Id.* at 517.
38. *Id.* at 489.
39. *Id.* at 443.

The court in *Hobson* applied the traditional equal protection test of rationality.[40] It has been pointed out, however, that "the court seems to apply a standard less permissive than the rationality test."[41] Although Judge Wright only hinted at the application of a compelling state interest test,[42] that seems to be what he applied.[43] This more stringent test is derived from the constitutionally suspect classification of race.[44] Judge Wright placed the burden of proof on this issue on the defendants, and the court in *P. v. Riles* followed his example.

Following Hobson, other courts have seized on its reasoning in deciding *de facto* segregation cases. In *Graves v. Walton County Board of Education*[45] a federal district court in Georgia issued an injunction requiring defendants to "provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education."[46] In a recent decision from a federal district court in North Carolina, the judge described the duty on local school boards "as not simply a negative duty to refrain from active legal racial discrimination, but a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical *apartheid*."[47] In that case, however, the court sanctioned a division of students into study groups based on achievement in a particular course even though evidence showed that there was a high percentage of blacks in the "slow" and "regular" sections.[48] The court declared that it was an educational matter whether ability grouping was allowed in a particular school system.

From these scattered opinions, it is difficult to ascertain any common standard. The court in *P. v. Riles* relied only on *Hobson* in making its decision. Judge Peckham drew from *Hobson* the shifting of the burden of proof[49] as well as the realization that testing could lead to

40. *Id.* at 511.
41. Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511, 1519 (1968).
42. This test is applied in Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 630 (1969). The Supreme Court decided that for a suspect classification to be upheld it must "promote a compelling state interest." *Id.*
43. *See* 269 F. Supp. at 513; Note, 81 HARV. L. REV., *supra* note 41, at 1519-20.
44. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
45. 300 F. Supp. 188 (M.D. Ga.), *aff'd*, 410 F.2d 1152 (5th Cir. 1968).
46. *Id.* at 200.
47. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358, 1363 (W.D.N.C. 1969).
48. *Id.* at 1367.
49. *See* note 62 *infra*.

*de facto* segregation within a school. He did not seem as concerned, however, over the use of ability grouping or the lack of supplemental programs for deprived blacks as Judge Wright was. The main goal of all courts dating from the original desegregation decision[50] has been to provide the black with an equal educational opportunity. One commentator has rephrased this goal: "In a broad sense probably the most important idea underlying the entire push for school desegregation, de-jure and de facto, is the possibility of developing greater intellectual and other competence in Negro children who are looked upon as culturally deprived."[51] The implementation of this goal has raised several questions for the courts in relation to the use of I.Q. tests for ability grouping.

Educational theorists are themselves not in agreement on the answers to such questions as: 1) is ability grouping educationally useful?[52] 2) are I.Q. tests accurate standards for placement in ability groups?[53] and 3) are varying results on I.Q. tests by race due entirely

50. Brown v. Board of Educ., 347 U.S. 483 (1954).

51. Punke, *Competence as a Basis of Student Assignment*, 32 ALA. LAW. 24, 40 (1971).

52. *See generally* M. Bryan, Ability Grouping: Status, Impact, and Alternatives, June 1971 (published on microfiche by Educ. Research Information Center, catalog no. ED 052 260); D. Esposito, Homogeneous and Heterogeneous Grouping: Principal Findings and Implications of a Re-search of the Literature, July 1971 (published on microfiche by Educ. Research Information Center, catalog no. ED 056 150).

53. Several educational theorists have written that I.Q. tests are accurate predictors of academic achievement. *See* V. Bennett, Intelligence Testing in the Schools, 1970 (published on microfiche by Educ. Research Information Center, catalog no. ED 045 708); V. Bhushan, Comparison of IQ and Socioeconomic Index in Predicting Grade Point Average, Mar. 6, 1970 (published on microfiche by Educ. Research Information Center, catalog no. ED 039 304); D. Goslin, The Social Consequences of Predictive Testing in Education, May 1965 (published on microfiche by Educ. Research Information Center, catalog no. ED 018 219); Hughson, *The Case for Intelligence Testing*, in CONTEMPORARY ISSUES IN EDUCATIONAL PSYCHOLOGY 366 (1970). However, other theorists have denied that I.Q. tests are useful for any purpose. *See* L. Barrit, Intelligence Tests and Educationally Relevant Measurements, Sept. 1, 1967 (published on microfiche by Educ. Research Information Center, catalog no. ED 016 255); R. Nichols, Implications of Racial Differences in Intelligence for Educational Research and Practice, Feb. 6, 1969 (published on microfiche by Educ. Research Information Center, catalog no. ED 033 179); Yourman, *The Case Against Group IQ Testing*, in CONTEMPORARY ISSUES IN EDUCATIONAL PSYCHOLOGY 371 (1970). There does seem to be a general agreement that I.Q. tests do not measure innate learning potential. *See* Garcia, *IQ—The Conspiracy*, PSYCHOLOGY TODAY, Sept. 1972, at 40; Mercer, *IQ—The Lethal Label*, PSYCHOLOGY TODAY, Sept. 1972, at 44. For a summary of American attitudes toward I.Q. tests, *see* O. Brim, Experiences and Attitudes of American Adults Concerning Standardized Intelligence Tests, 1965 (published on microfiche by Educ. Research Information Center, catalog no. ED 018 209). For the effect of tester's attitude on I.Q. test results, *see* J. Jacobs, Expectancy and Race: Their Influences upon the Scoring of Individual Intelligence Tests, Mar. 14,

to environmental factors?[54] These conflicts make the legal determinations on these issues more difficult. As for the first question, the courts seem willing to allow the decision of local educators to control. The courts found the second and third questions to be central to a decision on *de facto* segregation claims in *Riles* and *Hobson*. The failure of defendants to provide the court with an adequate answer to these questions ultimately decided *Riles* against them. Their best possible argument, one that defendants failed to make, was presented by Kenneth Eells in a well-known article on cultural bias in I.Q. tests.[55] Eells has suggested that if what is wanted from I.Q. tests is a good prediction of how well a child will do in school, then cultural bias is a necessary element of these tests.[56] The school system as it now exists bases judgments of a student's progress on a white middle-class standard, the same one on which I.Q. test results are based. Most educators feel that used for this limited purpose, I.Q. tests are excellent instruments.[57] Problems arise when people look on these tests as measures of some innate ability and not of present ability to achieve on a certain level.[58] Even when I.Q. tests are used for this limited purpose, however, the results can be disastrous for the child involved. Teachers tend to look at a low I.Q. score as signifying a child with limited educational potential when the child, especially if he is black, possibly has a deprived educational background.[59] As a result of this attitude on the part of teachers, the child begins to view himself as incapable of learning and begins to perform at a low level.[60] This re-

1972 (published on microfiche by Educ. Research Information Center, catalog no. ED 068 529); Watson, *IQ—The Racial Gap*, PSYCHOLOGY TODAY, Sept. 1972, at 48.

54. A recent article by Arthur Jensen suggests that racial differences in I.Q. scores are not due to cultural bias, but rather to genetic differences between blacks and whites. Jensen, *How Much Can We Boost IQ and Scholastic Achievement*, 39 HARV. EDUC. REV. 1 (1969). All that can be definitely said about this theory is that it is extremely unpopular. *See* E. Epps, Race, Intelligence, and Learning: Some Consequences of the Misuse of Test Results, Aug. 1970 (published on microfiche by Educ. Research Information Center, catalog no. ED 048 423); E. Gordon, Jensenism: Another Excuse for Failure to Educate, Sept. 1969 (published on microfiche by Educ. Research I formation Center, catalog no. ED 037 519). Not enough evidence exists on either side to make a definite decision, as Jensen readily admits. *See generally* A. Jensen, Intelligence, Learning Ability, and Socioeconomic Status, Feb. 8, 1968 (published on microfiche by Educ. Research Information Center, catalog no. ED 023 725).

55. Eells, *Some Implications for School Practice of the Chicago Studies of Cultural Bias in Intelligence Tests*, 23 HARV. EDUC. REV. 284 (1953).

56. *Id.* at 293.

57. *Id.*

58. *Id.* at 294.

59. 343 F. Supp. at 1312-13; Hobson v. Hansen, 269 F. Supp. 401, 489 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1969).

60. Hobson v. Hansen, 269 F. Supp. 401, 484 (D.D.C. 1967), *appeal dismissed*,

sult could be avoided by renaming the tests and by expressly limiting their function to prediction of academic performance.[61] Thus, a strong argument can be constructed in defense of the cultural bias present in the I.Q. tests now used.

The *Riles* decision does little to advance the legal answers to the questions posed above. The failure of the defendants to bring forth their strongest potential argument prevented the court from analyzing the varying educational theories. One significant result of the decision is that the court showed no inclination to extend *Hobson* into a requirement that classes be integrated. Ability grouping was not abolished, and although the court noted the need for a supplemental system to aid culturally deprived blacks, it did not require that the school system implement one.

*Riles* can be fairly characterized as a retreat from the far-reaching possibilities of *Hobson.* The wide leeway allowed the defendants to perfect a remedy is a strong indication that this court considered educators better able to settle the questions raised by the use of I.Q. tests in ability grouping than the courts. An inference can be drawn that as long as educators operate in good faith and on reasonable grounds, the courts will not interpose their own system of classroom division. This inference draws support from the retreat from a compelling state interest requirement in *Hobson* to a rational relationship requirement in *Riles.* This retreat was authored despite the presence of the suspect classification based on race. Thus the decision is at best inconsistent with the main line of equal protection cases. Judge Peckham's decision not to apply the compelling state interest test can only be attributed to some unarticulated policy reason, for modern legal precedent does not support him.[62]

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393 U.S. 801 (1969); Eells, *supra* note 55, at 295. This theory is referred to as the self-fulfilling prophecy. *See* R. Rosenthal, PYGMALION IN THE CLASSROOM (1968); J. Evans, Interpersonal Self-Fulfilling Prophecies: Further Extrapolations from the Laboratory to the Classroom, 1969 (published on microfiche by Educ. Research Information Center, catalog no. ED 034 276); Rosenthal, *Self-Fulfilling Prophecy,* PSYCHOLOGY TODAY, Sept. 1968, at 44. *Contra,* E. FLEMING, Teacher Expectancy or My Fair Lady, Mar. 5, 1970 (published in microfiche by Educ. Research Information Center, catalog no. ED 038 183).

61. Eells, *supra* note 55, at 295.

62. This retreat is unusual in that the Supreme Court has used the compelling state interest test frequently in modern decisions when faced with cases of prima facie denials of equal protection involving suspect categories, of which race is the leading one. *E.g.,* Korematsu v. United States, 323 U.S. 214 (1944). In *Hobson* the compelling state interest test was followed when the court considered the *de facto* inter-school segregation charges. 269 F. Supp. at 506. But when the *Hobson* court considered the challenge to the track system, it purported to use the rational relationship test.

This area of the law must necessarily remain unsettled until the larger questions of inter-school integration are answered. When issues such as busing are finally laid to rest, the Supreme Court may choose to advance further in this field by putting a premium on protection of the individual child's learning experience. Any system relying on testing will make errors in placement from time to time. Whether the judicial system will choose to tolerate these mistakes as incidental to the benefits derived from an objective standard of placement remains for the future.

JACK THORNTON

## Constitutional Law—A New Constitutional Right To An Abortion

The controversy concerning legalized abortion has been active in the United States for almost twenty years. The medical profession, legislators, and the judiciary have wrestled with the legal, moral, and social conflicts involved in the abortion issue. Recently in *Roe v. Wade*[1] and a companion case[2] the United States Supreme Court determined that the right of privacy inherent in the due process clause of the fourteenth amendment protected a woman's right to choose whether or not to

*Id.* at 511. It is unclear why such a distinction is drawn, in *Hobson* (in form) and in *Riles* (in fact), when all the classifications are based on race. The present test for testing the constitutionality of ability grouping therefore appears to be the rational relationship test and not the compelling state interest one.

1. 93 S. Ct. 705 (1973).

2. Doe v. Bolton, 93 S. Ct. 739 (1973). The decision is important apart from *Wade* because *Bolton* involved an attack on a relatively liberal abortion law adopted by Georgia in 1968, GA. CODE ANN. § 26-1202 (1972). The Court determined that in spite of the liberal nature of the statute it nevertheless could not stand in view of the standards established in *Wade*. The statute established certain procedural requirements that must be met before an abortion could be performed. These included requirements that the abortion be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals; that the operation be approved by the hospital staff abortion committee; and that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians. The Court held these requirements unconstitutional as having no rational relation to the statute's purposes, as being unduly restrictive of the patient's rights already safeguarded by her physician, and as being an undue infringement on the physician's right to practice. The statute's residency requirement was found to violate the privileges and immunities clause of the Constitution by denying protection to persons entering Georgia for medical services.

terminate her pregnancy, subject only to very limited interference from the state. This note will discuss two of the constitutionally significant aspects of the *Wade* decision—the Court's determination that the question was a proper one for judicial resolution under the due process clause and the Court's decision that the right of privacy includes the abortion decision. A brief analysis of the common-law and modern legislative attitudes concerning abortion is helpful in understanding the Court's holding in *Wade*.

It is generally accepted that under the English common-law abortion before "quickening" was not a crime.[3] Similarly, most American courts have ruled that abortion of an unquickened fetus was not criminal.[4] Some writers believe that a thorough analysis of common-law history supports the conclusion that women had the common-law liberty of abortion at every stage of gestation.[5] This belief was not shared by all of the early American courts, however, and several early decisions found the abortion of a quickened fetus to be a misdemeanor.[6] In 1821 Connecticut became the first state to adopt abortion legislation.[7] The statute[8] punished abortion of a quickened fetus but set no penalty for abortion of a fetus before quickening. Most of the early statutes dealt severely with abortions of a quickened fetus but prescribed very lenient punishment for abortion prior to that stage.[9] During the later decades of the nineteenth century, however, legislators began to dispense with the quickening distinction and began to prescribe much harsher penalties. By the end of the 1950's most states had banned abortion except when necessary to preserve the mother's life.[10]

Various factors have been advanced to explain enactment of these

3. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 731 (1968). "Quickening" is the first recognizable movement of the fetus in the uterus. It appears usually from the sixteenth to eighteenth week of pregnancy. 93 S. Ct. at 716.

4. *See, e.g.*, Edwards v. State, 79 Neb. 251, 252, 112 N.W. 611, 612 (1907); Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949).

5. *E.g.*, Means, *The Pheonix of Abortional Freedom: Is A Penumbral or Ninth-Amendment Right About To Arise from the Nineteenth-Century Legislative Ashes of A Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 336-75 (1971).

6. *E.g.*, Smith v. State, 33 Me. 48, 55 (1851); Lamb v. State, 67 Md. 524, 533, 10 A. 208, 208 (1887).

7. Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 435 (1961).

8. CONN. STAT. tit. 22, § 14 (1821).

9. Quay, *supra* note 7, at 437.

10. For a good survey of state abortion legislation and important judicial decisions on the subject *see* Quay, *supra* note 7, at 447-526.

highly prohibitive criminal abortion statutes. First, Victorian ideals of morality were elevated above the right of a married couple to choose if and when to have children.[11] These ideals fostered the belief that the primary function of sexual activity was procreation and that all attempts at abortion and contraception should therefore be prohibited. Secondly, legislators began attempting to shield the woman from the unskilled abortionist by enacting what they considered to be protective legislation.[12] Thirdly and most significantly, the surgical procedure involved in an abortion was dangerous because of the lack of modern antiseptic techniques and anitibiotics.[13] There is also some authority for the proposition that the legislators were concerned with the protection of prenatal life.[14]

Beginning in the 1950's a movement was initiated to liberalize the abortion laws. The initial objective was to accomplish this change through the legislative process, and to this end the American Law Institute proposed a statute allowing certain therapeutic abortions.[15] Fourteen states adopted some form of the American Law Institute proposal.[16]

In 1965 *Griswold v. Connecticut*[17] opened the door for *judicial* resolution of the abortion question. In *Griswold* the Court struck down a Connecticut statute[18] preventing the use of contraceptives on the ground that it violated a marital right of privacy found in the penumbras of the Bill of Rights. A concurring opinion noted that "the entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."[19] After this decision the judicial attack on abortion legislation was quickly mounted. In *People v. Belous*[20] the California Supreme Court recognized that "the fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right to privacy' or 'liberty' in matters relating to mar-

11. Lucas, *supra* note 3, at 732.
12. *Id.*
13. Means, *supra* note 5, at 382-91.
14. Roe v. Wade, 93 S. Ct. 705, 725-26 (1973).
15. MODEL PENAL CODE § 230.3 (Proposed Draft 1962).
16. Roe v. Wade, 93 S. Ct. 705, 720 n.37 (1973). This list includes N.C. GEN. STAT. § 14-45.1 (Supp. 1971).
17. 381 U.S. 479 (1965).
18. Act of March 28, 1879, ch. 78, [1879] Conn. Acts 428 (repealed 1969).
19. 381 U.S. at 495 (Goldberg, J., concurring).
20. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

riage, family, and sex."[21] Numerous suits challenging abortion statutes were brought in both federal and state courts, and a split of authority developed over the question.[22] The Supreme Court addressed itself in *Wade* to this diversity in the lower courts.

The Court was called upon to determine the constitutionality of the Texas abortion statute, which permitted abortion only "by medical advice for the purpose of saving the life of the mother."[23] After resolving the issue of standing[24] and reviewing the major historic attitudes concerning abortion,[25] the Court held that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of per-

21. *Id.* at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

22. Some courts struck down abortion statutes. Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972), *vacated and remanded*, 93 S. Ct. 1412 (1973); Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972); YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972); Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971), *vacated and remanded sub nom.* Hanrahan v. Doe, 93 S. Ct. 1410 (1973); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970); State v. Barquet, 262 So. 2d 431 (Fla. 1972).

Other courts upheld the statutes. Crossen v. Kentucky, 344 F. Supp. 587 (E.D. Ky. 1972), *vacated and remanded*, 93 S. Ct. 1413 (1973); Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated and remanded*, 93 S. Ct. 1411 (1973); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Rosen v. Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970); Cheaney v. State, — Ind. —, 285 N.E.2d 265 (1972); State v. Abodeely, — Iowa —, 179 N.W.2d 347 (1970); State v. Munson, — S.D. —, 201 N.W.2d 123 (1972), *vacated and remanded*, 93 S. Ct. 1416 (1973).

23. 93 S. Ct. at 709.

24. 93 S. Ct. at 712-15. The suit was brought by a single pregnant woman, a doctor who had been arrested for violating the Texas abortion statute, and a married couple without children. The Court ruled that the latter two plaintiffs lacked standing to sue, that the doctor alleged no federally protected right not assertable as a defense in the state prosecution pending against him, and that the married couple's complaint was too speculative, but the Court upheld the pregnant woman's right to challenge the statute. Because of the fact that the woman already had delivered her child, the question was technically "moot," but the Court, quoting from Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), held that the issue was "capable of repetition, yet evading review," and therefore could be heard.

In Doe v. Bolton, 93 S. Ct. 739, 745-46 (1973), the Court granted a group of physicians standing even though they had not been threatened with prosecution for violation of the state's abortion statute. The Court granted standing because the physicians were members of the group against which the statute operates directly and therefore had a sufficiently direct threat of personal detriment. The Court believed that they should not be required to become involved in a criminal prosecution before they could seek judicial relief. The Court distinguished Poe v. Ullman, 367 U.S. 497 (1961), in which standing was denied a physician challenging a Connecticut statute prohibiting the giving of medical advice on the use of contraceptives, by noting that the Connecticut statute was adopted in 1879 and only one physician had ever been prosecuted under it. 93 S. Ct. at 746. Conversely, the Georgia statute is recent and its predecessor had been used in several prosecutions. If the Court believes that a recent and active statute may be challenged by anyone subject to prosecution under it, it appears that the standing requirement may have been expanded by the *Bolton* decision.

25. 93 S. Ct. at 715-24.

sonal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[26] The Court determined that the right of privacy is not absolute, however, and can be regulated when the state can show a compelling interest.[27]

The state has two interests in the formulation of abortion legislation: protecting the life and health of the mother and protecting potential life. Balancing these interests against those of the mother, the Court determined that the state's interest in the mother becomes compelling only after the first three months of pregnancy because prior to that time it is medically safer to have an abortion than to carry the fetus full term.[28] Therefore, prior to the fourth month "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated."[29] Between the beginning of the fourth month of pregnancy and the point where the state's interest in protecting potential life becomes compelling, the state may pass legislation reasonably related to the preservation of the woman's health.[30] The Court determined that the state's interest in protecting potential life becomes compelling at the stage of viability.[31] After that stage the state may completely proscribe abortions except where necessary "to preserve the life or health of the mother."[32]

It is significant that the Court found the question of abortion legislation a proper one for judicial resolution under the due process clause. The Court noted[33] Justice Holmes' admonition in *Lochner v. New York*[34] that the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them

26. *Id.* at 727.
27. *Id.* at 727-28.
28. *Id.* at 731-32.
29. *Id.* at 732.
30. As examples of such legislation the Court suggested requirements based on the qualifications of persons permitted to perform abortions, the procedure to license such persons, the facility where the abortion may be performed, and the licensing of the facility. *Id.*
31. *Id.* Viability is the point at which the fetus is potentially able to live outside the mother's womb. It is usually placed at about seven months but may occur at an earlier time. *Id.* at 730.
32. *Id.* at 732.
33. *Id.* at 709.
34. 198 U.S. 45 (1905).

conflict with the Constitution of the United States."[35] In *Lochner* the Court had invalidated state legislation designed to regulate working hours among bakery employees in the State of New York. The statute was held to violate the right to contract that the Court found to be a liberty protected by the fourteenth amendment. Justices Harlan[36] and Holmes,[37] in vigorous dissents, felt that the Court had no authority to hold that the statute violated the due process clause. *Lochner* typified what is now known as the era of substantive due process, which lasted for three decades. This constitutional policy was designed to prevent legislative control over business, and it placed the burden of justifying legislation upon the state. It required the invalidation of economic regulatory legislation unless the state could clearly prove its relation to the public welfare, a burden that was extremely difficult to carry.[38] The *Lochner* approach was applied by the Court to invalidate various state regulatory statutes.[39] But *Nebbia v. New York*[40] and several subsequent cases[41] later firmly rejected this theory. The final blow was dealt by Justice Black in *Ferguson v. Skrupa*:[42] "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."[43]

This repudiation of the *Lochner* substantive due process approach has given the defenders of abortion legislation a weapon to use to persuade courts that the matter of abortion was one strictly for the legislatures. Some judges adopted this approach, believing that the question involved the weighing of values that should be accomplished by the legislators.[44] There appears to be a distinction, however, between

35. *Id.* at 76 (Holmes, J., dissenting).
36. *Id.* at 74.
37. *Id.* at 75-76.
38. *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13, 22 (1958).
39. *E.g.*, Coppage v. Kansas, 236 U.S. 1 (1915).
40. 291 U.S. 502 (1934).
41. *E.g.*, Lincoln Union v. Northwestern Metal Co., 335 U.S. 525 (1949); Olsen v. Nebraska, 313 U.S. 236 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
42. 372 U.S. 726 (1963).
43. *Id.* at 730.
44. *See* Crossen v. Kentucky, 344 F. Supp. 587, 591 (E.D. Ky. 1972), *vacated and remanded*, 93 S. Ct. 1413 (1973); Abele v. Markle, 342 F. Supp. 800, 812 (D. Conn. 1972) (dissenting opinion), *vacated and remanded*, 93 S. Ct. 1412 (1973); Corkey v. Edwards, 322 F. Supp. 1248, 1254 (W.D.N.C. 1971), *vacated and remanded*, 93 S. Ct. 1411 (1973); Doe v. Scott, 321 F. Supp. 1385, 1395 (N.D. Ill. 1971) (dissenting opinion), *vacated and remanded sub nom.* Hanrahan v. Doe, 93 S. Ct. 1410 (1973); State v. Barquet, 262 So. 2d 431, 440 (Fla. 1972) (dissenting

the *Lochner* type of substantive due process and that used in *Wade* to invalidate state abortion legislation. The difference is between judicial review of legislation affecting personal, fundamental rights essential to preserving the guarantees of freedom in our society and legislation dealing with economic regulation and control of an industrialized nation.[45] Several Supreme Court decisions have applied substantive due process criteria in the area of personal, fundamental rights.[46] The Court in *Griswold* apparently recognized this distinction:

> [W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* . . . should be our guide. But we decline that invitation. . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch *economic problems, business affairs,* or *social conditions.* This law, however, operates directly on an intimate relation of husband and wife . . . .[47]

If the Court in *Wade* has accepted this distinction in the application of substantive due process criteria without clearly acknowledging it[48] and has determined that a fundamental, personal right is involved, the discredited *Lochner* theory should be no barrier to determining the constitutionality of a state regulatory statute. The risk that the Court will substitute its judgment for that of the legislature in determining what is wise economic or social policy is inherent in our system of judicial review. The basic problem is not whether a court may review acts of the legislature but rather how wisely it utilizes this power to identify, appraise, and weigh the competing interests. De-

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opinion); Cheaney v. State, — Ind. —, —, 285 N.E.2d 265, 269 (1972); State v. Munson, — S.D. —, —, 201 N.W.2d 123, 127 (1972), *vacated and remanded,* 93 S. Ct. 1416 (1973).

45. *See* Emerson, *Nine Justices in Search of A Doctrine,* 64 MICH. L. REV. 219, 224 (1965); Lucas, *supra* note 3, at 756.

46. *E.g.,* Aptheker v. Secretary of State, 378 U.S. 500 (1964) (right to travel); Wieman v. Updegraff, 344 U.S. 183 (1952) (right of association); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to direct child's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to marry, establish a home, and bring up children).

In Bolling v. Sharpe, 347 U.S. 497 (1954), the Court applied the due process clause of the fifth amendment to strike down segregation in the District of Columbia public schools.

47. 381 U.S. at 481-82 (emphasis added). The holding in *Griswold,* however, was not based on the due process clause. Justice Goldberg, concurring in *Griswold,* recognized that a state may experiment with economic legislation but not with fundamental rights. 381 U.S. at 496. However, he was not speaking for the majority of the Court.

48. In *Wade* Justice Stewart discussed the substantive due process problem but did not draw any distinction between economic and personal rights. 93 S. Ct. at 733-34 (concurring opinion). In another concurring opinion, Justice Douglas mentioned the problem in a footnote. *Id.* at 758 n.4.

fining the right involved and determining the appropriate standard to be applied to legislation affecting that right are two basic aspects involved in this type of judicial review. "To refuse to recognize a right claimed to be basic to our constitutional order for fear that the Court, in exercising its power to protect that right, will employ a standard whereby it usurps the legislative function in determining basic social policy obscures analysis of the Court's role and denies the Court's resourcefulness in employing standards appropriate to the particular case."[49]

Having examined the method apparently adopted by the Court to review state abortion legislation, it is necessary to discuss the substantive right which the Court found to be within the fourteenth amendment's concept of personal liberty and restrictions on state action. The Court found that the right of privacy includes a woman's decision whether or not to terminate her pregnancy.[50]

Although the right of privacy is not explicitly mentioned in the Constitution, it has been recognized by the Court since 1891.[51] The roots of that right have been found to exist in the first amendment,[52] the fourth and fifth amendments,[53] and ninth amendment;[54] in the penumbras of the Bill of Rights;[55] and in the concept of liberty guaranteed by the fourteenth amendment.[56] It has been applied by the Court to protect various aspects of the family relationship.[57] Finally in *Griswold* the right was first recognized as an independent doctrine,[58] and it has recently been affirmed as applicable to the protection of the family relationship.[59]

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49. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 258 (1965).

50. 93 S. Ct. at 727.

51. In Union-Pacific R.R. v. Botsford, 141 U.S. 250, 251 (1891), the Court noted: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

52. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

53. *See* Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 n.5 (1967); Boyd v. United States, 116 U.S. 616 (1886).

54. Griswold v. Connecticut, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring).

55. *Id.* at 484-85.

56. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

57. Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (education of children); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (child rearing).

58. *See* Emerson, *supra* note 45, at 228.

59. The Court in Eisenstadt v. Baird, 405 U.S. 438 (1972), said, "If the right

In order to find whether this right should be applied to abortions the Court in *Wade* had first to determine that the right to an abortion was "fundamental," for "only personal rights . . . deemed to be 'fundamental' . . . are included in this guarantee of personal privacy."[60] The only justification given by the Court in granting such status to the abortion decision was the possible detrimental effects on the mother if she were compelled to deliver the child. These included direct physical harm, a distressful future life, impairment of mental and physical health due to child care, and the possible stigma attached to an unwed mother.[61] Although these are certainly weighty considerations, perhaps the Court should have elaborated more fully its finding that the abortion decision is a "fundamental" right. "Fundamental" has been defined as being "implicit in the concept of ordered liberty,"[62] as being "rooted in the traditions and conscience of our people,"[63] and as one of "those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' "[64] Since the state is required to demonstrate a compelling interest in order to regulate any fundamental right[65] and since statutes must be narrowly drawn so not to exceed this interest,[66] it is hazardous for the Court to grant "fundamental" status without sufficient justification, for if it does, a significant number of state regulations may be in jeopardy. In addition to examining the effects of an unwanted child on the woman, the Court might have noted that "the *Griswold* decision rested upon the broadest and most sweeping principles of substantive constitutional law"[67] and that the abortion right might be considered more important than the rights involved in *Griswold*. The use of contraceptives could be considered a first line of defense against an unwanted child, but

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of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. Justice Stewart, concurring in *Wade*, noted that this right necessarily includes the woman's decision whether to end her pregnancy or not. 93 S. Ct. at 735.

60. 93 S. Ct. at 726. The Court relied on the test for fundamental status given in Palko v. Connecticut, 302 U.S. 319, 325 (1937), holding that the right must be "implicit in the concept of ordered liberty . . . ."

61. 93 S. Ct. at 727.

62. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

63. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

64. Powell v. Alabama, 287 U.S. 45, 67 (1932).

65. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

66. NAACP v. Alabama, 377 U.S. 288, 307 (1964).

67. Rosen v. Board of Medical Examiners, 318 F. Supp. 1217, 1234 (E.D. La. 1970) (dissenting opinion).

an abortion is definitely the final means available.[68] Then the Court would at least have established some precedent for its determination. Combined with the fact that at the time the Constitution was adopted women had the right to an abortion of a fetus before quickening,[69] these arguments would have made the finding of a fundamental right more justifiable.

Once the right to an abortion is found to be fundamental, the Court must determine the state's interests involved so that they can be balanced with the rights of the mother. It is in the process of determining the state's interests that the major differences of opinion have arisen, for there is present one highly significant factor that was not present in *Griswold*—the existence of a fetus. Even if the courts are willing to agree that the state's interest in protecting the woman's health is not sufficiently compelling to justify regulation during all stages of pregnancy, differing opinions as to the status of the fetus have made a resolution of the state's interest in protecting potential life extremely difficult.[70]

The opponents of reform point to the fact that in other areas of the law the rights of the fetus are protected.[71] Proponents counter with the observation that in all these areas the rights are protected only if the fetus is born alive or if the right reflects the parent's interests.[72] Proponents also argue that if a fetus constituted human life, the destruction of the fetus would be murder and that "no prosecutor ever returned a murder indictment charging the taking of the life of a fetus."[73] The controversy revolves around the religious and moral question of when a developing fetus acquires "life," or becomes a "human being," or attains the status of a "person." As one lower court wisely noted, "[W]e are constrained simply to conclude that the great conflict raised by this issue is beyond the competence of judicial resolution."[74] Another district court concluded, "[F]or the purposes of this decision, we think it is sufficient to conclude that the mother's interests are su-

68. *Id.* at 1237.

69. Means, *supra* note 5, at 374-75.

70. *See* Drinan, *The Inviolability of the Right To Be Born*, 17 W. RES. L. REV. 465 (1965).

71. For a discussion of the rights accorded the fetus *see* Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233, 235-44 (1969).

72. *See* People v. Belous, 71 Cal. 2d 954, 969, 458 P.2d 194, 203, 80 Cal. Rptr. 354, 363 (1969), *cert. denied*, 397 U.S. 915 (1970).

73. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA U.L. REV. 1, 10 (1969).

74. YWCA v. Kugler, 342 F. Supp. 1048, 1075 (D.N.J. 1972).

perior to that of an unquickened embryo, whether the embryo is mere protoplasm . . . or a human being. . . . "[75] This position has been criticized as being opposed to a basic concept of American law that human beings have a right to live.[76]

It appears that the issue can be viewed in such a manner that all references to "life," "human being," and "person" can become a mere battle of semantics. Adopting such an approach, the Supreme Court in *Wade* believed that no resolution of the question of when "life" begins was necessary.[77] Instead the Court treated the abortion issue as one involving state interference with individual rights and liberty that, as such, could be resolved within the framework of the Constitution.[78] Viewing the controversy in this way and recognizing the many similarities between the typical abortion statute and the Connecticut contraceptive statute struck down in *Griswold*,[79] the Court's opinion in *Wade* seems to be a proper extension of the right of privacy to protect the mother from the consequences of an unwanted child.

The fact that the Supreme Court declined to accept the district court's determination that the right of privacy was found in the ninth amendment and instead found the right to be inherent in the due process clause could indicate that at least seven justices[80] have adopted the so-called fundamental rights interpretation of the fourteenth amendment. This theory finds no necessary relationship between the fourteenth amendment and the Bill of Rights but views the due process clause as incorporating those principles "implicit in the concept of ordered liberty."[81] The divergent views expressed in *Griswold* over where the right of privacy was found[82] prompted one writer to question whether

75. Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970).

76. Fox, *Abortion: A Question of Right or Wrong?*, 57 A.B.A.J. 667, 669 (1971).

77. 93 S. Ct. at 730. However, since the Court held that the state's interest in protecting potential life becomes compelling when the fetus becomes viable, it can be argued that the Court actually believes viability to be the point when life begins.

78. *See* Lucas, *supra* note 3, at 738.

79. *See* Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; New Approaches*, 27 OHIO ST. L.J. 647, 674 (1966).

80. *Wade* was a seven-to-two decision. Justice Blackmun delivered the opinion for the Court, with Justices Stewart, Burger, and Douglas concurring. Justices Rehnquist and White dissented.

81. J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL 5 (1971).

82. Justice Douglas, writing for the Court, found it in a penumbra of the Bill of Rights, 381 U.S. at 480-86. Justice Goldberg seemed to discover it hidden in the ninth amendment, *id.* at 486-99 (concurring opinion); Justices Harlan and White believed the right to be inherent in the due process clause, *id.* at 499-507 (concurring opinions). Justices Black and Stewart refused to "find" the right anywhere since it is not specifically mentioned in the document, *id.* at 507-31 (dissenting opinions).

the Court would find that rights not specified in the Bill of Rights are nevertheless protected by the due process clause.[83] The *Wade* decision has answered that question in the affirmative.

The *Wade* decision has several practical consequences in addition to its constitutional implications. The decision rendered virtually every state abortion statute invalid.[84] The so-called abortion mills in which any woman with enough money could obtain an abortion will be eliminated, along with the need for some women to travel to another state or country to obtain the services of a licensed physician. Those concerned with population control now have a legitimate tool with which to work. Competent doctors can now feel free to provide what is best for their patients without undue concern for legal interference. Most importantly, a woman who has no other hesitations about abortion will no longer be forced to evade the law. Since the decision was quite detailed, the states should have an adequate guide to the type of regulation that is now permissible. Since the leaders of the Catholic Church are violently denouncing the decision,[85] however, a struggle may emerge between the Catholic hospitals and state enforcement of the new procedure, expecially in areas where the Catholic hospital is the only one available.

In light of the *Wade* decision the Supreme Court appears to be ready to apply substantive due process standards to those rights found to be personal and fundamental, whether they are specifically mentioned in the Bill of Rights or not. In addition, the Court may apply the right of privacy to more varied situations in the future. The practical consequences of the abortion decision have evoked both criticism and praise from the various factions concerned with the abortion controversy,[86] but in the end, as one speaker has said, "this whole matter is eventually going to be resolved by the conscience of the individual who desires to have an abortion or not, to the exclusion of what the law, the moralist, or the medical profession has to say."[87]

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83. *See* Kauper, *supra* note 49, at 249.

84. It appears that only the New York abortion statute, N.Y. PENAL LAW § 125.05 (McKinney Supp. 1972), may survive the *Wade* decision. This provision allows an abortion during the first twenty-four weeks of pregnancy without qualification, if performed by a duly licensed physician with the woman's consent.

85. NEWSWEEK, Feb. 5, 1973, at 27.

86. *Id.*

87. Marchetti, *Symposium—Law, Morality, and Abortion,* 22 RUTGERS L. REV. 415, 423 (1968).