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Case Comments

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CASE COMMENTS

CONSTITUTIONAL LAW — EQUAL PROTECTION — FINANCING PUBLIC EDUCATION — A CHALLENGE TO CALIFORNIA'S ALLOCATION OF EDUCATIONAL REVENUES SUSTAINED. — Article IX, section six of the California Constitution provides a well-defined framework for a system of public school financing. Pursuant to article IX, section six the state legislature has developed a financial structure within which each school district serves as a focal point for purposes of raising,[1] allocating,[2] and expending[3] educational revenues. The law affords a district great latitude in establishing its budget requirements[4] which may be met through revenues derived from the two basic sources. These basic revenue sources are: (1) taxes levied upon real property within the district, and (2) aid derived from the state school fund.[5] Under this scheme, the appropriate local governing body will levy a tax on real property within each district at a rate sufficient to meet the budget requirements of that district.[6] Although the legislature has by statute established maximum tax rates for the support of public education,[7] a district may by majority vote approve a higher rate,[8] thus preserving its budgetary autonomy. Aid from the state school fund is allocated to the school districts in two principal forms: (1) basic aid which amounts to an unconditional grant of $125 per pupil[9] and (2) equalization aid which insures each district a basic minimum revenue per student.[10] In addition, a supplementary amount is available to certain districts disadvantaged by virtue of a low assessed valuation of real property per pupil.[11] For the school year 1968-1969, state aid and local property taxes accounted for over 90 per cent of California's educational revenues.

During that same year the Baldwin Park Unified School District expended $577.49 per pupil to educate its children, while the Beverly Hills Unified School District expended $1231.71 per student. This disparity is hardly unexpected in light of the tax bases and tax burdens of the two districts. The assessed valuation per pupil in Baldwin Park was $3,706, while the assessed valuation of Beverly Hills was $50,885. In 1968[12] children attending public schools within Baldwin Park and their parents brought class actions against certain state and county officials seeking injunctive and declaratory relief. Specifically, the plaintiffs sought a declaration that California's school financing scheme violates provisions of the California Constitution and the equal protection clause of the fourteenth amendment. Purporting to represent a class of all public school children save those in the district affording the greatest educational opportunity, the plaintiff

1 *See* CAL. EDUC. CODE §§ 20701-20703 (West 1969).
2 *See* CAL. EDUC. CODE § 17702 (West 1969).
3 *See* CAL. EDUC. CODE § 20633 (West Supp. 1971).
4 *Cf.* ch. 784, § 33.5, [1969] Cal. Stat. 1599.
5 *See* CAL. CONST. art. IX, § 6; CAL. EDUC. CODE § 17300 (West 1969).
6 CAL. EDUC. CODE § 20705 (West 1969).
7 CAL. EDUC. CODE § 20751 (West Supp. 1971).
8 CAL. EDUC. CODE § 20803 (West Supp. 1971).
9 CAL. EDUC. CODE §§ 17751, 17801 (West 1969).
10 *See* CAL. EDUC. CODE §§ 17901, 17902 (West 1969); CAL. EDUC. CODE §§ 17654.5, 17655.5, 17656, 17660, 17664, 17665 (West Supp. 1969).
11 CAL. EDUC. CODE § 17920 (West Supp. 1971).
12 Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures,* 57 CAL. L. REV. 305, 307 & n.2 (1969).

children alleged that the financing scheme made the quality of education a function of both a geographical accident and the wealth of their parents and neighbors. Their parents, claiming to represent all parents who have children in the school system and who pay property taxes in the county of their residence, alleged that the financing scheme caused them to suffer a higher tax rate than those rates imposed upon other districts in order to secure equal or lesser educational opportunities for their children. The defendants demurred generally to each claim. The trial court sustained the demurrers with leave to amend and upon plaintiffs' failure to do so, granted defendants' motion for dismissal. An appeal was taken from the order of dismissal. Reversing and remanding with directions to overrule the demurrers as to each claim, the Supreme Court of California *held:* the complaint alleged facts sufficient to show that California's public school financing system denied the plaintiff children "equal protection of the laws because it produces substantial disparities among school districts in the amount of revenue available for education." *Serrano v. Priest,* 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

I. The Court's Conclusion

In the opening paragraph of its opinion, the court states, "We have concluded, therefore, that such a system [of public school financing] cannot withstand constitutional challenge and must fall before the equal protection clause."[13] How did the court reach this conclusion when faced only with the question of sufficiency presented by general demurrer? In determining the sufficiency of the complaint the court judicially noticed a substantial amount of officially reported data.[14] Apparently the noticed data was enough to convince the court that its conclusion was sound. Why the court chose to forecast the results of pending litigation was not made clear. However, for purposes of this comment, it is enough to note that in general the discussion below will critically survey both the holding and conclusion.

II. Adequate State Ground?

The complaint alleged violations of both the state and federal constitutions. Provisions of the California Constitution specifically relied upon were sections 11 and 21 of article I. Section 11 provides, "All laws of a general nature shall have a uniform operation," while section 21 provides in part, "[N]or shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms shall not be granted to all citizens." In *Department of Mental Hygiene v. Kirchner,*[15] the California Supreme Court expressed an "understanding that the Fourteenth Amendment to the federal Constitution, and sections 11 and 21 of article I of the California Constitution provide generally equivalent but independent protections in their respective jurisdictions."[16] This expression was occasioned by a "judgment and mandate" issued by the U.S. Supreme Court

13 Serrano v. Priest, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971).
14 *Id.* at 1245, 1246 n.2-6, 1247 n.9, 1265, 96 Cal. Rptr. at 605, 606 n.2-6, 607 n.9, 625.
15 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).
16 *Id.* at 588, 400 P.2d at 322, 43 Cal. Rptr. at 330.

which sought clarification of the grounds upon which the California Supreme Court had struck down a state statute.[17] Pursuant to this mandate, the California Supreme Court held it was constrained by the aforementioned sections of the California Constitution to reach the result that the statute violated principles of equal protection.[18] This holding, of course, precluded review by the high court. Although in the present opinion, analysis of the complaint was confined to grounds of federal equal protection, the court noted in passing that its analysis was applicable to the plaintiffs' claims under sections 11 and 21.[19] This remark, seemingly dispositive of the question of adequate state grounds, merely muddies the waters. The confusion stems from the court's application of certain principles of constitutional construction to another of plaintiffs' claims. In rejecting the plaintiffs' contention that the school financing system violated article IX, section 5 of the California Constitution (directing the Legislature to provide for *a system* of common schools), the court said:

> While article IX, section 5 makes no reference to school financing, section 6 of that same article specifically authorizes the very element of the fiscal system of which plaintiffs complain . . . . Elementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted . . . . If the two provisions were found irreconcilable, section 6 would prevail because it is more specific and was adopted more recently.[20]

What was said here of article IX, section 5 appears equally true of article I, sections 11 and 21.[21] In the very least this approach to section 5 casts doubt on the existence of adequate state grounds. Nevertheless, if after final judgment, the U.S. Supreme Court grants certiorari, it is not unforeseeable that the steps of *Kirchner* will be retraced. However, the discussion below is confined, as was the Court's, to the application of the fourteenth amendment guarantee of equal protection.

III. Nor Shall Any State . . . Deny to Any Person Within Its Jurisdiction the Equal Protection of the Laws

A. *The Traditional Approach*

At the core of any equal protection claim is a classification that appears to affect similarly situated people differently. The traditional approach to a challenged statute requires little more than a rational distinction which serves a permissible state end. This approach was summarized in *McDonald v. Board of Election Commissioners*[22] as follows:

17 Dep't of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965), *vacating* 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964).
18 Dep't of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 588, 400 P.2d 321, 322, 43 Cal. Rptr. 329, 330 (1965).
19 Serrano v. Priest, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971).
20 *Id.* at 1249, 96 Cal. Rptr. at 609.
21 *See* CAL. CONST. art. I, §§ 11, 21, art. IX, § 6 (1879); CAL. CONST. art. I, §§ 11, 21, art. IX, § 6.
22 394 U.S. 802 (1969).

> The distinctions drawn by the challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.[23]

Under the traditional approach, ascribing or conjuring a legislative objective frequently determines the outcome.[24] *Morey v. Dowd*[25] provides a clear example of this process. The Court was faced with an Illinois statute imposing severe regulations on currency exchanges which issued money orders. The American Express Company was expressly exempt from the provisions of the act. Arguably, American Express was in a class by itself; its unquestioned solvency and high financial standing made regulation of its activities unnecessary.[26] Yet, the Court perceived in the act's licensing and inspection requirements an intention to "afford the public continuing protection," an end to which the class of one, unsusceptible as it was to change in membership, did not conform.[27] Recent approaches to certain equal protection claims, characterized by "strict scrutiny" depart sharply from the traditional approach, but the search for a legitimate state end remains a key element of analysis.[28]

B. *Suspect Classifications*

Exacting judicial scrutiny of an equal protection claim is warranted where the classification is either suspect or infringes upon a fundamental right. The classifications which have thus far been regarded as suspect include race and poverty. In *McLaughlin v. Florida*,[29] the Court said:

> But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," . . . and subject to the "most rigid scrutiny," and . . . "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose. . . .[30]

There is of course no similar constitutional basis for regarding the impoverished as a suspect class. The view that indigents form a suspect class has its roots in two important cases dealing with the procedural rights of criminal

23 *Id.* at 809.
24 *See, e.g.*, McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 810 (1969); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949); Goesaert v. Cleary, 335 U.S. 464, 466, 467 (1948).
25 354 U.S. 457 (1957).
26 *Id.* at 464.
27 *Id.* at 466, 467.
28 *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1103 (1969).
29 379 U.S. 184 (1964).
30 *Id.* at 191, 192.

defendants: *Griffin v. Illinois*[31] and *Douglas v. California.*[32] In *Griffin,* the Court ruled that an indigent criminal defendant was denied equal protection when his right to appellate review was effectively foreclosed by his inability to purchase a transcript of trial proceedings.[33] The prevailing and concurring opinions appear to rest on the proposition that the ability to pay costs in advance bears no rational relationship to providing criminal appellate review.[34] Within the prevailing opinion is this statement:

> Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."[35]

Douglas, relying on *Griffin,* said much the same thing of an indigent's ability to hire an attorney.[36] Neither case made mention of strict scrutiny or suspicions about wealth as a classifying factor.

The first indication that these cases established a general principle concerning wealth discrimination appears in *Harper v. Virginia Board of Elections*[37] which invalidated Virginia's poll tax. Referring to both *Griffin* and *Douglas,* the Court said, "Lines drawn on the basis of wealth or property . . . are traditionally disfavored."[38] Many Supreme Court decisions involving discrimination against indigent defendants followed *Harper,* but none has mentioned or apparently relied upon *Harper's* traditional disfavor.[39] Despite this silence, *Harper's* view emerged as a basis for special scrutiny in *McDonald v. State Board of Election Commissioners*[40] in the following dicta:

> And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race. *Harper* v. *Virginia Board of Elections,* . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. *Douglas* v. *California.* . . .[41]

With regard to lines drawn on the basis of wealth, *McDonald's* thesis is broader than the cases decided before or after its statement. First, only lines drawn on the basis of ability to pay have been invalidated.[42] Secondly, the class of indigents

31 351 U.S. 12 (1956).
32 372 U.S. 353 (1963).
33 Griffin v. Illinois, 351 U.S. 12, 19, 24 (1956).
34 *Id.* at 17, 18, 21, 22.
35 *Id.* at 17.
36 Douglas v. California, 372 U.S. 353, 355 (1963).
37 383 U.S. 663 (1966).
38 *Id.* at 668.
39 Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Williams v. Oklahoma City, 395 U.S. 458 (1969); Anders v. California, 386 U.S. 738 (1967); Swenson v. Bosler, 386 U.S. 258 (1967); Long v. District Court, 385 U.S. 192 (1966).
40 394 U.S. 802 (1969).
41 *Id.* at 807.
42 *See* Tate v. Short, 401 U.S. 395, 397 (1971); Williams v. Illinois, 399 U.S. 235, 241, (1970); Williams v. Oklahoma City, 395 U.S. 458 (1969); Anders v. California, 386 U.S. 738, 745 (1967); Swenson v. Bosler, 386 U.S. 258, 259 (1967); Long v. District Court 385 U.S. 192, 194 (1966); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966); Draper v. Washington 372 U.S. 487, 499, 500 (1963); Lane v. Brown, 372 U.S. 477, 482, 483 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252, 253 (1959); Eskridge v. Washington Prison Bd., 357 U.S. 214, 216 (1958).

has run afoul of the equal protection clause only where inability to pay has affected the exercise of "fundamental rights." Specifically, the cases have involved a citizen's right to vote and a criminal defendant's rights.[43]

Examination of *Rinaldi v. Yeager*,[44] another of *Griffin's* progeny, will serve to show the nature of strict scrutiny in the context of criminal justice. The Court was faced with a New Jersey statute enacted in apparent response to *Griffin*. A scheme was devised to enable the state to recover the cost of a free transcript from the prison earnings of an indigent defendant.[45] However, no provision was made to collect from other indigents who appealed but who either received a suspended sentence or were placed on probation.[46] The Court applied rigid standards in examining the distinction between prison inmates and other convicted defendants as it applied to three asserted state ends: recoupment, administrative convenience, and deterrence of frivolous appeals. Disregarding the traditional leeway afforded states to attack only part of a problem, the Court found that the purpose of recoupment was not served because the classification limited recovery to but a segment of those similarly situated.[47] The administrative convenience in collecting only from inmates was dismissed as minimal in light of methods readily available to collect from all convicted appellants.[48] With respect to the purpose of deterring frivolous appeals, the Court said:

> By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed.[49]

In apparent recognition of the cases which would seem to support the rational relationship of the class of inmates to these state ends,[50] the Court justified its approach as follows:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts (citing *inter alia Griffin* and *Douglas*).[51]

New Jersey's objective of recoupment might well be reconciled with open and equal access;[52] however, the distinctions designed to serve this end will be scrutinized for extraneous results which conflict with the fundamental aim of appellate review, open and equal access. No mention of strict scrutiny was made in *Rinaldi,* but the departure from the traditional approach is unmistakable.

43 *See* cases cited note 42 *supra.*
44 384 U.S. 305 (1966).
45 *Id.* at 306.
46 *Id.* at 308.
47 *Id.* at 309.
48 *Id.* at 310.
49 *Id.*
50 *See* Goesaert v. Cleary, 335 U.S. 464, 467, 468 (1948); Roschen v. Ward 279 U.S. 337, 339 (1929).
51 Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).
52 *Id.* at 311.

In the line of cases that runs from *Griffin,* departures from the traditional approach to equal protection are bound up with precepts of criminal justice.[53] Little or no support for *McDonald's* thesis that classification by wealth demands strict scrutiny can be found in the rationale of these decisions.

Concerning *Harper* itself, one theme is recurrent,[54] "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."[55] Once this is said, it could little matter that lines drawn on the basis of wealth were traditionally favored rather than disfavored. Close scrutiny was applied in *Harper,* but the *Harper* Court's reasons do not reflect the *McDonald* Court's thesis. Speaking through Justice Douglas, the Court said:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. . . . Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications. . . .[56]

In *Reynolds v. Sims*[57] (a reapportionment case) the Court said:

> Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.[58]

The *Harper* Court declined to qualify this principle in order to uphold the poll tax.[59]

What was merely implied in *Rinaldi* was made explicit in *Reynolds.* Ends ancillary to the basic aim of affording a fundamental right will be found impermissible to the extent that they may not be reconciled to that aim. The Court said:

> But if, even as a result of a *clearly rational state policy* of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired[60] (emphasis supplied).

53 *See* Williams v. Illinois, 399 U.S. 235, 241 (1970); Williams v. Oklahoma City, 395 U.S. 458, 459 (1969); Smith v. Bennett, 365 U.S. 708, 710, 711 (1961); Griffin v. Illinois, 351 U.S. 12, 33 (1956).

54 *But see* Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 25 (1969).

55 Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

56 *Id.* at 670.

57 377 U.S. 533 (1964).

58 *Id.* at 565, 566.

59 Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

60 Reynolds v. Sims, 377 U.S. 533, 581 (1964).

It is clear from *Rinaldi* and *Reynolds* that the process of strict scrutiny is triggered independently of the presence of a suspect class where open and equal access to the appellate courts or fair and effective representation is at stake. A citizen's constitutional protections in the area of state and local elections are similar in form to those of a criminal defendant in the area of appellate review. The state may grant or withdraw the franchise or right of appellate review but once established, lines may not be drawn inconsistent with equal protection.[61]

C. *Fundamental Rights*

What does it mean to characterize a right as fundamental under the equal protection clause? First of all, there is little need for this label where the right is assured by the Federal Constitution, for infringement of such a right can be dealt with under the due process clause.[62] If the purpose of this label is to explain the application of strict scrutiny, then, at least with respect to a citizen's voting rights and a criminal defendant's procedural rights, the term draws its significance from the basic[63] or central aim[64] in affording those rights.

A very important opinion has suggested that educational opportunity possesses the attributes of a fundamental right. In *Brown v. Board of Education*,[65]

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[66]

Of course, this point was made in the context of racial segregation, a constitutionally suspect classification which has been struck down in the context of relatively trivial interests.[67] Furthermore, the Court based its conclusion on the importance of education to the individual. Though clearly relevant to toppling the "separate but equal doctrine," the importance of education may not be sufficient to afford it special protection outside the area of racial segregation.[68]

IV. Wealth and Education in California

Plaintiffs, it will be recalled, alleged that "the quality of education for school age children . . . [is] a function of the wealth of the children's parents and neighbors, as measured by the tax base of the school district in which [they] reside."[69] Although the amount of property on which an individual parent will

61 Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).
62 Shapiro v. Thompson, 394 U.S. 618, 661, 662 (1969) (Harlan, J., dissenting).
63 Reynolds v. Sims, 377 U.S. 533, 565, 566 (1964).
64 Griffin v. Illinois, 351 U.S. 12, 17 (1956).
65 347 U.S. 483 (1954).
66 *Id.* at 493.
67 Gayle v. Browder, 352 U.S. 903 (1956), *aff'g mem.*, 142 F. Supp. 707 (M.D. Ala. 1956) (motorbuses); Mayor & City Council v. Dawson, 350 U.S. 877 (1955), *aff'g mem.*, 220 F.2d 386 (4th Cir. 1955) (bathhouses).
68 *Cf.* Boddie v. Connecticut, 401 U.S. 371, 385 (1971) (Douglas, J., concurring); Shapiro v. Thompson 394 U.S. 618, 661, 662 (1969) (Harlan, J., dissenting).
69 Serrano v. Priest, 487 P.2d 1241, 1244 n.1, 96 Cal. Rptr. 601, 604 n.1 (1971).

pay taxes would normally reflect his wealth or income, the impact of his tax on the school district's expenditure per pupil is hardly substantial. It was the wealth of their neighbors which produced the substantial disparities of which the plaintiffs complained. The familiar social patterns of rich and poor neighborhoods suggest a close relationship between the wealth of parents and neighbors, a relationship which zoning serves to shape and harden. However, the sharp lines of discrimination are obliterated here and there by the presence of commercial property and dense or sparce student populations. Thus, the discrimination presented to the court was very unlike the distinctions based on ability to pay struck down in previous cases.

The defendants urged that the wealth discrimination was de facto relying upon parallels easily drawn to de facto racial segregation. In rejecting this contention the court viewed the government's role in establishing the economic classifications as significant compared with *Griffin* and *Douglas*.[70] Precisely why the unusual extent of the government's activity is relevant is not made clear. In *Griffin* and *Douglas* the state afforded rights which could be effectively exercised only by those able to pay for a transcript or legal services. Nothing further was necessary to burden the indigent defendant in his exercise of a fundamental right. In the present case the government's action in zoning and establishing district lines created a situation in which a myriad of private factors might operate to create the resultant geographical disparities. However, the court did not rest its conclusion and assumed arguendo that the defendants were correct in their contentions. Assuming that the discrimination was de facto, the court observed that "[a]lthough the United States Supreme Court has not yet ruled on the constitutionality of de facto racial segregation, this court eight years ago held such segregation invalid. . . ."[71]

In support of their argument that the allegations of the complaint failed to show discrimination based on wealth, the defendants urged several points. The conclusions the court reached in discounting these contentions provide a novel view of wealth discrimination. Defendants first urged that a district's wealth is not reflected in assessed valuation per pupil because this figure is a function of the number of students as well as the assessed valuation of property within the district. Rejecting the notion that total assessed valuation represented the district's wealth, the court concluded that "the only meaningful measure of a district's wealth," in the context of school financing, is a ratio of resources to pupils.[72] Secondly, the defendants contended that the disparities in expenditure per student, of which plaintiffs complain, do not reflect the wealth of the various districts because this figure is a function of tax rate as well as the assessed valuation. To this the court responded by observing that although a district is able to determine its expenditure per child by establishing its tax rate, the richer districts are clearly favored in their ability to achieve the same results with a lower tax rate. In addition, the court noted that as a statistical matter poor districts are unable to match the expenditures of wealthier districts.[73] Finally, the defendants

70 *Id.* at 1254, 96 Cal. Rptr. at 614.
71 *Id.* at 1255, 96 Cal. Rptr. at 615.
72 *Id.* at 1251, 96 Cal. Rptr. at 611.
73 *Id.*

argued that the inclusion of commercial property within the tax base renders assessed valuation per pupil an unreliable index of the wealth of a district's families. "The simple answer to this argument," said the court, "is that the plaintiffs have alleged that there is a correlation. . . ."[74] Of course this simple answer does not meet the defendants contention that the plaintiffs will have to prove more than a functional relationship to show discrimination based on wealth. However, this point was buried as the court proceeded to reject the defendants' "underlying thesis that classification by wealth is constitutional so long as the wealth is that of the district, not the individual."[75] The court observed that the uneven distribution of commercial property is "the most irrelevant of factors as the basis for educational financing."[76]

The substance of the court's analysis is as follows:

1) Classification of a public school student according to the wealth of his district is inherently suspect.

2) The only meaningful measure of a district's wealth is the ratio of its resources to pupils. Thus: Classification of a public school student according to this ratio is inherently suspect.

This suspicion is not lifted by the fact that a district may compensate by raising its tax rate because such a procedure favors districts with a high ratio and as a statistical matter is not sufficient to eliminate some disparities. A district is favored by a low tax rate but is not necessarily favored by the amount of taxes paid by its residents. It all amounts to this: The fact that California's school districts would have to establish widely varying tax rates in order to achieve statewide uniformity in expenditure per pupil is inherently suspect. Only the broadest reading of the phrase "lines drawn on the basis of wealth" will permit such a conclusion.

It is extraordinarily difficult to conclude, in the absence of evidence of the composition of the various district tax bases, that the California school financing system draws lines based on the wealth of individuals. The difficulty would appear to stem from the fact that the system is almost as arbitrary as it is invidious as viewed by a child of the poor seeking equal educational opportunity.

In reaching its conclusion that education is a fundamental interest that may not be conditioned upon wealth, the court examined the important role education plays in affording an individual opportunity for social and economic success and in molding him into a responsible citizen able to effectively participate on the political process. In the course of its examination, the court observed that the importance of education could well be expressed in terms of the rationale offered in *Reynolds v. Sims*[77] to the effect that voting was a fundamental right because it is a "preservative of other basic civil and political rights."[78] Although the court's approach was oriented to the importance of education to the individual, its importance to society was stressed time and again. The court apparently concluded that the whole of free public education is a fundamental interest. Specifi-

74 *Id.* at 1252, 96 Cal. Rptr. at 612.
75 *Id.*
76 *Id.* at 1253, 96 Cal. Rptr. at 612.
77 377 U.S. 533 (1964).
78 *Id.* at 562.

cally why or how a child's fundamental interest in education exceeds the minimum assured in California was not addressed. Reasoning by analogy, the court indicated that just as the right to vote means more than the opportunity to cast a ballot, the right to education means more than access to a classroom. To dilute the effectiveness of either is to affect a fundamental interest.[79]

Having found suspect discrimination in the context of a fundamental interest, the court said, "We now reach the final step in the application of the 'strict scrutiny' equal protection standard—the determination of whether the California school financing system, as presently structured, is necessary to achieve a compelling state interest."[80] In this light the court considered the defendants' assertion that the state's interest in strengthening and encouraging local responsibility for decision making was served by the present structure of school financing. The court never reached the question of whether subsidiarity was a compelling state interest, for in considering the system's effectiveness in achieving this goal, the court noted that "decentralized financial decision making" is a "cruel illusion for the poor school districts."[81]

V. Conclusion

Two basic steps taken by the court involve a marked development of the law of equal protection. First, the court found that lines drawn on the basis of a school district's tax resources were inherently suspect. The suspect classifying factor was the wealth of a governmental entity and not that of an individual. Secondly, education was labeled a fundamental interest because of its extreme importance. No fundamental aim in affording education was discovered or relied upon. Why does a child's fundamental interest in education exceed the minimum provided in California? The court's suggested analogy to the impermissibility of diluting the vote provides little support for a similar conclusion as to education. In *Reynolds v. Sims*[82] the basic aim of apportionment, "fair and effective representation," required no less than apportionment on the basis of population.[83] The absence of a fundamental aim in affording education makes a similar conclusion as to the apportionment of resources to children difficult. Because the importance of education alone does not lead to a workable conclusion, the court's finding of a suspect classification is critical to plaintffs' claim for relief. Why should judicial suspicions determine the outcome of this case? What is suspect—the motives of the Legislature? The intent of California's system of school financing appears to be the result of a balancing of competing policies—adequate education and subsidiarity. Labeling a classification as "inherently suspect" is not a sound basis for constitutional interpretation.

Of all the qualities of education the court observed perhaps one serves best to support a fundamental aim. The court noted that education is essential to an individual's ability to compete successfully in our society. Education is a process

79 Serrano v. Priest, 487 P.2d 1241, 1255-59, 96 Cal. Rptr. 601, 615-19.
80 *Id.* at 1259, 1260; 96 Cal. Rptr. at 619, 620.
81 *Id.* at 1260, 96 Cal. Rptr. at 620.
82 377 U.S. 533 (1964).
83 *Id.* at 581.

that not only nurtures but creates differences in individuals, differences that affect the progress of their lives in fundamental ways. The state ought to act with an even hand in this delicate process. To ground a system of public school financing in a "crazy quilt" of tax resources is to act with other than an even hand. However, the question is not what the state ought to do but rather what the state may do. The state may balance interests and weigh policies.

To posit a fundamental aim is to limit state alternatives. The equal protection clause can be a powerful tool of reform once values such as "equal justice under law" or "fair and effective representation" are injected into the process of evaluation. The values with which the California Supreme Court dealt approach more closely the domain of ordinary policy than any heretofore incorporated within the equal protection clause.

Peter E. Nugent

LABOR LAW—RAILWAY LABOR ACT—"DUTY . . . TO [E]XERT [E]VERY [R]EASONABLE [E]FFORT" OF RAILWAY LABOR ACT SECTION 2 FIRST HELD TO BE JUDICIALLY ENFORCEABLE BY INJUNCTION.[1]—The conflict between the parties, which began in 1959, concerned the number of brakemen to be employed on the trains of the Chicago & North Western Railroad. At that time a majority of the nation's railroads served notice on various unions proposing excess crew members be eliminated at the discretion of management. In response thereto, the unions served similar notices, as provided for in Railway Labor Act § 6,[2] proposing a uniform rule requiring at least two brakemen on every crew. The parties completed the formal requirements of the Railway Labor Act (RLA) but were unsuccessful in reaching agreement. In the face of an impending strike, Congress enacted compulsory arbitration legislation,[3] under which Arbitration Board No. 282 was created and national procedures to govern resolution of the controversy were established. As a result of the Board's award, the Chicago & North Western agreements permitted the operation of 200 trains with only one brakeman instead of the usual two.[4]

Cognizant that the award of Board No. 282 was to expire in January, 1966, the Union in July, 1965, served notice requesting return to the requirement of two brakemen per crew. In December, 1965, the Railroad responded by

1 45 U.S.C. § 152 First (1964) provides:
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

2 45 U.S.C. § 156 (1964) provides in part:
> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions, and the time and place for the beginning of conferences between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice.

3 Brief for petitioner at 7, Chicago & N.W.R. Co. v. United Transportation Union, 402 U.S. 570 (1971). The legislation created being: Act of Aug. 28, 1963, Pub. L. No. 88-108, 77 Stat. 132.

4 *Id.* at 8.

serving notices on the Union requesting crew size to be determined by management. Subsequently, after all formal procedures required under the Railway Labor Act had been exhausted by the parties,[5] this suit was brought in the United States District Court for the Northern District of Illinois, Eastern Division, by C. & N. W. Railway Co. (Railroad) to enjoin a threatened strike by the United Transportation Union (Union).[6] In its pleadings, the Railroad alleged that although the Union had gone through the formal steps prescribed by the RLA it had not fulfilled the Act's most critical duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions."[7]

The district court deciding in favor of the Union held: (1) Section 2 First, being a matter for administrative determination by the Mediation Board, was non-justiciable; and, (2) Under provisions of Section 4 of the Norris-LaGuardia Act,[8] the district court did not have jurisdiction to enjoin the Union from striking. The district court did, however, grant an injunction against the strike pending appeal of its decision. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the decision below by construing Section 2 First "as a statement of the purpose and policy of the subsequent provisions of the Act and not as a specific requirement anticipating judicial enforcement."[9]

On certiorari, the United States Supreme Court, in a 5-4 decision, reversed and *held*: (1) That Section 2 First created a legal obligation on the parties to "exert every reasonable effort" to reach agreement; (2) Enforcement was to be by appropriate judicial means as intended by Congress rather than by the Mediation Board, and ; (3) That Section 4 of the Norris-LaGuardia Act does not prohibit use of the strike injunction by the district court when it is the only possible, effective means of enforcing the duty imposed by Section 2 First. *Chicago*

5 Briefly, those requirements are: (1) A party that wishes to change the rate of pay, rules, or working conditions must give advance written notice. 45 U.S.C. § 156 (1964); (2) The parties must confer. *Id.* § 152 Second; (3) If the conferences fail to resolve the dispute one or both of the parties may invoke the services of the National Mediation Board, which may initiate its service itself if it finds an emergency to exist. *Id.* § 155 First; (4) If mediation fails the Board will attempt to have parties submit to binding arbitration, but this can happen only upon agreement of both parties. *Id.* § 157 First; (5) If arbitration is not accepted and a strike could deprive the public of essential transportation service the President may create an emergency board to investigate and report on the dispute. *Id.* § 160 (The President created no emergency board in the present case); and, (6) While the dispute is going through these procedures the parties may not change the status quo. This also applies to a 30-day "cooling off" period following a refusal to accept binding arbitration. *Id.* § 155 First, and § 152 Seventh.

6 Chicago & N.W.R Co. v. United Transportation Union, Civil No. 69C2401 (N.D. Ill., E.D., Dec. 11, 1969).

7 The complaint as filed with the district court and reprinted in the Appendix to the decision.

8 29 U.S.C. § 104 (1964) provides in relevant part:

> No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

9 Chicago & N.W.R. Co. v. United Transportation Union, 422 F.2d 979, 985 (7th Cir., 1970).

& North Western Railway Co. v. United Transportation Union, 402 U.S. 570 (1971).

The Supreme Court decision that Section 2 First imposed a legal obligation was based on judicial interpretation of the section in earlier cases and on the legislative history of the RLA. In support of its contention that the writers of the RLA intended to create a legal obligation, the Court relied solely upon statements made by representatives of the railroads and unions in the House hearings on the Act.[10] The conclusion of the Court seems unequivocally supported by the statement of Donald R. Richberg, counsel for the organized railway employees supporting the bill, when he said:

> [I]t is their duty to exert every reasonable effort . . . to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion.[11]

While it is clear (even to those justices dissenting from the majority opinion[12]) that it was the understanding of all parties involved that the duty to "exert every reasonable effort" was judicially enforceable, it is not so clear to what *extent* that duty was enforceable. It is the opinion of the dissenting justices that Section 2 First requires only that the parties "recognize one another and sit down to bargain."[13] This proposition finds support in the following statement made during the hearings by Mr. Richberg:

> I think that a duty imposed by law is enforceable by judicial power, yes. Of course, this is not a duty which could be enforced in a very absolute way, because it is a duty to exert every reasonable effort. In other words, all that could be enforced by the Court would be an order against an arbitrary refusal to even attempt to comply with that duty, but I do believe that could be subject to judicial power.[14]

Earlier in the hearings Mr. Richberg stated:

> In the first place, I think if either party showed a willful disregard of the fundamental requirements, that they should make every reasonable effort to make an agreement—in other words, if they refuse absolutely to confer, to meet or discuss or negotiate, I think there is a question as to whether there might not be invoked some judicial compulsion, but I would rather see that left to development rather than see it written into the law.[15]

The minority opinion requiring only attendance and recognition for compliance with Section 2 First is not a fair interpretation of either the words of the statute

10 *Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce,* 69th Cong., 1st Sess. (1926) [hereinafter referred to as *Hearings*].
11 *Id.* at 91.
12 402 U.S. at 593 (dissenting Opinion).
13 *Id.* at 599.
14 *Hearings* at 84-85.
15 *Id.* at 66.

or its legislative history. Indeed, it is difficult to conclude that words such as, "It *shall* be the duty . . . to exert every reasonable effort" could have been intended by Congress to require only that the parties "recognize one another and sit down to bargain." It is also difficult to glean the requirement outlined by the dissent from statements made during the hearings. Mr. Richberg and the majority agree that an arbitrary refusal to even attempt to comply with Section 2 First could be subject to judicial power. The majority implies that an arbitrary refusal to attempt compliance may take more than one form,[16] while the dissent contends that the only form it may take is a refusal "to recognize one another and sit down to bargain."[17] The majority interpretation seems to be the much more logical, and is further supported by Mr. Richberg's explanation as to why the RLA was lacking in specific regulations and sanctions when he stated:

> We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America.[18]

In other words, what was proposed was not a duty susceptible to specific definitions, but was rather a general duty to exert some effort to reach agreement—the effort required to be developed on a case-by-case basis.

With an eye towards the case law relied upon by the Court to support the conclusion that Section 2 First imposes a legal obligation, attention is directed immediately to *Virginian Ry. v. Federation.*[19] Here, plaintiff union, which had won a representation election, sought judicial assistance when defendant railroad dealt instead with a "company union." The union claim was based on several sections of the RLA including Section 2 First.[20] The employees were successful in obtaining an injunction from the trial court directing defendant to "treat with" the plaintiff union and "to exert every reasonable effort to make and maintain agreements. . . ."[21] Defendant railroad appealed the decision contending that the RLA afforded no legal sanction for that part of the injunction requiring the railroad to "exert every reasonable effort" to reach an agreement.[22] The court, however, directly rejected that agreement by asserting that neither the words of the statute nor cases interpreting it lent any support to the contention that Section 2 First was incapable of judicial enforcement.[23] The Court made very clear its holding in the following statement:

> The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which

16 402 U.S. at 575.
17 *Id.* at 599.
18 *Hearings* at 66.
19 300 U.S. 515 (1937).
20 *Id.* at 538.
21 *Id.* at 540.
22 *Id.* at 544.
23 *Id.* at 545.

> no agreement can be reached. It *at least* requires the employer to meet and confer with the authorized representative of the employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into negotiation for the settlement of labor disputes such as is contemplated by Section 2 First.[24] (Emphasis added.)

The dissent in the present case asserted that the *Virginian* decision merely reaffirmed their conclusion that the only legal obligation imposed by Section 2 First was to recognize one another and begin the bargaining process.[25] Once again, it is asserted that the dissent has arrived at its conclusion in an inaccurate fashion. They have taken one example of the application of Section 2 First, which required the parties to "treat with" one another, and concluded that this is the only possible application. Quite the contrary, the court in *Virginian* stated that "at least" to the extent used in that case Section 2 First was judicially enforceable. Consequently, the Court did not exclude future enforcement of the "duty to exert every reasonable effort" in situations where there were recognition and discussion, but no attempt at agreement.

Furthermore, the Court's statement that Section 2 First requires the parties to make a "reasonable effort to compose differences" was not merely a passing reference. The very injunction sustained by the court in *Virginian* required the employer not only to "treat with" the union but also to "exert every reasonable effort to make and maintain agreements."

If there was any doubt after *Virginian* as to whether a violation of Section 2 First alone could support an injunction its meaning was made more explicit in later cases. In *Elgin, I. & E. R. Co. v. Burley*[26] the Court, in reference to both Section 2 First and *Virginian*, stated:

> . . . one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. (Citations omitted.) This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it.[27]

Other cases have reached the same conclusion,[28] and only recently the Court decided the case of *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*[29] which may have been a forecast of the present decision. There in a general discussion of the dispute resolving framework of the RLA the Court referred to Section 2 First as the heart of the RLA imposing upon management and

24 *Id.* at 548.
25 402 U.S. at 594.
26 325 U.S. 711 (1945).
27 *Id.* at 721-22.
28 Those cases supporting the justiciability of Section 2 First are: Stark v. Wickhard, 321 U.S. 288, 306-07 (1944); where the Court cited *Virginian* for the notion that "where rights of collective bargaining, created by the same RLA, contained definite prohibitions of conduct, or were mandatory in form, this Court enforced the rights judicially." In Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330, 339 (1960), the Court referred to "the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes." In Shore Line v. Transportation Union, 396 U.S. 142, 149 (1969), the Court referred to the RLA in this text: "It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement. . . ."
29 394 U.S. 369 (1969).

labor a duty "to exert every reasonable effort to make and maintain agreements . . . in order to avoid any interruption to commerce. . . ."[30] While the facts of the case do not facilitate a comparison of it with the present case it represents a recent example of the Court's interpretation of the legal obligations imposed by Section 2 First.

The enforcement of the RLA requirement to "exert every reasonable effort" has been in the past primarily exercised in cases involving an outright refusal to bargain, as was evidenced in the *Virginian* case. In recognizing the legal obligation of Section 2 First, the Court expressly agreed with, and exhibited a willingness to apply, the opinion of a leading commentator:

> It is not enough for the law to compel the parties to meet and treat without passing judgment upon the quality of the negotiations. The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition.[31]

With the decision in the present case the Court has possibly broadened the scope of the parties' legal obligation under Section 2 First—the extent of which will be discussed below.

"Given that Section 2 First imposes a legal obligation on the parties, the question remains whether it is an obligation enforceable by the judiciary."[32] The Court began its discussion of judicial enforcement from the proposition that the statutory language and legislative history of the Act were unclear and in such a case the court had in the past considered three criteria for deciding the propriety of judicial enforcement. These three criteria are: (1) The importance of the duty in the scheme of the act; (2) The capacity of the courts to enforce it effectively; and (3) The necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.[33]

The attitude of the Court as to the importance of Section 2 First has already been examined in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.* where it was referred to as "The heart of the Railway Labor Act."[34] The Court further supported its position that a sincere attempt at settlement was required to give effect to the Act by observing that even if all the formal procedures of the Act were complied with those procedures were "meaningless if one party goes through the motions with a desire not to reach an agreement."[35] It can be concluded that the Court made the "duty to exert every reasonable effort" the very essence of the negotiation process, at least to the extent it required the parties to possess a desire to reach agreement.

The capacity of the courts to effectively enforce the standard of "every reasonable effort" was evidenced in the *Virgianian* case when the Court noted that ". . . whether action taken or omitted is in good faith or reasonable, [is an]

30 *Id.* at 377-78.
31 Cox, *The Duty to Bargain in Good Faith,* 71 HARV. L. REV. 1401, 1412-1413 (1958).
32 402 U.S. at 578.
33 *Id.*
34 394 U.S. at 377.
35 402 U.S. at 578.

everyday subject of inquiry by courts in framing and enforcing their decrees."[36] It should also be noted that Section 8 of the Norris-LaGuardia Act calls for judicial decision as to whether plaintiffs have "failed to make every reasonable effort to settle such dispute."[37] The majority being unable to conclude that a court would be any more capable of enforcing such a standard in the case of the Norris-LaGuardia Act than it would for the RLA.[38]

The third criterion put forth by the Court was the necessity for judicial enforcement. The court of appeals took the position that the question of fulfilling the requirement to exert "every reasonable effort" was committed to the National Mediation Board.[39] In rejecting this proposition the Court looked to the legislative history surrounding the enactment of the RLA.

The original RLA was enacted due to dissatisfaction with the earlier 1920 Transportation Act[40] and particularly with the problems surrounding the Railroad Labor Board. This earlier board had been given the authority to make decisions as to labor disputes, and to direct public criticism against the party which in its opinion was at fault.[41] The fact that the Board was acting in an adjudicatory capacity was the main reason that it lost effectiveness in attempting to settle disputes. During the hearings it was clear that the intention was to create a National Mediation Board which had no adjudicatory function in order for it to retain the confidence of both parties.[42] Recently, the court reached the same conclusion that "the Mediation Board has no adjudicatory authority with regard to major disputes. . . ."[43]

It is not contended that judicial enforcement of the "duty to exert every reasonable effort" will not present some difficulties. But judicial enforcement is necessary if we are to preserve the full effect of the dispute settlement scheme of the RLA. And as was experienced by the Transportation Act of 1920, the judiciary is the only effective means for that enforcement.

Having established that Section 2 First imposes a legal obligation enforceable by the courts, consideration must be given to the contention that Section 4 of the Norris-LaGuardia Act prohibits the use of a strike injunction to compel compliance with the "duty to exert every reasonable effort."

The Court was brief in its treatment of this issue, relying primarily on their decision in *International Association of Machinists v. Street.*[44] This case involved a request by members of a union to enjoin enforcement of a union-shop agreement entered into under Section 2 Eleventh of the RLA. The agreement required

36 300 U.S. at 550.
37 29 U.S.C. § 108 provides in part:
> No restraining order or injunction relief shall be granted to any complainant who has . . ., or who has failed to make every reasonable effort to settle such dispute. . . .
38 402 U.S. at 579.
39 422 F.2d at 987.
40 41 Stat. 456 (1920).
41 As interpreted by Pennsylvania R.R. v. United States R.R. Labor Bd., 261 U.S. 72, 79-80 (1923).
42 *Hearings* at 18 (Mr. Richberg):
> The board of mediation, to preserve its ability to mediate year after year between the parties, must not be given any duties to make public reports condemning one party or the other, even though the board may think one party is wrong.
43 Shore Line v. United Transportation Union, 396 U.S. 142, 158 (1969).
44 367 U.S. 740 (1961).

membership in the union and the payment of various forms of assessments to the union. The plaintiffs claimed the money was being spent for improper purposes by the union. In deciding an injunction of a limited nature was consistent with both the RLA and Norris-LaGuardia Act the Court said:

> The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co.* v. *System Federation,* 300 U.S. 515; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen,* 338 U.S. 232. However, the policy of the Act suggests that the Courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right.[45]

The Court found it impossible to conclude that no situation could arise where an injunction "alone can effectively guard the plaintiff's right" to have the other party "exert every reasonable effort" as required of him under Section 2 First. Therefore, a trial court should be allowed to consider whether there has been a violation of Section 2 First, and if so, whether an injunction is the only effective means of enforcing the commands of Section 2 First.

The Court's position was further supported by the congressional debates over the Norris-LaGuardia Act.[46] The remarks of the Senators exhibit that the Act was not intended to be an absolute prohibition of strike injunctions but rather would allow injunctions to preserve rights already accrued by the parties under existing law and to protect the public welfare when endangered by a strike.[47]

The Court also noted the fact that Section 2 First was reenacted in 1934, two years after the Norris-LaGuardia Act, and in the event of irreconcilable conflict between their policies, the subsequent, more specific provisions of Section 2 First would prevail under familiar principles of statutory construction.[48] While the Court spoke in a positive manner its concluding statement acknowledged the possibility that there could be another interpretation:

> If we have misinterpreted the congressional purpose Congress can remedy the situation by speaking more clearly. In the meantime we have no choice

45 *Id.* at 772-73. Other decisions with similar statements are 300 U.S. at 562-63; Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232, 237 (1949); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 774 (1952).

46 75 CONG. REC. 4938 (1932) (Remarks of Mr. Blaine):

> I am quite sure there is no logical argument by which the Senator from Oregon can construe the provisions of Section 6 to deny the working men any right they may have under any substantive law, either statutory or courtmade; certainly not with respect to the substantive law within the Railway Labor Act.

Also, Mr. LaGuardia spoke in response to a question asking if the Act could prevent an injunction of the railroads and thereby stop the public from receiving needed supplies:

> We passed the Railway Labor Act, and that takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes. 75 CONG. REC. 5499 (1932).

47 *Id.*

48 402 U.S. at 582-83, n.18; *See also* 300 U.S. at 563.

> but to trace out as best we may the uncertain line of appropriate accommodations of two statutes with purposes that lead in opposing directions.[49]

If the Court had decided differently as to the applicability of the Norris-LaGuardia Act it would have frustrated the major purpose of the RLA, which was to provide a mechanism to avoid strikes. This purpose should not be frustrated merely because one, or possibly both, of the parties refuse to comply with the Act.[50]

By reaching the conclusion that Section 2 First was judicially enforceable by injunction, the Court recognized that there may be abuses of this newfound right to demand the opposing party "exert every reasonable effort." It is feared that the parties will no longer plan their negotiations around reaching an agreement, but rather will structure their negotiations to comply with the duty to "exert every reasonable effort." Another difficulty may be that the party who wishes to retain the status quo, in most cases the railroad, may not wish to compromise during negotiation if he believes the union may be effectively impeded from resorting to a strike after completion of the formal requirements.[51] Additionally, the Court took cognizance of the possibility that their decision could result in a "cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place."[52] The dissent goes a little further and states the belief that the decision "will destroy entirely the carefully planned scheme of the Act."[53] This argument seems invalid. Is it not logical that enforcement of the duty to "exert every reasonable effort" will result in a greater willingness to negotiate and promote ultimate agreement, than would non-enforcement, which would allow willful disregard of the "heart" of the bargaining mechanism?

It is also believed that if the threat of self-help measures are not felt in the initial negotiations there will not be sufficient motivation or pressure on the parties to produce an agreement on their own. The dissent further argues that a major problem is created by the decision in that it does not provide any rule as to where the parties are to be remanded in the bargaining scheme.[54] While the RLA does not include specific regulations and sanctions which would facilitate enforcement of the Act, it is no less necessary that the provisions be enforced. It is contended that the problems encountered in enforcement are best handled on a case-by-case basis. Also it would not be inappropriate to remand the parties back to the initial steps of the process to start again with a new attitude toward their negotiations.

In concluding, the Court counseled restraint in the issuance of strike injunctions based on Section 2 First violations. The Court explained its decision in the following manner:

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49 402 U.S. at 582.
50 Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, International, 416 F.2d 633, 638 (4th Cir. 1969).
51 394 U.S. at 380-81.
52 402 U.S. at 583.
53 *Id.* at 597 (dissenting Opinion).
54 *Id.*

> . . . the result reached today is unavoidable if we are to give effect to all our labor laws—enacted as they were by Congresses of differing political makeup and differing views on labor relations—rather than restrict our examination to those pieces of legislation which are in accord with our personal views of sound labor policy.[55]

While it is obvious from the 5-4 decision that equally articulate minds could reach different conclusions as to the legal issues involved in this case,[56] it is asserted that the Court came to the right conclusion. Upon a close reading of the case it is obvious the Court placed some restrictions on the use of an injunction in cases of Section 2 First violations. There must be two, and possibly three, important facts present before a district court may issue an injunction due to failure to "exert every reasonable effort" to reach agreement. The first and most difficult requirement to prove is that there has been a failure to exert every reasonable effort to reach an agreement. The Court cautioned that "great circumspection should be used in going beyond cases involving a desire not to reach agreement."[57] Thus, the Court seems to have restricted the interpretation of a failure to "exert every reasonable effort" to something only slightly more than an overt desire not to reach agreement.[58]

The second prerequisite is that an injunction will not be ordered unless such a remedy is the only available means to protect the plaintiff's right to expect the other party to make a good faith effort to reach agreement.[59]

The final requirement is that there be a danger of irreparable damage to the public welfare if a strike were to occur. While this requirement is not expressly stated by the Court, it is implicit from the opinion and has been developed on remand of the case to the district court. Holding that an injunction be ordered, the district court said: ". . . this court has the authority to and it is duty bound, because of certain irreparable damage to the public, to grant an injunction. . . ."[60]

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55 *Id.* at 583-84.

56 This is further supported in a letter to the author from counsel for the respondent, Mr. John H. Haley, Jr., in which he wrote:

> There seems to be general agreement that the dissenting opinion initially was prepared as the majority opinion but that one of the Justices changed his vote while the case was pending, between the time it was argued on January 18, 1971 and June 1, when opinions were filed.

57 402 U.S. at 579 n.11.

58 It seems that while the Court warned that utmost care should be used in drawing parallels between the "good faith" requirement of the N.L.R.A. and the "duty to exert every reasonable effort" of the RLA, such definitions of requirements of the RLA as in *American Airlines, Inc. v. Air Line Pilots Ass'n Inter.*, 169 F. Supp. 777 (S.D. N.Y. 1958) may still hold some vitality:

> The requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of bad faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with a desire or intent not to enter into an agreement at all. *Id.* at 794.

59 402 U.S. at 583.

60 Chicago & N.W.R. Co. v. United Transportation Union, 40 U.S.L.W. 2115 (U.S.D.C. N.D. Ill. 11, 8-13-71). It is interesting to note that the Court also held that:

> . . . this Court has the authority . . . to grant an injunction against a strike by defendant union even though the plaintiff does not come into the Court with clean hands. The clean hands equity doctrine would apply here except for the grave and irreparable damages that the public, composed of innocent bystanders, would suffer.

By adhering to these prerequisites, the problems considered by both the majority and dissenting opinions will be minimized. The limited application of the injunction will not allow parties to plan their negotiations around a hope that the other party will be enjoined from resorting to self-help because he was deemed to have failed to "exert every reasonable effort." A real danger of abuse lies in preliminary injunctions issued prior to decision of a frivolous claim. But this danger should also be substantially limited by the narrowness of the decision in the present case coupled with the procedural requirement of a showing that there is likelihood of success before an injunction will issue.[61] Because of the Court's prerequisites to the use of an injunction, the fear of "freewheeling" judicial interference in labor negotiations should also prove to be a false fear.

While this decision should promote the possibility of agreement due to the enforceability of the requirement to exert every reasonable effort during negotiation, in practice, it will not change the present situation. As outlined above, the three prerequisites to the use of an injunction to enforce Section 2 First are: (1) Failure to "exert every reasonable effort"; (2) injunctive relief being the sole remedy available; and, (3) potential irreparable damage to the public. Owing to these requirements it is doubtful that this decision will have any great effect on strikes in the transportation industry. The parties will still enter negotiations with a predisposition not conducive to agreement. The railroad's attitude will be a result of economic pressures and the employees' representative will be attempting to retain his position as representative by insisting upon a settlement exceeding that which could be considered fair.[62] The situation will often lead to the case where the parties complete all the formal requirements with a reasonable effort to reach agreement and are then able to resort to self-help. It is here that the RLA has often failed to accomplish its stated objective of avoiding interruptions in interstate commerce.[63] A possible solution would be for Congress to restructure the responsibilities of the Emergency Board which the President can create per Section 10 of the RLA.[64] If this Board were to have responsibility for determining whether a dispute should be submitted to compulsory arbitration it would be effective in preventing strikes. In making this decision the Emergency Board would consider both the impact of a possible strike on the public welfare and the possibility of a negotiated settlement between the parties without compulsory arbitration. While it is clear that government intervention is inevitable when a strike threatens the general welfare, the effectiveness of compulsory arbitration will depend on the fairness and neutrality of the procedures employed. If successful, compulsory arbitration could result in fair treatment of transportation employees, and eliminate strikes endangering public health, safety, and welfare.[65]

61 Checker Motors Corporation v. Chrysler Corporation, 405 F.2d 319, 323 (2d Cir. 1969), *cert. denied*, 394 U.S. 999 (1969).

62 Wisehart, *Transportation Strike Control Legislation: A Congressional Challenge*, 66 MICH. L. REV. 1697, 1709 (1968).

63 45 U.S.C. § 151 (a) (1964).

64 45 U.S.C. § 160 (1964). The President is allowed to create an Emergency Board when in the opinion of the Mediation Board there is the threat of a strike which would substantially interrupt interstate commerce to a degree such as would deprive a part of the country of essential transportation service. The Board merely investigates a dispute and reports to the President regarding such dispute.

65 Wisehart, *supra* note 62, at 1714-15. For a slightly different approach see Rothman, *National Emergency Disputes Under the LMRA and the RLA*, 15 LAB. L.J. 195 (1964).

While binding arbitration is generally not favored by either party to a dispute the merits of a process free from government interference must be questioned when the damage to the public due to self-help procedures far outweighs injuries to the parties. As one commentator so aptly stated:

> With the disparity in bargaining power that exists in transportation, muscle has become the ultimate determinate—at the expense of collective bargaining. The unions argue against compulsory arbitration because they seek to retain the advantage which their muscle confers. From the standpoint of the public, however, an assertion that settlements engendered by sheer muscle are productive of economic wisdom is no less ludicrous than the medieval assumption that trial by battle was productive of moral wisdom.[66]

John E. Oster

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—THE ALLEGED CRIMINAL REPUTATION OF A SUSPECT MAY BE CONSIDERED BY A MAGISTRATE IN EVALUATING AN AFFIDAVIT FOR A SEARCH WARRANT, AND HEARSAY STATEMENTS AGAINST AN INFORMANT'S PENAL INTERESTS MAY BE SUFFICIENT TO ESTABLISH HIS PROBABLE CREDIBILITY FOR THE PURPOSE OF ESTABLISHING PROBABLE CAUSE.—In 1967, Roosevelt Harris was charged with possession of non-taxpaid liquor[1] on the basis of evidence seized in a search of his home and premises. The search had been carried out pursuant to a warrant supported by a single federal investigator's affidavit. Prior to trial Harris had moved to suppress the seized evidence on the ground that the affidavit was inadequate to establish probable cause for a search, but his motion was denied and he was tried and convicted of the offense.[2]

The controversial affidavit had presented three allegations to the magistrate. The principal one was that an unidentified informant had reported purchasing liquor from Harris at his home many times, and had personal knowledge of the consumption of such liquor in an outbuilding on Harris' premises used as a "dance hall." Secondly, within the past four years, a local constable had discovered a large quantity of illegal whiskey in a house under Harris' control. Lastly, Harris had acquired a reputation with the officer as a "bootlegger," based on the statements of numerous third persons.

The Court of Appeals for the Sixth Circuit reversed the conviction on the specific ground that the affidavit was insufficient to enable the magistrate to determine the informant's credibility.[3] The Supreme Court, by a 5-4 majority, reversed the court of appeals, reinstated the conviction, and *held*: in examining an affidavit based primarily upon the hearsay statements of an anonymous informant to determine the existence of probable cause for the issuance of a search warrant, a magistrate may, to substantiate the informant's credibility: (1) consider an allegation of the suspect's criminal reputation as corroboration of the

66 Wisehart, *supra* note 62, at 1717-18.

1 26 U.S.C. § 5205(a) (2).
2 *See* United States v. Harris, 412 F.2d 796 (6th Cir. 1969).
3 *Id.*

informant's tip, as long as it is supported by facts indicating past criminal activity by the suspect, and (2) accord to a statement against the informant's own penal interest additional credibility sufficient to establish probable cause even without corroboration. *United States v. Harris,* 403 U.S. 573 (1971).

If a search is sought to be justified by the fact that it was based on a warrant, the essential constitutional requirement for the validity of the warrant is that it be based upon "probable cause."[4] If it is not so based, the evidence seized in the resulting search is not admissible into evidence at trial.[5] The officer seeking a warrant from a magistrate must submit an affidavit setting forth the grounds upon which he believes the search justified, from which the magistrate must then decide whether " 'the facts and circumstances within their [police officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[6]

Thus, probable cause requires the existence of more than a bare suspicion, but less than would be required to prove guilt beyond a reasonable doubt.[7] As a result, not only the quantum but also the mode of proof may be different from proof at trial; that is, strict rules of admissibility need not be followed by a magistrate at the probable cause stage.[8] In particular, probable cause can be predicated upon hearsay as long as there is "a substantial basis" for believing it.[9]

Beyond those general principles, the issue of what factual showing is necessary for probable cause has been the subject of heated discussion[10] when, as in *Harris,* the affidavit is based primarily on hearsay. The development of the law in such an area, where factual appraisals are the central task of the courts, has necessarily proceeded on an irregular, case-by-case basis; the comparison of cases is therefore difficult.[11] An examination of past Supreme Court decisions does, however, reveal that two distinct approaches to probable cause have evolved. The first of these has attempted to determine probable cause by erecting mechanical tests consisting of various criteria which must be satisfied by the affidavit.[12] The second approach has been to read the affidavit as a single unit, weighing all of the allegations together and deciding whether or not the affidavit as a whole

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

5 The so-called "exclusionary rule" was first applied to the federal courts in *Weeks v. United States,* 232 U.S. 383 (1914), and later extended to the states through the fourteenth amendment in *Mapp v. Ohio,* 367 U.S. 643 (1961), and *Ker v. California,* 374 U.S. 23 (1963).

6 Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

7 Brinegar v. United States, 338 U.S. 160, 175 (1949).

8 *Id.* at 172-73.

9 Jones v. United States, 362 U.S. 257, 269-71 (1960).

10 The differing viewpoints on this issue will be further developed by the remainder of this Comment.

11 A court can only make general statements about probable cause, and then examine the specific facts of the case before it and decide whether probable cause exists. This method of analysis is occasioned, in part, because probable cause is unique in each case. *See* 26 LA. L. REV. 789, 794 (1966).

12 *See, e.g.,* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

justifies a finding of probable cause.[13] The following analysis will focus on both approaches as they relate to the holding of the *Harris* case. The *Harris* opinion discloses two distinct areas of departure from prior law: (1) the use of a suspect's reputation to substantiate and lend credibility to an informer's statements, and (2) the use of the fact that the statements were against the informant's penal interest to further substantiate his credibility.

I. Reputation as Corroboration of the Informant's Tip

The first issue before the Supreme Court in *Harris* was whether probable cause was established by the informant's tip, as supported by the suspect's alleged reputation and the indication of his past criminal activity. The previous law in this area was based primarily upon two earlier cases, *Aguilar v. Texas*[14] and *Spinelli v. United States*.[15] In *Aguilar* a search warrant had been issued pursuant to an affidavit which stated that "Affiants have received reliable information from a credible person and do believe that heroin" is being kept in the described apartment.[16] This affidavit was found by the Court to be insufficient. Reaffirming the earlier cases of *Johnson v. United States*[17] and *Nathanson v. United States*,[18] the *Aguilar* Court emphasized that it is the role of the magistrate, not of the police officer, to determine the existence of probable cause. To make such an independent determination he must be presented with the actual facts and events from which the officer concluded that a search was justified, and not merely a statement of the officer's conclusions to that effect.[19] The Court then propounded its well-known two-pronged test for use in evaluating warrants which contain an informant's statement. Not only must (1) the facts and sources from which the informant drew his conclusions be set out, but (2) the affidavit must also contain the "underlying circumstances from which the officer concluded that the informant was 'credible' or his information 'reliable.' "[20] The affidavit in *Aguilar* was found to satisfy neither of those requirements. There were no facts or circumstances whatsoever in the affidavit from which the magistrate could independently evaluate probable cause, only a statement of the officer's conclusion that the informant was credible and that his information was reliable. *Aguilar* was later to be affirmed on its facts, by a plurality in *Harris*, as requiring that there be some "underlying facts and circumstances" in an affidavit;[21] but the *Harris* Court failed to ever explicitly mention the two-pronged test of *Aguilar*.

In 1969, the Supreme Court undertook to explain the *Aguilar* rationale in *Spinelli v. United States*.[22] The affidavit upon which that search was based

13 *See, e.g.*, Draper v. United States, 358 U.S. 307 (1959); Jones v. United States, 362 U.S. 257 (1960).
14 378 U.S. 108 (1964).
15 393 U.S. 410 (1969).
16 378 U.S. at 109.
17 333 U.S. 10 (1948). *Johnson* was one of the first cases to expressly emphasize the importance of the magistrate's independent role in determining the existence of probable cause, rather than his simply acting as rubber stamp. 47 J. URBAN L. 237 (1970).
18 290 U.S. 41 (1933).
19 378 U.S. at 111-13.
20 *Id.* at 114.
21 403 U.S. at 578.
22 393 U.S. 410 (1969).

related, first, that the FBI "has been informed by a confidential reliable informant that William Spinelli is operating a handbook" by means of two telephones with specified numbers.[23] Second, a five-day surveillance of Spinelli had revealed that on four of those days he had traveled to the same apartment building in Saint Louis, and on one day was followed to a certain apartment there; to that apartment were listed, in another name, the telephone numbers recited by the informant. Third, the affidavit stated that Spinelli was a known bookmaker.[24] The Court of Appeals for the Eighth Circuit had affirmed Spinelli's conviction on the ground that, while no one allegation independently established probable cause, the total effect of all of them was sufficient to do so.[25] That determination was made by reading the affidavit as a whole, without examining each allegation individually on its own merits.

The Supreme Court rejected such a general approach in favor of "a more precise analysis."[26] It proceeded to dissect the affidavit and to test the sufficiency of each allegation. First, the tip was subjected to the two-pronged test of *Aguilar,* and failed both parts. It was in fact no more substantial than that in *Aguilar* itself; it stated neither the informant's sources nor any facts which would have indicated that the informant was trustworthy. Only the conclusions of the affiant officer were set forth.

The Court did not for that reason, however, reject the whole affidavit. Rather, it elaborated on the *Aguilar* test by allowing a tip inadequate in itself to be cured if its information was sufficiently corroborated by other allegations in the affidavit. The test to be applied in this regard is whether the tip and the corroboration, together, show both the credibility of the informant and the dependability of his sources—that is, whether the tip as corroborated is as trustworthy as a tip which alone would pass *Aguilar's* test.[27] Each additional allegation was then examined to determine its corroborative value. Spinelli's daily trips to the apartment were found not to arouse suspicions of criminal activity, for they could have many legitimate explanations. Likewise, the presence in that apartment of two telephones with different numbers was held not to be incriminating, that being a rather common "petty luxury." And, quite controversially, even the fact that the numbers of the two telephones were the same as those divulged by the informant was found not to indicate probable criminal activity. In particular, it failed to establish that the informant's sources were reliable, for "[t]his meager report could easily have been obtained from an offhand remark heard at a neighborhood bar."[28]

To justify its decision, the *Spinelli* Court compared the facts of its case to those of *Draper v. United States.*[29] In *Draper,* a previously reliable informant had reported that the suspect would be carrying narcotics on one of two specified trains, and had described in detail the clothes which the suspect would be wearing and his unusually fast gait. The Court concluded that when the police saw a

23 *Id.* at 414.
24 *Id.*
25 Spinelli v. United States, 382 F.2d 871, 880 (8th Cir. 1967).
26 393 U.S. at 415.
27 *Id.*
28 *Id.* at 417.
29 358 U.S. 307 (1959).

man exactly matching the given description emerge from the second named train, they had probable cause to make a warrantless search and arrest.[30]

As a matter of factual comparison it has been difficult for commentators, including the present author, to distinguish the two cases.[31] Justices Fortas and White in their respective opinions in *Spinelli* had the same difficulty. Particularly troublesome, as the latter's dissent mentioned, was the fact that all of the corroborated facts in *Draper* had been innocent ones, not in themselves suggesting any criminal activity.[32] Yet, this lack of suspicion and of suggested criminality was a major reason for the majority in *Spinelli* finding the corroboration insufficient in that case. In fact, Mr. Justice Douglas, in his dissent in *Draper,* had condemned its affidavit for those very reasons in much the same language as that used by the *Spinelli* majority.[33] The *Spinelli* Court required such a high degree of corroboration that, as a practical matter, it confined the application of *Draper* to its exact facts.

Finally, the *Spinelli* Court dealt with the last allegation—that Spinelli was a known gambler. *Nathanson v. United States*[34] had determined that an allegation that a suspect had a criminal reputation, standing alone, was not sufficient to establish probable cause. In *Spinelli,* the Court went beyond this to hold that reputation could not be considered at all by the magistrate, not even to add weight to other allegations in the affidavit.[35] This was an important limitation, to again be encountered in *Harris.*

As a result of its analysis of the allegations, the Court found that probable cause for a search was not established, neither of *Aguilar's* prongs having been satisfied. Probably as interesting as the actual discussion in *Spinelli,* however, was the opinion's style and emphasis in dealing with probable cause. The decision was the high-water mark of an approach to warrants which had been developing in the earlier cases of *Nathanson* and *Aguilar.* Each of these cases examined warrants with a technical and demanding eye. Each focused on the idea that the magistrate, not the affiant officer, is the person who must independently determine the existence of probable cause. This attitude led to the total rejection of conclusory statements and to the erection of mechanical tests for deciding whether probable cause was present. *Nathanson* required that the underlying "facts and circumstances" from which the affiant drew his conclusion be set before the magistrate.[36] *Aguilar* further specified that when an informant is involved the affidavit must state the circumstances which substantiate both the credibility of the informant and the adequacy of his sources. *Spinelli* in turn decreed that corroboration could cure an insufficient tip only if, together, the tip and the corroborated evidence satisfied both prongs of *Aguilar*'s test. Moreover, *Spinelli* completely rejected any consideration of allegations concerning

30 *Id.* at 313.
31 *See, e.g.,* Levinson, *Employment of Informant's Statements in Establishing Probable Cause for Issuance of a Search Warrant,* 4 JN. MAR. J. 38, 44 (1970); 83 HAR. L. REV. 7, 180 (1969).
32 393 U.S. at 427.
33 Compare the language of Mr. Justice Douglas, 358 U.S. at 324, with that of the *Spinelli* Court, 393 U.S. at 418.
34 290 U.S. 41 (1933).
35 393 U.S. at 417-18.
36 290 U.S. at 47.

reputation. The result of testing each allegation by the above methods is that every part of the test must be separately and completely satisfied; an affidavit weak in any one area of the test will fail even though all other areas are very strong.

In contrast to those decisions another series of cases has arisen, intertwined chronologically with the former. These cases—*Draper, Jones v. United States,*[37] and *United States v. Ventresca*[38]—avoided applying mechanical tests. Instead they re-emphasized that probable cause is a lighter standard than reasonable doubt, and that affidavits must be examined in a "practical and realistic" manner.

In *Draper,* as previously discussed, the facts were arguably distinguishable from the *Spinelli* case, as the latter Court contended. Yet, the difference in approach is unmistakable.[39] The Court in *Draper* did not dissect the affidavit, but read it as a whole and considered its inferences. There was no trace of the technical attitude later evidenced in *Spinelli.* This differentiation of the cases probably better explains the difference in their results than does the attempted distinction between the factual situations. Likewise, *Jones* simply required that there be "a substantial basis" for crediting hearsay,[40] and did not develop a detailed test along the lines of *Aguilar.* And lastly, *Ventresca,* even though it was decided after *Aguilar,* did not apply the latter's test.[41] *Ventresca,* in fact, is probably the best example of the difference between the two methods of analysis. In that case the affiant had alleged a long series of suspicious occurrences at a certain residence. He stated that fellow officers had personally observed a few events, but he gave no specific source for the others, merely stating at the end of the affidavit that all of the occurrences had been either observed by the affiant himself or related to him by fellow officers (but he did not state the source of the officers' information).

Mr. Justice Douglas, in his dissent in *Ventresca,*[42] examined each alleged occurrence separately and found the few events stated to have been observed by the officers insufficient to establish probable cause. He rejected completely the other allegations because their original sources had not been specifically enumerated and they could have been related to the officers by unreliable informants.[43] Therefore, no probable cause existed according to his analysis which closely resembled the method to be used by the majority in *Spinelli.*

The majority in *Ventresca* refused to adopt that approach. Reading the affidavit instead as a whole, they found the fair inference to be that the officers had made most, if not all, of the observations personally. The Justices concluded that the affiant's failure to specifically state the source of each occurrence resulted from carelessness rather than from a deliberate attempt to conceal weak sources. The majority's decision resulted from its attitude that affidavits should not be required to meet precise tests, because "[t]hey are normally drafted by nonlawyers

37 362 U.S. 257 (1960).
38 380 U.S. 102 (1965).
39 *See* 10 WM. & MARY L. REV. 988, 1006 (1969).
40 362 U.S. at 271.
41 *See* 54 CORNELL L. REV. 958, 961 (1969).
42 380 U.S. at 116.
43 *Id.* at 119.

in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity . . . have no proper place in this area."[44] Rather, the important consideration was the effect which the affidavit had on the Court when read as a whole.

The Supreme Court has been able to decide each of the above cases without overruling any previous one; but the decisions obviously do not represent a consistent and unified line of authority. Therefore, *Spinelli,* the most recent landmark decision prior to *Harris,* was not so much an undisputed statement of existing law as a fragile triumph of one interpretation of probable cause over the other.[45]

Such was the state of the law in June, 1971, when the Supreme Court decided *United States v. Harris.* Five Justices found that probable cause was established by the disputed affidavit, but that majority differed among itself as to the reason. The most detailed opinion, written by Mr. Chief Justice Burger, gave two reasons for the decision. First, without overruling any previous decisions he determined that the corroboration of the informant's tip had cured it of any possible defects; second, he held that the tip alone established probable cause because the informant had made statements against his penal interest. Justices Blackmun and Black concurred in the opinion for both of the above reasons, with the addition that the former Justice would have explicitly overruled *Spinelli,* and the latter would have overruled both *Spinelli* and *Aguilar.*

Providing an early indication of its tenor, the Burger opinion began the evaluation of the affidavit by quoting from *Ventresca* the reminder that warrants must be considered in a "commonsense and realistic fashion."[46] Next, the opinion admitted that some facts and circumstances, and not merely the affiant's conclusions, must be submitted to the magistrate; but it did not mention the *Aguilar-Spinelli* test, or indeed any test.[47] Then, the Chief Justice turned his attention to the three allegations of the affidavit: the informant's statement that he had purchased whiskey from the defendant, the earlier discovery of contraband liquor on the defendant's property, and the criminal reputation of the defendant. The dispute, as the Burger opinion mentioned, concerned the credibility of the informant—had the allegations created a sufficient probability that the informant was telling the truth?

Initially, the opinion looked to the corroboration of the tip in search of indicia of credibility. The facts were compared to those of *Jones,* mentioned above; the Chief Justice declaring that case to be a "suitable benchmark" for "determining what quantum of information is necessary to support a belief that an unidentified informant's information is truthful."[48] In *Jones,* the informant told the affiant officer that he had made numerous purchases of narcotics from the suspect in a specific apartment. Had this been the only allegation in the of-

44 *Id.* at 108.

45 The majority in *Spinelli* was 5-3, with Mr. Justice White concurring "[P]ending full-scale reconsideration of [*Draper*] on the one hand, or of the *Nathanson-Aguilar* cases on the other . . ., especially since a vote to affirm would produce an equally divided court." 393 U.S. at 429.

46 403 U.S. at 577 (quoting 380 U.S. at 108).

47 Mr. Justice Harlan's dissenting opinion, on the other hand, began in true *Spinelli* fashion by stating the rule of that case and then discussing each of its parts in turn.

48 403 U.S. at 580.

ficer's affidavit, "it might not have been enough."[49] But in addition, the officer alleged three facts tending to corroborate the informant's story: the informant had previously given accurate information; his story was corroborated by statements of other unknown sources; and the suspect was a known and admitted narcotics user.[50] The Burger opinion in *Harris* found these facts to be very close to those of the instant case; particularly noteworthy were the two latter allegations. Just as the first of those was essentially that Jones had a reputation for selling narcotics, so Harris was a reputed "bootlegger." And just as Jones had in the past admitted to being a narcotics addict, so whiskey had earlier been found on Harris' property. That is, both cases contained a fact indicating that the defendant had previously been involved in the same criminal activity.

The Court, in *Spinelli,* had said that reputation could not be considered at all by the magistrate. The Chief Justice proceeded, in *Harris,* to distinguish that case on the ground that it contained no factual indication of past criminal activities on the defendant's part. Then, using *Jones* as precedent, the Chief Justice held that when a criminal reputation is "supported" by such factual statements indicating prior criminal conduct, the reputation can be considered along with the other allegations.[51]

Is this factual distinction between *Harris* and *Spinelli* a *bona fide* one? The reasoning of the majority in *Spinelli* would certainly not recognize it.[52] The whole thrust of that opinion was that an alleged reputation may not be "used to give additional weight to allegations which would otherwise be insufficient."[53] From such a viewpoint an allegation of reputation is simply a conclusion drawn from several hearsay statements made to the affiant.[54] And like all hearsay, *Spinelli* would consider it only if the source of each statement and the credibility of each speaker could be demonstrated. The other allegation, that of past criminal activity by the suspect, would in no way cure either of those defects in the statement of reputation; therefore, the latter could not be considered at all. By admitting such evidence of reputation for the magistrate's consideration, Mr. Chief Justice Burger in effect held that as long as the affidavit contains some facts, not only the facts but also the conclusions contained therein can be considered. Such a conclusion would be repugnant to *Spinelli;* therefore Justices Burger and Stewart appear to have distinguished *Spinelli* on a very technical aspect.

They did recognize the inconsistency in the theory of the two cases, however, as evidenced by their clear condemnation of the above *Spinelli* reasoning as it might apply to future cases. They said that "to the extent that *Spinelli* prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation."[55] Jus-

49 362 U.S. at 271.
50 *Id.*
51 403 U.S. at 581.
52 In fact, Mr. Justice Harlan's dissent in *Harris* totally rejected the distinction, calling it "a make-weight intended to avoid the necessity of calling for an outright overruling of *Spinelli.*" 403 U.S. at 596.
53 393 U.S. at 418-19.
54 403 U.S. at 598 (Harlan J., dissenting).
55 *Id.* at 583.

tices Blackmun and Black took a somewhat firmer position by urging the outright overruling of *Spinelli*.

Although *Jones* thus proved to be a helpful precedent for finding that corroborated reputation could be considered by a magistrate, the further question remained of whether, even considering reputation, the allegations in *Harris* were as substantial as those in *Jones*. They were in fact very similar, except that *Jones* contained the additional allegation that the informant had been previously reliable. Was this difference a crucial one? The *Burger* opinion, four Justices concurring, found that the previous reliability had not been regarded as essential in *Jones*. On the other hand, Mr. Justice Harlan's dissent contended that that specific allegation had been relied upon at least to the same extent as the others. In fact, Mr. Justice Frankfurter's majority opinion in *Jones* was inconclusive on the issue, for that Court did not have to decide it. Still, it should be noted that a statement of past reliability is always very strong evidence of credibility and has, in at least one instance, been held sufficient in itself to prove trustworthiness.[56] The Burger plurality, therefore, by finding credibility to be established without past reliability, has certainly established a factual precedent more liberal than that of *Jones*.

In summary, the first part of the Burger opinion moved from the precedent of *Spinelli* both in spirit and in specific holding and resurrected the practical attitude embodied in *Ventresca*. No mechanical tests of any type were used to separate the allegations and examine them individually. Even more significantly, the admission of the suspect's reputation diluted a fundamental tenet of *Johnson, Spinelli* and *Aguilar,* for an allegation of reputation is basically a conclusion of the affiant officer from various unrevealed sources. The magistrate, in evaluating a reputation, must base his decision not upon facts but upon his assessment of the officer's judgment. Such an evaluation is no longer "independent" on the part of the magistrate.

II. Statements Against Penal Interest

The *Harris* informant, in relating that he had purchased "illicit whiskey" from Harris, in effect admitted major elements of the crime of purchase and possession of nontaxpaid liquor under the Internal Revenue Code.[57] Four Justices,[58] concurring in the second part of Mr. Chief Justice Burger's opinion, decided that because the hearsay statement was against the declarant's penal interests it was sufficiently credible to establish probable cause, even apart from the previously discussed corroboration of the tip. Analogizing from an exception to the hearsay rule of evidence, they reasoned that no one would make such a statement against his interest unless it were true.[59] If someone were going to fabricate a story, he would create one which included no criminal conduct on his own part rather than intimate himself.

This reliance upon hearsay statements made against one's penal interest is

56 Rugendorf v. United States, 376 U.S. 528 (1964).
57 26 U.S.C. § 5205(a)(2).
58 Mr. Chief Justice Burger and Justices Black, Blackmun and White.
59 *See* 403 U.S. at 583, 584.

novel in the area of probable cause. The Supreme Court had never before even alluded to it as a basis for credibility,[60] and the prosecution had not raised the issue in its brief in *Harris*.[61] There is, however, a long history sanctioning the use of such statements as evidence at trial. This basic exception to the inadmissibility of hearsay evidence is that hearsay statements against the declarant's interest may be admitted.[62] The present rule in the federal courts and in most states, however, is that only statements against a declarant's pecuniary or proprietary interests, and not those against his penal interest, are admissible.[63]

Mr. Chief Justice Burger noted that no reason existed for this distinction between types of interest, a distinction which has been criticized within the Supreme Court itself since its adoption,[64] and widely condemned by commentators.[65] Moreover, the present judicial trend is clearly in favor of admitting statements against penal interest[66] and such statements are admissible under the Uniform Rules of Evidence,[67] the Model Rules of Evidence,[68] and, in part, under the more recent Proposed Federal Rules of Evidence.[69] However, nowhere in *Harris* was it pointed out that the cases, commentary and Proposed Rules all limit admissibility to hearsay statements which exculpate the accused. In fact, the Proposed Rules specifically exclude the admission of "a statement or confession . . . made by a co-defendant or other person implicating both himself and the accused."[70] Most informants' tips against their own penal interests will necessarily be of the latter type, for the only usefulness of such disclosures lies in their implication of the defendant. Moreover, the rationale behind the exclusion of such statements at trial is not that they would violate the confrontation clause of the sixth amendment—a rationale inappropriate to *ex parte* warrant hearings.[71] Rather, it is simply that they are especially unreliable due to the "readily supposed advantages [to the declarant] of implicating another" to share the blame with him.[72]

Admittedly, both the cases and the Proposed Rules deal with evidence at the trial stage where the standard of proof (beyond a reasonable doubt) is much greater than the probable cause required for a warrant. Consequently, some evidence excludible at trial might properly be considered in evaluating probable cause. Nonetheless, the Supreme Court has consistently held that even the latter

60 This issue has, however, been a minor point in the decisions of two state courts of last resort; Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309 (1970); People v. Montague, 19 N.Y.2d 121, 224 N.E.2d 873, 278 N.Y.S.2d 372 (1967).

61 *See* the statement of Mr. Justice Harlan at 403 U.S. 594.

62 C. McCormick, Handbook of the Law of Evidence §§ 253-57 (1954); 5 J. Wigmore, Evidence §§ 1455-77 (3d ed. 1940).

63 5 J. Wigmore, *supra* § 1476.

64 *See* the dissenting opinion of Mr. Justice Holmes in *Donnelly v. United States*, 228 U.S. 243, 277 (1913).

65 5 J. Wigmore, *supra* note 61, §§ 1476-77.

66 *See, e.g.*, People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970); People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964).

67 Uniform Rules of Evidence, rule 63 (1953).

68 Model Code of Evidence, rule 509 (1942).

69 Proposed Rules of Evidence for the U.S. District Courts and Magistrates (Revised Draft), rule 8-04(b)(4) (1971) [hereafter cited as P.F.R.E.].

70 *Id.*

71 California v. Green, 399 U.S. 149, 155-56 (1970); Dutton v. Evans, 400 U.S. 74, 86 (1970).

72 P.F.R.E., rule 8-04(b)(4), Advisory Committee's Note at 130.

standard requires more than mere unsubstantiated hearsay.[73] Mr. Justice White in his dissent in *Bruton v. United States* noted that: "Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant . . . did are less credible than ordinary hearsay."[74] Practically speaking, therefore, to the extent that an informant's interests resemble those of a codefendant at trial it appears that his statements are insufficient to establish even probable cause.

Essentially, the issue becomes that of whether the informant, like a codefendant, had interests which he was protecting by his statement greater than those which he sacrificed in confessing and implicating the defendant. If he volunteered his confession at a time when the police did not suspect him of a crime, or had little or no evidence against him, then he was obviously acting against his penal interest. But if he had, for example, been apprehended with the contraband whiskey in his possession and it appeared that he would be prosecuted, the situation would be entirely different. He might then well expect that his lot would be an easier one if he cooperated and revealed to the police the identity of his supplier. His position would be such that his penal interests in fact dictate that he confess, and the credibility of his statement would be correspondingly weakened. This is the type of situation contemplated by the exclusionary rule in the Proposed Rules and by Mr. Justice White in *Bruton*. The Burger plurality, however, made no mention of the fact that, for all the affidavit had revealed, this could well have been the situation in *Harris*.

As Mr. Justice Harlan emphasized in his dissent, the uncertainty over an informant's credibility is compounded when he is promised immunity from prosecution in return for his statement.[75] The Chief Justice, on the other hand, concluded that such immunity would still not remove "the residual risk . . . of having admitted criminal conduct."[76] True, this risk may be a deterrent to false admissions to some extent, but only if the informant is in a situation with no existing evidence against him. In the other case, where the informant is caught red-handed and is about to be charged with a crime, there is little such risk. On the contrary, with the promise of immunity the informant can now see not only a vague chance that things might go better for him if he cooperates, but a definite assurance to that effect. The informant thus has much to gain and little to lose by making his implicating admissions, his statement being against his penal interest only in the most technical sense.

Clearly, therefore, not all criminal admissions by informants are in reality statements against their penal interest. It is true that the Chief Justice, who early in his opinion emphasized a practical approach to evaluating warrants, did not in fact here contend that every admission by an informant would establish probable cause. Yet, he elaborated no criteria for distinguishing between situations, and gave little guidance to magistrates for their future probable cause rulings. Even more importantly, one must question his conclusion that, on the

73 This principle was established in *Jones* and has been consistently followed since that time.
74 391 U.S. 123, 141 (1968).
75 403 U.S. at 595.
76 *Id.* at 584.

facts of *Harris,* probable cause was established by the admission. The *Harris* informant could very well have been in the second situation above, and in effect been advancing rather than impeding his penal interest by his statement. Although Mr. Justice Harlan suggested that the affiant should be required to prove that the informant had not been granted immunity, it has just been demonstrated that immunity is not the crucial consideration; it is whether the informant was in fact harming and not advancing his true penal interest by his statement.

Future magistrates, when scanning the *Harris* decision for judicial guidance, will find very little of practical value; for on each of the two issues of the case the Court was evenly split, one justice withholding comment. In a case in which only one of the two issues arose, the affidavit might well be rejected. Furthermore, in examining the importance of statements against penal interest the Court has entered a new and undefined area, the exact contours of which must await future decisions.

What does emerge from the decision, though, is an indication that the lenient attitude evidenced in *Jones* and *Ventresca* has not been extinguished by *Spinelli,* and that conflict between the two lines of analysis will continue to make the proof of probable cause for warrant issuance one of the most controversial areas of contemporary criminal jurisprudence.

James J. Cunningham

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — DUE PROCESS — PREHEARING SEIZURE UNDER CALIFORNIA'S CLAIM AND DELIVERY LAW IS AN UNREASONABLE SEARCH AND SEIZURE WITHOUT PROBABLE CAUSE AND A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW. — Pursuant to section 526a of the California Code of Civil Procedure,[1] plaintiffs instituted a taxpayers' suit seeking injunctive relief to prevent the illegal expenditure of public funds. The plaintiff-taxpayers[2] contended that the expenditure of time and money by the sheriff of the County of Los Angeles in enforcing the provisions of the 1872 Claim and Delivery Law[3] amounted to an illegal use of public resources, since the provisions of that statute violated the fourth and fourteenth amendments of the United States Constitution, and article I, sections 13 and 19 of the California Constitution. The Superior Court of Los Angeles granted the requested injunc-

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1 CAL. CIV. PROC. CODE § 526a (West Supp. 1971).

2 The plaintiffs have not sustained direct harm by enforcement of the Claim and Delivery Law against themselves. Rather, they challenge it as taxpayers. Several declarations were offered by the plaintiffs on behalf of persons whose property was in fact seized; however, none of the declarants are involved in the controversy.

3 CAL. CIV. PROC. CODE §§ 509-521 (West 1954):

> § 509. *Claims for delivery; time*
> Delivery of Personal Property, When It May Be Claimed. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this Chapter. . . .
> § 517. *Property concealed in building or enclosure; demand; breaking building to effect seizure*
> If the property, or any part thereof, be in a building or enclosure, the sheriff, constable, or marshal must publicly demand its delivery. If it be not delivered, he must cause the building or enclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county. . . .

tive relief.[4] The court of appeals reversed the judgment on the grounds that no case or controversy existed, so that any opinion rendered would essentially be advisory.[5] In a unanimous decision, the Supreme Court of California sustained the action of the trial court, vacated the judgment of the court of appeals, and *held:* civil intrusions in execution of claim and delivery are searches and seizures that are prima facie unreasonable, unless supported by a warrant based on probable cause; and, the auxiliary remedy of claim and delivery is a taking of property without prior notice and an opportunity to be heard, and thus violates the requirements of procedural due process. *Blair v. Pitchess,* 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971).

The fourth amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[6] Due to an unfortunate dictum in an early case that the fourth amendment "has no reference to civil proceedings for the recovery of debts,"[7] courts in the past have been reluctant to extend its protections beyond the criminal sphere.[8] Paradoxically, the development of case law in the criminal context, which afforded greater protection against the waiver or negation of fourth amendment rights,[9] gave new impetus to the argument that these protections should be expanded to cover civil cases.[10] The growing concern to protect "the enclave of private life,"[11] lent credence to the contention that the civil-criminal dichotomy was a "fantastic absurdity."[12]

Finally, the viability of that bifurcation was called into question as a result

4 Blair v. Pitchess, No. 942, 966 Cal. Super. Ct., May 12, 1969, (final order entered, Nov. 25, 1969).

5 Blair v. Pitchess, 12 Cal. App. 3d 981, 91 Cal. Rptr. 352 (1970), *vacated,* Blair v. Pitchess, 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486, P.2d 1242 (1971).

6 U. S. CONST. amend. IV.

7 Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 285 (1855).

8 *Frank v. Maryland,* 359 U.S. 360, 367 (1959) held that fourth amendment protections were peripheral in civil inspections carried out to enforce fire, health and housing codes. Despite Mr. Justice Frankfurter's statement in behalf of the majority that the primary purpose of the inspections was corrective rather than punitive, the latter was the result if entry was denied. *Id.* at 362. *See* Eaton v. Price, 364 U.S. 263 (1960), *aff'g per curiam by an equally divided Court* State v. Price, 168 Ohio St. 123, 151 N.E.2d 523 (1958), *petition for rehearing denied,* 364 U.S. 855 (1959).

9 *See, e.g.,* Stoner v. California, 376 U.S. 483 (1964); Chapman v. United States, 365 U.S. 610 (1961); Mapp v. Ohio, 367 U.S. 643 (1961); McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Weeks v. United States, 232 U.S. 383 (1914).

10 Eaton v. Price, 364 U.S. 263 (1960) (opinion of Brennan, J.); Frank v. Maryland, 359 U.S. 360 (1959) (dissenting opinion of Douglas, J.); District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds,* 339 U.S. 1 (1950).

11 Emerson, *Nine Justices in Search of a Doctrine,* 64 MICH. L. REV. 219, 229 (1965) discussing Griswold v. Connecticut, 381 U.S. 479 (1965) (penumbral right of privacy).

12 District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949) (warrantless Health Department Inspection and subsequent conviction invalid), *aff'd on other grounds,* 339 U.S. 1 (1950). Judge Prettyman stated: "[T]he common-law right of a man to privacy in his home . . . is one of the . . . essentials of our concept of civilization. . . . To say that a man suspected of crime has a right to protection against [the] search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." *Id.* at 16-17.

of *Camara v. Municipal Court.*[13] There, the United States Supreme Court, in overruling an earlier decision,[14] issued a writ of prohibition barring prosecution of the appellant, who had refused to permit a warrantless inspection of his personal residence to enforce a municipal housing code. Absent consent from the owner of the house, the Court required that a warrant be issued if probable cause exists. However, on the consent issue the Court was quite equivocal and indecisive, for it stated that "it seems likely that warrants should normally be sought only after entry is refused." The reasonableness of the probable cause standards was to vary with " 'the nature of the search being sought,' "[15] but certainly would be less strict than the proper test in criminal cases. In a companion case, *See v. City of Seattle,*[16] the Court extended its reasoning to cover inspections of non-public areas of commercial premises which may ultimately result in punitive measures for violations. Unfortunately, the *See* case threw more confusion than light on the issue of consent because of its inconsistent language. While apparently standing by the *Camara* standard (warrant required only where refusal to permit entry), the Court went on to state that warrantless searches are "presumptively unreasonable,"[17] a standard which would arguably place the burden on the administrative official to obtain a warrant in all cases or show exceptional circumstances for dispensing with the requirement. Both cases appear to stand for the proposition that administrative searches require the same "traditional safeguards" as do searches to ferret out crime.[18]

Whether that statement of these cases is too comprehensive is a question that has aroused numerous speculations.[19] Several points remain unclear as a result of *Camara* and *See* taken together: (1) Is the extension of fourth amendment protections to civil cases limited only to those situations in which a criminal prosecution may result from a denial of entry? (2) To what extent does consent vitiate the need for probable cause in conducting an administrative search?

Wyman v. James answered the first question in the affirmative.[20] That case arose when a New York state recipient of Aid For Dependent Children (AFDC) refused to permit a home visitation as a prerequisite to receiving public assistance under the New York Social Services Law, and its implementing regulations.[21] Appellee instituted a suit for declaratory and injunctive relief, contending that the proposed visit by a welfare worker was a search, and must therefore be predicated upon consent, or a warrant based on probable cause. A divided three-judge district court, relying on *Camara* and *See,* ruled that the statutes were un-

13 387 U.S. 523 (1967).
14 Frank v. Maryland, 359 U.S. 360 (1959).
15 Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967), *quoting from* Frank v. Maryland, 359 U.S. 360, 383 (1958) (dissenting opinion).
16 387 U.S. 541 (1967).
17 *Id.* at 543. In his dissent, Mr. Justice Clark argues that the result of the decision will be the issuance of "boxcar warrants," which will render the fourth amendment meaningless. *Id.* at 554.
18 *Id.* at 534.
19 Blabey, *See and Camara: Their Far-Reaching Effect on State Regulatory Activities and the Origin of the Civil Warrant in New York,* 33 ALBANY L. REV. 64, 69 (1968); Comment, 47 NEB. L. REV. 613, 627 (1968); Comment, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 209, 216 (1967).
20 400 U.S. 309 (1971).
21 N. Y. SOCIAL SERVICES LAW § 134 (McKinney 1954).

constitutional, and the Supreme Court reversed.[22] In holding that there was no search, and even if there were, it was not unreasonable,[23] the Court was unwilling to require the warrant protection outside "a criminal context where a genuine search was denied and prosecution followed."[24] *Camara* and *See* followed that pattern, and so were "not inconsistent."[25] Significant also was the fact that the visitations were for rehabilitative and beneficent purposes.[26] The recipient could refuse entry and not fear penal action. To do so would simply jeopardize her qualifications for benefits.[27] The *Wyman* Court accepts the *Camara-See* extension of fourth amendment protections, but delimits a broad interpretation of those rights by refusing to enter the civil-criminal dichotomy. The Court indicates that there is no need to eradicate the above distinction; rather, it retains it by merely shifting the line of demarcation, marking off a quasi-criminal area which requires protection, and thereby appearing to deplete the non-protected "civil" area. As a result of this line of reasoning, *Wyman* obfuscates the search and probable cause aspects of the case, and makes the consequence of refusal, i.e., criminal prosecution, the controlling factor in determining whether constitutional guidelines should apply to the intrusion.[28]

It is against this background that the fourth amendment issue arises in *Blair*.[29] This case converges more sharply on the two questions posed above. For example, is the Court unqualifiedly correct in stating that the teaching of *Camara, See* and *Wyman* is that "the Fourth Amendment applies to civil as well as criminal matters"?[30] The above discussion requires a negative answer, since *Wyman* underscored the fact that *Camara* and *See* arose in the "criminal law context."[31] Compelled to distinguish *Wyman,* since that case appears to impose restrictions on an extension of the *Camara* rationale, the *Blair* court does so by pointing to the benefit to the person whose home is invaded, and the lack of criminal sanctions in the *Wyman* case.[32] The court concludes that the operation of section 517—permitting the breaking of buildings to effect seizure, if necessary, with the power of the county—is "clearly a search within the meaning of the

22 James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969), *rev'd sub nom.,* Wyman v. James, 400 U.S. 309 (1971).
23 400 U.S. at 318-19.
24 *Id.* at 325.
25 *Id.* at 324-25.
26 As Mr. Justice Brandeis has so wisely stated: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." Olmstead v. United States, 277 U.S. 438, 479 (1928) (dissenting opinion).
27 In a vigorous dissenting opinion Mr. Justice Douglas argues that this amounts to "buying up" rights guaranteed under the Constitution. 400 U.S. at 328. Or, as Justice Marshall points out in his dissent, the effect is to impose economic sanctions on the exercise of a constitutional prerogative. *Id.* at 340.
28 *Cf.* Comment, 51 BOSTON U. L. REV. 154, (1971): ". . . [Wyman] carves a limitation upon the applicability of the fourth amendment in noncriminal situations and represents a reversal of the trend toward greater fourth-amendment protection in cases involving involuntary searches." *Id.* at 157. *Compare* Comment, 19 KAN. L. REV. 486 (1971) *with* Comment, 40 U. CIN. L. REV. 157 (1971).
29 There is no concrete factual pattern *per se* here. Rather, the court is dealing abstractly with the operation of an entire statute which circumscribes a particular governmental action. *See supra* note 2 and accompanying text.
30 96 Cal. Rptr. at 52, 486 P.2d at 1252.
31 400 U.S. at 317.
32 96 Cal. Rptr. at 52, 486 P.2d at 1252.

Fourth Amendment."[33] Since the sheriff is empowered to enter premises and seize property "with the full force of the law"[34] should the replevin-defendant refuse delivery of the property, section 517 plainly falls within the "criminal context." Indeed, section 148 of the California Penal Code prescribes sanctions for resisting, delaying, or obstructing "any public officer, in the discharge or attempt to discharge any duty of his office."[35] Forced by *Wyman* to play the civil-criminal game, the *Blair* court safely meets that test. At first glance then, *Blair* appears to make the extension of fourth amendment protections to civil cases contingent upon whether criminal sanctions may result from a refusal to permit entry. If that is so, then the statement in *Blair* that fourth amendment protections apply to civil as well as criminal matters must be qualified and modified by the requirement of possible subsequent sanctions, however superfluous this requirement.

On the other hand, it may be that the language *Blair* uses in interpreting *Camara, See* and *Wyman* is a direct result of its proceeding beyond the artificial dichotomy, and resting its analysis on a more fundamental basis: *Blair* presents the proper set of circumstances for determining whether a *genuine search* (and seizure) was conducted, to which probable cause standards would be applicable;[36] in addition, assuming there is an invasion, does consent operate as an effective waiver of constitutionally guaranteed protections? To be rather pithy, the reliance on the criminal-civil argument, while admittedly helpful in invalidating the statute, adds nothing new or interesting; the importance of *Blair* is its focus on consent.

In response to the latter question posed above, the court resolves the apparent inconsistency between the language of *Camara* and *See* regarding consent, by opting for a presumption of non-waiverability of fourth amendment protections in claim and delivery cases.[37] In so deciding, the court goes far beyond the *Camara* standard of requiring a warrant in lieu of inability to obtain consent, and emphatically recognizes the realities of the replevin situation. The court demonstrates a strong preference for a warrant in a replevin action. Citing "the intimidating presence of an officer of the law," as well as "legal process which appears to justify the intrusion," the court concludes that consent to search in these circumstances can hardly be voluntary.[38] Nor will adhesion sales contracts, which allow entry by the creditor, operate as effective waivers.[39]

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33 *Id.*

34 *Id.*

35 CAL. PENAL CODE § 148 (West 1970).

36 Perhaps a much clearer case is presented here than in *Camara, See* and *Wyman* since § 517 permits a seizure, which goes beyond the search situation, and would justify more stringent probable cause requirements. See text accompanying note 70 *infra.*

37 96 Cal. Rptr. at 54, 486 P.2d at 1254. *See also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *citing* Ohio Bell Tel. Co. v. Comm'n, 301 U.S. 292, 307 (1937): ". . . we 'do not presume acquiescence in the loss of fundamental rights.' "

38 96 Cal. Rptr. at 54, 486 P.2d at 1254. In a case involving early morning raids to determine welfare eligibility (in which appellant refused to participate, and was thus relieved of his job), the Supreme Court of California noted that "[t]he request for entry by persons whom the beneficiaries knew to possess virtually unlimited power over their very livelihood posed a threat which was far more certain, immediate, and substantial. These circumstances nullify the legal effectiveness of the apparent consent. . . ." Parrish v. Civil Service Com'n of County of Alameda, 66 Cal. 2d 260, 57 Cal. Rptr. 623, 629-30, 426 P.2d 223, 229-30 (1967).

39 96 Cal. Rptr. at 54, 486 P.2d at 1254. *See, e.g.,* Williams v. General Elec. Corp., 159 Cal. App. 2d 527, 323 P.2d 1046 (1958).

The *Blair* case becomes further complicated (yet more significant) with respect to consent, in light of *Laprease v. Raymours Furniture Company*[40] and conflicting decisions from other jurisdictions.[41] *Laprease* provides a factual setting illustrating the operation of the New York replevin statute,[42] which is substantially similar to the California statute. The plaintiff, Mrs. Laprease, in a consolidated action, sought to enjoin the defendant Marshal from enforcing the New York replevin law. The defendant furniture company (plaintiff in the replevin action) had delivered an affadavit, requisition, undertaking, summons and complaint to the Marshal for the City of Syracuse, New York, requiring the seizure of a bed, dinette set, and other household furnishings. The Marshal advised Mrs. Laprease that ". . . if she did not release [the articles] a forcible entry into her apartment would be made."[43] Mrs. Laprease stated that her husband was ill, that she had ten children, and was living on public welfare. She alleged that if the statute were to be enforced, she would be in "immediate danger" of (1) a taking of her property without due process of law, and (2) an illegal search and seizure. In a unanimous opinion rendered by Judge Port, the three-judge District Court for the Northern District of New York held that, following the *Camara* and *See* rationale, the fourth amendment acts as a "shield" in civil matters, and here especially, since criminal sanctions would follow resistance to seizure.[44] Following the *See* language, the court held that a search without a warrant in the replevin situation is "presumptively unreasonable."[45]

Conflicting with the *Laprease* holding is a case decided one month later in a Florida district court, *Fuentes v. Faircloth*,[46] presently docketed before the Supreme Court. There, the plaintiff had purchased a gas stove and stereo set under a conditional sales contract. The purchaser defaulted on the payments. Upon the request of the vendor, the small claims court issued a writ of replevin, and commanded the sheriff to execute it. The deputy sheriff waited on the front porch with two employees from the vendor's company, until the plaintiff's son-in-law, Mr. Leon, returned. At first, Mr. Leon refused to give up the property, informing the officers that his attorney had advised that a court hearing was necessary. After the sheriff explained that the writ required the property to be yielded, Mr. Leon submitted to the repossession. The divided three-judge district court, while admitting that the "plaintiff was reluctant to allow the entry," held, *inter alia,* that the section of the replevin statute authorizing forcible entry with

40 315 F. Supp. 716 (N.D.N.Y. 1970).

41 *See* Brunswick Corporation v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970); Wheeler v. Adams Company, 322 F. Supp. 645 (D. Md. 1971); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted,* 401 U.S. 906 (1971), *presently docketed and argued sub nom.,* Fuentes v. Shevin, 40 U.S.L.W. 3233 (1971), *summarized,* 39 U.S.L.W. 3406 (1970) (No. 70-5039).

42 N. Y. C.P.L.R. §§ 7101 *et seq.* (McKinney 1963).

43 315 F. Supp. at 719.

44 N. Y. PENAL CODE § 195.05 (McKinney 1954) provides for sanctions for obstructing governmental administration. Florida has a similar provision for resisting an officer without violence to his person. FLA. STAT. ANN. 44, § 843.02 (Supp. 1971-72). In addition, the replevin-defendant may be held in contempt for attempting to conceal the property. FLA. STAT. ANN. tit. 6, § 78.071 (Supp. 1971-72). *See supra* note 35 and accompanying text for California provision.

45 315 F. Supp. at 721.

46 317 F. Supp. 954 (S.D. Fla. 1970).

"the power of the County" was not an issue, since there was not a forcible entry.[47] As to the issue of consent and waiverability, the court said that "the conditional sales contract in the instant case is dispositive of the Fourth Amendment question."[48] The fact of default under the conditional sales contract provided the vendor with the requisite consent to enter and repossess the goods "at its option."[49] The court likewise ruled against the purchaser on the due process question. Interestingly enough, the court cited the lower court decision in *Blair,* but disagreed with it to the extent that it conflicted.[50]

The *Blair* court refuses to allow waiverability of fourth amendment rights in a *Fuentes* factual pattern. Significantly, *Blair* ignores the less demanding *Camara* test for probable cause (warrant only after failure to obtain consent), and instead chooses the "presumptively unreasonable" standard.[51] Why does the court adopt such a stringent standard, which is normally exacted in the criminal sphere?[52] The absolutist language is a recognition that consent to an invasion can never be unequivocal when a person is confronted with equally obnoxious alternatives. Forced to choose between permitting entry, thereby waiving a constitutional prerogative, or refusing entry, thus risking criminal sanctions as well as forcible entry, most replevin defendants are likely to comply with the stark representation of legal sanction and compulsion, i.e., the sheriff. The effect of the sheriff's request to permit entry is to say: "Allow us to do what we shall proceed to do, in any event." This is nothing more than a Hobson's choice. As Mr. Justice Jackson noted in his dissenting opinion in *Brinegar v. United States:*[53] "The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." Absent extremely exceptional or critical circumstances, a warrantless search should be considered unreasonable, and deserves disapprobation and censure, since ". . . [t]here is no way in which the innocent citizen can invoke advance protection." Only the warrant procedure can offer that constitutional protection—it is presumably indispensable, and any other method should be viewed with extreme circumspection.

An analogy to the presumption against waiverability in criminal cases is particularly apt: just as "[i]t is incredible that [the defendant] would have voluntarily consented to a search which he knew would disclose incriminating evidence,"[54] it is quite as preposterous that a replevin-defendant would gleefully acquiesce in the expropriation of the very necessities of his everyday life. And

47 *Id.* at 957-58.
48 *Id.* at 958.
49 *Id.* at 956.
50 *Id.* at 959.
51 Note, 19 KAN. L. REV. 281, 287 (1971).
52 *See, e.g.,* Agnello v. United States, 269 U.S. 20 (1925): "The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws." *Id.* at 32. The presumption theory normally rests on a totality of circumstances test. *E.g.,* United States v. Shropshire, 271 F. Supp. 521 (E.D. La. 1967): "Considering the totality of circumstances under which [defendant] signed the consent to search form, this Court concludes that the consent to search was not freely and voluntarily given and thus could not validate the ensuing search." *Id.* at 523. *See also* Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); United States v. Slusser, 270 F. 818 (S.D. Ohio 1921); United States v. Marquette, 271 F. 120 (N.D. Cal. 1920).
53 338 U.S. 160, 182 (1949) (dissenting opinion).
54 United States v. Shropshire, 271 F. Supp. 521, 524 (E.D. La. 1967). *See also* Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954).

certainly the innocent citizen is entitled, at a minimum, to the same protections as a person suspected of a crime.[55]

By referring to "the intimidating presence of an officer of the law, . . . [and] the existence of legal process which appears to justify the intrusion,"[56] the court intimates that the presumption against waiver functions almost like a per se rule. Indicative of the court's disposition on the waiver matter is its abstract consideration and invalidation of the entire statute, rather than waiting until the case arises within a particular factual framework. "In such a situation acquiescence to the intrusion cannot operate as a voluntary waiver of Fourth Amendment rights."[57] Additionally, the *Blair* court notes that absence of a warning of the occupant's right to deny entry will not per se render consent ineffective, but will act as an indication that consent was not voluntary. However, in a replevin requisition, any warning would be nugatory and contradictory, since the owner is prohibited by the statute from refusing entry.[58] As was wisely explained in another case involving consent: ". . . [T]he circumstances of the defendant's plight may be such as to make any claim of consent 'not in accordance with human experience,' and explainable only on the basis of 'physical or moral compulsion.' "[59]

Such is the case under the replevin framework. The abstract consideration in *Blair* reaches absurd proportions under the factual conditions of the *Fuentes* case. There, as was noted above, entry was denied on the advice of Mr. Leon's attorney. But, upon explanation by the Sheriff that he was compelled to execute the writ, Mr. Leon agreed to the repossession. The court, admitting that such consent was reluctant, and despite Mrs. Fuentes claim of a meritorious defense, still refused to countenance that the entry was forced. In a short dissenting opinion, Judge Eaton, while arguing that the issue of forcible entry was before the court, focused on due process as the predominant consideration in a replevin action:

> When the state authorizes the forcible entry of a person's house prior to the establishment of the probable validity of a creditor's claim, it contravenes the Due Process Clause of the Fourteenth Amendment.[60]

55 A blatant disregard for citizens' rights has produced some of the grosser violations of the fourth amendment. *See* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (warrantless community search of innocent citizens' homes for suspected police slayers) and Parrish v. Civil Service Com'n of County of Alameda, 66 Cal. 2d 260, 57 Cal. Rptr. 623, 425 P.2d 223 (1967) (warrantless early morning raids to determine welfare eligibility).

56 96 Cal. Rptr. at 54, 486 P.2d at 1254.

57 *Id.* The balancing test which the court employs clearly comes down hard in favor of "these important individual rights against the less compelling state interests." *Id.* at 53, 486 P.2d at 1253.

58 *Id.* at 54, 486 P.2d at 1254 n.8. In an application of the exclusionary rule to a search by inspectors for the Food and Drug Administration, the defendants challenged their conviction on the grounds that their consent to the inspection was invalid, since they had not been warned of their right under *Camara* and *See* to insist upon a warrant. The Ninth Circuit rejected this argument, and held that there was a clear manifestation of consent to search, and no force or misrepresentation on the part of the inspectors. United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir. 1970). *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

59 Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951), *citing* Ray v. United States, 84 F.2d 654, 656 (5th Cir. 1936).

60 317 F. Supp. at 959 (dissenting opinion).

Furthermore, the conditional sales contract was not dispositive of the due process right, by operating as an effective waiver of that right. Judge Eaton's legitimate concern for the due process claim is illuminating in that it hints at the correlation between the stricter consent and probable cause standards on one hand, and the procedural due process demands on the other.

It has been suggested that the absolute language on the search and seizure issue in *Laprease* (by analogy, to the *Blair* case) was necessary because that case dealt with an express due process question *resulting from* a pretrial search and seizure, while *Camara* and *See* were cases dealing only with a search.

> Since notice and hearing are required, a warrantless search, though possible, would be inconsistent with the requirements of the due process clause. If a court determines in a pretrial hearing that a creditor may seize the personal property of the debtor, it naturally follows that there would be probable cause to seize the chattel.[61]

The *Blair* court will absolutely not permit fourth amendment protections to be waived if the result is that due process rights will also be invaded.

Analogous to the correlation here of the fourth and fourteenth amendments is the case *Boyd v. United States*.[62] Finding an "intimate relation" between the fourth and fifth amendments, the Supreme Court held that, a civil forfeiture proceeding takes on criminal aspects, so that the seizure of a person's papers for use in evidence against him is unreasonable; in effect, it is not ". . . substantially different from compelling him to be a witness against himself."[63] Likewise, in a replevin action the fourth and fourteenth amendments "run almost into each other."[64]

Blair fails to articulate the inherent interrelatedness of these two distinct rights in the replevin situation, and thus leaves unanswered the question whether a judicial hearing on the due process issue suffices to establish probable cause or a waiver of fourth amendment protections in the event of an adverse ruling. However, the court does say that

> . . . in order to create a constitutional replevin remedy, there must be provision for a determination of probable cause by a magistrate *and* for a hearing prior to any seizure . . .[65] (emphasis added).

This statement does not mean that separate dual procedures are necessary. Rather, the court is indicating that the new requirement of probable cause and a warrant, is not alone sufficient to establish a constitutional replevin remedy. In addition, due process is a constitutional prerequisite: prior notice and hearing are mandated.

While *Blair* is perplexing by its silence on the possible integral features of

61 Note, 19 KAN. L. REV. 281, 287 (1971).
62 116 U.S. 616 (1886).
63 *Id.* at 633. *But see generally* Warden v. Hayden, 387 U.S. 294 (1967), which discredits the "mere evidence" rule of Gouled v. United States, 255 U.S. 298 (1921), and also seems to undermine *Boyd* somewhat.
64 116 U.S. at 630.
65 96 Cal. Rptr. at 60, 486 P.2d at 1260.

these provisos, it does offer elucidation, which serves to clarify some of the ambiguity and confusion generated by *Laprease*. For instance, *Laprease* would countenance (albeit it prefers prior notice and hearing) an *ex parte* order based on probable cause as a minimum guarantee in replevin actions, provided that the creditor demonstrates that justifiably exceptional circumstances exist.[66] However, the appropriate circumstances are not specified. The narrow exceptions to the due process demands, and the appropriate probable cause criteria are described more definitively by the *Blair* court. Carefully limited instances may exist in which "a summary procedure may be consonant with constitutional principles": (1) Where there is a danger the property will be destroyed; or, (2) Where there is a likelihood that the debtor will abscond, preventing the state from exercising its jurisdiction.[67] These limitations should be narrowly construed, and the burden is placed on the creditor, for it is difficult to conceive how the due process imperatives of prior notice and hearing comport with allowance of an uncontested judicial proceeding. Absent these unique circumstances, notice and a hearing are "essential prerequisites."[68] Effective notice calculated to reach the replevin-defendant is a *sine qua non;* otherwise, the opportunity to be heard is aborted and subverted.[69]

In addition, four basic tests are suggested,[70] if the replevin-plaintiff (creditor) is to satisfy the probable cause and specificity standards of the fourth amendment: 1) The creditor must allege that he owns property which the defendant is wrongfully detaining (obviously, this entails the determination of whose property, and necessarily generates a due process issue); (2) Underlying facts must be set forth by the creditor, showing reasons to believe that such allegations are true; (3) The creditor must present facts showing probable cause to believe the property is actually at the location specified in the requisition; and (4) A neutral magistrate must pass upon the allegations. In light of these criteria, the "presumptively unreasonable" standard of *Blair* manifests itself. In claim and delivery actions there is an "obvious taking," both in the sense of a genuine search and seizure, and in the sense of deprivation of property. Due process "takes priority,"[71] and is afforded deserved protection through the fourth amendment standards revealed in *Blair*.

The genesis of the due process argument in the *Blair* case is found in *Sniadach v. Family Finance Corp.*,[72] in which the United States Supreme Court struck down the Wisconsin prejudgment garnishment proceeding. That statute permitted one-half of an employee's wages to be frozen, and allowed the creditor

66 315 F. Supp. at 723-25.
67 96 Cal. Rptr. at 57, 486 P.2d at 1257.
68 Note, 19 KAN. L. REV. 281, 287 (1971).
69 *Id.* at 288-89. For hearing requirements see Armstrong v. Manzo, 380 U.S. 545 (1965); Grannis v. Ordean, 234 U.S. 385 (1914): "The fundamental requisite of due process is the opportunity to be heard." *Id.* at 394. The constitutional prerogative of a hearing was first established in *Baldwin v. Hale,* 68 U.S. (1 Wall.) 223 (1863). For notice requirements and a recognition that notice affects the opportunity to be heard, *see* Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (notice by publication insufficient for due process purposes when possible to notify party through mail); and, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
70 96 Cal. Rptr. at 53, 486 P.2d at 1253.
71 Note, 19 KAN. L. REV. 281, 291 (1971).
72 395 U.S. 337 (1969).

ten days to issue a summons and complaint upon the debtor, *after* service on the garnishee.[73] The Supreme Court held that, without notice and a prior hearing, this procedure "violates the fundamental principles of due process."[74] The Court stressed the hardship and severity imposed by such a process,[75] but utilized an unfortunate phrase to make its point: "We deal here with wages—a specialized type of property presenting distinct problems in our economic system."[76] Mr. Justice Harlan concurred in the Court's opinion, but explained that the property of which the petitioner was deprived was the use of the garnished wages pending final judgment, a deprivation which "cannot be characterized as *de minimis*."[77] The distinction between the *type* of property and the *use* of property is vital. For it is on the basis of the type of property involved in *Sniadach*, that it is most often distinguished from other cases, a hurdle which the court in *Blair* must overcome.

Several courts have endeavored to limit the vitality of the *Sniadach* case by refusing to amplify its holding. For example, in *Brunswick Corporation v. J & P, Inc.*,[78] the United States Court of Appeals for the Tenth Circuit was faced with a due process attack on the Oklahoma replevin statute[79] in a diversity action. Brunswick had sold bowling equipment under a conditional sales contract. After Brunswick filed for replevin and bond, the United States Marshal took possession of the equipment by removing vital parts, thus rendering the machinery inoperative. He then delivered constructive possession to Brunswick, who sold the goods at a public auction before judgment. The court found that a due process objection was inappropriate, since *Sniadach* (which was relied upon by the replevin-defendant) involved "a specialized type of property," and was "not in the least comparable to the case here on appeal involving enforcement of a security interest."[80] As was discussed above, the District Court for the Southern District of Florida has reached an identical conclusion in the *Fuentes* case. Although other jurisdictions have also limited *Sniadach* by allowing replevin of household goods purchased under conditional sales contracts,[81] and peaceful repossession of a financed automobile,[82] the *Sniadach* language does not set up an insuperable barrier to the type of decision reached in *Blair*.

Indeed, there is ample support for the extension of the *Sniadach* rationale beyond the garnishment area.[83] As was noted above, the *Laprease* case struck down a replevin procedure almost identical to the one involved in *Blair*. The

73 WIS. STAT. ANN. § 267.01 *et seq.* (Supp. 1971-72).
74 395 U.S. at 342.
75 *Id.* at 340. Mr. Justice Black, on the other hand, argues that concepts of fairness and decency — a so-called "shock-the-conscience" test — results in a natural law theory, leaving to judges to decide what is fair, based on their own arbitrary whims and caprices. *Id.* at 350-51 (addendum to dissenting opinion).
76 *Id.* at 340.
77 *Id.* at 342 (concurring opinion).
78 424 F.2d 100 (10th Cir. 1970).
79 OKLA. STAT. ANN. tit. 12, § 1571 *et seq.* (1961).
80 424 F.2d at 105.
81 Wheeler v. Adams Company, 322 F. Supp. 645 (D. Md. 1971).
82 McCormick v. First National Bank of Miami, 322 F. Supp. 604 (S.D. Fla. 1971).
83 At least two state courts have determined that constitutional prerequisites are not limited solely to garnishment of wages, but extend to cover garnishment of other types of property. *Cf.* Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N.W.2d 87 (1970) (garnishment of accounts receivable); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969) (*all* prejudgment garnishments unconstitutional).

court in *Laprease* stressed not so much the type of property involved, as the hardship involved in the deprivation of use and enjoyment of household goods, even if only a temporary taking.[84] Other courts have, through extrapolation, applied *Sniadach* to broader contexts. For instance, the deprivation is even more drastic in the case of an imposition of an innkeeper's lien upon a boarder; for, in that situation, *all* the tenant's belongings are locked in his room.[85] Similarly, the issuance of a writ of immediate possession prior to a hearing on the merits in an unlawful detainer action is violative of due process. In such circumstances,

> the right of a tenant to the continued use of his rented property is a substantial and valuable right and until it has been judicially determined that such right has been forfeited . . . , the right is entitled to judicial protection.[86]

Perhaps the coup de grace to the judicial limitation of *Sniadach* to a "specialized type of property," is *Goldberg v. Kelly*.[87] There, the Supreme Court determined that the termination of federally financed Aid For Dependent Children (AFDC) and aid administered under the New York State Home Relief Program (which "benefits are a matter of statutory entitlement")[88] required prior notice and a hearing to satisfy the protections of due process of law. The Court did not require a full-blown judicial or quasi-judicial hearing, but merely prescribed that the recipient be afforded an "opportunity to be heard." Unless "overwhelming considerations" demand it, the termination of aid "in the face of . . . 'brutal need' . . . is unconscionable," without due process of law.[89] It would appear then, that there are "no cogent reasons" for limiting *Sniadach* standards to cases involving only wage garnishments.[90]

By quoting with approval Mr. Justice Harlan's concurring opinion in *Sniadach,* the *Blair* court recognizes that it is not the type of property that is determinative of a due process violation, but rather, whether there has been an obvious taking resulting in loss of use of property. ". . . [T]he right to be heard before being condemned to suffer grievous loss of any kind, . . . [provides] those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process."[91] The claim and delivery seizure and taking ". . . violates due process if it occurs prior to a hearing on the merits unless justified by weighty state or creditor interests."[92] Neither eventual retrieval of the merchandise nor a surety bond serves to abate the loss of use of the goods pending final judgment.[93] It is this vital concern which compelled Justice Harlan to conclude in *Sniadach*:

84 315 F. Supp. at 723. *See generally* Griggs v. Alleghany County, 369 U.S. 84 (1962) (temporary taking is a violation of due process).
85 Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).
86 Mihans v. Municipal Court, 7 Cal. App. 3d 479, 484, 87 Cal. Rptr. 17, 20 (1970).
87 397 U.S. 254 (1970).
88 *Id.* at 262.
89 *Id.* at 261, *aff'g sub nom. and citing* Kelly v. Wyman, 294 F. Supp. 893, 900 (S.D.N.Y. 1968).
90 Comment, 34 ALBANY L. REV. 426, 431 (1970).
91 Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (concurring opinion of Frankfurter, J.).
92 96 Cal. Rptr. at 56, 486 P.2d at 1256.
93 *Id.*

> I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use.[94]

The logical extension of this pronouncement is found in the substantiality and vitality of the stringent standards of *Blair*—this is the court's foremost concern in considering the replevin framework.

The *ratio decidendi* of *Blair* thus provides potent authority for a clarification of the troublesome language of *Camara, See* and *Sniadach,* and the resultant disharmony in the state and federal courts in replevin cases. Hopefully, the progeny of those three cases will be reconciled, if and when the Supreme Court decides *Fuentes* on the merits. At least, *Blair* provides the wherewithal to render a sound decision on the consent issue by focusing on whether there is a genuine search which requires fourth amendment guarantees of protection. In addition, the case implicitly raises the problem of whether the constitutionally protected right of probable cause has an inherently concommitant relationship to the expanding notions of due process of law in the replevin situation.

It is time to abandon draconian approaches, to recognize the clear realities of the replevin operation, and to decide that merely because a dubious practice has the "blessing of age,"[95] is not alone sufficient to render it constitutionally permissible today.

Edward M. Smith

CONSTITUTIONAL LAW — JUVENILE PROCEEDINGS — JURY TRIALS — A JURY TRIAL IS NOT REQUIRED IN A STATE JUVENILE DELINQUENCY ADJUDICATIVE HEARING UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.—The juveniles in this appeal were arrested and charged with delinquency in the state juvenile courts of North Carolina and Pennsylvania. Prior to each hearing, counsel for the juvenile made a timely request for a jury trial. These requests were subsequently denied by the trial judges. The delinquency declaration in each case was dependent upon a factual determination that the youth committed an act which, but for the age of the defendant, would have been punishable as a crime.[1] On appeal in the appropriate state courts the appellants each contended, *inter alia,* that the failure to honor the request for a jury trial was violative of the sixth and fourteenth amendments of the United States Constitution.[2] The state supreme courts affirmed based on a finding that the leading case of *In re Gault*[3] did not require that all adult due process rights be applied to the juvenile proceedings.[4] Further, the Supreme Court of Pennsylvania specifi-

94 395 U.S. at 343.
95 315 F. Supp. at 723.

1 N.C. GEN. STAT. § 7A-277-8 (1969); PA. STAT. ANN. tit. 11 § 243(4)(a) (1939).
2 McKeiver Appeal, 215 Pa. Super. Ct. 760 (1970); Terry Appeal, 215 Pa. Super. Ct. 762 (1970); In re Burrus, 4 N.C. App. 523 (1969), 167 S.E.2d 454 (1969); In re Shelton, 5 N.C. App. 487, 168 S.E.2d 695 (1969).
3 In re Gault, 387 U.S. 1 (1967).
4 Terry Appeal, 438 Pa. 339, 255 A.2d 921 (1970); In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

cally found that there were certain beneficial elements in the juvenile system which were sufficient to render the jury right less essential to the fundamental fairness of the proceeding. These factors included: (1) the different conception held by the juvenile judge of his role in the hearings as opposed to his criminal court counterpart, (2) the greater availability of rehabilitative and diagnostic services and (3) the fact that a declaration of delinquency does not carry with it the social stigma and civil liabilities normally associated with a finding of criminal guilt.[5] The United States Supreme Court heard arguments solely on the question of the jury right. The Court affirmed and *held*: A trial by jury is not constitutionally required in the adjudicatory phase of a state juvenile court delinquency proceeding. *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971).

The belief that minors should be accorded special treatment in the courts was well developed, both in the civil and common law, before the American Revolution. It was generally recognized that nonage might be a defense to a misdemeanor or felony, although the age of accountability varied. As a rule a child between the ages of seven and fourteen would be dealt with as an adult only if it was shown that he knew right from wrong. Children younger than seven were deemed incapable of having the requisite intent to commit a crime and therefore to be punished.[6] Infants were also entitled to special treatment under the equitable doctrine of *parens patriae*. The Crown was under an obligation to protect the interests of those subjects who could not do so for themselves. This protection was extended to the feebleminded, to the insane and to minors when their parents were either unwilling or unable to perform their obligations.[7] In the United States these concepts were, for the most part, accepted with little variation. In the 1870's reformers succeeded in having adopted limited procedural and institutional modifications in the criminal courts. These reforms were aimed at isolating the juvenile offender from adult criminals.[8] Major changes in this area did not occur until 1899 when Illinois passed the first comprehensive juvenile court statute in this country.[9]

The Illinois law, as well as the subsequent statutes patterned on it, was a hybrid of the criminal and equitable concepts outlined above. The new juvenile court system required taking the juvenile offender out of the adult process, focusing society's attention upon discovering why he was engaged in deviant behavior and attempting to correct any aberrations in his background in order to terminate his budding criminal career.[10] Judge Julian Mack aptly summarized the feelings of those involved in the new system:

> To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing it and then reforming it, to protect it from the stigma . . . Proceedings are brought to have a guardian

5 Terry Appeal, 438 Pa. at 355, 255 A.2d at 930.
6 4 W. BLACKSTONE, COMMENTARIES *22-24.
7 Eyre v. Shaftsbury, 24 Eng. Rep. 659, 664 (1722); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, 2-3 (1967) [Hereinafter referred to as TASK FORCE REPORT].
8 TASK FORCE REPORT 2-3.
9 Act of April 21, 1899, 1899 Ill. Laws 131 (repealed 1965).
10 Mack, *The Juvenile Court,* 23 HARV. L. REV. 104 (1909).

> or representative of the state appointed to look after the child, to have the state intervene between the natural parent and the child because the child needs it, as evidenced by some of its acts, and because the parent is either unwilling or unable to train the child properly.[11]

The statutes, which were passed in order to effectuate this ideal, faced stiff constitutional challenges in the state courts. These attacks centered upon the failure to include in the juvenile system the protections accorded an adult in a criminal proceeding. In deciding those cases the courts adopted the position that the protections typified by the provisions of the sixth and seventh amendments were limited to criminal trials.[12] The juvenile trials were exempted on the basis that they were "civil in nature,"[13] "statutory,"[14] "quasi-criminal"[15] or even "sui generis."[16] In each instance, the benevolent motive expressed by the supporters of the system persuaded the justices that the youth was not being subjected to the criminal process. Judge Brown of the Pennsylvania Supreme Court adopted a rather extreme view in this regard which was, nonetheless, in line with the other courts. He felt that the state is not required:

> when compelled as *parens patriae,* to take the place of the father for the same purpose [that is, to correct misconduct on the part of the minor and provide the necessary guidance] to adopt any process as a means of placing its hands upon the child to lead it into one of its courts.[17]

In the 1950's and 1960's the juvenile court system became the object of severe criticism and varied programs of reform.[18] Three of the recommendations relating to the adjudicatory phase of the process are notable. First, more emphasis should be placed upon the prehearing procedures in order to encourage settlements without the necessity of going to trial.[19] Second, the delinquency adjudication should be limited to those who are guilty of some criminal misconduct. A new designation being reserved for the remainder of persons now coming under the general classification of "delinquent."[20] Third, the adjudicatory hearing should be clearly distinct from the dispositive stage procedurally and should possess different rules of evidence.[21] One effect of these proposed reforms would be to increase the criminal nature of the delinquency proceeding and declaration by removing the non-criminal and uncontested cases from this type of hearing and adjudication.

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11 *Id.* at 109.

12 Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959). The cases cited in the appendix of this opinion survey decisions in every state supporting this position.

13 State v. Thomasson, 154 Tex. 151, 275 S.W.2d 463 (1955).

14 Kahm v. People, 83 Colo. 300, 264 P. 718 (1928).

15 Monk v. State, 238 Miss. 658, 116 So. 2d 810 (1960).

16 In re Diaz, 211 La. 1015, 31 So. 2d 195 (1947).

17 Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198, 200 (1905).

18 *E.g.*, P. TAPPEN, JUVENILE DELINQUENCY, Part III (1949); Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547 (1956); Ketcham, *Legal Renaissance in the Juvenile Court,* 60 N. U. L. REV. 585 (1965); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form,* 1965 WIS. L. REV. 7; Paulsen, *Kent v. United States: The Constitutional Context of the Juvenile Cases,* 1966 S. Ct. REV. 167.

19 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 81-82 (1967).

20 *E.g.*, N.Y. FAMILY COURT ACT § 712 (McKinney Supp. 1970).

21 *E.g.*, UNIFORM JUVENILE CT. ACT (1968).

The United States Supreme Court took its first cautious step towards a full evaluation of the constitutionality of the juvenile court procedures in the case of *Kent v. United States.*[22] Kent, sixteen years of age at the time of his trial, was accused of robbery and rape. Under the statutes of the District of Columbia, the juvenile court has original jurisdiction over all persons less than eighteen years of age who are accused of a crime unless jurisdiction is waived by the court. The statute requires that a waiver be made only after a "full investigation." In the event of a waiver the case is removed to the criminal court for trial.[23] Kent's appointed attorney requested a hearing on this matter but his request was denied by the trial judge on the grounds that it was not required under the statute. The judge thereafter announced his decision to waive the juvenile court jurisdiction after a "full investigation."[24] The Supreme Court reversed holding that the hearing was required within the meaning of the statute.

The holding of the Supreme Court was limited to the statutory construction but the opinion showed clear indications that the Court was not yet finished looking into the juvenile court procedures:

> They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded adults . . . particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by actions of the government, as *parens patriae,* evidencing . . . special solicitude for juveniles.[25]

Although the Court did not delve deeply into the constitutional issues it did make certain significant references with regard to the due process requirements in the waiver hearings:

> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial, or even the usual administrative hearing, but we do hold that the hearings must measure up to the essentials of due process and fair treatment.[26]

The constitutional questions were squarely before the Court in two subsequent cases, *In re Gault*[27] and *In re Winship.*[28] *Gault* concerned a youth who was adjudged to be delinquent based upon a finding that he and another youth made lewd telephone calls. The delinquency petition bringing him before the juvenile court alleged only the legal conclusion that he was a delinquent and in need of supervision. The court did not inform him of his rights to be represented by counsel during the critical phases of the proceedings, to refrain from incriminating himself and to confront the witnesses against him. After the adjudication Gault was allowed neither a direct appeal nor a transcript of the hearing.[29] The United States Supreme Court reversed this finding holding that a

22 383 U.S. 541 (1966).
23 D.C. CODE ANN. § 11-914, now § 11-1553 (Supp. iv, 1965).
24 383 U.S. at 546.
25 *Id.* at 551.
26 *Id.* at 562.
27 387 U.S. 1 (1967).
28 397 U.S. 358 (1970).
29 387 U.S. at 10.

juvenile in a state delinquency proceeding is entitled to the rights to counsel,[30] to confront and cross-examine witnesses,[31] to the privilege against self-incrimination,[32] and to the right to adequate notice of charges.[33] The Court expressly declined to to determine whether the juvenile was entitled to direct appeal and to a transcript.[34]

In the second case, Samuel Winship was accused of theft in a delinquency petition. The trial judge, after hearing all of the evidence, declared Samuel to be delinquent based upon a finding that he stole the money in question. He admitted, under questioning by the attorney for Winship, that his decision was based on a preponderance of the evidence in accordance with New York law.[35] The Supreme Court rejected the preponderance standard and held that for the limited purpose of determining the quantum of evidence necessary to declare a youth delinquent based on criminal misconduct, the proceedings may be considered criminal in nature and the reasonable doubt standard employed.[36]

The traditional justifications used in the early constitutional challenges in the state courts were the first points discussed in *Gault* and *Winship*. The benefits which a youth is said to receive in the juvenile courts have played a significant role in the perpetuation of the constitutional immunity of the system.[37] Mr. Justice Fortas, writing for the majority in *Gault*, was, however, unimpressed by similar contentions. First, the "industrial school" is a euphemistic title for an institution for confinement.[38] Second, the nonpublic nature of the proceedings and dispositions is sufficiently disregarded in practice to ignore it as a significant factor.[39] Third, the designation of delinquency as non-criminal, while not always so held by the general public, need not be affected by the addition of the procedural rights.[40] Finally, it is not necessary to impair the picture of the juvenile judge as a benevolent father figure.[41] The Court further noted that the good intentions of the state in administering the juvenile court system would not suffice to replace the due process rights.[42] The *Gault* court stated that the "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[43] Finally, the Court noted that the "civil" label would no longer be sufficient to circumvent the constitutional questions.[44]

The Court made it clear that in the juvenile as well as in the adult courts, due process procedures were to be employed in order to circumscribe the use of

30 *Id.* at 41.
31 *Id.* at 57.
32 *Id.* at 55.
33 *Id.* at 33-34.
34 *Id.* at 57-58.
35 N.Y. FAMILY COURT ACT § 744(b) (McKinney Supp. 1970).
36 397 U.S. at 368.
37 In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954).
38 387 U.S. at 27.
39 *Id.* at 24.
40 *Id.* at 24 n. 31.
41 *Id.* at 26.
42 *Id.* at 29.
43 *Id.* at 18.
44 *Id.* 36.

governmental power for the purpose of depriving one of his liberty.[45] Mr. Justice Fortas, in his opinion for the majority in *Gault*, stated that:

> Due process of laws is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.[46]

Although the Court was faced with a broad-based attack upon the juvenile system, it was not yet ready to terminate the experiment. Therefore, the opinions were extremely limited in their potential application:

> We do not . . . consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. . . . We consider only the problems presented by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.[47]

The opinions were further limited in their scope by their citation to *Kent* which held that the hearing need not necessarily conform to the due process standards of adult proceedings.[48] There is, in addition, some indication in both of these opinions that the Court was troubled by the possibility that the addition of certain rights might so alter the nature of the proceedings that they would be valueless.[49] The Court offered neither examples of situations in which this might be a factor nor any clear indication of the result it would prefer.

The Court then turned to the task of applying the due process rights in question to the juvenile courts. The standard used was that of fair treatment under the due process clause of the fourteenth amendment.[50] In each instance, the fact that a protection in question was required in an adult court was not determinative of the ultimate issue.[51] The Court, in applying this due process test, reveals a fundamental ambiguity as to the exact meaning of the standard. The rights discussed in *Gault* and *Winship* were found to protect the same interests, to serve the same purposes and to apply to the same extent as the corresponding right in the criminal courts; yet the same constitutional justification, to wit: the provisions of the Bill of Rights, was never invoked. For example, the sixth amendment right to counsel was made applicable to the state criminal courts through the operation of the fourteenth amendment in *Gideon v. Wainright*.[52] In *Gault*, the Court determined that:

> The juvenile needs the assistance of counsel to cope with problems of law,

45 397 U.S. at 363.
46 387 U.S. at 20.
47 *Id.* at 13; *see* 397 U.S. 359 n.1.
48 387 U.S. at 30, *citing* 383 U.S. at 562.
49 *Id.* at 21; 397 U.S. at 365-67.
50 387 U.S. at 30; 397 U.S. 359.
51 387 U.S. at 30; 397 U.S. at 359.
52 372 U.S. 335 (1963).

> to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to submit it.[53]

These are the same basic reasons the Court used in *Gideon*.[54] The *Gault* decision did not rely on *Gideon* but instead relied on the earlier case of *Powell v. Alabama*.[55] The *Powell* decision was decided on the basis of the fourteenth amendment alone;[56] the Bill of Rights provision playing no part. The Court concluded that the right to counsel is just as necessary to protect the alleged juvenile offender as to protect an adult defendant and is applicable to the same extent.[57]

In *Winship*, the rationale of the Court is similarly obfuscated. The Court here held that a defendant in a state criminal trial may be found guilty only upon proof beyond a reasonable doubt. The Justices found that the reasonable doubt standard is a prime instrument for reducing the risk of reversal for factual error,[58] giving substance to the presumption of innocence[59] and in general impressing the trier of the facts with the "necessity of reaching a subjective state of certitude" on the factual questions.[60] The Court then held that the "same considerations that demand extreme caution in fact finding to protect the innocent adult apply as well to the innocent child."[61] The reasonable doubt standard was then applied to the juvenile courts to provide the youthful offender with the same protections afforded the adult criminal.[62] The Court made no attempt to delineate the relationship between the applicability of the adult right and the youth right. It is clear from these examples that the standards employed in *Gault* and *Winship* are of little aid in any attempt to articulate the constitutional criteria by which the "fundamental fairness" of the juvenile courts is to be measured.

There were two significant separate opinions in these cases. In *Gault* Mr. Justice Harlan, dissenting in part, voiced the fear that perhaps the Court was moving too rapidly in its efforts to restrict the juvenile courts with procedural formality so as to inhibit the development by the state legislatures of alternative safeguards.[63] More fundamentally, he felt that the major issue before the Court was whether the proceedings authorized by the Arizona constitution met the standards of the due process clause, not whether a particular procedure required in the criminal courts was necessary in the delinquency hearings.[64]

In *Winship*, Mr. Chief Justice Burger wrote a dissenting opinion in which Mr. Justice White concurred. The Chief Justice believed that the Court was being influenced more by the failures in the dispositional phase than with any

53 387 U.S. at 36.
54 372 U.S. at 344.
55 287 U.S. 45 (1932).
56 *Id.* at 71.
57 387 U.S. at 41.
58 397 U.S. at 363.
59 *Id.*
60 *Id.* at 364, *citing* Dorsen and Rezneck; *In re Gault and the Future of Juvenile Law*, 1 FAM. L. Q. No. 4, 1, 26 (1967).
61 397 U.S. at 365.
62 *Id.* at 368.
63 387 U.S. at 76 (Harlan, J. dissenting in part).
64 *Id.* at 67.

real deprivation of due process rights.[65] He went on to say that he could "see no constitutional requirement . . . to overcome the legislative judgement of the States."[66] These two opinions are quite important in that they indicate the strong hold that the more traditional approach towards the juvenile courts still maintained on the Court. In addition, *Winship* was decided by a four-to-three vote with one vacancy on the bench. The tenuousness of the advances made in the two cases is self-evident.

Implicit in *Gault* and *Winship* is the requirement that before a right is applied to the juvenile courts it must first be determined to be necessary for a valid state criminal trial. When *Gault* was decided the right to a trial by jury had not yet been applied to state proceedings, in fact dictum in *Palko v. Connecticut*[67] indicated that the right was not applicable.[68] *Duncan v. Louisiana*[69] remedied this however.

In theory, the jury is not as essential to an adversary system as is, for example, the right to counsel. The Court noted in *Duncan* that it is easy to imagine a legal system in which the jury plays no part but which is perfectly fair in terms of our due process requirements.[70] Many of our quasi-judicial fact-finding boards provide excellent examples of the workability of such systems. In addition, petty crimes do not come within the scope of the jury right in the federal courts.[71] Mr. Justice Fortas' majority opinion in *Duncan* concluded that the right is within the purview of the fourteenth amendment.[72] There are certain positive functions which the jury serves such as involving the community in the judical process, mitigating the harshness of the law in light of local values and buffering the defendant from arbitrariness on the part of the judge or prosecutor which weigh in favor of applying the right.[73] In dictum, the Supreme Court clearly felt that due process questions should not be determined solely in terms of the actual fairness of a system of criminal justice devised by a state. Rather, the proceeding must be measured against the standards of due process, including the procedural elements, of the Anglo-American common-law experience.[74]

The *Duncan* holding was widened in *Bloom v. Illinois*[75] and *Williams v. Florida*.[76] In *Bloom*, the defendant was imprisoned for criminal contempt. The jury right had traditionally been denied in these cases on two grounds: first, it is not a serious crime[77] and second, it is necessary to uphold the integrity of the court.[78] In this decision the Court held that neither of these justifications would be sufficient of itself to overcome the basic constitutional question of a denial of due process. The Court concluded that in any proceeding in which

65 397 U.S. at 376.
66 *Id.*
67 302 U.S. 319 (1937).
68 *Id.* at 324.
69 391 U.S. 145 (1968).
70 *Id.* at 150 n.14.
71 Cheff v. Schackenberg, 384 U.S. 373 at 379 (1966).
72 391 U.S. at 149.
73 *Id.* at 156-57.
74 *Id.* at 150 n.14.
75 391 U.S. 194 (1968).
76 399 U.S. 78 (1970).
77 Bloom, 391 U.S. at 198.
78 *Id.* at 196.

the defendant charged with an offense having all of the indicia of a crime and involving the possibility of an extended prison term the constitutional right is operative.[79] In *Williams* the necessity of having a jury of twelve men was considered. In its decision to affirm, the Court found that twelve is an arbitrary number and the benefits of the jury system would not be affected by a panel containing a lesser number. The Court did say that there was conceivably a minimum number required but declined to speculate as to what this might be.[80]

The right to a jury trial in a delinquency proceeding was in issue in numerous cases following *Gault* and *Duncan*.[81] There were only two instances, however, in which the right was granted, *Nieves v. United States*[82] and *Peyton v. Nord*.[83] In neither of these cases was the issue as formulated in *Gault* and *Winship*, that is whether a particular right is required in the juvenile courts under the due process clause of the fourteenth amendment, squarely before the court. They are therefore of little aid in analyzing the effects of the two Supreme Court decisions.

The decisions in which the right was denied, although more explicitly addressed to the specific constitutional issue, seemed to ignore much of the rationale of *Gault* and *Winship*. One justification utilized was the criminal-non-criminal dichotomy repudiated in *Gault*.[84] Another interpreted the decision narrowly, applying the right only if the hearing could not be fair without it.[85] The more carefully reasoned opinions required that a "judicious balance" be struck between the desirability of maintaining the benefits "inherent" in the informal, flexible hearings against the protections accruing to the youth from the operation of the due process rights.[86] These state courts did not consider, however, the more fundamental elements as the general role of due process or the specific functions of the right in question. In sum, these decisions indicate that the state courts retained their traditional reluctance to look into, or tamper with, the juvenile court processes despite the decisions in *Gault* and *Winship* to the contrary.

It was against this background that the Supreme Court decided the issue of whether the jury is a necessary element in a delinquency proceeding.[87] The opinion in *McKeiver v. Pennsylvania* differed significantly in its approach to the problem from that taken in *Gault* and *Winship*. These differences centered on two areas: first, the *McKeiver* decision did not limit its primary concern to the adjudicatory proceedings as was done previously and second, the Court adopted a more restrictive view of the role of due process in the juvenile courts.

As was discussed above, the Supreme Court explicitly limited the holdings in *Gault* and *Winship* to the precise issues presented, that is to the application

79 *Id.* at 208.
80 Williams, 399 U.S. at 100.
81 A list of decisions dealing with this question after *Gault* is compiled at 403 U.S. at 549.
82 280 F. Supp. 994 (S.D.N.Y. 1968).
83 78 N.M. 717, 437 P.2d 716 (1968).
84 *E.g.*, in re Geiger, 184 Neb. 581, 169 N.W.2d 431 (1969).
85 Terry Appeal, 438 Pa. 339, 348, 265 A.2d 350, 354 (1970).
86 In re Agler, 18 Ohio St. 2d 70, 79, 249 N.E.2d 808, 813-14 (1969); In re D., 27 N.Y.2d 90, 92, 261 N.E.2d 627, 629 (1970).
87 The issue was first presented to the Court in *DeBacker v. Brainard*, 396 U.S. 28 (1969). However the Court did not feel that this was a proper case in which to resolve the question as the hearing took place prior to that in Duncan and was therefore within the holding of *DeStephano v. Woods*, 392 U.S. 631 (1968) which did not give retroactive application to *Duncan*.

of specific rights to the adjudicative stage of the proceedings.[88] The portions of these opinions referring to the failure of the system to live up to its high expectations justified the break with the traditional judicial unwillingness to look into the constitutionality of the juvenile system.[89] These considerations played no part in the determination of the specific question of the applicability of the rights. If we look to *McKeiver* the focus of the opinion widens to consider the intake, adjudicatory, and dispositional processes as interrelated in determining applicability of the jury right. The plurality opinion was fearful that:

> The imposition of the jury trial on the juvenile court system would . . . provide an attrition of the juvenile courts assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped for advance in the juvenile courts, the alternative would be regressive . . . and would tend once again to place the juvenile squarely in the routine of the criminal process.[90]

The Court went on to say that it did not consider the failures to be of constitutional consequence at this time.[91] Further the Court took the position that to impose the jury right necessarily equated the adjudicatory hearing with a criminal trial.[92] This approach is also not well supported by the authorities cited. The Task Force Report, it was noted, failed to recommend the use of juries in its list of reforms and expressly recommended "against abandonment of the system and against the return of the juvenile to the criminal courts."[93] The relevant portions of the pertinent passages from the Report read as follows:

> . . . and remand the *disposition* of children charged with crime to the criminal courts of the country . . . What should distinguish the juvenile from the criminal courts is the *greater emphasis on rehabilitation,* not exclusive preoccupation with it.[94]

The *McKeiver* Court took a narrow view of what was done in *Gault* and *Winship*. There was no question as to the appropriate due process standard, as "fundamental fairness" had been established in the earlier cases.[95] As developed in this decision fairness in the fact-finding mechanism should be the chief concern.[96] There can be no doubt that this was a crucial concern in the preceding cases, but it is only half of the picture. *Gault* and *Winship* applied the rights to the same extent and for the same reasons as they were required in the adult court: they were used to regulate the use of governmental power, to protect certain interests of the juvenile and to insure the reliability of the findings of fact.[97]

Based upon this interpretation of *Gault* and *Winship* the question of the

88 Cases cited note 32 *supra.*
89 Cases cited notes 34-37 *supra.*
90 403 U.S. at 547.
91 *Id.* at 547-48.
92 *Id.* at 550.
93 *Id.* at 546.
94 TASK FORCE REPORT 9 (emphasis added).
95 403 U.S. at 543.
96 *Id.*
97 Cases cited notes 56-57 *supra.*

necessity of the jury right in the adjudicatory hearing was answered in the negative.[98] The Court correctly pointed out that the jury is not the only reliable method of making factual determinations.[99] The relevance of the other functions of the jury such as to protect the youth from overzealous prosecution by a corrupt or politically minded prosecutor or judge and to interject community values into the determination of criminal guilt or innocence were not discussed.

The concurring opinions of Mr. Justice White and Mr. Justice Brennan took issue with the rest of the plurality on this omission. Mr. Justice White's attitude toward the juvenile court system is very traditional in its approach as he emphasizes more the ideals of the court than the realities of the situation.[100] He was, therefore, willing to consider the intake procedures as sufficient buffers against abuse.[101] Although there is nothing in the facts presented to indicate that political considerations were the primary motives of the arresting officers in this case, the fact remains that the North Carolina youths were arrested for conduct growing out of political activities.[102] It is remarkable that Mr. Justice White could see little "temptation to use the courts for political ends."[103]

Mr. Justice Brennan was more concerned with possible oppression in the system.[104] He was satisfied, however, that the juvenile could be adequately protected by an open trial:

> An accused may in essence appeal to the community at large, by focusing the public attention upon the facts of the trial, exposing improper judical behavior to public view, and obtaining if necessary executive redress through the medium of public indignation.[105]

The Justice would prefer to have the juvenile waive his right to a relatively secret trial and disposition and carry his case to the people. A public trial alone might be effective to deter judges or other court officers who are tempted towards more flagrant abuses, but it is difficult to see how this could counter the more subtle forms of bias or interject the sympathy of the community in the decisions of the court.

Mr. Justice Blackmun's opinion for the plurality in the present case also found the jury right to be somewhat less fundamental than the rights dealt with in *Gault* and *Winship*. He based this in part upon the following quote from *Duncan*: "We would not assert, however, that every criminal trial—or any particular trial—held before a judge is unfair. . . ."[106] The *Duncan* Court was referring specifically to the fact that waivers are allowed in criminal trials and that a jury need not be supplied to try petty cases.[107] The issue in *McKeiver* was not whether a trial after a waiver of the jury right is valid, but whether a request for such a trial may be constitutionally denied. In this respect the jury is no

98 403 U.S. at 545.
99 *Id.* at 543.
100 *Id.* at 551-552 (White, J., dissenting).
101 *Id.* at 552.
102 *Id.* at 536.
103 *Id.* at 552.
104 *Id.* at 553 (Brennan, J., dissenting).
105 *Id.* at 555.
106 *Id.* at 543, *citing* Duncan, 391 U.S. at 158.
107 Cases cited notes 65-67 *supra.*

different from the other due process rights previously discussed by the Court. The petty crime exception is also irrelevant as a delinquency adjudication is clearly serious. Dictum in *Gault* recognized that any indeterminant commitment to an "industrial school" was for a minimum of three years,[108] far in excess of the two-year sentence in *Bloom*.[109] A second point emphasized by Mr. Justice Blackmun was that *Duncan* was given only prospective application in *DeStephano v. Woods*.[110] In *DeStephano* three factors, "(1) the purpose to be served by the new standard, (2) the extent of the reliance by law enforcement authorities on the old standards and (3) the effect on the administration of justice of a retroactive application of the new standards" were balanced in reaching the decision.[111] Thus, the fundamentalness of the right was only one of three interrelated factors taken into account by the Court. The final case cited to support the contention that the jury is less fundamental was *Williams v. Florida*. The Court permitted a jury to contain less than twelve men. The opinion was careful to point out that it was not in any way watering down the right, rather it was providing a measure of flexibility to the states to ease the burden of meeting their constitutional obligations.[112] In sum, the holdings in *Duncan* and the cases which followed clearly require that a jury be provided on demand in a serious state criminal trial, and nothing less.

Due to the formulation of the issue by the Court the question of the effects of the jury upon the adjudicatory proceeding received scant attention.[113] The chief concern was whether the hearing would be turned into an adversary proceeding.[114] In light of *Gault* this appears to be almost a moot point. The addition of the rights to counsel, to cross-examination and to confrontation has probably done more than the jury could do to make it in to an adversary situation. Furthermore, the Court in *Gault* was not persuaded by this fear, suggesting that while some benefit may be afforded a juvenile by a flexible and informal procedure some "due process requirements will . . . [nonetheless] introduce a degree of order and regularity . . . and in contested cases will introduce some of the elements of the adversary system."[115] In *McKeiver* the Court also mentioned, but did not discuss the most serious argument against the use of the jury in the juvenile courts, that is the problem of increased delay.[116]

In this decision the Supreme Court has, at best, temporarily halted the trend of the Court to afford juveniles the rights to which all citizens are entitled, and at worst, a major step backwards has been taken. The failure to reverse the decisions of the state supreme courts is in and of itself unfortunate. The principles set forth in *Duncan, Gault* and *Winship* provided an ample basis for such a decision and would have been another step towards removing children

108 387 U.S. at 37 n.60.
109 Bloom, 391 U.S. at 211.
110 392 U.S. 631 (1968).
111 *Id.* at 633.
112 399 U.S. at 100-101.
113 403 U.S. at 534, 545, 547, 550.
114 *Id.* at 545.
115 387 U.S. 27.
116 403 U.S. at 550.

from the category of constitutional non-persons.[117] The Court did not completely close the door to a future evaluation of the question of juvenile rights however,[118] and one may hope that *McKeiver* is but a brief departure from the *Gault* and *Winship* trend.

The Court may here have taken a step backwards to the pre-*Gault* decisions. *Gault* and *Winship* stand for, at least, the principle that the Court will not yield to the rhetoric traditionally surrounding the juvenile court system. The Court was cognizant of the possible benefits of the system in the earlier cases but would not permit the state to interfere in the affairs of a youthful offender unless the precepts of due process were adhered to.[119] As noted above, the influence of the traditional evaluation of the system is evident throughout *McKeiver*. The different results of these two approaches are illustrated in the following hypothetical. A juvenile is arrested for possession of a non-addictive, but illegal, drug. The sole evidence presented in support of the delinquency petition is the drug which was obtained as a result of an illegal search and seizure. If the *Gault* approach is taken the violation of the youth's rights could arguably outweigh any interest of the state in "saving the child." If the *McKeiver* view is utilized there can be little doubt that the evidence would be admissible and the youth adjudged a delinquent. The Court was not required to apply the jury right to these proceedings by *Gault*. The ambiguity of the standard coupled with a balancing of the benefits gained and lost by the addition of the jury could have reasonably resulted in the same decision.

Dictum in the present case indicates that *McKeiver* may have further implications outside of the juvenile rights field. Mr. Justice Blackmun stated that:

> In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.[120]

This position is similar to that taken by the Chief Justice in *Winship*. He was there of the opinion that the legislative judgement of the state outweighed any constitutional issues present.[121] It is too early to fairly judge what effect the first two appointments by President Nixon will have on the future expansion of individual rights. The opinions expressed in *McKeiver* and the *Winship* dissent indicate that they will be willing to eschew the leadership role played by the Court during the last fifteen years.

This decision is unfortunate. It rests upon questionable distinctions in previous cases and equally questionable rhetoric. The conclusions drawn are basically those rejected in the earlier cases and as a result the usefulness of the leading cases in the juvenile rights field has been severely circumscribed. Unless

117 Fortas, *Equal Rights for Whom?* 42 N.Y.U.L. Rev. 401 (1967).
118 403 U.S. at 551.
119 Cases cited note 62 *supra*.
120 403 U.S. at 547.
121 397 U.S. at 376.

the Court sees fit to reevaluate the position it adopted here, one must conclude that *McKeiver v. Pennsylvania* marks the drawing to a close of the "Children's Hour" in the Supreme Court.

Paul V. Reagan

CONSTITUTIONAL LAW — CRIMINAL LAW — WARRANTLESS SEARCH OF AUTOMOBILE AT POLICE STATION HELD UNCONSTITUTIONAL EVEN THOUGH PROBABLE CAUSE EXISTED, DESPITE RULING IN CHAMBERS V. MARONEY. — Edward Coolidge was arrested at his home for the murder of Pamela Mason. The automobile parked in defendant's driveway was subsequently towed to the police station and searched two days later, and again on two occasions during the following year. Vacuum sweepings, including particles of gunpowder, were introduced as part of the state's evidence in its attempt to show that Miss Mason had been in Coolidge's car on the night of the murder.

Coolidge was convicted of first degree murder by the Superior Court of Hillsborough, and the Supreme Court of New Hampshire affirmed.[1] Relying upon *Cooper v. California,*[2] the New Hampshire Supreme Court upheld the search, and stated that since the automobile had been properly impounded as an instrumentality of the crime, investigating officers could properly seize whatever evidence was found therein. The United States Supreme Court granted certiorari, and in considering the validity of the police station search, reversed and *held*: a warrantless search of an automobile at the police station is invalid when no exigency exists, despite a strong showing of probable cause as to the automobile. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

The Supreme Court, in so holding, has deviated from its previous decisions in which it had indicated that due to an automobile's inherent mobility, a warrantless search at the police station was reasonable where probable cause existed. In *Chambers v. Maroney,*[3] the Supreme Court held that an automobile could be searched without a warrant if probable cause existed for the search, even though it was practical to obtain a warrant and the search was not justified as incident to an arrest.[4]

The Supreme Court in *Coolidge* has thus significantly undermined the *Chambers* decision and breathed new vitality into the "automobile exception" principle. This principle, which originated in *Carroll v. United States,*[5] had been so extended by recent Supreme Court opinions as to significantly dilute the fourth amendment right to privacy when an automobile was involved, giving the individual in effect a secondhand citizenship.[6]

In *Carroll v. United States,*[7] a contemporaneous search of an automobile was permitted even though it was not incident to an arrest and despite the absence

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1 State v. Coolidge, 109 N.H. 403, 260 A.2d 547 (1969).
2 386 U.S. 58 (1967).
3 399 U.S. 42 (1970).
4 Comment, 46 NOTRE DAME LAWYER 610, 611 (1971).
5 267 U.S. 132 (1925).
6 Landynski, *The Supreme Court's Search for Fourth Amendment Standards: The Warrantless Search,* 45 CONN. B.J. 2, 31 (1971).
7 267 U.S. 132 (1925).

of a search warrant when it was stopped on the highway. The Supreme Court related that due to the mobility of the automobile and the occupants having been alerted by the police, an exigency existed which made obtaining a warrant impractical. The focus of this "moving vehicle" exception was on the possible removal or destruction of evidence. If the officers had taken time to obtain the warrant, the contraband liquor would have been removed or the automobile driven out of the jurisdiction. The automobile was, practically speaking, a "fleeting target."

The *Carroll* principle in later decisions was so expanded as to lose sight of its original justification—exigency resulting from mobility. In *Cooper v. California,*[8] the Supreme Court upheld a warrantless search at the police station, despite the lack of an exigency, solely on the ground of "reasonableness." Cooper had been arrested for selling narcotics and his automobile impounded under a state statute in connection with the offense. While his automobile was in police custody pending forfeiture proceedings, a warrantless search was conducted which disclosed narcotics. The Supreme Court upheld the constitutionality of the search despite the practicability of obtaining a warrant. The Court said that it would have been unreasonable for the police to hold the automobile for the four months' duration without being able to search it for their own protection. The Court, relying upon *United States v. Rabinowitz,*[9] stated that the relevant test was whether the search was reasonable, not whether it was reasonable to procure a search warrant.[10]

In *United States v. Preston,*[11] a case decided three years earlier, the Supreme Court invalidated a warrantless search at the police station because it was clearly too remote to have been incident to an arrest and not within the *Carroll* exception since the automobile was properly in police custody and not likely to be moved out of the jurisdiction. The Court in *Cooper* distinguished *Preston* on two grounds. The Court noted that in *Preston* the search was not related to the offense charged (vagrancy), while in *Cooper,* the search was related to the narcotics charge. Also, in *Cooper* there was a statute authorizing the seizure of the automobile, while no such statute existed in the *Preston* case.

These factual distinctions are very unconvincing. The reasoning of *Preston* appears to have been equally applicable to *Cooper* whether or not the search was related to the offense charged, since *Cooper* was not based on a warrantless search incident to an arrest. In both cases the possibility that evidence would be destroyed once the defendant was arrested and taken into custody was remote.[12]

Mr. Justice Douglas, in his dissenting opinion in *Cooper,* expressed his belief that *Preston* was on "all fours" with *Cooper.*[13] The similarity between these two cases as to determinative factors is significant. In both cases the automobiles were being "validly held," the temporal and spatial relations of arrest and search were about the same, there was time for a warrant, and in addition, it appears

8 386 U.S. 58 (1967).
9 339 U.S. 56 (1950).
10 386 U.S. at 61-62.
11 376 U.S. 364 (1964).
12 Comment, 52 MINN. L. REV. 538 (1971).
13 386 U.S. at 62 (dissenting opinion).

that in both cases there was probable cause as to the automobile. The Supreme Court in *Preston* assumed that there was probable cause to believe that the automobile was stolen,[14] while in *Cooper* there was probable cause to search the car for narcotics. The existence of the statute authorizing seizure did not materially distinguish the cases because it did not authorize any search, although it could be argued that it altered the nature of the proceedings, which was against the automobile rather than against the arrestee. But this would be putting form before substance, for the stake of privacy is equally as great.

Cooper thus appears to be inconsistent with *Preston* in holding that where an automobile is validly within the custody of the police at the station and probable cause exists, a search may be conducted without a warrant despite the lack of any existing urgency.

The *Preston* approach was subsequently reaffirmed in *Dyke v. Taylor Implement Co.*[15] in which the Court held that reasons thought sufficient to justify a warrantless search no longer persist when the accused is in the custody of the police and his automobile is parked outside the station.[16]

With *Chimel v. California*[17] and the rejection of the "reasonable test" in justifying searches incident to an arrest, it appeared that *Cooper* had lost its vitality. *Chimel* emphasized that warrantless searches could only be justified by the necessities of the situation and the scope of a warrantless search was limited by its initial justification. *Chimel,* on this basis, limited a search incident to an arrest to the area from which the arrestee could obtain weapons or destroy evidence. The Court, clearly recognizing the fourth amendment's mandate of acquiring a warrant, echoed the principles articulated in *Katz v. United States* that

> . . . searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.[18] (Footnotes omitted.)

The *Chimel* decision was looked upon by some authorities as a "potential roadblock to vehicle searches."[19] This notion was quickly dispelled by the Court in *Chambers v. Maroney.*[20] In *Chambers* the police stopped an automobile on probable cause to believe that the occupants were involved in an armed robbery. The automobile was driven to the police station where a subsequent search without a warrant revealed two weapons and other fruits of the crime. The police had probable cause to believe that the auto contained weapons and stolen money at the time it was stopped.

In support of the taking of the auto into custody and driving it to the police station, the Supreme Court announced:

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14 Annot., *Warrantless Search of Automobile,* 26 L. Ed. 2d 893, 907 n.7 (1971); Williams v. United States, 412 F.2d 729, 735 (1969).
15 391 U.S. 216 (1968).
16 23 VAND. L. REV. 1370, 1373 (1970).
17 395 U.S. 752 (1969).
18 389 U.S. 347, 359 (1967).
19 Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches,* 17 U.C.L.A.L. REV. 626 (1970).
20 399 U.S. 42 (1970).

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.[21]

The Supreme Court went on to justify the warrantless police station search on the grounds that while at the station both the probable cause and mobility factors continued, and an immediate search was no greater an intrusion than a temporary immobilization. The Supreme Court thus was willing to permit a warrantless search either on the highway or at the station. The highway search falls neatly into the "automobile exception" principle because of the substantial risk of the auto leaving the jurisdiction. This same justification is apparently absent when the automobile is in custody at the station, unless there is some presumption to be drawn from the inherent mobility of an automobile. A realistic approach to the situation would have revealed no great danger of any removal or destruction of evidence. Strict adherence to the *Carroll* doctrine would have conditioned a valid search on the obtaining of a warrant. It is not enough to invoke *Carroll* that an automobile has potential for mobility where that potential does not create an exigency. The "continuing mobility" the Supreme Court refers to in *Chambers*,[22] when the auto was in custody at the police station, was a significant departure from the mobility standard espoused in *Carroll*. The auto, under the circumstances, could hardly have been described as a "fleeting target." In the language of *Preston v. United States*,

> Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction.[23]

The *Chambers* decision is inconsistent with *Chimel v. California*.[24] Justice Stewart emphasized in *Chimel* that a warrant was to be obtained despite the unquestionable existence of probable cause and, relying on *Terry v. Ohio*,[25] pointed out that the scope of a warrantless search was to be circumscribed by the demands of the situation and not to be freely expanded. This is even more evident when viewed in light of the fourth amendment's historical origin as a reaction to a large extent to general warrants. If nothing else, *Chimel* would seem to have required a close analysis of the facts to insure that the *Carroll* doctrine did apply in *Chambers*. The fact that an automobile is involved should not automatically justify a warrantless search on probable cause.[26] It can be reasonably inferred from *Chimel* that an even greater showing of necessity and urgency is required than what had previously been exacted due to the weight to be given warrants in protecting privacy and the desire to strictly limit the scope of warrantless activity.

21 *Id.* at 52.
22 *Id.*
23 376 U.S. at 368.
24 395 U.S. 752 (1969).
25 392 U.S. 1 (1968).
26 Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A.L. REV. 626, 648 (1970).

Chambers, contrary to the spirit of *Chimel,* went beyond the necessities of the situation in expanding the area of warrantless searches. There was no need to justify a warrantless search when adequate police measures existed to preserve the existing situation. The police had the authority to temporarily immobilize the automobile while a warrant was being acquired.

The Supreme Court deviated from recent precedent when it took the position that an immediate warrantless search was for all practical purposes the same as a temporary immobilization until a magistrate could pass on the issue.[27] This approach is inconsistent with the Court's repeated stress on adherence to the judicial process.[28] It is analogous to saying that it makes little difference to the suspect's privacy whether he has a neutral magistrate pass on the issue of probable cause or whether the police act on their own finding. This loses sight of the warrant requirement's deterrent effect on illegal police conduct.

Previous "weighing" of the two courses of police conduct by the Court balanced strongly in favor of a temporary immobilization to preserve the status quo. This is evident in a case decided immediately prior to *Chambers.* In *Vale v. Louisiana,*[29] the defendant was arrested outside his house on a narcotics charge. At that time there was probable cause to believe that the house contained narcotics. A search of the house was too remote to be incident to an arrest. The Supreme Court, while indicating its approval of a cursory search to determine if there was anyone in the house who might destroy any incriminating evidence,[30] invalidated the warrantless search of the house. Obviously the limited intrusion was permissible to dispel any fear of an urgent situation existing by the presence of someone in the house, and to ascertain whether the status quo would be preserved. Since this interim activity was available and employed, there was no justification for the immediate warrantless search.

In *United States v. Van Leeuwen*[31] a strong priority is shown for temporary immobilization pending a determination of probable cause. The Supreme Court permitted the "freezing" of a postal package until the existence of probable cause could be further explored, since there was a reasonable suspicion that the package was involved in an illegal transaction. After further investigation led to the establishment of probable cause as to its involvement in an illegal coin transaction, a warrant was obtained and a search conducted. The Supreme Court, while receptive to the temporary detention, was opposed to an immediate warrantless search.

Terry v. Ohio[32] provides another illustration of the Court's willingness to uphold some temporary measure to sustain the status quo while not permitting an immediate search. In *Terry,* the Court permitted officers who had reason to believe "criminal activity was afoot" to make an inquiry, and when they feared for their personal safety, to make a limited "frisk" of the suspect's outer garments. While the frisk was permitted, a search of the suspect was not.

27 399 U.S. at 52.
28 389 U.S. at 357.
29 399 U.S. 30 (1970).
30 *Id.* at 34.
31 397 U.S. 249 (1970).
32 392 U.S. 1 (1968).

Terry, Vale, and *Van Leeuwen* considered together indicate a strong preference for temporary, limited activity aimed at preserving the status quo, while at the same time, under the same conditions, are opposed to an immediate warrantless search. These decisions are strong support for the proposition that where a temporary immobilization will suffice to meet the urgency of the situation, police conduct is to be so confined until a warrant can be obtained.

In *Chambers,* the temporary seizure of the automobile would have eliminated any existing threat of the destruction of evidence while the issue of probable cause could have been presented to the magistrate.

Mr. Justice Harlan, in his dissenting opinion in *Chambers,*[33] points out that where probable cause exists to search an automobile there is usually ample reason to make an arrest. While a person is in custody he could scarcely be inconvenienced by the inability to drive his automobile. In any event, an individual would most likely prefer a brief loss of the use of the vehicle in exchange for a determination by a magistrate of probable cause. If the suspect would be offended by a temporary immobilization he could always consent to the immediate search. It would appear that in light of the fourth amendment's purpose to deter arbitrary invasions of privacy by government agents, the judgment as to which is least intrusive shoud be left to the individual, or at least a presumption should be made in favor of the more limited detention, rather than having an unequivical determination by the Court as to their equivalence.

The Supreme Court in this manner significantly extended the *Carroll* doctrine as to the area of permissible warrantless searches of automobiles. The Court validated a warrantless search on probable cause, even where practically speaking a warrant could have been obtained, since the automobile was in police custody and not in the *Carroll* sense "mobile." The Supreme Court permitted the search despite the fact that the needs of effective law enforcement could have sufficiently been satisfied by a limited detention or "seizure" to preserve the existing situation while a warrant was being obtained. This was in direct contrast to *Chimel* and its command to restrain the scope of warrantless activity to that demanded by the existing urgency, and no greater.

The *Chambers* decision led some authorities to conclude that automobiles were going to be left altogether out of the requirement of adherence to the judicial process in obtaining a warrant where practical.[34] The automobile and its *inherent* mobility appeared to be sufficient to justify a warrantless search where probable cause exists.

In the Supreme Court's most recent treatment of the subject, *Coolidge v. New Hampshire,* the Supreme Court alleviated fears that an automobile's inherent mobility would automatically justify warrantless police station searches. The Supreme Court returned to its original concept of mobility with its requirement that conditions be such as to create a danger that the automobile would be removed or evidence destroyed while the police obtained a search warrant.

In *Coolidge,* defendant was arrested at his house for murder and his auto-

33 399 U.S. at 64 (dissenting opinion).
34 *See* Comment, 46 NOTRE DAME LAWYER 610, 615 (1971); Note, 55 MINN. L. REV. 1011, 1027 (1971).

mobile was towed to the police station where it was subsequently searched. At the time of the station search there was probable cause to believe incriminating evidence might be found, since the testimony of witnesses had connected the automobile with the crime. In *Coolidge,* to the same extent as in *Chambers,* the "mobility" of the car continued while in custody at the police station. The "continuing mobility" the Court referred to in *Chambers,*[35] since equally present in *Coolidge,* appeared to require that the search be upheld under the *Carroll* doctrine. The Supreme Court, however, repudiated the police station search, relying on the fact that the police had known of the probable role of the automobile for some time, defendant had ample opportunity to destroy evidence, and he had been made aware that he was a suspect by previous inquiries; that in short "the opportunity for search was hardly 'fleeting.' "[36] It is thus evident that although there is a constitutional difference between a house and an automobile, where the surrounding circumstances make the automobile in many respects analogous to a house, no legal distinction for purposes of search can be drawn. The "automobile exception" has no basis for being invoked when an auto's inherent mobility poses no obstacle to obtaining a search warrant.

The Supreme Court did not even bother to consider the station search in light of the *Carroll* principle which it had relied on in *Chambers*[37] to justify the warrantless police station search, despite the fact that probable cause continued and there was "continuing mobility" to the same extent as it existed in *Chambers.*

The Supreme Court in *Coolidge* extremely limited *Chambers* and gave new vitality to the *Carroll* doctrine when it stated: "Since *Carroll* would not have justified a warrantless search of the Pontiac at the time Coolidge was arrested, the later search at the station house was *plainly* illegal. . . ."[38] (Emphasis added.)

The Supreme Court could easily have focused on the situation existing at the police station at the time of the search and found it almost identical with *Chambers,* and justified the warrantless search under *Carroll* since the automobile was "mobile" and there was probable cause. Instead, Justice Stewart made it clear that the *Chambers* rationale would only apply where there was an initial justifiable intrusion under the "automobile exception," as where an automobile is stopped on the highway containing contraband. The rationale being that there is little difference between the search on the open highway and a later search at the station.

Prior to *Coolidge,* authorities had interpreted *Chambers* as applying the *Carroll* doctrine to the situation existing at the police station and seriously questioning what, if any, actual mobility existed while the automobile was in custody at the station.[39] It appeared that the Supreme Court had deleted the requirements of *Carroll* that (1) the automobile be mobile, and (2) a warrant be obtained where practical, when an automobile was validly held at the police station.[40]

35 399 U.S. at 52.
36 403 U.S. at 460.
37 399 U.S. at 52.
38 403 U.S. at 463.
39 *See* Note, 55 MINN. L. REV. 1011, 1026 (1971); Comment, 46 NOTRE DAME LAWYER 610, 615 (1971).
40 Comment, 46 NOTRE DAME LAWYER 610, 615 (1971).

Coolidge puts a new perspective on the question of station searches without a warrant. The justification comes *not* because of any exigency existing while the automobile was in police custody but because of a prior *Carroll* situation existing on the highway. The *Carroll* requirements of mobility and resulting exigency have not been eroded by *Chambers*. The suspicion that the same type of "mobility" existing in *Chambers* while the automobile was in custody at the station would be used to justify other warrantless searches in different places has been laid to rest.

Mr. Justice Stewart, in *Coolidge,* admitted the lack of any mobility or exigency in *Chambers* where the police station search was conducted.[41] The requirement of exigency along with mobility to justify a warrantless automobile search is preserved by *Coolidge,* but at the same time police acting in such exigency may conduct the search either on the highway or at the police station. This is at least true when, as in *Chambers,* a highway search would be under severe conditions. In *Chambers* the automobile was stopped in the middle of the night in a dark parking lot where an immediate search would have been ineffective and possibly dangerous.

The Supreme Court made it clear that where there is no prior *Carroll* exigency, a warrantless search where the automobile is validly taken to the police station is a violation of the fourth amendment's requirement of adherence to the judicial process. While an auto is in custody at the police station there is no reasonable basis for invoking the "automobile exception." This is true despite the potential mobility of an automobile.

The Supreme Court relies upon *Dyke v. Taylor Implement Company*[42] as controlling. In *Dyke,* an automobile originally stopped on the highway was parked outside the police station as a reasonable police measure to protect the property of the arrestee. There was no probable cause to search the automobile. A warrantless search was struck down. In relying on *Dyke,* the Supreme Court indicates that the critical factor is not the existence or non-existence of probable cause but whether or not there is compliance with the warrant requirement.

The Supreme Court in *Coolidge* has thus severely confined *Chambers* and revived the original mobility requirement of *Carroll.* In light of *Coolidge, Cooper* would seem to be limited to situations where there is a proceeding directly against the *automobile,* justifying more far-reaching conduct analogous to the control exerted over an arrested person.

Coolidge is a recognition by the Supreme Court that the fourth amendment and its warrant requirement is designed to protect people, not places or things. That protection to the individual's privacy should be no less where an automobile is involved. Probable cause itself is no longer sufficient to justify a warrantless search of an automobile at a police station, despite its inherent mobility.

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41 403 U.S. at 463 n.20.
42 403 U.S. at 463.