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Recent Developments

Various Editors

RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — CORRECTIONS — INTRASTATE PRISON TRANSFERS HELD NOT TO VIOLATE DUE PROCESS WHEN STATE LAW DOES NOT CONDITION SUCH TRANSFERS ON PROOF OF SERIOUS MISCONDUCT.

Meachum v. Fano (U.S. 1976)

During a two-and-one-half-month period in 1974, a series of nine fires occurred at the Massachusetts Correctional Institution at Norfolk (Norfolk), a medium security institution.[1] The authorities at Norfolk, having received information from prison informants that the respondents, six inmates, were significantly involved in the planning and execution of one or more of the fires, instituted proceedings[2] before the Norfolk Classification Board to decide whether the inmates should be transferred to the Massachusetts Correctional Institution at Walpole (Walpole), a maxi-

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1. Meachum v. Fano, 427 U.S. 215, 216 (1976).

2. *Id.* All six respondents, inmates Fano, DeBrosky, Dussault, Hathaway, MacPhearson, and Royce, were notified of the hearing and informed that the authorities had information indicating that they were involved in criminal conduct. The following notice was given to respondents Fano, DeBrosky, and Dussault:

> The department has received information through a reliable source that you were in possession of instruments that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.
>
> These items and plans occurred during the period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to lives of persons at MCI, Norfolk as well as serious property damage.

Id. at 217 n.1

Respondents Hathaway and MacPhearson received a communication which stated:

> The department has received information through reliable sources that you were significantly involved in the planning and execution of one or more of the serious fires occurring within MCI, Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety.

Id. at 217 n.1.

The following notice was given to respondent Royce:

> The department has received information through a reliable source that you were involved in the trafficking of contraband in MCI, Norfolk (narcotics, barbiturates and/or amphetamines).
>
> This occurred during a period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage.

Id. at 217 n.1. Prior to the hearing, the respondents were removed from the general prison population and placed in an administrative detention area used to process new inmates. *Id.* at 216.

mum security prison with living conditions substantially less favorable than those at Norfolk.[3] After reviewing the classification board's recommendations,[4] petitioners Dawber, the Acting Deputy for Classification and Treatment, and Hall, the State Commissioner of Corrections, transferred five of the inmates to Walpole[5] and the other inmate to the Massa-

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3. Norfolk, a medium security, walled institution with an average population of 700 inmates, accommodates prisoners who are thought to have a greater potential to be rehabilitated. Designed to be more spacious and less "prison-like," it contains dormitory units rather than cell blocks. The prisoners work in shops where clothing, fabricated metal items, concrete novelties, park benches, mattresses, and shoes are manufactured. Additionally, there is a furniture upholstering and woodworking shop. The prison also provides apprentice training programs in barbering, welding, drafting, and auto repairing. For inmates who are within six months of being discharged from Norfolk there exists a prerelease program which enable them to develop more realistic vocational planning. The program includes counseling at the prison and, for selected inmates, two to six weeks in a halfway house in Boston, with personnel available from the Division of Employment Security to facilitate vocational reentry into the community. Inmates at Norfolk have the opportunity to work both at the Wrentham State School, which provides care for the retarded, and at the Foxboro State Hospital. A training program in the theatrical arts is also available. Norfolk offers opportunities for education through classroom instruction, leading to a high school equivalency certificate. The prison's library is equipped with over 12,000 volumes. The institution has a 75-bed hospital, accredited by the American Medical Association, which provides medical and surgical services. E. POWERS, THE BASIC STRUCTURE OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN MASSACHUSETTS 210–12 (6th ed. 1973).

Walpole, a maximum security prison, has an average population of 575 inmates, most of whom have been committed there directly by the courts. The prison provides a limited number of vocational training programs and is equipped with only a few modern classrooms. Walpole contains a "Segregation Unit" — a separate building within the walls that has the capacity to accommodate 60 men. While the Segregation Unit has furnished cells and limited recreational facilities, its inhabitants have no access to the rest of the institution. Inmates in the general prison population whose presence is deemed detrimental to the program of the institution may be transferred to the unit by the commissioner of the Massachusetts Department of Corrections for an indefinite period. Walpole also contains an isolation unit, used for the enforcement of discipline. This unit is provided with light, ventilation, adequate sanitary facilities and some furniture. The prison superintendent may confine an inmate to the unit for no longer than 15 days for any one offense. Medical facilities at Walpole consist of a 15-bed infirmary, a doctor's office, two treatment rooms, a dental room with two chairs, an x-ray room, a pharmacy, and two specialty rooms. In special cases an inmate may be transferred to the prison hospital at Norfolk for treatment. *Id.* at 212–14.

4. The classification board recommended that Fano, Dussault, and MacPhearson be transferred to Walpole; that DeBrosky and Hathaway be transferred to the Massachusetts Correctional Center at Bridgewater (Bridgewater), which had both maximum and medium security facilities; and that Royce be placed in administrative segregation for 30 days. 427 U.S. at 218.

5. *Id.* at 221. DeBrosky's attorney received the following explanation of the commissioner's reasons for not adhering to the board's recommendation (*see* note 4 *supra*) with respect to his client:

> As you are aware, the recommendation of the Board was for placement at MCI-Bridgewater. However, after a thorough review of the facts, with considerable concern being given to the intelligence information that connected Mr. DeBrosky with involvement with a weapon, the Commissioner has decided to place Mr. DeBrosky at MCI-Walpole. The intelligence information referred to

chusetts Correctional Center at Bridgewater, which has both maximum and medium security facilities.[6]

Alleging that the factfinding hearings conducted before their transfers were constitutionally inadequate and thus resulted in a deprivation of liberty without due process of law,[7] the respondents filed suit under section 1983 of the Civil Rights Act of 1871[8] in the United States District Court for the District of Massachusetts against Meachum, the prison superintendent, Dawber, and Hall.[9] The district court ordered the inmates returned to the general prison population at Norfolk until they were afforded proper notice and an adequate hearing.[10] On appeal, the order was affirmed by the United States Court of Appeals for the First Circuit, which concluded that a transfer from a medium security prison to a maximum security prison was "serious enough to trigger the application of

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above was judged to be reliable. Your request that the subject be placed back into the population at MCI-Norfolk is being denied.

427 U.S. at 221 n.3. Respondent Royce, whose transfer was also not in accord with the board's decision, was informed of the following:

Upon careful examination of all related materials and information, I have reached the following decision:

Placement: MCI, Walpole.

Reasons: I disagree with the recommendation of the Board and I am assigning you to MCI, Walpole because I feel that you have demonstrated that you are unwilling and/or unable to accept the responsibility that is commensurate with assignment to MCI, Norfolk, a medium security facility. Your actions of November 1, 1974 whereby you destroyed state property and displayed disrespect to a Correctional Officer have played a part in this decision.

Id.

6. Respondent Hathaway was the only inmate transferred to Bridgewater. *See* note 4 *supra.*

7. 427 U.S. at 222. The fourteenth amendment to the United States Constitution prohibits the states from depriving "any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The respondents averred that they were not afforded the minimum protection of due process because the evidence concerning the alleged offenses, which apparently consisted of superintendent Meachum's disclosure of the information he received from the informants, was heard in a closed session out of the presence of the inmates and their counsel. Fano v. Meachum, 520 F.2d 374, 376 (1st Cir. 1975). The respondents additionally alleged that this information was not revealed to them or their counsel and that they were not informed of the dates and locations of the alleged offenses. *Id.*

8. Section 1983 provides:

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

42 U.S.C. § 1983 (1970).

9. 427 U.S. at 222. The respondents sought declaratory relief, damages, and an injunction setting aside the ordered transfers. *Id.*

10. Fano v. Meachum, 387 F. Supp. 664, 668-69 (D. Mass. 1975). The district court stated: "It is absolutely basic to any concept of due process that a person charged be given sufficient information concerning the charge against him so that he may intelligently prepare a defense." *Id.* at 668.

the due process protections."[11] The United States Supreme Court reversed, *holding* that since state law did not condition the authority to transfer upon the occurrence of specific acts of misconduct or other events, the due process clause of the fourteenth amendment did not require prison officials to conduct factfinding hearings in connection with the transfers. *Meachum v. Fano*, 427 U.S. 215 (1976).

As a general proposition, procedural due process, by embodying the notion of fundamental fairness,[12] mandates that the state provide notice and a hearing before taking action to deprive a person of "life, liberty, or property."[13] Although, traditionally, the protection afforded by the due process clause extended only to "rights" and not to "privileges,"[14] recent Supreme Court cases have abandoned the right-privilege distinction.[15]

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11. 520 F.2d at 377–78. Some courts have separated administrative transfers from disciplinary transfers in their decisions. *See* Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), *vacated*, 425 U.S. 947 (1976); Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974), *rev'd*, 427 U.S. 236 (1976); Bryant v. Hardy, 488 F.2d 72 (4th Cir. 1973). The First Circuit, however, chose not to distinguish them:

> We attach no significance for present purposes to the fact that these proceedings were for "classification" rather than "discipline." Defendants assert that "there are in the instant case as many administrative overtones as disciplinary ones," but we have already indicated that in our view the motive of prison officials, as such, is not properly a part of the due process calculus. . . . Whether the transfer is thought of as punishment or as a way of preserving institutional order, the effects on the inmate are the same and the appropriateness of the action depends upon the accuracy of the official allegation of misconduct.

520 F.2d at 376 n.2 (citation omitted).

12. *See* Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting); Griffin v. California, 380 U.S. 609, 615–16 (1965) (Harlan, J., concurring); Pointer v. Texas, 380 U.S. 400, 408–09 (1965) (Harlan, J., concurring); Hannah v. Larche, 363 U.S. 420, 442 (1960); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring); Rogge, *An Overview of Administrative Due Process*, 19 VILL. L. REV. 1, 3–5 (1974).

13. For example, in Fuentes v. Shevin, 407 U.S. 67 (1971), the Court stated: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Id.* at 80, *quoting* Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863). *See also* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158–59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

14. Under the right-privilege doctrine, various types of governmental benefits were treated as gratuities which the government could provide or take away without a hearing. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (exclusion of aliens); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951) (government employment). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439–42 (1968).

15. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court stated that "'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."'" *Id.* at 481, *quoting* Graham v. Richardson, 403 U.S. 365, 374 (1971); *see, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 (nonrenewal of state college teacher's contract); Graham v. Richardson, 403 U.S. 365, 374 (1971) (denial of welfare benefits to aliens); Bell v. Burson, 402 U.S. 535, 539 (1971) (suspension of driver's operating license); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (termination of welfare payments); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969) (denial of welfare benefits to residents who have not resided within the state for at least one year).

Instead, the Court has focused upon the extent to which a person has suffered a "grievous loss" in determining whether due process safeguards are applicable.[16] As elucidated by recent cases, this analysis has centered not merely upon the "weight" of the individual's interest, but also upon whether the "nature" of the interest is one within the contemplation of the "liberty or property" language of the fourteenth amendment.[17]

Two recent Supreme Court cases involving the termination of employment of state college teachers have provided some guidance as to what liberty or property interests are constitutionally protected. In *Board of Regents v. Roth,*[18] the Court held that a professor, hired under a one-year contract with no provision for renewal by a state university which had a formal tenure system, had no constitutionally protected interest in being rehired and therefore was not entitled to a hearing prior to the non-renewal of his contract. The *Roth* Court stated that while the meaning of liberty must be broad enough to protect a person's good name, reputation, honor, and integrity, there was no suggestion that those interests were at stake in that case.[19] The Court stressed that a claim for due process protections must be founded upon some objective source and that an individual's expectations alone are insufficient.[20] *Perry v. Sindermann,*[21]

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16. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court held that the state could not terminate welfare payments without first providing the individual with the procedural protections of "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id.* at 267–68. The Court stated: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer *grievous loss.*'" 397 U.S. at 262–63, *quoting* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (emphasis added).

17. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972), *citing* Fuentes v. Shevin, 407 U.S. 67 (1972).

In deciding the form of the procedures required before a deprivation of a protected interest takes place, the Court balances the individual's interest in avoiding the loss against the state's interest in a summary adjudication. *See* Board of Regents v. Roth, 408 U.S. 564, 570 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 261 (1970). In Boddie v. Connecticut, 401 U.S. 371 (1971), the Court stated: "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Id.* at 378.

18. 408 U.S. 564 (1972); *see* Rogge, *An Overview of Administrative Due Process,* 19 VILL. L. REV. 1, 38–40 (1974); Comment, *Due Process Rights of Nontenured Teachers — Nonrenewal of Contract,* 77 DICK. L. REV. 94, 96 (1972); Note, *Constitutional Safeguards for Teachers Employed by Public Educational System upon Dismissal or Disciplinary Actions,* 2 CAP. L. REV. 164 (1973); *Note, Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 347 (1974); 41 FORDHAM L. REV. 684 (1973).

19. 408 U.S. at 572–73.

20. *Id.* at 577, *see* Note, *Procedural Due Process in Government-Subsidized Housing,* 86 HARV. L. REV. 880, 890 (1972).

21. 408 U.S. 593 (1972); *see* Rogge, *An Overview of Administrative Due Process,* 19 VILL. L. REV. 1, 38–40 (1974); Comment, *Due Process Rights of Nontenured Teachers — Nonrenewal of Contract,* 77 DICK. L. REV. 94, 99 (1972); Note, *Constitutional Safeguards for Teachers Employed by Public Educational Systems upon Dismissal or Disciplinary Actions,* 2 CAP. L. REV. 164 (1973); Note, *Implied*

however, made it clear that the conferral of a protected right need not be explicit. In that case, a professor employed under a series of ten one-year contracts by a state university which had no formal tenure system was given the opportunity to prove[22] that there existed a de facto tenure system officially created and fostered by the university by rules and understandings, under the terms of which the professor had tenure.[23] The Court stated that if the professor could prove the existence of such a system, he would have a property interest protected by due process safeguards.[24]

Procedural due process protections have only recently been extended into the corrections field.[25] The two principal reasons for the delay were the Court's adherence to the "hands-off doctrine,"[26] under which jurisdiction over prisoners' rights cases was denied in deference to prison administrators' discretion,[27] and the difficulty in delineating the scope of the rights and liberties to be accorded to prisoners.[28] The effect of the "hands-off doctrine" has been diminished as the result of several recent Supreme Court decisions giving prisoners access to judicial review.[29]

Contract Rights to Job Security, 26 STAN. L. REV. 335, 347 (1974); 4 TEX. TECH. L. REV. 203 (1972).

22. The district court had granted summary judgment for the members of the board of regents and the president of the college because the plaintiff's teaching contract had expired and the college had not adopted a tenure system. 408 U.S. at 596.

23. *Id.* at 602–03.

24. *Id.* at 603.

25. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (due process in prison disciplinary hearings); Procunier v. Martinez, 416 U.S. 396 (1974) (procedural protections must accompany the decision to censor or withhold prisoners' mail); Gagnon v. Scarpelli, 411 U.S. 478 (1973) (due process in probation revocation hearings); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process in parole revocation hearings).

26. This theory was based upon two policies: 1) the strong government interest in orderly incarceration; and 2) the view that interference by the courts, which have neither the authority nor the expertise to act as prison review panels, would impair the ability of prison officials to carry out the varied and complex objectives of a penal system. *See* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974); SOUTH CAROLINA DEP'T OF CORRECTIONS, THE EMERGING RIGHTS OF THE CONFINED 28 (1972); Note, *The Evolving Right of Due Process at Prison Disciplinary Hearings*, 42 FORDHAM L. REV. 878, 880 (1974); Note, *Procedural Due Process in the Involuntary Institutional Transfer of Prisoners*, 60 VA. L. REV. 333, 335 (1974).

27. *See, e.g.*, Siegel v. Ragen, 88 F. Supp. 996, 999 (N.D. Ill. 1949), *aff'd*, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950).

28. *See* Note, *The Evolving Right of Due Process at Prison Disciplinary Hearings*, 42 FORDHAM L. REV. 878, 881 (1974).

29. For example, in Cruz v. Beto, 405 U.S. 319 (1972) (per curiam), the Court stated:

> Federal Courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes "access of prisoners to the courts for the purpose of presenting their complaints."

Id. at 321, *quoting* Johnson v. Avery, 393 U.S. 483, 485 (1969).

At the same time, the Court has recognized that inmates do indeed possess certain rights.[30]

In *Morrissey v. Brewer*,[31] the Supreme Court, not adhering to the restraints of the "hands-off doctrine" and recognizing the limited liberty interest of a parolee,[32] held that a parolee's interest in remaining out of prison is protected by the due process clause of the fourteenth amendment and that, prior to its termination by the state, an informal factfinding hearing is required to determine whether a parole violation has in fact occurred.[33] The safeguards enunciated in *Morrissey* were subsequently extended to probationers in *Gagnon v. Scarpelli*.[34]

While *Morrissey* and *Gagnon* had a significant impact in the corrections field,[35] it was the Court's decision in *Wolff v. McDonnell*[36] that

30. *See* notes 31–39 and accompanying text *infra*. For cases granting specific rights to inmates, *see* note 43 *infra*.

31. 408 U.S. 471 (1972). Morrissey was convicted of false drawing or uttering of checks in 1967 and was sentenced to not more than seven years confinement. *Id.* at 472. He was paroled from the Iowa State Penitentiary in 1968, but was arrested seven months later for violating the terms of his parole and incarcerated in the county jail. *Id.* The Iowa Board of Parole then revoked his parole and he was returned to the state penitentiary. *Id.* at 472–73.

32. *Id.* at 482. The *Morrissey* Court stated: "We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty . . . ." *Id.*

33. *Id.* The *Morrissey* Court recognized that revocation of parole is not part of a criminal prosecution and that not all the rights due a defendant at trial apply to parole revocations. *Id.* at 480. The Court held that the minimum requirements of due process in revoking parole include: 1) written notice of the claimed parole violations; 2) disclosure to the parolee of the evidence against him; 3) an opportunity to be heard in person and to present witnesses and documentary evidence; 4) the right to confront and cross-examine adverse witnesses, unless there is good cause for not allowing confrontation; 5) a neutral and detached hearing body, such as a traditional parole board, members of which need not be judicial officers or lawyers; and 6) a written statement by the factfinders as to the evidence relied upon and the reasons for revoking parole. *Id.* at 489.

34. 411 U.S. 778 (1973). Scarpelli pleaded guilty to a charge of armed robbery in July 1965. *Id.* at 779. He was sentenced to 15 years imprisonment, but the judge suspended the sentence and placed him on probation for seven years. *Id.* On August 6, Scarpelli was arrested by police on burglary charges. *Id.* at 779–80. On September 1, the Wisconsin Department of Public Welfare revoked Scarpelli's probation without a hearing. *Id.* at 780. In affirming in part the order of the Seventh Circuit, which concluded that a revocation of probation without a hearing was a denial of due process, the United States Supreme Court stated: "Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*." *Id.* at 782.

35. *See, e.g.*, Tobriner & Cohen, *How Much Process is "Due"? Parolees and Prisoners*, 25 HASTINGS L.J. 801 (1974); Note, *Implications of Morrissey v. Brewer for Prison Disciplinary Hearings in Indiana*, 49 IND. L.J. 306 (1973–74); Note, *An Endorsement of Due Process Reform in Parole Revocation:* Morrissey v. Brewer, 6 LOY. L.A.L. REV. 157 (1973); 11 DUQ. L. REV. 693 (1973).

36. 418 U.S. 539 (1974). McDonnell filed a complaint on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex alleging that the prison's disciplinary procedures violated due process, that the inmate legal assistance program was constitutionally inadequate, and that the prison's regulations regarding the inmates' mail were violative of their constitutional rights. McDonnell v. Wolff,

extended due process protections to the regulation of prison disciplinary practices. *Wolff*, which held that a prisoner is entitled to procedural protections before his "good time" credits are revoked or before he is confined in a disciplinary cell,[37] generated much litigation in the lower courts concerning what other types of prison discipline were subject to procedural protections.[38] In particular, the lower courts have been divided in deciding whether due process extends to involuntary prison transfers.[39]

It was against this background of judicial dispute that the Supreme Court granted certiorari to determine whether the Constitution requires prison officials to conduct a factfinding hearing prior to a transfer when state law does not condition the authority to transfer upon the occurrence of acts of misconduct or other specified events.[40] In examining the scope of protection afforded by the due process clause, the *Meachum* Court observed, in an opinion by Justice White, that the state may not initially deprive an individual of his liberty without first complying fully with certain procedural standards; after a conviction has been validly obtained, however, the state has met its constitutional obligations and can deprive the individual of his liberty through confinement and by subjecting him to the rules of its prison system "so long as the conditions of confinement do not otherwise violate the Constitution."[41] Noting that the Constitu-

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483 F.2d 1059, 1061 (8th Cir. 1973). With regard to the due process claim, McDonnell stated that on the occasions that he appeared before the disciplinary board, he received no notice of any charges against him until he had actually appeared. McDonnell v. Wolff, 342 F. Supp. 616, 626 (D. Neb. 1972).

37. 418 U.S. at 571. The Court noted that although the impact upon the inmate of a revocation of "good time" — a system by which the inmate's parole date is determined — is not as immediate as the revocation of parole upon the parolee, it is still a matter of serious importance. *Id.* at 561. The Court thus concluded that while not all of the procedures specified in *Morrissey* and *Gagnon* (*see* note 31 *supra*) must accompany the deprivation of good time, advance written notice of the claimed violation and a written statement of the fact findings as to the evidence relied upon and the reasons for the disciplinary action taken are required. 418 U.S. at 564.

38. The *Wolff* decision left unanswered the question whether procedural protections are needed for institutional transfers and detainers, whether or not made for disciplinary reasons, for administrative segregations, and for disciplinary action which is less severe than a revocation of good time credits or solitary confinement. *See* W. TOAL, RECENT DEVELOPMENTS IN CORRECTIONAL CASE LAW 43, 45-47, 79-80, 85-89 (1975).

39. The Courts of Appeals for the Third and the Ninth Circuits have held that transfers of prisoners do not call for due process hearings. *See, e.g.*, Gray v. Creamer, 465 F.2d 179, 187 (3d Cir. 1972); Hillen v. Director, 455 F.2d 510 (9th Cir.), *cert. denied*, 409 U.S. 989 (1972). The Second, Fourth, Sixth, and Seventh Circuits, however, have held that minimum due process procedures must precede disciplinary transfers. *See, e.g.*, Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), *vacated*, 425 U.S. 947 (1976); Stone v. Egeler, 506 F.2d 287 (6th Cir. 1974); Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974), *rev'd* 427 U.S. 236 (1976) Bryant v. Hardy, 488 F.2d 72 (4th Cir. 1973). The First Circuit, in holding that every disadvantageous transfer must be accompanied by appropriate hearings, would apparently extend protection to administrative, as well as disciplinary transfers. *See* Fano v. Meachum, 520 F.2d 374 (1st Cir. 1975), *rev'd* 427 U.S. at 215 (1976); Gomes v. Traviasono, 510 F.2d 537, 541 (1st Cir. 1974).

40. 427 U.S. at 216.

41. *Id.* at 224

tion does not require the states to establish different types of prisons or guarantee to those convicted that they will be placed in a particular prison, the Court stressed that even though the living conditions of different prisons may vary substantially, the initial decision to assign a convicted individual to a particular institution is not subject to audit under the due process clause.[42]

The Court pointed out that while previous cases had held that a convicted prisoner does not forfeit all of his constitutional rights after a valid conviction,[43] none of those cases had gone so far as to hold that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the due process clause.[44] Such a holding, the Court reasoned, would compel the federal courts to review discretionary decisions that have traditionally been left to prison administrators.[45] Recognizing that transfer decisions are often made for reasons other than discipline,[46] the Court was unwilling to require a hearing merely because "the transfer would place the prisoner in substantially more burdensome conditions that [*sic*] he had been experiencing."[47]

In reaching the instant decision, the Court distinguished *Wolff* on its facts, noting that in that case a state prisoner was entitled to certain due process protections before being deprived of good time credits because the state itself, rather than the Constitution, had " 'not only provided a statutory right to good time, but also [specified] that it [was] to be forfeited only for serious misbehavior.' "[48] In *Meachum,* by contrast, Massachusetts law[49] did not specifically guarantee a right to a hearing before

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42. *Id.*

43. *Id., citing* Wolff v. McDonnell, 418 U.S. 539 (1974) (due process). *See also* Cruz v. Beto, 405 U.S. 319 (1972) (freedom of religion); Haines v. Kerner, 404 U.S. 519 (1972) (due process); Wilwording v. Swenson, 404 U.S. 249 (1971) (due process); Younger v. Gilmore, 404 U.S. 15 (1971) (access to courts); Johnson v. Avery, 393 U.S. 489 (1969) (access to courts); Lee v. Washington, 390 U.S. 333 (1968) (freedom from race discrimination); Cooper v. Pate, 378 U.S. 546 (1968) (freedom of religion); *Ex parte* Hull, 312 U.S. 546 (1941) (access to courts).

44. 427 U.S. at 225. Earlier in its opinion, the Court recognized the proposition that not every change in the conditions of confinement resulting in the prisoner being placed in substantially less favorable surroundings would require procedural safeguards. *Id.* at 224, *citing Roth,* the Court noted that "the determining factor is the nature of the interest involved rather than the weight." *Id., citing* Board of Regents v. Roth, 408 U.S. 564, 570–71 (1972).

45. 427 U.S. at 225.

46. *Id.* The Court stated that other reasons for transfers "often involve no more than informed predictions as to what would . . . best serve institutional security or the safety and welfare of the inmate." *Id.*

47. *Id.*

48. *Id.* at 226, *quoting* Wolff v. McDonnell, 418 U.S. 539, 557 (1974). For a discussion of *Wolff, see* notes 36–38 and accompanying text *supra.*

49. At the time the transfers in the instant case occurred, Massachusetts law authorized the following scheme for classifying prisoners:

> There shall be established by the commissioner . . . a reception center for all male prisoners . . . . Any male convict who is sentenced to any correctional insti-

transfer.[50] Turning to the question of whether the Constitution itself guaranteed such a right,[51] the Court held that since the state invested prison officials with the discretion to transfer inmates for any reason or for no reason at all, "[w]hatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself . . . is too ephemeral and insubstantial to trigger due process protections."[52]

In his dissenting opinion, Justice Stevens, joined by Justices Brennan and Marshall, disagreed with the majority's conception of "liberty" as having its exclusive source either in the Constitution or in state law.[53] According to the dissent, "liberty," as "one of the cardinal unalienable rights," should not be limited to "the particular rights or privileges conferred by specific laws or regulations."[54]

Specifically addressing the problem of defining the liberty interest of inmates, the dissent interpreted *Morrissey* as support for the proposition that a prisoner possesses "[a] residuum of constitutionally protected

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tution of the commonwealth . . . shall be delivered by the sheriff or other officer authorized to execute sentence to said center for the purpose of proper classification of the prisoner. . . .

The deputy commissioner for classification and treatment, under the general supervision of the commissioner, shall direct the professional staff assigned to said reception center and shall be responsible for grading and classifying all prisoners sentenced to any of the correctional institutions of the commonwealth, and shall in addition have general charge of the reception center.

MASS. GEN. LAWS ANN. ch. 127, § 20 (West 1974). In addition, state law regulated the transfer of inmates to and from correctional institutions as follows:

The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another, and with the approval of the sheriff of the county from any such institution except a prisoner serving a life sentence to any jail or house of correction, or a sentenced prisoner from any jail or house of correction to any such institution except the state prison, or from any jail or house of correction to any other jail or house of correction. Prisoners so removed shall be subject to the terms of their original sentences and to the provisions of law governing parole from the correctional institutions of the commonwealth.

Id. § 97.

50. 427 U.S. at 226.

51. The respondents argued that because many transfer decisions are based upon charges of serious misconduct which may be erroneous, hearings should be held to determine the validity of the charges before a transfer to a more confining institution is effectuated. *Id.* at 228.

52. *Id.* For a discussion of the role of personal expectations in procedural due process cases, *see* notes 18-24 and accompanying text *supra.*

53. 427 U.S. at 229-30.

54. *Id.* at 230. Justice Stevens had earlier elaborated:

If a man were a creature of the state, the analysis [of the majority] would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

Id.

rights" while in the state's custody.[55] Thus, at a minimum, the Constitution guarantees a prisoner the right to be treated with dignity.[56] Observing that imprisonment is intended to achieve not only a preventive but also a rehabilitative function, the dissent stressed that an inmate has a right to pursue his rehabilitative goals and maintain those attributes of dignity associated with the status he has acquired at a particular institution.[57] While acknowledging that the state should have discretion in determining both the conditions of confinement following an individual's conviction and whether the inmate should be transferred,[58] the dissent concluded that if the change is "sufficiently grievous," due process protections must precede the transfer.[59] Under this standard, the respondents in the instant case should have been afforded an adequate hearing prior to transfer since, as the dissent made clear in apparent reference to *Wolff*,[60] there was little difference "between a transfer from the general prison population to

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55. *Id.* at 232, *quoting* United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). Justice Stevens argued that *Morrissey* should not be narrowly limited by the distinction between incarceration and the conditional liberty of parole. 427 U.S. at 232. In his view, *Morrissey* required that due process protections precede any substantial deprivation of the liberty of individuals in the custody of the state. *Id.* at 234. In *Meachum*, Justice Stevens reaffirmed his prior interpretation of *Morrissey* stating that *Morrissey* stood for the basic concept that the liberty protected by the due process clause must to some extent coexist with incarceration. *Id.* at 231–33; *see* United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146. He argued that the limiting of the Morrissey analysis to parole situations creates a false distinction, since in both the cases of Morrissey's parole and Meachum's imprisonment the state maintained legal custody over the individuals. 427 U.S. at 232.

Although the majority did not consider *Morrissey* in its opinion, it is suggested that they distinguished that case from *Meachum* because of the *Morrissey* Court's emphasis upon the permission given to parolees to live outside of the institution. It was this distinction between in-prison and out-of-prison to which Justice Stevens objected. *Id.* For a discussion of *Morrissey*, *see* notes 31–33 and accompanying text *supra*.

56. 427 U.S. at 231–32.

57. *Id.* at 234.

58. *Id.* at 234. Justice Stevens stated:

> To supervise and control its prison population, the State must retain the power to change the conditions for individuals, or for groups of prisoners, quickly and without judicial review. In many respects the State's problems in governing its inmate population are comparable to those encountered in governing a military force. Prompt and unquestioning obedience by the individual, even to commands he does not understand, may be essential to the preservation of order and discipline. Nevertheless, within the limits imposed by the basic restraints governing the controlled population, each individual retains his dignity and, in time, acquires a status that is entitled to respect.

Id.

59. *Id.* The dissent, however, failed to expound more fully upon the definition of "sufficiently grievous."

60. Although Justice Stevens did not mention *Wolff* in this statement, it is evident that he was referring to that decision's holding that an inmate must be given notice and a factfinding hearing before the state can deprive him of good time credits or place him in solitary confinement. For a discussion of *Wolff*, *see* notes 36–38 and accompanying text *supra*.

solitary confinement and a transfer involving equally disparate conditions between one physical facility and another."[61]

In focusing upon the nature of the interest involved to ascertain whether it is within the contemplation of the "liberty" or "property" language of the fourteenth amendment, the *Meachum* decision is consistent with recent Supreme Court opinions.[62] It is submitted, however, that the majority, in stressing that procedural protections cannot be invoked merely because a grievous loss has been inflicted upon an individual by the state[63] and that the analysis must instead focus upon determining the nature of the interest,[64] is subject to criticism because of its failure to analyze fully the nature of the inmates' interests in both remaining at a particular institution and being free from unjust punishment. In reaching its conclusions, the *Meachum* Court relied too heavily upon the amount of discretion that Massachusetts law had given its prison administrators.[65] This reflects the view taken by the Court in two other cases[66] decided

61. 427 U.S. at 235.

62. *See* notes 17–24 and accompanying text *supra.*

63. The First Circuit had determined that the inmates in *Meachum* were entitled to procedural protection because of the extent of their loss. 520 F.2d at 378. This confusion in applying a test for determining whether due process procedures will be extended can be traced back to the Supreme Court's opinion in *Morrissey,* where the Court stated: "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer a grievous loss.'" 408 U.S. at 481, *quoting* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951). However, the Court's decision in *Roth* made it clear that the analysis must focus upon the nature and not the weight of the interest sought to be protected to determine if it is within the meaning of liberty or property. For a discussion of *Roth, see* notes 18–20 and accompanying text *supra.*

64. *See* note 43 and accompanying text *supra.*

65. *See* notes 49–52 and accompanying text *supra.*

66. Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 96 S. Ct. 1155 (1976).

In *Bishop,* a former police officer brought an action under section 1983 of the Civil Rights Act of 1871, alleging that he had been deprived of liberty and property without due process of law in that he had been discharged from his job without a hearing. 426 U.S. at 343. His claimed property interest rested upon his right to continued employment, while he claimed his liberty was deprived by the damage to his reputation resulting from the allegations leading to his discharge. *Id.* at 343, 347. The Supreme Court held that the individual's claimed property and liberty interests were insufficient to invoke the protections of the due process clause. *Id.* at 347–48. The Court reasoned that, since state law required only that an employee be given written notice of the grounds for discharge, no enforceable expectation of continued public employment could exist. *Id.* at 345–47. The Court also dismissed the individual's liberty claim stating that there had been no damage to his reputation since the reasons for his discharge had not been made public. *Id.* at 348.

In *Paul v. Davis,* plaintiff also sued under section 1983, claiming that he had been deprived of liberty without due process of law by the actions of the police in distributing to local merchants a circular of "Active Shoplifters" which included his name and picture. 96 S. Ct. at 1157–59. Although plaintiff's name appeared on the list as a result of his being arrested for shoplifting at the time of the distribution of the circular, his guilt or innocence had not been established. *Id.* at 1158. In fact the charge was dismissed soon after the circulars had been distributed. *Id.* Plaintiff claimed that the action taken by the police would "inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities." *Id.* at 1159. While acknowledging the serious effects of the police action upon the individual, the Supreme

last term, wherein the Court seemingly adopted a rigid analysis of the interests involved whereby the determining factor is whether the interest is guaranteed in the Bill of Rights or recognized by the states.[67] Additionally, in examining state recognition of a particular interest, the Court has narrowed its inquiry substantially by looking more toward state law rather than less formal indications of state recognition.[68] As a result, the Court failed to consider two substantial factors in *Meachum*.

First, the majority did not consider Justice Stevens' argument that the Court's decision in *Morrissey* recognized that an individual retains an amount of conditional liberty after he has been convicted.[69] Indeed, in *Morrissey*, state law authorized its parole board to use its discretion in terminating an individual's parole.[70] However, the Court ignored that fact, focusing instead upon the parolee's "core values of unqualified liberty."[71] Such an interest was recognized not only in *Morrissey* but also in *Wolff*, where the inmates were allowed some protection against arbitrary prison disciplinary measures.[72] Recognition of the fact that an

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Court held that the damage to plaintiff's reputation did not constitute a deprivation of his liberty. *Id.* at 1166–67. The Court distinguished its prior decisions in Wisconsin v. Constantineau, 400 U.S. 433 (1971), and Goss v. Lopez, 419 U.S. 565 (1975), *noted in* 20 VILL. L. REV. 1069 (1974–75), which seemed to stand for the proposition that one's reputation was protected by the due process clause. According to the Court, those cases involved not only damage to the individuals' reputations but also the deprivation of rights granted by state law (in *Constantineau*, the right to purchase liquor; in *Goss*, the right to attend school). 96 S. Ct. at 1164–65. However, in the *Davis* case the Court found no "legal guarantee of present enjoyment of reputation" in the state statute and concluded that the plaintiff's reputation was not protected by the fourteenth amendment. *Id.* at 1166.

67. *See* 427 U.S. at 229–30; 96 S. Ct. at 1165 & n.5. Justice Stevens, in his dissenting opinion in *Meachum*, stated:

> The Court indicates that a "liberty interest" may have either of two sources. According to the Court, a liberty interest may "originate in the Constitution" . . . or it may have "its roots in state law." . . . Apart from those two possible origins, the Court is unable to find that a person has a constitutionally protected interest in liberty.

427 U.S. at 230. (citations omitted).

Justice Rehnquist, in writing for the *Davis* majority, stated: "There are other interests, of course, protected not by virtue of their recognition by the law of a particular State, but because they are guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the Fourteenth Amendment." 96 S. Ct. at 1165 n.5.

68. Meachum v. Fano, 427 U.S. at 229–30; Bishop v. Wood, 426 U.S. at 344–47.

69. *See* note 55 and accompanying text *supra*.

70. Iowa law provides: "All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled." IOWA CODE § 247.9 (1975).

71. 408 U.S. at 482. For a discussion of *Morrissey*, *see* notes 31–33 & 55 and accompanying text *supra*.

72. 418 U.S. at 555. The *Wolff* Court stated:

> Petitioners assert that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of

inmate retains a limited form of liberty necessarily leads to the conclusion that a prisoner "retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law"[73] and that "any further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subject to judicial scrutiny."[74] It is submitted that a transfer from the general prison population to a maximum security institution, which is set aside for more dangerous inmates, is such a restraint.

While prison officials must have the authority to transfer inmates to ensure the welfare of the prison system, some procedure should take place to ensure that the transfer is being made for a valid state purpose. The Court has recognized that the form of a due process hearing varies with each situation depending upon the respective interests of the individual and the state.[75] It is submitted therefore, that the hearings required before a transfer can be effectuated should differ depending upon whether the transfer is being made for administrative or disciplinary purposes. When the transfer is made for administrative purposes, such as to reduce overcrowded conditions or to protect an inmate from possible harm, the inquiry should focus solely upon whether a legitimate state need exists and therefore, whether a less formal hearing is appropriate. However, a formal hearing should be held when a disciplinary transfer is involved because the state's action is predicated solely upon the inmate's alleged wrongdoing. Since the state has no legitimate interest in punishing an innocent party, a fact-finding hearing must be held in order to provide the inmate an opportunity to vindicate himself.[76] It would seem that Justice Harlan's notion of due process as ensuring fundamental fairness[77] mandates such a protection before one is punished for his alleged misconduct.[78]

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the ordinary citizen, a "retraction justified by the considerations underlying our penal system." But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.

Id., quoting Price v. Johnston, 334 U.S. 266, 285 (1948).

73. Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968), *quoting* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945).

74. Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968).

75. *See* note 17 *supra.*

76. In *Morrissey,* the Supreme Court recognized that, while the state has an interest in being able to return a parolee to the prison should he fail to abide by the conditions of his parole, it has no interest in revoking the parole without first determining whether the alleged misconduct had in fact occurred. 408 U.S. at 483–84.

77. *See* note 12 and accompanying text *supra.*

78. The Second Circuit, in Haymes v. Montayne, 505 F.2d 977 (2d Cir. 1974), *rev'd,* 427 U.S. 236 (1976), ruled that an inmate was entitled to due process protections before a transfer could be effectuated when the transfer was a punishment. In distinguishing between administrative and disciplinary transfers the court stated:

When harsh treatment is meted out to reprimand, deter, or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling. . . . [T]he specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior,

Secondly, in limiting its inquiry into the state's recognition of the interests of the prisoner solely upon the state's transfer statute and the inmate's expectations upon reading it, the *Meachum* Court failed to consider fully whether the state had afforded recognition of the inmates interests. Considering the Court's opinion in *Perry,* where it was recognized that while purely subjective expectations are irrelevant, " 'a person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement,' "[79] the inmate may have a protected interest if the state has, by its rules, regulations, or practices, fostered his expectation of having the right.[80] The *Meachum* majority reasoned that in light of the prison administrators' discretion, the inmates could have no legitimate expectation of remaining at Norfolk even if they abided by the rules.[81] The Court ignored the practices and norms of the institution and the general expectations of its prisoners. It is submitted, however, that had the Court looked beyond the language of the statutes which granted the authority to the prison officials,[82] it may have reached a different conclusion.

Notwithstanding prison officials' discretion, the state, through its actions, may have sufficiently created an understanding with its inmates as to render legitimate their expectations in remaining at an institution. Recognizing that one of the objectives of incarceration is the rehabilitation of the offender,[83] prison administrators have established a prison system with graduated conditions of confinement.[84] These range from minimum security institutions, which allow inmates a greater degree of mobility and provide the most extensive rehabilitation programs, to maximum security institutions, reserved for the more dangerous inmates and

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and to assess the effect which the transfer will have on the inmate's future incarceration.

505 F.2d at 980.

The Supreme Court reversed, citing its opinion in *Meachum* and stating that, for due process purposes, it is insignificant whether the transfer was made for administrative or disciplinary purposes for, as long as state law provided its prison administrators with the discretion to transfer, due process protections would not be required. 427 U.S. at 242–43.

79. 408 U.S. at 601, *quoting* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

80. For a discussion of *Perry, see* notes 21–24 and accompanying text *supra.*

81. *See* notes 51 & 52 and accompanying text *supra.*

82. For the text of the statutes, *see* note 49 *supra.*

83. For example, Massachusetts law provides for the commissioner of corrections to

establish, maintain and administer programs of rehabilitation, including but not limited to education, training and employment, of persons committed to the custody of the department, designed as far as practicable to prepare and assist each such person to assume the responsibilities and exercise the rights of a citizen of the commonwealth . . . .

MASS. GEN. LAWS ANN. ch. 124, § 1(e) (West 1974).

84. *See* American Correctional Ass'n, *Development of Modern Correctional Concepts and Standards,* in CORRECTIONAL INSTITUTIONS 17, 33 (R. Carter, D. Glaser & L. Wilkins eds. 1972); The President's Comm'n on Law Enforcement and Administration of Justice, *State Correctional Institutions for Adults,* in CORRECTIONAL INSTITUTIONS 35 (R. Carter, D. Glaser & L. Wilkins eds. 1972).

thus offering less mobility and fewer rehabilitation programs.[85] Prison authorities make a determination after a conviction as to which of its institutions will best satisfy the needs of the offender and the objectives of the state.[86] It is submitted that the state, in sending an inmate to an institution that provides him with the means to rehabilitate himself, has created a protected interest by fostering a mutual understanding that the inmate will remain as long as the objectives of the prison system are being met.[87] Since the state has no legitimate interest in transferring prisoners except for cause,[88] inmates have a legitimate expectation that they will be transferred only for valid reasons. Even when a transfer is made for disciplinary purposes — an admittedly valid reason for transfer — the minimum safeguards of due process should be met to ensure that the state is disciplining the right inmate, for again the state has no interest in punishing the innocent. The inmates' expectations are further reinforced in the *Meachum* situation where the prison authorities have set up certain procedures which precede an actual disciplinary transfer.[89]

The impact of an erroneous determination by the state upon an innocent inmate can be quite serious. In most cases, a transferee is placed in administrative segregation upon his arrival; long-distance transfers effectively sever communication with his family, friends, and attorney; and the educational and psychological therapy programs in which he was engaged will probably be unavailable in the less favorable institution.[90] Unfortunately, the Court's decision allows these substantial losses to be inflicted suddenly upon every individual in the state's institutions, leaving the inmates defenseless against nameless and faceless informants, unfriendly

85. The President's Comm'n on Law Enforcement and Administration of Justice, *State Correctional Institutions for Adults*, in CORRECTIONAL INSTITUTIONS 35 (R. Carter, D. Glaser & L. Wilkins eds. 1972).

86. For example, Massachusetts law provides for the commissioner of corrections to "establish a system of classification of persons committed to the custody of the department for the purpose of developing a rehabilitation program for each such person . . . ." MASS. GEN. LAWS ANN. ch. 124, § 1(f) (West 1974).

87. This was the view adopted by the court of appeals in *Meachum*, which noted: "It makes no difference that the Commonwealth need not have created a corrections system containing institutions with divergent conditions of confinement. The advantages of confinement in a more desirable institution are in this regard similar to the state-created right to good time credits which was involved in *Wolff* . . . ." 520 F.2d at 379 n.6, *citing* Wolff v. McDonnell, 418 U.S. 539, 556–58 (1974).

88. The *Morrissey* Court, in focusing upon the interests of all the parties involved in the revocation of parole, stated that society has a stake in whatever may be the chance of restoring a prisoner to a normal and useful life and, thus, that society's interests are not served when a parole has been revoked on the basis of erroneous information. 408 U.S. at 483–84. The Court further noted that the question of the prison official's discretion in the revocation decision need not even be reached until after there has been an appropriate determination that the individual had indeed participated in conduct that breached his parole conditions. *Id.*

89. *See* notes 2, 4 & 5 and accompanying text *supra.*

90. Gomes v. Travisono, 353 F. Supp. 457 (D.R.I. 1973), *aff'd in part, rev'd in part*, 490 F.2d 1209 (1st Cir. 1973), *vacated*, 418 U.S. 909 (1974).

guards, and insensitive prison officials. The inmate is rendered a "slave of the State,"[91] unable to combat arbitrary decisionmaking.

Although the *Meachum* Court's holding affects only intrastate transfers[92] in those states that have not provided inmates a right to a hearing prior to a transfer, it has nevertheless dealt a severe blow to the recent prison reform movement. As a result of the Court's analysis, prisoners may have no more freedom than the state decides to grant them. Furthermore, dicta in the majority's opinion emphasizing the need for prison administrators' discretion in dealing with inmates and declaring that federal judges do not sit to administer the functioning of state prisons[93] can be interpreted as a substantial step towards the revival of the "hands-off doctrine."[94] Such a return would unfortunately leave incomplete the reforms the courts have made in the corrections area during the early part of this decade.[95]

Thomas J. McGarrigle

CONSTITUTIONAL LAW — FOURTH AMENDMENT — EXCLUSIONARY RULE NOT APPLICABLE IN FEDERAL CIVIL TAX PROCEEDINGS WHERE EVIDENCE WAS EXCLUDED IN STATE CRIMINAL PROCEEDING.

United States v. Janis (U.S. 1976)

Acting pursuant to a warrant directing a search for bookmaking materials, a Los Angeles police officer arrested respondent Janis and seized wagering records and $4,940 in cash.[1] The officer informed an agent of the

91. In his dissent in *Meachum,* Justice Stevens stated that "if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases." 427 U.S. at 233. The "slave of the State" doctrine held that a prisoner rescinded all of his rights and that the state could deal with him as it pleased. *See* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 794–96 (1871).

92. 427 U.S. at 229. The *Meachum* Court stated: "The individual States, of course, are free to follow another course, whether by statute, by rule or regulation or by interpretation of their own constitutions. They may thus decide that prudent prison administration requires pretransfer hearings. Our holding is that the Due Process Clause does not impose a nationwide rule mandating transfer hearings." *Id.*

93. *Id.* at 228–29.

94. *See* notes 26 & 27 and accompanying text *supra.*

95. *See, e.g.,* Wolff v. McDonnell, 418 U.S. 539 (1974) (due process in prison disciplinary hearings); Procunier v. Martinez, 416 U.S. 396 (1974) (mail censorship and restrictive legal visitation regulations); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process in probation revocation hearings); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process in parole revocation hearings); Cruz v. Beto, 405 U.S. 319 (1972) (freedom of religion); Younger v. Gilmore, 404 U.S. 15 (1971) (access to courts).

1. United States v. Janis, 96 S. Ct. 3021, 3023 (1976). An accomplice, Morris Levine, was arrested with Janis but did not join in the present appeal. *Id.* at 3023 n.2.

Internal Revenue Service (IRS) of the arrests.[2] Since Janis had not filed wagering tax returns, the IRS computed an assessment for the unpaid taxes based exclusively upon the records seized[3] and levied upon the $4,940 in partial satisfaction of the assessment.[4] In a state criminal proceeding instituted for violation of gambling laws, the court granted Janis' motion to quash the search warrant as violative of the fourth amendment.[5] All seized items were ordered returned except the cash that had been levied upon by the IRS.[6] After rejection of his claim for a refund of the retained money, Janis commenced a civil action for a refund in federal court; the Government counterclaimed for the balance of the tax assessment.[7] Janis moved to suppress the illegally seized evidence and quash the assessment.[8]

The United States District Court for the Central District of California, concluding that the assessment was invalid because the evidence upon which

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2. *Id.* at 3023.

3. *Id.* at 3024. The assessment was made pursuant to section 4401 of the Internal Revenue Code of 1954 (Code), which states:

> (a) WAGERS — There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> . . . .
>
> (c) PERSONS LIABLE FOR TAX — Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in the pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

I.R.C. § 4401. The total assessment amounted to $89,026.09 plus $123.97 interest, 96 S. Ct. at 3024.

4. *Id.* The IRS has authority to levy upon funds under section 6331 of the Code, I.R.C. § 6331. Subsection (b) of this provision states that the term "levy" includes the power of distraint and seizure by any means and extends only to "property possessed and obligations existing at the time thereof." *Id.* § 6331(b).

5. 96 S. Ct. at 3024. The fourth amendment states:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U. S. CONST. amend. IV.

In determining that the warrant violated Janis' fourth amendment rights, the Court relied upon Spinelli v. United States, 393 U.S. 410 (1969), decided three weeks before the criminal proceeding against Janis was begun, 96 S. Ct. at 3024. In *Spinelli,* a search warrant was held to be deficient because it was based upon an informant's tip, which did not constitute probable cause as required by the fourth amendment. 393 U.S. at 418. The state court determination in *Janis* was not at issue before the Supreme Court.

6. 96 S. Ct. at 3024.

7. Janis v. United States, 73-1 U.S. Tax Cas. 81,391 (C.D. Cal. 1973). Only Mr. Janis was a respondent in the refund case because it was his money that was seized. *Id.* at 81,392.

8. *Id.*

it was based was seized in violation of the fourth amendment,[9] ordered the assessment quashed and granted a refund.[10] The Court of Appeals for the Ninth Circuit affirmed.[11] On a writ of certiorari,[12] the United States Supreme Court reversed, *holding* "that the judicially created exclusionary rule should not be extended to forbid the use in a civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign." *United States v. Janis,* 96 S. Ct. 3021, 3035 (1976).

The exclusionary rule developed as an exception to the common law doctrine that the admissibility of evidence did not depend upon the manner in which it was obtained.[13] Designed to exclude evidence garnered in violation of the search and seizure provision of the fourth amendment,[14] the rule was vigorously and broadly applied by the Warren Court,[15] which elevated it to constitutional status[16] and emphasized its twofold purpose — the deterrence of unlawful police conduct[17] and the preservation of judicial integrity.[18]

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9. *Id.* at 81,393. Specifically, the court held:

> The civil excise tax assessment . . . was based substantially *upon evidence illegally* obtained from the above described search and seizure; and, as a consequence thereof, such assessment, although civil in nature, is invalid and must be suppressed and quashed as being violative of the plaintiff's Fourth Amendment rights to be free from unreasonable search and seizure.

Id. (emphasis supplied by the Court).

10. *Id.*

11. 96 S. Ct. at 3025. Both the findings of fact and conclusions of law of the district court were affirmed by the appellate court in an unpublished opinion. *Id.*

12. 421 U.S. 1010 (1975).

13. *See* Boyd v. United States, 116 U.S. 616, 623 (1886); Comment, *The Applicability of the Exclusionary Rule to Civil Cases,* 19 BAYLOR L. REV. 263, 263 (1967); Note, *The Fourth Amendment Right of Privacy: Mapping the Future,* 53 VA. L. REV. 1314, 1316 (1967).

14. For the text of the fourth amendment, *see* note 5 *supra.*

15. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961) (all evidence obtained by search and seizure in violation of the Constitution inadmissible in a state court); Elkins v. United States, 364 U.S. 206 (1960) (evidence illegally obtained by state officials inadmissible in a Federal criminal trial).

16. Mapp v. Ohio, 367 U.S. 643 (1961), the Court overruled Wolf v. Colorado, 338 U.S. 25 (1949), which had permitted the use in state criminal proceedings of evidence obtained by an unreasonable search and seizure by state officials. 367 U.S. at 653. The *Mapp* Court, in holding that unconstitutionally seized evidence is inadmissible in state criminal proceedings, stressed that the exclusionary rule was an "essential part" of the right to privacy guaranteed by the fourth and fourteenth amendments. 367 U.S. at 655–57.

17. In United States v. Elkins, 367 U.S. 206 (1960), the Court stated: "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guarantee in the only effectively available way — by removing the incentive to disregard it." *Id.* at 217.

18. The concept of judicial integrity — that courts should not engage in or encourage constitutional violations — has been explained by the Court as follows:

> If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution.

Id. at 223 (1960) (citation omitted); *see* Mapp v. Ohio, 367 U.S. 643, 647, 659 (1961).

In recent years, however, the Court's philosophy with respect to the exclusionary rule has altered significantly. Chief Justice Burger, dissenting in *Bivens v. Six Unknown Federal Narcotics Agents,*[19] stressed the shortcomings of the rule and urged that its application be restricted.[20] Subsequently, in *United States v. Calandra,*[21] which held that the exclusionary rule did not preclude the use of illegally obtained evidence in a grand jury proceeding,[22] the Court stressed that the exclusionary rule was not a constitutional right,[23] but rather a judicially created remedy[24] designed primarily to protect fourth amendment rights by deterring illegal police conduct.[25] Significantly, the *Calandra* Court utilized a balancing test to weigh the deterrent effect of the rule against society's interest in having the evidence admitted.[26] Decisions following *Calandra* have adhered to this balancing analysis in circumscribing the scope of the rule's applicability.[27]

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19. 403 U.S. 388 (1971).

20. *Id.* at 411–24 (Burger, C.J., dissenting). Chief Justice Burger stated: "Although unfortunately ineffective, the exclusionary rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms." *Id.* at 418 (Burger, C.J., dissenting). After examining both the rule's deterrent effect and society's interest in effective law enforcement, he concluded that "the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomolies it has produced." *Id.* at 424 (Burger, C.J., dissenting).

21. 414 U.S. 338 (1974).

22. *Id.* at 354.

23. *See* note 16 and accompanying text *supra.*

24. 414 U.S. at 348. The Court, noting that the rule had never been applied in all situations, stated:

> As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served .... Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of an unlawful search.

Id. (citations omitted).

25. The court thus indicated the primacy of deterrence, rather than judicial integrity, as the underlying purpose of the exclusionary rule. *See* Stone v. Powell, 96 S. Ct. 3037, 3047–48 (1976); note 18 and accompanying text *supra;* note 53 and accompanying test *infra.*

26. 414 U.S. at 349–52, 354. The Court stated:

> Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal .... We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.

Id. at 351–52. While the balancing test may have originated in the decisions of the Warren Court (*see, e.g.,* Linkletter v. Walker, 381 U.S. 618 (1965)), it lay relatively dormant until *Calandra* and succeeding Burger court rulings. *See* note 27 and accompanying text *infra.*

27. For example, in Stone v. Powell, 96 S. Ct. 3037 (1976), decided the same day as *Janis,* the Court held where the state has allowed a full and fair litigation of a claim based upon the fourth amendment, federal habeas corpus relief will not lie for an allegation that the evidence used in the trial was unconstitutionally obtained. *Id.* at 3052. Applying the balancing test, the Court concluded that the costs to society outweighed any contribution of the exclusionary rule to the enforcement of the fourth amendment. *Id.* at 3049–52. For other recent cases restricting both the areas to

Few decided cases have involved factual circumstances identical to those presented in *Janis*. While the exclusionary rule has been applied to various types of criminal proceedings, state and federal, in which evidence was unconstitutionally obtained by law enforcement officials,[28] it has rarely been applied to purely civil actions between private parties.[29] However, the rule has on occasion been invoked in "quasi-criminal"[30] actions even though they involved civil rather than criminal proceedings. In *One 1958 Plymouth Sedan v. Pennsylvania*,[31] the Court held that the exclusionary

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which the rule applies and the scope of the fourth amendment protection in general, *see* note 78 *infra*.

28. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained by illegal search and seizure inadmissible in state court); Elkins v. United States, 364 U.S. 206 (1960) (evidence illegally obtained by state officials inadmissible in federal criminal trial); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (precluding all uses of illegally obtained evidence in course of a criminal prosecution); Weeks v. United States, 232 U.S. 383 (1914) (items seized from defendant's home without appropriate warrants held inadmissible); Boyd v. United States, 116 U.S. 616 (1886) (because demand to produce invoice to ascertain custom duties violated fourth amendment, its admission as evidence was erroneous).

29. For example, in Sackler v. Sackler, 16 App. Div. 2d 423, 229 N.Y.S.2d 61 (Sup. Ct. 1962), a divorce action in which a wife moved to suppress evidence of her adultery obtained by her husband in a raid on her apartment, the court held that the exclusionary rule could not be applied to suppress the evidence because it was obtained by a private person and because the case was civil in nature. *Id.* at 425, 229 N.Y.S.2d at 63. In so ruling, the court followed Burdeau v. McDowell, 256 U.S. 465 (1921), in which the Supreme Court held that evidence obtained by private parties and then given to the government was admissible. 16 App. Div. 2d at 425, 229 N.Y.S.2d at 63, *citing* Burdeau v. McDowell, 256 U.S. 465 (1921). *See also* Drew v. International Bhd. of Sulphite & Paper Mill Workers, 37 F.R.D. 446 (D.D.C. 1965).

The rule, however, has been applied in private actions involving replevin. *See* Chemielewski v. Rosetti, 59 Misc. 2d 335, 298 N.Y.S.2d 875 (Sup. Ct. 1969); Reyes v. Rosetti, 47 Misc. 2d 517, 262 N.Y.S.2d 845 (Civ. Ct. N.Y. 1969). Moreover, in Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958), blood tests taken without consent were found to violate the constitutional right of privacy, but their admission in a civil action was held to be harmless error. *Id.* at 440–41, 93 N.W.2d at 287. *See generally*, Note, 55 VA. L. REV. 1484 (1969).

30. One authority has defined "quasi-criminal" actions as follows:

> QUASI-CRIMES — This term embraces all offenses not crimes or misdemeanors, but that are in the nature of crimes — a class of offenses against the public which have not been declared crimes, but wrongs against the general or local public which it is proper should be repressed or punished by forfeitures and penalties. This would embrace all *qui tam* actions and forfeitures imposed for the neglect or violation of a public duty. A *quasi* crime would not embrace an indictable offense, whatever might be its grade, but simply forfeitures for a wrong done to the public, whether voluntary or involuntary, where a penalty is given, whether recoverable by criminal or civil process.

BLACK'S LAW DICTIONARY 446 (rev. 4th ed. 1968) (emphasis in the original).

31. 380 U.S. 693 (1965). In *One 1958 Plymouth Sedan*, a car traveling from New Jersey into Pennsylvania was found transporting liquor which lacked the required Pennsylvania tax seal. *Id.* at 694. A proceeding was instituted for forfeiture of the car as provided by Pennsylvania state law. *Id.* at 694 & n.2. The Pennsylvania Supreme Court, ruling that the exclusionary rule applied only to criminal, not civil cases, found the evidence to be admisisble. Commonwealth v. One 1958 Plymouth Sedan, 414 Pa. 540, 543–44, 201 A.2d 427, 429, *aff'g* 199 Pa. Super. Ct. 428, 186 A.2d 52 (1964). The United States Supreme Court reversed, holding, in reliance upon

rule calls for suppression of illegally obtained evidence in a forfeiture proceeding.[32] A similar result was reached by the Seventh Circuit in *United States v. $5,608.30*,[33] wherein cash and currency were seized as evidence of defendant's failure to register and pay taxes for bookmaking activities.[34] The court held that a motion to suppress evidence obtained by an allegedly unconstitutional search and seizure should have been ruled upon because of the quasi-criminal aspect of the forfeiture proceeding.[35]

Prior to *Janis*, several lower courts had held that evidence unconstitutionally obtained by state action would be excluded in a civil proceeding in which the federal government was a party.[36] Most significantly, in *Suarez v. Commissioner*,[37] the Tax Court held that evidence obtained in a raid by

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Boyd v. United States, 116 U.S. 616 (1886), that the exclusionary rule applied. 380 U.S. at 696, *citing* Boyd v. United States, 116 U.S. 616 (1886). In *Boyd*, the Supreme Court had stated:

> [P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal . . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for the purposes of the Fourth Amendment to the Constitution . . . .

116 U.S. at 634.

32. 380 U.S. at 702.

33. 326 F.2d 359, 362 (7th Cir. 1964).

34. *Id.* at 359–61.

35. *Id.* at 362. This case involved an action by the United States for forfeiture of money seized for failure to pay or register for special taxes in connection with alleged bookmaking activities. *Id.* at 359.

36. *See, e.g.*, Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965) (items seized incident to unlawful arrest and suppressed in previous criminal trial were ordered returned in forfeiture proceeding, even though the federal government was involved in the seizure and both procedures); Compton v. United States, 334 F.2d 212 (4th Cir. 1964) (where the IRS learned of an arrest through the press, information obtained from an unconstitutional search and seizure, although admissible for impeachment purposes, could not be used as evidence in an action for a jeopardy assessment and occupational taxes); Tovar v. Jarecki, 173 F.2d 449 (7th Cir. 1949) (where a tax assessment was made after an IRS agent visited defendant in jail and the evidence was suppressed in a criminal proceeding, the evidence was held to be inadmissible as a basis for a tax assessment); Rogers v. United States, 97 F.2d 691 (1st Cir. 1938) (where items seized were ordered returned to defendant due to an illegal warrant, the evidence could not be used in an action to collect custom duties); Anderson v. Richardson, 354 F. Supp. 363 (S.D. Fla. 1973) (in an arrest for a traffic violation accompanied by an unconstitutional search and seizure and no *Miranda* warnings, the IRS could not use the resulting information in a case involving a tax assessment); United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966) (where an IRS agent committed an illegal search and seizure, the evidence was held excluded in all proceedings, including a tax assessment); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962) (illegally seized evidence used to determine a tax held invalid); Suarez v. Commissioner, 58 T.C. 792 (1972) (evidence illegally seized during a raid on an abortion clinic was suppressed in a subsequent action for a deficiency in taxes). *Contra*, Hinchcliff v. Clarke, 371 F.2d 697 (6th Cir. 1967), *cert. denied*, 387 U.S. 941 (1967); *see* notes 65 & 69 *infra*.

37. 58 T.C. 792, 806 (1972). In *Suarez*, the IRS learned of a raid on an abortion clinic from the newspapers two or three days after the raid. *Id.* at 798. After a

the police was inadmissible not only in the resulting criminal action, but also in a tax assessment proceeding brought by the IRS.[38] *Janis* finally presented this question to the Supreme Court.

After discussing the burden of proof in tax proceedings,[39] the *Janis* Court, in an opinion by Justice Blackmun, turned to the primary issue — the applicability of the exclusionary rule in the instant case. The Court, surveying the evolution of the rule from *Boyd* to the present,[40] stressed that because the rule's primary purpose was to deter officials from violating citizens' constitutional rights,[41] only evidence that furthered this deterrence function should be excluded.[42] In *Janis,* however, the state law enforcement official who had obtained and executed the warrant had already been adequately "punished" by suppression of the evidence in all state and federal criminal proceedings.[43] Thus, concluded the Court, exclusion of the wagering evidence in the federal civil tax proceeding would produce

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prolonged series of appeals, evidence obtained in the raid was suppressed as unlawfully obtained. *Id.* 798–99. The court, observing that "[t]he costs to society of applying the exclusionary rule in civil tax cases are substantially less than in the criminal area where the rule is well established," concluded that the goal of enforcing tax liabilities must give way to the goal of protecting the individual and maintaining confidence in government processes. *Id.* at 805.

38. *Id.* at 798–801.

39. 96 S. Ct. at 3025–26. A major issue in *Janis* was the presumption of correctness in favor of the Government in a tax suit. The district court held that the burden of proof in an assessment hearing, normally on the plaintiff, shifted to the Government; thus, Janis had to prove only that the evidence upon which the assessment was based was illegally obtained. Janis v. United States, 73-1 U.S. Tax Cas. 81,391, 81,393 (C.D. Cal. 1973).

The Supreme Court acknowledged that two types of tax proceedings were involved in *Janis*. Regarding the first, Janis' suit for a refund, the Court cited Lewis v. Reynolds, 284 U.S. 281 (1932), as having established the rule that the taxpayer bears the burden of proving the amount he is entitled to recover; he cannot merely establish that the assessment upon which the refund is claimed is erroneous. 96 S. Ct. at 3025, *citing* Lewis v. Reynolds, 284 U.S. 281, 283 (1932). With respect to the second type of tax proceeding, the Government's counterclaim for an additional collection, the Court had not previously ruled upon the burden of proof. Such assessments, however, have been held to contain a presumption of correctness. 96 S. Ct. at 3025–26. The Court assumed, therefore, that the Government was correct in arguing that the burden is usually upon the taxpayer to prove that he paid the correct amount, *id.* at 3026, but observed that if the assessment were found to be without any foundation, it might not be subject to the same rule. *Id.* at 3026 (citations omitted). Acknowledging that lower courts had disagreed as to the burden of proof where the assessment was found to be without any foundation, the Court assumed, without deciding that the burden fell on the Government that if the district court was correct in ruling that the seized evidence should not be used, it was correct in granting judgments for the plaintiff on both claims. *Id.* at 3026–27 (citations omitted).

40. *Id.* at 3027–29.

41. 96 S. Ct. at 3028, *citing* United States v. Calandra, 414 U.S. 338, 347 (1974). *See* note 25 and accompanying text *supra.* The Court acknowledged, however, that empirical studies designed to gauge the deterrent effect of the exclusionary rule were far from conclusive. 96 S. Ct. at 3030–32.

42. 96 S. Ct. at 3032 n.28, *citing* Desist v. United States, 394 U.S. 244, 254 n.24 (1969).

43. 96 S. Ct. at 3029.

only an "additional marginal deterrence"[44] insufficient to outweigh society's interest in having the evidence admitted.[45]

With respect to respondent's argument that lower federal courts had on several occasions applied the exclusionary rule in civil proceedings,[46] the Court stated that because those decisions involved intrasovereign violations, in which the sovereign seeking to utilize the evidence also committed the violation, they were distinguishable from *Janis,* which involved an intersovereign violation.[47] The Court disagreed with the decision of the Tax Court in *Suarez*[48] — the one case squarely supporting respondent's position[49] — on the ground that it failed to emphasize the element of deterrence and to distinguish between inter- and intrasovereign uses of the materials.[50] In addition, the Court distinguished *Janis,* which involved use of the evidence by a second sovereign in a civil proceeding, from *Elkins v. United States,*[51] which involved a criminal prosecution by the

44. *Id.* at 3032.

45. *Id.* The Court, reasoning that this conclusion would be reached under any of the prevalent views concerning the efficacy of the exclusionary rule, stated:

> If the exclusionary rule is the strong medicine that its proponents claim it to be, then its use in the situation in which it is now applied (resulting, for example, in this case in frustration of the Los Angeles police officers' good-faith duties as enforcers of the criminal laws) must be assumed to be a substantial and efficient deterrent. Assuming this efficacy, the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation. If, on the other hand, the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted.
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> If the exclusionary rule is not "strong medicine," but does provide some marginal deterrence in the criminal situations in which it is now applied, the marginal deterrence is diluted by the attenuation existing when a different sovereign uses the material in a civil proceeding, and we must again find that the marginal utility of the creation of such a rule is outweighed by the costs it imposes on society.

Id. at 3032 & n.27.

46. For the cases cited by respondent, as well as other cases similarly applying the rule, *see* 96 S. Ct. at 3032–33 n.30; note 36 *supra.*

47. *Id.* at 3032–33. The Court stated that it was not ruling on the applicability of the exclusionary rule when an agreement between, or participation by, both sovereigns had been established. *Id.* at 3033 n.31.

48. 58 T.C. 792 (1972); *see* notes 37 & 38 and accompanying text *supra.*

49. 96 S. Ct. at 3033.

50. *Id.* at 3033–34.

51. 364 U.S. 206 (1960). *Elkins* held that the "silver platter" doctrine, which allowed federal officials to use evidence illegally procured by state agents, was unacceptable and provided that any evidence obtained in this manner would be suppressed. *Id.* at 208, 223; *see* notes 63–66 and accompanying text *infra.* In *Elkins,* state officers obtained evidence through an unreasonable search and seizure. The evidence found was not that for which the warrant was issued. *Id.* at 207 & n.1. After a state proceeding was abandoned a federal proceeding was instituted. *Id.* The Court held that evidence obtained by state officials in what would be an unreasonable manner if seized by federal officials, is inadmissible in a federal criminal trial. *Id.* at 223.

second sovereign.[52] Finally, the Court noted that, in the instant case, judicial integrity did not require exclusion, although it was another factor to be weighed in the balancing process.[53]

In his dissenting opinion, Justice Brennan, joined by Justice Marshall, stressing that the "exclusionary rule is a necessary and inherent constitutional ingredient of the protections of the Fourth Amendment,"[54] characterized *Janis* as another step in the Court's elimination of the exclusionary rule.[55] Justice Stewart, in a separate dissent, indicated that because the civil proceeding in *Janis* was closely related to enforcement of the criminal law,[56] the evidence should have been excluded unless the Court was abandoning *Elkins*.[57]

It is submitted that the Court's refusal to extend the exclusionary rule to civil tax proceedings involving intersovereign constitutional viola-

52. 96 S. Ct. at 3034. According to the Court, this distinction further attenuated the deterrent effect of the exclusionary rule. *Id.* The Court stated:

> [C]ommon sense dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the "punishment" imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign. In *Elkins* the Court indicated that the assumed interest of criminal law enforcement officers in the criminal proceedings of another sovereign counterbalanced this attenuation sufficiently to jusitfy an exclusionary rule. Here, however, the attenuation is further augmented by the fact that the proceeding is one to enforce only the civil law of the other sovereign.

Id. The Court reasoned that this attenuation, together with "the existing deterrence effected by the denial of use of the evidence by either sovereign in the criminal trials with which the searching officer is concerned," created a situation which "falls outside the offending officer's zone of primary interest." *Id.*

53. *Id.* at 3034 n.35. The Court indicated that "judicial integrity" — the doctrine that the courts cannot commit or encourage violations of the Constitution — does not always call for the exclusion of evidence. *Id.* In questions concerning the fourth amendment, the Court phrased the issue as whether the admission of the evidence encourages violative conduct — an inquiry essentially similar to the inquiry into whether exclusion would serve a deterrent purpose. *Id.* As to the situation presented in *Janis*, the Court stated that "the admission of evidence in a federal civil proceeding is simply not important enough to state criminal enforcement officers to encourage them to violate Fourth Amendment rights (and thus to obtain evidence they are unable to use in either state or federal criminal proceedings)." *Id.* For a brief discussion of the doctrine of judicial integrity, *see* note 18 and accompanying text *supra*.

54. 96 S. Ct. at 3035 (Brennan, J.,dissenting), *see* United States v. Calandra, 414 U.S. 338, 355–67 (1974) (Brennan, J., dissenting).

55. 96 S. Ct. at 3035 (Brennan, J., dissenting); *see* note 78 and accompanying text *infra*.

56. 96 S. Ct. at 3035 (Stewart, J., dissenting). Justice Stewart noted that the tax involved was levied upon wagering activities, an area in which there are criminal statutes, and that the provisions not only raise revenue but aid police authorities in the enforcement of penalties for such behavior. *Id.* Noting the close cooperation between tax officials and both the federal and state law enforcement agents in this area, Justice Stewart stated: "The pattern is one of mutual cooperation and coordination, with the federal wagering tax provisions buttressing state and federal criminal sanctions . . . . [T]he civil proceeding serves as an adjunct to the enforcement of the criminal law." *Id.* at 3036; *see* notes 58 & 63–66 and accompanying text *infra*.

57. (Stewart, J., dissenting). Justice Stewart was unable to reconcile the majority's decision in *Janis* with *Elkins*, which, according to his interpretation, "held that evidence illegally seized by state officers cannot lawfully be introduced against a defendant in a federal criminal trial." *Id.* at 3035 (Stewart, J., dissenting), *citing* Elkins v. United States, 364 U.S. 206 (1960); *see* note 51 and accompanying text *supra*.

tions was not the only conclusion that could have been reached on the facts presented. Without extending the rule to all civil actions, the Court could have excluded the evidence in *Janis* by focusing upon the manner in which tax and criminal proceedings complement each other.[58] The Supreme Court has observed that a "tax" is a "penalty" when it is in a statute designed to define and suppress crime.[59] The tax in *Janis* was supplementary to the criminal law and was, in fact, a penalty for the illegal activity of wagering.[60]

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58. The close relationship between tax and criminal provisions was stressed by Justice Stewart in his dissent in *Janis*. *See* note 54 and accompanying text *supra*. In Marchetti v. United States, 390 U.S. 39 (1968), a criminal proceeding in which defendant was charged with violations of the wagering tax statutes, the Court, noting that wagering is an area permeated with criminal statutes and that those engaged in such activity are inherently suspect, held that the defendant could assert his fifth amendment right in refusing to register for the wagering tax. *Id.* at 47, *citing* Albertson v. SACB, 382 U.S. 70, 79 (1965); *see* United States v. $5,608.30, 326 F.2d 359 (7th Cir. 1964), in which a civil proceeding for forfeiture arising from a tax on bookmaking activities was said to be technically a quasi-criminal proceeding. *Id.* at 361; *see* notes 30-35 and accompanying text *supra*.

In Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965), where evidence was suppressed in a criminal prosecution for willful violation of a wagering tax statute, the court held that the evidence must also be excluded in the later civil forfeiture proceeding. Noting that the right to privacy is greater than the need for punishment and confiscation, *id* at 171, the court concluded that "[t]he Government cannot be allowed to benefit from its infringement of Constitutional limitations." *Id.* at 173. In United States v. Blank, 261 F. Supp. 180 (E.D. Ohio 1966), illegally seized evidence that had been suppressed in a federal criminal prosecution was also found to be inadmissible in a subsequent assessment proceeding. *Id.* at 184. The *Blank* court stated:

> Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused, victimized by an illegal search, would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the government from complying with constitutional mandates when prosecuting their action in a civil form.

Id. at 182

59. Lipke v. Lederer, 259 U.S. 557, 561-62 (1922). The *Lipke* Court noted that the purpose of a tax is to provide support for the Government, while the purpose of a penalty is to punish individuals for violating the law. *Id.* at 562. One authority has defined penalty as follows:

> A punishment; a punishment imposed by statute as a consequence of the commission of an offense . . . . Also money recoverable by virtue of a statute imposing a payment by way of punishment.
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> . . . .
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> To constitute a "punishment" or "penalty" there must be a deprivation of property or some right, such as the enjoyment of liberty.

BLACK'S LAW DICTIONARY 1290 (rev. 4th ed. 1968).

The Supreme Court has stated that a condition of a penalty's imposition is the requirement of notice and hearing. Regal Drug v. Wardell, 260 U.S. 386, 392 (1922).

60. As Justice Stewart, dissenting in *Janis*, observed, the wagering provisions are intended not only to raise revenue, but also to "assist the efforts of state and federal authorities to enforce [criminal] penalties" for unlawful wagering activities. 96 S. Ct. at 3035 (Stewart, J., dissenting), *citing* Marchetti v. United States, 390 U.S. 39 (1968).

In Tovar v. Jarecki, 173 F.2d 449 (7th Cir. 1949), where evidence was suppressed in a criminal prosecution due to unconstitutional search and seizure and an

Moreover, it is difficult to distinguish the tax involved from a forfeiture, which has also been viewed as a penalty.[61] Both the car in *One 1958 Plymouth Sedan*[62] and the money in *Janis* were used in activities that violated the criminal law and both were seized unconstitutionally. Thus, by characterizing the tax as a penalty or the money seized as a forfeiture, the Court could have applied the exclusionary rule in *Janis*.

Moreover, the Court's distinction between inter- and intrasovereign violations seems inconsistent with its holding in *Elkins* that evidence unconstitutionally procured by state officials cannot be used by federal officials in a federal criminal proceeding.[63] As did *Janis, Elkins* applied to a situation in which the federal sovereign did not participate in the original violation;[64] in both cases the evidence was collected for the purpose of a criminal prosecution.[65] The *Elkins* Court implied that, generally, a distinction should not be drawn between the offending sovereign and the sovereign attempting to use the evidence once the violation has occurred.[66] *Janis,* in effect, drew such a distinction by refusing to apply the rule to

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assessment was made, based upon those materials, for a tax on marijuana, the plaintiff sought an injunction to stop collection of the tax. *Id.* at 449. The district court found the evidence to be inadmissible in a civil proceeding but dismissed the complaint because it could not determine whether the assessment was based upon the evidence. Tovar v. Jarecki, 85 F. Supp. 47, 49 (E.D. Ill. 1948). Characterizing the tax as a penalty, the court of appeals reversed and granted an injunction to stop its collection, stating:

> We think it quite plain that this statute is a penal and not a revenue raising statute . . . . Is it not perfectly plain that what the Government is trying to do is to take this plaintiff's property . . . for [his] not having a license to do something the Government did not want him to do without notice or hearing and by means of its tax techniques when it could not convict for the same offense by a fair trial in a criminal proceeding.

173 F.2d at 451.

61. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965).

62. *Id.*; *see* notes 31 & 32 and accompanying text *supra.*

63. *See* note 51 and accompanying text *supra.* In *Elkins,* the Court stressed that while cooperation between state and federal officers should be promoted, state officers should not be encouraged to violate an individual's constitutional rights. 364 U.S. at 221–22.

64. The officer in *Janis* testified that as a matter of his own policy he reported arrests, such as that involved, to the IRS. 96 S. Ct. at 3036 n.* (Stewart, J., dissenting).

65. A different result has been reached when the evidence was initially obtained for use by the IRS rather than for criminal prosecution. In Hinchcliff v. Clarke, 230 F. Supp. 91 (N.D. Ohio 1963), *rev'd,* 371 F.2d 697 (6th Cir. 1967), the district court, suppressing an order for an accountant to produce documents because the documents were unconstitutionally discovered, stated: "[I]t appears appropriate that in establishing the scope of the suppression order the Government should be forever barred from using all evidence illegally obtained in any proceeding of any kind, and should be further barred from reacquiring it by any means." 230 F. Supp. at 97. The appellate court reversed, expressing the view that the rule should not be applied to an administrative summons for records for use in a criminal proceeding when the summons was authorized by a congressional enactment which had previously been upheld. 371 F.2d at 701.

66. 364 U.S. at 215. The Court stated: "To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.*

civil proceedings.[67] Because the action in *Janis* can be characterized as quasi-criminal, it is submitted that the *Janis* Court should have followed the *Elkins* rule rather than distinguishing *Janis* on the basis of its being a civil tax proceeding.

Although the Court's perception that little deterrence would be gained from excluding the seized materials is probably accurate,[68] the possibility that at least some deterrence would ensue may warrant suppression. Under the result reached in *Janis,* the breaching officer would know that the defendant was paying for his crime even though criminal prosecution was impossible. However, if the officer knew that the defendant would incur no punishment, economic or otherwise, as a result of the evidence, he would be deterred from his unconstitutional methods of procuring the evidence. This should be sufficient to outweigh society's interests in having the evidence included,[69] especially since those interests would appear to be significantly less in a civil tax proceeding than in a criminal proceeding. In the former, the risk is that someone may avoid paying taxes that he ought to pay; in the latter, the risk is that a criminal may escape prosecution and incarceration.[70]

Finally, while judicial integrity is no longer viewed as a major purpose behind the exclusionary rule,[71] it should nevertheless be given some deference. The *Janis* Court stated that judicial integrity means that the court should not commit or encourage violations of the Constitution, but it dismissed that inquiry as "essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."[72] In thus removing judicial integrity as a principal consideration, the *Janis* Court in effect has told the officer that if he obtains evidence in violation of the fourth amendment that may be helpful to a governmental agency in a civil proceeding, the courts will aid him in punishing the criminal through that medium.

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67. 96 S. Ct. at 3035.

68. *See* 26 ARK. L. REV. 545, 550 (1972–73) (exclusionary rule not a deterrent in tax courts); 48 N.Y.U.L. REV. 197, 205–06 (1973).

69. *See* note 26 and accompanying text *supra.*

70. Suarez v. Commissioner, 58 T.C. 792, 805 (1972). The *Suarez* court stated: "Surely the lesser objective of civil tax collection should not be accorded preferential treatment over the greater objective of convicting the guilty criminal." *Id.* In Hinchcliff v. Clarke, 230 F. Supp. 91 (N.D. Ohio 1963), *rev'd,* 371 F.2d 697 (6th Cir. 1967), the District Court for the Northern District of Ohio made the following observation:

> [T]he factors mitigating against the suppression of such evidence [in a civil tax proceeding] are far less satisfactory. Here there is no instance of turning hardened and dangerous criminals loose upon society; here there is no instance of allowing heinous and immoral crimes to go unpunished; here there is but the potentiality of some slight decrease in the government revenues . . . . [I]t would be far more appropriate, from the viewpoint of protecting society, that evidence be excluded in civil tax cases than that it be excluded in criminal cases.

230 F. Supp. at 109.

71. *See* note 53 and accompanying text *supra.*

72. 96 S. Ct. at 3034 n.35; note 53 and accompanying text *supra. But see Suarez,* 58 T.C. at 805 (stressing an individual's faith and confidence in governmental processes and judicial integrity).

It is submitted that the *Janis* decision will cause unpredictability in civil cases in which there has been an unreasonable search and seizure. For example, lower courts will have to determine when there is or is not a sufficient connection between the activities of the sovereign seeking use of the evidence and those of the sovereign that procured it — a distinction still vague following *Janis*.[73] They will also have to determine whether or not a particular case involves a forfeiture[74] or qualifies as quasi-criminal,[75] since the Court has not overruled its earlier line of decisions in forfeiture cases.[76] In short, the factual situations of each case will have to be scrutinized carefully to determine the category in which the case belongs.

Most significantly, *Janis* indicates that the trend toward the elimination of the exclusionary rule,[77] as evidenced by the Burger Court's decisions in recent years,[78] continues unabated. By sanctioning the admission of evidence unconstitutionally obtained by one sovereign in civil proceedings to which the federal government is a party, *Janis* has furthered the steady erosion of defendants' fourth amendment rights.

Susan Krouse

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73. The *Janis* Court neither addressed the question of intrasovereign violations nor defined the meaning of that term. *See* note 47 and accompanying text *supra.*

74. Had the suit been brought as a claim for the balance of the assessment rather than as a counterclaim to Janis' claim for a refund, it is not clear whether the court would have found that the assessment constituted a forfeiture, thereby making the exclusionary rule applicable. *See* notes 61 & 62 and accompanying text *supra.*

75. The *Janis* Court did not discuss the quasi-criminal aspect of the tax proceeding. *See* notes 30–35 & 58–60 and accompanying text *supra.*

76. *See* notes 30–35 and accompanying text *supra.*

77. *See* notes 19–27 *supra.*

78. *See, e.g.,* South Dakota v. Opperman, 96 S. Ct. 3092 (1976) (where police searched a locked automobile impounded for parking violations, the Court found the search not "unreasonable" and refused to suppress evidence found in locked glove compartment); United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976) (fourth amendment does not require warrants for searches conducted at permanent border checkpoints); Stone v. Powell, 96 S. Ct. 3037 (1976) (where there has been an opportunity for litigation of alleged fourth amendment claims in a state court, federal habeas corpus relief will not be granted on the grounds that unconstitutionally obtained evidence was introduced in a criminal proceeding); Andreson v. Maryland, 427 U.S. 463 (1976) (evidence obtained in search of business premises pursuant to warrant with both general and specific descriptions not excluded because relevant to matter for which warrant was issued); United States v. Santana, 427 U.S. 38 (1976) (where defendant was on porch and retreated into her home while in the process of being arrested, evidence obtained in warrantless search was admissible since porch was "public" and officers were in "hot pursuit"); United States v. Miller, 425 U.S. 435 (1976) (no fourth amendment interest in bank records); United States v. Watson, 423 U.S. 411 (1976) (evidence seized from car incident to warrantless arrest upon probable cause held admissible); Texas v. White, 423 U.S. 67 (1976) (where defendant's car was driven to police station at time of his arrest and was searched without his permission, evidence obtained was held admissible); United States v. Peltier, 422 U.S. 531 (1975) (where court ruled against general practice of police conduct, officer had to have knowledge, real or constructive, of illegal character of his actions); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule does not preclude use of illegally seized evidence in grand jury proceedings).

CONSUMER LAW — TRUTH IN LENDING ACT — THE "MEANINGFUL SEQUENCE" PROVISION OF REGULATION Z IS VIOLATED WHEN CREDIT TERMS ARE NOT ARRANGED IN A LOGICAL AND SEQUENTIAL ORDER AND CREDITOR IS LIABLE FOR VIOLATION TO ALL OBLIGORS WHETHER OR NOT THEY ARE REQUIRED TO RECEIVE A COPY OF THE DISCLOSURE STATEMENT.

Allen v. Beneficial Finance Co. (7th Cir. 1976)

Plaintiff, Dorothy Allen, and her ex-husband renegotiated a consumer loan with the defendant, Beneficial Finance Company of Gary, Inc. (Beneficial).[1] Pursuant to the Federal Truth in Lending Act (Act),[2] Beneficial prepared and the Allens signed a disclosure statement which detailed the terms and conditions of the loan.[3] Alleging that the disclosure statement violated section 226.6(a) of Regulation Z,[4] which requires, *inter alia,* that all credit disclosures be made "in meaningful sequence,"[5] Mrs. Allen filed suit against Beneficial.[6] Beneficial argued in part that under the terms of the Act[7] the plaintiff, a co-borrower of the loan, could not properly institute suit since she allegedly did not receive a copy of the disclosure statement.[8] The trial court, granting plaintiff's motion for summary judgment, found that Beneficial's disclosure statement violated Regulation Z's "meaningful sequence" requirement and that plaintiff's receipt or non-receipt of a copy of the disclosure statement would not affect her right to recover.[9] On appeal, the United States Court of Appeals for the

1. Allen v. Beneficial Fin. Co., 531 F.2d 797, 799 (7th Cir.), *cert. denied,* 97 S. Ct. 237 (1976). The total amount financed was $1,769.58, which resulted in a finance charge of $714.42 at an annual percentage rate of 23.54%. 531 F.2d at 799. The loan was to be repaid in equal installments over a 36-month period. *Id.*

2. 15 U.S.C. §§ 1601–1665 (1970 & Supp. V 1975). For a brief discussion of the Truth in Lending Act (Act), *see* text accompanying notes 11–14 *infra.*

3. 531 F.2d at 799.

4. 12 C.F.R. § 226.6(a) (1976).

5. Section 226.6(a) provides in pertinent part: "[D]isclosures . . . shall be made clearly, conspicuously, in meaningful sequence . . . and at the time and in the terminology prescribed in applicable sections . . . ." *Id.*

6. Allen v. Beneficial Fin. Co., 393 F. Supp. 1382 (N.D. Ind. 1975). Mr. Allen signed Beneficial's credit disclosure statement as principal borrower with Mrs. Allen signing as co-borrower. 531 F.2d at 808. Mr. Allen was not a party to this action.

7. Section 121(b) of the Act provides: "If there is more than one obligor, a creditor need not furnish a statement of information required under this chapter . . . to more than one of them." 15 U.S.C. § 1631(b) (Supp. V 1975).

8. 393 F. Supp. at 1384; *see* notes 25–27 and accompanying text *infra.*

9. 393 F. Supp. at 1385. In granting summary judgment, the court stated that the only fact which remained in controversy was "whether or not the plaintiff received a copy of the disclosure statement." *Id.* at 1384. However, the court determined that since a creditor is not required to furnish a co-borrower with a copy of the disclosure statement, the question need not be answered. *Id., citing* 15 U.S.C. § 1631(b) (Supp. V 1975). For the pertinent text of this section, *see* note 7 *supra.* The court specifically ruled that Mrs. Allen was "a proper person to sue and recover." 393 F. Supp. at 1385.

Seventh Circuit affirmed, *holding* 1) that Beneficial's disclosure statement violated the "meaningful sequence" provision of section 226.6(a) by failing to present its credit terms in a logical and sequential format, and 2) that plaintiff was entitled to recover under the Act despite the fact that, because of her status as co-borrower, Beneficial was not required to furnish her with a copy of the disclosure statement.[10] *Allen v. Beneficial Finance Co.*, 531 F.2d 797 (7th Cir.), *cert. denied*, 97 S. Ct. 237 (1976).

The Federal Truth in Lending Act, which became effective on July 1, 1969, was designed "to assure meaningful disclosure of credit terms" to facilitate a more informed examination and comparison of available credit terms by consumers.[11] Responsibility for implementation of the Act was delegated to the Federal Reserve Board (Board),[12] which subsequently promulgated Regulation Z.[13] Section 226.6(a) of Regulation Z provides that all required disclosures by creditors be made "clearly, conspicuously, [and] in meaningful sequence."[14] In the absence of further guidance from the regulation's language, informal Board interpretations[15] and judicial

10. In addition, the Seventh Circuit rejected defendant's contention that the trial court erred in granting summary judgment without allowing oral argument or submission of opposing materials on the ground that defendant failed to request a hearing. 531 F.2d at 799–800, *citing* FED. R. CIV. P. 56 *and* N.D. IND. R. 7(b). Defendant's challenge to the constitutionality of the meaningful sequence requirement was not considered by the court, since defendant failed to raise the issue in the lower court. 531 F.2d at 805, *citing* N.D. IND. R. 16.

11. *See* 15 U.S.C. § 1601 (Supp. V 1975). The Truth in Lending Act is the first title of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1660 (1970 & Supp. V 1975). *See generally* B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES §§ 38–44 (1972 & Supp. 1976); Kintner, Henneberger & Neil, *A Primer on Truth in Lending*, 13 ST. LOUIS U.L.J. 501 (1969); Comment, *Truth in Lending and the Statute of Limitations*, 21 VILL. L. REV. 904 (1975–76).

12. *See* 15 U.S.C. § 1604 (1970).

13. 12 C.F.R. §§ 226.1–.14 (1976). According to section 105 of the Act, the purpose of Regulation Z is "to provide for adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604 (1970).

14. 12 C.F.R. § 226.6(a) (1976). For the pertinent text of section 226.6(a), *see* note 5 *supra*. Regulation Z implements the general disclosure rule of section 121(a) of the Act, which requires that "[e]ach creditor . . . disclose clearly and conspicuously . . . to each person to whom consumer credit is extended, the information required . . . ." 15 U.S.C. § 1631(a) (Supp. V 1975).

15. Since 1969, the Board, in amending and interpreting Regulation Z, has issued informal interpretations in letter form to answer inquiries regarding specific transactions. Some of these staff opinion letters, referred to as public position letters, have been made available to the public. In the past, the Board has maintained the position that "the public is entitled to rely on a formal staff opinion." [1969–1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,640, at 66,283. However, some courts have asserted that the Board's interpretations are not necessarily determinative regarding questions of law. *See, e.g.*, Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740, 747 (5th Cir. 1973); Rivers v. Southern Discount Co., 5 CONS. CRED. GUIDE (CCH) ¶ 98,796, at 88,447 (N.D. Ga. Dec. 17, 1973). Other courts, however, recognizing the Board's administrative expertise and experience in construing these provisions, have tended to defer to its construction of the Act and Regulation Z. *See e.g.*, Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971, 977 (5th Cir. 1974); Bone v. Hibernia Bank, 493 F.2d 135, 139 (9th Cir. 1974).

opinions have attempted to delineate specific requirements of the phrase "meaningful sequence."

On two occasions prior to 1976, the Board responded to requests for clarification of the meaningful sequence requirement. A 1971 Board public position letter emphasized that while there were a "multitude of ways" to comply with this provision, the obligation rested with the creditor "to support his belief that his disclosures [met] the requirements of the Regulation."[16] A warning that elements of the finance charge should not be scattered throughout the disclosure statement was the only specific example of a violation provided in the letter.[17] In another letter issued in 1974,[18] the Board further clarified the meaningful sequence requirement by providing that "meaningful sequence would call for those items which are arithmetically related to appear within a reasonable proximity to each other, not mixed with items which are irrelevant to a progression of arithmetical computations or thought."[19]

Prior to the *Allen* decision, few courts had directly addressed the "meaningful sequence" question. In *Garza v. Chicago Health Clubs, Inc.*,[20] the court, interpreting a meaningful sequence provision of a state installment sales act, held that compliance required that "those disclosures which are logically related must be grouped together rather than scattered through the contract."[21] However, in *Barksdale v. Peoples Financial Corp.*,[22] the court adopted a different approach, distinguishing disclosure items of an

16. [1969–1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,759, at 66,333.

17. *Id.*

18. *See* [1974] 5 CONS. CRED. GUIDE (CCH) ¶ 31,102, at 66,489.

19. *Id.* at 66,490. The Board reiterated, however, that it would be "difficult to design an all-purpose type of disclosure statement" since "[t]he type of presentation of disclosures will depend upon the complexity of the transaction and the ingenuity of the designer of the disclosure form." *Id.* at 66,489.

20. 347 F. Supp. 955 (N.D. Ill. 1972). *Garza* was a class action suit brought against a health club corporation, which had entered into installment sales contracts with the plaintiff class, and finance companies to which the contracts had been assigned. *Id.* at 958–59, 963. The defendants were charged with violations of both the Truth in Lending Act, 15 U.S.C. §§ 1601–1666 (1970 & Supp. V 1975), and the Illinois Retail Installment Sales Act, ILL. REV. STAT. ch. 121½, §§ 501–533 (1973), for failing to disclose late payment charges and acceleration provisions. *Id.* at 958–63.

21. 347 F. Supp. at 961. Although the defendant in *Garza* was charged with disclosure violations under both federal and state law, the court's definition of meaningful sequence was placed in the section of the opinion dealing with the state sales act. *Id., citing* ILL. REV. STAT. ch. 121½, § 505 (1973). Since the concern of both the state sales act in *Garza* and the Truth in Lending Act is to protect consumers effectively, there is a strong argument that a judicial interpretation of a provision such as the meaningful sequence requirement could be applied to either. The *Allen* court appears to have taken this position, for in citing *Garza* and applying that court's reasoning to develop its own definition of meaningful sequence, it made no mention of the original applicability of the interpretation. *See* 531 F.2d at 801; text accompanying notes 43 & 44 *infra*. *But see* Barksdale v. Peoples Fin. Corp., 393 F. Supp. 112 (N.D. Ga. 1975), which indicated that the *Garza* interpretation should be considered applicable solely to the construction of state law. *Id.* at 117. For a discussion of *Barksdale, see* notes 22 & 23 and accompanying text *infra*.

22. 393 F. Supp. 112 (N.D. Ga. 1975). *Barksdale* concerned alleged acceleration clause, due date, and security interest disclosure violations by the defendant, who had extended a consumer loan to the plaintiff. *Id.* at 113–14.

arithmetic nature (*e.g.*, finance charge) from those which were simply "informative" (*e.g.*, nonpayment rights and liabilities).[23] Citing the 1974 Board public position letter, the court concluded that the meaningful sequence requirement was not intended to apply to items which had "no particular arithmetic interdependence."[24]

The controversy regarding a creditor's liability to a co-borrower involves two subsections of section 121 of the Act.[25] While subsection (a) requires that proper credit disclosures be made to "each person to whom consumer credit is extended,"[26] subsection (b) limits to one the number of disclosure statements that a creditor must provide, regardless of the number of obligors.[27] The question upon which some courts have disagreed is whether a creditor can be held liable under subsection (a) to a joint obligor to whom there was no corresponding duty to provide a disclosure statement.

Several courts have denied separate recoveries to joint obligors who were husband and wife. In *St. Marie v. Southland Homes, Inc.*,[28] the court stated that although "the manner in which the Act requires disclosure is not conclusive in interpreting the penalty provision, it is persuasive."[29] However, the *St. Marie* court indicated that a different decision might have resulted had the co-borrowers been two individuals with conflicting interests rather than a "family unit."[30] The *In re Wilson*[31] court, in disallowing joint recoveries to spouses, mentioned only the "family unit" rationale as a basis for its decision.[32]

A contrary view was espoused by *Rivers v. Southern Discount Co.*,[33] which allowed two plaintiffs (again, a husband and wife) to secure separate judgments against a creditor for a single disclosure violation.[34] *Rivers* held that despite the limited disclosure requirement of section

23. *Id.* at 116. One of the plaintiff's arguments which the *Barksdale* court rejected was that the repayment schedule and the default charge provisions were so logically related that they should be presented in close proximity on the disclosure statement. *Id.*

24. *Id.* at 115–16, *citing* [1974] 5 CONS. CRED. GUIDE (CCH) ¶ 31,102, at 66,489. For a discussion of the 1974 public position letter, *see* text accompanying notes 18 & 19 *supra.*

25. 15 U.S.C. § 1631 (Supp. V 1975).

26. 15 U.S.C. § 1631(a) (Supp. V 1975). For the pertinent text of this subsection, *see* note 14 *supra.*

27. 15 U.S.C. § 1631(b) (Supp. V 1975). For the pertinent text of this subsection, *see* note 7 *supra.*

28. 376 F. Supp. 996 (E.D. La. 1974).

29. *Id.*

30. *Id.* at 997.

31. 411 F. Supp. 751 (S.D. Ohio 1975).

32. *Id.* at 753, *citing* St. Marie v. Southland Homes, Inc., 376 F. Supp. 996, 997 (E.D. La. 1974). *See also* Mason v. General Fin. Corp., 542 F.2d 1226, 1235 (4th Cir. 1976) (since only one disclosure was required, husband and wife could recover only one civil penalty); Powers v. Sims & Levin, 542 F.2d 1216, 1219–20 (4th Cir. 1976) (even in the case of a right of rescission, which requires disclosure to all obligors, husband and wife were limited to one recovery).

33. 5 CONS. CRED. GUIDE (CCH) ¶ 98,796, at 88,447 (N.D. Ga. Dec. 17, 1973).

34. *Id.* at 88,450.

121(b), the creditor could not avoid liability to an obligor who had provided the creditor with added security.[35]

In analyzing the meaningful sequence issue, the *Allen* court first examined the Act and its legislative history to determine whether it was within the Board's authority to require,[36] in addition to the Act's mandate of clear and conspicuous disclosure, that credit terms be arranged in meaningful sequence.[37] Since the Act's objective was to provide the consumer with adequate and meaningful credit disclosure,[38] and since Regulation Z was issued to clarify the Act in any manner consistent with the intent of Congress,[39] the court concluded that the Board's addition of the meaningful sequence requirement was justified.[40]

Next, the court addressed the issue of what the meaningful sequence provision specifically required with respect to the creditor's disclosure statement. Relying upon the Board's public position letters[41] and the *Garza* decision,[42] the Seventh Circuit determined that the term meaningful sequence involves two requirements: 1) that logically related terms be grouped together, and 2) that these groupings be arranged in a "logically sequential order emphasizing the most important terms."[43] While acknowledging that the meaningful sequence requirement does not compel a specific format, the court emphasized that the arrangement chosen must adequately reflect the essential purpose of the Act — "clarity of disclosure."[44]

Turning to a detailed examination of Beneficial's disclosure statement, the *Allen* court concluded that it failed to present the credit terms in meaningful sequence.[45] First, the court found that the credit terms were not arranged in logical groupings as required by the first element of the meaningful sequence standard.[46] The court pointed out that the terms comprising the amount financed were "scattered across the top half of the

35. *Id.; accord,* Mirabal v. General Motors Acceptance Corp., 537 F.2d 871, 881–83 (7th Cir. 1976) (opinion written by same judge who authored *Allen*).

36. *See* 15 U.S.C. § 1631(a) (Supp. V 1975). For the pertinent text of this section, *see* note 14 *supra.*

37. 531 F.2d at 800–01.

38. 531 F.2d at 800–01, *citing* 15 U.S.C. § 1601 (Supp. V 1975); *see* text accompanying note 11 *supra.*

39. 531 F.2d at 800–01, *citing* 15 U.S.C. § 1604 (1970).

40. 531 F.2d at 800–01.

41. For a discussion of these public position letters, *see* notes 16–19 and accompanying text *supra.*

42. For a discussion of the *Garza* holding, *see* notes 20 & 21 and accompanying text *supra.*

43. 531 F.2d at 801. The *Allen* court expressed the view that if the creditor were sincerely interested in providing the consumer with adequate credit information, these requirements would not be considered burdensome. *Id.*

44. *Id.* at 802, *citing* [1969–1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,759, at 66,333.

45. 531 F.2d at 802. The Seventh Circuit noted that the lower court had found 10 examples of meaningful sequence violations on Beneficial's form, and it expanded this list with further illustrations of the defendant's noncompliance. *Id., citing* Allen v. Beneficial Fin. Co., 393 F. Supp. 1382, 1384–85 (N.D. Ind. 1975).

46. 531 F.2d at 802; *see* text accompanying note 43 *supra.*

statement" and interspersed with terms which were not "principal elements of the amount financed."[47] Conversely, other terms which were arithmetically unconnected were grouped together.[48] In addition, the court found that Beneficial's form did not satisfy the second element of the meaningful sequence requirement — that disclosure items be arranged in a logical order emphasizing the most important terms.[49] The court opined that for optimum clarity the elements comprising the amount financed should be listed in a summation order with principal terms, such as the amount disbursed to the borrowers, placed at the top.[50] The court stated that since the disclosure statement was created to aid the borrower, it must provide a "conceptual framework a borrower can easily comprehend."[51]

In finding that the disclosure statement did not comply with the meaningful sequence requirement, the court rejected Beneficial's contention that the layout of the statement was logical in that it had employed a subtractional[52] rather than a summation formula in the arrangement of the credit terms.[53] The *Allen* court characterized the subtractional method as insufficient "to convey an understanding of the transaction" since "[p]eople do not normally conceive of a loan from a subtractional point of view."[54]

Having disposed of the meaningful sequence issue, the Seventh Circuit addressed the question of whether the defendant was liable to Mrs. Allen despite the fact that as a co-borrower she was not required to receive a copy of the disclosure statement.[55] Initially, the court found that the plaintiff was clearly entitled to disclosure under section 121(a) of the Act as a "person to whom consumer credit [was] extended."[56] Examining

47. 531 F.2d at 802.

48. *Id.* at 803. In the court's view, the only logically related group of terms were elements of the prior loan. *Id.* However, since these terms stood out clearly in contrast to the rest of the statement, the court reasoned that a customer might easily mistake them for elements of the present loan. *Id.*

49. *Id. see* text accompanying note 43 *supra.*

50. *Id.* at 801.

51. *Id.* at 803–04.

52. This subtractional order began with the total amount of payments and ended with the amount disbursed. *Id.* at 804.

53. *Id.* at 804. In a summation order, as explained by the *Allen* court, "the terms making up the sum are placed in a column with the principal terms of the sum at the top and with the total at the bottom." *Id.* at 801.

54. *Id.* Beneficial also argued that its format was designed to conform to a national computer system to which it subscribed. *Id.* at 804. The court found no merit in this argument and stated that either the program could be altered or the computer output could be transferred by hand to a proper disclosure form. *Id.*

Besides taking exception to the theory behind the subtractional method, the *Allen* court found fault with Beneficial's use of that method. The court pointed out that the elements were not placed in a purely subtractional order, since many terms were included in the series but were not subtracted. *Id.* at 804 n.5.

55. *Id.* at 805; *see* text accompanying notes 25–27 *supra.*

56. *Id.* at 805, *citing* 15 U.S.C. § 1631(a) (Supp. V 1975). For the pertinent text of section 121(a), *see* note 14 *supra.*

Beneficial's argument that section 121(b), which provides that only one disclosure statement need be provided to joint obligors, limits a creditor's liability under section 121(a),[57] the court concluded, on the basis of the language and legislative history of section 121, that Congress did not intend to restrict the scope of subsection (a) and that subsection (b) was added "merely to facilitate compliance with the Act" by reducing the "burden of paperwork on the creditor."[58]

The court proposed first that Congress could have intended the creditor to disclose the required information to all obligors, although only one individual actually would receive a copy of the statement.[59] Alternatively, the court observed that even if only one obligor were to receive the disclosure information, Congress may have assumed that proper disclosure would protect all obligors, since the person receiving the information "would certainly take the best credit terms available."[60] Improper disclosure, the *Allen* court concluded, would harm all obligors, not merely the person who received the disclosure form.[61]

The *Allen* court's formulation of the twofold meaningful sequence standard[62] leaves at least two unanswered questions concerning its application. First, it is unclear whether *Allen* intended that this meaningful sequence test be applied to both arithmetic and non-arithmetic terms. Since the court concentrated its criticism of the defendant's disclosure statement on the arrangement of arithmetic terms,[63] it is arguable that the Seventh Circuit would agree with the *Barksdale*[64] conclusion that the relative placement of informational or descriptive items need not conform to the meaningful sequence requirement.[65] However, it might be argued that in order to provide the consumer with the most comprehensible statement possible, the *Allen* meaningful sequence test should apply to non-arithmetic terms as well.[66]

57. 531 F.2d at 805. For the pertinent text of section 121(b), *see* note 7 *supra.*

58. 531 F.2d at 806. For guidance, the court reviewed the House Report which accompanied the Act. *Id., citing* H.R. REP. No. 1040, 90th Cong., 1st Sess. 27, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962, 1984 The section of this report which refers indirectly to section 121(b) of the Act provides in pertinent part: "In order to reduce needless paperwork, disclosure need only be made to one obligor. For example, if two people (e.g. a husband and wife) are the obligors, only one copy of the contract with the required disclosure information would need to be furnished." *Id.*

59. 531 F.2d at 805.

60. *Id.*

61. *Id.* at 805–06.

62. For a discussion of the *Allen* court's meaningful sequence test, *see* text accompanying notes 43–44 *supra.*

63. The *Allen* court did criticize the placement of one non-arithmetic term — the security interest description; however, the reason was not its placement relative to the other terms but the fact that the description had been split in half and printed in separate, unconnected sections of the form. 531 F.2d at 803.

64. For a discussion of the *Barksdale* decision, *see* text accompanying notes 22–24 *supra.*

65. 393 F. Supp. at 116–17.

66. While *Barksdale* cited the 1974 Board letter as support for its theory (*see* notes 18–19 & 24 and accompanying text *supra*), a recent letter issued by the Board could

The second unanswered question involves the Seventh Circuit's criticism of the subtractional method of listing disclosure items.[67] It is submitted that the *Allen* court's firm objection to the subtractional method and its strong endorsement of the summation method unnecessarily limits the flexibility of the meaningful sequence test. This position seems rather arbitrary and is inconsistent with the court's statement that no singular arrangement of terms was mandatory.[68] In addition, a recent Board public position letter opposes the proposition that all disclosure items must be presented in a summation column and characterizes such a requirement as unreasonably rigid.[69]

In view of the Act's purpose of protecting the consumer against unfair credit practices, the *Allen* court's decision to allow recovery to joint obligors appears sound. Of the court's two arguments in support of its position

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be referred to in defense of the contrary view. *See* [1976] 5 CONS. CRED. GUIDE (CCH) ¶ 31,387, at 66,646. This letter stated:

> "[M]eaningful sequence" cannot — and should not — be defined by reference to some rigid concept of arithmetical progression. Since a primary purpose of this requirement and of the . . . Act as a whole is to adequately inform consumers of the terms and costs of credit, we believe that § 226.6(a) requires that related terms be presented in an order which will assist the customer in understanding their relationship.

Id. at 66,647. The Board's latest statement, therefore, suggests a retreat from its former position, which concentrated upon the presentation of only arithmetically related terms.

A more basic question might be whether the sheer volume of non-arithmetic information which the Act and Regulation Z require actually adds to the confusion of the consumer, no matter how "meaningfully" it is presented. In testimony before the Senate Committee on Banking, Housing and Urban Affairs, Jonathan Landers stated that "[f]rom the consumer's point of view the typical truth-in-lending statement is virtually inscrutable." *Hearings on the Consumer Protection Efforts of the Three Major Bank Regulatory Agencies Before the Senate Comm. on Banking, Housing and Currency,* 94th Cong., 2d Sess. 119 (1976) (Statement of Jonathan Landers) [hereinafter cited as *Senate Hearings*]. Landers credited this confusion to a shift in emphasis from basic credit *cost* disclosure to complicated and technical credit *term* disclosure. *Id.* at 120. According to Landers, "people tend to respond to too much disclosure not by selectively trying to pick out those terms which are most important, but by being so overwhelmed by the disclosure as to totally ignore them." *Id.* at 124.

67. For a discussion of the court's position, *see* notes 52–54 and accompanying text *supra.*

68. 531 F.2d at 802, *citing* [1969–1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,759.

69. [1976] 5 CONS. CRED. GUIDE (CCH) ¶ 31, 387, at 66,646. The Board stated: "In order to comply with the requirements of [certain Regulation Z sections], most disclosure statements would necessarily involve both additions and subtractions of various items." *Id.* For a further discussion of the implications of this Board letter, *see* note 66 *supra.*

One critic has claimed that the *Allen* court's rejection of the subtractional method "is a clear example of middle-class bias in the courts." Kaufman, *Bringing Chaos Out of Order: Truth in Lending in the Courts,* 10 GA. L. REV. 937, 949 n.47 (1976). This commentator suggested that in shopping for credit, the poor borrower "works backward from the amount of monthly payment he can afford . . . to the maximum amount of credit . . . which that monthly payment will produce — essentially the subtractional method." *Id.*

that Congress did not intend to qualify the disclosure requirement of section 121(a) by its limitation on the number of disclosure statements required, the second is more persuasive.[70] While Congress may not have intended the Act to require creditors to disclose the credit terms to all obligors regardless of the number of statements provided, it is probable that Congress assumed that proper disclosure to one obligor was adequate protection for all. Section 121(b), which the House described as a measure "to reduce needless paperwork,"[71] should not be permitted to stifle the effectiveness of the Act's disclosure requirements by preventing injured borrowers from recovering.

It should be noted that the Seventh Circuit's holding that each obligor may sue the creditor for disclosure violations raises two problems which were not addressed in *Allen*. First, the court's ruling could increase the number of potential plaintiffs, resulting in additional litigation which would impose further costs and burdens upon the courts. It is arguable, however, that this problem is counterbalanced by the positive contribution the instant decision makes toward the achievement of the Act's goal of protecting consumers.[72] Second, and more importantly, the decision subjects the creditor to multiple liabilities on each credit transaction involving more than one obligor. Interestingly, in reaching its determination, the *Allen* court did not mention the decisions which refused to grant multiple recoveries.[73] Nevertheless, since the rationale of the single-recovery decisions appears to rest not upon statutory construction, but upon the courts' view of the legal status of husband and wife,[74] perhaps the *Allen* court did not consider these cases applicable to the instant facts.

Whether Congress intended the creditor to be penalized more than once for a single violation of the Act is not altogether clear. The civil liability section of the Act[75] provides for both actual and statutory damages. In its

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70. *See* 531 F.2d at 805–06; text accompanying notes 59–61 *supra*.

71. H.R. REP. No. 1040, 90th Cong., 2d Sess. 27, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962. For the pertinent text of the Report, *see* note 58 *supra*.

72. See text accompanying note 11 supra. In Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740 (5th Cir. 1973), the court stated that the Act's goal was to create "a system of 'private attorney generals'" and that the civil liability section was "intended to allow aggrieved consumers to participate in policing the Act." *Id.* at 748. It would be inconsistent with this objective to restrict the number of consumers who are given access to the courts.

73. For a discussion of these opposing decisions, *see* notes 28–32 and accompanying text *supra*. The Seventh Circuit did criticize the *St. Marie* position in a case subsequent to *Allen*. *See* Mirabal v. General Motors Acceptance Corp., 537 F.2d 871, 882 (7th Cir. 1976).

74. *See* note 32 and accompanying text *supra*.

75. The civil liability section of the Act provides in pertinent part:

> (a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of the failure;
>
> (2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . . except that the liability

discussion of the statutory damages, the House Report interpreted the Act as imposing "a maximum penalty not to exceed $1,000 *on any individual transaction.*"[76] This statement suggests an overall recovery limit of $1,000 per transaction and not per obligor. However, two policy reasons support the *Allen* court's holding that multiple recoveries are allowable. First, effective civil enforcement of the Act requires that consumers not be frustrated in their attempt to recover against a noncomplying creditor.[77] Furthermore, multiple recoveries are not unjustifiable in view of the fact that the Act's terms do not impose onerous standards upon creditors.[78]

In conclusion, the *Allen* decision is significant both in its attempt to articulate a meaningful sequence standard and in its handling of the multiple recovery question. The meaningful sequence test no doubt will be useful to future courts in evaluating creditors' compliance with Regulation Z. However, the question of multiple recoveries is likely to remain a controversial one. Since the Supreme Court has denied certiorari to the defendant in this case,[79] *Allen* will stand, at least for the present, as an influential rule of law in the Seventh Circuit and beyond.

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> under this subparagraph shall not be less than $100 nor greater than $1,000; [and]
>
> . . . .
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. § 1640 (Supp. V 1975) (amended 1976).

76. H.R. REP. No. 1040, 90th Cong., 1st Sess. 19, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1976 (emphasis added).

77. In Buford v. American Fin. Co., 333 F. Supp. 1243 (N.D. Ga. 1971), the court noted that "[t]he Truth in Lending Act clearly contemplates substantial enforcement through individual consumers." *Id.* at 1248. For a further discussion of the civil liability section of the Act, *see* Comment, *Truth in Lending and the Statute of Limitations,* 21 VILL. L. REV. 904, 926–27 n.131 (1975–76).

78. In Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973), the United States Supreme Court determined that "[t]he burdens imposed on creditors [by the Act] are not severe, when measured against the evils which are avoided." *Id.* at 371. Some commentators, however, have argued that the Act imposes a heavy burden upon the creditor and that "it has become virtually impossible [for the creditor] to formulate and devise a statement that is in full compliance, no if's, and's, or but's." *Senate Hearings, supra* note 66, at 119. *See also,* B. CLARK & J. FONSECA, *supra* note 11, § 43, at 90–91 (Supp. 1976).

79. 97 S. Ct. 237 (1976).

FEDERAL ESTATE TAXATION — SECTION 2056 MARITAL DEDUCTION — EQUALIZATION CLAUSE — MARITAL TRUST, THE CONTENT OF WHICH IS DETERMINED UNDER A FORMULA DESIGNED TO EQUALIZE THE VALUE OF THE DECEDENT'S AND THE SURVIVING SPOUSE'S ESTATES, QUALIFIES FOR THE MARITAL DEDUCTION.

Estate of Charles W. Smith (Tax Ct. 1976)

Charles W. Smith (decedent) died on June 7, 1970.[1] Pursuant to the provisions of an inter vivos trust agreement executed by the decedent, the trust assets, comprising most of his gross estate for federal estate tax purposes,[2] were divided into a marital and a residual portion upon the decedent's death.[3] The residual portion first received those assets which, had they passed to the decedent's wife, would not have qualified for the marital deduction under section 2056 of the Internal Revenue Code of 1954 (Code).[4] Under an equalization formula clause in the trust agreement, the marital portion then received a percentage interest of the balance of the assets equal to one-half of the amount by which the value of the decedent's adjusted gross estate exceeded the value of what the surviving spouse's adjusted gross estate[5] would have been had she survived her

1. Estate of Charles W. Smith, 66 T.C. 415 (1976), *appeal docketed,* No. ——— (7th Cir. Jan. 21, 1977).

2. 66 T.C. at 416. The inter vivos trust agreement between the decedent and the Northern Trust Company of Chicago, Illinois, was dated August 2, 1967. The trust was revocable, with the income payable to the decedent for life. *Id.* Because the trust was established within three years of the decedent's death, because he had reserved an interest in the trust assets, and because the trust was revocable, the trust assets constituted part of the decedent's gross estate. *See* I.R.C. §§ 2035, 2036(a)(1), 2038(a)(1).

3. 66 T.C. at 417. For the full text of the trust provisions at issue in this case, *see id.* at 417-19.

4. *Id.* at 417. The trust instrument provided in pertinent part: "There shall first be allocated to the Residual Portion any assets or the proceeds of any asset (or interest therein) with respect to which the marital deduction would not be allowed if allocated to the Marital Portion." *Id.*

Section 2056 of the Code allows the decedent's estate to deduct the value of the property passing to the surviving spouse, subject to certain limitations. I.R.C. § 2056(a). One limitation is that certain terminable interests so passed do not qualify for the marital deduction. *Id.* § 2056(b)(1). A terminable interest is one which could terminate with the lapse of time or upon the occurrence or failure of a condition, thus escaping taxation in the estate of the surviving spouse. *Id.*

5. 66 T.C. at 418. The trust instrument further provided:

> There shall then be allocated to the Marital Portion that percentage interest in the balance of the assets constituting the trust estate which shall when taken together with all other interests and property that qualify for the marital deduction and that pass or shall have passed to the Settlor's said wife under other provisions of this trust or otherwise, obtain for Settlor's estate a marital deduction which would result in the lowest Federal estate taxes in Settlor's estate and Settlor's wife's estate, on the assumption Settlor's wife died after him, but on the date of his death and that her estate were valued *as of the date on (and in the manner in)* which Settlor's estate is valued for Federal estate tax purposes;

husband but died on the same day that he died. The surviving spouse's estate was deemed to include her own assets existing at the date of the decedent's death, valued as of the date on (and in the manner in) which the decedent's estate was valued for federal estate tax purposes.[6] Finally, the remaining percentage of trust assets was allocated to the residual portion.[7]

The marital portion was administered as a trust (marital trust) with Smith's wife receiving a life estate in the net income therefrom and a general power of appointment by will over the marital trust corpus.[8] Despite section 2056(b)(5) of the Code, which specifies that life estates coupled with general powers of appointment exercisable in favor of the surviving spouse or the surviving spouse's estate will qualify for the marital deduction,[9] the Commissioner of Internal Revenue (Commissioner)

Settlor's purpose is to equalize, insofar as possible, his estate and her estate for Federal estate tax purposes, based upon said assumptions.

Id. (emphasis added).

The objective of the equalization clause was the minimization of the total federal estate taxes payable on both the estate of the decedent and the hypothetical estate of his surviving spouse. Because of the progressive estate tax rates, the sum of the federal estate taxes will be minimized when the two taxable estates are equal in value. *See* I.R.C. § 2001.

6. *See* note 5 *supra*. The trust instrument also provided:

In selecting a valuation date for the purpose of the Federal estate tax, Settlor directs Trustee to select the date which will result in the greatest tax benefit to Settlor's wife's and Settlor's estates, regardless of the effect this selection may have on the amount provided by this Article for Settlor's wife.

66 T.C. at 418.

At the time decedent died, section 2032 of the Code allowed the valuation of an estate to be determined at any time within one year of the decedent's death. *See* I.R.C. § 2032. Therefore, the trustee could not have determined the extent of the interest which would pass to the marital portion until after one year from the date of death. 66 T.C. at 420.

Although the percentage shares of the marital and residual portions were computed on the basis of estate tax values, the actual amount of the trust assets to be distributed to each portion of the trust was determined by applying these percentage shares "to the assets distributed valued at their fair market value at the time of distribution." *Id.* at 418.

7. 66 T.C. at 418. The trust instrument provided that all taxes and other expenses were to be charged against the residual portion. *Id.* at 419.

8. *Id.* at 418. She also received a nongeneral power of appointment exercisable inter vivos. *Id.*

9. I.R.C. § 2056(b)(5). Section 2056(b)(5) of the Code provides in relevant part:

In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other

disallowed a marital deduction for the interest passing to the surviving spouse under the marital trust.[10] He argued that under the equalization clause formula it was possible that an increase in the value of the assets in the spouse's estate during the alternate valuation period could prevent any transfer of assets to the marital trust.[11] Thus, he concluded that the marital trust was a nondeductible terminable interest within the meaning of section 2056(b)(1) of the Code.[12] The United States Tax Court rejected the Commissioner's view, *holding* that the equalization clause did not create a nondeductible terminable interest within the meaning of section 2056(b)(1) of the Code, in that the assets passing to the marital trust qualified for the marital deduction under section 2056(b)(5). *Estate*

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person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

Id.

10. 66 T.C. at 421.

11. *Id.* at 427.

12. *Id.* at 421, *citing* I.R.C. § 2056(b)(1). Section 2056(b)(1) of the Code provides:

Where, on the lapse of time, on the occurrence of an event of contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust. For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

Id.

In construing the language of section 2056(b)(1) that "an interest passing to the surviving spouse *will* terminate or fail," *id.* (emphasis added), the courts, in accord with the legislative history of the deduction, have interpreted the term "will" as if it read "may." *See, e.g.*, Estate of Virginia L. Ray, 54 T.C. 1170 (1970). In other words, there is no requirement that the interest must terminate; it is sufficient that it is terminable. *See* S. REP. No. 1013, pt. 2, 80th Cong., 2d Sess. 7, 15–16, *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1229, 1237–38.

If the interest in the instant case could have terminated before the wife's death, then the marital trust would have also failed to satisfy section 2056(b)(5)'s requirement that the surviving spouse be entitled to all the income from the trust for life. For the text of section 2056(b)(5), *see* note 9 *supra.*

of Charles W. Smith, 66 T.C. 415 (1976), *appeal docketed,* No. ..... (7th Cir. Jan. 21, 1977).

The marital deduction was originally enacted in 1948[13] as part[14] of an effort to equalize the estate tax treatment of estates in community property and common law states.[15] This provision, as it existed for decedents dying before 1977, allowed the estate to deduct the value of the property passed to the surviving spouse,[16] up to a maximum of one-half of the value of the decedent's adjusted gross estate.[17] The availability of the deduction, however, is limited by the terminable interest rule, which provides as follows: if the interest received by the spouse could terminate with the lapse of time or upon the occurrence or nonoccurrence of some contingency and one of the four exceptions to the rule is not met,[18] it

13. *See* Revenue Act of 1948, ch. 168, § 361, 62 Stat. 117 (now I.R.C. § 2056).

14. *See also* I.R.C. §§ 1(a), 2523, 6013.

15. S. REP. No. 1013, pt. 1, 80th Cong., 2d Sess. 1, *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1163. In the common law states, the entire value of property owned by the decedent or owned jointly with the surviving spouse is included in full in the decedent's gross estate, except to the extent that part of the consideration for the jointly held property was provided by the surviving spouse. I.R.C. §§ 2033, 2040. However, in community property states, only one-half of the property acquired during the marriage is included in the decedent's gross estate. *See id.* § 2033. Equalization occurs through the operation of section 2056(c), which limits the deduction to one-half of the adjusted gross estate, a defined term that excludes all community property. *See id.* § 2056(c).

16. I.R.C. § 2056(a). The property must qualify for the marital deduction by not violating the requirements of the terminable interest rule of section 2056(b)(1) of the Code or by complying with the requirements of one of the exceptions to the terminable interest rule. For the exceptions to the terminable interest rule, *see* note 18 *infra.* For the text of section 2056(b)(1), *see* note 12 *supra.* Otherwise, property could be passed to the surviving spouse which would be taxed in neither the decedent's nor the surviving spouse's estate.

17. I.R.C. § 2056(c)(1) (1954). For decedents dying before 1977, a bequest of probate assets equal to less than 50% of the decedent's adjusted gross estate resulted in a partial loss of a tax deduction, assuming that no assets in the decedent's gross estate that were not in the probate estate and that had passed to the surviving spouse qualified for the marital deduction. A bequest of more than 50% could result in the excess being taxed both in the estate of the decedent and the estate of the surviving spouse. Thus, a formula clause designed to pinpoint the marital deduction at the 50% level is frequently included in a will or trust instrument. *See generally id.* § 2056; 39 TENN. L. REV. 89, 97 (1971). For the treatment of decedents dying after 1976. *see* I.R.C. § 2056(c)(1).

18. For the four exceptions to the terminable interest rule, *see* I.R.C. § 2056-(b)(1)(B), (3), (5), (6). If the terminable interest rule would apply solely because 1) the interest is conditioned upon the survival of the spouse for a period not exceeding six months or upon the survival of the spouse of a common disaster, or both, 2) the interest is an income interest for the surviving spouse's life payable no less frequently than annually, or 3) the interest is a right to income from life insurance or annuity payments, the marital deduction will be allowed so long as the spouse does in fact survive for six months or from the common disaster, or with respect to the latter two occurrences, as long as the spouse has a general power of appointment exercisable in favor of the surviving spouse or the surviving spouse's estate. Also the terminable interest rule will not apply if no other person has an interest in the property *subsequent* to that of the surviving spouse. *Id.; see id.* § 2041.

Cases which have interpreted section 2056(b) include: Estate of Cunha v. Commissioner, 279 F.2d 292 (9th Cir.), *cert. denied,* 364 U.S. 942 (1960); Quivey

will not qualify for the marital deduction.[19] The terminable interest rule and the four statutory exceptions to it have been the focus of much of the judicial interpretation of the marital deduction, as exemplified by the lengthy controversy over the deductibility of widow's support allowances.[20]

Widow's support allowances[21] provided the occasion for the major Supreme Court case interpreting section 2056. The Supreme Court in *Jackson v. United States*[22] held that a California widow's statutory right to support did not qualify for the marital deduction[23] since qualification for the marital deduction must be determined as of the decedent's death,[24] and a surviving spouse in California "did not have an indefeasible interest"[25] as of that date. Under California law, a surviving spouse is entitled to support for two years following the death of the decedent unless the spouse dies or remarries prior to an order for relief, in which case all rights to support (accrued or otherwise) cease; if death or remarriage occurs after the court order, the spouse's right to all nonaccrued payments ceases.[26] That the spouse did not die or remarry within the two year period was considered irrelevant by the Court,[27] as was the fact that the monies paid to the spouse would be taxed again in her estate, if not consumed. The Supreme Court stated: "[T]he determinative factor is not taxability to the surviving spouse but terminability as defined by the statute."[28] The

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v. United States, 176 F. Supp. 433 (D. Neb. 1959), *rev'd*, 292 F.2d 252 (8th Cir. 1961); Estate of Margaret R. Gale, 35 T.C. 215 (1960).

19. I.R.C. § 2056(b)(1); Treas. Reg. § 20.2056(b)-1(b) (1958). For the text of section 2056(b)(1), *see* note 12 *supra*.

20. *See* note 28 *infra*.

21. A support allowance is a state statutory right of the surviving spouse to support payments from the decedent's estate while the estate is being administered. *See, e.g.*, GA. CODE ANN. § 113-1002 (1975).

22. 376 U.S. 503 (1964).

23. *Id.* at 507.

24. *Id.* The Court commented that "judging deductibility as of the date of the Probate Court's order ignores the Senate Committee's admonition that in considering terminability of an interest for purposes of a marital deduction 'the situation is viewed as at the date of the decedent's death.'" *Id.* at 508, *quoting* S. REP. No. 1013, pt. 2, 80th Cong., 2d Sess. 10, *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1232. *See also* Jackson v. United States, 376 U.S. 503, 510 & n.10. For other types of interests in which date of death is considered the proper time for a determination of value, *see id.* at 508 n.6.

25. 376 U.S. at 507.

26. *Id.* at 507–08; *see* CAL. PROB. CODE § 680 (West 1956).

27. 376 U.S. at 507. The Supreme Court emphasized that the situation must be viewed as of the date of the decedent's death and not as of the probate court's order:

> [I]t is difficult to accept an approach which would allow a deduction of $42,000 on the facts of this case, a deduction of $72,000 if the order had been entered at the end of two years from Mr. Richard's death and none at all if the order had been entered immediately upon his death.

Id. at 507–08.

28. *Id.* at 510. *See also* S. REP. No. 1013, pt. 2, 80th Cong., 2d Sess. 10, 11, 15, *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1232–33, 1237.

The Supreme Court in *Jackson* did not decide whether the fact that a support allowance required the obtaining of a court order would alone make any such allowance a terminable interest. Prior to the *Jackson* decision, lower courts had wrestled extensively with the issue. The Commissioner contended in every case that support

reasoning of *Jackson* has not been overturned by subsequent cases,[29] and in fact, was utilized by the *Smith* court in reaching its decision.

Prior to *Smith,* no court had been presented with the exact issue[30] of whether a formula clause bequest to a surviving spouse is a terminable interest if the value of the bequest is dependent upon the hypothetical value of the spouse's adjusted gross estate, a factor which is extrinsic to the decedent's estate and not determinable as of the date of the dece-

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awards were nondeductible interests if they had to be enforced by court orders or would fail upon the death or remarriage of the surviving spouse. Some courts found such awards to be deductible on the ground that a support allowance could be paid only to the surviving spouse; thus, no interest could pass to someone else as required by section 2056(b)(1)(A) in order for the terminable interest to become nondeductible. *See, e.g.,* Quivey v. United States, 176 F. Supp. 433 (D. Neb. 1959), *rev'd,* 292 F.2d 252 (8th Cir. 1961). Other courts held that since the right to support vested as of the date of the decedent's death, the allowance qualified for the marital deduction even though the surviving spouse had to petition the appropriate probate court in order to receive it. *See* United States v. First Nat'l Bank & Trust Co., 297 F.2d 312 (5th Cir. 1962); Estate of Michael G. Rudnick, 36 T.C. 1021 (1961); Estate of Margaret R. Gale, 35 T.C. 215 (1960); Estate of Proctor D. Rensenhouse, 31 T.C. 818 (1959). Still other courts supported the Commissioner, taking the view that even if the right to support vested under the applicable state law, it would not qualify for the marital deduction, since failure to apply to the probate court would divest the surviving spouse of the right to support. *See* Quivey v. United States, 292 F.2d 252 (8th Cir. 1961); Estate of Cunha v. Commissioner, 279 F.2d 292 (9th Cir.), *cert. denied,* 364 U.S. 942 (1960).

29. *See, e.g.,* United States v. Edmondson, 331 F.2d 676 (5th Cir. 1964) (per curiam); Wachovia Bank & Trust Co. v. United States, 234 F. Supp. 897 (M.D.N.C. 1964); Estate of Ludwig Neugass, 65 T.C. 188 (1975).

30. The court's statement that *Smith* was the first time that the Commissioner had challenged a formula clause, 66 T.C. at 425 & n.16, was inaccurate. *See* REV. PROC. 64–19, 1964–1 C.B. 682. But *Smith* may well be the first case in which a fractional formula bequest was challenged.

In the past there have generally been two types of formula bequests designed to insure that the amount passed to the surviving spouse equaled the amount of the maximum marital deduction. *See* Friedman & Wheeler, *Marital Deduction Formula Clauses,* 106 EST. & TR. 799 (1967). The first involved a pecuniary bequest of one-half of the adjusted gross estate *as valued for estate tax purposes.* In other words, the surviving spouse would be vested with a right to a sum certain. A hybrid of this type of bequest, subsequently disallowed except in two limited situations, directed the executor to distribute the assets in kind or in cash and to choose the assets to be distributed. This type of formula bequest allowed a bit of post mortem planning because certain assets would depreciate or appreciate within the alternate valuation period. Although the estate tax values controlled the amounts to be distributed, by accepting depreciated assets, a surviving spouse could make a tax-free transfer to the other beneficiaries without reducing the decedent's estate tax marital deduction. A later revenue procedure disallowed this hybrid formula by requiring that the power of the executor be strictly limited to one of two alternatives: either the date-of-distribution values of the assets passed to the surviving spouse must equal the marital deduction, or the spouse must share pro rata in any value changes. REV. PROC. 64–19, 1964–1 C.B. 682.

The second type of formula was a fractional bequest, by which the decedent devised to his surviving spouse a specified fraction of all the assets as valued at *the time of distribution.* This type was specifically exempted from Revenue Procedure 64–19 by section 4 thereof. *See id.* § 4.

For a detailed discussion of formula clauses, *see* R. COVEY, THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS (1966); Friedman & Wheeler,

dent's death.[31] The *Smith* court disagreed with the Commissioner's view that since the actual amount to be transferred to the marital trust could be based upon events occurring after the decedent's death, the interest was a nondeductible terminable interest.[32] Rather, the court observed that the actual value of Mrs. Smith's interest was immaterial since the interest would be determined upon the basis of a fixed formula mandated by the trust instrument.[33] In the court's view, Mrs. Smith had an indefeasibly vested interest in whatever transfer of assets the formula produced.[34] If the formula resulted in no allocation to the marital trust, Mrs. Smith's interest would be valued at zero,[35] but such valuation would not mean that her interest was terminable.[36] Since the trustee had no discretion as to the choice of valuation dates,[37] and since no "subsequent events which could occur . . . would change the basic ingredients of the formula,"[38] the court concluded that the surviving spouse had an interest in the decedent's estate as of the date of death, and that the interest qualified for the marital deduction under the principles implicit in *Jackson*.[39] In reasoning to this conclusion, the *Smith* court stressed that the surviving spouse's interest would not escape taxation in the subsequent estate because of the general power of appointment that accompanied the life estate,[40] and that *Northeastern Pennsylvania National Bank & Trust Co.*

supra; Polasky, *Marital Deduction Formula Clauses in Estate Planning — Estate and Income Tax Considerations,* 63 MICH. L. REV. 809 (1965); 39 TENN. L. REV. 89 (1971).

The equalization clause in *Smith* is probably best termed a fractional bequest. *See* notes 5 & 6 *supra.* However, it is distinguishable from the normal fractional bequest in that it relied upon an element not within the decedent's estate and not determinable as of the date of the decedent's death: the value of the surviving spouse's hypothetical estate.

31. *See* note 6 *supra.* No problem would have existed in this case if the valuation of the wife's estate could have been determined only on the day of the decedent's death. In that situation, the outside factor, except for what passed from the husband to the wife on the husband's death, would have been determinable as of decedent's death as required by *Jackson.* For a discussion of *Jackson, see* notes 22–29 and accompanying text *supra.* That the decedent's estate could utilize the alternate valuation date for valuation purposes is unimportant since section 2032 of the Code specifically authorizes this practice. *See* I.R.C. § 2032. The Commissioner apparently has conceded that the variables created by sections 642(g) and 213(d) of the code raise no problems with the *Smith* equalization formula. R. COVEY, *supra* note 30, at 70 & n.145e (1976 Supp.).

32. 66 T.C. at 427–28.

33. *Id.* at 430.

34. *Id.*

35. *Id.* at 429.

36. *Id.* In support of this view, the court cited Treasury Regulation section 20.2056(b)–4, which implicitly provides "that the use of the alternate valuation date might affect the amount of the marital deduction." *Id.* at 428, *citing* Treas. Reg. § 20.2056(b)–4 (1958). It also relied upon *Jackson* for the premise that a terminable interest existed if the surviving spouse did not have an interest in the estate on the date of the decedent's death. 66 T.C. at 428–29, *citing* Jackson v. United States, 376 U.S. 503 (1964).

37. 66 T.C. at 428.

38. *Id.* at 430.

39. *Id.* at 429–30. For a discussion of *Jackson, see* notes 22–29 and accompanying text *supra.*

40. 66 T.C. at 429.

v. United States,[41] the most recent Supreme Court case on the marital deduction, had described the marital deduction as encompassing a liberal estate-splitting policy.[42]

The court defined an interest indefeasibly vested as of the date of the decedent's death as nonterminable.[43] In support of this, *Jackson* was properly cited. However, the dissent maintained that the court erred in defining the interest received by Mrs. Smith as one which was indefeasibly vested.[44] Although her interest had vested upon the date of the decedent's death, it had the potential of becoming an interest in nothing since nothing would have been transferred to the marital trust if, upon the chosen valuation date, the wife's hypothetical adjusted gross estate equaled or exceeded that of the decedent.[45] Hers was not a vested interest in, for example, stock certificates which, although received, might have had a market value of zero. Rather, her interest in the decedent's estate was such that, potentially, no transfer at all would be made to her under the formula.[46] The dissent observed that an interest in nothing is no interest at all, and a right although vested can still be defeasible.[47]

In its initial consideration of *Jackson,*[48] and by its lack of discussion as to why it found Mrs. Smith's vested interest to be indefeasible, the *Smith* court seemingly implied that the *Jackson* test[49] is satisfied once it is determined that there is a vested interest in the decedent's probate estate. In order to satisfy the terminable interest rule, however, not only must the interest be vested as of the date of the decedent's death, it must

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41. 387 U.S. 213 (1967) (holding that the grant of the right to a specific dollar amount of trust income qualified for the marital deduction under section 2056(b)(5) despite Treasury Regulation section 20.56(b)-5(c)); *see* notes 56–58 and accompanying text *infra.*

42. 66 T.C. at 430.

43. *Id.* at 428.

44. *See id.* at 433–34 (Irwin, J., dissenting).

45. *Id.* at 433 (Irwin, J., dissenting).

46. *Id.* at 434 (Irwin, J., dissenting); *cf.* Treas. Reg. § 20.2031-1(b), T.D. 6826, 1965-2 C.B. 367 (describing how an interest is to be valued).

47. 66 T.C. at 433 & n.2 (Irwin, J., dissenting).

The *Smith* opinion was internally inconsistent with respect to defining the percentage interests. It stated that if an interest "was contingent or conditioned on unknown factors or events, that interest would have to be categorized as terminable." *Id.* at 432. In support thereof the court stated that the surviving spouse "was indefeasibly vested in an *undefined* percentage interest in each and every asset remaining in the trust corpus after all nondeductible property interests were allocated to the residual portion." *Id.* (emphasis added). It is unclear how an interest which is to be defined at some future time can be indefeasibly vested before it is so defined.

If the bequest to Mrs. Smith had been an outright gift rather than in trust, then the variableness of her percentage interest would make it a nondeductible terminable interest. *See* R. COVEY, *supra* note 30, at 108 (1976 Supp.). The fact that Mrs. Smith was given a fixed interest in a trust which had a variable interest should not make the bequest a deductible terminable interest. To hold otherwise would violate the substance over form tenet of the Code. *See generally* Treas. Reg. § 20.2056(b)-1(f).

48. 66 T.C. at 428.

49. *See* text accompanying note 28 *supra.*

be *indefeasibly* vested as of that date.[50] In failing to recognize this additional element, the *Smith* court did not adhere to the distinction which is set forth in the Senate Report accompanying the enactment of the marital deduction:

> Subparagraph [(b)(1) of section 2056] is intended to be all encompassing with respect to various kinds of contingencies and conditions. Thus, it is immaterial whether the interest passing to the surviving spouse is considered as a vested interest subject to divestment or as a contingent interest. Subparagraph [(b)(1)] applies whether the terms of the instrument or the theory of their application are conceived as creating a future interest which may fail to ripen or vest or as creating a present interest which may terminate. . . .[51]

The court also overlooked the fact that, the marital deduction, being a matter of statutory grace, should have been strictly construed.[52] Construing the marital deduction strictly would have required construing liberally the terminable interest rule[53] since that rule is a limitation upon the allowance of the marital deduction. Therefore, the terminable interest rule should have been interpreted as encompassing any type of contingency.[54] The possibility that an interest in nothing would have passed to the surviving spouse because of the incorporation of the value of her estate into the mechanics of the formula bequest should have made the formula clause a contingency.[55] This conclusion is not altered by the *Smith* court's attempt to buttress its holding by quoting *Northeastern*[56] as follows:

> [The congressional intent was] "to afford a liberal 'estate-splitting' possibility to married couples, where the deductible half of the decedent's estate would ultimately — if not consumed — be taxable in the estate of the survivor * * *. Plainly such a provision should not be construed so as to impose unwarranted restrictions upon the availability of the deduction. * * *"[57]

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50. *See* note 12 *supra.*

51. S. REP. No. 1013, pt. 2, 80th Cong., 2d Sess. 7, *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1229.

52. Estate of Wycoff v. Commissioner, 506 F.2d 1144, 1149 (10th Cir. 1974), *cert. denied,* 421 U.S. 1000 (1975), *citing* Commissioner v. Estate of Bosch, 387 U.S. 456 (1967); *see* McGehee v. Commissioner, 260 F.2d 818 (5th Cir. 1958); Estate of Pipe v. Commissioner, 241 F.2d 210 (2d Cir.), *cert. denied,* 355 U.S. 814 (1957); Stewart v. Usury, 273 F. Supp. 302 (E.D. La. 1967), *aff'd,* 399 F.2d 50 (5th Cir. 1968).

53. I.R.C. § 2056(b)(1); *see* note 12 *supra.*

54. *See* text accompanying note 51 *supra.*

55. However, if the surviving spouse's estate could be valued only on the date of the decedent's death, the contingency would cease on that date and the *Jackson* test would be satisfied. *See* note 31 *supra.* The Commissioner, at least in *Smith,* has admitted that a formula involving only the value of the *decedent's* estate would not violate the terminable interest rule regardless of whether its value is determined at the date of death or within the alternate valuation period authorized in section 2032 of the Code. *See* 66 T.C. at 431, 435.

56. 387 U.S. 213 (1967).

57. 66 T.C. at 430, *quoting* Northeastern Pennsylvania Nat'l Bank & Trust Co. v. United States, 387 U.S. 213, 221 (1967).

It is submitted that *Northeastern* is not applicable to the *Smith* situation. Rather than interpreting the terminable interest rule, *Northeastern* dealt with an element not at issue in the instant case — the "specific portion" requirement of section 2056(b)(5) of the Code.[58]

Further, pragmatic difficulties attend the instant decision. First, no guidance is provided with regard to the scope of the court's holding and rationale. If the deduction is not disallowed here, courts in the future may rely upon *Smith* in permitting other factors[59] from outside of the decedent's estate that are valued within the alternate valuation period to be utilized within an equalization formula clause bequest.

Moreover, a second problem could arise if the degree of control exercised by the surviving spouse over the outside factors was such that a marital deduction might be artificially created. In the instant case the wife had no control over the assets in her own estate during the alternate valuation period because of the assumption that she died the same day as her husband.[60] Thus, her estate was limited to the assets she possessed on the assumed date of death or those which would have been picked up under the inclusion sections of the Code;[61] therefore, any disposition of the assets by her during the alternate valuation period would have fixed their value for purposes of valuing her estate on the alternate date.[62] On the other hand, one could conceive of a clause wherein an assumption as to when the surviving spouse died is made conditional upon which valuation date is chosen — for example, a clause which assumes that the wife died on the decedent's date of death if the date of death values were chosen, but that she died six months after the decedent if the alter-

58. *See* Northeastern Pennsylvania Nat'l Bank & Trust Co. v. United States, 387 U.S. 213 (1967). *Northeastern* held that a bequest in trust providing for a monthly stipened of a fixed dollar amount to be paid to the surviving spouse for life with a power of appointment by will over the entire corpus met the "specific portion" requirements of section 2056(b)(5) of the Code despite the contrary position taken by the regulations to that section. 387 U.S. at 218; *see* Treas. Reg. § 20.2056(b)-5(b), (c) (1958). The *Northeastern* Court followed Gelb v. Commissioner, 298 F.2d 544 (2d Cir. 1962), in stating that the determinative issue is whether the amount passing to the surviving spouse could be computed as a specific sum. 387 U.S. at 224. The Court calculated the deduction on the basis of the principal sum necessary to produce the fixed monthly payments rather than calculating it as an actuarial present discounted value as the Second Circuit had done in *Gelb*. *Id.* at 224-25.

59. Aside from statistically projected economic variables, one could, for example, use the values of the estates of the other beneficiaries.

60. *See* note 5 *supra*. The court in *Smith* did not deal with the question of the control of the outside factor which could be achieved by assumptions regarding the composition of the surviving spouse's hypothetical estate which are different from those used in *Smith*. Therefore, it is unlikely that the absence of such control formed a basis for the court's holding. However, it is probably reasonable to assume that *Smith* would not be followed if the trustee were given discretion to choose the valuation dates.

61. *See* I.R.C. §§ 2031-44.

62. It was mandated that the wife's estate be valued in the same manner, as well as on the same "date," as the decedent's estate. 66 T.C. at 418. Since the section 2032 alternate valuation period is not a fixed date per se, it is probable that the drafters of decedent's trust instrument intended to provide that which is set out in note 63 *infra*.

nate valuation period controlled for the decedent's valuation purposes.[63] By riotous living and gambling during the alternate valuation period,[64] the survivor could diminish her estate. A smaller value for the survivor's estate would result in a greater bequest under the mandates of an equalization clause, allowing a greater marital deduction. Such artificial manipulation might be a consideration for future courts even though the effect would be merely to increase artificially the deduction and to postpone the payment of taxes.[65] The hypothesized situation would not violate the *sine qua non* of estate tax, namely, that which is not taxed now must be taxed later unless consumed in the interim.[66]

Judicial interpretation of section 2056(b) of the Code has increased in importance under the Tax Reform Act of 1976[67] because with the new

63. It is assumed here that the two estates would both be valued as of decedent's date of death or within the decedent's alternate valuation period. This is the same assumption as was used in *Smith*. *See* note 5 *supra*.

64. The gambling odds, be it at the roulette wheel or in the stock market, would be increased in favor of the surviving spouse since, for each two dollars lost, one would be recovered from the decedent's estate under the mandates of an equalization clause. If stock were purchased and it decreased in value not only would the marital deduction be increaesd because of the lower value for the surviving spouse's estate, but the spouse could also sell the depressed stock after the alternate valuation date and realize a capital loss. *See* I.R.C. § 165(f). For a surviving spouse with a marginal income tax bracket in excess of 50% and net capital gains, this situation would be beneficial. If the stock increased in value, or if the gambling bets paid off, the executor would have to elect the date of death values in order to avoid the increase in the value of the surviving spouse's estate and the resulting increase in the estate taxes payable on both estates. This result could still be accomplished even if the trustee had no discretion in the choice of valuation dates as seemingly is required by *Smith*. *See* 66 T.C. at 428.

Treasury Regulation section 20.2032-1(c)(1) states that the investment of money is a disposition fixing the value of the funds expended so that any change in value of the assets purchased does not affect the alternate valuation. Treas. Reg. § 20.2032-1(c)(1), T.D. 7238, 1973-1 C.B. 544. Arguably, this principle would not be applicable to the surviving spouse's estate because of the assumption that the spouse died six months after the decedent. Thus, that date would not be the assumed alternate valuation date for the survivor's estate. *See id. But see* Treas. Reg. § 20.2032-1(c)(3), T.D. 7238, 1973-1 C.B. 544. It seems that under the language of the *Smith* opinion such assumptions could be made, provided no discretion was vested in the trustee as to the choice of valuation dates. *See* 66 T.C. at 428.

65. Increasing the amount of the marital deduction above some minimum level theoretically does not violate the terminable interest rule so long as that minimum level is ascertainable as of the decedent's death. *See* REV. PROC. 64-19, 1964-1 C.B. 682; R. COVEY, *supra* note 30, at 70 & n.145f (1976 Supp.). There is, however, some question as to whether the minimum marital deduction is ascertainable as of the decedent's date of death for either the hypothesized or the *Smith* situation. *See id.* at 105.

66. *See generally* D. KAHN, E. COLSON & G. CRAVEN, FEDERAL TAXATION OF ESTATES, GIFTS, AND TRUSTS 133 (1st ed. 1970). Because the *sine qua non* is not violated, the hypothesized situation is not like the Revenue Procedure 64-19 type of post mortem planning. *See* note 30 *supra*.

It should be remembered that in stating that taxability in the surviving spouse's estate does not control the determination of whether an interest is terminable, the Supreme Court in *Jackson* was referring to a contingent interest becoming indefeasible, and thus taxable in the survivor's estate. *See* text accompanying note 28 *supra*. The Court did not refer to an avoidance of tax altogether. In other words, it is acceptable to tax an interest twice, but never to allow an interest to escape taxation.

67. Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 101-2141, 90 Stat. 1520.

provisions it is more likely that estate planners will want to utilize the type of formula employed in *Smith*. The maximum allowable marital deduction has been increased for those adjusted gross estates valued at less than $500,000,[68] and the new uniform credit in lieu of the $60,000 exemption[69] has made it less expensive to both the decedent's and the surviving spouse's estates for the decedent's estate not to utilize the maximum marital deduction.[70] It seems clear that the interpretation of the section will still be governed by the standard enunciated by the Supreme Court in *Jackson*.[71] However, as the discussion of *Smith* illustrates, application of the standard is far from simple. Until more guidance is forthcoming, estate planners would be wise to make no attempt to expand the holding in *Smith* but, rather, to treat the case as limited to its facts.

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68. *Id.* § 2002(a). Under the amendments, the maximum marital deduction is one-half of the adjusted gross estate or $250,000, whichever is greater. *Id.*

69. *Id.* § 2001(a).

70. In an effort to obtain the best of both; 1) less taxes, and 2) more financial security for the surviving spouse, perhaps the best clause would be a *Smith* clause coupled with a proviso that at least that sum required to give the tax liability (to the survivor's estate) which is equal to the applicable credit shall pass to the surviving spouse. This proviso would simply give the survivor more money without increasing the total estate taxes on both estates. To the extent that the surviving spouse requires more than this, the additional amount could be placed in a trust which does not meet the requirements of the section 2056(b)(5) exception to the terminable interest rule.

71. *See* text accompanying note 28 *supra*.