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Case Comments

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CASE COMMENTS

TORTS — MINNESOTA DRAMSHOP ACT — A SOCIAL HOST WHO ILLEGALLY FURNISHES INTOXICATING LIQUOR IS LIABLE FOR INJURY TO A THIRD PERSON RESULTING FROM THE INTOXICATION OF THE GUEST.—Appellant Delmar Ross and Joel Owen Johnson purchased liquor for Ross' 19-year-old brother, Rodney Alan Ross. Rodney became intoxicated and was killed when the auto he was driving left the road. In consolidated actions brought on behalf of his infant son and by the decedent's parents the jury awarded judgments totaling $5,706.84, finding Ross and Johnson liable under the Minnesota Dramshop Act.[1] The trial court denied the defendants' motion for judgment notwithstanding the verdict. Defendant Ross appealed from the judgment in each action, but the Supreme Court of Minnesota affirmed and *held*: A social host who illegally furnishes intoxicating liquor is liable for injury to a third person resulting from the intoxication of the guest.[2] Ross v. Ross, —— Minn. ——, 200 N.W.2d 149 (1972). The court went on to acknowledge the broad implications of its holding:

> While the act applies to those invited to wedding receptions and company picnics as well as other gatherings where supervision may be onerous, no reason occurs to us why those who furnish liquor to others, even on social occasions, should not be responsible for protecting innocent third persons from the potential damages of indiscriminately furnishing such hospitality.[3]

While there are decisions to the contrary,[4] the general rule at common law was that there was no cause of action in favor of one injured by an intoxicated person against the furnisher of the intoxicating liquor.[5] In 1889 the Supreme Court of Illinois stated in dictum, without citation to authority, that it was not a tort to sell or give intoxicating liquor to a strong and able-bodied man.[6] This statement has since been extended by many courts to mean that a liquor vendor is not responsible to third parties for an inebriated customer's conduct. These courts usually hold that the proximate cause of the injuries is the consumption of the liquor, not the sale.[7] In Minnesota, the common law rule that there was no

1 MINN. STAT. ANN. § 340.95 (1972) provides:
> Every husband, wife, child, parent, guardian, employer, or other person who is injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person, has a right of action, in his own name, against any person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person, for all damages, sustained; and all damages recovered by a minor under this section shall be paid either to such minor or to his parent, guardian, or next friend, as the court directs; and all suits for damages under this section shall be by civil action in any court of this state having jurisdiction thereof.

2 Ross v. Ross, —— Minn. ——, 200 N.W.2d 149, 150 (1972).

3 *Id.* at ——, 200 N.W.2d at 153.

4 Waynick v. Chicago's Last Dept. Store, 269 F.2d 322 (7th Cir. 1959); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Jardine v. Upper Darby Lodge No. 1973, 413 Pa. 626, 198 A.2d 550 (1964). *Contra, e.g.*, Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Hull v. Rund, 150 Colo. 425, 374 P.2d 351 (1962); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969).

5 45 AM. JUR.2d *Intoxicating Liquor* § 553 (1969).

6 Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889).

7 *See* Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Hull v. Rund, 150 Colo. 425, 374 P.2d 351 (1962), Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Meade

cause of action against the furnisher of intoxicating liquor first appeared in 1955 in *Beck v. Groe.*[8]

Even though an injured third party had no common law cause of action, a number of states enacted legislation which created a statutory cause of action imposing civil liability. These statutes are variously called civil damages acts or dramshop acts. The first such statute appeared in Maine in 1851[9] and at various times some 37 states have had civil damages acts[10] with 10 states at the present time retaining broad form acts[11] (acts which create a cause of action for injury to persons, property, or means of support). While the legislatures have created a cause of action against any furnisher of the intoxicating liquor, the statutes have almost uniformly been applied only to those who sell intoxicating liquors.[12]

> Although dramshop or civil damage acts usually provide for the recovery of damages from "any person" giving or selling intoxicating liquor, the general rule appears to be well established that such statutes were not intended to and do not create a right of action against one who gives another the beverage as a mere act of hospitality or social courtesy and without pecuniary gain, but instead provide a right of action only against those in the business of selling liquor.[13]

In Minnesota the supreme court has held that the operator of a liquor establishment, whether a corporation, a municipality, or a nonprofit organization, may be made the original defendant under the dramshop act because such parties are involved in the liquor business.[14] In *Dahlin v. Kron,*[15] however, it was implied that one not engaged in the liquor business might be liable under the civil damages act. There the court did not find the defendant immune as a social host, but rather found that the party causing the injury was not in fact intoxicated. Thus the question of a social host's liability under the dramshop act remained unanswered in Minnesota until *Ross.* In deciding *Ross* the court's only inquiry was into the 1911 legislature's purpose in enacting the dramshop act. It con-

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v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Lee v. Peerless Ins. Co., 248 La. 982, 183 So.2d 328 (1966); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Garcia v. Hargrove, 46 Wis.2d 724, 176 N.W.2d 566 (1970).

8 245 Minn. 28, 70 N.W.2d 886 (1955).

9 Note, *Liability Under the Minnesota Civil Damage Act,* 46 MINN. L. REV. 169, 170 (1961).

10 Hollerud v. Malamis, 20 Mich. App. 748, 755, 174 N.W.2d 626, 630 (1969).

11 ALA. CODE tit. 7, § 121 (1960); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1972); IOWA CODE ANN., ch. 123, § 123.92 (Supp. 1972). ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. COMP. LAWS § 436.22 (1967); MINN. STAT. ANN. § 340.95 (1972); N.Y. GEN. OBLIGATIONS LAW § 11-101 (McKinney 1964); N.D. CENT. CODE § 5-01-21 (1959); OKLA. STAT. ANN. tit. 37, § 121 (1953); VT. STAT. ANN. tit. 7, § 501 (1958). *See also* McGough, *Dramshop Acts,* A.B.A., SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW, 1966-67 PROCEEDINGS.

12 *Contra,* Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972).

13 Annot., 8 A.L.R.3d 1412, 1413 (1966).

14 See Randall v. Village of Excelsior, 258 Minn. 81, 103 N.W.2d 131 (1960) (municipality); Hartwig v. The Loyal Order of Moose, 253 Minn. 347, 91 N.W. 2d 794 (1958) (nonprofit organization); Adamson v. Dougherty, 248 Minn. 535, 81 N.W.2d 110 (1957) (liquor establishments); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957) (corporation).

15 232 Minn. 312, 45 N.W.2d 833 (1950).

cluded that the purpose of the act was to impose civil liability on every violator, whether or not he was in the liquor business.[16]

The dramshop act creates a cause of action in favor of an injured third party against "any person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person" causing the injury.[17] The court focused its attention on the words "any person" and had very little difficulty in finding what it believed to be the intent of the 1911 legislature.

The use of the words "any person" and the words "selling, bartering, or giving" appear throughout both past and present Minnesota statutes regulating the commercial vendor of intoxicating liquor.[18] It would seem therefore that the use of the same words in the civil damages act was meant to impose liability only on the commercial vendor of intoxicating liquor.

When faced with the problem of interpreting the words "give," "giving away," and "giving" in *Harris v. Hardesty*[19] the Supreme Court of Kansas reached the following conclusion:

> In numerous sections of the prohibitory law other than the civil damages section, giving intoxicating liquors was coupled with selling and bartering, and in due time it became necessary to reach a conclusion respecting the meaning of the words give, giving away, giving, and gift. The conclusion was that [these words were] inserted in the law to circumvent the ingenuity of those who might seek to effect sales without transgressing the letter of the law.
>
> The result is that under provisions of . . . the civil damages section, the giving of intoxicating liquor means giving as a subterfuge for sale.[20]

If this interpretation of the word "give" is correct when applied to the use of similar words in the historical development of the Minnesota statutes, then it is

16 200 N.W.2d at 150.

17 MINN. STAT. ANN. § 340.95 (1972).

18 The words *any person* and *sell, give, barter,* have been used in Minnesota statutes regulating commercial vendors of intoxicating liquor. The Law of March 3, 1887, ch. 6, § 1 [1887] Minn. Laws 41-42 provided that "*any person*" applying "for a license to sell intoxicating liquors" file a bond before the license would be issued, and further provided that such person could "not *sell, barter, give away* or otherwise furnish or dispose of such liquors" to certain persons. (Emphasis added.)

The Law of April 18, 1905, ch. 246, § 1 [1905] Minn. Laws 379-80 amended the 1887 statute. In addition to providing that "*any person*" applying for a license must file a bond, and providing that the license could not "*sell, barter, give away* or otherwise furnish or dispose" of liquor to certain classes, the Act provided that the licensee would be liable for damages or injuries caused as a result of any violation of these conditions. The liability language of this 1905 statute was not included in the Revised Laws of Minnesota for 1905.

The Law of April 5, 1911, ch. 83, § 1534 [1911] Minn. Laws 102 (now MINN. STAT. ANN. § 340.73 (1972)) provided that it "shall be unlawful for *any person* . . . to *sell, give, barter,* furnish or dispose of in any manner, either directly or indirectly" liquors to certain classes of persons. The year 1911 is particularly important because it was the year that the Minnesota Civil Damage Act was enacted. The civil damages act, Law of April 18, 1911, ch. 175 [1911] Minn. Laws 221 (now MINN. STAT. ANN. § 340.95 (1972)), provided that specified individuals would have a right of action "against *any person,* who by illegally *selling, bartering,* or *giving* intoxicating liquors, have caused the intoxication of [the] person" causing the injury or damage.

The repeated use of the terms *any person* and *sell, give, barter* in statutes licensing and regulating vendors of intoxicating liquor indicate that the civil damages act, which contains the same terms, should be applied only against those who are in the liquor business.

19 111 Kan. 291, 207 P. 188 (1922).

20 *Id.* at 295-96, 207 P. at 190.

clear the civil damages act should be applied only to those engaged in the liquor business and should not be extended to the social host.

In *Heveron v. Village of Belgrade*[21] the Supreme Court of Minnesota searched for legislative intent with respect to complicity by the injured third party as a possible defense in an action under the dramshop act. The court stated that because the legislative intent was not clear it would necessarily have to look to other states' decisions and policies relevant to the issue.[22] If a similar procedure had been used in *Ross* in searching for legislative intent, the court might have reached the conclusion that a social host is not liable under the Minnesota Dramshop Act. While the court recognized decisions in Illinois and Michigan which have directly dealt with this question, those decisions were given little consideration in the court's attempt to discover the legislative intent of the dramshop act.

The court of appeals of Illinois and the court of appeals of Michigan have both dealt directly with the liability of a social host under a dramshop or civil damages act. In *Miller v. Owens-Illinois Glass Co.*,[23] the plaintiff brought an action under the Illinois dramshop act against an employees' association and the employer for injuries received in an auto collision caused by an intoxicated employee who had left an association picnic. The defendants moved for summary judgment and the trial court granted the motion. Plaintiff appealed and the court of appeals of Illinois affirmed, noting that while the dramshop act was to be liberally construed to protect the health, safety and welfare of the citizens of Illinois, the court did not believe it was the intent of the legislature to make social drinking and the giving of intoxicating liquor to another such conduct as to make the social host liable under the act:

> In the opinion of this court, the Dram Shop Act was intended to regulate the business of selling, distributing, manufacturing and wholesaling alcoholic liquors for profit. In other words, it was to regulate those in the business, not the social drinker or the social drinking of a group.[24]

It is important to note here that, like the Minnesota statute, the Illinois statute contains the words "any person" and "giving."[25]

The court of appeals of Michigan, interpreting a civil damages act[26] very similar to the Minnesota statute, has also refused to impose statutory civil liability on the social host. In *LeGault v. Klebba* that court concluded that

21 288 Minn. 395, 181 N.W.2d 692 (1970).
22 *Id.* at 397, 181 N.W.2d at 693.
23 48 Ill. App.2d 412, 199 N.E.2d 300 (1964).
24 *Id.* at 423, 199 N.E.2d at 306.
25 ILL. ANN. STAT. ch. 43, § 135 (1972) provides in part:
Every person, who is injured in person or property by any intoxicated person, has a right of action in his own name, severally or jointly, against *any person* who by *selling or giving* alcoholic liquor, causes the intoxication of such person. (Emphasis added.)
26 MICH. COMP. LAWS § 436.22 (1967) provides a right of action in favor of:
Every wife, husband, child, parent, guardian or other persons who shall be injured in person or property, means of support or otherwise, by an intoxicated person by reason of the unlawful selling, giving or furnishing to any such persons any intoxicating liquor, shall have a right of action in his or her name against the person who shall by such selling or giving of any such liquor have caused or contributed to the intoxication of said person or persons or who shall have caused or contributed to any such injury.

". . . it is not the law that private individuals are liable for the actions of their social guests who over-indulge in liquid hospitality provided at private homes or parties."[27]

The Minnesota Supreme Court has stated that liability under the dramshop act is imposed without regard to fault.[28] Under *Ross,* this standard of strict liability has now been applied to the social host. This holding not only conflicts with rulings in other jurisdictions but it ignores the underlying policy of the dramshop acts. Justification for the imposition of a strict liability standard in the case of vendors is based "on the theory that such business or activity can best bear the loss occasioned by a violation of law regulating the business or activity, even though the violation was unintentional or did not involve any deviation from the standard of due care."[29] The court has also found that the purposes of the dramshop act are to protect the public, to penalize the licensed operator for an illegal sale, and to compensate for injury.[30] None of the policies underlying the act warrant the imposition of strict liability on the unwary social host. Under the *Ross* holding, however, a social host may be strictly liable for any damages caused by a minor or an intoxicated person to whom he has furnished intoxicating liquor. This places upon a social host the burdensome if not impossible task of policing his guests to make sure that no minor or intoxicated person is served an alcoholic drink. Certainly there are circumstances where the social host, though not negligent, will be unable to identify a minor or an individual who has reached the point of intoxication. The social host should not be held strictly liable for damages caused by a minor or an intoxicated person when, without deviating from any standard of due care, he has allowed that individual to obtain intoxicating liquor. If this liability without fault standard is applied to the social host, the question of the injured third party's contributory negligence is immaterial.[31] Should a social host who has exercised due care be liable for injuries to a third party who could have prevented the injuries by the exercise of due care on his own part? While it is not reasonable and is far from equitable, this is the standard to be imposed on the social host in Minnesota as a result of the *Ross* decision.

Instead of imposing such a burden on the social host under the dramshop act, a more equitable liability standard can be found at common law. As noted earlier, the traditional view at common law has been not to allow an action by

27 7 Mich. App. 640, 643, 152 N.W.2d 712, 713 (1967) (wedding reception). In *Behnke v. Pierson,* 21 Mich. App. 219, 175 N.W.2d 303 (1970) the plaintiff's deceased husband's car was struck in the rear by a car driven by Blair, an employee of the defendant, who had attended a company picnic where he became intoxicated. The court stated:

> In Michigan, recovery for such injury caused by an intoxicated person is exclusively statutory. The statute makes no provision for holding private individuals liable for furnishing intoxicants without pecuniary gain for social courtesy or hospitality reasons. In this case, the holiday beverages were dispensed for no pecuniary gain and for social and hospitable enjoyment. *Id.* at 220-21, 175 N.W.2d at 303-04 (footnotes omitted).

28 Dahl v. Northwestern Nat'l Bank, 265 Minn. 216, 219-20, 121 N.W.2d 321, 323-24 (1963).

29 *Id.* at 220-21, 121 N.W.2d at 324.

30 *Id.* at 219, 121 N.W.2d at 323.

31 Williams v. Klemesrud, 197 N.W.2d 614, 618 (Iowa 1972); Ross v. Ross, —— Minn. ——, 200 N.W.2d 149, 154 (1972) (dissenting opinion).

an injured third party against the furnisher of the intoxicating liquor. "The rationale for the common law rule was that the consumption and not the sale of liquor was the proximate cause of injuries sustained as a result of intoxication."[32] "[This] common law rule immunizing the furnisher of liquor from civil liability, has been picturesquely described as a 'backeddy running counter to the mainstream of modern tort doctrine.' "[33] In recognition of this a growing number of states have begun to permit common law negligence actions against hosts and vendors of alcohol for damages caused by intoxicated guests or customers. These jurisdictions have decided that the sale of alcoholic beverages may be the proximate cause of injuries to an innocent third party.[34] Some of the states which have refused to recognize the common law cause of action do so because they choose to defer the whole area to legislative action.[35] In addition, it has been indicated that to allow this action against a vendor would be to open the door for a similar action against the social host.[36] In the absence of a civil damages act, if a vendor is negligent in his sales, he should be liable to those injured. Likewise if a social host is *negligent,* he should be liable for the resulting injury to the innocent third party.

The California Supreme Court in *Vesely v. Sager,*[37] in dealing with the question of the common law liability of a vendor decided that the central issue is not one of proximate cause, but rather one of duty. The court stated that the standard of care required may be found in a prohibitory statute which does not impose civil liability.[38] If the statute was enacted to protect the general public from personal injuries and property damage by those to whom the sale or furnishing of alcoholic beverages is prohibited, then a violation of the statute is also a breach of a duty to the injured third party.[39] Notwithstanding the fact that *Vesely* applied to a commercial vendor, the California Court of Appeals relied on it to extend liability to a social host who served intoxicating liquor to a minor.[40]

> Clearly, the impeccable logic of *Vesely* impels the conclusion that any person, whether he is in the business of dispensing alcoholic beverages or not, who disregards the legislative mandate breaches a duty to anyone who is injured as a result of the minor's intoxication and for whose benefit the statute was enacted. If one willfully disobeys the law and knowingly furnishes liquor to a minor . . . he must face the consequences.[41]

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32 Vesely v. Sager, 5 Cal. 3d 153, 159, 486 P.2d 151, 155, 95 Cal. Rptr. 623, 627 (1971).
33 Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752, 753 (1972).
34 Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S. 2d 290 (1965); Jardine v. Upper Darby Lodge No. 1973, 413 Pa. 626, 198 A.2d 550 (1964); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1965).
35 Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358, 359 (1969); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71, 74 (1966).
36 Carr v. Turner, 238 Ark. 889, 892, 385 S.W.2d 656, 658 (1965).
37 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).
38 *Id.* at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631.
39 *See, id.* at 165, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32.
40 Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).
41 *Id.* at ——, 100 Cal. Rptr. at 756.

Although the California Court of Appeals did not reach the question whether in other situations a host at a social gathering might be liable for negligence as the result of a violation of the prohibitory statute, the logic of *Vesely* indicates that there would not be a different result.

In *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*[42] the Oregon Supreme Court sustained a complaint against a fraternity which allegedly served intoxicating liquor to a minor who later, while intoxicated, injured the plaintiff. Once again a minor was involved, but the same reasoning could apply to find a cause of action against any other social host who had breached a duty. The court stated its theory broadly:

> The fraternity status as host and its direct involvement in serving the liquor to Blair are sufficient to raise a duty . . . to refuse to serve alcohol to a guest when it would be unreasonable under the circumstances to permit him to drink.[43]

Thus there are states allowing a cause of action by an injured third party based on common law negligence of the furnisher of intoxicating liquor whether the furnisher is a vendor or a social host. While these courts have found a cause of action against the social host who has furnished intoxicating liquor to a minor, it is only a matter of time until the action is allowed against any social host.

In 1970 in the United States 54,800 people lost their lives as the result of motor vehicle accidents.[44] Of those 983 were in Minnesota[45] and at least one-half of all of these deaths were caused by the excessive consumption of alcohol.[46] These alarming statistics may have been given some consideration by the Minnesota Supreme Court in the *Ross* decision. Notwithstanding these statistics and the need to reduce the number of intoxicated drivers, the liability without regard to fault standard should not be imposed on the social host.

The dramshop act, with its strict liability standard, should be applied exclusively against those who treat the expense of insuring against such liability as a cost of doing business. The social host should be liable for injuries to a third party caused as a result of his deviation from a standard of care, but he should not be held to the strict liability standard required by the Minnesota Dramshop Act.

Chester D. Longenecker

CONSTITUTIONAL LAW — ABORTION — STATUTE DEFINING "JUSTIFIABLE ABORTIONAL ACT" NOT UNCONSTITUTIONAL — CONSTITUTION DOES NOT CONFER OR REQUIRE LEGAL PERSONALITY FOR UNBORN — WHETHER LAW SHOULD ACCORD LEGAL PERSONALITY IS POLICY QUESTION TO BE DETERMINED BY LEGISLA-

42 —— Ore. ——, 485 P.2d 18 (1971).
43 *Id.* at ——, 485 P.2d at 23.
44 THE WORLD ALMANAC 88 (L. Long ed. 1972).
45 *Id.* at 96.
46 *Id.* at 58.

TURE.* In 1970, the plaintiff was appointed guardian ad litem for all unborn children awaiting abortion in the New York City public hospitals. Thereupon the plaintiff brought an action against the New York City Health and Hospitals Corporation in the New York Supreme Court for a declaratory judgment to have the 1970 New York abortion "liberalization" statute[1] declared unconstitutional. The plaintiff asserted that the statute was violative of the equal protection and due process clauses of the fourteenth amendment, and that its application would constitute cruel and unusual punishment under the eighth amendment. Plaintiff obtained a temporary injunction at Special Term to restrain defendants from "performing any abortional acts" unless the mother's life was endangered. On appeal, the Appellate Division reversed, vacated the injunction, and remanded to Special Term to enter a declaratory judgment sustaining the validity of the statute as a constitutional exercise of legislative power.[2] This decision was directly appealed to the New York Court of Appeals, where the issue was whether children in embryo are and must be recognized as legal "persons" entitled under the Federal Constitution to a right to life. The court *held*: the Constitution does not confer or require legal personality for the unborn; the legislature may, in its discretion, classify unborn children so as not to confer legal personality upon them. *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972).

This marks the first action attacking an abortion statute in which unborn infants have been made parties to the action as a class, directly insisting upon their right to life in all instances except where their mothers' lives are endangered. However, while conceding that unborn infants were *living human beings,* the court, in holding that the legislature has the power to treat unborn children as legal nonpersons, deprived them of the protection of the law until birth. This is done, notwithstanding the admission that, *upon conception,* the fetus is independent in its genetic structure, autonomous in its development and character, human, and unquestionably alive.[3]

* Subsequent to the writing of this article, the Supreme Court of the United States decided Roe v. Wade, 41 U.S.L.W. 4213 (U.S. Jan. 22, 1973), *aff'g* 314 F. Supp. 1217 (N.D. Tex. 1970), and Doe v. Bolton, 41 U.S.L.W. 4233 (U.S. Jan. 22, 1973), *aff'g* 319 F. Supp. 1048 (N.D. Ga. 1970), declaring restrictive abortion statutes unconstitutional. The Court avoided deciding whether the unborn child is a living human being, which was admitted as a fact in *Byrn.* The Supreme Court concluded only that there is at least potential life in the womb, but held that the unborn child is not a "person" within the meaning of the fourteenth amendment.

1 N.Y. PENAL LAW § 125.05 (McKinney 1971).

> 3. "Justifiable abortional act." An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy.

2 Byrn v. N.Y.C. Health & Hosp. Corp., 38 App. Div. 2d 316, 329 N.Y.S.2d 722 (1972).

3 31 N.Y.2d at 199, 286 N.E.2d at 888, 335 N.Y.S.2d at 392. In addition, the court below stated that "New York courts have already acknowledged that . . . the child begins a separate life from the moment of conception." (Citations omitted.) 38 App. Div. 2d at 324, 329 N.Y.S.2d at 729.

The court concludes that there are "real issues in this litigation, but they are not legal or justiciable. They are issues outside the law unless the Legislature should provide otherwise."[4] Noting, however, that the legislature's decision is subject to the Constitution, the court summarily states that the Constitution does not require that legal personality be conferred on the unborn. In so concluding, the court undercuts a basic assumption of abortion opponents that once the unborn child was recognized as a separate, living human being, constitutional protection would be readily available to him.[5] As one opponent of abortion has stated:

> The critical issue is whether an abortion involves the destruction of a human life. If one concedes that it does, then one can hardly support a proposal to kill existing human beings to suit the convenience or comfort of others.[6]

However, while admitting that the unborn child has an independent human life, the court upheld legislation that would sanction the taking of that life. In accomplishing this, the court produced an opinion which has several basic shortcomings:

(1) the historical analysis of the legal status of the unborn is too quickly disregarded;

(2) the law is divorced from its foundations of natural justice;

(3) the crucial issue of constitutional interpretation is totally neglected; and

(4) the court's own emphasis on modern science is ignored.

Historical Analysis

The rights of the unborn child have been traditionally recognized in property law, and more recently, in tort law. In *Byrn,* the court noted this, but stressed that these rights were confined to "narrow legal categories."[7] In fact, however, the property rights of the unborn child have received considerable attention in the law. In 1941, a lower New York court, in *In re Holthausen's Will,* summed up the law's progress:

> It has been the uniform and unvarying decision of all common-law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is "born" and "alive" *for all purposes* for his benefit.[8]

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4 31 N.Y.2d at 203, 286 N.E.2d at 890, 335 N.Y.S.2d at 395.

5 *See, e.g.,* Byrn, *Abortion-on-Demand: Whose Morality?* 46 NOTRE DAME LAWYER 5 (1970); Noonan, *Amendment of the Abortion Law: Relevant Data and Judicial Opinion,* 15 CATH. LAW. 124 (1969); Brown, *Recent Statutes and the Crime of Abortion,* 16 LOYOLA L. REV. 275 (1970)

6 Testimony of Charles E. Rice before New York Joint Legislative Committee on Health, Albany, New York, Feb. 27, 1969.

7 31 N.Y.2d at 200, 286 N.E.2d at 888, 335 N.Y.S.2d at 392.

8 175 Misc. 1022, 1024, 26 N.Y.S.2d 140, 143 (1941) (emphasis added).

This sweeping statement renders questionable the characterization as "narrow" of those categories in which the unborn child's property rights have been recognized. Nevertheless, the court in *Byrn* did not discuss *In re Holthausen's Will,* but relied instead upon *Endresz v. Friedberg* to illustrate the "narrow" property rights of the unborn. There it was stated:

> In other words, even if, as science and theology teach, the child begins a separate "life" from the moment of conception, it is clear that, "except insofar as is necessary to protect the child's own rights," the law has never considered the unborn foetus as having a separate "juridical existence" or a legal personality or identity "until it sees the light of day."[9]

There could hardly be one of "the child's own rights" more valuable to it than the right to live.[10] Since the law recognizes that unborn children have property rights, it is illogical to withhold the most important of all rights, life itself.[11] Moreover, it should be noted that at the time *Endresz* was decided the unborn child's right to life was in fact still protected by New York's previous restrictive abortion law, which permitted abortions to be performed only in circumstances when a reasonable belief existed that the mother's life was endangered.[12]

In the law of torts, a child, if born alive, has been allowed recovery for injuries sustained prior to birth.[13] New York courts have not, however, allowed any recovery under New York's wrongful death statute if the child died before birth.[14] In considering this precise issue, a majority of jurisdictions that have considered the question have reached a conclusion contrary to that reached by the New York courts.[15] In such states, where recovery for a stillborn child is

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9 24 N.Y.2d 478, 485, 248 N.E.2d 901, 904, 301 N.Y.S.2d 65, 70 (1969).

10 "And what right is more inherent, and more sacrosanct, than that of the individual in his possession and enjoyment of his life, his limbs and his body?" Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946).

11 Byrn v. N.Y.C. Health & Hosp. Corp., 31 N.Y.2d 194, 214, 286 N.E.2d 887, 897, 335 N.Y.S.2d 390, 404 (1972) (dissenting opinion, Scileppi, J.); *see* Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies,* 46 NOTRE DAME LAWYER 349, 369 (1971).

12 Prior to the 1970 amendment, the New York statute read:

> 3. "Justifiable abortional act." An abortional act is justifiable when committed upon a female by a duly licensed physician acting under a reasonable belief that such is necessary to preserve the life of such female. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician that such is necessary to preserve her life. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, and when she acts upon the advice of a duly licensed physician that such is necessary to preserve her life.

N.Y. Penal Law § 125.05 (McKinney 1967), as amended, (Cum. Supp. 1971).

13 Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

14 Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

15 *Connecticut:* Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966); Gorke v. LeClerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); *Delaware:* Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); *District of Columbia:* Simmons v. Howard University 323 F. Supp. 529 (D.D.C. 1971); *Georgia:* Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Indiana:* Britt v. Sears, —— Ind. App. ——, 277 N.E.2d 20 (1971); *Kansas:* Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); *Kentucky:* Rice v. Rizk, 453 S.W.2d 732 (Ky. 1970); Orange v. State Farm Mut. Auto. Ins. Co., 443 S.W.2d 650 (Ky. 1969); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); *Louisiana:* Valence v. Louisiana Power & Light Co., 50

allowed under a wrongful death statute, logic would call for the prohibition of abortion also; for if the death of an unborn child is culpable when negligently caused, then the *purposeful* killing of such a child would be no less wrongful.

Even where recovery is denied, as in New York, the reason given for denial does not support liberalized abortion legislation. Generally a wrongful death statute is enacted for the benefit of *survivors* of the deceased, and the parents of a stillborn child already have adequate remedies available through an action for the mother's injury, in which the stillbirth is taken into account.[16] Abortion prohibitions, on the other hand, directly benefit the *child,* and without such protection, he has no other recourse to prevent the deliberate taking of his life before birth.[17]

After concluding that unborn children do have "narrow" legal rights, the court in *Byrn* makes the principal point of its historical analysis when it states that "unborn children have never been recognized as persons in the law *in the whole sense.*"[18] The decision in *In re Holthausen's Will* and the judicial recognition of modern scientific advances would now appear to require that unborn children be recognized as persons in the law "in the whole sense."[19] For it is clear that "[s]tare decisis does not, of course, compel us to perpetuate an unjust rule 'out of tune with the life about us.' "[20]

If the court in *Byrn* had decided that the legal personhood of unborn children, even if previously denied, was now fully warranted by modern scientific knowledge, it would have been consistent with the earlier reasoning of a cele-

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So. 2d 847 (La. App. 1951); Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923) (dictum); *Maryland:* State *ex rel.* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); *Michigan:* O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); *Minnesota:* Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); *Mississippi:* Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); *Nevada:* White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); *New Hampshire:* Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); *Ohio:* Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); *South Carolina:* Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); *West Virginia:* Baldwin v. Butcher, 184 S.E.2d 428 (W. Va. 1971); Panagopoulous v. Martin, 295 F. Supp. 220 (S.D. W.Va. 1969) (applying West Virginia law); *Wisconsin:* Kwaterski v. State Farm Mut. Auto. Inc. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

Twelve jurisdictions agree with the result reached by the New York courts: *California:* Bayer v. Suttle, 23 Cal. App. 3d 361, 100 Cal. Rptr. 212 (1972); Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); *Florida:* Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968); *Illinois:* Rapp v. Hiemenz, 107 Ill. App. 2d 382, 246 N.E.2d 77 (1969); *Iowa:* McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); *Massachusetts:* Keyes v. Constr. Service, Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); *Nebraska:* Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W. 2d 229 (1951); *New Jersey:* Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); *North Carolina:* Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Oklahoma: Padillow v. Elrod, 424 P.2d 16 (Okla. 1967); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); *Pennsylvania:* Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); *Tennessee:* Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Hogan v. McDaniel 204 Tenn. 235, 319 S.W.2d 221 (1958); *Virginia:* Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969); *see* Annot., 15 A.L.R.3d 992 (1967).

16 Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

17 Byrn v. N.Y.C. Health & Hosp. Corp., 38 App. Div. 2d 316, 325, 329 N.Y.S.2d 722, 730 (1972).

18 31 N.Y.2d at 200, 286 N.E.2d at 888, 335 N.Y.S.2d at 392 (emphasis added).

19 *See, e.g.,* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

20 Endresz v. Friedberg, 24 N.Y.2d 478, 488, 248 N.E.2d 901, 906, 301 N.Y.S.2d 65, 73 (1969).

brated tort case, *Bonbrest v. Kotz.*[21] There the infant plaintiff recovered in a medical malpractice suit for injuries sustained while in the process of being removed from his mother's womb, the court holding that "[t]he law is presumed to keep pace with the sciences and medical science certainly has made progress. . . ."[22]

The *Bonbrest* rule concerned prenatal injury to a viable child; it was later extended to prenatal injuries to nonviable children in *Kelly v. Gregory,* which also held that:

> We ought to be safe in this respect in saying that *legal* separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate that separability begins at conception. . . . The complaint here, in alleging that plaintiff was in being in the third month of his mother's pregnancy, alleges a conclusion of fact consistent with generally accepted knowledge of the process.[23]

The court in *Byrn,* at first glance, seemed ready to follow this line of reasoning, and uphold the unborn child's right to life. Instead, after deemphasizing the value of precedent and reaffirming the importance of medical knowledge, the court shifts its attention to its attempt to explain how abortion can continue to be legally justified.

Natural Justice

The theory of natural justice has as its initial premise the principle that the legal order necessarily corresponds to the natural order.[24] An exposition of this principle can be found in *Calder v. Bull,* an early Supreme Court decision:

> I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state. . . . To maintain that our federal or state legislature possesses such powers, if they had not been expressly restrained, would . . . be a political heresy, altogether inadmissible in our free republican governments.[25]

In New York initial support for the opposite view can be found in *Bertholf v. O'Reilly,* which discussed the validity of the 1873 New York "Civil Damage Act":

> The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. . . . The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any con-

21 65 F. Supp. 138 (D.D.C. 1946).
22 *Id.* at 143.
23 282 App. Div. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953).
24 B. WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 280-306 (1931).
25 3 U.S. (3 Dall.) 386, 387-89 (1798).

> stitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by an authoritative adjudication, and is repudiated by numerous authorities.[26]

In *Byrn,* the court relied upon *Bertholf* in refusing to adopt the principles of natural justice:

> It is not true, however, that the legal order necessarily corresponds to the natural order. . . .
>
> . . . That the legislative action may be wise or unwise, even unjust and violative of principles beyond the law, does not change the legal issue or how it is to be resolved. The point is that it is a policy determination whether legal personality should attach and not a question of biological or "natural" correspondence.[27]

The court refused to take cognizance of more recent New York cases which had adopted the view that natural justice exists as an independent measure of the law. For example, in *Endresz,* the court held that the decision in *Woods v. Lancet*[28] "simply brought the common law of this State into accord with the *demand of natural justice* which requires recognition of the legal right of every human being to begin life unimpaired by physical or mental defects resulting from the negligence of another."[29]

If "natural justice" requires that the unborn child can recover for defects negligently caused, should not the same "natural justice" require that there be protection against the ultimate defect, death itself, when *purposefully* caused, as in abortion? In any respect, it is clear that severe difficulty will inevitably be encountered if an attempt is made to justify abortion in the face of biological reality.

On the other hand, if the view of the law expressed in *Bertholf* is correct, then the court's task in *Byrn* is a simple one: it can speak for the legislature in saying, "*Quod scripsi, scripsi*—What I have written, I have written" (John 19:22). This is apparently what the court meant in finding that "[w]hen the proposition [that the legal order does not correspond to the natural order] is reduced to this simple form, the difficulty of the problem is lessened."[30] Unfortunately, to simplify a problem is not necessarily to solve it.[31]

The court finally adopts the view that legal personality is a question solely for legislative discretion, subject only to constitutional limitation. This result mandates that future legislative resolutions be upheld, irrespective of any considerations of justice. The logical consequence of this position is that "valid law is a merger of legislative and executive emotions, whims and hunches—an-

26 74 N.Y. 509, 514-15 (1878).
27 31 N.Y.2d at 201, 286 N.E.2d at 889, 335 N.Y.S.2d at 393.
28 303 N.Y. 349, 102 N.E.2d 691 (1951).
29 24 N.Y.2d at 483, 248 N.E.2d at 903, 301 N.Y.S.2d at 68-69 (emphasis added).
30 31 N.Y.2d at 201, 286 N.E.2d at 889, 335 N.Y.S.2d at 393.
31 For instance, cutting down the incidence of crime is a worthwhile goal but it may not be accomplished by discriminatorily mandating the sterilization of a particular class of felons. Interracial strife is to be avoided, but not by the discriminatory segregation of the races.

Byrn, *supra* note 5, at 26.

nounced today and perhaps changed tomorrow. One's rights are never permanent. . . ."[32]

The assertion that the law is independent from standards of natural justice is opposed to the principles upon which our entire legal system is founded, as enunciated in the Supreme Court decision of *Butchers' Union Co. v. Crescent City Co.*:

> "We hold these truths to be self-evident"—that is so plain that their truth is recognized upon their mere statement—"that all men are endowed"—not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but "by their Creator with certain inalienable rights"—that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime—"and that among these are life, liberty, and the pursuit of happiness, and to secure these"—not grant them but secure them—"governments are instituted among men, deriving their just powers from the consent of the governed."[33]

In *Byrn* the "inalienable right" of life for literally thousands of human beings depends upon the conferral of legal personality upon unborn children. That issue should not be resolved apart from a permanent standard of justice and wisdom.

Constitutional Interpretation

Although the court in *Byrn* divorced law from justice, it recognized that policy decisions of the legislature must be tested according to constitutional standards. It states, however, only that the granting of legal personality is "not a question of biological or 'natural' correspondence,"[34] and concludes that "[t]he Constitution does not confer or require legal personality for the unborn. . . ."[35] Since the court rejected natural justice as a criterion for determining the validity of legislation, the constitutional issues deserved more of the court's attention than such summary treatment. Even in *Bertholf* there is reassurance that measuring legislation by the Constitution alone will still adequately protect fundamental rights:

> Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights by legislation which will not fall within the express or implied prohibition and restraints of the Constitution, and it is unnecessary to seek for principles outside of the Constitution, under which such legislation may be condemned.[36]

The United States Supreme Court has recently declared that the Constitution does not allow a legislature to distinguish arbitrarily between legal personality and biological reality. In *Glona v. American Guarantee Co.*, the Court con-

32 Byrn v. N.Y.C. Health & Hosp. Corp., 31 N.Y.2d 194, 209, 286 N.E.2d 887, 894, 335 N.Y.S.2d 390, 399 (1972) (dissenting opinion, Burke, J.).
33 111 U.S. 746, 756-57 (1884) (concurring opinion).
34 31 N.Y.2d at 201, 286 N.E.2d at 889, 335 N.Y.S.2d at 393.
35 *Id.* at 203, 286 N.E.2d at 890, 335 N.Y.S.2d at 395.
36 74 N.Y. at 515.

sidered the rights of illegitimate children under Louisiana's wrongful death statute:

> To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.[37]

Similarly, In *Levy v. Louisiana,* the Court set forth the requirements for "personhood" under the equal protection clause:

> We start from the premise that illegitimate children are not "nonpersons." They are humans, live, and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[38]

Being human, alive, and in being are all characteristics of unborn children which the court in *Byrn* concedes. Since under the tests enunciated in *Glona* and *Levy* the unborn child would be considered a person within the meaning of the fourteenth amendment, it remains to be considered whether the New York abortion statute would violate his equal protection rights.

Relevant here is the Supreme Court's statement in *Levy*:

> While a State has broad power when it comes to making classifications, it may not draw a line which constitutes an invidious discrimination against a particular class. Though the test has been variously stated, the end result is whether the line drawn is a rational one.[39]

Under the New York statute, the unborn child's life may be ended anytime during the first six months of pregnancy;[40] the motives of the mother in having the abortion are completely irrelevant. Consequently, unborn children, as a class, may be killed for reasons which would not legally justify the killing of human beings already born. It may have been rational to draw the line at three months before birth when the fetus was thought to be only a part of his mother, but, as the court in *Byrn* acknowledged, human life is now known to begin *upon conception.* Since "birth is but a convenient landmark in a continuous process,"[41] it is no longer rational to maintain any distinction between born and unborn children as regards legal personhood. This is especially true in light of the increasingly broad interpretation given to the fourteenth amendment:

> From its original intent to safeguard Negroes against discrimination by Whites, the fourteenth amendment has evolved into a broad guarantee of equality both to artificial persons and to all natural persons irrespective of

37 391 U.S. 73, 75-76 (1968).
38 391 U.S. 68, 70 (1968).
39 *Id.* at 71 (citations omitted).
40 *Supra* note 1.
41 B. PATTEN, FOUNDATIONS OF EMBRYOLOGY 3 (2d ed. 1964).

> citizenship, sex or race. In an era of increased sensitivity to human rights, it would be the ultimate in irony if the corporation which manufactures the instruments used to abort the unborn human child was entitled, as an artificial person, to equal protection of the law, while the unborn child, who is in all respects qualitatively human, is deprived of that protection.[42]

Although the Supreme Court, in applying the equal protection clause to social and economic legislation, has given "great latitude to the legislature in making classifications. . . . [it has] been extremely sensitive when it comes to basic civil rights and [has] not hesitated to strike down an invidious classification even though it had history and tradition on its side."[43] There is no civil right more basic than the right to life itself, and any statute which deprives a whole class of human beings of that right on an irrational basis ought to be struck down.

The court in *Byrn* was not without recent examples of how constitutional standards may be applied to determine the validity of abortion legislation, for in several states restrictive abortion statutes have been attacked in the courts as unconstitutional on various grounds. In *Steinberg v. Brown*,[44] for example, the restrictive abortion statute of Ohio was held not to be unconstitutionally vague, nor a violation of the mother's right of privacy, of the equal protection clause, or of the cruel and unusual punishment prohibition. The district court recognized that, upon conception, a new life has begun. On this basis, the court held that "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it."[45]

The Supreme Court of Missouri has upheld that state's restrictive abortion statute, holding that it was not unconstitutionally vague, that it did not violate rights of privacy, equal protecion of the laws or due process of law, and that it did not constitute an establishment of religion. The court concluded:

> [U]nborn children have all the qualities and attributes of adult human persons differing only in age or maturity. . . .
>
> The United States Supreme Court has . . . generally expressed its disapproval of the practice of putting to death persons who, some would argue, had forfeited their right to live. We believe we must anticipate at least equal solicitude for the lives of innocents.[46]

On the other hand, the restrictive abortion statutes of Texas and Georgia

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42 Byrn, *supra* note 5, at 27; *see also* II B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 490-93 (1968).

43 Levy v. Louisiana, 391 U.S. 68, 71 (1968).

44 321 F. Supp. 741 (N.D. Ohio 1970).

45 *Id.* at 746-47.

46 Rodgers v. Danforth, No. 57105 (Sup. Ct. Mo., Oct. 3, 1972). The Missouri court cited Furman v. Georgia, 408 U.S. 238 (1972), in which the United States Supreme Court declared the death penalty unconstitutional as cruel and unusual punishment under the given circumstances.

have been declared unconstitutional.[47] In *Roe v. Wade,*[48] for example, the court stated that such a statute deprived single women and married couples of their right, secured by the ninth amendment, to choose whether to have children.

In another context, the right of the unborn child to equal protection of the laws has been reaffirmed in cases not involving the issue of a statute's validity under the Constitution. Especially significant are those cases where pregnant women, for religious reasons, have refused medical treatment necessary to preserve the lives of their unborn children. In each case it has been held that, since unborn children are entitled to the law's protection, the medical treatment should have been given.[49] In *Application of the President & Directors of Georgetown College,* the rationale for this rule was stated:

> The state, as *parens patriae,* will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant.[50]

The constitutional implications of these holdings are clear:

> The law has protected the life of the unborn child against the assertion of such a fundamental constitutional right as the freedom of religion. Undoubtedly, the reason is that the law has recognized a countervailing constitutional right belonging to the unborn child.[51]

Government failure to protect a class in its civil rights has also been found in itself to be an unconstitutional denial of those rights. For example, in *Lynch v. United States* it was held that "[t]here was a time when the denial of equal protection of the laws was confined to affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection."[52] By applying this rationale to the liberalized abortion statute in *Byrn,* it is clear that the removal of the protection of the criminal law from the unborn child would be in itself an unconstitutional act.[53]

Supporting Authorities

In the resolution of the issue of whether an unborn child should be accorded the status of a legal person in the whole sense, both attacks upon and defenses of the liberalized abortion statute must be determined in accordance with modern scientific developments.[54] In *Byrn,* however, the court failed to discuss either

47 Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970); Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970).

48 314 F. Supp. 1217 (N.D. Tex. 1970).

49 Application of President & Directors of Georgetown Col., 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied,* 377 U.S. 978 (1964); Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied,* 377 U.S. 985 (1964).

50 331 F.2d 1000, 1008 (D.C. Cir. 1964).

51 Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies,* 46 NOTRE DAME LAWYER 349, 362 (1971).

52 189 F.2d 476, 479 (5th Cir. 1951).

53 Noonan, *supra* note 5, at 129-30.

54 Byrn v. N.Y.C. Health & Hosps. Corp., 31 N.Y.2d 194, 200, 286 N.E.2d 887, 889, 335 N.Y.S.2d 390, 392 (1972).

the legal or constitutional implications of its decision to refuse legal personality to the unborn—recognized in modern science as separate, living human beings. Instead, the court takes a jurisprudential approach, ignoring modern scientific developments.

The court cites the works of John Chipman Gray[55] with approval, notwithstanding the fact that his approach is founded on outdated information. A logical extension of his views taking modern scientific knowledge into account, would most likely accord legal personality to the unborn child. For he believed that "[i]ncluded in human beings, normal and abnormal, as legal persons, are all *living* beings having a *human* form."[56] The court in *Byrn* recognized the unborn child as being both "alive" and "human." By Gray's standards, then, the unborn child would be a "legal person."

Byrn's reference to the works of George W. Paton[57] merits more careful analysis, for his statement is directly relevant:

> Most systems lay down the rule that, in cases where legal personality is granted to human beings, personality begins at birth and ends with death. . . . [T]he child in the womb is not a legal personality and can have no rights.[58]

The unborn child is regarded as already born in the civil law for all matters affecting the child's interests, and in English law for matters benefitting the child after birth.[59] Although such treatment is labeled by Paton as a "fiction," this term is not justified in light of modern knowledge. The life of the unborn child is certainly something "affecting his interests," and its continuation is a "benefit" without which he would be able to take no others. Such a "fiction" should, therefore, in all logic be preserved for the unborn child's protection.

Opportunities for "child destruction" are too numerous even with the prohibition of abortion.[60] If "child destruction" would be easily accomplished when abortion was prohibited, the termination of such prohibition—which *Byrn* accomplishes—would not be an improvement in the law. In fact, removal of restrictive abortion statutes effectively ends the only protection that the law has provided for the unborn child.[61]

Conclusion

The *Byrn* decision acknowledges the unborn child to be a separate human being in fact, but not a "person" in the eyes of the law for purposes of preserving its life. The court in effect held that if the legislators consider the life of this human being worth preserving, let them so provide by statute; otherwise there is nothing in the law militating such protection. The court's analysis in coming

55 J. GRAY, THE NATURE AND SOURCES OF THE LAW 27-64 (2d ed. 1921).
56 *Id.* at 38 (emphasis added).
57 G. PATON, A TEXT-BOOK OF JURISPRUDENCE 353-56 (3d ed. 1964).
58 *Id.* at 353-54.
59 See text accompanying notes 7-8 *supra.*
60 G. PATON, *supra* note 57, at 354.
61 *See* note 51 *supra,* at 365.

to this holding is deficient in several significant respects: in its analysis of judicial history, in its rejection of natural justice, in its neglect of constitutional interpretation, and in its disregard for modern scientific knowledge.

Strong logical and constitutional objections can be raised with respect to the court's holding. Its failure to discuss these objections in any detail makes the case important for what it does *not* say, rather than for what it does. In fact, all that *Byrn* really does say is, "*Quod scripsi, scripsi.*"

James A. Kearns

TORTS—FEDERAL TORT CLAIMS ACT—SONIC BOOM—CAUSE OF ACTION BASED ON ABSOLUTE LIABILITY NOT ACTIONABLE UNDER THE FEDERAL TORT CLAIMS ACT.—The plaintiff, James Nelms, sought recovery for property damage allegedly resulting from a sonic boom caused by California-based United States military planes flying over North Carolina on a training mission. Nelms presented his claim to the Air Force for payment as required by statute.[1] After an adverse determination, he sued the United States in the United States District Court for the Eastern District of North Carolina under the Federal Tort Claims Act (FTCA).[2] That court entered summary judgment for the Government based on its determination that the power to authorize supersonic training flights was within the exercise of a discretionary function, and thus expressly excluded from coverage of the FTCA.[3] On appeal, the Court of Appeals vacated the summary judgment and held that the discretionary function exception was not applicable, Air Force regulations granted no discretion as to the amount of protection to be afforded civilians during supersonic flights.[4] The court went on to say that even though the plaintiff was unable to show negligence either in the planning or operation of the flight, he could proceed with his action based on a theory of absolute liability.[5] Certiorari was granted by the Supreme Court and, in a 6-2 decision, the Court *held*: A cause of action under the FTCA cannot be grounded solely on a theory of absolute liability. *Laird v. Nelms,* 406 U.S. 797 (1972).

Prior to the passage of the FTCA, liability for torts of the federal government was virtually nonexistent because of the doctrine of sovereign immunity which had been accepted by the Supreme Court at an early stage.[6] After nearly twenty years of debate, the FTCA was enacted as part of the Legislative Reorganization Act of 1946.[7]

The Act permitted the Government to be sued on recognized tort actions,

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1 28 U.S.C. § 2675(a) (1970).
2 28 U.S.C. §§ 1346(b), 2671-80 (1970).
3 28 U.S.C. § 2680(a) (1970) excludes from the coverage of the FTCA: "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."
4 Nelms v. Laird, 442 F.2d 1163, 1165-67 (4th Cir. 1971).
5 *Id.* at 1167-68.
6 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411 (1821).
7 Act of Aug. 2, 1946, ch. 753, tit. IV, 60 Stat. 812.

certain torts being specifically excluded. It was left to the federal courts to determine whether the law of the place of the occurrence recognized the cause of action and having met that criterion, whether the specific tort complained of was excepted from the Act. One of the early issues concerning the Act's coverage was the application of absolute liability. In the early years following passage of the Act a number of courts interpreted it so as to impose absolute liability upon the Government if a private person would have been subject to the same liability under the law of the place of the occurrence. In *Boyce v. United States,*[8] the Government was sued for damage allegedly caused by blasting operations. Though finding for the Government on the basis of the discretionary function exception, the court stated that a recovery in some amount could have been allowed even without a showing of negligence since the applicable state law made the actor absolutely liable for any damage caused by blasting.[9] This logic was similarly applied later in *Parcell v. United States,*[10] and *United States v. Gaidys,*[11] which involved damage claims arising from the crash of Air Force planes on private property. The courts in both cases concluded that the Government was absolutely liable for the damage because a private person under state law would have been absolutely liable.[12] Until 1953, the only case questioning the application of absolute liability rules under the FTCA was *United States v. Hull.*[13] In that case, a window at a post office counter had fallen on the plaintiff's hand for no apparent reason. Plaintiff sued on a theory of negligence, basing her case exclusively on the doctrine of *res ipsa loquitur.* The court discussed the application of general tort law under the FTCA and stated that recovery for all common law torts would not be allowed. As an example, the court used liability without fault for injuries resulting from ultrahazardous activities stating that the United States has only consented to be sued where there has been a negligent or wrongful act or omission of some government employee.[14]

With lower court precedent supporting the proposition that absolute liability could be a basis for recovery under the FTCA, the Supreme Court in 1953 decided the well-known case of *Dalehite v. United States.*[15] This case arose out of the "Texas City Disaster" in which two shiploads of government-manufactured ammonium nitrate fertilizer exploded in the harbor of Texas City killing over 500 people and leveling a large portion of the city. *Dalehite* was one of approximately three hundred cases brought against the Government seeking recovery for wrongful death and property damage with aggregate claims totaling in excess of $200 million. *Dalehite* was chosen as a test case with both sides stipulating that the issue of government liability in all cases would be determined by the result reached in that case.[16] In discussing the decision of the Government to enter

8 93 F. Supp. 866 (S.D. Iowa 1950).
9 *Id.* at 868.
10 104 F. Supp. 110 (S.D. W.Va. 1951).
11 194 F.2d 762 (10th Cir. 1952).
12 *Id.* at 764-65. Parcell v. United States, 104 F. Supp. 110, 116 (S.D. W.Va. 1951).
13 195 F.2d 64 (1st Cir. 1952).
14 *Id.* at 67.
15 346 U.S. 15 (1953), *aff'g sub nom.* In re Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952).
16 In re Texas City Disaster Litigation, 197 F.2d 771, 772 (5th Cir. 1952).

into the manufacture and shipment of dangerous fertilizer, the Supreme Court focused primarily on the application of the discretionary function exception of the FTCA. The decision to manufacture as well as all subsequent decisions at the planning and operational levels was held to be discretionary.[17] At the end of a lengthy opinion, the Court addressed itself to the issue of absolute liability under the FTCA. Noting the statutory words "wrongful act," the Court concluded that the FTCA applied primarily to the negligent acts of government employees, with some brand of misfeasance or nonfeasance involving fault necessary to impose liability. Since absolute liability is imposed regardless of fault, argued the Court, it is not within the scope of the FTCA.[18] The determination of the absolute liability question was not essential to the outcome of the decision and can be characterized as dicta.

Nevertheless, *Dalehite* has necessarily been the starting point for any court faced with the issue of entertaining a tort claim against the Government based on a theory of absolute liability filed under the FTCA. All but one of the courts of appeals which have dealt with the problem have adhered strictly to the determination made in *Dalehite*.[19] The lone case opposing it is *United States v. Praylou*[20] decided by the Court of Appeals for the Fourth Circuit less than a year after *Dalehite* was decided. Implementing an approach taken in the pre-*Dalehite* cases, Chief Judge Parker held that the Government was absolutely liable for ground damage caused by the crash of a government plane since a South Carolina statute made a private person absolutely liable for any such damage. Although the result reached in *Praylou* was contrary to the holding of *Dalehite*, the Supreme Court declined to review the case.[21]

This conflict remained until *Nelms* was decided nineteen years later. Since *Nelms* also arose in the fourth circuit, the Court of Appeals based its decision in *Nelms* on its holding in *Praylou* and allowed the plaintiff to proceed against the Government on a theory of absolute liability. While North Carolina had no specific statute imposing absolute liability for damage caused by an airplane the court found that the approach taken in sections 519 and 520 of the *Restatement of Torts*[22] had been adopted in North Carolina and that absolute liability could be imposed for damage resulting from the carrying on of an ultrahazardous activity. The court determined that supersonic training missions fell within the

17 Dalehite v. United States, 346 U.S. 15, 35-36 (1953).

18 *Id.* at 44-45.

19 Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969); Wright v. United States, 404 F.2d 244 (7th Cir. 1968); United States v. Page, 350 F.2d 28 (10th Cir. 1965); Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1957); United States v. Ure, 225 F.2d 709 (9th Cir. 1955); Strangi v. United States, 211 F.2d 305 (5th Cir. 1954); Heale v. United States, 207 F.2d 414 (3rd Cir. 1953).

20 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954).

21 *Id.*

22 Restatement of Torts §§ 519-20 (1938). MISCARRIAGE OF ULTRAHAZARDOUS ACTIVITIES CAREFULLY CARRIED ON. § 519. Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm. § 520 DEFINITION OF ULTRAHAZARDOUS ACTIVITY. An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.

scope of the Restatement provisions[23] and vacated the trial court's summary judgment in favor of the Government. Although *Dalehite* had been criticized as too narrow an interpretation of governmental tort liability under the FTCA,[24] the Supreme Court in *Nelms* has apparently adhered to the former ruling. Relying solely on *Dalehite* in its opinion, the Court held that a claim founded on absolute liability could not be asserted under the Act, and since it was not within the FTCA, the claim was barred by sovereign immunity. Any discussion of the *Nelms* decision, therefore, necessarily involves discussion of the *Dalehite* case.

The pertinent parts of the FTCA regarding tort liability of the Government read as follows:

> [The] district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[25]

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .[26]

It is evident from the statutes that the district court must look to the law of the state in which the act occurred.[27]

The first inquiry of a court presented with a claim under the FTCA is whether a private individual would be liable on the facts alleged. This is exactly the procedure followed in *Praylou, Nelms,* and the pre-*Dalehite* cases which allowed absolute liability. In each instance, the courts found that under state law, absolute liability was imposed on the actor for damage resulting from the specific conduct involved. In each case the court imposed liability on the Government in the same manner and to the same extent as it would toward a private individual.

Why then did the Supreme Court in *Dalehite* and *Nelms* hold that no such liability could be extended to the Government? Speaking for the majority, Justice Rehnquist argued that the statutory words "negligent or wrongful act" apply only to culpable conduct. Since the absolute liability theory requires no showing of fault, he concluded that a claim based on absolute liability cannot be asserted under the FTCA.[28] This reasoning is identical to that used in *Dalehite.*

This interpretation of the FTCA is not necessarily correct in light of the legislative history and purpose of the Act. The purpose of the FTCA was to relieve Congress of the burdensome private bill device, which had been necessi-

23 Nelms v. Laird, 442 F.2d 1163, 1168-69 (4th Cir. 1971).
24 *See* Indian Towing Co. v. United States, 350 U.S. 61 (1955) and Rayonier, Inc. v. United States, 352 U.S. 315 (1957).
25 28 U.S.C. § 1346(b) (1970).
26 28 U.S.C. § 2674 (1970).
27 Laird v. Nelms, 406 U.S. 797, 804 (1972) (dissenting opinion).
28 *Id.* at 798-99.

tated by the doctrine of sovereign immunity, and to provide injured individuals with a cause of action against the Government for torts committed by government employees.[29] Attorney General Jackson, in a letter presented before the House committee conducting hearings on the Act, remarked:

> The continued immunity of the Government to suit on common-law torts does not seem to be warranted either as a matter of principle or as a matter of justice.[30]

Testifying before a Senate committee on the purpose and spirit of the Act, Assistant Attorney General Holtzoff stated:

> But the problem presented by this legislation involves a much larger principle. It involves the question of whether relief to a person who has been injured by the tortious act of a Government agent shall be a matter of grace or a matter of right. The underlying and basic idea upon which the present bill is predicated is that, when a person is injured by an act of a Government officer or employee by what would be considered a tortious act if it had been committed by the agent of a private individual or a private corporation, the injured party shall have the same right to sue the United States as he would have had to sue the private individual or private corporation under similar circumstances.[31]

The legislative history[32] indicates that the Act was intended to be broad in purpose and was not meant to gradually erode the doctrine of sovereign immunity. In *Rayonier, Inc. v. United States,* a case decided after *Dalehite,* Justice Black stated for the Court:

> The very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.[33]

Despite the broad purpose enunciated by the Court, the majority in *Dalehite* held that the jurisdictional grant found in the phrase "negligent or wrongful act or omission" could not be extended to include absolute liability.[34] This appears contrary to the intent of Congress that the FTCA was meant to apply to other areas in addition to the area of negligence. At one stage in its development, the

29 *Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary,* 77th Cong., 2d Sess., at 29-30 (1942).

30 *Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary,* 76th Cong., 3rd Sess., at 18 (1940).

31 *Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary,* 76th Cong., 3rd Sess., at 34 (1940).

32 The hearings pertaining to the Federal Tort Claims Act will not be found in the proceedings of the 79th Congress in which it was enacted. The following is a chronological list of the hearings and reports relating to the Act: *Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary,* 76th Cong., 3rd Sess. (1940); H.R. REP. No. 2428, 76th Cong., 3rd Sess. (1940); S. REP. No. 1196, 77th Cong., 2d Sess. (1942); *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary,* 77th Cong., 2d Sess. (1942); H.R. REP. No. 2245, 77th Cong., 2d Sess. (1942); H.R. REP. No. 1287, 79th Cong., 1st Sess. (1945); S. REP. No. 1400, 79th Cong., 2d Sess. (1946).

33 352 U.S. 315, 319 (1957).

34 346 U.S. 15, 44-45 (1953).

Act applied only to damage caused by the "negligent act" of a government employee. The House, afraid that governmental liability under the act would be too narrow, refused to adopt the Senate bill, but instead reinserted the wording found in the present Act—"negligent or wrongful act." The report accompanying the House bill made these comments:

> The Senate bill covers only claims arising out of "negligence" whereas the recommended bill uses the phrase "negligent or wrongful act or omission." The committee prefers its language as it would afford relief for certain acts or omissions which may be wrongful but not necessarily negligent.[35]

It is clear then that the FTCA was meant to apply to cases other than those based solely on a theory of negligence. In addition, it should be noted that the Act contains a number of exceptions pertaining to specific substantive torts not covered therein—actions based on absolute liability not being included among the exceptions.[36]

The thrust of the Court's argument in *Dalehite* was that absolute liability was not encompassed under the heading of a "wrongful act" since absolute liability may be imposed in the absence of fault. This reasoning gives too narrow a meaning to the word wrongful and to the notion of fault. One may be legally at fault if he is the cause of the damage regardless of whether he is morally culpable. Absolute liability is not so much liability without fault as it is liability without regard to the degree of care exercised by the actor. Absolute liability is recognized as a basis for a tort action which may lead to liability; therefore, some element of fault must exist. As one author has put it, there is conditional fault.[37] Until the conduct causes harm to another, the actor is free from liability but the moment the conduct is the cause of harm, the actor is at fault and is responsible for the damage even though the claim is predicated on a theory of absolute liability. Any act which results in harm to another must necessarily be classified as a wrongful act. Since absolute liability does involve fault in the broad sense, an act giving rise to such liability is wrongful within the meaning of the FTCA.

The FTCA was designed to give private persons access to the courts which were better equipped to handle the factual and legal issues involved in tort cases than Congress which was equipped solely with the private bill device. In *Dalehite* and *Nelms,* the Supreme Court has blinded itself to the purpose of the FTCA, denying recovery against the Government on a theory of liability accepted by the states and based as much on the fault concept as any other recognized mode of recovery for damage. As one court of appeals stated in construing another passage of the FTCA:

> If the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials were driving, the federal courts must reject an absolutist interpretation of *Dalehite* . . . .[38]

35 H.R. REP. No. 2245, 77th Cong., 2d Sess. 11 (1942).
36 28 U.S.C. § 2680 (h) excepts specific substantive torts: "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights."
37 Keeton, *Conditional Fault In the Law of Torts,* 72 HARV. L. REV. 401 (1959).
38 Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967).

In light of the ruling in *Nelms,* any possibility that absolute liability will be recognized as a basis of recovery under the FTCA would follow only if Congress takes the steps necessary to amend the Act.

Richard M. Furgason

CONSTITUTIONAL LAW—DUE PROCESS—PREHEARING SEIZURE OF PROPERTY UNDER FLORIDA AND PENNSYLVANIA REPLEVIN STATUTES IS A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.—Appellant, Margarita Fuentes, purchased a gas stove and later a stereo under conditional sales contracts from the Firestone Tire and Rubber Company. The contracts provided that, in the event of a default of any payment, the seller could, at its option, take back the merchandise. The total cost of the merchandise was over $500 plus approximately $100 in finance charges. Under these contracts, Firestone retained a security interest in the mechandise. With about $200 left to be paid, a dispute developed over the servicing of the stove under the warranty. Mrs. Fuentes stopped making payments under the contract. Firestone, pursuant to the Florida replevin statute,[1] submitted a complaint and affidavit in replevin in the Small Claims Court of Dade County and posted a replevin bond. A writ of replevin was issued immediately by the court and executed by a deputy sheriff. Mrs. Fuentes then instituted an action in a federal district court, challenging the constitutionality of the Florida prejudgement replevin statute under the due process clause of the fourteenth amendment. She sought declaratory and injunctive relief against continued enforcement of the procedural provisions of the statute authorizing prejudgement replevin. A three-judge district court upheld the validity of the statute and judgement was entered for the defendant. Mrs. Fuentes appealed directly to the Supreme Court under 28 U.S.C. § 1253[2] which authorizes such appeals when injunctive relief is denied in an action considered by a three-judge district court. The Supreme Court, in a 4-3 decision, reversed the district court and *held*: Florida prejudgement replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before goods are taken from their possessor.[3] *Fuentes v. Shevin,* 407 U.S. 67 (1972).

Replevin is a very ancient writ which has its origins in the Statute of Marlborough,[4] enacted in 1267 A.D. Its original purpose was to protect tenants from the abuses of their lords. The replevin writ was used to combat distraint, a process by which the lords could seize and hold the tenant's property until any claims the lord had against his tenant were satisfied. By obtaining a writ of replevin, the tenant could have the sheriff take back the property from the lord. Today, the replevin writ can be used whenever one person's property is wrongfully detained

1 FLA. STAT. ANN. § 78.01 (Supp. 1972).

2 28 U.S.C. § 1253 (1970).

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard or determined by a district court of three judges.

3 PA. STAT. ANN. tit. 12, § 1073 (1967). This statute was also declared unconstitutional in a case consolidated with *Fuentes.*

4 52 Hen. 3, ch. 21 (1267).

by another. It is principally relied upon by creditors seeking the return of goods after there has been a default under a conditional sales contract.[5]

The Florida and Pennsylvania replevin statutes which were considered in the present case are typical of most replevin statutes. In Florida, the replevin action lies whenever goods have been wrongfully detained.[6] The process is commenced by the filing of a bond for double the value of the property to be replevied. The writ of replevin is issued on condition that the plaintiff prosecute the action in court without delay.[7] After the sheriff has seized the property, the defendant in replevin has three days in which to file a counterbond equal to the plaintiff's bond in order to have the property returned to him by the sheriff.[8] The Pennsylvania procedure is substantially the same as that of Florida. Unlike the latter statute, however, there is no requirement that an action ever be commenced in any court. The burden is on the defendant either to commence a court action or to file a counterbond if he wishes to regain possession of the property.[9] In this respect, Pennsylvania is typical of many states.

Prior to its decision in *Fuentes,* the Supreme Court had decided only one other case involving replevin statutes. This was *McKay v. McInnes,*[10] a 1929 one line per curiam decision upholding the Supreme Judicial Court of Maine.[11] The Maine court had set out three points in upholding replevin statutes. First, any statute which had been in effect so long while remaining unchallenged is presumed to be constitutional. Second, while the court granted that there was a deprivation, it was temporary and conditioned upon success in a later court action and therefore not within the protection of the fourteenth amendment. Third, since a later hearing was possible at some time, there was a "process" available and, therefore, there was "due process."

The Maine court's reasoning in *McInnes* has been eroded over the years by subsequent Supreme Court cases.[12] The due process arguments of the *McInnes* case were completely rejected, forty years later, in a Supreme Court case, *Sniadach v. Family Finance Corp.*[13] Although it involved the garnishment of wages and not replevin statutes, *Sniadach* is the foundation for the Supreme Court's decision in *Fuentes.* First, the court impliedly struck down *McInnes'* "blessing of age" argument by striking down garnishment statutes which do not have provision for a prior hearing and prior notice despite the fact that such statutes had been in existence and had gone unchallenged for many years. Second, it was emphasized that the property taken was the use of the garnished portion of the wages.[14] Even though this deprivation was only temporary and conditioned on success in a

5 Comment, *LaPrease and Fuentes: Replevin Reconsidered,* 71 COLUM. L. REV. 886 (1971).
6 FLA. STAT. ANN. § 78.01 (Supp. 1972).
7 *Id.* § 78.07.
8 *Id.* § 78.13.
9 PA. STAT. ANN. tit. 12, R. CIV. P. 1076 (1967).
10 279 U.S. 820 (1929).
11 McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), *aff'd mem.,* 279 U.S. 820 (1929).
12 *See* United States v. Causby, 328 U.S. 256 (1946) (even a temporary taking of property is protected by due process); and Armstrong v. Manzo, 380 U.S. 545 (1965) (the hearing required by due process must be granted at a meaningful time).
13 395 U.S. 337 (1969).
14 *Id.* at 342 (Harlan, concurring).

later court action, the use of property was held to be protected by the fourteenth amendment. Third, the Court stated that for the requirement of a hearing to have any meaning, it must be granted prior to the garnishment.

While all the arguments in favor of replevin were directly contradicted in *Sniadach,* certain language in the majority opinion, which referred to wages as "a specialized type of property presenting distinct problems in our economic system,"[15] caused some lower courts[16] to limit *Sniadach* to its facts: the garnishment of wages that as a practical matter, could drive a "wage earning family up to the wall."[17] Other courts, looking at the main thrust of the opinion, extended the *Sniadach* holding to other property, such as bank accounts[18] and tenants' possessions.[19]

This due process rationale was expanded to prohibit the cancellation of welfare benefits without some kind of notice and prior hearing in *Goldberg v. Kelly.*[20] Mr. Justice Brennan, speaking for the majority, said that in situations where important determinations turn on questions of fact, due process requires an opportunity to confront adverse witnesses.[21] Again, however, the court laid special emphasis on the type of property involved, noting that the termination of welfare benefits pending a later determination of the controversy could deprive a recipient "of the very means by which to live while he waits."[22]

Finally, in *Boddie v. Connecticut,*[23] the Supreme Court indicated the scope of the property interest protected by the fourteenth amendment:

> That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity to be heard *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.[24]

In light of *Sniadach* and its progeny, several lower courts have considered the constitutionality of prejudgement replevin statutes. They have reached opposite conclusions. In *Blair v. Pitchess,* the California Supreme Court declared unconstitutional California's Claim and Delivery law[25] (replevin statute), which provided for the seizing of property without notice or a prior hearing.[26] In doing so, the court relied heavily on *Sniadach, Goldberg,* and *Boddie* which, when taken together, support the proposition that due process requires prior notice and hearing before a person can be deprived of any significant property interest.

15 *Id.* at 340.
16 *See, e.g.,* Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970).
17 395 U.S. at 341-42.
18 Jones Press v. Motor Travel Services, 286 Minn. 205, 176 N.W.2d 87 (1970); Larson v. Fetherston, 44 Wis.2d 712, 172 N.W.2d 20 (1969).
19 Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).
20 397 U.S. 254 (1970).
21 *Id.* at 269.
22 *Id.* at 264.
23 401 U.S. 371 (1971) (a denial of due process to refuse to allow indigent plaintiffs to bring divorce actions because of their inability to pay a filing fee and publication costs).
24 *Id.* at 378-79, *citing Sniadach* and *Goldberg.*
25 CAL. CIV. PRO. § 509 (West 1954), *repealed,* Calif. Stats. 1972, ch. 855.
26 5 Cal. 3d 258, 277, 96 Cal. Rptr. 42, 55, 486 P.2d 1242, 1255 (1971), *noted in* 47 NOTRE DAME LAWYER 643 (1972); *accord,* LaPrease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970).

The court held that the use of the property replevied was protected by the fourteenth amendment. While the court acknowledged that there are some situations in which prehearing replevin can be justified, it concluded that the California statute was too broadly drawn.[27]

A different result was reached in *Fuentes v. Faircloth,*[28] in which a three-judge federal district court upheld Florida's replevin statute. The district court chose to limit *Sniadach* and *Goldberg* to their facts, holding in effect that the Supreme Court had intended to pronounce a new constitutional rule for wages,[29] welfare payments, and other necessities of life. Since the property here was not a necessity, it was not protected by the fourteenth amendment.[30] This decision was reversed by the Supreme Court in *Fuentes v. Shevin.*[31]

In *Fuentes,* the Supreme Court held that replevin without prior notice and hearing was a deprivation of property without due process of law. Mr. Justice Stewart, speaking for the majority,[32] delineated the issue as follows: "[Does] procedural due process . . . [require] an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person on the application of another?"[33] In holding that it does, the court pointed out that the statutes under review did not even require a sworn statement that the goods to be replevied were wrongfully detained. In many instances, the court noted, one who wishes to regain possession of replevied property must take the initiative and institute a lawsuit himself.[34] In these instances, not only is there no opportunity for a prior hearing, there is often no hearing at all.

The Court emphasized that the present replevin statutes bear little resemblance to the ancient writ from which they descended. Originally, the writ was used by a tenant to force the return of property wrongfully taken by his lord. The lord, however, could always stop this action of replevin by claiming to be the owner of the goods. As the Court pointed out, the ancient writ of replevin ". . . did *not* flow from an entirely *ex parte* process of pleading by the [tenant]."[35] The Florida and Pennsylvania statutes, on the contrary, provide for an *ex parte* proceeding, without any kind of opportunity for the party in possession to be heard.

The *Fuentes* Court noted that the opportunity to be heard must be granted at a meaningful time and in a meaningful manner.[36] The Court concluded that the right to a hearing only after replevin has taken place does not meet the standard of meaningfulness: "If the right to notice and a hearing is to serve its

27 5 Cal. 3d at 277, 96 Cal. Rptr. at 55, 486 P.2d at 1255.
28 317 F. Supp. 954 (S.D. Fla 1970), *rev'd sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972).
29 *Id.* at 957; *accord,* Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970).
30 317 F. Supp. at 958; *accord,* Epps. v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), *rev'd sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972).
31 407 U.S. 67 (1972).
32 This was a 4-to-3 decision. Justices Rehnquist and Powell took no part in the decision. Mr. Justice White wrote a dissenting opinion in which the Chief Justice and Mr. Justice Blackmun joined.
33 407 U.S. at 80.
34 For example, none of the appellants in *Epps,* the case consolidated with *Fuentes,* were ever sued in any court. *Id.* at 72 n.4.
35 407 U.S. at 79.
36 *Id.* at 80, citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

full purpose . . . it is clear that it must be granted at a time when the deprivation can still be prevented."[37] A wrong does not become permissible simply because it can later be undone.[38]

The form of the hearing depends on the nature and importance of the case and the interests involved. While the Court refrained, as it had in the past,[39] from stating the form of the hearing that is required, it must be one sufficient to determine the probable validity of the underlying claim against the alleged debtor.[40]

Even though the deprivation is only temporary, and even though the possessor does not have full title to the goods, his interest is protected by the fourteenth amendment. The Court held that the due process clause protects even a mere possessory interest and made it clear that *Sniadach* did not merely establish a special constitutional rule for wages.[41]

The Court conceded that property may be seized without a prior hearing in "extraordinary situations."[42] Since the lower courts had disagreed as to whether creditors' interests fell within such extraordinary situations, the Court listed in detail the types of situations where the courts had properly allowed such seizures. In the past, seizures without prior hearing had been used to protect the public against bank failure;[43] to meet the needs of a national war effort;[44] to protect the public from misbranded drugs[45] or contaminated food.[46] In these cases, prompt seizure was necessary to secure an important governmental or general public interest. In each case the action was initiated by a government official acting under a narrowly drawn statute indicating that the seizure was necessary and proper. The Court in *Fuentes,* noted that the replevin statutes under consideration failed to meet these requirements. The replevin statutes were not limited to special situations demanding prompt action. The statutes were not narrowly drawn and they did not insure effective state control over state power.

The Court also considered the contention that Mrs. Fuentes had waived her constitutional rights by signing a conditional sales contract containing a specific provision authorizing repossession of the property on default. In response to this, the Court noted that the purported waiver was contained in a printed form contract, that this waiver was in small type, and that the appellant was not aware of its existence. Additionally, there was no equal bargaining power between the parties and in fact no bargaining at all concerning the waiver. To waive constitutional rights it must be shown that the waiver was voluntarily, knowingly, and intelligently made.[47] Since no showing was made in *Fuentes* that this criteria had been met, the court did not enforce the waivers in the sales contracts.

37 407 U.S. at 81.
38 *Id.* at 82.
39 Both in *Sniadach* and *Goldberg* the Court said that it would not determine the form of a hearing required by due process.
40 407 U.S. at 97.
41 *Id.* at 88, 90. "The Fourteenth Amendment speaks of 'property' generally."
42 *Id.* at 90.
43 Fahey v. Mallonee, 332 U.S. 245 (1947).
44 Central Trust Co. v. Garvan, 254 U.S. 554 (1921).
45 Ewing v. Mytinger & Casselbery, 339 U.S. 594 (1950).
46 North American Storage Co. v. Chicago, 211 U.S. 306 (1908).
47 *Accord,* D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) (upholding such a waiver specifically bargained for in a commercial setting).

In the wake of the *Fuentes* decision, the question arises as to how state legislatures can conform their own replevin statutes to due process requirements. The California legislature's response to *Blair v. Pitchess,*[48] which struck down California's claim and delivery law, provides a possible model for other state legislatures. California has amended its Code of Civil Procedure to allow the courts, upon application of a replevin-plaintiff, to issue an order to the replevin-defendant to appear and show cause why the specific property should not be taken from him and given to the replevin-plaintiff.[49] The hearing must be set for a date within 10 days of the issuance of the order. If the defendant fails to appear, the plaintiff may apply to the court for a writ of possession.[50] The statute also permits the issuance of a writ of possession without prior hearing in certain limited circumstances: (1) if probable cause appears that the defendant gained possession of the property by theft; (2) if the property consists of negotiable instruments or credit cards; (3) if the property is perishable or is likely to perish before a noticed hearing is possible; (4) the property is in immediate danger of being destroyed, concealed, removed from the state, or sold to an innocent purchaser; (5) if the holder of the property has threatened to do any of the action listed in part four above.[51] The judge may issue a temporary restraining order forbidding any of the above actions if he believes such an order would be sufficient to prevent such action.[52] After a hearing has taken place, the court can order disposition of the property pending the final outcome of the litigation.[53] The statute provides for the speedy completion of such hearings so that the determination of who is entitled to the property can be quickly made.[54] This legislation was designed as a temporary experiment, set to expire on December 31, 1975.[55] By that time, it will be evident whether such a statute is practically feasible. Whether it is constitutional in light of *Fuentes* is a question left to the courts. It will be especially interesting to see whether the provisions allowing prehearing replevin are within the *Fuentes* guidelines discussed above.

It is yet uncertain what the impact of *Fuentes* will be on other areas of the law where prehearing seizure of property is still sanctioned. One of the most common such remedies is prejudgement attachment. The California Supreme Court in *Randone v. Appellate Department,*[56] has held California's prejudgement attachment statute,[57] which permits the attachment of any property of the defendant without prior hearing or notice on the filing of an action on an express or implied contract for the payment of money, to be unconstitutional. In doing so, the court followed the same rationale as the Supreme Court in *Fuentes.* In light of *Fuentes,* the California court's opinion in *Randone* seems to be an ac-

48 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971).
49 CAL. CIV. PRO. § 510 (b) *as enacted in* Calif. Stats. 1972, ch. 855.
50 *Id.*
51 *Id.* § 510 (c).
52 *Id.* § 510 (d).
53 *Id.* § 510 (e).
54 *Id.* § 520.
55 *Id.* § 521.
56 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971).
57 CAL. CIV. PRO. § 537 (West 1954), *repealed by* Calif. Stats. 1972, ch. 550 § 1.

curate statement of the law. The validity of prejudgement attachment appears to be in great doubt after *Fuentes*.

The California court distinguished foreign attachment statutes, however. Foreign attachment is used to obtain quasi in rem jurisdiction over defendants where in personam jurisdiction is not possible. These statutes often are the only basis by which a state can give its citizens an effective remedy for injuries inflicted by nonresidents. This is such an important governmental interest that foreign attachment statutes do not violate the *Fuentes* rule.

Another area of the law which may feel the impact of *Fuentes* is that of self-help repossession under the Uniform Commercial Code § 9-503. Prior to *Fuentes*, several federal district courts considered UCC 9-503 and came to differing conclusions. In *Oller v. Bank of America*,[58] a federal district court sitting for the Northern District of California never reached the substantive question, but dismissed for lack of subject matter jurisdiction. In order for the court to have subject matter jurisdiction over such a claim, the plaintiff must allege that he has been deprived of a constitutionally protected right under color of state law.[59] Since the action was brought under the Civil Rights Act, there was no requirement that jurisdictional amount be in excess of $10,000. The court had only to find "state action."[60] The court in *Oller* was reluctant to find any "state action" in self-help repossession, arguing that while self-help repossession is specifically authorized by UCC 9-503, it had long been commonly accepted contractually based and judicially sanctioned practice prior to such statutory authorization.[61] The court went on to say that not all action which conforms to state law is "state action." Noting that state action is rarely found where no state official had acted, the court listed the few exceptions: First, where a state official has acted in concert with a private individual;[62] second, where state law has compelled such action;[63] third, where the power exercised was purely statutory.[64] Finding that self-help repossession fitted into none of these categories, the court dismissed the action for lack of subject matter jurisdiction.[65] A week earlier, the Federal District Court for the Southern District of California, in *Adams v. Egley*,[66] reached the opposite conclusion on the same question and determined that California's enactment of UCC 9-503[67] did constitute state action. In doing so, the court relied on a Supreme Court case, *Reitman v.*

58 342 F. Supp. 21 (N.D. Cal. 1972).
59 Civil Rights Act, 42 U.S.C. § 1983 (1970).
60 28 U.S.C. § 1343 (3) (1970).
61 342 F. Supp. at 22.
62 *Id.* at 23, *citing* Shelly v. Kraemer, 334 U.S. 1 (1948).
63 *Id.* at 23, *citing* Harrison v. Murphy, 205 F. Supp. 449 (D. Del. 1962).
64 *Id.* at 23, *citing* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).
65 *See also* McCormick v. First Nat'l Bank of Miami, 322 F. Supp. 604 (S.D. Fla. 1971), which reached a similar conclusion. In finding no subject matter jurisdiction under 42 U.S.C. § 1983, the court relied on an older case which had held that § 1983 was only applicable where personal constitutional rights were at stake, having no application to property rights. This distinction was recently rejected by the Supreme Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). Also, in dicta, the court rejected the due process argument and in doing so relied on its own previous opinion in *Fuentes*, which was subsequently reversed by the Supreme Court.
66 338 F. Supp. 614 (S.D. Cal. 1972).
67 CAL. COMM. § 9503 (West 1964).

Mulkey,[68] which held that an amendment to the California constitution which would prohibit the placing on any restrictions on a person's right to sell property to whomever he pleases, and had the effect of repealing all of California's anti-discrimination in housing legislation, was an "encouragement" by state law of private segregation and therefore unconstitutional. The district court in *Adams* similarly found state action in that UCC § 9-503 had set up a state policy encouraging repossessions. The court concluded that when a creditor, on his own and without any judicial process, repossesses property he is operating "under color of state law" within the meaning of the Civil Rights Act.[69] "Even if an independent right to repossess is created by the signed security agreement, that right is created under authority of state law."[70] The court then determined that UCC 9-503 was unconstitutional following the reasoning of the California Supreme Court in *Blair v. Pitchess*[71] and *Randone v. Appellate Department*.[72]

The *Oller* court distinguished *Reitman v. Mulkey* saying that that case dealt with racial discrimination, that there was presented a compelling fact situation to which much federal legislation was applicable, and that the historical, legal, and moral considerations fundamental to extending federal jurisdiction to meet racial injustice were not found in the self-help repossession situations. To date the conflict between *Adams* and *Oller* has not been resolved by the Ninth Circuit.

Finally, there is the question of the costs of *Fuentes*, both financial and social. Replevin, by providing an efficient remedy for creditors, helps promote easy credit. If the remedy of replevin becomes more expensive, creditors will take a much closer look at credit applicants, and will probably raise interest rates and prices to reflect the increased costs of repossession. Costs to low income consumers are already high. Generally, retailers serving the low income market pay a smaller percentage of their sales price for the goods they sell than do their counterparts serving the general market. Part of this extra profit is lost through the present costs of repossession. Low income market retailers generally resort to repossession much more often than do general market retailers. Still, the low income market retailer's profit is significantly higher than that of the general market retailer.[73]

Increased cost of replevin would not drive the low income market retailers out of business. They do a thriving business despite already high costs. If replevin costs go up, they will raise their already inflated prices once more, safe in the assurance that their market has nowhere else to go.

While the result in the *Fuentes* case is clearly mandated by the Supreme Court's interpretation of the due process clause, it is equally clear that those who

68 387 U.S. 369 (1967).
69 42 U.S.C. § 1983 (1970).
70 338 F. Supp. at 618.
71 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971) (California prehearing replevin statute is unconstitutional).
72 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971) (California prehearing attachment statute is unconstitutional).
73 *See* Comment, *Replevin: A Due Process Prescription for an Ancient Writ*, 45 TEMPLE L.Q. 259, 266-7 (1972).

are the supposed beneficiaries of due process could very well end up as its victims through restricted credit, higher interest rates, and higher prices.

Patrick J. Sullivan

CONSTITUTIONAL LAW—FREEDOM OF RELIGION—AMISH PARENTS NOT REQUIRED TO ENROLL CHILDREN IN SECONDARY SCHOOL.—Jonas Yoder and Adin Yutzy, members of the Old Order Amish Religion, and Wallace Miller, a member of the Conservative Amish Mennonite Church, were convicted in Green County Court for their refusal to comply with the Wisconsin compulsory school attendance law which requires all parents to enroll their children in either public or private schools until they have attained sixteen years of age.[1] The respondents defended on the ground that the tenets of their religion forbade the education of children beyond the level of eighth grade, and that, therefore, to compel their children's attendance at school would violate respondents' rights under the first and fourteenth amendments. Thus, they claimed an exemption on religious grounds from the compulsory school attendance law. Their convictions were affirmed by the Wisconsin Circuit Court. On appeal, the Wisconsin Supreme Court, however, reversed the convictions and sustained on free exercise of religion grounds respondents' asserted exemption from the compulsory school attendance law.[2]

The United States Supreme Court granted the state's petition for a writ of certiorari, and *held*: the state's interest in universal education is not totally immune from a balancing process when it impinges on certain fundamental rights such as those protected by the free exercise clause of the first amendment and the traditional interest of parents with respect to the religious upbringing of their children. *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

The Wisconsin Supreme Court's decision in *Yoder* marked the first significant victory for the Amish people in their protracted struggle to pierce the wall of compulsory education that had been erected around them in one state after another throughout this century.[3] In a series of decisions[4] state courts had upheld the contention of their respective state governments (or more precisely, their state education departments) that the state possessed the authority to compel the public high school attendance of Amish children even over the religiously motivated opposition of their parents.

In *Commonwealth v. Beiler*[5] the Superior Court of Pennsylvania rejected the claim raised by members of the Old Order Amish Religion challenging the state's compulsory school attendance law as violative of the free exercise clause of the first amendment as made applicable to the states by the due process clause of the fourteenth amendment. In *State v. Hershberger*[6] the Appellate Court of Ohio, confronted by a similar Amish-inspired challenge to that state's compulsory educa-

1 WIS. STAT. § 118.15 (1969).
2 State v. Yoder, 49 Wis.2d 430, 182 N.W.2d 539 (1971).
3 Comment, *The Amish and Compulsory School Attendance: Recent Developments,* 1971 WIS. L. REV. 832, 841 (1971).
4 Cases cited notes 5 & 6 *infra.*
5 168 Pa. Super. 462, 79 A.2d 134 (1951).
6 103 Ohio App. 188, 144 N.E.2d 693 (1955).

tion law, arrived at a virtually identical result. Both decisions rested heavily upon the now disfavored[7] thought-action distinction in first amendment interpretation which forbade state restrictions on religious belief, but allowed state restrictions on religious behavior.[8] The concept of school attendance, the *Beiler* court reasoned, fell obviously under the heading of behavior, and was thus manifestly subject to reasonable regulation in the interests of public welfare.[9]

In 1967 the Supreme Court of Kansas delivered the decision *State v. Garber*[10] in which the Court alluded extensively to the arguments adduced in *Beiler* and adhered rigidly to the outmoded thought-action distinction; it rejected the Amish defendant's claim that enforcement of the state's education requirement with respect to his daughter constituted an impermissible transgression upon his first amendment right to freedom of religion. *Garber* is notable, among other reasons, for its glaring failure either to employ a balancing of interests analysis, or to recognize that recent trends in the law had swept past the antiquated and artificial thought-action rule.[11] *Garber's* most striking flaw came in its refusal to take judicial cognizance of the wholly pervasive nature of the Amish religion; it blandly glossed over the fact that for the Amish education is fundamentally a theological question of profoundly grave import for their very preservation as an organized sect. The Kansas Supreme Court concluded that "the question of how long a child should attend school is not a religious one."[12]

Dismissing an appeal from the Kansas court, the United States Supreme Court summarily denied the petition for certiorari over the dissents of Mr. Chief Justice Warren, Mr. Justice Douglas, and Mr. Justice Fortas, in effect letting the Kansas decision stand.[13]

This was the state of the law in 1971 when the Supreme Court announced that it had granted Wisconsin's appeal of *Yoder* and would take a case of this nature for the first time. Several considerations contributed to a nonfanciful anxiety that the *Yoder* holding was in clear danger of reversal.[14] The very fact that *Yoder* marked a sharp break with long-established precedent was in itself a cause for concern on the part of the Amish. Moreover, in the context of the Supreme Court's prior refusal in *Garber* to review a decision adverse to the Amish, its willingness in *Yoder* to review the favorable result gave rise by natural implication to a possible inference of judicial disfavor toward the Amish claim.[15]

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7 Cases cited note 11 *infra.*

8 The thought-action rule had its origin in *Reynolds v. United States,* 98 U.S. 145 (1878). The Supreme Court in *Reynolds,* upheld the bigamy conviction of a Mormon who had taken a second wife in accord with the established doctrine of his church.

9 Commonwealth v. Beiler, 168 Pa. Super. 462, 469, 79 A.2d 134, 137 (1951).

10 197 Kan. 567, 419 P.2d 896 (1966).

11 *See,* Sherbert v. Verner, 374 U.S. 398 (1963); People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). In *Sherbert,* the Supreme Court significantly broadened free exercise coverage by upholding a Seventh Day Adventist's right to unemployment compensation despite her religiously motivated refusal to take employment. In *Woody* the California Supreme Court extended first amendment protection to the use of peyote in the religious rites of the American Indians belonging to the Native American Church. Neither decision is reconcilable with the rationale of the thought-action rule.

12 State v. Garber, 197 Kan. 567, 574, 419 P.2d 896, 902 (1966).

13 Garber v. Kansas, 389 U.S. 51 (1967).

14 Comment, *The Amish and Compulsory School Attendance: Recent Developments,* 1971 WIS. L. REV. 832, 847 (1971).

15 *Id.*

In addition, the Wisconsin Supreme Court's opinion in *Yoder,* although a model of the proper approach to the "balancing of interests" test requisite in first amendment litigation, was open to legitimate criticism and was indeed taken seriously to task for several well-grounded reasons.

> *Yoder* is suspect on a number of substantive grounds, among them the failure to classify compulsory education as a compelling state interest, the failure to recognize and discuss the status and rights of Amish children, and the uncomfortably broad test established for granting exemption from mandatory school attendance.[16]

These flaws were of no little moment in light of the impending Supreme Court review.

Finally, with the change of membership on the Court resulting from the retirement of Chief Justice Warren and the resignation of Justice Fortas, only Justice Douglas remained of the three justices willing to grant the Amish appeal of *Garber* in 1967. Moreover, Warren and Fortas had been succeeded by Chief Justice Burger and Justice Blackmun who were popularly thought to be more generally predisposed toward the state's interests as against competing civil liberties.[17] Taken all together, this combination of factors could certainly have led an Amish sympathizer to fear for the preservation of the *Yoder* rule.

As noted above, a skeptical Supreme Court might well have found a fatal constitutional infirmity of *Yoder* to lie in any one of several possible flaws: the refusal to recognize the compelling state interest; the sweeping overbreadth of its exemption test; and the failure to consider juvenile rights. The first two of these three points found their way into the separate opinion of Justice White;[18] the third became the nucleus of Justice Douglas' dissent.[19]

Such putative deficiencies to the contrary, the constitutional philosophy employed by the Wisconsin Supreme Court prevailed. This philosophy long central to the Anglo-American creed of limited government and fundamental rights holds that "liberty and freedom consists in [persons'] having of government those laws by which their life . . . may be most their own."[20]

In *Wisconsin v. Yoder,* the opinion for the Court was written by Mr. Chief Justice Burger, and expressed the views of six of the justices; it sustained the *Wisconsin* holding and with it the Amish parents' exemption claim. Chief Justice Burger recognized forthrightly that it was the Court's responsibility to strike the proper balance between the exercise of individual religious liberties and the facilitation of legitimate governmental concerns.[21] Although the state's interest in universal education and its concomitant regulatory authority must be respected, *Pierce v. Society of Sisters*[22] insists firmly that such an interest is never

16 *Id.*
17 U.S. NEWS & WORLD REPORT, April 27, 1970, at 22.
18 Wisconsin v. Yoder, 406 U.S. 205, 237 (1972).
19 *Id.* at 241.
20 C. WEDGWOOD, A COFFIN FOR KING CHARLES: THE TRIAL AND EXECUTION OF CHARLES I 221 (1964).
21 406 U.S. at 214.
22 268 U.S. 510 (1925).

absolute to the exclusion or subordination of other constitutionally protected interests.

In addition, a state regulation though neutral at first glance, may in its localized application contravene the first amendment's prohibition of interference with religion, and thus come within the reach of judicial interposition.[23] Under the doctrine of *Meyer v. Nebraska*,[24] the courts must defer in the ordinary scheme of things to a valid state interest, especially as formalized in proper implementations of legislative power; however, they must not defer when its operation would have the inevitable result of chilling the exercise of basic first amendment rights. These rights include the freedom of religion and also the traditional panoply of parental rights in regard to the nurture and upbringing of children. Furthermore, *Sherbert v. Verner* reiterated the constitutional presumption that only interests of the highest order which cannot be otherwise served may supersede bona fide claims to the free exercise of religion.[25]

> Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children. . . .[26]

The Amish adhere literally to St. Paul's injunction, "Be not conformed to this world."[27] In light of this theological principle, Amish teaching prohibits higher learning on the ground that its inescapable effect is to develop values that irresistibly tend to estrange man from his God. In light of the realities of contemporary American life Amish teaching prohibits higher learning on the further ground that it places Amish children in a hostile environment, separates them from their community during the critically formative adolescent years, and constitutes an impermissible exposure to worldly influence entirely in conflict with their most cherished and deeply held beliefs.[28] Such an exposure contains within it the danger of unravelling the inextricably interwoven matrices of values that underlie the Amish community and comprise the Amish way of life.[29] Thus the preservation of the Amish as an organized religion was more than merely tangentially involved in the disposition of the case. In order for a state policy requiring secondary school attendance to prevail over religiously inspired parental opposition, there must perforce be a compelling state interest of sufficient magnitude to outweigh claims arising under the free exercise clause of the first amendment.[30] In view of its circumstances, *Yoder* set an even higher standard for the Government to meet.

The Court held that the state's case did not meet the standard. Chief Justice Burger could find no evidence in *Yoder* of such an overpowering state in-

23 Sherbert v. Verner, 374 U.S. 398 (1963).
24 262 U.S. 390 (1923).
25 Sherbert v. Verner, 374 U.S. 398 (1963).
26 Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).
27 *Romans* 12:2.
28 Wisconsin v. Yoder, 406 U.S. 205, 211 (1972).
29 *Id.* at 218.
30 *Id.* at 233.

terest as to justify Wisconsin's claim that it was empowered, "as *parens patriae,* to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education."[31] No proof had been adduced to show that foregoing the last two years of compulsory education would impair the children's mental or physical well-being or their eventual ability to support themselves or would result, in any way, in the material debilitation of American society.[32]

Furthermore, the highly skilled vocational education that Amish children receive at the hands of their elders satisfies the requirement of *Pierce* that parents "prepare [them] for additional obligations,"[33] and hardly leaves them doomed to dependency upon society should they ever decide to withdraw from Amish life. No less preeminent an authority than Thomas Jefferson suggested that "[a]t the discharging of the pupils from the elementary schools, . . . those destined for labor will engage in the business of agriculture or will enter into apprenticeships to such handicraft art as may be their choice."[34] In fact, Chief Justice Burger could not see how the combination of formal education and vocational training provided for Amish children failed to satisfy the overall interests that Wisconsin itself was advancing in support of its compulsory attendance claim.[35]

Thus, the Court held that consistent with the first and fourteenth amendments a state could not constitutionally compel members of the Amish faith to enroll their children in school beyond the eighth grade.[36] Conversely, state recognition of such an exemption did not constitute an establishment of religion under the first amendment for the reason that its purpose was not to favor or further the Amish religion but merely to permit it to survive in an increasingly antagonistic world. To the Court the exemption policy reflected nothing more than the constitutionally commanded neutrality of government toward all religions and toward all religious differences.[37] As Chief Justice Warren strongly admonished in *Braunfeld v. Brown,*[38] the courts must move with circumspection in performing their sensitive task of striking the delicate balance between the exercise of religious liberties and the pursuit of governmental interests that they find competing in the field of first amendment litigation. In *Yoder* Chief Justice Burger concluded that the balance had indeed been found and struck:

> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish . . . have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role which belief and daily conduct play in the continued survival of

31 *Id.* at 232.
32 *Id.* at 234.
33 Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).
34 Jefferson, *Letter to P. Carr,* in THOMAS JEFFERSON AND EDUCATION IN A REPUBLIC 97 (C. Arrowood ed. 1930).
35 406 U.S. at 234.
36 *Id.*
37 *Id.* at 234-35 n.22.
38 366 U.S. 599, 605 (1961).

> Old Order Amish communities . . . and the hazards presented by the State's enforcement of a statute generally valid as to others.[39]

In his separate opinion, Justice White, speaking for Justices Brennan and Stewart,[40] concurred in the judgment but expressed marked reservations with respect to the nature and impact of the *Yoder* holding. Mr. Justice White appeared to be drawing back from the breadth of the Burger majority opinion. In particular, he seemed disquieted by the larger implications of the decision for the future of American public education.

By stressing the weight that must be given to the presumption of validity inherent in the state's concern for preserving minimal educational standards,[41] Mr. Justice White emphasized the decision's limited scope and localized impact. His opinion dwelt at some length upon the central position occupied by the institution of public education in contemporary American life. He turned to Mr. Chief Justice Warren's opinion in *Brown v. Board of Education*[42] which stands as a foremost authority for the proposition that education is perhaps the most important of all the functions performed by state and local governments.

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[43]

Only because the legitimate state interest in education was largely satisfied by the eight years that Amish children spent in school, and because the potentially adverse effect of the state requirement upon Amish religious integrity was feared to be great, was Justice White able to concur in the decision.[44] Even at that he thought *Yoder* still a "close" case. In contradistinction to Chief Justice Burger's conclusion that the Amish right to freedom of religion commanded precedence over the state's interest in universal education, Justice White concluded that it commanded precedence only over the controverted final two years of universal education that Wisconsin law required. To this end he emphasized that it would have been a very different case for him had the Amish parents asserted "that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State."[45] Thus, Justice White also subjected the competing interests to a weighing process, but with the difference that his balancing test had been performed on much more finely calibrated scales than that of Chief Justice Burger.

The apparent anomaly of a unanimous decision incorporating a dissent arose with the opinion of Mr. Justice Douglas. Although he assented to the

39 406 U.S. at 235.
40 Of the seven justices participating in *Yoder,* only Mr. Justice Blackmun and Mr. Justice Marshall gave unqualified assent to the Burger opinion for the Court.
41 406 U.S. at 239.
42 347 U.S. 483 (1954).
43 *Id.* at 493.
44 406 U.S. at 241.
45 *Id.* at 238.

holding of the Court as regards respondent Yoder, Douglas dissented as to his two fellow respondents, Yutzy and Miller, who would appear, at first glance, to stand before the law in the same position as Yoder.[46] The distinction that Justice Douglas drew between the respective positions in which the respondents found themselves before the law rested solely upon the issue of the rights of the children involved.[47] He maintained this was an issue clearly central to the ultimate disposition of the case, but one to which the Court had not even addressed itself in passing. The crucial difference in the outcomes lay in the fact that of the three children upon whose education the entire controversy pivoted only Yoder's daughter had actually testified in regard to her own deep religious scruples against secondary learning.[48]

Justice Douglas disagreed sharply with the Court's assumption that the matter was within the dispensation of the parents alone. He rejected the majority's approach which he felt rested upon the presupposition "that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other."[49] For all intents and purposes, the Wisconsin Supreme Court had treated the free exercise of religion question that *Yoder* posed in terms of an implicit identity of interest between the parent and the child.

All such implications aside, for Douglas the question of the child's right to the free exercise of his religion along with his right to a higher education demanded consideration of his own desires in the face of these potentially conflicting values. Moreover, the inexorable result of upholding the Amish parents' exemption claim was the isolation of the children from exposure to the full contrariety of external influences present in a heterogenous and pluralistic society, and the inculcation in the children, through parental preemption and governmental default, of the elders' conceptions of religious faith and moral duty.[50]

Justice Douglas alluded to *Prince v. Massachusetts*[51] where the narrow question for decision concerned the adult's free exercise of his religion, although the Court's analysis actually focused upon the strong state interest in the welfare of the child. In *Yoder,* on the other hand, the imposition of the parents' religious beliefs upon the child was an imposition resulting directly from the litigation itself, and Douglas pointedly reminded the court that "[r]eligion is an individual experience."[52]

In light of these legal and sociological realities, Douglas was unwilling to permit this imposition of religious belief without a judicial determination of the child's desires and possibly even an accession to his wishes. "[I]f an Amish child desires to attend high school, and is mature enough to have that desire respected,

46 *Id.* at 243.
47 *Id.*
48 *Id.*
49 *Id.* at 241.
50 *Id.* at 245-46.
51 321 U.S. 158 (1944). In *Prince,* the Supreme Court upheld the conviction of a Jehovah's Witness who had violated a state statute prohibiting juvenile street solicitation by furnishing her minor niece with religious literature to distribute on the streets of Brockton. The Court upheld the conviction even though it is a religious duty of Jehovah's Witnesses to proselytize.
52 406 U.S. at 243.

the State may well be able to override the parents' religiously motivated objections."[53]

Mr. Justice Douglas perceived the juvenile rights that he would have upheld in *Yoder* as following consistently in a direct line of Supreme Court precedent firmly establishing the principle that young people have constitutionally protectible interests that the states may not abridge. The Court had elevated into a constitutional rule the precept that "[n]either the Bill of Rights nor the Fourteenth Amendment is for adults alone."[54] Under this principle, the Court has required first amendment protection for school children in civil cases,[55] and sixth amendment protection for juveniles in criminal cases.[56] For Douglas, *Wisconsin v. Yoder* called for nothing more than a natural and timely extension of this trend.

In anticipation of the points raised by Justice Douglas' dissent, both the Burger majority opinion and the brief Stewart concurrence explicitly stated that the holding of the Court was posited to no degree upon the assertion of the religious interest of the parents as against that of the child.[57] As that question was not at all an issue in the case, the Court's opinion did not reach nor decide it; on that subject Chief Justice Burger was careful to intimate no view. Nevertheless, his verbal formulation of the concept of state interposition between the conflicting desires of parents and child indicated deep reservations with Douglas' contention should it ever arise directly for decision by the Court:[58]

> It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here. . . .[59]

Mr. Chief Justice Burger was explicit in limiting the *Yoder* holding only to those persons professing a sincere and recognizable religious faith.[60] Before reaching its decision the Court had scrupulously ascertained that Amish theology and the Amish mode of life were indeed inseparably intertwined.[61] Such an evaluation was crucial, for a way of life, however laudable and salutary, could not be asserted to frustrate the indisputable state authority over universal education if it stood on wholly secular considerations.[62] In order for it to secure the protection of the first amendment, an exemption claim must have its source in religious motivation.

> Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own

53 *Id.* at 242.
54 In re Gault, 387 U.S. 1, 13 (1967).
55 Tinker v. Des Moines, 393 U.S. 503 (1968).
56 In re Winship, 397 U.S. 358 (1970).
57 406 U.S. at 230, 237.
58 *Id.* at 231.
59 *Id.*
60 *Id.* at 215.
61 *Id.*
62 *Id.*

> standards on matters of conduct in which society as a whole has important interests.[63]

The Court turned to the example of Henry David Thoreau to demonstrate a life style ordered purely along subjective lines that would not have qualified for an exemption under the first amendment.[64] Claims based on philosophical and personal, rather than theological values, failed to satisfy the requirements of the freedom of religion clause.

Mr. Justice Douglas, however, lamented what he thought to be the Court's retreat from the libertarian precedents of *United States v. Seeger*[65] and *Welsh v. United States*.[66] *Seeger* and *Welsh* both involved the selective service system, and the Court held in both that conscientious objector status could not be automatically denied to persons whose opposition to war was philosophical rather than religious in nature. In Douglas' view, the free exercise right of the first amendment could not be conditioned solely upon theistically rooted systems of belief nor limited only to those persons adhering to conventional religious faith. If the Court had seen fit in *Seeger* to extend the exemption from military service to nontheists, Justice Douglas could see no reason why an exemption from secondary education should not be similarly extended.[67] The nontheist should no more be precluded from claiming a bona fide exemption than should the religious dissenter; the proper test is whether he professes "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[68] For his part, Douglas reaffirmed this "exalted" conception of religion for which he could find "no acceptable alternative."[69]

Mr. Chief Justice Burger, however, held firmly to the requirement that an exemption claim must rest on established religious belief before the Court will grant it legal recognition:

> It cannot be over-emphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life.[70]

It appears inevitable that the Court will have to confront someday the related questions not directly before it in *Yoder*: the validity of philosophical rather than religious claims, the rights of the children involved, and the breadth of the exemption in the face of strong state interest. Nevertheless, in *Yoder* the Supreme Court significantly strengthened the first amendment's capacity to protect an individual's free exercise of his religion. In that sense alone, *Wisconsin v.*

63 *Id.* at 215-16.
64 *Id.* at 216.
65 380 U.S. 163 (1965).
66 398 U.S. 333 (1970).
67 406 U.S. at 248.
68 United States v. Seeger, 380 U.S. 163, 176 (1965).
69 406 U.S. at 249.
70 *Id.* at 235.

Yoder represents a major step forward in the constitutional development of religious freedom.

Robert J. Seminara

INTERNATIONAL LAW — THE ACT OF STATE DOCTRINE — THE BERNSTEIN EXCEPTION — WHEN THERE IS AN ASSURANCE FROM THE EXECUTIVE BRANCH TO THE COURT THAT THE ACT OF STATE DOCTRINE WOULD NOT ADVANCE THE INTEREST OF AMERICAN FOREIGN POLICY, THE DOCTRINE SHOULD NOT APPLY. —In July of 1958, First National City Bank loaned $15 million to a predecessor of the Banco Nacional de Cuba. The loan was secured by a pledge of United States Government bonds. The loan was renewed the following year, and in 1960 $5 million was repaid, the $10 million balance was renewed for one year, and collateral equal to the value of the portion repaid was released by First National City Bank.

Meanwhile, on January 1, 1959, the Castro government came to power in Cuba. On September 16, 1960, the Cuban militia, pursuant to decrees of the Castro government, seized all of the branches of the First National City Bank located in Cuba. A week later the bank retaliated by selling the collateral securing the loan, and applying the proceeds of the sale to repayment of the principal and unpaid interest. An excess of at least $1.8 million over and above principal and unpaid interest was realized from the sale of the collateral. The Banco Nacional de Cuba brought an action against First National City Bank to recover this excess and the First National City Bank, by way of set-off and counterclaim, asserted the right to recover damages for the expropriation of its property in Cuba.[1]

The district court recognized that the decision in *Banco Nacional de Cuba v. Sabbatino*,[2] holding that the courts of one nation will not sit in judgment on the acts of another nation within its own territory, would bar recovery on the counterclaim. The court concluded, however, that Congressional enactments since the *Sabbatino* decision had overruled that case.[3] There was a summary judgment in favor of the First National City Bank on all issues except the amount which could properly be applied to the loan by First National City Bank. The parties stipulated that in any event the excess was less than the damages which the First National City Bank could prove in support of its expropriation claim if that claim were allowed. First National City Bank then waived any recovery on its counterclaim over and above the amount recoverable by Banco Nacional de Cuba on its complaint; the district court then rendered judgment dismissing First National City Bank's counterclaim on the merits.[4]

The case was appealed to the United States Court of Appeals for the Second Circuit, and there it was held that the Congressional enactments relied upon by

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1 First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

2 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

3 Banco Nacional de Cuba v. First National City Bank, 270 F. Supp. 1004, 1007 (S.D.N.Y. 1967); Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370 (e) (2) (1971).

4 Banco Nacional de Cuba v. First National City Bank, 270 F. Supp. 1004 (S.D.N.Y. 1967).

the district court did not govern the case and that the decision in *Sabbatino* barred recovery by First National City Bank on its counterclaim.[5] Certiorari was granted and the judgment of the Court of Appeals was vacated for consideration of the views of the Department of State, which had been furnished to the Supreme Court following the filing of the petition for certiorari.[6] Upon reconsideration, the Court of Appeals by a divided vote adhered to its earlier decision, holding that the letter submitted to the court by the Department of State would have no bearing on the case.[7] The Supreme Court again granted certiorari and reversed with no majority opinion. *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972).

This case is not an isolated incident. For many years almost every country in the world has been faced with the problem of how a domestic court in one nation is to treat transfers of property that arise from the expropriation decrees of foreign nations.[8] The dilemma became extremely troublesome to the United States with the Castro government's seizure and nationalization of so many American companies. The economic ties between the two countries had been very strong with almost all significant investment in Cuba being held by American interests.[9] The expropriation by the Cuban government of property owned by United States citizens gave rise to the celebrated international law case of *Banco Nacional de Cuba v. Sabbatino.*[10]

In the *Sabbatino* case an American company had contracted to purchase a shipment of sugar from a Cuban company principally owned by American nationals. Before the shipment was sent, the Cuban company was nationalized and the American company set about negotiating with the nationalized company for the same shipment. An agreement was reached between them and the shipment was sent to the American company. However, the American company did not know whether to pay the nationalized company or its predecessor, the American-owned company. Suit was filed and Sabbatino was appointed receiver for the Cuban company owned by American nationals while Banco Nacional de Cuba represented the nationalized company. The issue arising from this case was whether or not the proceeds of the shipment should be paid to the company which had been nationalized without proper compensation to the American owners. The Supreme Court held in a very unpopular decision that under the "act of state" doctrine the United States Court could not sit in judgment on the acts of the Castro government within Cuban territory.[11] The act of state doctrine appears to have taken root in England as early as 1674.[12] It began to emerge in the jurisprudence of the United States in the late eighteenth century.[13] The

5 Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394, 399 (2d Cir. 1970).
6 First National City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1971).
7 First National City Bank v. Banco Nacional de Cuba, 442 F.2d 530 (2d Cir. 1971).
8 *See,* Testimony of N. Katzenbach, Attorney General of the United States, at the *Hearings on the Foreign Assistance Act Before the House Comm. on Foreign Affairs,* 89th Cong., 1st Sess., pt. 8, at 1234-37 (1965).
9 *Id.*
10 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
11 *Id.*
12 Blad v. Bamfield, 3 Swans. 604, 36 Eng. Rep. 992, (1674).
13 *See,* The Schooner Exchange v. M'Faddon 11 U.S. (7 Cranch) 116, 135-36 (1812).

doctrine gained the recognition of the Supreme Court in *Underhill v. Hernandez* where the Court refused to inquire into acts of a revolutionary Venezuelan military commander who an American citizen, Underhill, claimed had unlawfully assaulted, coerced, and detained him while in Venezuela.[14]

There was a great deal of criticism regarding the *Sabbatino* decision.[15] In one of the rare cases where the proceeds of expropriated property in Cuba had found their way back into the United States, the Court had, in effect, put them back into the pockets of the expropriators. Richard Falk summed up the American sentiment in a question:

> Is an American court obliged to give respect to governmental acts of Castro's Cuba if they violate either our public policy or the applicable substantive norms of international law?[16]

The *Sabbatino* decision listed four circumstances under which the act of state doctrine will not be applied: (1) where the dispute is governed by a treaty or other international agreement which the court is able to review; (2) where an international consensus exists regarding the applicable law; (3) where the litigation does not affect important or sensitive political issues; (4) the *Bernstein* exception.[17]

Before the *Sabbatino* case, the *Bernstein* exception had been the only exception to the act of state doctrine. It was established in a suit brought by a German national to regain property that had been expropriated from him by the Nazi government. The German national, Bernstein, had lost all of his property under German laws pertaining to the treatment of Jews. Having managed to survive the Nazi concentration camps, Bernstein came to New York where he brought suit against the party then holding his property. The court of appeals reversed the trial court's judgment for Bernstein on the basis of the act of state doctrine, but hinted that if the executive branch of the United States Government had no objection to judicial review of the case, the court might be able to deal with it. Bernstein's attorney took note of this and obtained a letter from the executive branch of the Government to the effect that they would allow judicial review of the subject matter. Thus the earlier decision was reversed and the *Bernstein* exception emerged.[18]

Even though the court in *Sabbatino* created four exceptions to the act of state doctrine, the legislature went even further in its limitation of the doctrine in order to protect the interests of American nationals in foreign countries. On October 7, 1964, the Hickenlooper Amendment was enacted into law.[19] The

14 Underhill v. Hernandez, 168 U.S. 250 (1897).
15 *Hearings on the Foreign Assistance Act Before the House Comm. on Foreign Affairs,* 89th Cong., 1st Sess., pt. 8, at 1234-37 (1965).
16 R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 64 (1964).
17 Bernstein v. N.V. Nederlansche Amerikaansche, 210 F.2d 375 (2 Cir. 1954).
18 *Id.* at 376.
19 The Hickenlooper Amendment, which has also been referred to elsewhere as the Sabbatino Amendment or the Rule of Law Amendment, was attached to the Foreign Assistance Act of 1964 and became section 301 (d) (4) of that act. (Pub. L. 88-633, 78 Stat. 1009, 1013).

amendment provided that the courts of the United States should not decline, on the ground of the act of state doctrine, to entertain a claim of title or other right to property based upon a confiscation or other taking. The amendment then went on to state that decision of such claims should be based upon principles of international law and other standards set out by Congress.[20] Since there is no international consensus as to the law regarding confiscation of property,[21] it is to be inferred from the Hickenlooper Amendment that the courts in such circumstances must apply the standards set out by Congress. The Hickenlooper Amendment was upheld in *Banco Nacional de Cuba v. Farr.*[22] However, the court in *Farr* was careful to avoid the issue of whether Congress could set the standards by which the court was to consider questions of international law.[23] In a later case, however, *French v. Banco Nacional de Cuba,* the New York Court of Appeals applied a restrictive interpretation of the statute by holding that money is not "property" for purposes of the Hickenlooper Amendment's reference to the "taking of property."[24] The Hickenlooper Amendment had reversed, with respect to cases involving foreign expropriation of property, the *Sabbatino* presumption that the courts should not sit in judgment on the acts of a foreign state. It raised the opposite presumption that the courts could hear a case unless there was a Presidential letter stating that the act of state doctrine should apply. Until *First National City Bank,* the narrow interpretation given the Hickenlooper Amendment gave the *Sabbatino* decision great importance. If the amendment did not apply, the only means of escaping the act of state doctrine were the four exceptions given in the *Sabbatino* case.

It was with this background that *First National City Bank v. Banco Nacional de Cuba* had to be decided. The district court recognized that the act of state doctrine established in *Sabbatino* would bar recovery by First National City Bank on its counterclaim. However, the court concluded that the Hickenlooper Amendment had overruled the *Sabbatino* decision. The court issued summary

20 The amendment provided:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* that this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966.

Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 USC § 2370 (e) (2) (1971).

21 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

22 Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967).

23 *Id.*

24 French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704 (1968).

judgment for First National City Bank on all issues except the amount available for possible set-off.[25]

The court of appeals reversed the district court on the grounds that *Sabbatino* barred the counterclaim. Since the counterclaim asked for damages rather than for compensation for the confiscation of property, the Hickenlooper Amendment was held to be inapplicable.[26] After certiorari was granted by the Supreme Court, a letter was furnished by the Department of State, encouraging the court to deal with the merits of the case. Based on this letter, the Supreme Court remanded the case to the court of appeals.[27] The court of appeals adhered to its earlier decision, stating the *Bernstein* "executive letter" exception to the act of state doctrine would not apply in this case. The court stated that *Bernstein* arose out of a unique set of circumstances calling for special treatment, and hence should be narrowly construed and, insofar as is possible, limited to its facts.[28]

The Supreme Court again granted certiorari and reversed. Justice Rehnquist announced the judgment of the Court and, in an opinion joined by only two other justices, concluded that if the executive branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents that the act of state doctrine would not advance the interests of American foreign policy, then the doctrine should not be applied by the courts.[29] Is it the law, then, that in those situations where the Hickenlooper Amendment does not apply the *Bernstein* exception may still operate to prevent application of the act of state doctrine?

The answer to this question is not clear from the Court's holding. The justices themselves were divided as to this point. Justice Rehnquist, joined by the Chief Justice and Justice White expressly adopted and approved the *Bernstein* exception to the act of state doctrine.[30]

Justice Douglas, however, concluded that the central issue in the case was governed by *National City Bank v. Republic of China*[31] which held that a sovereign's claim may be offset by a counterclaim or set-off. On this basis he would allow the set-off up to the amount of the respondent's claim without relying upon the *Bernstein* exception.[32]

Justice Powell, believing that *Sabbatino's* broad holding was not compelled by principles underlying the act of state doctrine, concluded that federal courts have an obligation to balance the interests involved based on a careful examination of the facts in each particular case, including the position taken by the political branches of the government. He felt that under the circumstances of the present case the federal courts have an obligation to hear First National City's claim and apply the appropriate rule of international law.[33]

25 Banco Nacional de Cuba v. First National City Bank, 270 F. Supp. 1004 (S.D.N.Y. 1964).
26 Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394 (2d Cir. 1970).
27 First National City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1971).
28 First National City Bank v. Banco Nacional de Cuba, 442 F.2d 530, 534 (2d Cir. 1971).
29 First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).
30 *Id.* at 768.
31 National City Bank v. Republic of China, 348 U.S. 356 (1955).
32 First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 770-73 (1972).
33 *Id.* at 773-76.

In a dissenting opinion joined by Justices Stewart, Marshall and Blackmun, Justice Brennan went so far as to conclude:

> The Court today reverses the judgment of the Court of Appeals for the Second Circuit which declined to engraft the so-called *"Bernstein"* exception upon the act of state doctrine as expounded in *Banco Nacional de Cuba v. Sabbatino*. The Court, nevertheless, affirms the Court of Appeals' rejection of the *"Bernstein"* exception. Four of us in this opinion unequivocally take that step, as do Mr. Justice Douglas and Mr. Justice Powell in their separate concurring opinions.[34]

Thus *First National City Bank v. Banco Nacional de Cuba* left grave doubts as to the continued validity of the *Bernstein* exception. It appears that at least four Justices have rejected the *Bernstein* exception. Perhaps this is not a regrettable development. Both the Hickenlooper Amendment and the *Bernstein* exception are based on the assumption that the courts by themselves are incapable of determining which cases of international law are susceptible of a judicial solution. This is a very questionable assumption. Because of their intensive dealing with political questions of international policy, the executive and legislative branches may be the least qualified to decide whether the courts should render decisions on problems of international law. The Court is trying to break away from such legislative interference by limiting the scope of the Hickenlooper Amendment.[35] Rejection of the *Bernstein* exception constitutes a similar attempt by the courts to free themselves of interference from the executive branch as well.

Only when the courts are completely free to base their decisions on a continuing consensus as to what the international law is, will they be able to handle the complex international problems of today.

The Supreme Court should take the earliest opportunity to adopt the view expressed by the dissenting opinion in *First National City Bank* and unequivocally reject the *Bernstein* exception.

Patricia S. Brown

34 *Id.* at 776-77.
35 French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704 (1968).