SEARCH AND SEIZURE—STOP AND FRISK—REASONABLENESS OF A PERSONAL SEARCH IN AN AIRPORT SETTING—*United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973).

Disembarking from his flight into San Antonio, Abraham Pina Moreno entered the lounge area of the San Antonio International Airport. Already he had come under the purposeful gaze of Deputy U.S. Marshall Granados of the airport's Anti-Air Piracy detail. Granados' attention was drawn by Moreno's wariness, attention to security guards, and visible nervousness. Moreno, by now conscious that he was under surveillance, left the terminal and ordered a taxicab to the bus station.

Two hours later Moreno again entered the terminal concourse, still obviously nervous. After switching among several ticket lines, he finally purchased a Southwest Airlines ticket and headed toward the boarding gate, once again followed by Granados' now suspicious stare. As Moreno approached Granados' position and the officer moved forward, their eyes met, and Moreno abruptly turned and entered a restroom. Following him into the restroom, Granados noticed that Moreno appeared to be protecting something in his left coat pocket, which was bulging prominently. Granados had seen enough; accosting Moreno and identifying himself, Granados asked if anything was wrong. Moreno replied that he had arrived in San Antonio the day before and was upset at the fare charged by the taxicab driver bringing him to the airport from the hospital, where he had been visiting a sick relative. Granados recognized the fabrication, having seen Moreno's previous arrival and departure. Granados then requested identification. After some hesitation Moreno produced some identification, and then started to turn away. Granados, fearing that Moreno was about to break for an exit, summoned another officer to help escort Moreno to the security office.

Once in the office, Granados conducted a pat-down search, then asked what Moreno had in his left coat pocket. Moreno pulled out some papers, but the bulge remained. He was then ordered to remove his coat, and three packages of heroin were extracted from the pocket. He was arrested, tried, and convicted of possession of heroin with intent to distribute. His motion to suppress the evidence on the ground that the search of his person exceeded the limitations of *Terry v. Ohio*[1] was denied, the district court recognizing the special need for stop and frisk procedures in preventing air piracy attempts.

I. EXPANDING THE *Terry* DOCTRINE.

When Moreno appealed, the Fifth Circuit Court of Appeals was faced with two fundamental issues. First, did the facts of this case allow a stop and frisk on the basis of the *Terry* doctrine of street encounters? And second, does the fact that the encounter occurred in an airport alter the test of reasonableness as stated in *Terry*?

The Supreme Court stated in *Terry*:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the en-

[1] 392 U.S. 1 (1968).

> counter serves to dispell his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.[2]

If the search is valid under *Terry*, items found during the search which are admissible as evidence in court include not only weapons, but, under the concept labelled by Professor LaFave as the "serendipity doctrine,"[3] may include any material which might be useful in proving a crime.

The major problem facing the *Moreno* court in applying the *Terry* doctrine was the apparent lack of concern on the part of Officer Granados that Moreno might pose a threat to his safety. The Supreme Court, in deciding *Terry*, stated that the purpose of allowing stop and frisk procedures is to permit a police officer who reasonably believes that criminal activity may be imminent to approach the person under surveillance and ask questions. In order to prevent his first question from being met with a bullet,[4] he has a right to conduct a pat-down search of the outer clothing of the person being questioned in order to discover any concealed weapon which could be used to assault the officer or those nearby. Here, Officer Granados asked questions first, and then conducted a personal search. Appellant in his brief pointed out that Granados permitted Moreno to reach into his bulging coat pocket twice during their encounter, once when he asked for identification in the restroom and Moreno produced his wallet from that pocket, and again in the security office when he asked what Moreno had in his pocket and Moreno reached in and pulled out a wad of paper.

If Granados believed that the bulging pocket contained a weapon, permitting the pocket to go unsearched and allowing Moreno to pull items repeatedly from that pocket were, to say the least, imprudent. Moreover, his marching Moreno through a crowded airport concourse with myriad opportunities to grab a hostage and escape, when he could have disarmed Moreno in the unoccupied restroom, tends to strengthen the theory that Granados in fact did not believe that Moreno was armed and dangerous. Finally, when Granados conducted a pat-down search in the security office, he did not detect any weapons, nor did he make an attempt to identify, by feeling or squeezing, the contents of the pocket. *Terry* by itself permits no more than a pat-down search of outer clothing in an attempt to discover weapons,[5] and implies that the police officer in that case acted correctly only because he did not search inside the subject's clothing until he had detected a weapon.[6] In contrast, Granados searched Moreno's inside coat pocket without ever detecting a possible weapon, and, perhaps, without even suspecting that Moreno was armed.

Faced with these deviations from the permissible stop and frisk situation described in *Terry*, the court emphasized that the *Terry* decision permits stop and frisk procedures to ensure the safety not only of police officers but also of others.

---

[2] *Id.* at 30.

[3] LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 92 (1968). *See also* Abel v. United States, 362 U.S. 217 (1960); Harris v. United States, 331 U.S. 145 (1947), *overruled on other grounds*, Chimel v. California, 395 U.S. 752 (1969); *cf.* Sibron v. New York, 392 U.S. 40 (1968).

[4] 392 U.S. at 33 (Harlan, J., concurring).

[5] *Id.* at 30.

[6] *Id.* at 29.

The court construed "others" in this case to be persons departing San Antonio aboard commercial aircraft.[7] The court then described the acute problems which air piracy presents to law enforcement officials, declared that "society's law enforcement capabilities have not caught up with these problems,"[8] and therefore found that airport security searches are to be treated as exceptional and exigent situations under the fourth amendment.[9] Analogizing an airport to a border crossing, the court declared that both are critical zones to which special fourth amendment considerations should apply. Because all skyjackers must pass through airports before committing their crime, and because skyjackers are otherwise so difficult to detect, the court held in applying *Terry* that security officers should not be limited to a pat-down search, which, though sufficient to detect handguns, is not thorough enough to detect carefully concealed explosives or other weapons. Thus in an airport concourse, a police officer who, from observation of an individual ticket-holder, has formed a reasonable belief that the individual is contemplating an air piracy attempt and is carrying weapons or explosives for that purpose, may search the individual. Such a search is not limited to a pat-down of outer clothing, but may include a search inside the subject's pockets.

Although rationalized under the *Terry* decision, the holding in *Moreno* was based on the need to protect passengers and crew on the aircraft rather than the investigating officer himself. Thus the court had no difficulty reconciling with *Terry* the fact that the personal search occurred *after* interrogation and the trip across the concourse, since the search did occur *before* Moreno had gained access to the aircraft itself. Whether or not Officer Granados perceived immediate danger to himself or those in the concourse was irrelevant, so long as he perceived a possible danger to passengers boarding the aircraft at the airport, and acted to alleviate that danger before Moreno could approach the aircraft.

It is unfortunate that the court chose to characterize its *ratio decidendi* as an application of *Terry* to the facts of *Moreno*, because the limited set of circumstances under which a stop and frisk is justified in *Terry* and the limited type of search permitted in a *Terry* situation both come out of the process somewhat the worse for wear. A "frisk" in an airport becomes something more than it was in the *Terry* context; it would be a zealous police officer indeed who would characterize a search inside a subject's pockets by an officer as a frisk. Furthermore, under *Moreno* a police officer need not fear for his personal safety to conduct a search in the absence of probable cause. Finally, the procedures approved by *Moreno* seem much more amenable to turning stop and frisk into "stop and fish" searches, a transformation which the Supreme Court in *Terry* had hoped to avoid by limiting the frisk to a patting of outer garments in a street encounter, and by strict judicial examination of the reasonableness of a search in its factual context as a means of carrying out the limited objective of immediate protection without further intrusion.[10]

---

[7] *But see* Adams v. Williams, 407 U.S. 143, 146 (1972), wherein the Court said: "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." The Supreme Court thus implied that prevention of violence at a place remote from the officer's investigation is not an intended justification of a *Terry* frisk, though it would justify a *Terry* stop.

[8] 475 F.2d at 49.

[9] *Id.* at 48.

[10] LaFave, *supra* note 5, at 59. *See also* United States v. Legato, 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring):

> The exigencies of skyjacking and bombing, however real and dire, should not leave an airport and its environs and [sic] enclave where the Fourth Amendment has

What has actually occurred through the *Moreno* decision is that the limited circumstances and methods of searches described in *Terry* have been left behind in the rush to approve special police methods for airports. It is true that the *Terry* decision stated that it did not purport to establish the limitations of protective search and seizure for all factual situations, and that such limitations would be developed through future decisions.[11] Nevertheless, to say that under the *Moreno* facts *Terry* allows more than a pat-down when necessary for the protection of "others" is to abandon all of the limitations which *Terry* imposed on the use of stop and frisk.

The *Moreno* court recognized this problem and attempted to attenuate it by characterizing an airport as a critical zone, similar to a border crossing, thus emphasizing the uniqueness of the airport situation and restricting to an airport context the need to abandon *Terry* limitations. Of course, extending the "mere suspicion" test of reasonableness for searches at border crossings to airports in general would be an expansion of an even less desirable doctrine, from the standpoint of constitutional rights, so the court declined to base its decision on that established legal doctrine.[12] What the court was straining to accomplish was to forge a new search and seizure rule, applying to airports only, which permits warrantless searches of suspicious persons, while purporting merely to be following established precedent.[13]

Perhaps it would have been better, in terms of safeguarding fourth amendment protections, to use *Terry* as an analogy rather than controlling precedent. In this way the court might have left the *Terry* restrictions intact while dealing with airport searches as a matter separate from police searches in general. But the court's opinion did not reflect any extended concern over such theoretical matters; it was primarily concerned with endorsing a procedure for searching possible skyjackers during a period in which "law enforcement capabilities have not caught up" with the air piracy threat.[14]

II. The Relationship of *Moreno* to Earlier Airport Search Cases.

In considering the permissibility of airport searches exceeding a pat-down in intensity without probable cause, the court had only a few cases on which to rely as precedent. Virtually all of the legal commentary and cases which treat the constitutionality of airport frisks are concerned with the constitutional legality of the Federal Aviation Administration's (F.A.A.) anti-air piracy screening program. Those cases turn upon the reasonableness of the screening process in which the use of a behavior "profile" to identify passengers displaying behavior traits of

---

taken its leave. It is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our rush toward malleating the Fourth Amendment in order to keep the bombs from exploding.

It has also been suggested that, in order to prevent the use of airport searches for the mere warrantless detection of contraband, all non-weapons seized during a pre-boarding search be excluded from use as evidence in a court of law. *See* United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973) (Aldrich, J., dissenting). *See also* People v. Sibron, 18 N.Y.2d 603, 606, 219 N.E.2d 196, 198, 272 N.Y.S.2d 374, 377 (1966) (Van Voorhis, J., dissenting), *rev'd*, 392 U.S. 40 (1968).

[11] 392 U.S. at 29.

[12] 475 F.2d at 51 n.8.

[13] *But see id.* where the court denies that it is attempting to substitute a suspicion test for the *Terry* standard based on probable cause. Nevertheless, Moreno's conduct would only be considered suspicious on a street, since the officer perceived no threat to himself. Thus suspicious conduct becomes probable cause in an airport setting.

[14] *Id.* at 49.

a skyjacker, coupled with the use of a magnetometer to detect metal objects carried by a passenger, leads to the frisk of a passenger who fails both tests. *Moreno* devoted little attention to these cases, primarily because they add little to Judge Weinstein's articulate analysis, in his opinion in *United States v. Lopez*,[15] of the constitutionality of those airport frisks carried out as a part of the F.A.A. screening procedure. Subsequent cases, in which motions to suppress evidence seized during an F.A.A. screening frisk were based on the alleged unconstitutionality of such a frisk, have relied heavily upon the principal points of the *Lopez* analysis. Of the several cases which the *Moreno* court cited as precedent for its interpretation of *Terry*, only *United States v. Lindsey*[16] deals with a situation in which an airport frisk occurred without the use of the F.A.A. screening procedure to designate persons to be frisked.[17]

The facts in *Lindsey* are somewhat analogous to those in *Moreno*. In that case Lindsey had rushed up to the boarding gate four minutes before his flight was scheduled to depart and handed a ticket to the agent, saying "save a seat for Williams." The ticket was made out to "James Marshall," triggering the agent's suspicion, so he indicated to the U.S. marshall standing at the gate that Lindsey should be watched. The marshall noted that Lindsey seemed nervous and agitated. When Lindsey moved toward the aircraft the marshall confronted him and requested identification. Lindsey produced a selective service card bearing the name "Melvin Giles." He then produced a social security card bearing his own name. The marshall then noted two large bulges in Lindsey's coat pocket, and conducted a pat-down search in which the the bulges felt "very solid."[18] Thinking that those objects could be weapons, the marshall extracted them from Lindsey's pocket; the objects turned out to be packages containing heroin wrapped in aluminum. In upholding the use of the heroin as evidence the *Lindsey* court stated:

> In the context of a possible aircraft hijacking with the enormous consequences which may flow therefrom, and in view of the limited time in which Marshall Brophy had to act, the level of suspicion required for a *Terry* investigative stop and protective search should be lowered.[19]

Thus the *Lindsey* court was moving toward the position advocated in *Moreno* that an airport setting is a special situation, requiring different standards of constitutional protection in order to facilitate anti-hijacking measures.

But even *Lindsey* is not sufficiently analogous to *Moreno* to support the holding in the latter case on its similarity of facts. In *Lindsey* the defendant had cleared the gate agent and was on his way to the aircraft when accosted. Moreno had not yet begun the boarding process. Thus the urgency to conduct a stop and frisk was much greater in *Lindsey*. More important, the *Lindsey* court carefully distinguished its case from other stop and frisk cases in which the frisks produced

---

[15] 328 F. Supp. 1077 (E.D.N.Y. 1971). This opinion also appears with an annotation in 14 A.L.R. Fed. 252 (1973). Although concluding after a lengthy analysis that the F.A.A. screening procedure was constitutional, the court excluded heroin found on Lopez' person during the frisk because the character traits used to designate Lopez as a frisk candidate had been altered by the local airline manager and did not fully conform to the F.A.A. profile.

[16] 451 F.2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972).

[17] The other airport frisk cases cited by the *Moreno* court as precedent are United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Bell, 464 F.2d 667 (2d Cir. 1972); United States v. Epperson, 454 F.2d 769 (4th Cir. 1972).

[18] 451 F.2d at 703.

[19] *Id.* It should be noted that *Terry* used the term "reasonable belief" rather than "level of suspicion" as the test of constitutionality of a frisk.

only contraband which could not reasonably have been assumed to be a weapon when detected during a pat-down search.

In *United States v. Davis*,[20] for instance, a pat-down search followed by an exploration of defendant's pocket yielded a roll of counterfeit bills. The *Davis* court ruled the search void under *Terry*, citing the arresting officer's testimony that he had had no particular reason, other than personal habit, for conducting the search. It seems a fair inference that the court believed the pat-down of that pocket must have indicated to the police officer that whatever was inside was not a weapon, thus requiring him at that point to discontinue the search. In *Tinney v. Wilson*[21] a pat-down search revealed something that felt like pills wrapped in cellophane. The officer reached into defendant's pocket and found illegally-possessed drugs. That search was ruled invalid because the officer did not believe the defendant to be armed.

The *Lindsey* court emphasized that the marshall's search inside Lindsey's pocket after the pat-down was justified because he had a reasonable belief that the solid object he had felt during the pat-down could be a weapon.[22] But in *Moreno*, Officer Granados had not formed, as a result of the pat-down search, a reasonable belief that Moreno's coat pocket could contain a weapon. The *Lindsey* case would thus suggest that the evidence should have been suppressed.

A case similar to *Moreno* did in fact rely upon *Lindsey* as well as *Lopez* and *Terry* to suppress marijuana found in an airport search of defendant's coat pocket during boarding process. In *People v. Erdman*,[23] a New York state court held that a bulging coat pocket of a passenger preparing to board an aircraft did not justify a frisk under the *Terry* doctrine, since the bulging pocket would at most support only a hunch and not a reasonable belief that the defendant was armed. The New York court noted, however, that nervousness or suspicious mannerisms which would alarm a prudent official might combine with the bulge to create a reasonable belief justifying a frisk.[24]

The *Moreno* court devoted a substantial portion of its opinion to justifying a lowering of *Terry* standards for stop and frisk in an airport. Indeed, most of the recent cases dealing with airport searches express the view that the government has a substantial interest in preventing skyjacking, and that airport searches are an effective means of doing so. This view is closely scrutinized in *United States v. Meulener*,[25] in which the court held that a passenger meeting the profile is not on those grounds alone subject to a forced search. The court said that before a search can be made a passenger would have to be told that he had the option of declining to board the aircraft and of thus avoiding the search. A person declining to board the plane could be monitored by marshalls while in the airport and become subject to a search under the usual search standards.

---

[20] 441 F.2d 28 (9th Cir. 1971).

[21] 408 F.2d 912 (9th Cir. 1969).

[22] *See also* United States v. Lopez, 328 F. Supp. at 1098:

> Even in the hijacking situation, any intrusion by a Marshal beyond the legitimate scope of a weapons search is clearly unjustified and the fruits of such an excessive search would be inadmissible in a subsequent criminal proceeding....
>
> In this case the location and size of the object and the fact that it was tightly packed and hard covered and that it was large enough to be a container for a pistol or even explosive material gave the Marshall ample cause to require removal from underneath defendant's clothing.

[23] 69 Misc. 2d 103, 329 N.Y.S.2d 654 (Sup. Ct. 1972).

[24] *Id.* at 108, 329 N.Y.S.2d at 660.

[25] 351 F. Supp. 1284 (C.D. Cal. 1972).

But the special government interest justifying a search to prevent skyjacking extends only to those persons who actually board the aircraft, and does not extend to those persons who merely appear at the boarding gate but decline to board the aircraft. To hold otherwise, said the court, would be to establish a special fourth amendment standard for passengers at a boarding gate.[26] Under the *Meulener* rationale, Moreno would not have been subject to a lower standard for a frisk than that articulated in *Terry* until he presented himself for boarding and waived his right to decline to board the aircraft.

The *Meulener* decision is based upon the theory that a warrantless search may be justified if the subject voluntarily submits to the search. A passenger who chooses to board his flight after being given an opportunity to avoid a frisk by choosing not to fly is deemed to have consented to a frisk. This rationale is more explicitly outlined in *People v. Bleile*.[27] However, in *Bleile*, verbal notification by the boarding gate personnel to the passengers of their right to not be searched was held not to be a prerequisite to a finding of voluntary consent to be searched.

Of course, *Meulener* was not binding on the *Moreno* court.[28] But it is probably true that the *Moreno* court declined to follow *Meulener* because the *Moreno* court wished to do what the *Meulener* court had specifically avoided, namely, to establish a special fourth amendment standard for ticketed passengers at an airport.[29] That special standard is that once a person becomes a ticketed passenger in an airport, he is subject to a forced search based not upon a police officer's need to protect himself and others, but rather upon the reasonable belief that the person may constitute a threat to other passengers should he board an aircraft.

III. Future Implications: The Balancing Test.

Having reviewed the *Moreno* decision in the context of precedent available to the Fifth Circuit in deciding the case, it remains necessary to consider the implications of the holding both in the narrow field of airport searches and in the broader field of fourth amendment protections.

The debate over the constitutional validity of warrantless airport searches without probable cause has transcended the holding of *Terry* and directly confronted the fourth amendment. But the fourth amendment does not contain specific prohibitions; it only prohibits in general terms "unreasonable" searches. Thus a court must determine whether or not a search is "reasonable" under the facts presented when deciding on the constitutional validity of a search. The Supreme Court has said: "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[30] This balancing test is used by the *Moreno* court: "In cases such as this one, where a warrantless search is conducted, it is necessary to strike a cautious

---

[26] *Id.* at 1290.

[27] 33 Cal. App. 3d 203, 108 Cal. Rptr. 682 (1973).

[28] In United States v. Skipwith, 482 F.2d 1272, 1277, the Fifth Circuit rejected *Meulener*: "Moreover, [we] fully concur . . . that Skipwith's right-to-leave argument is devoid of merit. Thus this court expressly declines to follow the rule announced in U.S. v. Muelener [sic] . . . ."

[29] The *Moreno* court does not explicitly limit its holding to ticketed passengers, but Moreno's purchasing a ticket was a key element in the court's determination that Officer Granados' belief that Moreno could be a skyjacker was reasonable. Whether that belief would have been found to be reasonable absent the purchase of a ticket was simply not considered by the *Moreno* court.

[30] Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

balance between the competing interests of law enforcement and the right of the individual to be left alone."[31]

The courts considering airport searches are uniform in noting that the urgency of the skyjacking problem requires special judicial consideration in balancing the reasonableness of a search against the rights of passengers to be secure in their persons, especially in view of the mortal danger to large numbers of passengers threatened by a single skyjacker.[32] Messrs. McGinley and Downs in their critique of judicial decisions concerning airport searches[33] note the willingness of courts to construe *Terry* as requiring a very low standard of reasonable belief when applied to airport searches. As an extreme example of this attitude, they quote from the concurring opinion in *Bell*, wherein Chief Judge Friendly stated that he would have "no difficulty in sustaining a search that was based on nothing more than the trained intuition of an airline ticket agent or a marshall of the Anti-Hijacking Task Force."[34] Thus the case law on this problem has been a continual erosion of the *Terry* standards for a stop and frisk conducted in an airport.[35] A doctrine that began as a cautious approval of a frisk if used in conjunction with a properly conducted and carefully restricted screening process in *Lopez* now threatens to permit full searches of nervous-looking people who have bulging pockets in an airport.

This possibility alarms civil libertarians, as well as a few judges. Judge Friendly's comment so shocked his colleague, Judge Mansfield, that he wrote in a separate concurrence: "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."[36] Judge Mansfield's burst of indignation was echoed by the American Civil Liberties Union, which recently released a position paper stating their opposition to both the present system of searching all passengers and the screening system in effect when Lopez, Bell, Epperson, and Slocum were arrested.[37] In stating its view that "ignoring the Fourth Amendment" in the context of an airport search is unconstitutional, the paper observed that at the height of the skyjacking epidemic an air passenger had a far lower probability of being involved in a skyjacking than of being present during a bank robbery or of being mugged. Thus, the paper argues, if the airport situation requires emergency measures encroaching on constitutional rights,

---

[31] 475 F.2d at 49-50.

[32] A typical judicial statement of this principle is found in People v. Botos, 27 Cal. App. 3d 774, 778, 104 Cal. Rptr. 193, 195 (1972):

> The content of the Fourth Amendment guarantee, however, must be shaped by the context in which it is asserted. Here the questioning did not take place on a sreet or in a park, but occurred in an airline terminal at the place where passengers were boarding the plane. It is unnecessary to document the alarming increase in aircraft piracies over the last few years. The dangers presented to innocent bystanders by these crimes are apparent. When these obvious dangers are combined with the inherent difficulty of preventing hijackings, an individual's expectation of privacy from questioning or search when boarding an aircraft should not be as high as in other public places.

[33] McGinley and Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293 (1972).

[34] *Id.* at 315, quoting from 464 F.2d 667, 675 (2d Cir. 1972).

[35] McGinley and Downs trace the gradual loosening of standards set by *Lopez* as necessary to apply *Terry* to airport searches, through later cases scrutinizing the constitutionality of F.A.A. screening procedure searches. *Id.* at 313-15.

[36] *Id.* at 315, quoting from 464 F.2d at 676.

[37] CIVIL LIBERTIES, July 1973, at 6.

cannot the same emergency measures be used in the streets of our cities, given the greater probability that a citizen may be mugged?

In concluding their critique of the cases McGinley and Downs state their belief that "*Terry* can [not] constitutionally be expanded to cover the airport anti-hijacking situation, and attempts to do so can only lead to a potentially serious dilution of the protections embodied in the Fourth Amendment."[38] They go on to say that public interest should not be permitted to justify a search of all passengers at an airport, because to permit the reasonableness of a search to be determined solely by reference to each new public crisis is to nullify the protections of the fourth amendment.

However, since the cases cited herein arose, the F.A.A. has instituted a program in which every passenger and every piece of luggage carried aboard U.S. aircraft are being searched. Since the institution of this program in February of 1973 not one U.S. flag aircraft has been hijacked.[39] In view of the absolute success of the program, it will be difficult for a court to rule it unconstitutional. The compelling interest of the government in preventing skyjackings, the obvious effectiveness of the measures taken, and the apparent lack of alternative solutions to the problem, all combine to present a strong favorable ground of support for the program in a court with pragmatic tendencies. Nevertheless, judges sensitive to constitutional freedoms may have misgivings about the possibility that for the foreseeable future each passenger will be searched before being permitted to board an aircraft. It is not difficult to overlook or justify temporary measures to ensure security during a time of conflict or unrest. But it is disconcerting to note that this program does not envision an end to skyjackings, but rather assumes that only the continuance of the program will assure that the skyjacking threat will remain dormant.

IV. Future Implications: Border Search Standards Applied to Airports.

It can be predicted with a fair degree of certainty that the court which upholds the new universal search program will not be able to justify it on the *Terry* doctrine. To do so would require a finding that all ticketed passengers are suspicious persons, each of whom can be reasonably believed to pose a present danger to the other passengers. Some other rationale will have to be found, and *Moreno* suggests what that rationale will be. *Moreno* suggests that an airport be treated as an "exceptional and exigent situation under the Fourth Amendment";[40] that an airport, "like a border crossing, is a critical zone to which special fourth amendment considerations apply."[41] Although the court declined to base its decision on that idea, its discussion of the analogy suggests the availability of that doctrine as a possible justification of airport frisks.[42]

---

[38] McGinley and Downs, *supra* note 33, at 516.

[39] NEWSWEEK, May 7, 1973, at 88.

[40] 475 F.2d at 48.

[41] *Id.* at 51.

[42] The Fifth Circuit evidenced its intent to continue the doctrine of upholding airport searches on the basis of *Terry*, but justifying the greater intensity of the searches on the basis of an airport being a critical zone, like a border crossing, in United States v. Legato, 480 F.2d 408 (5th Cir. 1973). Appellant was arrested after an F.B.I. agent opened a gift-wrapped package he was carrying, having received a telephoned bomb threat, and found heroin inside. In United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973), the Fifth Circuit also stated that passengers need not be deemed suspicious to justify a search at a boarding gate:

The significance of analogizing airports to border crossings is that border crossings have long been recognized as a situation in which the general standards for permitting a personal search may be lowered. In *United States v. Warner*,[43] the Fifth Circuit explains that the border crossing doctrine arises from a federal statute[44] never successfully challenged on constitutional grounds, which authorizes a customs officer to search any person whom he suspects to be carrying merchandise subject to duty. Thus the federal courts have uniformly held that border searches do not require a warrant or probable cause, but that mere suspicion of possible illegal activity is cause enough to justify a border search. Such a relaxation of standards is said to be based upon Congressional recognition of the "peculiar and difficult problems involved in effectively policing our extensive national boundaries."[45] While a border search is not exempt from the reasonableness requirement of the fourth amendment, the measure of reasonableness differs at a border crossing in that searches which would be considered unreasonable if conducted by police officers on a street might be held reasonable if conducted by customs officers at a border crossing. An alternate statement of the justification for border searches, appearing in numerous cases, is that there is reason and probable cause to search every person entering the United States from a foreign country by reason of such entry alone.[46]

Under the border crossing rationale, the *Meulener* test would be disposed of easily. In *United States v. Glaziou*[47] the Second Circuit held that the class of persons subject to border searches was not limited to those actually crossing the border, but also included persons who work in a border area, or who act suspiciously near a border area. Applying this argument to an airport would negate the *Meulener* requirement that only those persons actually boarding an aircraft be subject to search.

V. CONCLUSIONS

It is probable that the usefulness of *Moreno* as precedent for justifying the frisk of passengers not in the boarding process will be curtailed by the continued use of the universal frisk program, the existence of which negates the justification of a *Moreno* search on the grounds of urgency and extreme potential danger. In moving to suppress evidence seized in a *Moreno* type of search today, the

---

> In the critical pre-boarding area where this search started, reasonableness does not require that officers search only those passengers who meet a profile or who manifest signs of nervousness or who otherwise appear suspicious. Such a requirement would have to assume that hijackers are readily identifiable or that they invariably possess certain traits. The number of lives placed at hazard by this criminal paranoia forbid taking any such deadly chances.

The court thus rejected yet another of the basic criteria of the *Terry* doctrine—that the person frisked be suspicious.

But the Second Circuit has held that a person who does nothing suspicious in a boarding area cannot be frisked on the basis of *Terry* unless he has met the profile and activated the magnetometer at the boarding gate. United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973).

[43] 441 F.2d 821 (5th Cir. 1971), *cert. denied*, 404 U.S. 829 (1971). *See also* Annot., 6 A.L.R. Fed. 317 (1971).

[44] 19 U.S.C. § 482 (1970).

[45] 441 F.2d at 832.

[46] Annot. 6 A.L.R. Fed. 317, 323 (1971). A lengthy list of cases stating this rule appears at the page cited.

[47] 402 F.2d 8 (1968), *cert. denied*, 393 U.S. 1121 (1969). This holding was adopted by the Fifth Circuit in United States v. Hill, 430 F.2d 129 (1970).

defendant could argue that each passenger will be frisked at the boarding gate before boarding the aircraft. Thus there is no compelling interest of the government to frisk any passenger prior to that passenger reporting to the boarding gate, unless the frisk can be justified under *Terry* as necessary to protect a police officer and bystanders during an interrogation based upon reasonable belief that a crime is about to be committed or is being committed. To relax the *Terry* requirements in a *Moreno* search in order to protect passengers aboard aircraft, when the defendant would face a certainty of having his person and hand luggage searched at the boarding gate anyway, would be to condone unnecessary infringement of fourth amendment protections, since the *Moreno* frisk would be superfluous in protecting passengers aboard the aircraft. The basis of the *Moreno* court's consideration of the constitutionality of the search of Moreno, namely that "society's law enforcement capabilities have not caught up with these problems,"[48] is no longer valid. While courts may well continue to justify frisks which take place within airports, but which are not part of the boarding process, by citing *Moreno*, the necessity for the *Moreno* decision is no longer apparent, nor the rationale compelling.

Whether *Moreno* will become a useful precedent in non-airport situations is a question to which any answer would be speculative at best. The *Moreno* court was certainly emphatic in saying that its holding was justified precisely because the encounter occurred in an airport.[49] Although the ingenuity of courts in extending seemingly inextensible doctrines is enormous, it is to be hoped for the sake of the rights protected by the fourth amendment that no court will find it expedient or necessary to determine that other situations in American life are analogous, in terms of potential danger, to that of American airports in January of 1972 when Moreno was arrested.

Robert Conley Kahrl

FEDERAL INCOME TAX—DEDUCTIBILITY OF COST OF ESTABLISHING MERCHANDISING OUTLETS—*Briarcliff Candy Corp. v. Commissioner*, 475 F.2d 775 (2d Cir. 1973).

I. FACTS; TAX COURT AND COURT OF APPEALS HOLDINGS.

Taxpayer, formerly the Loft Candy Corp., manufactured and sold boxed chocolates, candy bars, and other confectionary products. For many years it had marketed its candies through retail stores located in cities throughout the northeastern United States. In the late 1950's these urban stores suffered a substantial drop in sales, as many urban dwellers left cities to live and to buy in suburbs.

To combat this loss of revenue, Briarcliff transfered its marketing thrust to suburban areas, establishing franchise agreements for the sale of its candies with independent suburban drug stores. It created a franchise division that spent $332,869 in the 1962 taxable year[1] to open and operate 159 such outlets. Of that amount, $120,841 was allocable to recurring operational expenses; the remainder, $212,028, was allocable to promotional costs incurred in obtaining the con-

[48] 475 F.2d at 49.

[49] See notes 40 and 41, *supra*.

[1] Briarcliff Candy Corp. is an accrual method taxpayer and files its returns on the basis of a 52-53 week taxable year ending on the Saturday nearest June 30.

tracts, such as expenditures for advertising, travel, art work, circulars, and salary for the head of the new franchise division. The franchise contracts ran for initial terms of one to five years with an average length of 2.4 years. These contracts were to be renewed automatically every year after the expiration of the initial term, until either party cancelled on thirty days' notice.

This franchise system proved so effective in restoring Briarcliff's income to its former level that Briarcliff spent $4,152,249 to open and operate new franchises in the succeeding years through 1968. However, increased administration and operation costs caused franchise profits to decline after 1966; and in 1969 taxpayer decided to phase out the franchise program by cancelling each of the 1,640 franchise contracts then in force as soon as was possible under its terms. In 1971 taxpayer sold all its intangibles and some equipment. In the sale the remaining 179 franchise contracts combined with all other intangible assets, such as customer lists, manufacturing formulas, and goodwill, brought only $10,000.

These facts presented the issue whether the $212,028 of promotional costs incurred to obtain new franchise outlets in 1962 was deductible as an ordinary and necessary business expense pursuant to § 162(a) of the Internal Revenue Code of 1954.[2] In *Briarcliff Candy Corp.*[3] the Tax Court held that the promotional costs were not deductible, but were instead capital expenditures pursuant to § 263 (a)(1) of the Internal Revenue Code of 1954.[4] That ruling was based upon the finding that Briarcliff's franchise expenditures resulted in the acquisition of assets benefiting the taxpayer beyond the taxable year. And since these assets were not shown to have a demonstrably limited useful life, their cost could not be amortized pursuant to § 167(a)(1) of the Internal Revenue Code of 1954[5] and § 1.167(a)-3 of the Treasury Regulations.[6]

The court of appeals for the Second Circuit reversed the Tax Court. It held that whether an expenditure could be expected to generate benefits beyond the taxable year was no longer a controlling test, since certain other clearly deductible expenses, such as advertising costs, can also produce benefits beyond the taxable year. The court further held that the franchise costs were not capital expenditures because those costs did not result in the creation or acquisition of a separate and distinct business entity or asset. The court distinguished separate and distinct assets

---

[2] INT. REV. CODE OF 1954, § 162(a) provides: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

[3] 41 P-H Tax Ct. Mem. 179 (1972).

[4] INT. REV. CODE OF 1954, § 263(a)(1) provides in pertinent part that no deduction shall be allowed for "[a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate."

[5] INT. REV. CODE OF 1954, § 167(a)(1) provides that "[t]here shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) . . . for property used in the trade or business. . . ."

[6] TREAS. REG. § 1.167(a)-3 (1956) provides:

> If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to good will. For rules with respect to organizational expenditures, see section 248 and the regulations thereunder. For rules with respect to trademark and trade name expenditures, see section 177 and the regulations thereunder.

acquired through capital expenditures from other costs: a § 263 asset has been acquired "if at the time it is furnished to the company, it has an ascertainable and measurable value—that is, a value in money or a fair market value."[7] The court held that Briarcliff's rights under its franchise contracts were so minimal that the agreements served as mere conduits for normal sales to individual customers. Since no property interests, "items of ownership of a permanent or fixed nature which are convertible into cash,"[8] had been acquired, or separate and distinct assets had been created, no capital expenditures had been made pursuant to § 263. The court found that the facts of the case

> bring it squarely within the long recognized principle that expenditures for the protection of an existing investment or the continuation of an existing business or the preservation of existing income from loss or diminution, are ordinary and necessary within the meaning of § 162 . . .[9]

Thus Briarcliff's franchise costs were held to be fully deductible in the year in which they were incurred.

II. The Use of Accounting Principles for Tax Classification.

Both the Tax Court and the Second Circuit saw Briarcliff's franchise expenditures as an outward and cash-flow sign of an inward and economic phenomenon. Both tried to construct an account of this phenomenon that would expose the true economic nature of the expenditure made, and thus provide a reasonable basis for tax classification. The results were remarkably different. This divergence is partly understandable, since courts attempting such constructions operate in a statutory wasteland: the individual provisions of the Internal Revenue Code of 1954 and their correlative Treasury Regulations do not provide detailed economic or accounting descriptions of those expenditures to which they are to be applied. Hence, when an expenditure such as Briarcliff's franchise costs seems capable of classification under two or more possibly conflicting Code provisions, courts rely upon inner convictions and outside sources for the economic analysis and accounting principles used to develop tests to determine the tax classification of that expenditure. The problem becomes how to develop an appropriate test from several economic and accounting principles, none of which are officially sanctioned by the Internal Revenue Code.

Not even those accounting practices which are required for reports to federal agencies other than the Internal Revenue Service control tax law classification.[10] But the pronouncements of the American Institute of Certified Public Accountants (AICPA) are a fruitful source for criteria that may be advanced by litigants, and accepted by courts, as the bases for the tax classification of expenditures. And even if particular parties or courts do not expressly refer to these generally accepted accounting principles, such principles often expose the economic and accounting assumptions of courts more clearly than does analysis of the explicit language of their opinions.

Accounting Research Bulletin No. 43, Chapter 5, Intangible Assets (1953)[11]

---

[7] Briarcliff Candy Corp. v. Commissioner, 475 F.2d 775, 784 (2d Cir. 1973).

[8] *Id.* at 786.

[9] Id. at 787.

[10] Old Colony R. R. v. Commissioner, 284 U.S. 552, 562 (1932).

[11] American Institute of Certified Public Accountants, Committee on Accounting Procedure, Accounting Research Bulletin No. 43, Chapter 5, Intangible Assets (1953).

divided intangible assets into two groups. It provided that the costs of those intangible assets whose term of existence is limited by law, such as patents, copyrights, leases, licenses, franchises for a fixed term, and goodwill as to which there is evidence of limited duration, were to be systematically amortized over their useful lives. These assets were called "type (a)" intangibles. The costs of assets having no such limited life, such as goodwill generally, going value, trade names, secret processes, subscription lists, perpetual franchises, and organization costs, were to be amortized if at some time it appeared that those assets' useful lives had become limited. Such costs might also be amortized at the discretion of the company if it appeared that the asset acquired or developed might not continue to have value during the entire life of the enterprise, even if there was no present indication that the asset's useful life had become limited. These assets were called "type (b)" intangibles. The Internal Revenue Code of 1954 provides for a similar classification of intangible assets in Treasury Regulation § 1.167(a)-3 and allows amortization of intangibles whose useful life is known. Intangibles whose useful life is not known, however, will not be subject to amortization unless one of the statutory exceptions, such as those for organization expenditures under § 248, trademark expenditures under § 177, and circulation costs under § 173, is applicable, or unless the useful life can be estimated with reasonable accuracy.

The AICPA's previous division of assets according to whether useful life can be calculated, still the basis of tax treatment under the Internal Revenue Code, was superseded by a new accounting classification expounded in Accounting Principles Board Opinion No. 17, Intangible Assets (1970) (hereinafter cited as APB Opinion No. 17).[12] The opinion considered four bases for classifying intangibles:

> [1] Identifiability—separately identifiable or lacking specific identification.
>
> [2] Manner of acquisition—acquired singly, in groups, or in business combination or developed internally.
>
> [3] Expected period of benefit—limited by law or contract, related to human or economic factors, or indefinite or indeterminate duration.
>
> [4] Separability from an entire enterprise—rights transferable without title, salable, or inseparable from the enterprise or a substantial part of it.[13]

APB Opinion No. 17 abandons the third basis, the previous AICPA position, and adopts the second for use in future accounting practice. That practice will be to

> record as assets the costs of intangible assets acquired from other enterprises or individuals. Costs of developing, maintaining, or restoring intangible assets which are not specifically identifiable, have indeterminate lives, or are inherent in a continuous business and related to an enterprise as a whole—such as goodwill—should be deducted from income when incurred.[14]

This change means that analyses drawn from generally accepted accounting principles will no longer provide direct support for the classification of intangible assets for tax purposes pursuant to Treasury Regulation § 1.167(a)-3. Therefore the utility of generally accepted accounting principles as a basis for advocating tax classifications might be expected to have diminished.

Predictably, neither the Tax Court nor the Second Circuit mentioned APB Opin-

---

[12] American Institute of Certified Public Accountants, Accounting Principles Board, Opinion No. 17, Intangible Assets (1970).

[13] *Id.* at 6663.

[14] *Id.* at 6665.

ion No. 17 in its analysis of expenditures for tax purposes. But both courts paraphrased its bases of classification for purposes of economic analysis and, more importantly, for tax classification. This de facto congruence of court-developed tests for tax classification with generally accepted accounting principles suggests that APB Opinion No. 17, in spite of its explicit differences from present tax law, provides an implied gloss upon both *Briarcliff* opinions and a source for argument in future, related cases.

III. THE TAX COURT'S OPINION.

The Tax Court assumed that all costs generating benefits beyond one year produce assets, and that the cost of acquiring any such multi-year benefit would therefore be a § 263 capital expenditure. The court overlooked advertising expenditures, whose benefits often last beyond the taxable year, but which are almost always held not to be § 263 expenditures.[15] Even if advertising expenditures were held to create internally developed goodwill, that asset may be excluded by implication from the operation of § 263: the mention of the cost of goodwill acquired pursuant to the purchase of a going concern in Treasury Regulation § 1.263(a)-(2)(h),[16] as an example of a capital expenditure, may distinguish such goodwill from goodwill created by advertising expenditures. And even if internally developed goodwill is a § 263 asset, or the multi-year benefit enjoyed by Briarcliff constituted some other § 263 asset, not all expenditures made in respect to a § 263 asset are capital expenditures.

This distinction shows up most clearly with tangible § 263 assets, such as buildings. Treasury Regulation § 1.263(a)-1(b)[17] provides that amounts spent to add to the value or substantially prolong the life of a § 263 asset or to adapt it to a new or different use must be capitalized, whereas amounts spent for incidental repairs and maintenance are not capital expenditures. Treasury Regulation § 1.162-4[18] specifically provides for the deduction of such noncapital expenditures as ordinary and necessary business expenses. Therefore the Tax Court might rea-

---

[15] An exception is Alabama Coca-Cola Bottling Co., 38 P-H Tax Ct. Mem. 680 (1969), in which the cost of signs used in advertising was held to create an intangible asset, an advertising benefit, whose useful life was co-extensive with the five-year average useful life of the signs themselves. Taxpayer was required to capitalize the cost of the signs and allowed to amortize it over five years.

[16] TREAS. REG. § 1.263(a)-(2)(h) (1958) provides that, "The cost of good will in connection with the acquisition of the assets of a going concern is a capital expenditure."

[17] TREAS. REG. § 1.263(a)-1(b) (1958) provides:

> In general, the amounts referred to in paragraph (a) of this section include amounts paid or incurred (1) to add to the value, or substantially prolong the useful life, of property owned by the taxpayer, such as plant or equipment, or (2) to adapt property to a new or different use. Amounts paid or incurred for incidental repairs and maintenance of property are not capital expenditures within the meaning of subparagraphs (1) and (2) of this paragraph.

[18] TREAS. REG. § 1.162-4 (1958) provides:

> The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as an expense, provided the cost of acquisition or production or the gain or loss basis of the taxpayer's plant, equipment, or other property, as the case may be, is not increased by the amount of such expenditures. Repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property, shall either be capitalized and depreciated in accordance with section 167 or charged against the depreciation reserve if such an account is kept.

sonably have inquired whether before 1962 Briarcliff had first enjoyed the benefits of a § 263 asset (property such as an effective retail merchandising system), and had subsequently maintained or protected the value of that property by the expenditure of the franchise promotion costs in such a way that no capital expenditure pursuant to § 263 had been made.

If the Tax Court's assumption that taxpayer's franchise expenditures did create a new or different § 263 asset is correct, then so is its holding that the method of acquiring that asset is irrelevant for tax purposes. To pursue further the analogy to tangible assets, the cost of purchasing a new building and that of constructing one will both be considered capital expenditures.[19]

Given the Tax Court's assumption that Briarcliff's expenditure had resulted in the acquisition of a new or different § 263 asset, its choice of how to characterize that asset for tax purposes appears to be based upon identifiability and period of benefit, the first and third bases of classification discussed in APB Opinion No. 17. By labelling the assets acquired as 159 valuable franchise contracts and as new sales outlets, the court focused on the criterion of identifiability to support its holding that the assets did not constitute unidentifiable goodwill. Rather, these assets were identifiable individually, as contracts with individual store owners. Their value could be measured on a contract-by-contract basis, and they were identifiable collectively as the result of a new and different marketing campaign.

The Tax Court then relied on the third basis of classification from APB Opinion No. 17, that of expected period of benefit, to hold that it is impossible to determine a useful life for these assets over which amortization may be scheduled. In some recent cases involving amortizability of purchased franchise contracts, customer lists, and the like, courts have allowed statistical analyses of the average life of such types of assets (in the hands of the purchaser or the seller, or in the experience of the business or industry as a whole) as the basis for a reasonably accurate determination of a useful life.[20] The ensuing amortization made possible by such analyses stands in contrast to the results of other cases, which suggest that average useful life cannot be determined with reasonable accuracy by the use of the statistical analyses offered, or that the assets acquired represent nondepreciable goodwill.[21]

---

[19] Here is an instance in which a similar tax treatment of intangible § 263 assets would conflict with generally accepted accounting principles pursuant to APB Opinion No. 17, since that opinion provides that the cost of developing an intangible asset internally be expensed.

[20] *See* Manhattan Co. 50 T.C. 78 (1968) (taxpayer's cost of purchasing customer lists from another laundry service held amortizable over five years based on taxpayer's own previous experience of a 20% yearly turnover of customers in the same geographical area); Super Food Services, Inc. v. United States, 416 F.2d 1236 (7th Cir. 1969) (taxpayer's cost of purchasing retail franchise contracts subject to cancellation on 30 days' notice nevertheless held amortizable, based on average duration of 86 months for such contracts in the hands of the seller); Securities-Intermountain, Inc. v. United States, 460 F.2d 261 (9th Cir. 1972) (taxpayer's cost of purchasing a mortgage portfolio held amortizable over eight years based on taxpayer's previous experience in the mortgage banking business); Vaaler Insurance, Inc. v. United States, 21 AFTR 2d 558 (D.N.D. 1968) (taxpayer's cost of purchasing an insurance agency and its expiration files held amortizable based on a showing that policies had previously stayed on the seller agency's books for an average of five years).

[21] Thrifticheck Service Corp., 33 T.C. 1038 (1960), *aff'd*, 287 F.2d 1 (2d Cir. 1961) (taxpayer's cost of purchasing five-year banking service contracts renewable for one term held not to be amortizable because neither the five- nor the ten-year terms claimed by taxpayer as a useful life of each contract for purposes of amortization could be shown to be the demonstrable average useful life of all contracts); Commissioner v. Indiana Broadcasting Corp., 350 F.2d 580 (7th Cir. 1965) (taxpayer's cost of network affiliation contracts for a term of two years but indefinitely renewable held not amortizable over an estimated life of twenty

This recent relaxation of the standard of proof for the demonstration of the average useful life of a group of assets was not helpful in Briarcliff's case. Since Briarcliff's franchise contracts were internally developed rather than purchased, no history of the average duration of such contracts in the hands of a seller was available as a basis for statistical determination of average useful life. And since the contracts developed in 1962 represented Briarcliff's first venture into franchising, no history of similar contracts in the hands of Briarcliff was available either.

Given the assumption that Briarcliff's expenditures were capital expenditures resulting in the acquisition of a § 263 asset, the use of the fourth criterion discussed in APB Opinion No. 17, that of separability, might reasonably have resulted in the holding that goodwill was created. Taxpayer's arguments against the claim that the franchise costs created identifiable contracts even points in that direction:

> In essence, the contracts required only that the drugstore proprietors set aside and equip space in their stores for the sale of Taxpayer's products and that they use their best efforts to sell such products. The principal function of the contracts was to *regulate sales* when, as and if they occurred. They did not provide for the payment of any fees or royalties to Taxpayer, nor did they require that the drugstore proprietors purchase any specific amount of candy, or for that matter, any candy at all. Those drugstore customers who were satisfied with Taxpayer's product continued as good customers. The others did not. The profitability and continuity of the supplier-customer relationship thus hinged entirely on Taxpayer's ability to provide the drugstores with products which would find continued acceptance with the drugstores' retail customers. This in turn depended upon the quality and price of the product, upon the success of Taxpayer's advertising and marketing programs and upon all of the other factors which generally add up to a successful product. The existence of the contracts afforded Taxpayer nothing more than an "expectation or hope" that profitable supplier-customer relationships would develop and continue.[22]

If the value of the franchise contracts was so inextricably entwined with Briarcliff's success in maintaining customer relations, those contracts could probably not be sold or assigned separately from the candy corporation as a whole and still be of any value. Therefore, given the Tax Court's conclusion that Briarcliff's expenditures did result in the acquisition of a § 263 asset, the criterion of separability considered in APB Opinion No. 17 could plausibly operate to classify such an asset as goodwill inseparable from the enterprise as a whole.

Treasury Regulation § 1.167(a)-3 provides that goodwill is not amortizable at all.[23] Therefore, to characterize Briarcliff's franchise costs as goodwill would

---

years because each contract was unique and not subject to predictions based upon statistical analysis); Dunn v. United States, 400 F.2d 679 (10th Cir. 1968) (franchisee's gallonage payments for the use of franchisor's Dairy Queen syrup under a perpetual assignment subject to cancellation at any time held neither deductible nor amortizable, but held to be capital expenditures increasing the basis of the franchise); Marsh & McLennan, Inc., 51 T.C. 56 (1968), *aff'd*, 420 F.2d 667 (3rd Cir. 1969) (taxpayer's cost of purchasing insurance expirations held not amortizable in spite of statistical evidence showing an average useful life of five years for similar assets in the hands of the taxpayer. The Tax Court held itself free to disregard statistical evidence gleaned from the study of assets other than the ones actually under consideration, and held that the purchase of the expirations was inextricably tied up with goodwill.).

[22] Brief for Appellant at 22, Briarcliff Candy Corp. v. Commissioner, 475 F.2d 775 (2d Cir. 1973).

[23] Tax law need not necessarily have developed in such a way as to disallow the amortization

prohibit their amortization even if a demonstrable useful life for that goodwill could reasonably be determined. Thus *any* characterization of Briarcliff's costs as capital expenditures would amount to disallowing any deduction of those costs through the depreciation provisions of the tax system, regardless of whether those costs are said to produce identifiable franchise contracts or to produce unidentifiable, inseparable goodwill. Since these alternatives result in this same tax treatment of no write-off of costs through immediate deduction and no deferred deduction through amortization, Briarcliff sought to avoid this unattractive consequence by arguing that the incurring of the franchise costs resulted in the acquisition of no assets at all.

IV. The Court of Appeals Opinion.

Tests for deciding whether expenditures create assets may be found both in the Internal Revenue Code and in APB Opinion No. 17. The second criterion considered in APB Opinion No. 17, that of manner of acquisition, assumes that intangible assets may be developed internally as well as purchased. But it finds internally developed assets, such as goodwill developed by an ongoing enterprise, so difficult to distinguish from expenses, such as the cost of advertising, that it recommends writing off both of them and treating only purchased intangibles as assets.

The Internal Revenue Code, by contrast, attempts to distinguish expenses from assets according to the economic consequences that result from an expenditure. The standard promulgated by Treasury Regulations §§ 1.263(a)-1(b) and 1.162-4, characterizing capital expenditures and repairs respectively, considers addition to the value of property, substantial prolongation of its useful life, or its adaptation to a new and different use, to be economic consequences which characterize the acquisition of an asset.

The operation of these economic tests is best understood in terms of opinions that have construed them. A leading case is *Midland Empire Packing Co. v. Commissioner*,[24] in which the expenditure had been made to oilproof a basement

---

of goodwill. In Haberle Crystal Springs Brewing Co. v. Clarke, 30 F.2d 219 (2d Cir. 1929), Judge Learned Hand held that a stipulated loss of $89,000 in damage to a brewery's goodwill, caused by the anticipation and passage of prohibition legislation, could be depreciated over the period in which the goodwill was lost. The schedule ran from January 31, 1918, when passage of the eighteenth amendment became predictable, to January 16, 1920, when it went into effect. The decision was reversed by Mr. Justice Holmes, 280 U.S. 384 (1930), not because goodwill was held incapable of a decline in value and thus not properly the subject of amortization, but because compensation for losses incurred by a business noxious to the Constitution ought not to be made through the tax system, or any other agency, of the government that prohibits the operation of that business.

In Williams v. McGowan, 152 F.2d 570 (2d Cir. 1945), Justice Hand held that purchased goodwill of a hardware business was amortizable, distinguishing the case from *Haberle* on the basis of the illegality of Haberle's business.

While subsequent cases could have followed this permissably narrow reading of *Haberle*, they instead adopted the reading of another brewery case. In V. Loewer's Gambrinus Brewing Co. v. Anderson, 282 U.S. 638 (1931), the allowance for depreciation of a brewer's buildings and equipment suitable only for brewing was distinguished from the disallowance of depreciation in *Haberle* because the assets damaged in the later case were tangible.

APB Opinion No. 17 requires that purchased goodwill be amortized, for accounting purposes at least. For arguments that purchased goodwill should be amortizable for tax purposes as well, see Note, *Amortization of Intangibles: An Examination of the Tax Treatment of Purchased Goodwill*, 81 HARV. L. REV. 859 (1968); Pearson, *Is Goodwill Immortal?*, 56 A.B.A.J. 60 (1970).

[24] 14 T.C. 635 (1950).

used by the taxpayer for meat storage, against oil and water seepage that had rendered the basement unfit for its former use. Holding that the expenditure constituted a repair expenditure, the court noted that the concrete lining added to the taxpayer's basement enabled the business only to continue operating as it had in the past. Rather than prolonging the useful life of the basement or adding to the value of the building, the repairs merely maintained and preserved the value of the building. The repairs prevented the shortening of its useful life and the lessening of its value as a business property that the casualty of the oil seepage would have caused if left unchecked.

In *Briarcliff* the Second Circuit did not specifically apply these standards for the characterization of expenditures made respecting intangibles, because of the confusing state of present case law. But the court's opinion indicates that it kept these or similar standards in mind:

> [T]he changes which Loft made in its own internal organization to spread its sales into a new territory were not comparable to the acquisition of a new additional branch or division to make and sell a new and different product. Loft, in spite of its own talk about an additional division and the entering into franchise contracts, was doing no more than stimulating its sales department to stem the downward course of sales by making Loft's candy available in the suburbs to a class of customers who had moved there from the cities where they had been purchasers of its candy. It was selling exactly the same products it had sold for decades.[25]

The analogy to *Midland* is almost inescapable. Customer migration to the suburbs threatened the value of the merchandising system just as the oil leak hurt the storage value of the basement. The franchise costs did not add value to the system, but did "stem the downward flow" of sales—a finding supported because the addition of the franchise outlets restored Briarcliff's income to its presuburban level but did not increase it substantially beyond that amount. The opening of the suburban franchises did not adapt taxpayer's business to a new and different use, since taxpayer would continue to sell to the same class of customers, "exactly the same products it had sold for decades."

The Second Circuit did not rely upon this analogy as the ground for its holding that Briarcliff's franchise costs were expenses instead of capital expenditures. But the analogy may serve as the basis for rejecting the Tax Court's standard of benefits beyond the taxable year as the test for whether a capital expenditure has been made: the effectiveness of both Midland's concrete lining and of Briarcliff's franchising system lies in the continued protection of the preserved business property for more than one year.

The authority supporting the Second Circuit's rejection of the Tax Court standard, and the basis for the new test it described and applied, are found in *Commissioner v. Lincoln Savings and Loan Association*.[26] That case involved payments by a bank into a secondary reserve fund to cover only those losses not already covered by the Federal Savings and Loan Insurance Corporation. The payments were required by federal law, and the reserves they created were kept available to cover losses incurred in future years as well as in the year in which the payments were made. In its holding that the payments represented a capital expenditure rather than a deductible expense, the Supreme Court said that whether the payments created benefits that the taxpayer would enjoy beyond the taxable year was not

---

[25] 475 F.2d at 782.

[26] 403 U.S. 345 (1971).

controlling. Rather the test was whether the payments served "to create or enhance for Lincoln what is essentially a separate and distinct additional asset and, that as an inevitable consequence, the payment is capital in nature. . . ."[27]

In *Briarcliff* the Second Circuit held that the test for what constitues a separate and distinct additional asset, an asset whose cost represents a capital expenditure, is whether "at the time it is furnished to the company, it has an ascertainable and measurable value—that is, a value in money or a fair market value."[28] Section 263 assets also have "an ascertainable and measurable value in money's worth, so that they are no longer regarded as an expense but as a distinct and recognized property interest."[29] In addition, § 263 assets are those "items of ownership of a permanent or fixed nature which are convertible into cash."[30]

This multiple-step analysis bears an interesting, if somewhat strained, relation to the bases of classification offered by APB Opinion No. 17. A "separate and distinct additional asset" may or may not be one which is capable of separate sale pursuant to the opinion's fourth criterion, that of separability from the entire enterprise. For instance, the taxpayer in *Lincoln Savings and Loan Association* was not legally or practically able to sell its property interest in the secondary reserve fund without also parting with title to the bank itself.

The Second Circuit's definitions of "separate and distinct" are cast in terms of cash value and fair market value. These definitions seem to make little economic sense, since even Briarcliff's franchise contracts, if they could have been offered for sale with or without the rest of the enterprise at the time they were acquired, presumably would have fetched *some* sum of money, and thus have had a cash value. If all these allusions to fair market value suggest only that the fair market value of Briarcliff's internally developed benefits cannot be ascertained before they are actually sold, then the Second Circuit seems to be adopting the second APB Opinion No. 17 criterion for what constitutes an asset, the basis for accounting practice ultimately promulgated by the APB opinion as its own basis for determining what constitutes a § 263 asset—whether the benefits were acquired by purchase or developed internally.

Since all benefits purchased at arm's length by definition have a fair market value (because they have been purchased), and since such benefits are recorded as assets at their historical cost, this standard on the part of the court of appeals does include all purchased intangible benefits in its definition of § 263 assets. Therefore, half of the APB Opinion No. 17 second criterion, that which became the basis of the 1970 change in generally accepted accounting practice, is satisfied.

A more difficult question is whether the court's standard, like APB Opinion No. 17, excludes all internally developed intangible benefits from its definition of a § 263 asset. The adopted standard did act to exclude Briarcliff's internally developed intangible benefit from the court's definition of a § 263 asset, just as the operation of the practices advocated by APB Opinion No. 17 would classify the franchise costs as an expense rather than as an asset.

By adopting the fourth APB Opinion No. 17 criterion of separability as its definition of a § 263 asset, and by casting its own definition of separability in terms of the opinion's second, newly adopted criterion, manner of acquisition, the Second Circuit has managed to recast tax treatment of internally developed intangi-

---

[27] *Id.* at 354.

[28] 475 F.2d at 784.

[29] *Id.* at 785.

[30] *Id.* at 786.

bles at least partly in accordance with present generally accepted accounting principles. But since this court's standard of what constitutes a § 263 asset is not stated explicitly in terms of the accounting opinion or in language clearly equivalent, it is difficult to predict how these new standards will affect tax treatment of other internally developed intangible benefits. And the new tax and accounting standards, even if identical in operation, were reached by different reasoning. APB Opinion No. 17 provides that the costs of certain internally developed assets will be written off, because their value may not be ascertainable; while the Second Circuit seems to say that anything whose market value is not ascertainable, because it was internally developed, is not a § 263 asset at all.

V. The Effect of This Holding.

If tax treatment coincided exactly with the practices promulgated in APB Opinion No. 17, it would not matter what Briarcliff's costs, or the benefits they produced, were called. As costs of an internally developed unidentifiable asset (goodwill), or of an identifiable asset with an indeterminate duration (the franchise contracts), the amount spent would be deducted in accordance with the second basis for classification of APB Opinion No. 17, the method of the acquisition. And if these expenditures brought no assets at all to the enterprise, they would be deducted as expenses.

But since the Second Circuit's test for finding that no asset has been created may not apply to every internally developed intangible benefit, taxpayers will have to look to the facts of *Briarcliff* to supply them with standards for their own tax planning. Although not mentioned explicitly by the court, the analogy of costs incurred for the protection and maintenance of income to costs incurred for the preservation of tangible assets should be explored. The appellate court emphasized that Briarcliff's injured revenues were restored to their former level and were preserved and protected through the sale of identical products to a similar class of customers. Hence, taxpayers whose situations are similar to that of Briarcliff, but who sell a slightly different product or attempt to reach a different class of customer through new franchises, might find their costs of developing a franchise system distinguished from those incurred by Briarcliff. Taxpayers whose revenues were healthy and whose new franchise operations substantially increased their income also might find their franchise costs distinguished from those of Briarcliff.

Another useful tax planning fact about Briarcliff's expenditures, never mentioned by the Second Circuit as a basis for its decision but apparent from financial charts reproduced in the opinion, is that Briarcliff incurred its franchise promotion costs over a period of several years. This spreading of the cost makes it more closely resemble a yearly advertising-type expense. Taxpayers who have engaged in a massive, single-year campaign to open a franchise division might find their claim for an ordinary and necessary business expense more difficult to uphold.

This new standard, with its tacit (perhaps only partial) adoption of the APB Opinion No. 17 criterion for what constitutes an asset, will likely lead to profuse and irritating piecemeal litigation. Numerous questions will arise as to whether the fair market value of any internally developed intangible benefit is in fact ascertainable at the time it is furnished to the enterprise. For the sake of simplifying tax law, if for no other reason, it might be hoped that courts will adopt the criteria of APB Opinion No. 17 as an explicit basis for tax classification in the future. Such criteria would have disposed of *Briarcliff* with a minimum of economic soul-searching, since the one indisputable feature of Briarcliff's franchise contracts is that they were developed internally rather than acquired by purchase.

If all internally developed intangible benefits were allowed to be expensed pursuant to APB Opinion No. 17 practice, taxpayers would undoubtedly scramble to develop, rather than to purchase, such assets. Ultimately, to avoid economic distortion and to promote consistency and fairness, the amortization of all purchased intangibles in accordance with APB Opinion No. 17 would have to be allowed as well. The practical consequence of such tax treatment might be an undesirably heavy revenue loss.

A brief look at the present tax treatment of intangibles in general shows that the process described above may gradually be occurring already. Purchased assets formerly characterized as inseparable from goodwill are now being called by other names, as in the case of *Manhattan Co.*[31] Not only were Manhattan's purchased customer lists found not to be inextricably bound up with goodwill, but their partial depreciation was also allowed on the showing of a statistically demonstrated useful life. Intangible expenditures such as organization costs and research and development costs have become amortizable pursuant to special statutory provisions. Now *Briarcliff* has opened the door to the expensing of internally developed intangible assets, including goodwill. These recent trends toward expensing or amortizing costs for intangibles, which costs were never before written off or deferred, may represent a gradual shift of tax law toward the practices and standards promulgated by APB Opinion No. 17.

Mary S. Lycan

FEDERAL INCOME TAX—PAYMENTS TO SETTLE A CLAIM ARISING UNDER § 16(b) OF THE SECURITIES EXCHANGE ACT OF 1934 HELD TO BE LONG-TERM CAPITAL LOSSES—*Anderson v. Commissioner*, 480 F.2d 1304 (7th Cir. 1973), *rev'g* 56 T.C. 1370 (1971).

In *Anderson v. Commissioner*,[1] the United States Court of Appeals for the Seventh Circuit recently considered the question of the proper federal income tax treatment for payments made to settle a claim arising from an alleged violation of § 16(b) of the Securities Exchange Act of 1934.[2] The issue was whether the payments should be characterized as ordinary business expenses or as long-term capital losses. The Seventh Circuit resolved that issue by reference to the rule of *Arrowsmith v. Commissioner*[3] and to the policies and purposes of § 16(b) and held that the payments should be treated as long-term capital losses.

I. SECTION 16(b) AND THE ANDERSON FACTS

Under § 16(b), corporate officers[4] who realize a profit from short swing trading[5] in the corporation's common stock can be required to pay that profit to the

---

[31] Cf. 50 T.C. 78 (1968).

[1] 480 F.2d 1304 (7th Cir. 1973), *rev'g* 56 T.C. 1370 (1971).

[2] 15 U.S.C. § 78p(b)(1970) [hereinafter § 16b].

[3] 344 U.S. 6 (1952).

[4] The statute's coverage extends also to directors and holders of more than 10% of any class of the corporation's registered equity securities. 15 U.S.C. § 78p(a)(1970).

[5] Defined as any combination of sale and purchase or purchase and sale, occurring within any period of less than six months on which a profit is realized.

corporation.[6] The purpose of § 16(b), as defined therein, is the prevention of the unfair use of insider information;[7] however, to impose liability under the statute, no proof is required that the insider did use, or intended to use such information unfairly.[8] The statute's standards of proof are wholly objective and minimal; liability follows automatically from a showing that the alleged violator was an insider, as defined in the statute, and that he did engage in the proscribed trading.[9] When a § 16(b) violation appears to have occurred, Securities and Exchange Commission rules require the corporation to include details of the alleged violation in any proxy solicitations thereafter sent to shareholders.[10] These publicity requirements and the statute's minimal requirements of proof tend to encourage insiders charged with having violated § 16(b) to arrange voluntary settlements.

In 1966, James E. Anderson was vice-president in charge of purchasing for Zenith Radio Corporation. Some years earlier, Anderson had acquired 1000 shares of Zenith common stock. He sold those shares in early April, 1966, realizing a gain of $148,884.31. A few days later he acquired additional (and different) shares of Zenith common. The price at which he purchased was lower per share than that which he had received in the earlier sale. Shortly thereafter, Zenith's legal staff informed Anderson that he had apparently violated § 16(b). Following that notification, Anderson paid Zenith, in two installments, the full amount of the corporation's apparent claim under § 16(b), a total of $51,259.14. No formal legal proceedings had been instituted, although Anderson had been advised by his attorneys that Zenith had no choice but to start such proceedings should he not pay the claim. On his federal income tax return for 1966, Anderson reported the gain from his April 1966 sale of Zenith shares as a long-term capital gain. In addition he claimed the full amount of his § 16(b) payments to Zenith as a deduction against ordinary income, treating those payments as an ordinary and necessary expense of his trade or business as a corporate executive and deductible as such under § 162(a) of the Internal Revenue Code of 1954 [hereinafter referred to as Code].[11] The Commissioner did not question Anderson's treatment of the capital gain, but he determined that the payments to Zenith should be treated as long-term capital losses, recalculated Anderson's 1966 tax liability, and assessed a $21,897.64 deficiency.

In the early cases involving § 16(b) payments the Commissioner had successfully contended that public policy considerations required disallowing *any* deduc-

---

[6] The text of § 16(b) reads, in part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six moths, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months.

[7] *See* note 6 *supra.*

[8] Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943).

[9] *See* 2 L. LOSS, SECURITIES REGULATION 1043 (1961).

[10] General Rules and Regulations of the Securities Exchange Act of 1934, Schedule 14A, Item 7 (e).

[11] Section 162(a) provides: There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. INT. REV. CODE OF 1954, § 162(a).

tion for such payments.[12] That position was overruled in *Lawrence M. Marks*,[13] in which the Tax Court held that public policy is not disserved and that the deduction was an ordinary and necessary business expense. In the immediate case the Commissioner's contention that Anderson's payments to Zenith were long-term capital losses reflects the current service position that the deduction, though allowable, is either capital or ordinary depending on the character of the stock transaction giving rise to the alleged § 16(b) violation.[14]

II. JUDICIAL RESOLUTION OF ANDERSON

A. The Tax Court Issues

Anderson petitioned the Tax Court for a redetermination of the assessed deficiency.[15] In support of his treatment of the expenditure Anderson stated that he had made the payments to avoid the risk that his well-compensated employment[16] might be jeopardized as a result of formal § 16(b) charges and to avoid the possible adverse effect of such charges upon his business reputation. His basic position was that, under the judicial gloss which has been placed on § 162(a) of the Code, payments made to protect one's employment and business reputation qualify for treatment as an ordinary deduction.[17]

1. Mitchell Precedent

In making his protection of employment and business reputation argument, Anderson asked the Tax Court to reaffirm the position it had taken in *William L. Mitchell*,[18] a case which involved facts virtually identical to those in *Anderson*. The taxpayer in *Mitchell* was vice-president in charge of styling for General Motors Corporation. He had sold General Motors stock at a long-term capital gain, and within less than six months of that sale, he had exercised options to purchase additional shares. On being charged with a violation of § 16(b), and faced with the prospect that the alleged violation would be publicized in the corporation's next proxy statement, Mitchell paid General Motors the full amount of its apparent claim. The Tax Court found that the payment had been made to avoid injury to the taxpayer's business reputation and career, embarrassment to General Motors and Mitchell, and expenses of potential litigation. Under these circumstances, the court held that the payment was deductible under § 162(a) of the Code as an ordinary and necessary expense of being an employee, the taxpayer's trade or business.

The Commissioner did not directly attack Anderson's contention that the payments were deductible under § 162(a) of the Code,[19] nor did he contend that

---

[12] *E.g.*, William F. Davis, Jr., 17 T.C. 549 (1951). For a summary of the developments leading to the Commissioner's current position on § 16(b) payments, see Nelson, *Tax Deductibility of Insider Profit Repayments: Resolving an Apparent Conflict*, 24 CASE W. RES. L. REV. 330 (1973).

[13] 27 T.C. 464 (1956).

[14] Rev. Rul. 61-115, 1961-1 CUM. BULL. 46 (1961).

[15] 56 T.C.1370 (1971).

[16] In 1966, Anderson reported income of $173,332.14 as a result of his employment with Zenith. James E. Anderson, 56 T.C. 1370, 1371 (1971).

[17] *E.g.*, Joseph P. Pike, 44 T.C. 787 (1965); Lawrence M. Marks, 27 T.C. 464 (1956).

[18] 52 T.C. 170 (1969), *rev'd*, 428 F.2d 259 (6th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).

[19] The Commissioner's only argument against disallowing any deduction was an indirect

the payments should be properly classified, as an initial matter, as "losses" rather than "expenses." Instead, the Commissioner argued that the Tax Court should follow the Sixth Circuit's decision in *Mitchell v. Commissioner*,[20] which reversed the Tax Court, and should hold the payments to be long-term capital losses. In its decision to reverse, the court of appeals in *Mitchell* was persuaded by the contention that the rule of *Arrowsmith v. Commissioner*,[21] as interpreted in *United States v. Skelly Oil Co.*,[22] was applicable and required treating the payments as long-term capital losses, regardless of any business purpose on Mitchell's part in having made the payments. In other words the Commissioner argued that application of the *Arrowsmith* rule made it irrelevant that the settlement payments might have satisfied the usual statutory tests for allowance as an ordinary deduction.

2. Arrowsmith and Skelly Oil Precedent

In *Arrowsmith*, the Supreme Court faced the problem of classifying, for federal income tax purposes, the payment of a judgment by two individuals on behalf of a defunct corporation. The two individuals had been the corporation's only stockholders and had caused the corporation to be liquidated in a series of transactions completed five years prior to the taxable year in which the judgment was paid. As allowed by the Internal Revenue Code of 1939,[23] the taxpayers had reported their profits from the liquidation as long-term capital gains. After paying the judgment, the taxpayers claimed the full amount of the payment as an ordinary deduction. When the deduction was challenged, they relied on the principle that each year stands alone for tax accounting purposes and argued that the payment should be classed as an ordinary business loss incurred in the year of payment. The Commissioner contended that the payment should be viewed as part of the original liquidation transactions, requiring classification as a capital loss because of the capital gain treatment accorded the profits from the liquidation. The Supreme Court adopted the contentions of the Commissioner and held the payment to be a capital loss. The Court further held that the annual accounting principle "is not breached by *considering* all the [prior years'] . . . transaction events in order properly to classify the nature of the [current year's] loss for tax purposes."[24]

More recently the Supreme Court was confronted with questions similar to those in *Arrowsmith*. In *United States v. Skelly Oil Co.*[25] the taxpayer was a corporation engaged in producing and selling natural gas. It sought to deduct the full amount of refund payments made to two of its customers for overcharges during preceding tax years. In those preceding years the receipts, which were refunded, had been included in gross income; however, in determining its tax liability taxpayer had deducted from net income the natural resource depletion allowance provided by the 1939 Code [now § 611]. In computing this allowance taxpayer

one. He contended that Anderson's fears of the possible consequences of not settling the claim were unreasonable on the facts. The Tax Court dismissed this contention and the issue was not subsequently revived. 56 T.C. at 1373-74.

[20] Mitchell v. Commissioner, 428 F.2d 259 (6th Cir. 1970) *cert. denied*, 401 U.S. 909 (1971).

[21] 344 U.S. 6 (1952).

[22] 394 U.S. 678 (1969).

[23] Section 115(c) of the 1939 Code, the predecessor of 331(a) in the 1954 Code, provided that the proceeds from complete liquidation of a corporation would be treated as payment in exchange for the shareholder's stock.

[24] 344 U.S. at 8-9.

[25] 394 U.S. 678 (1969).

had elected to use the percentage depletion under the 1939 Code [now § 613], which for these years permitted the deduction of an amount equal to 27½% of "gross income from property." Thus the actual increase in taxable income attributable to the receipts had not been the full amount later refunded, but had been that amount less 27½%.

The Supreme Court held that Skelly Oil's refund deduction must be reduced by 27½%, the depletion allowance percentage; otherwise taxpayer would have "the practical equivalent of a double deduction."[26] Writing for the majority, Justice Marshall commented that *Skelly* was "really no different" than *Arrowsmith*, which he cited for the principle that prior years' transactions may be examined to determine whether a transaction in the current year gives rise to a capital or ordinary loss.[27] Then, in a significant step, Justice Marshall wrote that the *Arrowsmith* holding, like that in *Skelly Oil*, is a "tax benefits" doctrine:

> The rationale for the *Arrowsmith* rule is easy to see: if money was taxed at a special lower rate when received, the taxpayer would be accorded an unfair tax windfall if repayments were generally deductible from receipts taxable at the higher rate applicable to ordinary income. The Court in *Arrowsmith* was unwilling to infer that Congress intended such a result.[28]

Prior to the *Skelly Oil* opinion, *Arrowsmith* could be viewed as standing for the proposition that the classification of a transaction which is directly related to an earlier taxable event is the "inherited" capital or non-capital character of the earlier event. Thus classification of the later transaction would in no way depend on the actual tax consequences of the earlier one: if the earlier transaction was "capital," the later transaction would be "capital," regardless of any favorable tax treatment for the earlier transaction. This is a simpler view of the *Arrowsmith* result than that advanced by Justice Marshall in *Skelly Oil*.

According to Marshall's interpretation the first effect of *Arrowsmith* is to place an upper limit on the extent of the deduction allowable for the later transaction.[29] Thus it matters not that the transaction might otherwise qualify for allowance as an ordinary deduction[30]—the taxpayer cannot deduct 100% of an item when that same item was earlier the subject of a special deduction (as in *Skelly Oil*) or was earlier taxed at the preferential capital gains rate (as in *Arrowsmith*). Given this limited extent of the deduction, the goal now is to balance the "tax benefits" between the earlier and later transactions. The Court in *Skelly Oil* did so by arbitrarily reducing the taxpayer's deduction; the Court in *Arrowsmith* did so by "treating the repayment as a capital loss, rather than by disallowing 50% of the deduction."[31]

Thus in *Mitchell*,[32] the Sixth Circuit had held that *Arrowsmith*, as interpreted in *Skelly Oil*, controlled the treatment of the § 16(b) payments in that case. Noting that the Tax Court's decision in *Mitchell* had been made just prior to

---

[26] *Id.* at 684.

[27] *Id.* at 685.

[28] *Id.*

[29] "[T]he rule of the *Arrowsmith* case prevents taxpayers from deducting 100% of an item refunded when they were taxed on only 50% of it when received." *Id.* at 685 n.4.

[30] In *Skelly Oil*, the government and taxpayer differed over whether the deduction qualified for allowance under § 162 or § 165 of the Code. The Court held that it made no difference since in either case the result would be an ordinary deduction. *Id.* at 684.

[31] *Id.* at 685 n.4.

[32] Mitchell v. Commissioner, 428 F.2d 259 (6th Cir. 1970), *rev'g* 52 T.C. 170 (1969), *cert. denied*, 401 U.S. 909 (1971).

the announcement of the Supreme Court's holding in *Skelly Oil*, the Sixth Circuit concluded that the Tax Court would have applied *Skelly Oil* and would not have allowed the payments as ordinary deductions.

3. Holding of the Tax Court

The Tax Court resolved *Anderson*[33] by holding that the payments to Zenith were made to protect his employment and his business reputation, thereby satisfying the usual tests for an ordinary and necessary business expense under § 162(a). The court expressly declined to follow the Sixth Circuit's reversal of *Mitchell*, and by doing so signaled its intention to follow *Mitchell* only in the Sixth Circuit. The court confirmed this intent in *Nathan Cummings*,[34] a § 16(b) case decided in the Second Circuit a short time after the Tax Court's decision in *Anderson*. In *Cummings*, the Tax Court again expressly declined to follow the Sixth Circuit's holding in *Mitchell*, and again held that the facts established the taxpayer's right to deduct his § 16(b) settlement as an ordinary and necessary business expense.

The *Arrowsmith* rule requires the existence of an "integral" relationship between the transaction being classified and an earlier taxable event.[35] Although in *Anderson* there was such an event, the sale transaction, the Tax Court disagreed that it was integrally related to the settlement. In *Mitchell*, the Tax Court had concluded that there was an integral relationship between the settlement payments and the combination sale-purchase "occurrence,"[36] but not between the payments and the sale alone. The court had offered essentially two reasons for that conclusion: (1) the sale was a "completed transaction"[37]—a transaction that had produced a gain which belonged to the taxpayer, claim free,[38] and one that, by itself, would have led to no alleged violation of § 16(b); and (2) the taxpayer had made the payments for an independent business purpose[39]—for reasons other than conceding his liability under § 16(b), a fact that "further divorced"[40] the payments from any connection with the sale.

In reversing *Mitchell*, the Sixth Circuit had found it appropriate to apply a

---

[33] James E. Anderson, 56 T.C. 1370 (1971), *rev'd*, 480 F.2d 1304 (7th Cir. 1973).

[34] 60 T.C. 91 (1973).

[35] *See* William L. Mitchell, 52 T.C. 170, 175 (1969); Mitchell v. Commissioner, 428 F.2d 259, 264 (6th Cir. 1970). None of the courts dealing with the problem of classifying § 16(b) payments have differed with the principle that the basic *Arrowsmith* requirement is an integral connection between the two transactions. Nor is there any evident disagreement that the earlier transaction must have been a taxable event.

[36] 52 T.C. at 175.

[37] *Id.* at 174.

[38] In *Arrowsmith*, the suit against the corporation had been brought before the liquidation was completed. That fact is not included in the Supreme Court report of the case, but see the lower court's opinion, Commissioner v. Arrowsmith, 193 F.2d 734 (2d Cir. 1952).

[39] The majority opinion in *Arrowsmith* was contained in four brief paragraphs, the first of which was the Court's restatement of the facts and the last dealing with an ancillary issue in the case. Spread through those four paragraphs are several comments, unelaborated, to which the Tax Court's basic position in *Mitchell* and *Anderson* can be traced. Justice Black had written that the taxpayers in *Arrowsmith* were "paying *in their capacities as* [transferees of liquidation distribution assets]," 344 U.S. at 9, and that it was "plain that [the taxpayers'] liability was *not based on any ordinary business transaction* . . . apart from the liquidation proceedings." *Id.* at 8 (emphasis supplied).

[40] William L. Mitchell, 52 T.C. 170, 175 (1969). In *Anderson*, the Tax Court saw no need to restate the position it had taken in *Mitchell*, but incorporated that position by reference to its *Mitchell* opinion. James E. Anderson, 56 T.C. 1370, 1374 (1971).

"but for" test for establishing the required integral connection, saying, "[e]xcept for the sale . . . the alleged violation of § 16(b) and the payment . . . would never have occurred."[41] In *Anderson*, the Tax Court rejected the appropriateness of a "but for" test, reiterated its reliance on the reasoning it had expressed in *Mitchell*, and offered a separate ground to support its conclusion, namely, that taxpayer's capacity with respect to the two transactions had differed.[42] While Anderson had made the sale in his capacity as a stockholder, his obligation to make the payments had arisen out of his status as an employee. On this basis, the court concluded that *Arrowsmith* and *Skelly Oil* were both inapplicable "because the payment was not directly and integrally related to the earlier sale transaction . . . and because the status of the taxpayer in making the payment differed from that which he had at the time the gain was realized."[43]

B. The Seventh Circuit's Holding

On appeal to the Seventh Circuit, the Commissioner again argued that the tax benefits principles of *Arrowsmith* and *Skelly Oil* controlled and that Anderson's payments to Zenith should be treated as long-term capital losses. Anderson relied on the arguments with which he had prevailed in the Tax Court. The Seventh Circuit held that *Arrowsmith*, "with and without the benefit of its interpretation in *Skelly Oil*,"[44] was applicable, and that the payments should be classified as long-term capital losses. As the Sixth Circuit had done in *Mitchell*, the Seventh Circuit found the taxpayer's business purposes irrelevant in determining whether the rule of *Arrowsmith* applied. The court decided that the payments were properly viewed as a direct modification of the sale transaction, a return of "a portion of the sale proceeds, an adjustment of the sale price."[45] Having thus found the required connection between the two transactions, the court said, "Since there is hardly anything inevitable about whether the § 16(b) payments inherit the capital nature of the sale transaction, we think the purpose and operation of Section 16(b) relevant to the determination."[46] The court concluded that the purpose of § 16(b) was to foreclose every possibility of profit from the proscribed transactions and that allowing Anderson to deduct the payments as ordinary business expenses would produce a significant "tax profit."[47] The court was "unwilling to interpret the Internal Revenue Code so as to allow this anomalous result which severely and directly frustrates the purpose of Section 16(b)."[48] On this basis, the court ordered the Tax Court's decision reversed and the case remanded to enter judgment for the Commissioner.

After the Seventh Circuit's decision was announced the question immediately arose whether that holding would convince the Tax Court to reverse its position on the treatment of § 16(b) payments. The Tax Court has indicated that it will not. Following the Seventh Circuit's decision, the government in *Nathan Cummings*[49] asked the Tax Court to reassess its holding. The Tax Court did

---

[41] 428 F.2d at 264.

[42] *See* note 39 *supra.*

[43] 56 T.C. at 1376.

[44] Anderson v. Commissioner, 480 F.2d 1304, 1307 (7th Cir. 1973).

[45] *Id.* at 1307.

[46] *Id.*

[47] *Id.* at 1308.

[48] *Id.*

[49] 60 T.C. 91 (1973).

so[50] and reaffirmed its decision that the § 16(b) payments in that case were deductible as ordinary business expenses. Thus the immediate impact of *Anderson* is restricted to the Seventh Circuit. Payments made to settle an alleged violation of § 16(b) are now not deductible as ordinary business expenses in either the Sixth or Seventh Circuits. Whether the Tax Court will change its position in the other jurisdictions must await further developments in *Cummings* and subsequent cases.

III. COMMENT

A. The Tax Court Position

The Tax Court's position that the *Arrowsmith* rule does not apply to the factual situation presented by *Anderson* appears to be based largely on language in the *Arrowsmith* opinion[51]—language which invites the inference that the result in that case would have differed if (a) the taxpayers had had an independent business purpose in the later transaction; or (b) their capacities in the two transactions had differed. It is difficult to see that these ideas represent different principles. In *Anderson*, for example, saying that the taxpayer had a business purpose in arranging the settlement is really no different than saying his capacity in the settlement transaction was that of an employee, and both observations are only different ways of declaring that the payments qualified for deductions as ordinary business expenses. *Skelly Oil*, however, says that it is immaterial whether the transaction being classified qualifies for allowance as an ordinary deduction, given that it is directly related to an earlier transaction which had produced a tax benefit. The Seventh Circuit, therefore, was on firm ground in finding that taxpayer's business purpose in making settlement was irrelevant in determining whether *Arrowsmith* applies. The court, however, apparently did not recognize that the distinctions based on taxpayer's different capacities are no different than the "business purpose" arguments. The Tax Court had presented its capacity distinctions as a separate ground for holding *Arrowsmith* inapplicable, and the Seventh Circuit responded by discussing them as though they were separate—finding them only "unpersuasive"[52] instead of irrelevant.

The Tax Court's other ground for holding *Arrowsmith* inapplicable to § 16(b) repayments is that such payments are not integrally related to the sale portion of the combination sale-purchase transaction. This is a strained and artificial distinction and is likely to be regarded as such by the appellate courts. Denying that the alleged violation of § 16(b) in *Anderson* did not originate in the sale transaction is a difficult position to defend. The Seventh Circuit's response is doubtlessly typical. The court said that "the Tax Court has given only dubious conceptual justification for isolating the earlier sale from the payments . . . ;"[53] that "the 16(b) payments were "inextricably intertwined with taxpayer's April 1966 transactions';"[54] that "[b]ifurcating the sale and payments smacks of artificialty."[55]

B. Under Arrowsmith—What Result?

The most striking aspect of the Seventh Circuit's analysis of *Anderson* is the court's reasoning as to the result which follows once *Arrowsmith* is determined

---

[50] 61 T.C. No. 1 (1973).

[51] See note 39 *supra.*

[52] Anderson v. Commissioner, 480 F.2d 1304, 1308 (7th Cir. 1973).

[53] *Id.* at 1307.

[54] *Id.*

[55] *Id.*

to be applicable. To place this part of the Seventh Circuit's reasoning in perspective, it is useful to recall the positions taken by the Tax Court and Sixth Circuit in their views of *Arrowsmith*. Those positions differed not only on the question of the events that would trigger *Arrowsmith's* application, but also on the question of the result that follows after it is determined that *Arrowsmith* should be applied. Thus, in *Mitchell*, the Tax Court commented on the result that would have followed had the court not declined to follow *Arrowsmith*: "[T]he *character* of the gain or loss in the later transaction is determined by the capital or non-capital *nature* of the gain or loss in the earlier one."[56] In other words, the later transaction would definitely "inherit" the earlier transaction's capital or non-capital classification, without reference to the actual tax consequences which had been produced by the earlier transaction. In the Sixth Circuit's view, however, the tax consequences of the earlier transaction would be wholly decisive. Having found *Arrowsmith* applicable in its analysis of *Mitchell*, the Sixth Circuit concluded that the result was determined solely by the "tax benefits" implications of the two transactions in that case—a position reflecting the *Skelly Oil* interpretation of *Arrowsmith*.

In *Anderson* the Seventh Circuit decided that *Arrowsmith* was applicable and required looking to the earlier sale transaction to classify the taxpayer's § 16(b) payments. On taking that look, the court presumably saw two things: (1) the sale had qualified as a "capital" transaction; and (2) the sale had qualified for preferential tax treatment. At that point it was possible to hold, in accord with the Tax Court's view, that the payments were to be treated as long-term capital losses because they had "inherited" the capital "nature" of the sale transaction. It was possible also to reach a similar result solely on the basis of the "tax benefits" version of *Arrowsmith*. In either case, it could then be said that the result would have the *additional* advantage of comporting with the policies of § 16(b).[57] The court, however, chose neither alternative. Instead, it framed its opinion in language which suggests that the purposes of § 16(b) had been solely decisive as to the chosen result. The court found "nothing inevitable" about the payments inheriting the capital nature of the sale transaction. To it the purposes and operation of § 16(b), therefore, were "relevant to the determination." Since allowing a full deduction would "directly and severely frustrate" those purposes, a full deduction could not be allowed. Because treating the payments as long-term capital losses would complement the purposes of § 16(b) by preventing taxpayer from realizing a "tax profit," the payments were to be treated as long-term capital losses. From this reasoning, it appears that the court meant that there was "nothing inevitable" in *any* sense about the result produced by application of *Arrowsmith*. According to the prior views of *Arrowsmith*, if the payments did not inherit the nature of the sale (the Tax Court position), presumably the extent to which the payments could be deducted would remain limited by the "tax benefits" version of the rule. If that were so, there would be no need to invoke the purposes of § 16(b) as grounds for disallowing a full deduction. The possibility that the payments might be fully deductible would have been foreclosed.

From its reasoning, it would appear that the Seventh Circuit applied *Arrowsmith* not as a unified rule whose application would itself determine the result

---

[56] 52 T.C. at 174.

[57] Such had been the position argued by the Commissioner—that while the tax benefits principles of *Arrowsmith–Skelly Oil* required treating the payments as long-term capital losses, such treatment would have the additional advantage of meshing with the policy and purpose of § 16(b). Brief for Appellant at 20, Anderson v. Commissioner.

to be reached but rather as an entree to the decisive step of invoking the policy and purposes of § 16(b). Thus viewed, the Seventh Circuit's analysis is confusing. For example, why should the court have felt compelled to invoke *Arrowsmith* at all, if the policies of § 16(b) were to be decisive? Was the court suggesting that *Arrowsmith* is a doctrine which, when applicable, allows wide discretion in fashioning the result according to the court's views on the total "equities" of the particular case? In a footnote,[58] the court suggested that, in different circumstances, it might have considered treating the payments as something other than capital losses. The court referred to suggestions in the literature[59] that treating such payments as an addition to the basis of the purchased shares might be the proper solution. The court commented that it was not necessary to decide on the appropriateness of this alternative in *Anderson* because the parties had not argued it and because the sale and payments in *Anderson* had occurred in the same taxable year. The latter factor made treating the payments as long-term capital losses the "most appropriate"[60] solution in *Anderson*. That observation implies that, on different facts, the court might disallow any deduction in the year of payment, on the ground that adding the amount of the payments to the basis of the purchased shares is the more "equitable" solution. Does it also imply that other, unmentioned, equitable solutions might be "most appropriate" in other cases?

C. *The Public Policy Rule*

The Seventh Circuit's holding that it was unwilling to reach a result that would "directly and severely frustrate the purpose of Section 16(b)" is based on a line of cases in which the Supreme Court developed the "frustration of public policy" doctrine.[61] Under this doctrine, if allowing an otherwise legitimate deduction would have the effect of directly and severely frustrating a clearly defined public policy, the deduction will be denied. The rationale of the rule is that allowing the deduction of such items as fines and penalties would lessen the financial sting of the sanction being imposed. Such a result is presumed to be contrary to congressional intent and presumed not to have been contemplated when the income tax laws were enacted. In the "public policy" cases, the Supreme Court has denied the deduction of expenditures which fit into one of only two categories: (1) the expenditure is itself prohibited by statute (inapplicable on its face to *Anderson*); and (2) the expenditure represents a fine or penalty imposed for violation of a statute. The solution by the Supreme Court in those situations has been, without exception, to deny in its entirety the deduction in question.[62]

In *Anderson*, the Seventh Circuit invoked the "public policy" rule to justify *reducing* a deduction which had been claimed for an expenditure made pursuant

---

[58] 480 F.2d at 1308 n.9.

[59] Lokken, *Tax Significance of Payments in Satisfaction of Liabilities Arising Under Section 16(b) of the Securities Exchange Act of 1934*, 4 GA. L. REV. 298 (1970).

[60] To support its holding, the Seventh Circuit cited Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958). For a later review of the history of the "public policy" rule, see Commissioner v. Tellier, 383 U.S. 687 (1966).

[61] See Justice Douglas' comments in *Tank Truck Rentals*, 356 U.S. at 35, discussing the need for caution in applying the public policy rule, and identifying only the two named categories as those in which the rule can be applied without hesitation.

[62] The Supreme Court has never said that denying the deduction in its entirety is an exclusive remedy under the public policy rule, but has never invoked the rule with any other result.

to a *nonpenal* statute—securities law cases,[63] the Commissioner,[64] and a prior Tax Court case[65] all say that payments made under § 16(b) are "remedial" rather than "penal." The Seventh Circuit did not say or imply that it regarded Anderson's payments to Zenith as "penalties" or that it was invoking the "public policy" rule for that reason, although presumably the court would agree that those payments were, in fact, nonpenal. Thus the Seventh Circuit's treatment of the "public policy" rule in *Anderson*, like its treatment of *Arrowsmith*, would seem to have taken that rule beyond its prior limits.

D. A Rationalization

There is, though, another perspective from which the court's analysis can be viewed. The central issue in *Arrowsmith* was whether the annual accounting principle prevented looking to an earlier transaction to classify a later one. The Commissioner's position was that relating back was required, whether the transactions occurred in the same year or not. Therefore, *Arrowsmith* can be read to stand only for the principle that prior transactions must be "considered" to classify properly the later transaction. In *Anderson*, on considering the relationship between the two transactions, the Seventh Circuit decided that the settlement payments represented a return of a portion of the sale proceeds. Thus viewed, the payments did not fall within any definition in the Code. For example, though the payments were related to the sale of a capital asset and though they represented a retroactive adjustment on the price received in that sale, their amount was not sufficient, when subtracted from the actual sale price, to determine that the sale, as adjusted, had produced a loss. The court therefore looked to other principles to determine how the payments would be treated. The logical source for such principles are the "public policy" cases, which deal with subject of the tax treatment of payments made pursuant to statutory sanctions. While those cases identify only two specific situations in which their rule can be invoked, they also contain language defining guidelines[66] to be used for identifying other cases in which public policy can be properly considered. Ostensibly, payments made under § 16(b) fit within those guidelines. The public policy cases imply, but do not definitively say, that total disallowance of deductions is the exclusive solution in cases where their rule is invoked. Because of their silence on the question of discretion, disallowance of the deductions in those cases can be viewed as nothing more than giving effect to the purposes of the particular statutes involved. Because those statutes were penal, full disallowance of the deductions was appropriate there. However, § 16(b) is not penal. To give effect to its purposes requires recapturing, insofar as possible, all the profits which the insider had realized from the proscribed trad-

---

[63] *See* Smolowe v. Delendo Corp. 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943); Western Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736 (8th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966).

[64] Rev. Rul. 61-115, 1961-1 CUM. BULL. 46 (1961) states the Commissioner's position that § 16(b) is remedial:

> Section 16(b) does not render the dealings of the insider unlawful or state that the amount required to be paid to the corporation constitutes a penalty. . . . Section 16(b) merely shifts the beneft of the insider's dealing to the corporation. It extends the common law concept of a corporate officer's or director's fiduciary duty. The purpose of the statute is to place the insider in the same position he would have occupied if he had never engaged in the stock dealings.

[65] Lawrence M. Marks, 27 T.C. 629 (1955).

[66] *See, e.g.*, Commissioner v. Tellier, 383 U.S. 687 (1966).

ing. Presumably this includes preventing the insider from realizing a "tax profit," insofar as that is possible. Treating the payments as long-term capital losses is one way to prevent the insider from realizing such a "tax profit." That such a rationalization is even remotely plausible, given the variety of questions suggested throughout this discussion, is an eloquent comment on the ambiguities in the rules the Seventh Circuit was applying in *Anderson*. Perhaps by straining those rules beyond their previously evident limits, the court has, in the most graphic fashion possible, merely emphasized the need for their review and clarification.

John R. Rosebrough

CONSTITUTIONAL LAW—SIXTH AMENDMENT—NO RIGHT TO COUNSEL AT PHOTOGRAPHIC IDENTIFICATIONS—*United States v. Ash*, 93 S. Ct. 2568 (1973).

On September 21, 1964, a man with a small strip of tape on each side of his face and armed with a pistol robbed a federally insured bank in Eustace, Texas.[1] That robbery triggered the investigation and criminal process which resulted in the Supreme Court's decision in *United States v. Wade*.[2] The *Wade* decision, delivered along with *Gilbert v. California*[3] and *Stovall v. Denno*,[4] recognized that a lineup is a critical stage of the prosecution at which the accused is entitled to the presence of counsel. Unfortunately, however, the sweeping language of these three cases has presented the courts with more questions than answers, more confusion than guidance.

Recognizing the problems that the *Wade* decision has thrust upon those charged with its implementation, the Court has recently taken upon itself the task of explaining just how broadly the language of *Wade* should be read. In *Kirby v. Illinois*,[5] the Court said that the right to counsel attaches only at *post-indictment* lineups, and in *United States v. Ash*,[6] the Court held that there is no right to counsel at photographic displays even though such an identification procedure is similar to a lineup. These cases neither overruled the *Wade* decision nor even expressed dissatisfaction with its propositions. But the fact remains that neither *Kirby* nor *Ash* was compelled by the *Wade* language; rather, a logical application of the *Wade* rationale would suggest an opposite result in those cases.

United States v. Ash involved the robbery of a Washington, D.C., bank by

---

[1] United States v. Wade, 388 U.S. 218, 220 (1967). A female cashier and the bank vice president were the only eyewitnesses to the crime. They subsequently identified Wade at a post-indictment lineup.

[2] The prosecution did not introduce evidence at the trial as to the pretrial lineup identification; however both witnesses identified Wade in court. On cross-examination, Wade's counsel elicited evidence of the pretrial lineup identification. Counsel was not present at the lineup. 388 U.S. at 220-21.

[3] 388 U.S. 263 (1967). A post-indictment lineup at which the accused was deprived of the assistance of counsel was also involved in *Gilbert*. However, unlike the prosecution in *Wade*, the prosecution here introduced evidence of the pretrial lineup identification at trial.

[4] 388 U.S. 293 (1967). As opposed to a lineup which involves the display of two or more individuals before the witness, the *Stovall* case involved a showup. A showup is a one-man lineup; that is, only one individual is presented to the witness for identification. In *Stovall*, the Court refused to apply the *Wade* and *Gilbert* rules retroactively.

[5] 406 U.S. 682 (1972). The Court reasoned that since the accused had not been indicted at the time of the showup, adversary proceedings had not been commenced, and therefore, no right to counsel existed at the identification.

[6] 93 S. Ct. 2568 (1973). A photographic display includes any identification procedure where the witness is asked to identify a photograph of the suspect or to select one photograph from a group of photographs.

two men wearing stocking masks. Four witnesses observed the robbery, but none was able to give the police a description of the robbers' facial characteristics. Five months after the robbery, the FBI, acting on information supplied by a government informer, showed five black-and-white mug shots, including a picture of Ash, to the four witnesses. All four witnesses made uncertain identifications of Ash.[7] Ash was subsequently arrested and indicted; trial was set for May 1968, almost three years after the crime. Less than twenty-four hours before trial, the four eyewitnesses were shown five color photographs, including one of Ash; only three of the witnesses were able to identify Ash.[8] At trial, all four witnesses made in-court identifications of Ash, but only one of these witnesses was "positive" of her identification.[9] Over the objections of defense counsel, the prosecution introduced evidence of the recent pretrial photographic identifications. Ash was convicted and appealed on the ground that he was deprived of counsel at the post-indictment photographic display. The Court of Appeals for the District of Columbia recognized the similarities between a lineup and a photographic display and reversed the conviction on the theory that the *Wade* requirement of the presence of counsel at lineups also applied to photographic displays.[10] A petition for writ of certiorari was filed to determine the applicability of *Wade*.

The *Wade* opinion was concerned with the reliability of eyewitness identification. Since this form of identification is present in both lineups and photographic displays, the *Wade* opinion would appear to have precedential value in resolving the controversy in *Ash*. But the *Ash* Court chose to limit *Wade* to its facts rather than to extend it to photographic displays.

The purpose of this casenote is to analyze the inconsistency between the *Wade* and *Ash* opinions. It is suggested that difficulties may arise in the criminal process as a result of the existence of two standards to control the admission of eyewitness identification—one for lineups, another for photographic displays.

In dissenting from the majority opinion in *Ash*, Mr. Justice Brennan concluded that, given the *Wade* decision, there was no logical justification for the *Ash* result. He saw the *Ash* opinion as a "complete evisceration of the fundamental constitutional principles . . ." established in the lineup cases.[11] Regardless of the validity of this reading of *Ash*, it is important to examine the Court's justification for refusing to extend the *Wade* rationale to photographic displays. In contrasting *Wade* and *Ash*, it is easy to conclude that the latter decision is unsound since it post-dated the *Wade* opinion and therefore created the inconsistency. It will be seen herein, however, that *Wade* may have been the decision which deviated from constitutional principles. If this is the case, the only defect of *Ash* would be that it failed to overrule *Wade*.

Undoubtedly the easiest explanation for the inconsistency in the eyewitness identification cases can be found in a recognition of the composition of the Court when *Wade*, *Kirby* and *Ash* were decided.[12] The decisions in *Wade*, *Gilbert*, and *Stovall* were handed down on June 12, 1967. By the time *Kirby* and *Ash* were

---

[7] *Id.* at 2570.

[8] *Id.*

[9] *Id.* at 2582 (Brennan, J., dissenting).

[10] United States v. Ash, 461 F.2d 92, 100 (D.C. Cir. 1973).

[11] *Id.* at 2582 (Brennan, J., dissenting).

[12] Burger, C.J., and Blackmun, Powell, Rehnquist and Marshall, JJ., took part in the *Ash* decision but were not on the Court at the time of *Wade*. Of the five judges who left the Court between the *Wade* decision and the *Ash* decision, four (Black, Fortas, Clark, JJ., and Warren, C.J.,) concurred in the Court's holding that a lineup was a critical stage

decided, five new members, each with his own philosophy and values, had been added to the Court. The easy conclusion is that the shift in membership also produced a shift in the law. But such a conclusion ignores the well settled principles of *stare decisis* and judicial continuity, and suggests that the Court decides cases based on mere opinion rather than an examination of the Constitution and prior Supreme Court interpretations.[13] Therefore, it is necessary to analyze and critically evaluate the *Ash* opinion. Such an analysis naturally begins with a look to *United States v. Wade.*

I. UNITED STATES V. WADE AND THE DANGERS OF IDENTIFICATION EVIDENCE

The sixth amendment guarantees a criminal defendant the right to have the assistance of counsel for his defense.[14] Numerous Supreme Court decisions have held that this right entitles an accused to representation not only at the trial but also at all "critical stages" of the proceeding.[15] A critical stage has been defined as "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[16]

Like *Ash*, the *Wade* case involved a bank robbery. An indictment was returned against Billy Joe Wade approximately six months after the crime had been committed. Wade was arrested and counsel appointed for him. Fifteen days after the appointment of counsel, an FBI agent, without notice to Wade's lawyer, arranged to have two bank employees observe a lineup made up of Wade and five or six other prisoners. Both bank employees identified Wade at the lineup.[17]

At trial, the prosecution made no reference to the pretrial lineup but asked the two bank employees to identify Wade in court. Both did so. On cross-examination, defense counsel brought out the fact that a pretrial lineup had been conducted in the absence of counsel and this became the basis of Wade's appeal.

The question before the Court in *Wade* was whether a pretrial, post-indictment lineup was a sufficiently critical stage of the proceeding for the right to counsel to attach. Answering affirmatively, the Court dedicated ten full pages of its opinion to a discussion of the dangers inherent in eyewitness identification.[18] In the words of the Court, "identification evidence is peculiarly riddled with innumerable dan-

---

of the criminal process at which the accused were entitled to the assistance of counsel. The fifth Justice (Harlan, J.) dissented from that holding.

[13] *See* Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 652 (1895) where Mr. Justice White wrote in his dissenting opinion:

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personalities of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

[14] U. S. CONST. amend. VI.

[15] *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932). All of these cases involved a pretrial confrontation which the Court determined to be a critical stage of the proceedings.

[16] United States v. Wade, 388 U.S. 218, 226 (1967).

[17] *Id.* at 220.

[18] *Id.* at 228-39.

gers and variable factors which might seriously, even crucially, derogate from a fair trial."[19]

The unreliability of eyewitness identification had led Mr. Justice Frankfurter many years ago to ask:

> What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent —not due to the brutalities of ancient criminal procedure.[20]

The *Wade* opinion was the first attempt by the Court to establish effective constitutional safeguards and rules governing the use of eyewitness identification in federal and state criminal trials.[21] Implicit in the decision was a recognition that an accused's guilt or innocence is often determined for all practical purposes at the lineup.[22] The subsequent trial becomes merely a rubber-stamp of the witness's pretrial identification.

Two observations predominate throughout the *Wade* opinion. First, the Court repeatedly recognized that there is grave potential for prejudice in a pretrial lineup.[23] This potential for prejudice is the product of normal human inaccuracy in observation and improper police identification procedures.[24] Furthermore, the Court noted that a pretrial identification has a certain "freezing effect" on the witness's perception of the guilty party. The Court stated that "it is a matter of common experience that once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined then and there, before trial."[25]

The second observation underlying the *Wade* opinion is that the prejudice which may result at a pretrial identification is difficult to reconstruct at trial.[26] If counsel is not present to observe the conduct of the pretrial lineup, he will be unable to cross-examine adequately the witness at trial. With little opportunity to impeach the heavily weighted and often inaccurate eyewitness identification, the accused is deprived of his fundamental right to a fair trial.[27]

Therefore, the *Wade* majority characterized the pretrial lineup as a critical

---

[19] *Id.* at 228.

[20] F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927). This passage is also quoted in *Wade*, 388 U.S. at 228.

[21] N. SOBEL, EYE-WITNESS IDENTIFICATION 2 (1972).

[22] 388 U.S. at 229; Williams and Hammelmann, Identification Parades—I, 1963 CRIM. L. REV. 479, 482. *See also* United States v. Collins, 416 F.2d 696, 701 (4th Cir. 1969) (Winter, J., dissenting).

[23] 388 U.S. at 236.

[24] *See* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 214 (1971) where the author summarizes the causes of eyewitness identification dangers:

> . . . the normal human fallibilities of perception and memory, improper and suggestive identification procedures employed by the police, a general unawareness of the dangers of identification evidence on the part of jurors, and the failure of the criminal process to provide adequate measures to combat these deficiencies.

[25] 388 U.S. at 229.

[26] *Id.* at 231-32. *See also* United States *ex rel.* Reed v. Anderson, 461 F.2d 739, 742 (3rd Cir. 1972) which deals with the difficulty of reconstructing photographic identifications:

> Recurring through *Wade* is the Court's concern over the difficulty of reconstructing with fairness and accuracy what actually took place at the lineup or showup . . . .

[27] 388 U.S. at 224.

stage of the criminal proceedings because of the substantial prejudice which inheres in a lineup identification and the need for enhancing counsel's ability to avoid that prejudice. Furthermore, the Court fashioned an exclusionary rule prohibiting the introduction of any evidence obtained at a lineup at which the accused is deprived of his right to counsel.[28] The Court also barred the introduction of any in-court identification which was preceded by a lineup at which the accused was deprived of counsel unless the prosecution produces clear and convincing evidence that the in-court identification was not tainted by the prior lineup.[29]

The difficulty and confusion created by the *Wade* opinion does not arise from its discussion of the problems inherent in eyewitness identifications, but rather from its proposed solution to those problems. The *Wade* Court was concerned with the prejudicial suggestion and difficulty of reconstruction which accompany a lineup identification. However, instead of directly attacking these weaknesses in eyewitness identifications, the Court opted for assigning counsel the duty to protect against these dangers. As an alternative to recognizing a right to counsel at lineups, the Court could have prescribed specific procedures that police would be required to follow before any lineup identification could be introduced at trial. Admittedly, it would be more difficult for the Court to propose detailed standards which would define the requirements of due process; nevertheless, such an approach to the problem would be more consistent with the major concerns of the opinion. When the Court prescribed the right to counsel as the solution to the weakness inherent in eyewitness identification, it directed its focus away from the principal issue in the case. Thus, it camouflaged its reasoning and encouraged those who must implement the *Wade* decision to concentrate on "critical stage" concepts and the right to the assistance of counsel rather than the dangers of eyewitness identification.[30]

Moreover, at one point in the opinion the majority suggests that a lineup might not be considered a "critical" stage of the proceedings if there were published guidelines regarding the proper conduct of a lineup.[31] The Court says:

> Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical." But neither Congress nor the federal authorities has seen fit to provide a solution. What we hold today "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have that effect."[32]

In this passage, the Court seems to suggest that certain standardized procedures,

---

[28] Gilbert v. California, 388 U.S. 263, 273 (1967).

[29] 388 U.S. at 240.

[30] The dissenting opinion in *Wade* suggests that the unreliability of eyewitness identification was not the only concern of the Court:

> The Court apparently believes that improper police procedures are so widespread that a broad prophylactic rule must be laid down, requiring the presence of counsel at all pretrial identifications in order to detect recurring instances of police misconduct.

Id. at 251-52 (White, J., concurring and dissenting). This view perhaps has led those who share Mr. Justice White's trust in police officers to refuse to extend the *Wade* opinion to its natural limits. *See* 7 WAKE FOREST L. REV. 333, 337 (1971) where the author uses this rationale to explain a decision of the North Carolina Supreme Court, State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

[31] 388 U.S. at 229.

[32] *Id.*

perhaps including videotaping or otherwise recording the lineup event, might extinguish the need for counsel at a lineup.

In other words, when the *Wade* Court selected the sixth amendment as the vehicle to remedy the problems of eyewitness identification, it superimposed upon the identification issue a whole body of law pertaining to right to counsel cases. It thereby permitted the *Ash* Court to distinguish *Ash* from *Wade* on right to counsel grounds, effectively undermining the basic concern of both cases: the dangers inherent in eyewitness identification.

The *Wade* reasoning was deficient not just because of its oversimplified solution to the problems of eyewitness testimony, but also because it failed to establish any criteria which would define the means that an attorney could employ to insure a fair lineup.[33] The accused's counsel was given no indication as to what role he should play at a lineup. Therefore the Court could not guarantee that the presence of counsel at a lineup would guard against all the identification dangers which it considered in its opinion. Certainly a more direct, due process approach to the problems that plagued the Court in *Wade* would have generated less confusion in the area of eyewitness identification and would have been more consistent with earlier Supreme Court decisions.[34]

It is true that *Wade* involved a post-indictment lineup, not a photographic display. But the broad language and repeated references to the dangers of eyewitness identification led many to speculate that a photographic display was just as critical, for sixth amendment purposes, as a lineup. Nevertheless, the Supreme Court refused to grant certiorari to answer such speculation until more than six years had elapsed.[35] In those six years there was near unanimity among commentators in favor of the extension of the *Wade* rationale to photographic displays.[36] On the other hand, the contrary opinion was voiced by nine of the ten circuits which had considered the issue.[37] At the time of *Ash*, only the Court of Appeals

---

[33] 388 U.S. at 259 (White, J., concurring and dissenting). *See* N. SOBEL, EYE-WITNESS IDENTIFICATION 115 (1972); Comment, *Extension of The Sixth Amendment Right to Counsel —The Road from Wade to Ash*, 7 U. RICH. L. REV. 139, 148 (1972).

> By failing to specifically delineate the function of the lawyer at the lineup, the Supreme Court's decision not only made the role of counsel at a lineup proceeding ambiguous, but also had the ultimate effect of fostering the implicit suggestion that presence of counsel may be remedial in areas of pretrial procedure only vaguely similar to the lineup itself.

Id. at 148.

[34] *See* cases cited note 12 *supra.*

[35] *See, e.g.*, United States v. Collins, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970); United States v. Robinson, 406 F.2d 64 (7th Cir. 1969), *cert. denied*, 395 U.S. 926 (1969); People v. Lawrence, 4 Cal.3d 273, 481 P.2d 212 (1971), *cert. denied*, 407 U.S. 909 (1972).

[36] *See, e.g.*, Quinn, *In the Wake of Wade: The Dimensions of the Eyewitness' Identification Cases*, 42 COLO. L. REV. 135 (1970); Sobel, *Assailing the Impermissable Suggestion, Evolving Limitations on the Abuse of Pre-Trial Identification Methods*, 38 BROOK. L. REV. 261 (1971); Comment, *Photo Identifications: A Right to Counsel?*, 7 CALIF. WEST. L. REV. 161 (1970); *The Supreme Court 1966 Term*, 81 HARV. L. REV. 69, 181-82 (1967); Comment, *Extension of the Sixth Amendment Right to Counsel—The Road from Wade to Ash*, 7 U. RICH. L. REV. 139 (1972); 41 FORD. L. REV. 149 (1972); 43 N.Y.U. L. REV. 1019 (1968); 44 TEMP. L. Q. 434 (1971); 16 VILL. L. REV. 741 (1971); 7 WAKE FOREST L. REV. 333 (1971).

[37] United States v. Serio, 440 F.2d 827 (6th Cir. 1971); United States v. Long, 449 F.2d 288 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); Allen v. Rhay, 431 F.2d 1160 (9th Cir. 1970); United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1970); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1969); United States v. Collins, 416 F.2d

for the District of Columbia had chosen to extend the right to counsel to photographic displays.[38]

Those who suggested that the *Wade* opinion should not be limited to lineups, but should also be read to include photographic displays, based their reasoning on the extensive similarities between the two identification processes. Both lineups and photographic displays are directed towards eyewitness identification; both are laden with the possibilities of prejudicial suggestion; and both are difficult to reconstruct at trial.[39] Since these factors were the major concern of the *Wade* Court, writers concluded that the right to counsel should also attach to photographic displays. Any other conclusion, they believed would conflict with the clear language of *Wade*.

But courts, on the other hand, have generally refused to recognize a right to counsel at photographic displays.[40] To justify this refusal to apply *Wade*, courts have resorted to two distinct arguments. Some have said that since the accused is not present at a photographic display, there is no confrontation and, therefore, no right to counsel.[41] Others have held that any prejudice which might inhere in a photographic display can be brought out at trial since, in most instances, the photographs could be examined by the accused's counsel.[42] Therefore, the reconstruction difficulty which bothered the *Wade* Court would be no problem at photographic displays.

This was the state of the law when the Supreme Court finally granted certiorari to resolve the controversial issue.[43] In the six years that followed *Wade*, the applicability of the right to counsel to photographic displays had been heatedly debated. All arguments on both sides of the question had been raised, and it was left for the Court to choose among them.

---

696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970); United States v. Robinson, 406 F.2d 64 (7th Cir. 1969), *cert. denied*, 395 U.S. 926 (1969); United States v. Conway, 415 F.2d 158 (3d Cir. 1969); Rech v. United States, 410 F.2d 1131 (10th Cir. 1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

The majority of state courts have agreed that there is no right to counsel at photographic displays. *See, e.g.*, People v. Martin, 47 Ill. 2d 331, 265 N.E.2d 685 (1970); Commonwealth v. Geraway, 355 Mass. 433, 245 N.E.2d 423 (1969), *cert. denied*, 396 U.S. 911 (1969). However a few state courts have granted the right to counsel at photographic displays. These courts have based their reasoning on the *Wade* opinion. *See, e.g.*, Thompson v. State, 85 Nev. 134, 451 P.2d 704 (1969), *cert. denied*, 396 U.S. 983 (1969); Cox v. State, 219 So. 2d, 762, 765 (Fla. Ct. App. 1969).

[38] United States v. Ash, 461 F.2d 92 (D.C. Cir. 1972). The only other court of appeals decision which recognized the right to counsel at photographic displays was United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970); however the Third Circuit overruled this case in United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972).

[39] *See, e.g.*, United States v. Marson, 408 F.2d 644, 653 (4th Cir. 1968) (Winter, J., concurring and dissenting), *cert. denied*, 393 U.S. 1056 (1969). *See generally* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES (1971).

[40] *See* cases cited note 37 *supra.*

[41] *See, e.g.*, United States v. Bennett, 409 F.2d 888, 899 (2d Cir. 1969), in which Judge Friendly stated:

> . . . to require that defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant himself is not present would press the Sixth Amendment beyond any previous boundary.

[42] *See, e.g.*, United States v. Ballard, 423 F.2d 127, 131 (5th Cir. 1970); United States v. Collins, 416 F.2d 696, 700 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970).

[43] 407 U.S. 909 (1972).

II. A Critical Analysis of United States v. Ash

Mr. Justice Blackmun, writing for the majority, refused to extend the *Wade* rationale to the photographic display situation in *United States v. Ash*. The Court said that a photographic display was not a critical stage triggering the right to counsel, since the accused was not physically present at the identification.[44] Interestingly, no prior decision of the Court had specifically held that the presence of the accused was a necessary prerequisite to having the right to counsel attach at any particular stage of the proceeding.[45]

As support for the Court's new concept of the sixth amendment, Mr. Justice Blackmun carefully examined the Supreme Court cases dealing with the right to counsel.[46] He correctly observed that the accused was present at every stage of the proceedings that the Court had subsequently labeled critical.[47] His view was that the right to counsel was created because the "unaided layman had little skill in arguing the law or in coping with an intricate procedural system."[48] The guiding hand of counsel was needed to "minimize the imbalance in the adversary system that otherwise resulted with the entry of a professional prosecuting official."[49]

In other words, counsel's role was to act as an advisor to the accused. His mission was to assure that the accused would have available all defenses that the law permitted.[50] If the accused was not present at a particular step in the criminal process, the sixth amendment did not require the presence of counsel since the accused needed no legal advice at that step.[51]

The Court's recognition that *confrontation* is an essential element of the critical stage, and that counsel should be required only when the accused is in need of legal advice, is readily supported by early opinions construing the sixth amendment.[52] However, the reliance upon confrontation in *United States v. Ash* is

---

[44] 93 S. Ct. at 2577.

[45] *Id.* at 2588 (Brennan, J., dissenting); *See also* 388 U.S. at 226 where Justice Brennan defines a critical stage as any stage of the prosecution where counsel's absence might derogate from the accused's right to a fair trial. Implicit in Justice Brennan's opinion in *Wade* is the fact that the right to counsel exists "whenever necessary to assure a meaningful defense" regardless of whether the accused is present. *Id.* at 225.

[46] *See* cases cited note 15 *supra.*

[47] Escobedo v. Illinois, 378 U.S. 478 (1964) and Massiah v. United States, 377 U.S. 201 (1964) involved police interrogations. White v. Maryland, 373 U.S. 59 (1963) involved a preliminary hearing. Hamilton v. Alabama, 368 U.S. 52 (1961) involved an arraignment at which the defense of insanity had to be pleaded or lost. Powell v. Alabama, 287 U.S. 45 (1932) dealt with the right to counsel at trial.

[48] 93 S. Ct. at 2572.

[49] *Id.* at 2573.

[50] *See* State v. Williams, 97 N.J. Super 573, 601, 235 A.2d 684, 698 (Bergen County Ct. 1967), where the court defined a critical stage:

> A critical stage in the criminal process is thus one in which defendant's rights may be lost, defenses waived, privileges claimed or waived, or which in some other way substantially may affect the outcome of the case.

[51] *See* United States v. Bennett, 409 F.2d 888, 899-900 (2d Cir. 1969) where Judge Friendly refused to extend the *Wade* rationale to a photographic identification:

> None of the classical analyses of the assistance to be given by counsel, Justice Sutherland's in *Powell v. Alabama* and Justice Black's in *Johnson v. Zerbst* and *Gideon v. Wainwright*, suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when, as here, the defendant is under arrest. . . . (Citations omitted).

[52] *See* Annot., 18 L. Ed. 2d 1420 (1968) for a general discussion of the Supreme Court's

inconsistent with the rationale of *Wade*, *Gilbert*, and *Stovall*. The lineup cases were not concerned with the advisory role of the attorney, but rather with his ability to effectively reconstruct at trial the identification scene. The *Wade* opinion described counsel's role as that of an observer who would report at trial the fairness of the lineup procedure. This observer role that the Court recognized in *Wade* was not dependent upon the presence of the accused at the particular stage, but rather upon the possibility of prejudicial suggestion and reconstruction difficulty surrounding the activities of a particular stage. Counsel was not expected to advise his client at the lineup. In fact, the *Wade* opinion began by suggesting that a lineup does not violate an accused's right against self-incrimination,[53] and therefore counsel could not even advise the accused to refuse to participate.

On this point, therefore, the reasoning of the *Ash* opinion directly conflicts with the reasoning of the *Wade* opinion. Unfortunately, the majority opinion in *Ash* refused to confront this conflict. Rather it chose to distinguish the cases on the basis of the physical presence of the accused. But Mr. Justice Brennan, the author of the *Wade* opinion, made clear in his dissent in *Ash* that the accused's physical presence was not the point on which the *Wade* opinion turned. He stated:

> The fundamental premise underlying *all* of this Court's decisions holding the right to counsel applicable at "critical" pretrial proceedings, is that a "stage" of the prosecution must be deemed "critical" for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary "to protect the fairness of the trial itself."[54]

The conflict between the *Wade* opinion and the *Ash* opinion becomes even more apparent when one analyzes photographic identification procedures and realizes that all of the dangers that concerned the Court in the lineup cases are present in a photographic identification.[55] Inherent in the two procedures are the same possibilities for prejudical suggestion. These possibilities arise from the choice of photographs used, the order in which they are presented and the time which the witness is given to study them.[56] Furthermore, it is not unrealistic to recognize that a police officer might even directly suggest that a particular photograph should be considered more carefully than others.[57] Just as with a lineup,

---

right to counsel cases. *See also* Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000 (1964) for an analytical work tracing the development of the right to counsel through medieval law and common law to 1964.

[53] 388 U.S. at 221.

[54] 93 S. Ct. at 2588-89 (Brennan, J., dissenting). *See* United States *ex rel.* Reed v. Anderson, 461 F.2d 739, 750 (3d Cir. 1972) (Hastie, J., concurring and dissenting):

> Therefore, the majority reasons, the Court was treating the physical confrontation of accused and witness as the circumstance that made a lineup a "critical stage" of the prosecution and thus entitled the accused to the assistance of counsel. But if this had been what made the lineup a critical state of prosecution, it is hard to believe that the court would not have made explicit and would not have undertaken to justify so important a conclusion.

[55] *See* periodicals cited note 36 *supra.*

[56] *See* 43 N.Y.U. L. REV. 1019, 1021-22 (1968).

[57] *See* United States v. Marson, 408 F.2d 644, 653 (4th Cir. 1968) (Winter, J., concurring and dissenting). Judge Winter would interpret the *Wade* opinion to apply similarly to photographic displays:

> Aside from direct prejudical oral communications between police officers and a witness asked to make an identification, an unscrupulous police officer, or even a scrupulous police officer, unwittingly, may influence the identification by the manner in which

there is no way that counsel can protect his client against such prejudicial suggestion unless he is allowed to be present. A witness who is involved in the identification procedure can hardly be expected to detect the subtleties of suggestion which occur at a photographic display.[58] Therefore, without counsel's presence the opportunity to impeach the credibility of the eyewitness identification vanishes forever.

In one respect a lineup is even less likely than a photographic display to jeopardize the accused's right to a fair trial. The physical presence of the accused at the lineup increases the likelihood than any prejudicial suggestion can be brought out at trial. But in a photographic display, not even the accused is present to observe the procedures and detect instances of possible suggestion.[59] Nevertheless, the *Ash* Court chose the physical presence of the accused as the basis upon which to distinguish the two cases.

Whether or not one accepts the Court's conclusion that a photographic display is not a critical stage of the criminal process, it is obvious that the *Ash* Court incorrectly uses the *Wade* opinion to support its reasoning. In all likelihood, the members of the Court who decided the *Wade* case would have assigned the accused a right to counsel at post-indictment photographic displays if they had been called upon to decide that issue six years ago. In fact, the dissent in *Wade* specifically recognized that the *Wade* rule would apply "to any other techniques employed to produce an identification."[60] Nevertheless, the Supreme Court refused to overrule the *Wade* decision in *Ash*, even though its opinion clearly indicates that it was unhappy with its sweeping language. Just as the *Wade* Court failed to meet the lineup issues directly, the *Ash* Court refused to deal with the *Wade* decision directly.

There is a natural reluctance on the part of Supreme Court Justices to overrule prior decisions.[61] But especially where a sounder rationale presents itself as an alternative to the direction of a previous opinion, the Court should adopt that rationale rather than distort the clear language of the earlier opinion.[62] *Wade* was not a confrontation case. For the Court to say that it was is to inject a certain intellectual dishonesty into the decision making process. In effect, the Court indirectly overruled elements of the *Wade* decision in *Kirby* and *Ash*. Nothing in the *Wade* opinion suggested that its rationale would not be equally applicable to pre-indictment lineups or photographic displays.[63] Such indirect overruling is not healthy for the judicial system.[64]

---

they are handed to the witness—in short, by any of the myriad forms of suggestion possible in the context of an *in camera* identification.

[58] Mr. Justice Brennan uses similar language in suggesting the difficulty of reconstructing a lineup identification. 388 U.S. at 230-31.

[59] 93 S. Ct. at 2591 (Brennan, J., dissenting).

[60] 388 U.S. at 251 (White, J., concurring and dissenting).

[61] *See* Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEX. L. REV. 514, 539-40 (1943).

[62] *See* Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 VAL. U.L. REV. 101 (1969).

[63] *See* Commonwealth v. Whiting, 439 Pa. 205, 209, 266 A.2d 738, 740 (1970), *cert. denied*, 400 U.S. 919 (1970):

> As for the photographic lineup employed in the instant case, the necessity for counsel at that confrontation is implicit in *Wade*, which factually concerned a corporeal lineup. *Wade* cannot be undercut simply by substituting pictures for people, nor can the police prepare a witness for the lineup by privately showing the witness pictures of the accused.

[64] Heimanson, *Overruling—An Instrument of Social Change?* 7 N.Y.U.L.F. 167, 170 (1961).

III. The Aftermath of Ash

If and until the Supreme Court chooses to clarify the ambiguities that it has created in the area of eyewitness identification, the criminal process must operate amid the confusion and inconsistency of the *Wade* and *Ash* opinions. Out of this confusion, certain rules of thumb may be extracted. First, an accused has a right to counsel at all post-indictment lineups. Second, there is no right to counsel at a photographic display regardless of when in the criminal proceeding the display is conducted. Finally, all eyewitness identifications not covered by the subsequently narrowed *Wade* opinion are subject to the due process test enunciated in *Simmons v. United States*[65] and *Stovall v. Denno*.[66]

Simmons involved the robbery of a Chicago savings and loan association and provided the Court with an opportunity to deal directly with photographic identifications. The morning following the robbery, five eyewitnesses were shown snapshots which included pictures of the petitioner Simmons. All five witnesses identified Simmons; he was subsequently arrested, indicted, and convicted of the robbery. He appealed to the Supreme Cout alleging that the identification procedure was so unduly prejudicial as to fatally taint his conviction.[67]

The Court rejected petitioner's argument, but not before recognizing the dangers of prejudicial suggestion inherent in photographic identifications.[68] Noting that Simmons was not yet in custody at the time of the photographic identification, the Court stated:

> Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs.[69]

Furthermore, the Court found that the "totality of the circumstances" surrounding the identification procedure, including the fact that the perpetrators of a felony were still at large, did not warrant a finding of an unduly prejudicial identification.[70] The Court went on to conclude that evidence of pretrial photographic identification is inadmissable at trial only if the identification procedure is "so impermissably suggestive as to give rise to a very substantial likelihood or irreparable misidentification."[71]

In applying the *Simmons* rule, one question immediately comes to mind: How can the accused or his counsel detect any unfair suggestion in pretrial identifications if neither is present to witness them? The answer is simple—they cannot with any degree of effectiveness. On cross-examination, counsel must probe in the dark to discover any unfair suggestion prior to trial.[72] The failure of the *Ash* Court to recognize this is a grave flaw in its decision. While the Court

---

[65] 390 U.S. 377 (1968).

[66] 388 U.S. 293 (1967).

[67] 390 U.S. at 381.

[68] *Id.* at 383-84.

[69] *Id.* at 384.

[70] *See also* Foster v. California, 394 U.S. 440 (1969) and Coleman v. Alabama, 399 U.S. 1 (1970) which applied the "totality of the circumstances test" enunciated in *Simmons* to pre-*Wade* lineups.

[71] 390 U.S. at 384.

[72] The same situation concerned the Court in lineup identifications. United States v. Wade, 388 U.S. 218, 240-41 (1967).

does recognize that the photographs themselves could be made available to defense counsel, that alone does not insure adequate cross-examination and a fair trial. The availability of the photographs does nothing to illuminate the manner in which they were displayed or the unconscious suggestion that the exhibitor conveyed to the witness.[73]

While the failure of the Court to demand that the accused's counsel be provided with some means of determining what occurred at the identification procedure is probably the greatest defect of the *Ash* opinion, it is by no means its only shortcoming. As the law stands now, the prosecution must notify the accused's counsel and provide him with an opportunity to be present before a post-indictment lineup can be conducted.[74] Pursuant to *Ash*, this need for notifying defense counsel can be avoided by conducting a photographic display rather than a lineup. In most cases, one identification procedure would be as acceptable to the prosecution as another, and so it is not too difficult to forecast a movement away from lineups as a tool in the identification process.

Unfortunately, the shift from lineups to photographic displays has already begun. In *People v. Lawrence*,[75] a lineup was conducted at which the accused was not afforded counsel. A photograph of the lineup was taken and presented to the witness. The witness selected the accused from the photograph. Over a strong dissent, a majority of the California supreme court permitted the introduction of the pretrial identification in court even though the photograph was admittedly employed to circumvent the *Wade* rule. The court held that there was no right to counsel at the photographic display and that the identification procedure did not violate the *Simmons* test.

As long as the inconsistency between *Wade* and *Ash* remains, the "Lawrence lineup"[76] will become the rule, rather than the exception, in the area of eyewitness identification.[77] But photographic identifications are unquestionably inferior to corporeal identifications, if for no other reason than the fact that a picture depicts only two dimensions.[78] Therefore, the undesirable but inevitable consequence of *Ash* will be an increased use of secondary sources of evidence in the determination of an accused's guilt or innocence.[79]

---

[73] 93 S. Ct. at 2585 (Brennan, J., dissenting).

[74] United States v. Wade, 388 U.S. 218, 237 (1967).

[75] 4 Cal. 3d 273, 481 P.2d 212 (1971), *cert. denied*, 407 U.S. 909 (1972).

[76] *Id.* at 217.

[77] *See* United States v. Marson, 408 F.2d 644, 654 (4th Cir. 1968) (Winter, J., concurring and dissenting). Judge Winter stated:

> To hold that a post-custody identification by resort to photographs without counsel, absent the waiver of counsel is constitutionally permissable would be to invite law enforcement officers to avoid the presence of counsel by resort to identification by photographs. This would be an unfortunate consequence of declining to extend *Wade* and *Gilbert*, because the quest for ultimate truth, the basic purpose of a criminal trial would be relegated to secondary sources.

[78] *See* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES, 70 (1971), where the author concludes:

> Because of the inherent limitations of photography, which presents its subject in two dimensions rather than the three dimensions of reality, and which presents a "frozen" image, often not too similar to the image of the living, moving subject, and also because a police photograph may be an old one which no longer accurately depicts its subject, a photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification.

See People v. Gould, 54 Cal. 2d 621, 631, 354 P.2d 685, 870 (1960).

[79] *See* Wright v. United States, 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, J., dissenting):

Another aspect of *Ash* which the Court ignores, but which may return to plague it in the near future, concerns the failure of the Court to establish any specific due process standards regarding the application of the *Simmons* test. Whereas the exclusionary rule suggested in *Wade* and set forth in *Gilbert v. California*[80] can be applied with little difficulty, the *Simmons* test requires the Court to consider the "totality of the circumstances" surrounding an identification event.[81] Not only is this time consuming but, even more unfortunately, it encourages the Court to resolve a case based on unarticulated concepts of fairness and fundamental justice rather than upon more precise criteria.[82]

In short, the *Ash* opinion is a peculiar combination of sound constitutional reasoning and ill-considered generalities. Consistent with the Court's early decisions interpreting the sixth amendment, the *Ash* Court recognizes that confrontation is a prerequisite to labeling a stage of the criminal proceedings critical, but it fails to suggest a viable alternative to the right to counsel at pretrial identifications. It correctly concludes that a pretrial photographic display is not a critical stage of the proceedings at which the right to counsel attaches, but it fails to provide any realistic safe-guards against the use of unduly suggestive photographic procedures. It recognizes that the due process clauses of the fifth and fourteenth amendments protect the defendant against improper identification, but it fails to establish any guidelines to aid in the implementation of a due process standard. Finally, the *Ash* opinion fails to distinguish adequately *United States v. Wade*. This failure will result in a shift from the use of lineups to a use of less reliable photographic identifications.

IV. CONCLUSION

Despite its deficiencies, the *Ash* opinion should be welcomed by the legal community. It does finally resolve an issue which has troubled lower courts for six years. Although nine of the ten courts of appeal which have dealt with the right to counsel at photographic displays reached the conclusion that no such right existed, these conclusions were not reached with unanimity.[83] In most cases, strong dissents were filed which pointed out the weaknesses of the majority opinions.[84] Still, the Supreme Court has left some questions unanswered in the area of photographic identification. For the sake of the criminal process, it should act quickly to eliminate the weaknesses of the *Ash* opinion.

The Court would go a long way towards clearing up the problems surrounding eyewitness identification evidence if it were to establish specific due process guidelines.[85] As the law now stands, the *Simmons* test is too vague to be applied

---

I believe that due process is violated whenever the police unjustifiably fail to hold a lineup. Since mistaken identifications are probably the greatest cause of erroneous convictions, we must require the fairest identification procedures available under the circumstances. With the stakes so high, due process does not permit second best.

[80] 388 U.S. 236 (1967).

[81] *See* text accompanying notes 69-71 *supra.*

[82] *See* Stovall v. Denno, 388 U.S. 293, 305 (1967) (Black, J., dissenting).

[83] *See, e.g.*, United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (1972).

[84] *See, e.g.*, Wright v. United States, 404 F.2d 1256 (D.C. Cir. 1968); United States v. Marson, 408 F.2d 644 (4th Cir. 1968).

[85] An analogy can be drawn between the police interrogation cases, Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964); and Miranda v. Arizona, 384 U.S. 436 (1966), and the cases dealing with eyewitness identification. In the former set of cases, the Court was concerned with coerced confessions, but rather than formu-

with any degree of success. Presumably, the Court will be called upon repeatedly to determine whether certain photographic identification techniques are unduly suggestive. Perhaps after several cases have been decided by the Court, specific guidelines will appear. But because of the inherent unreliability of eyewitness identification and the tendency of juries to give great weight to such evidence, the criminal system cannot wait several years for the *Ash* opinion to be explained.

The Court should particularly take upon itself the task of insuring that photographic displays do not replace the more reliable lineup as the commonly used method of obtaining identification evidence. The Court has already suggested a mechanism which can prevent the expanded use of photographic displays. That mechanism, implicit in the *Simmons* test but not yet specifically stated by the Court, would require a reversal of any conviction based on photographic identification whenever the prosecution could have feasibly conducted a lineup but neglected to do so.[86] The prosecution would bear the burden of proving by clear and convincing evidence that a lineup could not have been conducted. Furthermore, there would be a strong presumption that whenever the accused is in custody a lineup is feasible.[87] Indeed, except in unusual circumstances, the only time a photographic display *should* be employed is when the accused is at large.[88] Once he is taken into custody, the compelling considerations supporting the use of a photographic display virtually disappear.

This is not to suggest that a photographic identification is improper in all cases where the accused is in custody. For instance, a situtions such as existed in *Stovall v. Denno* where the witness was thought to be dying might permit the use of photographs as a matter of necessity.[89] But the situations which would justify the use of a photographic display when the accused is in custody are few and should be scrutinized carefully.

Anytime a photographic display is conducted when a lineup is possible, the identification procedure is "so impermissably suggestive as to give rise to a very

---

lating due process guidelines prohibiting coerced confessions, the Court assigned counsel the duty of guarding against their dangers. Similarly, in the later cases, the Court was concerned with the dangers of eyewitness evidence, but rather than defining specific due process rules, the Court assigned counsel the duty to guard against the dangers of lineup identifications. Both solutions are indirect ways of dealing with the problems and have caused the courts much difficulty in application. Perhaps a direct assault on the problems would create less confusion and more successfully remedy the problems bothering the Court.

[86] *See* text accompanying notes 74-79 *supra.*

[87] *See* Wright v. United States, 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, J., dissenting). *But see, e.g.*, United States v. Serio, 440 F.2d 827 (6th Cir. 1971); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969).

[88] The key to the resolution of the *Simmons* case and the *Stovall* case is that the identification procedures involved were employed because they were the only ones available in the particular circumstances. In *Simmons*, the defendants were still at large at the time of the identification. In *Stovall*, the only witness was in critical condition and there was no time to arrange a lineup. These cases suggest that necessity may be the principal determining factor in the resolution of a case under the due process test. *See* United States v. Washington, 292 F. Supp. 284, 288 (D.D.C. 1968), where the court applied the *Simmons* test to photographic identifications:

> In sharp contrast to *Simmons*, therefore, which represented a case involving a high degree of necessity for the photographic identification, and a low level of suggestivity, the present case involves no necessity whatsoever and quite a high level of suggestivity. Thus balanced, and in light of the factors deemed relevant in *Simmons*, this Court finds a serious violation of due process.

[89] 388 U.S. 293, 302 (1967).

substantial likelihood of irreparable misidentification."[90] This is just one example of a specific guideline which the Court should set forth to insure a meaningful application of the reasoning in *United States v. Ash*.

John H. Burtch

CRIMINAL PROCEDURE—DISCRIMINATORY ENFORCEMENT OF FEDERAL PENAL LAWS—*United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

On December 4, 1967, as part of the national "Vietnam Week" protests against American involvement in the war, Jeffrey Stuart Falk mailed his Selective Service Registration card to the Department of Justice. In October of 1968 Falk mailed his 1968 I-A classification notice to a federal judge, and in May of 1969 he mailed his 1969 classification notice back to his local draft board. Each of these protestant acts of dispossession of Selective Service notices constituted a violation of a federal statute.[1]

In 1968, Falk applied for reclassification as a conscientious objector,[2] but his application was rejected. When his scheduled date for induction came in May 1970 Falk refused to submit. He was subsequently charged in a four-count indictment with refusing to submit to induction[3] and with failing to possess his registration card or his 1968 and 1969 classification cards.[4] Falk filed a pre-trial motion in the District Court for the Northern District of Illinois[5] for dismissal of the card possession counts, alleging that the United States Attorney had sought his indictment on these charges solely to "punish" him for his outspoken criticism of government foreign policy,[6] thus denying him equal protection of the law through discriminatory enforcement. The district court denied Falk's motion without holding an evidentiary hearing and at trial rejected Falk's offer to prove improper prosecutorial motive. A jury found Falk guilty.[7]

In an en banc rehearing of his appeal,[8] the Court of Appeals for the Seventh Circuit vacated Falk's conviction on the card possession counts and remanded the case to the district court for a hearing on the allegations of discriminatory enforcement.[9] In so ordering, the Seventh Circuit took unprecedented action in setting

---

[90] Considering custody to be the key event in the determination of the totality of the circumstances test is not at odds with Kirby v. Illinois, 406 U.S. 682 (1972). Although *Kirby* limits the right to counsel recognized in *Wade* to post-indictment lineups, it does not suggest that custody might not be the key event in the application of the *Simmons* due process test.

---

[1] Military Selective Service Act, 50 U.S.C. APP. § 462 (1971).

[2] *Id.* § 456.

[3] *Id.* § 462; 32 C.F.R. § 1641.5 (Supp. 1973).

[4] 32 C.F.R. §§ 1613.11, 1623.4 (Supp. 1973).

[5] United States v. Falk, Crim. No. 70 CR 515 (N.D. Ill., filed Nov. 1970).

[6] United States v. Falk, 479 F.2d 616, 619 (7th Cir. 1973).

[7] Falk was found guilty on all four counts; however, the court granted a post-trial motion for acquittal of the conviction for refusing to submit to induction. The court found no basis in fact for denying Falk classification as a conscientious objector. Welsh v. United States, 398 U.S. 333 (1970).

[8] United States v. Falk, 479 F.2d 616 (7th Cir. 1973).

[9] It must be noted that the appellate court's opinion is not overtly based on any denial of Falk's first amendment rights. But Falk's allusion to the possible chilling effect of prosecution, in the context of a period of widespread protests, may reasonably lead to the conclusion

standards for the finding of discriminatory enforcement of penal laws by United States Attorneys. The court of appeals found not only that Falk's charges of discrimination raised a material issue of fact so as to merit an evidentiary hearing on the motion to dismiss, but also that the inferences raised by Falk's contentions were so strong as to make out a prima facie case of discrimination. Thus the burden of proving non-discrimination shifted to the Government, and the Assistant United States Attorney was forced to take the stand to explain his motives.[10] The decision raises serious questions concerning the quantum and nature of proof necessary to establish a prima facie denial of equal protection through selective prosecution and concerning judicial power to review discretionary actions by federal prosecutors.

The guarantee of equal protection of the law[11] applies to all branches of government. As early as 1886 the Supreme Court in *Yick Wo v. Hopkins*[12] made clear that the guarantee applied to action by executive officials. In *Yick Wo*, a city ordinance that required a license to operate a laundry in a wooden building was challenged as discriminating principally against Chinese. In holding criminal enforcement of the statute unconstitutional, the Court stated:

> Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[13]

In a 1962 decision, *Oyler v. Boles*,[14] the Supreme Court cautioned persons claiming discriminatory prosecution not to rely too readily on a literal reading of *Yick Wo* as an automatic bar to their conviction. In *Oyler*, the appellant charged that he had been singled out for prosecution under a state recidivist statute while others eligible for such prosecution were not so charged. The Court set forth its oft-repeated rule:

> The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.[15]

The breadth of this acknowledgment of prosecutorial discretion has caused courts to summarily dismiss charges of discrimination in numerous cases in the post-*Oyler* period.[16] Almost without exception, these cases have turned on either of

---

that the decision was in fact based on the court's unarticulated but overriding desire to protect free speech rights.

[10] 479 F.2d at 623-24.

[11] The equal protection guarantee has been held applicable to the federal government through the due process clause of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

[12] 118 U.S. 356 (1886).

[13] Id. at 373-74.

[14] 368 U.S. 448 (1962).

[15] *Id.* at 456.

[16] *E.g.*, Edelman v. California, 344 U.S. 357, 359 (1953); United States v. Alarik, 439 F.2d 1349, 1350-51 (8th Cir. 1971); Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970); United States v. Malinowski, 347 F. Supp. 347, 353-54 (E.D. Pa. 1973); Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio), *aff'd on other grounds*, 450 F.2d 480 (6th Cir. 1971).

two facts: (1) the defendant was unable to offer evidence sufficient to satisfy the court that discrimination had in fact occurred;[17] or (2) the Government was able to show a discernible pattern of prosecution of violators grounded upon a legitimate selection process.[18]

In holding that Falk had made out a prima facie case of discriminatory enforcement, the court relied heavily on two recent decisions in other circuits. Each of these two cases involved prosecution of political dissenters for violations of federal statutes, and in each the *Oyler* rule was held to be inapplicable. In the first case, *United States v. Crowthers*,[19] the defendants, who had held an unauthorized Episcopal "Mass for Peace" in the Pentagon concourse, were charged with disturbing the general public and impeding public employees in the conduct of government business.[20] In placing the burden of proving non-discriminatory prosecution on the Government, the Fourth Circuit noted the defendant's showing of sixteen other political or religious ceremonies in the concourse. Each of these other ceremonies was shown to have created more noise or obstruction than the defendants' mass; however, each was distinctly pro-Administration in tone, thus raising a strong inference of discrimination in the Government's prosecution.[21]

In the second case, *United States v. Steele*,[22] a conviction for refusal to answer census questions[23] was reversed by the Ninth Circuit when the Government was unable to "explain away" the strong inference of discrimination raised by the defendant's evidence. Steele was able to show that he and three other vocal census resisters in Hawaii were the only persons prosecuted, while at least six other identified persons who had refused to answer the questions, but who had not vocally protested, were not prosecuted.[24]

Thus the defendants in *Steele* and *Crowthers* were able to present to the court the names of other violators and the nature, times, and places of their offenses. The defendants were able to prove that these other violators were or should have been known to the Government and that their offenses, although similar to those of the defendants, were either disposed of without court action or were ignored completely.

Against this background, it can be readily seen that the allegations made by Falk lacked the specificity and substance that were present in those made by Steele and Crowthers. Falk only "expressed his belief" that some 25,000 other men had dispossessed themselves of their draft cards, but had not been prosecuted, and that he had been indicted solely because of his activities protesting the war and the draft.[25] He failed to allege one of the requisite elements of a claim of denial of equal protection: the drawing of a line "between him, who possesses

---

[17] United States v. Gebhart, 441 F.2d 1261, 1265 (6th Cir. 1971); Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970).

[18] United States v. Sacco, 428 F.2d 264, 271 (9th Cir. 1970).

[19] 456 F.2d 1074 (4th Cir. 1972).

[20] The charges were based upon 40 U.S.C. § 318 (1971).

[21] 456 F.2d at 1079.

[22] 461 F.2d 1148 (9th Cir. 1972).

[23] In violation of 13 U.S.C. § 221(a) (1971).

[24] 461 F.2d at 1152. Statistics on "uneven" application of a particular law are apparently not sufficient alone to make out a case of discrimination. In Oyler v. Boles, 368 U.S. 448, 456 (1962), the Supreme Court disregarded Oyler's listing of the names of the 904 other offenders eligible for prosecution under the West Virginia recidivist statute who were not so prosecuted.

[25] 479 F.2d at 621.

a certain characteristic, and others, similarly situated, who do not possess that characteristic."[26] Specifically, he failed to allege that these 25,000 other men who were not prosecuted had not publicly protested the war and the draft. Further, Falk did not show that the unidentified 25,000 men had refused induction, or that they had not had their claims processed administratively, or that they were otherwise situated similarly to him.[27] Falk did allege, however, that the Assistant United States Attorney prosecuting his case had told Falk's counsel in a pre-trial conference that Falk was, in fact, being prosecuted because of his anti-draft activities. This allegation seemed to be controlling in the court of appeal's decision to grant the new evidentiary hearing at which the Assistant United States Attorney would be required to explain and prove the legitimacy of the Government's motives in prosecuting Falk.

For Falk to have the charges against him dismissed, he ordinarily would have been required to *prove* a denial of equal protection. To prove this denial, Falk would have to be granted an evidentiary hearing, and to be granted an evidentiary hearing, Falk would have at least been required to allege that there was a material question of fact whether his fourteenth amendment rights had been violated. The remarks of the Assistant United States Attorney do not alone constitute an allegation of a denial of equal protection. Even if the statement were true, it must be shown that the "singling out" was discriminatory. There must be a comparison of Falk with others to show that they possess the same characteristics as Falk, but were not singled out. Since Falk failed to make such a comparison, the evidentiary hearing must have been granted solely on the basis of the alleged remarks by the Assistant United States Attorney. Thus without ever having alleged facts sufficient under traditional standards to establish a denial of equal protection,[28] Falk forced the Government to prove that no such denial occurred. The Seventh Circuit was apparently willing to overlook Falk's pleading failure because of the relative importance it gave to policy considerations underlying discriminatory enforcement.

Some very basic constitutional values become apparent in analyzing cases such as *Falk*, *Steele*, and *Crowthers*; these are the need for enforcement of valid laws, the need for *fair* enforcement of valid laws, and the need to safeguard fundamental rights, such as free speech. While the Seventh Circuit in *Falk* gave token attention to each value, it applied them collectively in an unsatisfactory manner.

The court failed to recognize that the United States Attorney is charged with the faithful enforcement of *all* federal laws, yet the number of potential defendants is incalculable. This situation is exemplified by *Falk* in which there may indeed have been 25,000 other violators. The United States Attorney is retarded by limited resources and time, but is pressured by a public concerned about the level of crime and outraged at symbolic public violations by political dissidents who appear to act with impunity. Duty-bound to enforce the laws, yet physically unable to enforce all laws against all violators, the prosecutor must necessarily exercise considerable discretion.

Before *Falk*, there were no cases in which United States Attorneys were forced to prove non-discriminatory prosecution;[29] the defendants had always borne the

---

[26] *Id.* at 626 n.2. (Cummings, J., dissenting). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886).

[27] 479 F.2d at 626 (Cummings, J., dissenting).

[28] See text accompanying notes 32-33 *infra.*

[29] In United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972), and United States v. Crowthers, 456 F.2d 1074, 1079 (4th Cir. 1973), the officials called upon to explain

heavy burden of proof. For two reasons this burden was nearly impossible to carry. First, one of the best methods to prove discrimination is testimony as to its existence.[30] Except for the availability of hearsay, as in *Falk*, the defendant must force the prosecutor to admit his motives. Even if such testimony were available to prove intentional selection, the court might still consider such selection to be reasonable.[31] Thus the defendant would be forced to rely on inferential proof. But to raise the necessary inferences, the defendant has traditionally been forced to produce: (1) evidence that a number of identifiable violators have not been prosecuted;[32] (2) evidence that these persons were situated similarly to the defendant and were known to the prosecutor;[33] and (3) evidence that the defendant alone possessed a characteristic that was focused upon by the prosecutor in singling him out.[34] The difficulty of such proof is self-evident.

The second reason for the defendant's nearly impossible burden of proof is the natural reluctance of courts to question the motives of prosecutors in bringing charges. The discretionary power of the prosecutor is considered essential by courts to the fair and effective administration of justice.[35] This attitude is best exemplified in an opinion by Chief Justice (then Circuit Judge) Burger in *Newman v. United States*:[36]

> It is not the function of the judiciary to review the exercise of executive discretion, whether it be that of the President himself or those to whom he has delegated certain of his powers.[37]

A similar opinion is voiced by the Fifth Circuit in *United States v. Cox*,[38] in which the court cites the doctrine of separation of powers as an injunction upon courts "not to interfere with the free excercise of the discretionary power" of United States Attorneys in prosecuting criminal cases. A defendant like Falk who asks that the United States Attorney be examined regarding his reasons for bringing the prosecution normally fights an uphill battle against this traditional presumption of regularity.

Since it is impossible for the Government to prosecute all offenders, one logical

---

their motives in bringing charges against the defendant were a Regional Census Director and the Regional Counsel of the General Services Administration, respectively. In a recent decision, a defendant alleging discriminatory enforcement by a United States Attorney was unable to convince the Third Circuit that the United States Attorney should be called to the stand to prove non-discrimination in a prosecution for smuggling letters out of a federal prison, the court refusing to follow *Falk*. United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973).

[30] Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1122 (1961).

[31] *Id.*; *see* United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972).

[32] United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1973); United States v. Crowthers, 456 F.2d 1074, 1079 (4th Cir. 1973). See discussion at note 24 *supra*.

[33] United States v. Falk, 479 F.2d 616, 626 (7th Cir. 1973) (Cummings, J., dissenting).

[34] See cases cited at note 16 *supra*.

[35] Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1119 (1961).

[36] 382 F.2d 479 (D.C. Cir. 1967).

[37] *Id.* at 482.

[38] 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). *See also* Spillman v. United States, 413 F.2d 527, 530 (9th Cir.) *cert. denied*, 396 U.S. 930 (1969); Dear Wing Jung v. United States, 312 F.2d 73, 75 (9th Cir. 1962); Goldberg v. Hoffman, 225 F.2d 463, 467 (7th Cir. 1955).

method for enforcing the laws might be prosecution of "high visibility" violators.[39] This method, if not used with the intention of denying the exercise of fundamental rights, could serve two goals in which the Government has a compelling interest; (1) the deterrence of other potential violators; and (2) the creation of a rational, non-discriminatory pattern of enforcement.[40] If a highly visible violator, such as Falk, is permitted to commit a crime and then evade prosecution merely because he had, at some time, exercised his first amendment rights, the ability of the Government to effectively enforce its laws would be substantially impaired.

The Seventh Circuit took the position that in Falk's case the charge of refusal to submit to induction had been found invalid[41] and that it had previously been the policy of the Government not to prosecute persons solely for card possession offenses.[42] Assuming that Falk's anti-draft activities were exercises of first amendment rights, the logical explanation for his prosecution could only be his anti-Administration posture, especially in light of the remarks allegedly made by the Assistant United States Attorney. The court in *Falk* thus saw the key question not to be whether Falk had stated or shown an acceptable equal protection claim, but rather whether the court should become a party to a conviction that might be later construed as a reprisal against a person espousing views at variance with governmental policy. Regardless of Falk's obvious guilt or a proper pattern of governmental enforcement, the court's view of the role of the judiciary in the separation of powers prevailed over any other consideration: "[T]he judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government."[43]

Taken out of context, this last stated principle would be criticized by few, but its application in *Falk* produced a questionable result. It is vitally important to protect the expression of unpopular viewpoints, and often the courts are the only available instrumentality for doing so. However, the now diminished showing that a defendant must make to establish an equal protection claim of unlawful selective prosecution and the accompanying facility with which a defendant can call the prosecutor to the stand to defend his motives could severely impede the administration of criminal justice and damage the credibility of the federal courts.

The perils of adopting the *Falk* approach are several. First, it will subject the courts to new delays in the processing of frivolous claims, since the defendant

---

[39] United States v. Falk, 479 F.2d 616, 634 (7th Cir. 1973) (Cummings, J., dissenting).

[40] People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 21, 225 N.Y.S.2d 128, 136 (1962).

[41] 479 F.2d at 622. It must be noted that the charge for refusal to submit to induction was found to be invalid only in *post-trial* proceedings in the district court. The Seventh Circuit apparently is once again relying on the out-of-court remarks of the Assistant United States Attorney to defense counsel to the effect that the Government "wasn't sure about Count I," rather than implying that the Government could have known in advance that Falk would be acquitted on this count. *Id.* at 636. (Cummings, J., dissenting).

[42] *Id.* at 622, citing statements by Lt. Gen. Lewis B. Hershey, Director, Selective Service System in U.S. GOVERNMENT PRINTING OFFICE, LEGAL ASPECTS OF SELECTIVE SERVICE 47 (1969). The court's reliance on this statement of "Government" policy seems somewhat ill-founded, however, since the Supreme Court effectively outlawed administrative handling of delinquency cases by local draft boards *after* the Hershey statement and *before* Falk's indictment. *See* Breen v. Selective Service Local Board No. 16, 396 U.S. 460 (1970); Oesterich v. Selective Service Local Board No. 11, 393 U.S. 233 (1968).

[43] 479 F.2d at 624, citing Stamler v. Willis, 415 F.2d 1365, 1369-70 (7th Cir. 1969), *cert. denied sub. nom.* Ichord v. Stamler, 399 U.S. 929 (1970).

can too easily cast doubt upon the prosecutor's motives.[44] Second, it will hinder the enforcement of any law if the proscribed activity is *malum prohibitum*. Indeed, it may make the enforcement of *any* law against a vocal or prominent offender inherently suspect—a presumption that may often be incorrect. Third, such an approach binds the Government to the unofficial remarks of a relatively low-level agent. This is arguably incorrect in light of two recent federal decisions[45] and in light of the fact that the Assistant United States Attorney may often be relating only his personal opinion as to the reasons for the prosecution and not the valid, prosecutorial motives of the official who actually made the decision to charge.[46] Finally, the *Falk* approach can only tend to exacerbate a public already skeptical of the willingness of the courts to bring known violators to justice. It is by no means certain that requiring both a complete statement of the elements of an equal protection claim and a convincing advance allegation of base prosecutional motives will soothe a public concerned about unpunished crime. However, the courts and their supporters will have a much easier task in defending their protection of such fundamental rights as free speech if this approach is adopted.

The end of American involvement in the Indo-China War and the end of the draft may severely limit the number of cases in which the circumstances of *Falk* arise, and this may partially alleviate the problem of discriminatory enforcement. In addition, the deterrent effect of such decisions may produce caution on the part of prosecutors or at least force them to have available alternative "wiser" motives[47] for bringing charges when called upon to prove their impartiality. But these are, at best, short-run and coincidental solutions to the problem of avoiding and proving discriminatory prosecution.

It is incumbent on the legislatures and the courts to devise and implement effective long-run solutions to the problems that are exposed by *Falk*. One alternative solution might be more searching discovery rules and detailed complaints in criminal cases. These changes would better enable the defense and the court to determine the basis for the charges against the defendant.

In addition the courts should require defendants to make a prima facie case of discriminatory prosecution before the prosecutor is required to prove that he has not abused his discretion. Such a prima facie case should be based on a clear and specific statement of the circumstances by which the defendant was denied equal protection. The defendant should be required to state that (1) there were other identifiable violators; (2) these other violators committed offenses substantially the same as those of the defendant; (3) these other violators were or should have been known to the prosecutor; (4) the defendant possessed some characteristic not possessed by the other violators; (5) the defendant was prosecuted soley because he possessed this characteristic; and (6) the other violators were not prosecuted. This approach would balance prosecutorial discretion and fundamental rights by enabling prosecutors to discharge their statutory duty to enforce the laws

---

[44] See Address by Hon. William J. Campbell, Conference of Metropolitan Chief District Judges, 55 F.R.D. 229, 231 (1972).

[45] United States v. Santos, 372 F.2d 177, 180-81 (2d Cir. 1967) (inconsistent statement by government narcotics agent not admissible in criminal case as "evidence of the fact"); United States v. Koegh, 271 F. Supp. 1002, 1008 n.22 (S.D.N.Y. 1967) (out-of-court statements by prosecution concerning veracity of witness against defendant are hearsay and inadmissible).

[46] United States v. Powers, 467 F.2d 1089, 1095 (7th Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174, 177 (1965).

[47] United States v. Falk, 479 F.2d 616, 631 (7th Cir. 1973) (Cummings, J., dissenting).

without fear of arbitrary questioning by courts of their motives, and by giving defendants a procedure by which they would be able to vindicate their fundamental rights.

A different approach to the problem would be to set high standards for government conduct and strict sanctions against government prosecutors. Adoption of a system similar to that employed in West Germany,[48] where the prosecutor's records are subject to strict and continuous scrutiny by the courts (which make all final decisions as to whether or not to proceed with a prosecution) could serve to eliminate the abuses of prosecutorial discretion. However, such a plan may effectively eliminate the prosecutor's ability to exercise discretion.

As an absolute minimum, the public must scrutinize prosecutorial activities of the Government[49] and the decision-making of the courts to ensure that equal protection guarantees and fundamental rights are faithfully recognized.[50]

Robert G. Joseph

CONSTITUTIONAL LAW—FIRST AMENDMENT—STATE REGUALTION OF PARTISAN POLITICAL ACTIVITIES OF PUBLIC EMPLOYEES—*Broadrick v. Oklahoma*, 93 S.Ct. 2908 (1973).

A recurring issue in American politics has been the extent to which the partisan political activities of public employees may be restricted.[1] Clearly, the state has a vital interest in maintaining a civil service based on merit rather than political favoritism and in protecting public employees from being coerced by superiors to participate in partisan politics. A broad prophylactic rule prohibiting virtually all political activity by public employees would surely accomplish these goals. On the other hand, the public employee has a vital interest in being able to participate like any other citizen in the nation's political processes. Historically, this controversy has been resolved against the employee by the legislatures[2] and the courts[3] through laws which prohibit essentially any active partisan political involvement.

---

[48] K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY 191-95 (1969). Under the West German system, government prosecutors have discretion only as to minor offenses and even these exercises are subject to judicial review. The prosecutor may neither withhold prosecution for serious crimes nor engage in plea bargaining. Rather, when the evidence or law in a case is doubtful, the court will determine whether the case should proceed. Further, the German prosecutor is required to open a file on every crime reported by the police or citizens. These files remain open until the final disposition of the case by the courts, thus eliminating the possibility of a prosecutor merely "forgetting" about the case. The West German system does not totally eliminate discretion and thus the necessary flexibility it affords. It merely transfers the responsibility for the exercise of discretion from the prosecutor's office to the courts, thus greatly reducing the possibility of abuse of discretionary power and its potential use for political ends.

[49] Address by Attorney-General Elliot L. Richardson, Annual Convention of the American Bar Association, Aug. 8, 1973, in N.Y. Times, Aug. 9, 1973, at 1, col. 6.

[50] K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY, 207-09 (1969).

---

[1] *See generally* Epstein, *Political Sterilization of Civil Servants: The United States and Great Britain*, 10 PUB. AM. REV. 281 (1950); Esman, *The Hatch Act—A Reappraisal*, 60 YALE L.J. 986 (1951); Madama, *The Hatch Act—A Constitutional Restraint of Freedom?*, 33 ALBANY L. REV. 345 (1969); Nelson, *Public Employees and the Right to Engage in Political Activity*, 9 VAND. L. REV. 27 (1955); Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510 (1962); Note, *The Hatch Act—Political Immaturity?*, 45 GEO. L.J. 233 (1957).

[2] *See, e.g.*, codified portions of the Hatch Act, 5 U.S.C. §§ 1502 & 7324 (1970).

[3] *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (upholding validity of the Hatch Act); *Ex parte* Curtis, 106 U.S. 371 (1882) (restrictions on political contributions).

The courts have traditionally upheld the validity of such restrictions because of the notion that employment in government service was a privilege, not a right.[4] To enjoy this privilege the employee had to waive certain first amendment rights which other citizens were free to exercise.[5] Perhaps in the nation's past, when state and federal payrolls were small, this rationale was justified. Today, however, the character of government service has changed. First, a substantial portion of the national work force is employed by federal, state, and local governments,[6] and a person may have no choice other than to seek governmental employment. Second, large numbers of public employees are engaged in work which has been traditionally considered solely within the realm of the civilian sector of the economy.[7] In addition to these changing characteristics, the Court has rejected the idea that the exercise of a constitutional right can be denied by classifying the receipt of a governmental benefit as a "right" or as a "privilege."[8]

Given these fundamental changes in the character of the modern civil service, the Supreme Court's most recent pronouncements on this issue are disappointing. In *Broadrick v. Oklahoma*,[9] the Court upheld the constitutionality of an Oklahoma statute which substantially restricts the partisan political activities of employees in the state's classified civil service. A companion case to *Broadrick* reaffirmed the validity of the Hatch Act.[10]

In *Broadrick*, appellants were charged by the Oklahoma State Personnel Board with violating § 818 of the state's Merit System of Personnel Administration Act.[11]

---

[4] "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892) (Holmes, J.), *as quoted in* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) [hereinafter cited as Van Alstyne].

[5] Van Alstyne, *supra* note 4, at 1439.

[6] In 1972, out of a total national work force of 80,216,000, the various levels of government employed 13,377,000. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 230, 225 (1972).

[7] Van Alstyne, *supra* note 4, at 1461-62.

[8] *See* Graham v. Richardson, 403 U.S. 365 (1971); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967). *See also* Mancuso v. Taft, 341 F. Supp. 574, 579-80 (1972), *aff'd*, 476 F.2d 187 (1st Cir. 1973); Van Alstyne, *supra* note 4, at 1458. Expanded activities of government as a public employer make the restraints of substantive due process increasingly necessary. Van Alstyne, *supra* note 4, at 1461-62.

[9] 93 S.Ct. 2908 (1973) (5–4 decision).

[10] United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S.Ct. 2880 (1973). The Hatch Act, as codified in 5 U.S.C. § 7324 (1967), regulates the partisan political activities of federal employees. The constitutionality of the Hatch Act was first upheld in United Public Workers v. Mitchell, 330 U.S. 75 (1947). Although the continued validity of *Mitchell* has been challenged, *Letter Carriers* emphatically reaffirmed the Court's holding in *Mitchell*. *See* Mancuso v. Taft, 476 F.2d 187, 197-98 (1st Cir. 1973), where the court speculated the demise of the right/privilege distinction would render *Mitchell* obsolete. *Cf.* Van Alstyne, *supra* note 4, at 1447 (suggesting *Mitchell* may have been decided incorrectly).

Although *Broadrick* and *Letter Carriers* used similar reasoning, the two cases can be distinguished. In *Letter Carriers*, the Court had a substantial body of Civil Service Commission regulations and rulings with which to work. These materials tended to narrow the overbroad portions of the Hatch Act. This was not the case in *Broadrick*, in which all that was available to the Court were "a scant five rules that shed no light at all on the intended reach of the statute." 93 S.Ct. at 2922 (Brennan, J., dissenting).

[11] This Act has been codified in 74 OKLA. STAT. ANN. § 818 (1965) [hereinafter cited as § 818], in pertinent part:

> No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting

Specifically, appellants were charged with soliciting political contributions from their co-workers for the benefit of their superior. Appellants maintained § 818 was void for vagueness and overbreadth and urged the Court to declare the section unconstitutional on its face.[12]

The Court dismissed appellants' vagueness claim by noting that even if the exact parameters of § 818 were imprecise, this imprecision was not at issue since appellants' solicitation of political contributions fell squarely within the "hard core" of the statute's proscriptions.[13] In reaching this conclusion, the Court reiterated its position in *United States Civil Service Commission v. National Association of Letter Carriers*,[14] in which a similar vagueness issue had been raised:

> [T]here are limitations in the English language with respect to being both specific and managably [sic] brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.[15]

Appellants' solicitations were so clearly proscribed by the terms of the statute that they would not be permitted to benefit from any alleged peripheral ambiguities of the statute.

While dealing only tangentially with the vagueness issue, the Court devoted substantial time to appellants' overbreadth challenge. Essentially, the Court held that appellants' active solicitation of political contributions could not be considered protected first amendment activity. Therefore, since the Court is not a "roving

---

or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

Similar to the Oklahoma statute is a provision of the Hatch Act which restricts the partisan political activities of state employees who work for state agencies which are funded in whole or in part by the federal government. 5 U.S.C. § 1502 (1967). The constitutionality of this provision was upheld in Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947), which was a companion case to *Mitchell*.

[12] Appellants in *Broadrick* also asserted an equal protection claim which the Court dismissed in a footnote. The Court felt that it was no denial of equal protection to regulate the political activities of employees in the classified civil service while the political activities of employees in the unclassified service went unregulated. The Court reasoned, "a State can hardly be faulted for attempting to limit the positions upon which such regulations are placed." 93 S.Ct. at 2913 n.5.

The Court did not touch upon the larger equal protection issue which was thoroughly analyzed in Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973). The *Mancuso* court felt that the discrimination between public and private employees was of itself a denial of equal protection. A similar argument is used by Professor Van Alstyne, when he notes, "[a] regulation which restricts the continuing eligibility of employees to the class willing to conform to an unreasonable rule of conduct ipso facto establishes an arbitrary classification. Such a regulation denies equal protection and is therefore unconstitutional." Van Alstyne, *supra* note 4, at 1455.

[13] 93 S.Ct. at 2914.

[14] 93 S.Ct. 2880 (1973).

[15] 93 S.Ct. 2908, 2913-14 (1973).

commission," appellants would not be permitted to assert vicariously the constitutional rights of other public employees.[16] The Court did say that in certain first amendment cases it would relax its traditional rules of standing if the statute under scrutiny had an adverse effect on the free exercise of speech. With respect to appellants' claim, however, "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[17] The Court concluded that § 818 was not "substantially" overbroad and that whatever overbreadth might exist could be cured through case-by-case adjudication.

In analyzing appellants' overbreadth claim the *Broadrick* Court had a choice between two distinct methods of review. One method would have been to review the statute on an individual or "as applied"[18] basis, judging the statute "in terms of the result worked by its application in the instant case."[19] This was the method the *Broadrick* court purported to use.[20] The second method would have been to review the statute facially; that is, to judge the statute in terms of the "chilling effect"[21] on the protected activity of parties not immediately before the Court. The technique is not limited to review of statutes challenged on the basis of overbreadth, but may also be used to invalidate statutes which affect fundamental interests or statutes which do not comport with the "less drastic" means doctrine.[22]

The individual or "as applied" method is in accord with the Court's long-standing position that "constitutional rights are personal and may not be asserted vicariously."[23] There must be real controversies between the actual parties so that constitutional issues are not decided in the abstract.[24] This method permits the Court to save an otherwise legitimate statute by striking only the impermissible construction. Facial overbreadth review, on the other hand, "is an exception to [the Court's] traditional rules of practice."[25] In certain limited cases, the Court will adjudicate the rights of parties who may never appear before it because the parties are deterred by the statute's overbreadth from exercising constitutionally protected rights.[26] Since this method of review permits the Court to void a law on its face, even parties such as the *Broadrick* appellants, whose own conduct is within a statute's proscription and who might otherwise be constitutionally punished, are allowed to benefit.[27]

Ostensibly, the Court determined the constitutionality of § 818 on an "as applied" basis because (1) appellants' solicitation of contributions came within the

---

[16] *Id.* at 2915.

[17] *Id.* at 2918.

[18] Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[19] *Id.*

[20] 93 S.Ct. at 2915-18.

[21] Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). *But see* Younger v. Harris, 401 U.S. 37 (1971). While *Younger* did not expressly overrule *Dombrowski*, the Court tended to limit the "chilling effect" standard to those statutes that *directly* abridged free speech. 401 U.S. at 51.

[22] For a discussion of "less drastic" means see text accompanying notes 52-54 *infra*.

[23] 93 S.Ct. at 2915.

[24] *See, e.g.*, Baggett v. Bullitt, 377 U.S. 360, 383 (1964) (Clark, J. dissenting); Saia v. New York, 334 U.S. 558, 571 (1948) (Jackson, J., dissenting).

[25] 93 S.Ct. at 2917.

[26] *See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

[27] Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 847 (1970).

"core" of the provision, and (2) the provision regulated conduct, not speech.[28] The Court, in other words, reached its decision by focusing on the *type of activity* the statute purported to cover. This distinction between speech and conduct can be subtle, and a person exercising first amendment rights often engages in both types of activity.[29] Further, an overbroad statute regulating conduct can cause as great a constitutional injury as an overbroad statute regulating speech. Thus merely looking at the nature of the activity may leave a whole class of privileged activity—conduct—unprotected. For example, in *Zwickler v. Koota*,[30] the Court had before it a New York statute which prohibited distribution of anonymous handbills. In a case like this, to draw a distinction between where speech "ends" and conduct "begins" seems at best to be artificial. Fortunately, the *Zwickler* Court did not do this.

By distinguishing between the types of activity, the *Broadrick* Court was forced to devise a separate overbreadth standard for each. Under this approach a statute regulating speech will be reviewed on its face if has "ordinary"[31] overbreadth, whereas a statute regulating conduct will be reviewed on its face only if it has "substantial" overbreadth. This may be a distinction without a difference since "overbreadth" by definition implies an element of the substantial. Traditionally, successful invocation of the overbreadth rubric has meant that the statute involved

---

[28] While the rhetoric of *Broadrick* was that a strict "as applied" method of review would be used, the Court went considerably beyond the facts of the case in listing a virtual *ipse dixit* catalogue of prohibitions that would be constitutional:

> [T]here is no question that § 818 is valid at least insofar as it forbids classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of national, state, or local committees of political parties, or officers or committee members in partisan political clubs, or candidates to any paid public office; taking part in the management or affairs of any political party's partisan political campaign; serving as delegates or alternates to caucuses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a partisan effort to get voters at the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate.

93 S.Ct. at 2918.

While this language may have corrected some of the vagueness of § 818, it certainly did nothing to narrow the construction of the statute. In fact, the Court's dictum may even increase the "chilling effect" on protected activity. For example, the line between vigorous political debate with one's co-workers and "soliciting votes" can be very thin, with the result that the employee's personal political expression may be less "vigorous" and even "chilled."

The Court's statement that Oklahoma can permissibly forbid employees from "becoming . . . candidates to any paid public office," would seem to squarely overrule Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973), which held that such a restriction constituted a denial of equal protection.

[29] *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing of arm band); Cox v. Louisiana, 379 U.S. 536 (1965) (civil rights demonstration). As dissenting Mr. Justice Brennan noted in *Broadrick*:

> More fundamentally, the Court offers no rationale to explain its conclusion that, for purposes of overbreadth analysis, deterrence of conduct should be viewed differently from deterrence of speech, even where both are equally protected by the First Amendment. Indeed, in the case before us it is hard to know whether the protected activity falling within the Act [§ 818] should be considered speech or conduct.

93 S.Ct. at 2925.

[30] 389 U.S. 241 (1967).

[31] The Court did not use the specific term "ordinary" overbreadth.

was already "too overbroad" to be cured by a series of judicial limiting constructions.[32]

To compound the difficulty, the Court provided no guidance as to what "substantial overbreadth" might mean,[33] which tends to render the standard unworkable. As dissenting Mr. Justice Brennan noted:

> At this stage, it is obviously difficult to estimate the probable impact of today's decision. If the requirement of "substantial" overbreadth is construed to mean only that facial review is inappropriate where likelihood of an impermissible application of the statute is too small to generate a "chilling effect" on protected speech or conduct, then the impact is likely to be small. On the other hand, if today's decision necessitates the drawing of artificial distinctions between protected speech and protected conduct, and if the "chill" on protected conduct is rarely, if ever, found sufficient to require the facial invalidation of an overbroad statute, then the effect could be very grave indeed.[34]

Since this guidance was not provided, the mere classification of an activity as "conduct" could make it substantially more difficult for a person to successfully challenge a broad regulatory scheme restricting that activity.

Rather than focusing on the nature of the *activity* involved, the *Broadrick* majority could have analyzed the nature of the *interests* affected by § 818. Since a first amendment interest was involved, this approach would have rendered the speech/conduct distinction nugatory and would have relieved the Court from the need to devise separate overbreadth standards for speech and conduct. The Court could then have applied a traditional overbreadth analysis without regard to the type of activity involved.

The Court also could have analyzed appellants' first amendment claim in unequivocal "free speech" terms, holding that *any* restraint on the exercise of the free speech value is unconstitutional.[35] This, of course, is an extreme position which has never commanded a majority of the Court. Rather, the Court has taken the position that first amendment rights are not absolute, that under certain circumstances the state's interests can override the first amendment interests of the individual. For example, if a person's exercise of first amendment rights creates a "clear and present danger" of bringing about a substantive evil which a legislature has an interest in proscribing, then the state could lawfully prohibit exercise of that activity.[36] As the epigram goes, no one has a right to shout "fire" in a crowded theater. Implicit in such an approach is a balancing of the state's interests against the individual's interests. This was the method adopted in *United Public Workers v. Mitchell*,[37] where the Court stated:

> [T]his Court must balance the extent of the guarantees of freedom

---

[32] Zwickler v. Koota, 389 U.S. 241, 250 (1967).

[33] Nowhere in the decision did the Court define what was meant by "substantial" overbreadth. Dissenting Mr. Justice Brennan voiced his concern over this when he noted, "[T]he Court makes no effort to explain why the overbreadth of the Oklahoma Act, while real, is somehow not quite substantial. No more guidance is provided than the Court's conclusory assertion that appellants' showing here falls below the line." 93 S.Ct. at 2925.

[34] 93 S.Ct. at 2926.

[35] "[T]he First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.'" Bridges v. California, 314 U.S. 252, 263 (1941) (Black, J.) (footnote omitted).

[36] *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925).

[37] 330 U.S. 75 (1947).

> against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.[38]

Although the *Broadrick* court did not discuss this balancing of the various interests as such, it did acknowledge that important state interests[39] were involved, and that the terms of § 818, if directed at private individuals, would be invalid under the first and fourteenth amendments.[40]

The right to engage in vigorous political debate and discussion is perhaps one of the most valued rights protected by the Constitution.[41] Indeed, it can be argued that a major purpose of the first amendment is "to protect the free discussion of governmental affairs."[42] The democratic operation of the nation's political system is inextricably tied to the scrupulous protection of individual liberty, and free discussion and participation in governmental affairs is an imperative of representative self-government.[43]

Broadrick demonstrates the potential difficulties inherent in any analysis of interests, since the interest of the state and the interest of the public employee are both vital, and mere "balancing" will provide no clue as to whose interest should prevail. Ordinarily, if competing interests are essentially equal, the presumption is in favor of the statute's validity;[44] however this is not the case when a statute burdens first amendment liberties. In fact, a reverse presumption obtains.[45]

One way the Court could have resolved the dilemma created by this seemingly equal balance would be to examine the character of the interests involved and to determine if the changes in the composition of the modern civil service warrant a reappraisal of the state's interest. If the original reasons for restricting political activity of public employees are no longer valid,[46] the presumption against the statute's constitutionality would be strengthened since this would present a clear justification for application of the "reverse presumption" principle.

Given the profound changes in the composition of the modern civil service, it is clear that traditional rationales such as the right/privilege distinction are no longer viable. Today a substantial portion of the national work force is employed by government, and, as the demand for government services increases, more people will be drawn into public service. One commentator has suggested that a person's chances for economic success are significantly limited if that person is denied access to public employment; and, since the government does control such a great proportion of the labor market, exclusion from government service substantially decreases

---

[38] *Id.* at 96.

[39] 93 S.Ct. at 2913.

[40] 93 S.Ct. at 2918.

[41] *See, e.g.*, Bond v. Floyd, 385 U.S. 116 (1966).

[42] Mills v. Alabama, 384 U.S. 214, 218 (1966).

[43] A. COX, THE WARREN COURT 92-93 (1968).

[44] *See, e.g.*, Davies Warehouse Co. v. Bowles, 321 U.S. 144, 153 (1944).

[45] [D]oubtful intrusions cannot be allowed to stand consistently with the [first] Amendment's command and purpose, nor therefore can the usual presumptions of constitutional validity, deriving from the weight of legislative opinion in other matters more largely within the legislative province and special competence, obtain.
United States v. CIO, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring).

[46] "A view today, that running for public office is not an interest protected by the First Amendment, seems to us an outlook stemming from an earlier era when public office was the preserve of the professional and the wealthy." Mancuso v. Taft, 476 F.2d 187, 196 (1st Cir. 1973).

a person's bargaining power with civilian employers.[47] Since a person may have no choice other than to seek government employment and since the range of occupations in government is so varied, a broad prophylactic rule such as § 818 seems wholly unjustified.[48] True, the state's interest in protecting a public employee from coerced participation in partisan politics remains vital; however the state's interest in restricting the partisan political activities of a gardener or construction worker should be different from its interest in restricting the political activities of a department or agency head. A more carefully drafted statute would compensate for this difference in interests, possibly by capitalizing on the difference between proprietary and governmental functions, and provide greater protection for the first amendment rights of the rank and file public employee.

Also, a statute like § 818 may actually be counterproductive to the state's interest in good government. Laws restricting political activities of public employees tend to diminish the pool of candidates qualified for public office,[49] since a public employee may be dissuaded from running for office if he knows he must first resign. As the court noted in *Mancuso v. Taft*,[50] public employees are uniquely qualified to run for office because of their intimate knowledge of governmental operation. Thus, although the Oklahoma statute may be designed to improve the caliber of the civil service, it may accomplish that end to the detriment of a highly qualified candidate pool.

In addition to the changing character of the state's interest, another factor militating in favor of facial invalidity of the Oklahoma statute is that far less draconian means are available to protect the state's interest.[51] In addition to narrowing the scope of the statute as discussed above, a liberal leave of absence policy would accomplish the state's goals without unduly burdening the first amendment rights of civil servants.[52] Thus, although employees wishing to run for office would be required to leave temporarily the state's employ, they could return to duty whenever their political activities were completed. Another alternative would be to limit the employees' political activities to certain levels of government. For example, a local employee would be permitted to engage only in state politics, or a state employee would be permitted to engage only in national politics.[53] To

[47] Van Alstyne, *supra* note 4, at 1461-62.

[48] *See* Mancuso v. Taft, 476 F.2d 187, 198-99 (1st Cir. 1973).

[49] One factor the Court did not consider is that the carte blanche restrictions on the political activities of public employees can result in a built-in demographic bias. In the areas surrounding Washington, D.C., or state capitals, there are likely to be high concentrations of government employees. Because the ratio of government employees to civilian employees will be higher in these areas than in other areas of the nation, the pool of available political participants could be critically diminished. *See generally Hearings on S. 1474 Before the Subcomm. on Privileges and Elections of the Senate Committee on Rules and Administration*, 89th Cong., 1st Sess. 6-7 (1965).

[50] 476 F.2d 187, 194 (1st Cir. 1973).

[51] *See generally* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 267-93 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

[52] Mancuso v. Taft 476 F.2d 187, 199 (1st Cir. 1973). *See also* Gray v. City of Toledo, 323 F. Supp. 1281 (N.D. Ohio 1971); Kinnear v. San Francisco, 61 Cal. 2d 341, 38 Cal. Rptr. 631, 392 P.2d 391 (1964); Minielly v. State, 242 Ore. 490, 411 P.2d 69 (1966).

[53] It is difficult for us to see that a public employee running for the United States Congress poses quite the same threat to the civil service as would the same employee if he were running for a local office where the contacts and information provided by his job related directly to the position he was seeking, and hence where the potential for various abuses was greater.

Mancuso v. Taft, 476 F.2d 187, 200 (1st Cir. 1969):

protect an employee from being compelled to participate in politics at the insistence of superiors, a statute sternly prohibiting abuse of political influence would accomplish the state's goal of protecting the employee without denying the employee the exercise of first amendment rights.[54]

Since these reasonable alternatives were available to lessen the chill on protected activity, and since the court will not undertake to rewrite a statute,[55] the Court could have declared § 818 facially void as an impermissible restraint on protected first amendment activity.[56] Appellants, of course, would have been the beneficiaries of a constitutional windfall since a more narrowly drawn statute penalizing their specific activity would undoubtedly have been permissible.[57] This, however, should not have deterred the Court, since the first amendment rights of potentially millions of government employees would have been vindicated.

CONCLUSION

While *Broadrick* is in accord with past precedent, the decision is unfortunate because it did not attempt to correct the abuses of a system of political restrictions which no longer reflects the realities of public service. Such abuses seriously interfere with the exercise of protected first amendment liberties and should not be permitted to stand. By focusing on the type of activity covered by § 818 instead of the interests affected by the statute, the Court was compelled to formulate an unworkable standard of review. Further, by failing to give adequate guidance as to what "substantial" overbreadth might mean, the Court may in fact have *increased* the "chill" on the exercise of protected activity, since parties may now be uncertain as to whether their activity constitutes "speech" or "conduct." In view of the vital employee interests involved and the availability of permissible, yet less drastic, alternatives to the Oklahoma statute, the Court should have declared § 818 unconstitutional on its face.

John David Hvizdos

---

[54] *See, e.g.*, OHIO REV. CODE ANN. § 143.44 (Page 1969):

> No officer or employee of the state or the several counties, cities, and city school districts thereof, shall appoint, promote, reduce, suspend, lay off, discharge, or in any manner change the official rank or compensation of any officer or employee in the classified service, or promise or threaten to do so, for giving, withholding or neglecting to make any contribution of money or other valuable thing for any party or political purpose, *or for refusal or neglect to render any party or political service.* (emphasis supplied)

[55] *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

[56] [W]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.

389 U.S. at 268 (footnote omitted).

[57] "Cox's conviction was reversed even though the State might have been permitted to punish the very same conduct under a statute properly drafted." A. COX, THE WARREN COURT 106 (1968), *discussing* Cox v. Louisiana, 379 U.S. 536 (1965), *cf.* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kunz v. New York, 340 U.S. 290 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949).