Notre Dame Law Review

Volume 46 | Issue 4 Article 8

6-1-1971

Case Comments

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CASE COMMENTS

LABOR LAW—JURISDICTIONAL DISPUTES—NATIONAL LABOR RELATIONS BOARD HAS NO JURISDICTION IN A § 10(k) PROCEEDING WHERE TWO UNIONS, WHICH ARE COMPETING FOR THE RIGHT TO PERFORM A PARTICULAR JOB ASSIGNMENT, AGREE ON A VOLUNTARY METHOD OF SETTLEMENT, EVEN THOUGH THE EMPLOYER OF THESE DISPUTING UNIONS DOES NOT AGREE TO THE CHOSEN METHOD OF SETTLEMENT.—In the fall of 1966, Texas State Tile & Terrazzo Company assigned certain tile installation work to its employees who were members of the Tile Setters Union. Other employees of Texas State Tile, who were members of the Plasterers Union, claimed that portions of the work should have been assigned to members of their union. The Tile Setters rejected the Plasterers' claim, and the two unions submitted the dispute to the Joint Board for the Settlement of Jurisdictional Disputes (hereinafter referred to as Joint Board) for determination.[1] The Joint Board awarded the disputed work to the Plasterers. Upon the Tile Setters' refusal to accept the Joint Board's determination, the Plasterers picketed the job site, resulting in the filing of an unfair labor practice charge against the Plasterers.

The National Labor Relations Board held its § 10(k) hearing, and on August 22, 1967, awarded the disputed work to the Tile Setters.[2] The NLRB rejected the Plasterers' contention that the existence of an agreed-upon method of settlement (i.e., the Joint Board) deprived it of jurisdiction to make a § 10(k) determination.

Following the Plasterers' failure to comply with the NLRB decision, an unfair labor practice hearing was held wherein the Plasterers' contention that the NLRB had no jurisdiction to make the original § 10(k) determination was again rejected. The NLRB found the Plasterers in violation of § 8(b)(4)(D), and it issued a cease and desist order against the Plasterers.[3]

The Plasterers then petitioned the United States Court of Appeals for the District of Columbia to review and set aside the NLRB order, and the NLRB cross-petitioned for enforcement of its order. The court of appeals, relying mainly on its analysis of the legislative history of § 10(k) and *NLRB v. Radio and Television Broadcast Engineers Local 1212 (CBS)*,[4] *held:* the National Labor

1 The Joint Board for the Settlement of Jurisdictional Disputes should not be confused with the National Labor Relations Board. The Joint Board is an aspect of the AFL-CIO Building and Construction Trades Department's "Plan for Settling Jurisdictional Disputes Nationally and Locally." Brief for Bldg. & Constr. Trades Dep't, AFL-CIO as Amicus Curiae at 5, Plasterers Local 79 v. NLRB, No. 22,073 (D.C. Cir. June 30, 1970). The Joint Board is thus voluntary, non-governmental, dispute settlement machinery. The "Plan" and decisions of the Joint Board are binding on all International Unions which make up the Building and Construction Trades Department and on the various locals within the international union. *Id.* Numerous employer associations and their component members have agreed to be bound by Joint Board determinations, but the failure of an employer to be bound does not affect the unions under the plan, and they remain bound regardless of their employer's status. *Id.* at 12. The Joint Board is composed of two employee representatives, two employer representatives, and a fifth neutral member. No union or employer representative may hear any case involving a union or employer of which he is an officer or representative. Board decisions are based on a number of factors, including trade practices, past agreements, efficiency, and economy. *Id.* at 6-7.

2 Plasterers Local 79, 167 N.L.R.B. 185 (1967).

3 Plasterers Local 79, 172 N.L.R.B. No. 77 (1968).

4 364 U.S. 573 (1961).

Relations Board is without jurisdiction to determine a jurisdictional dispute in a § 10(k) proceeding where the two unions, but not the employer, have agreed upon a voluntary method of adjustment. *Plasterers Local 79 v. NLRB,* No. 22,073 (D.C. Cir. June 30, 1970).[5]

Jurisdictional disputes have historically disrupted the labor scene.[6] Such disputes generally fall into two classes: (1) the work-assignment dispute, wherein two groups of laborers compete for the right to perform particular job assignments (as in *Plasterers Local 79*); and (2) the representation dispute, involving a conflict over which union shall be the authorized representative of an employee group.[7]

In spite of numerous attempts early in the 20th century to establish voluntary settlement procedures,[8] the jurisdictional strike problem still plagued employers at the end of World War II. The loosening of government-imposed wartime regulations further aggravated the problem.[9] President Truman, in his State of the Union Address, voiced his concern:

> Another form of interunion disagreement is the jurisdictional strike involving the question of which labor union is entitled to perform a particular task. When rival unions are unable to settle such disputes themselves, provisions must be made for peaceful and binding determination of the issues.[10]

On June 23, 1947, Congress passed the Labor-Management Relations Act over the President's veto.[11] The text of § 10(k) of the Act,[12] which must be read in conjunction with § 8(b)(4)(D),[13] provides that:

5 Judge MacKinnon filed a dissenting opinion based upon the Board's past interpretation of "parties" in cases of this nature, his own interpretation of the legislative history (or lack thereof), and the language of the section itself. He contended that the long-standing interpretation of § 10(k) by the NLRB (*see, e.g.,* Local 65, Operative Plasterers (Twin City Tile & Marble Co.), 152 N.L.R.B. 1609 (1965); Local 450, Int'l Operating Eng'rs (Sline Indus. Painters), 119 N.L.R.B. 1725 (1958); Local 231, Int'l Hod Carriers (Middle States Tel. Co.), 91 N.L.R.B. 598 (1950), requiring the employer to be a party to any voluntary agreement, should not be overturned. Because of the employer's economic interest in any job assignment, Judge MacKinnon felt that he should have a voice in any voluntary settlement, and should not be required to accept settlements reached by the competing unions without his participation and consent.

6 The earliest such recorded dispute is probably that of the Cobblers and Cordwainers over the right to certain shoe work in the year 1395. Mann & Husband, *Private and Governmental Plans for the Adjustment of Interunion Disputes: Work Assignment Conflict to 1949,* 13 STAN. L. REV. 5 (1960).

7 Farmers & Powers, *The Role of the National Labor Relations Board in Resolving Jurisdictional Disputes,* 46 VA. L. REV. 660, 664 (1960); Gaba, *Jurisdictional Disputes in the Building Trades,* 37 TEXAS L. REV. 859 (1959).

8 The first of these voluntary procedures was established by the American Federation of Labor with the formation of the National Building Trades Council in 1897. Numerous other attempts were made in the interim until the passing of the Taft-Hartley Act in 1947. K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB 61-71 (1961). For an excellent analysis of the various governmental and private attempts to establish settlement machinery, *see* Mann & Husband, *supra* note 6.

9 Mann & Husband, *supra* note 6, at 40.

10 93 CONG. REC. 136 (1947).

11 *Id.* at 7538.

12 29 U.S.C. § 160(k) (1964).

13 Section 8(b) provides, in part, that:

> It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
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> (4) to engage in, or to induce or encourage any individual to engage in, a strike . . . where . . . an object thereof is:
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> . . . .

> (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within 10 days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

A thorough understanding of the significance of § 10(k) requires an understanding of its procedural import. The section provides an intermediate step between the filing of an unfair labor practice charge and the issuance of the complaint. The union charged with a violation can avoid the complaint, and a possible adverse decision at the complaint hearing, by voluntarily settling the dispute or accepting the NLRB's § 10(k) determination. The section thereby favors voluntary settlement, rather than compulsion under a cease and desist order.[14] In addition, the purpose of the § 10(k) hearing is to determine the dispute out of which the alleged unfair labor practice arose, rather than to determine the unfair labor practice charge on the merits.

S. 1126,[15] as reported from the Committee on Labor and Public Welfare, was the forerunner of the present § 10(k). This bill was almost identical to the section as finally enacted. There was, however, one exception. In the original Senate version the NLRB was empowered to appoint an arbitrator to settle the dispute. This arbitration provision was deleted without explanation by the House Conference Committee. The remainder of the section, however, remained unchanged.[16] In referring to § 10(k), the House Conference Committee stated that § 10(k) "would empower and direct the Board to hear and determine *disputes between unions* giving rise to unfair labor practices under section 8(b)(4)(D) [Jurisdictional strikes]."[17] (Emphasis added.)

The majority of the court in *Plasterers Local 79* placed much emphasis on this report as one "of highest standing in ascertaining legislative intent."[18] However, such reliance could possibly be misplaced as the next sentence of the report implies that the Committee was referring to a representation dispute rather than a work-assignment conflict.[19]

> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: . . . . 29 U.S.C. § 158(b) (1964).

14 *See* Local 595, AFL (Bechtel Corp.), 112 N.L.R.B. 812 (1955).

15 80th Cong., 1st Sess. (1947).

16 H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 57 (1947).

17 *Id.*

18 Plasterers Local 79 v. NLRB, No. 22,073 at 19 (D. C. Cir. June 30, 1970).

19 *See* H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 57 (1947). That sentence reads as follows: "If the employees select as their bargaining agent the organization that the Board determines has jurisdiction, and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it."

Nevertheless, the underlying intent of the Act, as interpreted by the majority, is reinforced by reference in the House Report to sympathy strikes, illegal boycotts, and jurisdictional strikes as all having

> in common the characteristic that they do not arise out of any dispute between an employer and employees who engage in the activities, or, in most cases, between the employer and any of his employees. More often than not the employers are powerless to comply with demands giving rise to the activities, and many times they and their employees as well are the helpless victims of quarrels that do not concern them at all.[20]

It thus appears that the employer was viewed as a neutral party who was not involved in the dispute.

Similarly, the Conference Committee reported: "Jurisdictional strikes usually involve quarrels, not between employers and employees, but between rival unions, which use the strike weapon against each other . . . ."[21]

The language of the Senate Minority Report,[22] although referring to the original § 10(k) which included the arbitration clause, further supports the holding that "parties" refers to the opposing unions and that the employer is not a party to the jurisdictional dispute underlying the unfair labor practice:

> We believe this provision of the bill to be sound, and are pleased to note that full opportunity is given the *parties* to reach a voluntary accommodation without government intervention if they so desire. We are confident that the mere threat of governmental action will have a beneficial effect in stimulating *labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks, where they properly should be settled.*[23] (Emphasis added.)

In 1949, due to the discontent surrounding the Labor-Management Relations Act, a bill repealing the Act was introduced which contained similar provisions for the settlement of jurisdictional disputes. It empowered the NLRB to appoint an arbitrator capable of binding both the employer and employees.[24] The language of the bill was considerably more specific than § 10(k): "[T]he Board may . . . appoint an arbitrator to hear and determine the dispute . . . , first affording the *labor organizations involved in the dispute a reasonable opportunity to settle their controversy between or among themselves.*"[25] (Emphasis added.) It is therefore evident that, at least in 1949, Congress viewed the jurisdictional dispute—the problem to be cured by § 10(k)'s successor—as one between the unions themselves. It did not include the employer.

In addition, most scholars who have analyzed § 10(k) and its history have also concluded that Congress did not intend that the employer be considered a

20 H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947).
21 *Id.* at 24.
22 S. REP. No. 105, pt. 2, 80th Cong., 1st Sess. (1947).
23 *Id.* at 18-19.
24 S. 249, 81st Cong., 1st Sess. § 9(d) (1949).
25 *Id.*

necessary party to any voluntary agreement.[26] Some commentators, however, have reached a contrary conclusion.[27]

The NLRB's decisions involving § 10(k) are less than consistent. Differing fact patterns have produced varying interpretations of the statutory language which often cannot be reconciled. One author concludes:

> After more than twenty years the law in regard to Sections 8(b) (4) (D) and 10(k) remains in a state of uncertain application. . . . Perhaps no other sections of the Act have engendered so much confusion in the thinking of lawyers, Board Members, and courts.
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> . . . While it is almost impossible for an attorney to really determine what the Board will do in any given case, it is possible to utilize some of the decided cases to justify any rational argument which an attorney may desire to advance.[28]

With such encouragement, an analysis of the NLRB's holdings will be commenced. The Board's first interpretation of § 10(k) came in 1949 in the case of *Lodge 68, I.A.M. (Moore Drydock Co.)*.[29] In *Moore Dry Dock* the dispute involved a preferential hiring agreement and picketing by members of the International Association of Machinists not employed by *Moore*. The NLRB, relying on its interpretation of the legislative history, concluded that a § 10(k) determination of the dispute was proper even though the employer was not neutral and refused to assign the disputed task to the I.A.M. Similarly, the fact that the NLRB lacked the power to directly enforce its determination against the employer did not preclude the determination. *Moore Dry Dock* was also the genesis of the NLRB's policy of refusing to make an independent affirmative award of the disputed work to either union—a policy later overruled by the Supreme Court.[30] A NLRB member, Houston, filed a strong dissent, arguing that the § 10(k) determination was not within the Board's jurisdiction if the employer was not truly neutral and disinterested.[31]

In *Local 16, CIO (Juneau Spruce Corp.)*,[32] the NLRB reaffirmed its *Moore Dry Dock* holding even though the group to whom the non-neutral Juneau Spruce Corporation had assigned the work made no claim to it. In

26 *E.g.*, ABA, REPORT OF THE SPECIAL COMMITTEE ON THE BUILDING AND CONSTRUCTION INDUSTRY, SECTION OF LABOR RELATIONS LAW 456-57 (1965) ("The literal language of Section 10(k) does not require the employer to be a party to any agreed upon method of settlement . . . . Nowhere in the legislative history is there any indication that Congress sought to require employer participation in this agreed upon method of adjustment of the dispute. . . . [T]he legislative history makes no mention of employer participation in private settlements."); O'Donoghue, *Jurisdictional Disputes in the Construction Industry Since CBS*, 52 GEO. L.J. 315, 333 (1964) ("It is reasonable to assume, then, that Congress did not intend employers to be parties to a settlement of a dispute that did not concern them."); Sussman, *Section 10(k): Mandate for Change?* 47 B.U. L. REV. 201, 229 (1967) ("The NLRB is incorrect in presently requiring that the employer be a party to an agreement procedure before it satisfies the standards necessary to avoid a section 10(k) hearing. Thus, if two unions by membership in the Building Trades Department are bound to accept the decisions of the Joint Board, this should be sufficient to dispense with the section 10(k) hearing").

27 Farmers & Powers, *supra* note 7, at 672-73.

28 3 J. JENKINS, LABOR LAW § 18.3 at 524, 526 (1969).

29 81 N.L.R.B. 1108 (1949).

30 NLRB v. Radio & Television Broadcast Eng'rs Local 1212 (CBS), 364 U.S. 573 (1961).

31 81 N.L.R.B. at 1128.

32 82 N.L.R.B. 650 (1949).

referring to the ten-day grace period for voluntary adjustment before a § 10(k) hearing, the Board stated: "[T]he opportunity is afforded the *rival unions to reach a settlement* or to agree upon methods for reaching an adjustment of the dispute . . . ."[33] (Emphasis added.)

Both the National Labor Relations Board[34] and Plasterers Local 79[35] cite the *Juneau Spruce* case in support of their contradictory views regarding the parties necessary for the voluntary settlement of the underlying dispute. The NLRB relies on the holding of the case; the Plasterers cite the above-quoted language. Although both *Moore Dry Dock* and *Juneau Spruce* did involve the issue of whether or not a § 10(k) determination could properly be rendered when the employer was not neutral, the context in which the issues arose did not involve the specific controversy over who is a party to the underlying dispute. At most, these cases support the hypothesis that the employer's lack of neutrality cannot deprive the NLRB of its § 10(k) jurisdiction where the parties have not arrived at a voluntary method or settlement of the dispute. A finding that the employer is thereby rendered a party to the underlying dispute, and a necessary party to any voluntary settlement, does not necessarily flow from the *Juneau Spruce* holding as the NLRB contends.

Local 231, International Hod Carriers (Middle States Telephone Co.),[36] was the first case in which the NLRB faced squarely the questions of whether the employer was a necessary party to a voluntary agreement, and whether an agreement to which only the disputing unions were parties would deprive it of § 10(k) jurisdiction. The fact pattern was analogous to that in *Plasterers Local 79.* The disputing unions were both bound by the voluntary settlement machinery (the Joint Board), but the employer was not and refused to accept the Joint Board's determination. The NLRB cursorily held that the employer must be a party to a voluntary settlement agreement before the agreement would be determinative of the underlying dispute. As precedent for its holding, the NLRB cited[37] *Los Angeles Building & Construction Trades Council (Westinghouse Electric Corp.).*[38] *Westinghouse* held, as did *Juneau Spruce,* that the NLRB could not make an affirmative independent award of the disputed work since §§ 8(b)(4)(D) and 10(k) "do not deprive an employer of the right to assign work to his own employees, nor were they intended to interfere with an employer's freedom to hire . . . ."[39] Consequently, it appears that the only basis enunciated for the NLRB's holding that the employer is a necessary party to any voluntary settlement is based on a premise which has since been overruled by the Supreme Court in *NLRB v. Radio and Television Broadcast Engineers Local 1212 (CBS),*[40] where it was held that the NLRB must make an independent affirmative award. The NLRB's long-standing policy of requiring the employer to be a

33 *Id.* at 655-56.
34 Brief for Respondent at 15, Plasterers Local 79 v. N.L.R.B., No. 22,073 (D.C. Cir. June 30, 1970).
35 Brief for Petitioner at 25, Plasterers Local 79 v. N.L.R.B., No. 22,073 (D.C. Cir. June 30, 1970).
36 91 N.L.R.B. 598 (1950).
37 *Id.* at 604.
38 83 N.L.R.B. 477 (1949).
39 *Id.* at 481. The *Westinghouse* decision, in turn, cited *Juneau Spruce.*
40 364 U.S. 573 (1961).

party to any voluntary settlement before it will defer its own § 10(k) determination[41] is merely a carryover of this repudiated view that the employer's assignment is the most important factor, and a prerogative of which he cannot be deprived.[42]

The NLRB's next interpretation of § 10(k) came in *Wood, Wire, & Metal Lathers International, Local 9 (A. W. Lee Inc.)*.[43] In *Lee*, all parties, including the employer, were contractually bound by the Joint Board settlement machinery. One of the unions, however, refused to accept the Joint Board's determination, claiming that the Joint Board settlement could not deprive the NLRB of its power to determine the dispute through the § 10(k) hearing procedure. The Board held that an agreed upon method did exist and it was therefore without jurisdiction to determine the dispute in a § 10(k) proceeding. In so holding, it relied on an earlier decision ruling that an employer, once contractually bound to the Joint Board procedure, could not disavow that obligation and seek a NLRB determination of the controversy.[44] The rationale for the *Lee* decision was succinctly expressed:

> To hold otherwise would condone and sanction Lathers Local 9's breach of the agreement, and would tend to discourage and render worthless the making of such agreements, contrary to the statutory purpose to encourage the voluntary adjustment of jurisdictional disputes. Otherwise, any party adversely affected by a determination made pursuant to the agreement could breach the agreement with impunity and then have recourse to this Board for a redetermination of the dispute in the hope that the redetermination might be favorable.[45] (Footnote omitted.)

A parallel case before the Third Circuit Court of Appeals, *NLRB v. Local 825, International Operating Engineers*,[46] received a similar disposition: "[H]aving agreed to the settlement . . . by the Joint Board and . . . experiencing an adverse ruling, Local 825 is in no position to challenge the merits of that ruling before another tribunal."[47]

If one attempts to reconcile these decisions with the contention that the employer is a necessary party to any voluntary agreement, he is met with an irreconcilable dichotomy. Although it is accepted that § 10(k) was meant to further voluntary methods as far as practicable,[48] the NLRB's interpretation of "parties to the dispute" would encourage all parties to refrain from entering into voluntary agreement procedures other than on an ad hoc basis. The employer, by not stipulating beforehand that he would accept a Joint Board determination, could accept their decision, ad hoc, in which case the particular dispute would be settled voluntarily and the notice of the § 10(k) hearing necessarily quashed.

41 *See, e.g.*, Local 65, Operative Plasterers (Twin City Tile & Marble Co.), 152 N.L.R.B. 1609 (1965); Local 450, Int'l Operating Eng'rs (Sline Indus. Painters), 119 N.L.R.B. 1725 (1958); Local 231, Int'l Hod Carriers (Middle States Tel. Co.), 91 N.L.R.B. 598 (1950).

42 This rationale is more fully developed in Brief for Petitioner, *supra* note 35, at 31-32.

43 113 N.L.R.B. 947 (1955).

44 Teamsters Local 236 (Wm. F. Traylor), 97 N.L.R.B. 1003 (1952).

45 113 N.L.R.B. at 953-54.

46 410 F.2d 5 (3d Cir. 1969).

47 *Id.* at 9.

48 *See, e.g.*, N.L.R.B. v. Radio & Television Broadcast Eng'rs Local 1212 (CBS), 364 U.S. 573, 576-77 (1961); Wood, Wire, & Metal Lathers Int'l, Local 9 (A.W. Lee Inc.), 113 N.L.R.B. 947 (1955).

However, if he were not satisfied with the Joint Board's determination and not contractually bound to accept it, he could get a second and possibly more favorable determination through the § 10(k) procedure. It would thus be most advantageous for the employer to refrain from any binding agreements concerning the voluntary settlement of future disputes.

Similarly, the unions could also agree to be bound by the Joint Board. However, if the employer was not bound and was favorably disposed to either of their claims, that union could obtain a second determination from the NLRB and disregard its contractual obligation to accept a Joint Board settlement.

The *CBS* case,[49] wherein the Court struck down the NLRB's long standing non-affirmative award policy, was relied upon extensively by the *Plasterers Local 79* majority. The prelude to *CBS* involved a dispute between stage employees and television technicians over who had the right to perform certain lighting functions. This dispute culminated in a work stoppage and the issuance of a cease and desist order by the NLRB. The NLRB refused, however, to make an affirmative award of the disputed work to either labor group. Instead, it issued the cease and desist order on the basis of its finding that the striking employees had no "right" to the work in question.[50] The Supreme Court in its analysis of §§ 8(b)(4)(D) and 10(k) concluded that:

> [T]he clause "the dispute out of which such unfair labor practice shall have arisen" can have no other meaning except a jurisdictional dispute under § 8(b)(4)(D) which is a *dispute between two or more groups of employees* over which is entitled to do certain work for an employer.[51] (Emphasis added.)
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> Accordingly, § 10(k) offers strong inducements to quarreling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes.[52]

The Court, after analyzing § 10(k) and its legislative history, concluded that Congress visualized the employer as a neutral bystander, caught between the competing unions and not being able to satisfy either by any single work assignment. It noted that the employer is trapped between "the devil and the deep blue."[53]

In the *CBS* case, however, the employer was truly neutral and cared not who performed the disputed work, so long as it was done. He had in the past assigned it to both of the unions in attempting to satisfy them, but was unable to avoid the conflict regardless of which party received the assignment. This employer disinterest apparently had much bearing on the Court's decision and the case is thus distinguishable from *Plasterers Local 79* where the employer was not neutral. Even more important, the *CBS* Court never addressed itself to the questions of

49 364 U.S. 573 (1961).
50 Radio & Television Broadcast Eng'rs Local 1212 (CBS), 121 N.L.R.B. 1207 (1958).
51 364 U.S. at 579.
52 *Id.* at 577.
53 *Id.* at 575.

who the parties to the dispute were, and whether or not the employer was a necessary party to any voluntary agreement.

Soon after the *CBS* decision was handed down, however, the District Court for the District of Delaware squarely faced the task of interpreting the meaning of "parties" as used in § 10(k). In *Penello v. Local 59, Sheet Metal Workers,*[54] the court held that a dispute over work assignments, where the union to which the employer assigned the work made no claim to it (and in fact, affirmed the opposing union's right to it), was not a dispute between two unions which would empower the NLRB to make a § 10(k) determination. It was, rather, a dispute between the employer and one employee group, which § 10(k) did not encompass. In his analysis of §§ 10(k) and 8(b)(4)(D) and their interrelationship, Judge Wright commented:

> [C]ongress continually referred to it as a ban on jurisdictional disputes in which rival groups of employees use economic coercion against each other with the employer trapped in the middle.
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> . . . .
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> [A] fair reading of § 10(k) would seem to indicate that the "dispute" to be "determined" is one *between rival groups of employees* over which is entitled to "particular work."[55] (Emphasis added.)

After extensively analyzing the *CBS* opinion and its mandate regarding the furthering of voluntary methods of adjustment, the judge addressed the NLRB's contention concerning the parties necessary to a voluntary settlement procedure:

> [Petitioner's theory] apparently is that no agreement between the groups of employees involved can stay the operation of § 8(b)(4)(D) so long as the employer does not agree. But this argument proves too much . . . . Otherwise, the Board would, under § 10(k), be forced to decide on their merits disputes solely between unions and employers.[56] (Footnotes omitted.)

In a rather caustic comment concerning past NLRB policies in the area of voluntary adjustment, Judge Wright admonished:

> Petitioner's theories have demonstrated an unwillingness to depart from prior Board law even where necessary to comply with *Radio and Television Engineers.* The Board has held in the past that the employer must be a party to the "voluntary adjustment."[57] (Citation omitted.)

A study of the excellent analysis presented in the *Penello* opinion clearly convinces one that the NLRB's contentions cannot be reconciled either with the legislative history of § 10(k) or any rational policy goals, and that the court in *Plasterers Local 79* could have justified no other decision than that which it

54 195 F. Supp. 458 (D. Del. 1961).
55 *Id.* at 463-64.
56 *Id.* at 466.
57 *Id.* at n.51.

reached.[58] The *Penello* view is not without contradiction, however—at least in cases decided prior to *CBS*.[59]

Concerning the issue of who § 10(k) requires as "parties" before a determinable dispute exists, the NLRB has wholeheartedly accepted the *Penello* rationale. This is evidenced by its decision in *Teamsters Local 107 (Safeway Stores)*.[60] In *Safeway,* upon rehearing granted to reconsider the case in light of the *CBS* decision, the NLRB found that the employer-employee dispute remaining, where the opposing unions had agreed upon a settlement, was not a dispute which could be determined under the power granted by § 10(k). The Board relied on Judge Wright's "painstaking analysis" of the section in *Penello.*

The Board has consistently adhered to the holdings of *Penello* and *Safeway.*[61] In *Carpet, Linoleum, & Soft Tile Layers, Local 1905 (Southwest Floor Co.),*[62] the NLRB refused to exercise § 10(k) jurisdiction and gave full credit to the Joint Board's determination, even though the employer was not bound by it and refused to accept it as conclusive. The NLRB reasoned that no dispute existed within the language of § 10(k) since the unions had agreed upon a method for settlement, and the only remaining dispute was between the non-neutral employer and one of the unions.

The view taken by the NLRB in the above cases is, sub silentio, in direct conflict with that advocated by it and supported by the dissent in *Plasterers Local 79.* The NLRB is following a bifurcated interpretation of the term "parties" for the purposes of § 10(k).[63] That section, which provides that "the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute . . . have adjusted or agreed upon methods for the voluntary adjustment of the dispute" is undergoing two distinct and conflicting interpretations regarding whom the term "parties" refers to: in determining whether or not a § 10(k) dispute exists, an interpretation of "parties" as not including the employer is followed in accordance with the *Safeway* decision. On the other hand, in interpreting who was meant to be a party for the purposes of settling this same dispute, the NLRB has consistently held that the employer must be one of the "parties."[64] The NLRB's contention thus appears to be that, on the one hand, the employer is a necessary party to any voluntary agreement in settlement of the underlying dispute. On the other hand, he is not a party for the purpose of bringing a dispute between himself and an employee group within the coverage of § 10(k) since that section deals only with disputes between employee groups.

Although both the *Safeway* and *Lee* rationales independently provide support for the *Plasterers Local 79* decision, when viewed conjunctively they mandate

58 The *Penello* opinion, although done an injustice by this author's limited citation and quotation, should be read in its entirety if for no other reason than to introduce the reader to a seldom found degree of excellence and clarity in legal expression and analysis.

59 *See* Local 450, Int'l Operating Eng'rs v. Elliott, 256 F.2d 630 (5th Cir. 1958); McGuinn, *Jurisdictional Disputes & the N.L.R.B.,* 15 N.Y.U. ANN. CONF. ON LAB. 103 (1962).

60 134 N.L.R.B. 1320 (1961).

61 *See, e.g.,* Seafarers Int'l Union (Delta Steamship Lines), 172 N.L.R.B. No. 70 (1968); Sheet Metal Workers, Local 272 (Valley Sheet Metal Co.), 136 N.L.R.B. 1402 (1962).

62 143 N.L.R.B. 251 (1963).

63 This conclusion is also advanced in Brief for Petitioner, *supra* note 35, at 28.

64 *See, e.g.,* AFL-CIO, Local 300 (D'Annunzio Bros. Inc.), 155 N.L.R.B. 836 (1965); Int'l Operating Eng'rs, Local 66 (Badolato & Son), 135 N.L.R.B. 1392 (1962).

the decision. In *Lee,* the NLRB held that once unions voluntarily agree upon a method for the settlement of disputes, to allow them to repudiate it would be to encourage a breach of contract and to discourage voluntary procedures. Accepting this, one reaches the conclusion that in *Plasterers Local 79,* where both unions were contractually bound by the Joint Board, neither could repudiate that agreement, regardless of its discontent with any particular Joint Board determination. Consequently, if both unions are bound to accept the Joint Board determination, no dispute exists between the unions, but only between the employer and the union to whom he refuses to award the disputed work. Therefore, under both the *Safeway* and *CBS* interpretation of "dispute," none exists for the purposes of § 10(k). Accordingly, the NLRB must quash the notice of hearing since it lacks jurisdiction to determine a dispute solely between the employer and an employee group.

Aside from the factors previously discussed, there are two remaining areas which cannot be neglected if one is to evaluate the practicality of the mandate in *Plasterers Local 79.* These areas are the enforceability of voluntary methods of settlement and the speed with which the dispute is settled through voluntary procedures, as contrasted with the § 10(k) hearing process.

If the NLRB is required to defer its determination in favor of the voluntary settlement, what means exist to enforce that voluntary agreement and settlement of the dispute against a party dissatisfied with it? First, where the Joint Board is the settlement machinery, the unions are contractually bound to accept the decisions of that board, and they are prohibited from creating any work stoppage. The work assignment, as given by the employer, must be accepted until the Joint Board settlement is reached.[65] Second, in addition to Joint Board sanctions for non-compliance:

> The impetus for unions to live up to interunion agreements rests on reinforcing considerations of honor, reciprocity, mutuality—and enforceability. The winning union may bring an action, either in federal court under § 301 of the Taft-Hartley Act or in a state court, to secure injunctive relief against a union that has failed to abide by its agreement to honor the Joint Board decision and renounce the work.[66] (Footnote omitted.)

Third, in the case where a union refuses to abide by its voluntary agreement (the Joint Board determination) and pickets or engages in other coercive activities, unfair labor practice charges may be brought and a § 10(b) complaint may be filed against the non-complying union. Although the availability of such a procedure in the absence of a § 10(k) NLRB determination has been challenged, the NLRB finalized its validity in *Wood & Metal Lathers International, Local 2 (Acoustical Contractors).*[67] In that case the Board held that when notice of a voluntary *settlement* is received, the notice of the § 10(k) hearing will be quashed and the unfair labor practice charge which precipitated that notice dismissed.

65 The general requirements for participating unions are discussed in Brief for Bldg. & Constr. Trades Dep't, AFL-CIO as Amicus Curiae at 9, Plasterers Local 79 v. N.L.R.B., No. 22,073 (D.C. Cir. June 30, 1970).

66 Plasterers Local 79 v. NLRB, No. 22,073 at 23-24 (D.C. Cir. June 30, 1970).

67 119 N.L.R.B. 1345 (1958).

If, however, notice is received of a voluntarily agreed-upon *method* for settlement, the notice will be quashed, but the unfair labor practice charge will remain pending until notice of an actual settlement of the controversy is received. If the voluntary means fail to permanently settle the dispute, the absence of the § 10(k) determination does not preclude the issuance of a NLRB cease and desist order.[68] NLRB practices in the enforcement area thus favor the establishment and acceptance of voluntary methods by providing enforcement sanctions for such settlements in addition to § 10(k)'s built-in favoritism toward voluntary compromises.

Enforcement against the employer is of little import since no method exists under the Act for directly enforcing any § 10(k) determination against an employer. The majority of the court in *Plasterers Local 79* capitalizes on this congressional failure to provide a means of binding the employer as further evidence that the employer was not intended to be a party to the dispute or to any voluntary settlement.[69] Although a plausible argument, the basic premise involved overlooks the fact that the employer is offered strong encouragement by § 8(b)(4)(D) to abide by the NLRB decision. Under this section, it is an unfair labor practice for a labor organization to engage in conduct: "forcing . . . any employer to assign particular work . . . unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." The employer is thereby refused the right to bring an unfair labor practice charge against the union if the purpose of the latter's coercive activity is to force employer compliance to a NLRB order. In this sense the employer is negatively bound since the union would have a valid defense to any unfair labor practice charge he might bring against it. A strict interpretation of § 8(b)(4)(D), however, would not provide this statutory encouragement for employer acceptance of a *voluntary* agreement. Therefore, the NLRB's contention that the employer is more likely to accept voluntary agreements if he is a party to them would be buttressed if such a strict interpretation were given the section. But, considering the underlying encouragement provided the parties to voluntarily settle their disputes by § 10(k),[70] it would seem anomalous to allow the maintenance of an unfair labor practice charge based on the union's acceptance of a *voluntary method,* while dismissing such charge if the activity was in acceptance of a *NLRB order.*

The second area to be analyzed involves the relative speed at which disputes are settled. Here, the voluntary procedure of the Joint Board is clearly superior to the submission of the dispute to the NLRB for determination. The Joint Board determination is usually granted at the weekly meeting following the submission of a dispute. In cases requiring extensive investigation, a maximum delay of two or three weeks may be encountered.[71]

In contrast, the NLRB procedure is slow and cumbersome with the median time between the filing of the charge and the § 10(k) determination being 172.5

68 *Id. See also* NLRB v. Local 825, Int'l Operating Eng'rs, 410 F.2d 5 (3d Cir. 1969).
69 Plasterers Local 79 v. N.L.R.B., No. 22,073 at 12 (D.C. Cir. June 30, 1970).
70 NLRB v. Radio & Television Broadcast Eng'rs Local 1212 (CBS), 364 U.S. 573 (1961).
71 K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB 103 (1961).

days for fiscal year 1968.[72] The Joint Board procedure is thus far superior as a means of prompt dispute settlement (presupposing equal effectiveness of the Joint Board and NLRB in permanently ending the dispute).

Although the *Plasterers Local 79* opinion asserts that the employer is not a necessary party to the voluntary agreement and that he was viewed as neutral by Congress, the decision through its caveat implies that the employer does have a valid stake in the dispute and is, to a limited extent, a necessary party to the voluntary agreement. In limiting the impact of the decision to the facts before it, the court cautions:

> Thus, we need not consider the efficacy for purposes of § 10(k) of an inter-union proceeding that made no realistic provision for meaningful attention to the interest of the employer and to questions of efficiency. In the case before us we have a Joint Board . . . that takes into account factors of economy and efficiency of operation.[73]

The court thereby accedes to the contention that the employer is a party with an interest in the settlement of the dispute. Thus, in some instances, he may be a necessary party to the voluntary agreement although not, statutorily, a party to the underlying dispute.

What the court actually held was that on the facts before it, the employer did not have to be bound by the voluntary agreement in order to deprive the NLRB of § 10(k) jurisdiction. In other situations, however, he may be a necessary party to such an agreement. The court thereby interjects a modicum of practicality and a realization of the true problem into its interpretation of § 10(k). But, by so doing, the court left a major question unanswered: when will the voluntarily agreed-upon method satisfy their loosely enunciated standards of efficiency and economy consideration? To what extent must it include employer representation? Aside from holding that the present Joint Board meets the requirements, the court leaves the NLRB to formulate its own answers and criteria for future settlement methods.[74]

Likewise, the court, by basing its decision on the existence of a voluntary settlement method, failed to reach petitioner's contention that the NLRB has not complied with the mandate given in *CBS* and is still following its pre-*CBS* practice of "rubber-stamping" employer assignments in its § 10(k) determinations.[75]

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72 Brief for Bldg. & Constr. Trades Dep't, AFL-CIO as Amicus Curiae at 15 n.7, Plasterers Local 79 v. NLRB, No. 22,073 (D.C. Cir. June 30, 1970). Further indicia of the Joint Board's effectiveness are found in the fact that in the period from July, 1961, to January, 1969, the Joint Board rendered 3,943 jurisdictional dispute determinations. The N.L.R.B. rendered 290. *Id.* at 13-14. For a most critical view of the N.L.R.B.'s effectiveness, *see* O'Donoghue, *Jurisdictional Disputes in the Construction Industry Since CBS,* 52 GEO. L.J. 315, 333 (1964).

73 Plasterers Local 79 v. NLRB, No. 22,073 at 27 n.27 (D.C. Cir. June 30, 1970).

74 The *CBS* decision likewise left the criteria upon which the N.L.R.B. would make an affirmative award up to the NLRB. *CBS* mandated only that such an award was required. 364 U.S. at 583.

75 Petitioners, in their brief, conduct an extensive survey of NLRB determinations since *CBS,* finding that in the time between the *CBS* decision and December, 1968, the NLRB made 89 affirmative awards. The employer's assignment was overturned in only six of these. Brief for Petitioner at 30-38, Plasterers Local 79 v. NLRB, No. 22,073 (D.C. Cir. June 30, 1970).

Although the court in *Plasterers Local 79* reached a conclusion consistent with the meaning of § 10(k) and fair to all parties involved, both the caveat previously referred to and the limitation of the decision to its own facts may tend to negate any beneficial effect which it might have had in bringing some consistency to the overall interpretation of the section.

Legislative clarification, long overdue, appears to be the only solution to the present maze of conflicting interpretations of § 10(k), a section which disregards the business reality that the employer is necessarily an interested party to any labor dispute affecting his operations. The NLRB and the courts, in attempting to follow the statutory command of the section, have been forced to provide strained interpretations and distinctions without differences in order to prevent gross unfairness to the concerned parties. *Plasterers Local 79* and its limiting caveat present another example of the near impossibility of complying with the letter of the law, yet the decision assures equitable results for those concerned.

Paul J. Tomasi

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—EQUAL PROTECTION CLAUSE—EQUAL EDUCATIONAL OPPORTUNITY—FLORIDA STATUTE WHICH CONDITIONS STATE SCHOOL SUPPORT ON MAXIMUM TEN-MILL TAX LEVY IS A VIOLATION OF THE EQUAL PROTECTION CLAUSE.—Florida's public schools are financed primarily through statewide and local taxation. The state appropriates funds to the counties through its Minimum Foundation Program in accordance with certain indices of need. The Florida legislature during the Extraordinary Session of 1968 enacted a statute, commonly known as the Millage Rollback Act, which provided that any county that imposed more than ten mills ad valorem property taxes for educational purposes would become ineligible to receive state minimum foundation funds for its public educational system.[1] Twenty-four Florida counties which had been levying taxes at rates in excess of the ten-mill limit were forced to "roll back" their millage to avoid losing their state aid. As a result, the amount of educational funds that could be raised through local taxation efforts was substantially reduced[2] and became directly related to the amount of property within a county.[3]

The plaintiffs, Florida parents and schoolchildren,[4] brought a class action in which they alleged that the Millage Rollback Act violated the equal protection clause of the fourteenth amendment because it set a taxation limitation for educational purposes by reference to a standard related solely to the amount of property within a county, not to the county's educational needs. The plaintiffs further contended that the Act promoted no compelling state interest and was arbitrary and unreasonable because it failed to provide Florida's children with an economically equal educational opportunity.

1 FLA. STAT. ANN. § 236.251 (Cum. Supp. 1970-71).

2 The loss exceeded $50,000,000 measured by the reduction in millage from the year before the Act was passed. Hargrave v. Kirk, 313 F. Supp. 944, 946 (M.D. Fla. 1970), *prob. juris. noted*, 39 U.S.L.W. 3199 (U.S. Nov. 10, 1970) (No. 573).

3 At the ten-mill limit, one county could raise $725 per student by its own taxes, while another county, using the same limit, could raise only $52 per student. *Id.* at 947.

4 The defendants are members of the State Board of Education and others who regulate the amount of Minimum Foundation Program funds paid to the counties. *Id.* at 946 n.3.

A single-judge district court refused plaintiffs' request for a three-judge court and dismissed the complaint for lack of jurisdiction. The Court of Appeals for the Fifth Circuit held that the complaint raised a substantial constitutional issue and remanded with directions to convene a three-judge court.[5] The three-judge District Court for the Middle District of Florida *held:* the Millage Rollback Act, which required that a county levy no more than ten mills ad valorem property taxes for educational purposes as a condition to participation in the state's Minimum Foundation Program, violated the equal protection clause since it prevented poorer counties from adequately financing their children's education. *Hargrave v. Kirk,* 313 F. Supp. 944 (M.D. Fla. 1970), *prob. juris. noted,* 39 U.S.L.W. 3199 (U.S. Nov. 10, 1970) (No. 573).

The court of appeals, in remanding the case to the district court, noted that plaintiffs based their arguments on novel and recently developed ideas of equal protection.[6] Although the equal protection clause has long been used to attack discriminatory statutes in the Negro's quest for equal educational opportunity, it has only recently been used outside the racial discrimination context to challenge statutes allowing gross economic inequalities in the financing of public schools.[7] As in *Hargrave,* these inequalities are largely the result of an educational system financed primarily by local property taxes.[8] Thus, the amount of revenue that can be raised for educational purposes often depends directly upon the amount of property wealth within any given school district,[9] and the extent of the inequalities is most conspicuously reflected by the varying per pupil expenditures from district to district.[10]

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5 Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969). An order constituting a three-judge court was entered by the district court in Hargrave v. McKinney, 302 F. Supp. 1381 (M.D. Fla. 1969).

6 413 F.2d at 324. Two authors who have written on this subject observe that:

> It is a familiar yet ever surprising observation of students of constitutional law that the most fundamental issues are usually the last to be resolved. That observation holds true for the basic constitutional issue of public education inequality, which has avoided judicial attention throughout decades of rulings on narrower questions of school segregation, and education issues in such areas as teacher loyalty and religion in public schooling. Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause,* 1970 WIS. L. REV. 7.

7 *See generally* Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures,* 57 CALIF. L. REV. 305 (1969); Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State,* 15 U.C.L.A. L. REV. 787 (1968); Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined,* 35 U. CHI. L. REV. 583 (1968); Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969); Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause,* 1970 WIS. L. REV. 7; Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

8 *See, e.g.,* 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 25 (1967); Coons, Clune & Sugarman, *supra* note 7, at 312.

9 *See, e.g.,* Michelman, *supra* note 7, at 48, 50. "The core of the grievance is that states are forcing local districts to settle for whatever education they can afford out of their own means." *Id.* at 50.

10 *See, e.g.,* 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 28 (1967). A breakdown of the discrepancies in the Chicago area was recently made in one law review article:

> [T]he expenditure per high school pupil in a suburb to the north of Chicago is 1,283 dollars; in a suburb to the south of the city it is 723 dollars. The expenditure per elementary school pupil in a northern suburb is 919 dollars; in a southern suburb it is 421 dollars. Levi, *The University, the Professions and the Law,* 56 CALIF. L. REV. 251, 258 (1968).

Since the *Hargrave* decision is based on little direct precedent, it is necessary to examine judicial treatment of three related areas: discriminatory classifications generally, educational inequalities containing a racial discrimination element, and classifications in which wealth or poverty is a factor.

In analyzing economic or business regulations to determine their constitutionality under the equal protection clause, the courts have traditionally applied the "rational basis" test.[11] Under this test the court determines "whether the classification utilized was reasonable in light of the statutory purpose." The classification will not be found arbitrary or unreasonable unless it rests on grounds wholly unrelated to achievement of legitimate governmental objectives or unless there is no state of facts reasonably conceivable to justify it.[12] However, where classifications are based on "suspect" criteria or affect "fundamental" interests, the courts have required a much stricter standard of review, and the state must show a "compelling interest" for its distinctions before the classification will be upheld.[13] Racial classifications have consistently been subjected to rigid scrutiny[14] and classifications based on wealth may also be "suspect."[15] Although the criteria for determining fundamental rights have not been well defined, apparently procreation,[16] voting,[17] marital privacy,[18] and interstate travel[19] qualify for this "inner circle"[20] of protection.

While the federal courts have never formally declared that the right to an education is fundamental, judicial treatment of educational inequalities where there has been an element of racial discrimination gives some indication of their attitude toward the equality of educational opportunity concept, the importance of education, and the possibility of extending the equality of educational op-

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Michelman points out that: "It seems reasonable to assume . . . that educational expenditure is a sufficiently important predictor of educational quality to warrant the excitation of equal protection sensors by any state-sanctioned differences therein." Michelman, *supra* note 7, at 50.

11 The rational basis test was best explained in McGowan v. Maryland, 366 U.S. 420 (1961):

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *Id.* at 425-26.

12 Horowitz, *Unseparate but Unequal—the Emerging Fourteenth Amendment Issue in Public School Education,* 13 U.C.L.A. L. REV. 1147, 1155 (1966).

13 *See, e.g.,* McDonald v. Bd. of Election, 394 U.S. 802, 806-07 (1969); Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting). For an excellent discussion of the development of the "compelling interest" test, *see* Comment, 45 NOTRE DAME LAWYER 142 (1969).

14 *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944).

15 *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

16 Skinner v. Oklahoma 316 U.S. 535 (1942).

17 *See, e.g.,* Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1964). *See also* 45 NOTRE DAME LAWYER 142 (1969).

18 Griswold v. Connecticut, 381 U.S. 479 (1965).

19 Shapiro v. Thompson, 394 U.S. 618 (1969).

20 The term is used by Coons, Clune & Sugarman to designate those cases "singled out upon substantive grounds for special scrutiny." Coons, Clune & Sugarman, *supra* note 7, at 346.

portunity standard beyond the racial discrimination realm. In a series of cases[21] beginning in 1938 and leading up to the historic *Brown v. Board of Education*,[22] the Supreme Court, while adhering to the "separate but equal" doctrine of *Plessy v. Ferguson*,[23] found that where a state failed to provide "substantially equal" higher-education facilities for Negro students, these students were deprived of the equal protection of the laws.[24]

In the first of these cases, *Missouri ex rel. Gaines v. Canada*,[25] a Negro was seeking admission to the law school of a white Missouri university. The Court had little difficulty in finding that the state had not furnished an equal opportunity for legal training to its Negro students since there were no law schools in Missouri that accepted Negroes.[26] In *Sweatt v. Painter*,[27] the Court went a step further. Again a Negro student was seeking admission to a white law school, but on this occasion the state had hastily opened a new Negro law school prior to the Supreme Court's decision. While noting that the new law school was "apparently on the road to full accreditation,"[28] the Court decided: ". . . we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State."[29] In evaluating the "substantial equality" of the two law schools, the Court considered both tangible factors, such as faculty, courses, and library, and intangible factors, such as prestige and tradition.[30]

In the 1954 landmark school desegregation case, *Brown v. Board of Education*,[31] the unanimous Court struck down the separate but equal doctrine, finding "[S]eparate educational facilities are inherently unequal."[32] In considering public education "in the light of its full development" and "present place in American life,"[33] the Court further declared:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.*[34] (Emphasis added.)

21 Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).
22 347 U.S. 483 (1954).
23 163 U.S. 537 (1896).
24 *E.g.*, Sweatt v. Painter, 339 U.S. 629, 634 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938).
25 305 U.S. 337 (1938).
26 *Id.* at 349-50.
27 339 U.S. 629 (1950).
28 *Id.* at 633.
29 *Id.*
30 *Id.* at 633-34.
31 347 U.S. 483 (1954).
32 *Id.* at 495.
33 *Id.* at 492.
34 *Id.* at 493.

Because *Brown* is a racial discrimination case, this oft-quoted passage may not provide direct precedent from which to launch fourteenth amendment attacks on *any* educational inequality;[35] yet it does indicate the Court's attitude toward the importance of education and the duty of the state to provide it equally where it provides it at all.

Several post-*Brown* federal court decisions involving racial discrimination have indicated, at least in dicta, a willingness to extend the equality of educational opportunity concept to non-racial discriminations involving geography or wealth. A Louisiana statute authorizing school boards to close the public schools upon vote of the electors was found unconstitutional in *Hall v. St. Helena Parish School Board*.[36] Although the three-judge district court's decision was based primarily on grounds of racial discrimination, the court indicated it would have found the statute unconstitutional even without the racial element, since ". . . another effect of the statute is to discriminate geographically against all students, white and colored . . . where the schools are closed under its provisions."[37] The court further stated: "Thus, it is clear enough that, absent a reasonable basis for so classifying, a state cannot close public schools in one area while, at the same time, it maintains schools elsewhere with public funds."[38] Since the court could find no rational basis for the school closure in only one parish, it concluded that ". . . the present classification is invidious, and therefore unconstitutional, even under the generous test of the economic discrimination cases."[39]

The Supreme Court reached a similar result in *Griffin v. School Board,*[40] a case which involved a racially motivated school closing in a Virginia county. As in *Hall,* the Court found the closure a denial of equal protection. Yet in granting relief it not only upheld the district court's power to enjoin county officials from paying tuition grants and giving tax exemptions to private segregated schools,[41] but, more significantly, it pointed out that ". . . the District Court may . . . require the [county] Supervisors . . . *to levy taxes to raise funds* adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia."[42] (Emphasis added.)

By sanctioning such drastic and far-reaching relief measures, the Court left little doubt as to the extent of its powers to assure schoolchildren within an educational unit of their right "to an education equal to that afforded" in other parts of the state.[43] The question left unanswered by *Griffin* is whether the Court will exercise that power to eliminate educational inequalities when the discrimination involved is non-racial and non-intentional.[44]

35 *See* Coons, Clune & Sugarman, *supra* note 7, at 355-58, 380-82.
36 197 F. Supp. 649, (E.D. La. 1961), *aff'd per curiam,* 368 U.S. 515 (1962).
37 *Id.* at 656.
38 *Id.*
39 *Id.*
40 377 U.S. 218 (1964).
41 *Id.* at 232-33.
42 *Id.* at 233.
43 *Id.* at 234.
44 Horowitz and Neitring point out:

> There should not be a distinction of constitutional significance between offering *no* opportunity for public education in some places in a state as compared to other places and offering significantly lower quality educational opportunity in some places as compared to other places. Horowitz & Neitring, *supra* note 7, at 811.

In *Hobson v. Hansen*,[45] one of the few racial discrimination cases to deal directly with inequalities in per pupil expenditures, the litigation was notably brought on behalf of both Negro *and poor children* in the District of Columbia's public schools.[46] In a lengthy, well-documented opinion, Judge Skelly Wright[47] cogently described the existing educational inequalities, and then significantly noted: "The fact that median per pupil expenditure in the predominantly Negro elementary schools has been a clear $100 below the figure for predominantly white schools . . . summarizes all the inequalities . . . and perhaps significant others."[48] The judge remarked that no matter how the Supreme Court decided the de facto racial segregation issue:

> [I]t should be clear that if whites and Negroes, *or rich and poor*, are to be consigned to separate schools *pursuant to whatever policy*, the minimum the Constitution will require and guarantee is that *for their objectively measurable aspects these schools be run on the basis of real equality*, at least unless any inequalities are adequately justified.[49] (Emphasis added.)

Judge Wright concluded that it was the responsibility of the courts to insure that disadvantaged minorities received equal treatment when the "crucial right to a public education" was at stake.[50]

The Supreme Court has indicated disapproval of laws having unequal effects on the rich and poor in two areas involving neither educational equality nor racial discrimination problems. In *Griffin v. Illinois*[51] the right of a criminal defendant to a free transcript on appeal was in issue. The Court acknowledged that a state was not required to provide appellate courts or appellate review at all, but pointed out that ". . . that is not to say that a state that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."[52] The Court further stated:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.[53]

A similar rationale was employed by the Supreme Court in *Douglas v. California*[54] where it held that a convicted indigent should have the right to counsel on his first appeal.

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45 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir 1969).
46 *Id.* at 405.
47 It should be noted that Judge Wright, normally a circuit judge for the D.C. Circuit, was sitting as district judge by designation pursuant to 28 U.S.C.A. § 291(c) (1968).
48 269 F. Supp. at 496.
49 *Id.* Judge Wright expressed a more lenient view toward inequalities between schools not involving Negroes or the poor. *Id.* at 497. However, this does not detract from the main thrust of his opinion since elimination of the race and poverty factors also eliminates to a great extent existing educational inequalities.
50 *Id.* at 497.
51 351 U.S. 12 (1956).
52 *Id.* at 18.
53 *Id.* at 19.
54 372 U.S. 353 (1963).

In a voting rights case, *Harper v. Virginia Board of Elections,*[55] the Supreme Court found Virginia's $1.50 poll tax unconstitutional and re-emphasized its *Griffin-Douglas* view on classifications involving wealth: "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."[56]

In 1968 one of the first non-racially based attacks directed specifically at the inequalities of a state's public school finance laws reached the federal courts. In *McInnis v. Shapiro*[57] high school and elementary students attending school within four districts of Cook County, Illinois, challenged the constitutionality of state statutes that permitted wide variations of expenditures per student from district to district. They alleged that statutes which permitted school revenues to be distributed on the basis of such arbitrary factors as variations in district property values or differing tax rates were a violation of the equal protection clause. Pointing out that per pupil expenditures in various Illinois counties varied from $480 to $1,000,[58] plaintiffs claimed that the fourteenth amendment required that school expenditures be made only on the basis of pupils' educational needs.

The three-judge district court, faced with a statutory educational finance scheme that did not offer even a pretense of equality of educational opportunity between wealthy and poor districts, acknowledged that ". . . there is little direct precedent because the contentions now presented are novel."[59] However, the court summarily discredited all that had been said about equality of educational opportunity and discrimination based on wealth.[60] The *McInnis* court conceded that there were wide variations in the amounts of money available for various Illinois school districts, that the inequalities of the existing arrangement were obvious, and that because the educational potential of each child should be cultivated to the utmost, the poorer school districts should have the additional funds with which to improve their schools.[61] Yet it failed to find education a fundamental right, and it declined to apply the compelling state interest test. It specifically rejected the concept that public school expenditures should be made on the basis of pupils' educational needs.[62] Finally, in applying the rational basis test, it found an extremely dubious justification for the discriminatory classification.

Apparently the court's rational basis to justify the existing inequalities was that ". . . delegation of authority to school districts appears designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools."[63] Although this might be a valid state objective if all districts had equal property values, it hardly seems a realistic justification since the districts with the lowest per pupil expenditures are

55 383 U.S. 663 (1966).
56 *Id.* at 668.
57 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd per curiam sub nom.,* McInnis v. Ogilvie, 394 U.S. 322 (1969).
58 *Id.* at 330.
59 *Id.* at 335.
60 *Id.* at 334.
61 *Id.* at 331-32.
62 *Id.* at 336.
63 *Id.* at 333.

often levying the highest taxes.[64] The *McInnis* court itself conceded this by its statement: "Though districts with lower property valuations *usually levy higher tax rates,* there is a limit to the amount of money which they can raise, especially since they are limited by maximum indebtedness and tax rates."[65] (Emphasis added.)

Although the *McInnis* court concluded that the existing school legislation was neither arbitrary nor invidious, the key to its failure to find the educational inequalities a violation of equal protection probably lies in its rationalization that: "Even if the Fourteenth Amendment required that expenditures be made only on the basis of pupils' educational needs, this controversy would be non-justiciable."[66] The *McInnis* court repeatedly emphasized that due to a lack of judicially manageable standards, the plaintiffs must resort to the legislature rather than the courts.[67] The validity of the court's contention, however, is less than convincing in the light of *Baker v. Carr,*[68] the landmark reapportionment case. In that case the Supreme Court, finding that a challenge to Tennessee's legislative apportionment scheme presented a justiciable issue, failed to adhere to its earlier view that the remedy for unfairness in districting was to elect state legislatures that would apportion properly, or to invoke the power of Congress.[69] The Court also failed to accede to the vigorously stated contention of dissenting Justice Frankfurter that judges lacked ". . . legal standards or criteria or even reliable analogies to draw upon for making judicial judgments"[70] on state legislative apportionment schemes. While offering no view as to proper constitutional standards or appropriate remedies to be applied,[71] the *Baker* opinion simply stated:

> Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.[72]

Although the one-man-one-vote doctrine was later developed by the courts, Justice Frankfurter's dissent amply indicates no such simple standard was envisioned by the Court at the time *Baker* was decided.[73]

64 *See, e.g.,* Coons, Clune & Sugarman, *supra* note 7, at 317; Silard & White, *supra* note 7, at 9. *See also* 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 25-31 (1967).

65 293 F. Supp. at 331.

66 *Id.* at 335.

67 *Id.* at 329, 332, 335, 336-37.

68 369 U.S. 186 (1962).

69 Colegrove v. Green, 328 U.S. 549, 556 (1946).

70 369 U.S. at 268 (Frankfurter, J., dissenting). In his dissent, Frankfurter repeatedly referred to a lack of judicially manageable standards. *See also id.* at 337 (Harlan, J., dissenting).

71 *See* Reynolds v. Sims, 377 U.S. 533, 556 (1964).

72 369 U.S. at 226.

73 The futility of appealing to the legislature is emphasized by Kurland's comment:

> It should be noted that, to the extent that any voice in the legislatures of the states has been strengthened by reapportionment, it is the voice of suburbia, the least likely, I submit, to contribute to the effectuation of a concept of equal educational opportunity. Kurland, *supra* note 7, at 593.

In *Burruss v. Wilkerson,*[74] a case with a fact pattern closely resembling that of *McInnis,* suit was brought by parents and students in Bath County, Virginia. These plaintiffs challenged Virginia's statutory scheme for distribution of public education funds because the apportionment formula worked to the disadvantage of the relatively poor rural counties. In ordering a three-judge court,[75] Chief Judge Dalton expressed a particularly enlightened view in which it appeared relief might be granted:

> The right to an equal educational opportunity was clearly recognized in *Brown v. Board of Education* [Citation omitted]. While racial discrimination is not an issue in this proceeding, at least one recent interpretation of this right to an equal educational opportunity suggests that the right protects individuals not only from discrimination on the basis of race, but also on the basis of poverty. *Hobson v. Hanson* [*sic*] [Citation omitted]. Poverty does appear to be a factor contributing to the conditions which give rise to the plaintiffs' complaint. It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination, and that the discrimination on the part of state officials need not be intentional to be condemned under the equal protection clause. See *Griffin v. Illinois; Douglas v. California; Harper v. Virginia State* [*sic*] *Board of Elections* [Citations and brief explanations omitted]. The rationale of those decisions appears to be that state policies imposing conditions on the exercise of basic rights, which conditions operate harshly upon the poor, must be clearly justified in order to be constitutionally permissible.[76]

However, the three-judge court took a different view and upheld the state distribution formula, undoubtedly relying heavily on *McInnis.* The *Burruss* court ascribed the existing deficiencies and differences solely to the absence of sufficient taxable values within the county and concluded that since state funds were distributed under a uniform and consistent plan, the state statutory distribution scheme was not discriminatory.[77] Conceding that the quest for equal educational opportunities was "certainly a worthy aim, commendable beyond measure" and that ". . . we must notice their beseeming, earnest and justified appeal for help," the *Burruss* court followed the *McInnis* principle by proclaiming: ". . . the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State." The General Assembly, the court noted, would undoubtedly come to their relief.[78] Like *McInnis, Burruss v. Wilkerson* was summarily affirmed by the Supreme Court.[79]

The Court of Appeals for the Fifth Circuit, in remanding *Hargrave* for consideration by a three-judge court, indicated its willingness to expand the rationale for determining equality of educational opportunity considerably beyond that of *McInnis* and *Burruss.* That court acknowledged that the equal protection argument of the plaintiffs was the "crux of the case." It further noted that ". . . lines

74 310 F. Supp. 572 (W.D. Va. 1969), *aff'd per curiam,* 397 U.S. 44 (1970).
75 Burruss v. Wilkerson, 301 F. Supp. 1237 (W.D. Va. 1968).
76 *Id.* at 1239-40.
77 310 F. Supp. at 574.
78 *Id.*
79 397 U.S. 44 (1970).

drawn on wealth are suspect and . . . we are here dealing with interests which may well be deemed fundamental. . . ."[80] However, Judge Bell, in his dissenting opinion, felt that the equal protection argument had already been decided by *McInnis*.[81]

In holding the Millage Rollback Act unconstitutional, the three-judge *Hargrave* court chose a considerably more cautious approach than that suggested by the court of appeals. It did not step into the judicial vanguard to proclaim that education is a fundamental interest—although it did not rule out that possibility.[82] The court relied neither on the education cases involving racial discrimination,[83] nor the poverty discrimination cases[84] in arriving at its conclusion. In addition, to answer Judge Bell's dissent[85] and thus avoid conflicting with the *McInnis-Burruss* precedent, the *Hargrave* court purported to distinguish *McInnis* and *Burruss*. On cursory examination, *Hargrave* may therefore seem to leave the equal educational opportunity concept where it found it. Closer scrutiny, however, reveals discrepancies between what the *Hargrave* decision purports to do and what it actually does.

In attempting to distinguish *McInnis* and *Burruss*, the *Hargrave* court apparently relied on three distinctions: (1) plaintiffs in *McInnis* and *Burruss* were challenging inequalities in distribution of educational funds whereas in *Hargrave* plaintiffs were requesting the right to raise more funds; (2) there was a rational basis for the Illinois statute whereas there was none for the Millage Rollback Act; (3) the *McInnis* court was confronted with a judicially unmanageable standard whereas the *Hargrave* court could grant a simple injunctive remedy.

The first two of these distinctions may be more superficial than real. Although it is true that the *McInnis* and *Burruss* complaints were primarily challenges to the scheme of distributing educational moneys and *Hargrave* was a challenge to a tax limitation for educational purposes, the underlying problem is the same: may educational finance schemes ignore the educational needs of the districts and thereby discriminate against the children in the poorer districts? Stated another way, if *Hargrave* holds that a state must take into consideration the educational needs of a district's children in setting a tax limitation for educational purposes, why must the state not take these same needs into consideration in the collection and distribution of educational funds, or, for that matter, in establishing the district boundary lines themselves? Certainly the question forcefully put by the *Hargrave* court—"What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties?"[86]—might be as validly asked of the educational finance schemes in Illinois or Virginia.

80 413 F.2d at 324.
81 *Id.* at 329 (Bell, J., dissenting).
82 The court stated:
> Having concluded that there is no rational basis for the distinction which the legislature has drawn, we decline the invitation to explore the fundamental-right-to-an-education thesis, and thus we do not reach the more exacting "compelling interest" approach. 313 F. Supp. at 948.

83 *See* text accompanying notes 21-50 *supra*.
84 *See* text accompanying notes 51-56 *supra*.
85 *See* text accompanying note 81 *supra*.
86 313 F. Supp. at 948.

The second distinction drawn by *Hargrave* seems totally lacking in validity. While the *Hargrave* court claims to find no rational basis for the Millage Rollback Act, it ignores several justifications for the Act which are at least as reasonable as that used by the *McInnis* court to uphold the Illinois finance scheme.[87] *McInnis* itself offers *Hargrave* a rational basis: "The maximum tax rates which plaintiffs object to were enacted to avoid another disaster such as that which struck certain localities during the Great Depression; the possibility of similar economic crises supports the statutory ceilings."[88] Or the *Hargrave* court might simply have found a rational basis in a tax limitation to prevent the majority from imposing an excessive tax rate contrary to the will of the minority.

In ignoring these and other possibilities, the *Hargrave* court seems to be applying a rational basis test that is equivalent to the compelling state interest test, and thus it is in effect saying that before a state can justify a classification which deprives the poor of equal educational opportunity, it must show a compelling state interest. This proposition gains support by the fact that each of the cases cited by the *Hargrave* court in explaining its approach to the main issue involved either a suspect classification or a fundamental interest.[89]

The third distinction drawn by *Hargrave,* availability of a manageable standard, is probably the crucial factor in finding the Millage Rollback Act unconstitutional. As indicated earlier,[90] both *McInnis* and *Burruss* stressed the lack of a manageable standard in failing to grant plaintiffs relief. The *Hargrave* court could claim no such difficulty since the remedy sought was simply an injunction to prevent the state from withholding certain educational funds from those counties exceeding the ten-mill limit. Thus, *Hargrave* may stand for the proposition that where there is a manageable standard, economic educational inequalities will be strictly scrutinized, whether or not education is a fundamental right. If so, *Hargrave* casts doubt on the precedent of *McInnis* and *Burruss* since many manageable standards for equitable collection and disbursement of educational funds have been suggested by astute commentators,[91] any one of which may be found acceptable by the courts.

Whether *Hargrave* has in effect imposed a more rigid standard of review than traditionally used under the rational basis approach or whether it simply finds irrational possible state objectives for the discriminatory classification, its significance should not be underestimated. Viewed in its narrowest sense, the decision undermines the constitutional validity of any tax limitation for educational purposes that fails to consider the educational needs of the districts and thereby handicaps children in the poorer districts. Viewed in its broadest sense, *Hargrave* indicates a significant break with the *McInnis* and *Burruss* precedent and places the state in a position where it must show a compelling state interest for ignoring educational needs in operating its educational finance program.

87 *See* text accompanying notes 63-65 *supra.*
88 293 F. Supp. at 333.
89 McDonald v. Bd. of Election, 394 U.S. 802 (1969) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); McLaughlin v. Florida, 379 U.S. 184 (1964) (racial discrimination).
90 *See* text accompanying notes 66, 78 *supra.*
91 *See, e.g.,* Coons, Clune & Sugarman, *supra* note 7; Silard & White, *supra* note 7, at 25-30.

Since *McInnis, Burruss,* and *Hargrave* unanimously recognize that there are gross inequalities in existing educational finance programs and since state justifications for allowing these inequalities seem inadequate at best, the Supreme Court should affirm the *Hargrave* decision either by accepting the reasoning of the *Hargrave* court, or by taking this opportunity to declare education a fundamental right. If, as declared in *Brown,* "[Education] is a right which must be made available to all on equal terms,"[92] the affirmance of *Hargrave* will be a small, but significant, step in that direction.

Victor J. Koenig

LANDLORD—TENANT—IMPLIED COVENANT OF HABITABILITY—LANDLORD'S FAILURE TO COMPLY WITH HOUSING CODE MAY BE USED AS DEFENSE FOR NONPAYMENT OF RENT.—First National Realty Corporation [landlord] commenced separate actions against several of its tenants in the District of Columbia Court of General Sessions, Landlord and Tenant Branch, to repossess certain leased premises for failure of the tenants to pay their rent. The tenants admitted the failure of rental payments but alleged numerous violations of the District of Columbia Housing Code as an equitable defense. The tenants offered to prove the existence of approximately 1,500 direct and indirect violations of the Housing Regulations of the District of Columbia in their apartment complex. The Court of General Sessions refused the tenants' offer of proof and entered judgment for the First National Realty Corporation. The District of Columbia Court of Appeals, Judge Hood presiding, affirmed, stating:

> The long established rule in this jurisdiction, following the common law, is that in the absence of statute or express covenant in the lease, a landlord does not impliedly covenant or warrant that the leased premises are in habitable condition and the landlord is not obligated to make ordinary repairs to the leased premises in the exclusive control of the tenant.[1]

On appeal, Judge Skelly Wright reversed the decision of the lower courts and *held*: housing code violations can be used as an equitable defense or claim for recoupment in an action for possession based on nonpayment of rent. *Javins v. First National Realty Corp.,* 428 F.2d 1071 (1st Cir. 1970), *cert. denied,* 91 S. Ct. 186 (1970).

Prior to the sixteenth century a lease was considered a contractual agreement between two or more parties wherein the lessor contracted to grant the lessee possession of the premises for a specified period. This contractual agreement was effective only between lessor and lessee and therefore seldom gave the lessee protection from ejectment by persons other than the lessor.[2] The present theories of common law, which consider a lease to be a conveyance of an interest in land, have changed little since their inception in the sixteenth century. The primary obligation of the landlord in the common law lease theory is to deliver possession

92 347 U.S. at 493.

1 Saunders v. First Nat'l Realty Corp., 245 A.2d 836, 838 (D.C. Ct. App. 1968).

2 SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 68-71, 87-88 (1961).

(or in some cases merely the right to possession[3]) to the tenant, and the tenant's primary duty is to pay rent.[4] Additionally, the landlord must not substantially disturb the tenant's quiet enjoyment of the premises, and the tenant must not commit waste against the landlord's reversionary interest. From these bare foundations, the modern lease with all its special clauses and covenants evolved.

At common law, the remedies available to a tenant for breach of covenant by the landlord are insufficient. After delivery of possession by the landlord, there are few incidents that can excuse the tenant from his duty of paying rent.[5] One often used exception is the theory of constructive eviction. Constructive eviction permits a tenant to cease paying rent and vacate the premises if the landlord substantially breaches his covenant to provide quiet enjoyment.[6] There are several problems connected with this theory.

First, the breach of the covenant of quiet enjoyment must be so substantial as to make the premises uninhabitable. This implies that any breaches of the covenant of quiet enjoyment that fall short of destroying all habitability cannot be used as the basis for constructive eviction. The amenities of life such as air conditioning, elevator service, proper ventilation, sufficient lighting and proper plumbing are *usually* not considered "necessities of life" and therefore would not substantiate a constructive eviction. So long as there remain four walls and a ceiling reasonably free of cracks, sufficient water for sanitary and personal use, and a minimum form of utility service, the doctrine of constructive eviction usually is not available to the tenant.

Second, the tenant must determine the severity of the breach of the covenant at his own peril. Once the breach has occurred, the tenant must vacate the premises within a "reasonable" period of time to attest to the breach. If later the landlord sues for failure of rent payment, and the court rules that the breach of quiet enjoyment was not substantial enough to render the premises uninhabitable, the tenant is required to pay all the rent due the landlord.[7] Therefore, most tenants hesitate to use this remedy for fear the court might later decide the breach did not warrant abandonment of the premises.

Finally, as mentioned above, the tenant must attest to the severity of the breach of the covenant by vacating the premises within a reasonable time after the breach. In today's metropolitan areas, however, there is a sufficient shortage of housing to make abandonment completely unreasonable.[8] Even if the tenant is able to find another place to occupy, the chances are high that the conditions of the new location will be little better than those just vacated. The tenant's posi-

3 Cobb v. Lavalle, 89 Ill. 331 (1878); Gazzalo v. Chambers, 73 Ill. 75 (1874). *See* 2 POWELL, THE LAW OF REAL PROPERTY § 225[1] (1967); 3 THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1130 (1959 Replacement).

4 SIMPSON, *supra* note 2, at 237.

5 *See* Simmons, *Passion and Prudence*, 15 BUFF. L. REV. 572, 575 (1966); *Note*, 21 VAND. L. REV. 1117, 1118 (1968).

6 *See* 1 AMERICAN LAW OF PROPERTY § 3.51 (Casner ed. 1952); 2 POWELL, *supra* note 3, at § 225[3]; 3 THOMPSON, *supra* note 3, at § 1132.

7 Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). *See* Bennett, *The Modern Lease*, 16 TEXAS L. REV. 47, 65 (1938).

8 Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 480, 268 A.2d 556, 558 (1970). *See also* Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 802 (1965).

tion in today's housing market is one of vastly unequal bargaining power[9] characterized by "adhesion leases"[10] and a "take it or leave it attitude."

Absent an express agreement to the contrary, the common law imposes no duty on the landlord to maintain the leased premises in a habitable condition.[11] This general rule is frequently characterized by the slogan "caveat emptor."[12] The common law has been judicially and statutorily changed in many jurisdictions to hold the landlord liable in tort for injuries caused to the tenant by concealed dangerous conditions known to the landlord within the leased premises.[13] Also, many jurisdictions have provided criminal sanctions to force the landlord to maintain the premises within the limits prescribed in the applicable housing code.[14]

Although the tort liability of the landlord for injuries to the tenant caused by concealed dangerous conditions known to the landlord on the premises has given the tenant a cause of action against the landlord for the results of disrepair, its application is limited by the prerequisite of physical injury. The criminal sanctions imposed by housing codes have had some success in alleviating the plight of the tenant,[15] but their efficacy is largely hampered by a multitude of problems readily evidenced by the large areas of substandard multiple dwellings in every metropolitan area.[16] Even if the sanctions of the housing codes could be effectively enforced, there is a growing faction of "urban problem authorities"

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9 Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969).

10 *See* Schoshinski, *Remedies of the Indigent Tenant*, 54 GA. L.J. 519, 555 (1966).

11 Kutcher v. Graft, 191 Iowa 1200, 184 N.W. 297 (1921); Auer v. Vahl, 129 Wis. 635, 109 N.W. 529 (1906). *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 6, at § 3.78; 2 POWELL, *supra* note 3, at § 225[2]. *But see* Delamater v. Forman, 184 Minn. 428, 239 N.W. 148 (1931); Earl Millikin, Inc. v. Allen, 21 Wis.2d 297, 124 N.W.2d 651 (1963); Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961).

12 Nussbaum v. Sovereign Hotel Corp., 72 So. 2d 814 (Fla. 1954); Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961). *Accord,* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Altz v. Lieberson, 233 N.Y. 16, 134 N.E. 703 (1922). *See also* 3 THOMPSON, *supra* note 3, at § 1129; 45 MARQ. L. REV. 630 (1962).

13 Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942); Looney v. Smith, 96 N.Y.S. 607 (1950). *See also* PROSSER, HANDBOOK OF THE LAW OF TORTS § 63 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 358, Comment B (1966).

14 Prior to 1954, few large eastern cities had passed any housing codes. In 1954, in an effort to safeguard federal funds spent on local redevelopment programs, Congress enacted the workable program requirement, "which required each community to develop a workable program . . . to eliminate and prevent the development or spread of slums and urban blight." Certification of a workable program by the HHFA administrator was thus made a statutory condition to urban renewal loans and grants and other federal assistance. . . . The administrator prescribed several requirements for a workable program, but one was the adoption of local housing codes. As a result of this requirement, most communities now have housing codes. CASNER & LEACH, CASES AND TEXT ON PROPERTY 507 n.16 (2d ed. 1969).

15 Housing code enforcement has had significant success in correcting expensive *structural* deficiencies on a city wide basis. . . . Code enforcement has failed, however, effectively to impose standards of maintenance and sanitation, perhaps because of the overwhelming difficulties in discovering these recurring deficiencies. (Emphasis added.) Note, *Enforcement of Municipal Housing Codes,* 78 HARV. L. REV. 801, 860 (1965).

16 "Nowhere, however, has code enforcement been completely successful in preventing the development of slums or in preserving sound neighborhoods. In part this is due to administrative and judicial failures. . . ." *Id.* at 801.

In Simmons, *supra* note 5, it is pointed out that "As a rough approximation, it appears that one sixth of our urban population — over 5,000,000 families — reside in a slum environment." *Id.* at 572 n.5.

who feel that the landlords would merely pay the fines imposed by the codes and raise the tenants' rents to encompass this "new business expense."[17]

It has been suggested that one possible solution to the substandard housing problem would be to make "slumlordism" a tort.[18] This innovation would provide the individual tenant with a method of obtaining compensation for damages caused by inadequate and substandard housing conditions. Both constructive eviction and efficient enforcement of housing codes give the tenant a remedy for immediate disrepairs, but they do not compensate the tenant for the damages sustained. Treating slumlordism as a tort gives the tenant no immediate remedy. In fact, in some jurisdictions with a considerable backlog of cases, the tenant would be forced to live in premises that are "causing him severe emotional distress" and humiliation[19] while the case is pending a decision.

Perhaps a more expeditious solution lies in treating the lease as a contract. The common law theory that the landlord is not required to maintain and repair the premises is a reflection of the attitude that the real value of a lease is not the structure supplied to house the tenant (if any such structure existed) but rather the value of the land itself. In previous centuries, in an agrarian economy, the value of the land usually exceeded the value of any structure upon the land.[20] Today this is no longer true. In today's cities, the economic concepts which govern an agrarian society are no longer relevant. The average multiple dwelling tenant has little or no interest in the land itself. He is concerned only with the value of the apartment as suitable housing. It is true that there are still some regions where the land value would be of primary importance in the lease, but these are far outnumbered by urban leases.[21]

The limitations of an agrarian society lease should have been discarded long ago. Leases should be treated for what they actually are—contracts for space usable for a specified purpose. The movement of the law is in the direction of treating leases as any other type of contract:[22]

> The task of modern courts has been to divorce the law of leases from its medieval setting of real property law and adapt it to present day conditions and necessities by means of contract principles, which were only emerging when the law of landlord and tenant first developed.[23]

The District of Columbia courts have shown no reluctance to apply contract principles to leases.[24] Basic to the decision of *Javins* is the court of appeal's belief that the lease should be governed by contract rather than property law:

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17 *See* Note, *Enforcement of Municipal Housing Codes,* 78 HARV. L. REV. 801, 820 (1965); Note, *Rent Withholding* 53 CALIF. L. REV. 304, 318 (1965).

18 Sax and Hiestand, *Slumlordism as a Tort,* 65 MICH. L. REV. 869 (1967).

19 *Id.* at 875.

20 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (1st Cir. 1970). *See also* 1 AMERICAN LAW OF PROPERTY, *supra* note 6, at § 3.78.

21 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078 n.39 (1st Cir. 1970).

22 For a few cases that have shown a tendency to treat a lease as a contract *see* Brown v. Southhall Realty Co., 237 A.2d (D.C. Ct. App. 1968); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1969); 6 WILLISTON, CONTRACTS § 890 (3d ed. 1962).

23 Bennett, *The Modern Lease,* 16 TEXAS L. REV. 47, 48 (1938).

24 *See, e.g.,* Brown v. Southhall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968).

> Some courts have realized that certain of the old rules of property law governing leases are inappropriate for today's transactions. . . .
>
> In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract.[25]

At common law, the promises contained in a conveyance of an interest in land were independent and separable.[26] A breach on the part of the landlord would not necessarily excuse the tenant from his duties under the lease.[27] Consequently, the tenant would usually pay the rent specified in the lease even though the landlord had failed to perform the duties assigned him by the lease.[28] The tenant's remedy was to sue the landlord for failure of performance and have the court either extinguish the tenant's duty to pay rent or order the landlord to perform.

Since contract law considers promises mutually dependent,[29] a substantial breach by either party excuses the offended party from further performance. Using the theory of dependent promises as applied to a lease, the tenant has a remedy against the landlord's failure to maintain the premises properly if it can be proven that the promise of maintenance was part of the lease.

The *Javins* court found that the lease contains an implied promise by the landlord to maintain the premises in a suitable condition for habitation. This implied warranty of habitability was found to exist in contract due to two theories of law. First, since the lease is being considered and treated as a contract, appropriate contract law was taken to imply a condition that the premises would be suitable for the purpose they were intended.[30] "Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings."[31] Second, the *Javins* court followed precedents which held that the law existing at the time and place of the making of a contract is deemed to be a part of the contract.[32] The laws existing at the time and place of the making of the lease in question included

25 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-75 (1st Cir. 1970).

26 *See* Schoshinski, *Remedies of the Indigent Tenant,* 54 GA. L.J. 519, 535 (1966); 6 WILLISTON, CONTRACTS §§ 890-890a (3d ed. 1962).

27 At common law the lessor was, without express covenant to that effect, under no obligation to repair, and if the demised premises became, during the term, wholly untenable by destruction thereof by fire, flood, tempest or otherwise, the lessee still remained liable for the rent unless exempted from such liability by some express covenant in his lease. Suydam v. Jackson, 54 N.Y. 450, 454 (1873).

Accord, Walton v. Waterhouse, 85 Eng. Rep. 1235 n.(g) (1845); 1 AMERICAN LAW OF PROPERTY, *supra* note 6, at § 3.103.

28 *See* Note, *Enforcement of Municipal Housing Codes,* 78 HARV. L. REV. 801, 844 (1965).

29 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (1st Cir. 1970); Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961).

30 For other cases that found an implied warranty of habitability, *see* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Academy Spires Inc. v. Brown, 111 N.J. Super. 477, 480, 268 A.2d 556, 558 (1970). *Compare* UNIFORM COMMERCIAL CODE §§ 2-314, 2-315.

31 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 (1st Cir. 1970).

32 *See* Schiro v. W. E. Gould & Co., 18 Ill.2d 538, 165 N.E.2d 286 (1960).

the Housing Regulations of the District of Columbia.[33] The District of Columbia courts ruled in both *Kanelos v. Kettler*[34] and *Brown v. Southhall Realty Co.*[35] that the housing codes impose a duty on the landlord to maintain the premises according to the standards set forth therein. "In *Whetzel v. Jess Fisher Management Co.*, 108 U.S. App. D.C. 385, 282 F.2d 934 (1960), we followed the leading case of *Altz v. Lieberson,* 233 N.Y. 16, 134 N.E. 703 (1922), in holding (1) that the housing code altered the common law rule and imposed a duty to repair upon the landlord. . . ."[36]

Through these two theories, the *Javins* court held that there is an implied warranty of habitability in all leases made within the jurisdiction of the Housing Regulations of the District of Columbia. When this implied warranty of habitability is breached, the tenant is excused from further performance of his duties under the lease. The extent and severity of the breach, as found by the trier of fact, will determine the amount of payment (if any) the tenant is required to continue paying the landlord.[37] The *Javins* court made it clear that if the disrepair of the premises was due to the tenant's wrongful action, the landlord could not be held to have breached the implied warranty of habitability.

It is paradoxical that the Illinois Supreme Court decided on November 18, 1970, that there is no implied warranty of habitability in modern leases and that the covenants of a lease are independent real property covenants. That court, in *Jack Springs, Inc. v. Little*[38] stated:

> [A]ssuming *arguendo* that we adopt the rule that the covenant of habitability, express or implied, is mutual with the covenant to pay rent, we are then faced with innumerable problems far beyond the capability of this or any other court to deal with.[39]

It appears that the *Javins* court has seen no such overwhelming impediment.

The *Javins* decision is not a panacea for the slums of our metropolitan areas. It is a step toward a realistic solution. *Javins* gives the initiative to the tenant to withhold rent for abuses by the landlord, without burdening the tenant with the necessity of instituting a court action.

Some of the questions yet to be answered are of major significance if the *Javins* decision is to be widely followed. Most of the tenants in low income metropolitan areas are tenants at sufferance or tenancies from month to month. After successfully defending an action for possession based on failure of rent payments, these tenants can still be terminated on thirty days written notice.[40] Another,

33 2 D.C. Register 47 (1955); Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 n.50 (1st Cir. 1970).
34 406 F.2d 951 (1st Cir. 1968).
35 237 A.2d 834 (D.C. Ct. App. 1968).
36 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 (1st Cir. 1970).
37 *Id.* at 1082. *See also* Charles E. Burt v. Seven Grand Corp., —— Mass. ——, 163 N.E.2d 4 (1959); Academy Spires Inc. v. Brown, 111 N.J. Super. 477, 480, 268 A.2d 556, 558 (1970); Schoshinski, *Remedies of the Indigent Tenant,* 54 GA. L.J. 519, 527 (1966); UNIFORM COMMERCIAL CODE § 2-714.
38 Nos. 41730, 41739 cons. (Ill. S. Ct. Nov. 18, 1970). During a telephone conversation on Feb. 16, 1971, Mr. Russell from the office of the Clerk of Courts, Illinois Supreme Court, stated that the case was docketed for a rehearing on Mar. 23, 1971.
39 *Id.*
40 Simmons, *supra* note 5, at 588; *Comment,* 39 GEO. WASH. L. REV. 152, 161 (1970).

separate drawback to the acceptance of the *Javins* decision is that the tenant must decide what will constitute a sufficient breach of the warranty of habitability to justify withholding rent at his peril. If the trier of fact later disagrees with the tenant and rules that withholding was not justified, the landlord will be granted possession for failure of rent payment.

George H. Lyons

CONSTITUTIONAL LAW—STATUTE PROVIDING FOR SIX-MAN JURY IN TRIALS OF NON-CAPITAL CASES DOES NOT VIOLATE SIXTH AMENDMENT.—Prior to his trial for robbery in the state of Florida, defendant Johnny Williams filed a pretrial motion to impanel a twelve-man jury in place of the six-man jury provided by Florida law.[1] The motion was denied and Williams was convicted of robbery and sentenced to life imprisonment. Williams appealed, contending that the denial of his request for a twelve-man jury violated his constitutional right to a jury trial. Rejecting this contention, a Florida district court of appeal affirmed the conviction.[2] Since this court was the highest Florida court to which he could appeal, Williams then sought and was granted certiorari in the United States Supreme Court. The Supreme Court affirmed the Florida court and *held*: the right to trial by jury guaranteed by the sixth and fourteenth amendments is not violated by a law providing for a jury of six in criminal trials. *Williams v. Florida*, 399 U.S. 78 (1970).[3]

The *Williams* decision overrules the long-standing historical test for delineating the essential features of a constitutional jury and perhaps presages an effort to give flexibility to the application of the Bill of Rights to the states.

The preservation of the right to a jury trial in criminal proceedings was foremost among the many demands for amendments to the Constitution. Although article III of the Constitution guaranteed that "the trial of all crimes, except in cases of impeachment, shall be by Jury," several states objected strongly to the vagueness of this language and, in particular, to the absence of an explicit vicinage requirement.[4] At the Virginia ratifying convention, Patrick Henry protested that the article III jury trial provision had in reality sacrificed the jury trial right by not expressly incorporating the vicinage rule.[5] James Madison sought to satisfy this objection when he introduced the forerunner of the present sixth amendment. Madison's original amendment stated that "the trial of all crimes . . . shall be by an impartial jury of the freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . ."[6] However, the sixth amendment, as adopted,

1 FLA. STAT. § 913.10(1) (1967).
2 Williams v. State, 224 So. 2d 406 (Fla. Dist. Ct. App. 1969).
3 An additional issue in this case was the constitutionality of Florida's notice-of-alibi rule, FLA. RULE CRIM. PROC. 1.200. The Court upheld the rule, rejecting Williams's claim that it violated his privilege against self-incrimination.
4 "Technically, 'vicinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county." Williams v. Florida, 399 U.S. 78, 93 n.35 (1970).
5 *See* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 25 (1951).
6 I ANNALS OF CONG. 435 (1789).

provided that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." While this language eliminated the need for a vicinage requirement, in other respects it was scarcely more explicit than the article III jury trial provision. The framers by and large left to the judiciary the task of filling the interstices of the constitutional mandate of trial by jury.

The Supreme Court decided all questions about the form of a constitutional jury on the basis of a simple historical test: the sixth amendment preserved all the features of the common law jury that existed at the time of the adoption of the Constitution. Since the common law jury numbered twelve in 1789, the sixth amendment mandated a twelve-man jury.[7] And since the common law had generally required unanimity among jurors in all their findings, the sixth amendment also required unanimous verdicts.[8]

The Court first expounded this historical test to resolve the question of the number of jurors required by the Constitution in *Thompson v. Utah*.[9] An eight-man jury in Utah had convicted Thompson of larceny shortly after Utah had attained statehood. Utah's state constitution had provided for eight-man juries in criminal proceedings, but Thompson had allegedly committed larceny while Utah was still a territory. Undaunted, the Supreme Court of Utah affirmed the conviction and held that Utah's constitutional provision was applicable and that the Federal Constitution, were it applicable, would not require a twelve-man jury.[10] With Justice Harlan writing the opinion in *Thompson*, the United States Supreme Court reversed and held that Utah's eight-man jury rule was an *ex post facto* law in regard to the defendant Thompson and that the Federal Constitution did indeed mandate a twelve-man jury.

> It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the Territory of Utah —the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.[11]

Justice Harlan's exposition of the historical test was remarkable in that he omitted discussion of the essential premise of his argument. Justice Harlan quoted the language of the Magna Carta[12] and the writings of common law scholars such as Bacon and Story as authority for the clearly undebatable historical fact of the twelve-man common law jury. Yet he offered no authority or historical data to support his conclusion that the "jury" of the Constitution was the common law jury of Bacon and Story. His unsupported assumption was that the

7 Thompson v. Utah, 170 U.S. 343, 349 (1898).
8 Maxwell v. Dow, 176 U.S. 581, 586 (1900).
9 170 U.S. 343 (1898).
10 State v. Thompson, 15 Utah 488, 50 P. 409 (1897).
11 170 U.S. at 350.
12 *Id.* at 349. For criticism of Justice Harlan's reliance on the Magna Carta, *see* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 922 n.14 (1926).

framers intended to equate the constitutional jury and the common law jury.[13] Despite this flaw in his argument, Justice Harlan's opinion established the historical test for determining the features of the jury required by the sixth amendment and received steadfast adherence in later cases. For example, in *Maxwell v. Dow*,[14] the Court cited *Thompson* and declared that "a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt."[15]

The Court again followed the *Thompson* rule in *Rasmussen v. United States*,[16] a case which involved the constitutionality of the six-man jury in the trial of misdemeanors in Alaska. Here, however, *Thompson* was not directly challenged. The Court observed that "the Government did not deny that offenses of the character of the one here prosecuted could only be tried by a common law jury, if the Sixth Amendment governed."[17] Rather than question the equation of the constitutional jury and the common law jury, the Government argued that the Constitution was not controlling on Congress when it legislated for the then territory of Alaska. But the Court rejected this argument and held that "the provision of the act of Congress under consideration depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury, was repugnant to the Constitution and void."[18]

In *Patton v. United States*,[19] the Court considered whether an accused could waive the right to be tried by a jury of twelve. The defendant's trial for bribery of a federal prohibition agent had been interrupted by the illness of one of the jurors. All parties had agreed to continue the trial with the eleven jurors then impaneled. After a guilty verdict, the defendant Patton appealed and claimed that he had no power to waive his constitutional right to a twelve-man jury. The Supreme Court rejected this claim and held the jury trial provision was not jurisdictional but "was meant to confer a right upon the accused which he may forego at his election."[20] In reaching this conclusion, however, the Court gave the historical test its most dogmatic restatement:

> [W]e first inquire what is embraced by the phrase "trial by jury." *That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question.* Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.
>
> As to the first of these requisites, it is enough to cite *Thompson v. Utah* . . . .[21] (Emphasis added.)

13 170 U.S. at 349-50.
14 176 U.S. 581 (1900).
15 *Id.* at 586.
16 197 U.S. 516 (1905).
17 *Id.* at 519.
18 *Id.* at 528.
19 281 U.S. 276 (1930).
20 *Id.* at 298.
21 *Id.* at 288.

In none of these cases did the Court ever scrutinize Justice Harlan's assumption that the framers intended to incorporate all the features of the historical common law jury into the sixth amendment. The *Thompson* rule was never directly challenged. Furthermore, it was not likely to be challenged as long as it only burdened the federal government.

Maxwell v. Dow[22] first presented the question of whether the fourteenth amendment required that the states adhere to the sixth amendment jury trial guarantee in state criminal proceedings. *Maxwell* again involved a conviction by an eight-man jury in Utah. Here there was no *ex post facto* issue as in *Thompson* since the alleged robbery occurred after Utah became a state. Thus *Maxwell* squarely presented the question of the applicability of the sixth amendment to the states. The Supreme Court, however, was not yet ready in 1900 to give a broad interpretation to the fourteenth amendment due process clause. Specifically, the Court declared that the right to trial by jury in criminal proceedings "has never been affirmed to be a necessary requisite of due process of law."[23]

The present era has, of course, seen a broader interpretation of the fourteenth amendment due process clause. The Court in recent cases has selectively incorporated various Bill of Rights guarantees into the due process clause and applied these guarantees to the states.[24] Although Justice Black's total incorporation approach[25] has never won a majority of the Court, the cumulative effect of the selective incorporation cases has in effect established a national code of criminal procedure based on practically the entire Bill of Rights. *Duncan v. Louisiana*[26] contributed to this result by adding the jury trial guarantee. Specifically, *Duncan* held "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[27]

Duncan clearly overruled *Maxwell* but its exact impact was not immediately clear. Only Louisiana, New York, and New Jersey had provisions for trial without jury under circumstances where the right to trial by jury would be guaranteed on the federal level.[28] A greater number of states, however, did provide jury trials but in a different form than the federal jury (e.g., Florida's six-man jury in non-capital cases).[29] The impact of *Duncan* on these latter states depended

22 176 U.S. 581 (1900).

23 *Id.* at 603.

24 Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment); Benton v. Maryland, 395 U.S. 784 (1969) (fifth amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment); Klopfer v. North Carolina, 386 U.S. 213 (1967) (sixth amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment).

25 *See* Adamson v. California, 332 U.S. 46, 122 (1947) (Black, J., dissenting).

26 391 U.S. 145 (1968).

27 *Id.* at 149.

28 Louisiana and New Jersey enacted statutes to comply with Duncan v. Louisiana. LA. CRIM. PRO. CODE ANN. art. 779 (Supp. 1970); N.J. REV. STAT. § 2A:169-4 (Supp. 1970). New York's scheme for trial without jury in the New York City Criminal Court, N.Y.C. CRIM. CT. ACT § 40 (Supp. 1970), was struck down by the Supreme Court in Baldwin v. New York, 399 U.S. 66 (1970).

29 In addition to Florida's six-man jury statute, Louisiana, South Carolina, Texas, and Utah have provisions for juries of less than twelve in trials of serious offenses: LA. CONST. art. 7, § 41; LA. CRIM. PRO. CODE ANN. art. 779 (Supp. 1970); S.C. CODE ANN. § 15-618 (1962); TEX. CONST. art. 5, § 17; TEX. CODE CRIM. PROC. art. 37.02 (1966); UTAH CONST. art. 1, § 10; UTAH CODE ANN. § 78-46-5 (1953). For a poll of other state practices which differ from

on whether that decision incorporated judicial accretions such as the *Thompson* rule in addition to the explicit language of the sixth amendment jury trial provision. Prior incorporation decisions indicated that the *Thompson* decision would also apply against the states since, by selective incorporation, "the fourteenth amendment incorporates specific provisions of the Bill of Rights and those that are 'absorbed' at all are incorporated whole and intact, providing protections against the states exactly congruent with those against the federal government."[30]

Justice Brennan, the leading spokesman of the selective incorporation theory,[31] emphasized this aspect of the incorporation approach in *Malloy v. Hogan*.[32] There Justice Brennan responded to the contention that the fifth amendment privilege against self-incrimination should be enforced according to different standards for the states and the federal government:

> The State urges, however, that the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding. We disagree. We have held that the guarantees of the First Amendment . . . the Fourth Amendment . . . and . . . the Sixth Amendment are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment . . . . The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a "watered-down, subjective version of the individual guarantees of the Bill of Rights."[33] (Citations omitted.)

This uniform standard corollary is the "real bite"[34] of the selective incorporation theory. It is argued that applying the specifics of the Bill of Rights against the states with all the overlays that the Court has developed for the federal courts imposes a needless uniformity which is inconsistent with our system of federalism.[35] *Duncan* seemed particularly susceptible to this criticism, especially in the application of the twelve-man jury standard to the states. All commentators have agreed that there is nothing sacrosanct about the number twelve. Justice White encountered this objection in the Court's opinion in *Duncan*:

> Louisiana also asserts that if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the federal courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. In particular, Louisiana objects to application of the decisions of this Court interpreting the Sixth Amendment as guar-

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the federal standard of jury trial, *see* Appendix to Opinion of Harlan, J., Williams v. Florida, 399 U.S. 78, 138-42 (1970). *See also* Holtzoff, *Modern Trends in Trial by Jury*, 16 WASH. & LEE L. REV. 27, 34-35 (1959).

30 Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

31 See Justice Brennan's opinions in Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960); Cohen v. Hurley, 366 U.S. 117, 154 (1960). *See also* his article, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961).

32 378 U.S. 1 (1964).

33 *Id.* at 10-11.

34 Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 935 (1965).

35 *See* Malloy v. Hogan, 378 U.S. 1, 15-17 (1964) (Harlan, J., dissenting).

> anteeing a 12-man jury in serious criminal cases, *Thompson v. Utah* . . . as requiring a unanimous verdict before guilt can be found, *Maxwell v. Dow* . . . . It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration . . . .[36]

Justice Fortas in his concurring opinion was less ambiguous. He argued that the uniform standard rule was inappropriate for the jury trial provision:

> This Court has heretofore held that various provisions of the Bill of Rights such as freedom of speech and religion guarantees of the First Amendment, the prohibition of unreasonable searches and seizures in the Fourth Amendment, the privilege against self-incrimination of the Fifth Amendment, and the right to counsel and to confrontation under the Sixth Amendment "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." I need not quarrel with the specific conclusion in those specific instances. But unless one adheres slavishly to the incorporation theory, body and substance, the same conclusion need not be superimposed upon the jury trial right . . . . While we may believe (and I do believe) that the right of jury trial is fundamental, it does not follow that the particulars of according that right must be uniform.[37] (Citations omitted.)

The majority of the Court did not immediately accept Justice Fortas's view, but it did soon commit itself to the reconsideration of the federal standard for jury trials which Justice White had suggested. In *De Stefano v. Woods*,[38] the Court refused to give *Duncan* retroactive application, reasoning that the effect of a holding of general retroactivity on the adminstration of justice would be severe. The Court pointed to the number of convictions in Louisiana where a sixth amendment argument could be made, and added that "depending on the Court's decisions about unanimous 12 man juries, all convictions for serious crimes in certain other States would be in jeopardy."[39]

The effect of such language by the Court was to suspend the total impact of the *Duncan* decision. Although, theoretically, the prohibitions against juries of less than twelve members and non-unanimous verdicts were applicable against the states, their courts did not change over to the federal standard.[40] The Florida district court of appeal, by citing *Duncan,* had summarily rejected Williams's claim of right to trial by jury of twelve.[41] Such a state reaction was understandable considering the ambiguity of the Court's position. The promised reconsideration of past decisions became imperative in order to remove the sixth amendment right to jury trial from the limbo created by *Duncan* and *De Stefano*. *Williams* provides the first part of this reexamination by presenting the twelve-man jury issue. In *Williams* the Court examines questions which past decisions involving the required number of jurors had simply glossed over: the

36 391 U.S. at 158 n.30.
37 *Id.* at 214.
38 392 U.S. 631 (1968).
39 *Id.* at 634.
40 *See, e.g.,* State v. Caston, 256 La. 459, 236 So. 2d 800 (1970).
41 Williams v. State, 224 So. 2d 406, 407 (Fla. Dist. Ct. App. 1969).

origin of the twelve-juror rule and the intent of the framers to preserve this rule in the sixth amendment.

Lord Devlin suggests that there are twelve jurors for the same reason there are twelve pennies to the English shilling: the early English abhorrence of the decimal system.[42] However, Justice White, again writing for the Court, quotes Lord Coke's explanation that the "*number of twelve* is much respected *in holy writ,* as 12 *apostles,* 12 *stones,* 12 *tribes,* etc. . . ."[43] and notes that plausibility of this solution is verified by the early English oath for jurors: "Hear this, ye Justices! that I will speak the truth of that which ye shall ask of me on the part of the king, and I will do faithfully to the best of my endeavor. So help me God, and these holy Apostles."[44] Whatever the explanation, Justice White concludes that the choice of twelve and only twelve jurors does not derive from the purpose which gave rise to the jury trial.[45]

The fact that the twelve-juror standard was strictly a historical appendage seemed irrelevant in previous decisions. The Court had consistently followed Justice Harlan's assumption in *Thompson* that the framers intended to incorporate every feature of the common law jury into the sixth amendment, whether any particular feature was accidental to the jury trial right or not. In *Williams* the Court finally refutes this assumption and discards the historical test. While acknowledging that there is not any conclusive evidence of the framer's intent in regard to the jury trial guarantee, Justice White marshalls persuasive data to show that the framers did not desire that the sixth amendment jury be forever restricted to its 1789 form. Justice White relies primarily on the opposition and changes to Madison's original version of the sixth amendment.[46] His reliance seems well placed. If the framers had adopted Madison's initial draft of the amendment with its explicit language preserving the jury and all its "accustomed requisites" their intent to perpetuate the jury in its historical common law form would have been indisputable. But the framers rejected Madison's draft. They replaced the common law vicinage requirement with a more precise provision and deleted altogether the "unanimity" and "accustomed requisites" language. It could be argued that these changes and deletions were made simply to prevent redundancy in the language of the Constitution since in 1789 the word "jury" meant a jury according to common law standards and these standards need not be included. But the Court takes the opposite position, stating that the changes were meant to have substantive effect.[47] Noting additionally that in several other enactments the framers had left no doubt as to their intent to incorporate common law standards (e.g., the seventh amendment[48]), Justice White concludes that there is insufficient evidence to substantiate the premise underlying past decisions concerning the twelve-man requirement:

42 P. DEVLIN, TRIAL BY JURY 8 (rev. ed. 1966).
43 399 U.S. at 88.
44 *Id.* at 89 n.23.
45 *Id.* at 89-90.
46 *Id.* at 93-96.
47 *Id.* at 97.
48 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. U.S. CONST. amend. VII.

> [T]here is absolutely no indication in "the intent of the Framers" of an explicit decision to equate the constitutional and common law characteristics of the jury. Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other then purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution.[49]

The Court substitutes a functional approach for the discarded historical test. Whether or not any particular feature of jury practice is constitutionally required in criminal trials hinges upon "the function that the particular feature performs and its relation to the purposes of the jury trial."[50] Whereas the assumed intent of the framers was the foundation of the historical test, the new test depends on the Court's determination of the purpose of jury trial. *Williams* resolves this question by reiterating the *Duncan* concept of the jury as a political institution.[51] The purpose of jury trial is to prevent governmental oppression of the criminally accused by "the corrupt or overzealous prosecutor" and "the compliant, biased, or eccentric judge."[52] Although the threat of government oppression may seem to be a flimsy basis to justify trial by jury, Kalven and Zeisel's empirical study of American jury trials offers statistics to support this supposition.[53] Their study of 3576 criminal trials showed some form of judge-jury disagreement in 33.8% of the trials. Disagreement on guilt or innocence was present in 19.1% of the trials with the jury acquitting in 16.9% of the cases where the judge would have convicted. On the other hand, judges stated that they would have acquitted where the jury convicted in only 2.2% of the trials. The spread on all types of judge-jury disagreement generally reflected this spread on the issue of guilt or innocence. Of the 33.8% total, the jury was more lenient to the defendant in 28.3% of the trials while the judge was more lenient in 5.5%.[54] While these statistics are not conclusive proof of the reality of governmental oppression in criminal trials, they do clearly demonstrate the vital role of the jury as a political institution.

Considering the twelve-juror standard in light of this functional test, Justice White reasons:

> Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community.[55]

Rejecting contentions that juries of less than twelve might be disadvantageous to defendants or less likely to be representative of the community, Justice

49 399 U.S. at 99.
50 *Id.* at 99-100.
51 *See* Note, *Trial by Jury in Criminal Cases,* 69 COLUM. L. REV. 419, 424-26 (1969).
52 Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
53 H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).
54 *Id.* at 62.
55 399 U.S. at 100.

White reaffirms that the common law composition of the jury is a historical accident unrelated to the purposes for jury trial. But he does not say that Congress or the states cannot or should not fix the number of jurors in accordance with the common law rule. The Court in *Williams* holds that since the number of jurors is not integrally related to the purpose of jury trials, Congress and the states are simply not required by the Constitution to forever fix that number at twelve.[56]

Justices Harlan and Stewart concurred in the result. Justice Harlan, however, was highly critical of the circuitousness employed to produce the result:

> The historical argument by which the Court undertakes to justify its view that the Sixth Amendment does not require 12-member juries is, in my opinion, much too thin to mask the true thrust of this decision. The decision evinces, I think, a recognition that the "incorporationist" view of the Due Process Clause of the Fourteenth Amendment, which underlay *Duncan* . . . must be tempered to allow the States more elbow room in ordering their own criminal systems. With that much I agree. But to accomplish this by diluting constitutional protections within the Federal system itself is something to which I cannot possibly subscribe. Tempering the rigor of *Duncan* should be done forthrightly, by facing up to the fact that at least in this area the "incorporation" doctrine does not fit well with our federal structure, and by the same token that *Duncan* was wrongly decided.[57]

Justice Harlan views *Williams* as a "backlash" decision since the consequence of holding that the twelve-juror standard is not required of the states is to hold that the standard is not required of the federal government either. While selective incorporation is presumably meant "to raise the standards of individual protection . . . to the higher federal level,"[58] the Court in *Williams* does allow a dual standard for the incorporated jury trial guarantee. Thus *Williams* seems inconsistent with *Malloy* which inveighed against the application of a "watered-down version of the Bill of Rights"[59] to the states. But the majority of the Court clearly remains committed to the *Malloy* uniform standard principle.[60] *Williams* then must be interpreted as a refinement of selective incorporation and a limitation of the *Malloy* approach to procedures and practices integrally related to the specifics of the Bill of Rights. It also may signify that the Court will give greater recognition to what one commentator has termed "procedural differences [which] represent different ways of achieving constitutionally adequate implementation . . . ."[61] Such a development would give flexibility to the selective incorporation theory and permit a pragmatic approach to local problems of judicial administration. In particular, the Court's acceptance of the six-man jury as a permissible mode of implementing the jury trial guarantee should mean a minimization of delay and court congestion. The reasoning underlying recent experi-

56 *Id.* at 103.
57 *Id.* at 118.
58 Henkin, *"Selective Incorporation" in the Fourteenth Amendment,* 73 YALE L.J. 74, 77 (1963).
59 Malloy v. Hogan, 378 U.S. 1, 10 (1964).
60 *See* Benton v. Maryland, 395 U.S. 784, 794-95 (1969).
61 Hill, *The Bill of Rights and the Supervisory Power,* 69 COLUM. L. REV. 181, 191 (1969).

ments and proposals[62] for smaller juries in civil trials applies with at least equal force to criminal trials. A recent experiment in San Francisco is illustrative:

> A judge trying to speed up the wheels of justice has started using juries of six members instead of 12, and reports it works great.
>
> The jury returned an innocent verdict Wednesday after 17 minutes of deliberation.
>
> "It was aimed at streamlining the process of justice, and in this case it certainly did the job," Municipal Court Judge John O'Kane said in an interview.
>
> . . . .
>
> He said that the smaller jury saves time in selection that reduces costs, because jury members are paid for their time in court.[63]

The Supreme Court still must decide whether the unanimous verdict rule should be applied against the states as part of the jury trial guarantee.[64] The resolution of this issue should more clearly indicate how much local variation the Court will allow in the implementation of the provisions of the Bill of Rights which have been incorporated into the due process clause of the fourteenth amendment. Justice White refers to the unanimity rule in *Williams* when discussing the essential role of the jury. He states that the goals of group deliberation, and true representation of the community can be achieved with fewer jurors, "particularly if the requirement of unanimity is retained."[65] The implication that the constitutionality of a jury of less than twelve members would be contingent upon retention of the unanimity rule is negated by the accompanying footnote where Justice White says: "We intimate no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial."[66]

Only Louisiana and Oregon allow non-unanimous verdicts in trials of felonies.[67] But England in 1967 changed its law to permit non-unanimous verdicts in criminal trials, apparently in reaction to frequent reports of jurors being bribed in order to bring about hung juries.[68] One commentator suggests that since the possibility of jurors being reached by bribes exists in the United States just as in England, the unanimity requirement should be abolished here as well.[69] However, Kalven and Zeisel's study showed hung juries in only 5% of

62 *See* Cronin, *Six-Member Juries in District Courts,* 2 BOSTON B.J. no. 4, 27 (1958); Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment,* 51 GEO. L.J. 120 (1962); Wiehl, *The Six-Man Jury,* 4 GONZAGA L. REV. 35 (1968).

63 South Bend Tribune, Nov. 19, 1970, at 3, col. 1.

64 The United States Supreme Court has noted jurisdiction of an appeal from a ruling of the Supreme Court of Louisiana which upheld Louisiana's provision for non-unanimous verdicts. State v. Johnson, 255 La. 314, 230 So. 2d 825 (1970), *prob. juris. noted,* 39 U.S.L.W. 3199 (U.S. Nov. 9, 1970) (No. 5161).

65 399 U.S. at 100.

66 *Id.* at 100 n.46.

67 LA. CONST. art. 7, § 41; LA. CRIM. PRO. CODE ANN. art. 782 (1966); ORE. CONST. art. 1, § 11; ORE. REV. STAT. §§ 136.330, 136.610 (1967). The Supreme Court of Oregon has recently held that Oregon's non-unanimous verdict provisions are constitutional. *See* State v. Gann, 463 P.2d 570 (Ore. 1969).

68 For a summary of the background to the passage of this law and the role played by Kalven and Zeisel's empirical study, *see* Kalven & Zeisel, *The American Jury: Notes for an English Controversy,* 48 CHI. B. REC. no. 7, 195 (1967).

69 Ryan, *Less Than Unanimous Verdicts in Criminal Trials,* 58 J. CRIM. L.C. & P.S. 211, 217 (1967).

the trials. If verdicts of ten or eleven of the twelve jurors had sufficed for a verdict, 34% of these hung juries would have convicted, 8% acquitted. Yet in none of these instances of hung juries did the trial judge suggest that juror corruption was the reason for the deadlock.[70]

When the question of unanimity presents itself, it is possible that the Court will adopt the argument of the Sixth Circuit that unanimity is required by due process since it is "inextricably interwoven" with the burden of proof beyond a reasonable doubt.[71] However, the Court should be able to reaffirm the unanimity rule solely in terms of the *Williams* criteria. For where the possibility of government oppression exists (e.g., in areas where laws are enforced in a discriminatory fashion), the majority verdicts of six or less will likely only mirror the oppression exercised by elected officials. Even assuming that the jury sufficiently survives peremptory challenges to represent a fair cross-section of the community, it can quickly become unrepresentative without the unanimity requirement. The vote of a member of a minority group on the jury can be ignored with the result that the jury, rather than preventing government oppression, could become a vehicle for legalizing majority oppression.

Interposing a group of untrained laymen between the accused and the accuser works best when the group acts as a group by deliberating on the genuine issue. Unanimity serves to foster this group interaction.[72] One dissenting juror can compel a discussion of relevant facts which might otherwise never occur. Kalven and Zeisel's study demonstrated that jury deliberation, though limited by the psychological pressures inherent in every group activity, resulted in an initial minority of jurors reversing an initial majority on the issue of guilt in 10% of the trials.[73] Without unanimity, this percentage will surely decrease. Finally, unanimity gives the community, which participates in the determination of guilt or innocence and shares the responsibility for such a determination, the greatest possible assurance that the determination is just and correct.[74]

Unlike the twelve-man rule, unanimity is integrally related to the purpose of a jury trial and, therefore, is appropriately a uniform standard for the states and the federal government. A decision that *Duncan* only incorporates the right to trial by a jury of six or less which can render a non-unanimous verdict would sacrifice justice for expediency and would signify an emasculation of the selective incorporation theory rather than a refinement such as existed in *Williams*.

Thomas L. Young

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70 Kalven & Zeisel, *The American Jury: Notes for an English Controversy,* 48 CHI. B. REC. no. 7, 195 (1967).

71 Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953). *But cf.* Comment, *Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt,* 21 U. CHI. L. REV. 438, 441-43 (1954).

72 United States v. Fioravanti, 412 F.2d 407, 417 (3d Cir. 1969).

73 H. KALVEN & H. ZEISEL, THE AMERICAN JURY 490 (1966).

74 *Cf.* Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases?* 47 ORE. L. REV. 417, 424 (1968).

CONSTITUTIONAL LAW—SCHOOL LAW—PUBLIC BOARD MAY SUMMARILY TERMINATE A PROBATIONARY TEACHER'S EMPLOYMENT AT EXPIRATION OF THE EMPLOYMENT TERM; THERE IS NO CONSTITUTIONAL RIGHT TO CONTINUED EMPLOYMENT.

> After careful consideration with the appropriate department members concerning future staffing requirements . . . we have reached the conclusion that your services will no longer be needed . . . .[1]

Benjamin Solomon and Dr. Ida Lalor were nontenured[2] associate professors at Chicago State College.[3] On November 25, 1968, they received a short letter from the Dean of Faculty advising them that they would not be retained beyond expiration of their present term.

For the Dean of Faculty, the letters were the beginning of the end of the professors' association with the college; but for the professors, this was neither the beginning, nor an acceptable end, to their dealings. They felt that the reasons for nonretention could be traced to their activities during 1968 when they unsuccessfully attempted to gain collective bargaining privileges for the faculty of the college and initiated campuswide discussions on racism.[4] Apparently they thought the motivation for the decision not to retain them sprang from the administration's desire to purge the faculty of union leaders and shut off discussion of controversial but academically relevant subjects.[5] Solomon and Lalor felt that

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1 Record at C-10, Appendix A, Fooden v. Bd. of Governors, Nos. 42460, 42461 (Ill. S. Ct., Jan. 25, 1971) [hereinafter referred to as Record].

2 *Id.* at C-40, Exhibit C. Their probationary contract reads: "This is to notify you that . . . you were appointed . . . on a ten-month basis . . . . [X] Probationary-*2nd* Year, [ ] Tenured (granted only by special Board action) . . . ." In the body of the contract it is provided: "Appointments . . . are subject to all provisions of the *Bylaws, Governing Policies, and Practices* of the Board . . . ."

The notice of nonretention met the standards of timeliness set by the American Association of University Professors: "[T]he Association prescribes, in its statement on the *Standards for Notice of Nonreappointment,* that faculty members in their first year of service should be given notice by March 1, in their second year by December 15, and thereafter a year in advance. . . ." Davis, *Principles and Cases: The Mediative Work of the AAUP,* 56 AAUP BULL. 169 (1970).

3 [Chicago State College] is a degree-granting institution for the education of teachers . . . . The school enrolled 2,085 men and 2,931 women attending classes on the Main Campus and West Center Campus in 1969. The college was founded in 1869 and offers . . . vital, forward-looking programs of teacher education . . . . Special programs are offered for the culturally disadvantaged as well as American Negro history." 3 THE COLLEGE BLUE BOOK, 1969/'70 165 (13th ed. 1970).

4 Graduate students protested the administrative action of President Byrd in a letter entitled, "A Statement Concerning the Non-Retention of Dr. Lalor and Mr. Solomon" signed by Ralph Faust Jr., Dale Harger, Phil Crump, and Eve V. Evans. At Part IV(1) of the letter the students said: "Dr. Lalor and Mr. Solomon are at the forefront of union activity at Chicago State College. . . . By dismissing Dr. Lalor and Mr. Solomon, the Administration can undermine the union strength . . . ." The letter went on to point out that Dr. Lalor was the director of the program entitled Masters of Education in Teaching the Socially Disadvantaged Child, and Mr. Solomon was chairman of the American Federation of Teachers Committee on Racism in Education. The students imply that the administration was opposed to "progressivism" in the fight against racism.

The Cook County College Teachers Union, Local 1600, American Federation of Teachers (AFL-CIO) took a leading role in the teachers' court action. On June 17, 1968, they issued a Special Bulletin appealing for $1200 needed to prosecute the appeal and asked that checks be made payable to the "Lalor-Solomon Legal Defense Fund." The union members also published a newsletter entitled "Common Sense" which carried a lead article concerning the decision not to retain the two professors. Common Sense, June 1969, at 1, col. 2.

5 Record at C-9.

their fourteenth amendment rights of procedural due process had been infringed by the summary action.[6]

On April 7, 1969, Solomon and Lalor filed a complaint in the Circuit Court of Sangamon County, Illinois, Chancery Division, asserting on information and belief that their union membership and open discussion of racism were the basis for the action of the Dean of Faculty.[7] On April 29, 1969, the Board of Governors of the college filed a motion for summary judgment, together with the supporting affidavit of the executive officer and secretary of the board. When no counter-affidavits were forthcoming from the plaintiffs and after argument on the motion, the circuit court granted summary judgment.[8] In their direct appeal[9] to the Illinois Supreme Court, the teachers asserted: "It is unconstitutional for a public institution to remove an employee without a prior, specific statement of reasons given to the employee."[10] After lengthy analysis of the procedural steps taken at the circuit court level, the Illinois Supreme Court *held*: a board may summarily terminate a probationary teacher's employment at the end of his employment term, and there is no constitutional right to continued employment. *Fooden v. Board of Governors,* Nos. 42460, 42461 (Ill. S. Ct., Jan. 25, 1971).

Professors Solomon and Lalor found strong support for their alleged denial of procedural rights in the recent federal decision of *Roth v. Board of Regents.*[11] In that case an assistant professor at Wisconsin State University had been retained on a probationary one-year contract. When the time for renewal of the contract came, he was notified that a contract would not be offered for the next year. The university president gave no reason for the decision. No hearing was requested and none was held, but an action was filed in the United States district court for alleged violation of the plaintiff's procedural rights under the fourteenth

6 Brief for Appellants at 10-11, Fooden v. Bd. of Governors, Nos. 42460, 42461 (Ill. S. Ct., Jan. 25, 1971) [hereinafter referred to as Brief for Appellants].

7 Record at C-7, C-8.

8 Fooden v. Bd. of Governors, Nos. 42460, 42461 at 2-3 (Ill. S. Ct., Jan. 25, 1971).

Donald Paull and Ruth Nedelsky, teachers at Chicago State College, filed a nearly identical complaint on May 8, 1970, in the United States District Court, Northern District of Illinois, Eastern Division. In his judgment for the Board, Judge Richard B. Austin held that:

> Neither the plaintiffs' contracts, nor any statute, regulation or practice governing the College, gave any right or created any expectancy that their contracts would be renewed beyond the expiration of the contract term. Unlike tenured faculty members, the plaintiffs were not entitled by statute, regulation, practice or contract to a statement of reasons for the nonrenewal of their contracts or to a hearing to determine if adequate cause existed for non-renewal.

Cook County College Teachers Local 1600 v. Byrd, Civil No. 70 C 1086 (N.D. Ill., Nov. 5, 1970).

Robert Thaw, a probationary teacher for the Dade County (Florida) School Board, alleged in Thaw v. Bd. of Public Instruction, 432 F.2d 98, 99-100 (5th Cir. 1970), that without asserting a violation of constitutional rights it was still imperative that a hearing "be held to assure that the 'real basis for separation is not bottomed on conduct that is or should be constitutionally protected.' " Judge Thornberry held: "It *would* be too much to ask the school board to hold a hearing every time it determines not to renew the contract of a probationary teacher, or even every time a terminated teacher requests a hearing without alleging unconstitutional action."

9 Ill. S. Ct. (Civ.) R. 302.

10 Brief for Appellants at 30.

11 310 F. Supp. 972 (W.D. Wis. 1970), *appeal docketed,* No. 18490 (7th Cir., filed ——, 1970). In support of their basic proposition they also cited Olson v. Regents of the Univ. of Minnesota, 301 F. Supp. 1356 (D. Minn. 1969), and Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969). Both cases are easily distinguishable on the facts. *Olson* involved a civil service employee with fourteen years' service who was dismissed without any prior notice. *Lucia* involved a probationary teacher dismissed without notice provided for in his contract.

amendment. The assistant professor claimed there had been a failure to provide a reason for the decision or a hearing as to the merits of the decision.[12] District Court Judge James E. Doyle found himself bound to undertake a balancing process he found described in *Cafeteria Workers v. McElroy*.[13] Whether a nontenured teacher had the rights sought could only be determined, he stated, by weighing ". . . the precise nature of the government function involved as well as the private interest that has been affected by governmental action."[14] After admitting that the board's loss of its power to summarily find that a probationary teacher's contract would not be renewed presented a potential danger to the central missions of teaching and research, Judge Doyle nevertheless concluded:

> I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have reasonable opportunity to submit evidence relevant to the stated reasons.[15]

A divergent view of the procedural rights owed to a probationary teacher is offered in the case of *Jones v. Hopper*.[16] In that case a professor had served two probationary or nontenured terms at Southern Colorado State College. He was then notified that he would not be retained for the next term. Filing suit in district court under § 1983 for denial of his right of expectancy of continued employment, the professor asserted that the board's decision not to retain him was a denial of his free exercise of first amendment rights. When his case went to the Tenth Circuit Court of Appeals, that court found that on the face of the complaint there was no demonstrated "right of expectancy to continued employment."[17] Absent the jurisdictional claim under § 1983 that the board's conduct subjected the professor "to a deprivation of rights, privileges, or immunities secured by the Federal Constitution and laws," the court held the plaintiff had failed to state a claim upon which relief could be granted.[18]

Although the professor did not specifically demand procedural due process either in the form of a statement of reasons for dismissal or in the form of a hearing, the court took it upon itself to determine whether a probationary teacher's employment could be summarily denied:

> It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer . . .

12 *Roth* also alleged violation of first and fifth amendment rights which are not the subject of this comment.
13 367 U.S. 886 (1961).
14 *Id.* at 895.
15 310 F. Supp. at 980.
16 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).
17 *Id.* at 1326.
18 *See* Shirk v. Thomas, 315 F. Supp. 1124, 1125 (S.D. Ill. 1970), where the court said: "This court holds that a complaint by a former probationary school teacher, stating only that she was dismissed upon proper notice and in conformity with State law, fails to state a cause of action for which relief may be granted."

> subject, however, to the restriction that unreasonable conditions may not be imposed upon the granting of public employment.[19]

The court stated that, by summarily deciding on nonretention, the president and board of the college were exercising a discretion granted by statute.[20] Acknowledging the special needs of the college, the judges deferred to the wishes of the legislature which "intended to commit to the sound judgment of the regents" the responsibility of determining whether the interests of the institution would be promoted by dispensing with the services of a particular professor.[21]

The *Jones* and *Roth* cases represent the edges of a broad field of legal interpretation. In both cases the spectrum used to filter and project opinion was *Cafeteria Workers*.[22] Originally that case was not accepted as a useful or desirable expression of constitutional law.[23] The Supreme Court's opinion was described as a "regression to the question-begging 'privilege v. right' reasoning."[24] Nevertheless, *Cafeteria Workers* remains viable, perhaps because of its apparent ambiguity, and certainly because catch-phrases have lent themselves to the kind of wide-range extemporizing found in *Jones* and *Roth*.[25]

In *Goldberg v. Kelly*,[26] Justice Brennan, who wrote the dissent in *Cafeteria Workers*, used the following balancing test: ". . . 'consideration of what due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' "[27]

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19 410 F.2d at 1328. In reaching this conclusion the court read the principle of *Cafeteria Workers*, in light of Pickering v. Bd. of Education, 391 U.S. 563 (1968), and Keyishian v. Bd. of Regents, 385 U.S. 589 (1967). *Contra*, Pred v. Bd. of Public Instruction, 415 F.2d 851 (5th Cir. 1969).

20 410 F.2d at 1329. The court quoted the following passage from *Developments in the Law - Academic Freedom*, 81 HARV. L. REV. 1045 (1968):

> Because of the special needs of the university . . . great discretion must be given it in decisions about the renewal of contracts during the probationary period. In deciding whether to rehire or grant tenure, the considerations involved go well beyond a judgment about general teaching competence. *Id.* at 1101.

21 410 F.2d at 1329. The court quoted from Ward v. Bd. of Regents, 138 F. 372 (8th Cir. 1905). The sentiment is also expressed in Schultz v. Palmberg, 317 F. Supp. 659, 662 (D. Wyo. 1970): "The discretion of a school board in this respect should be broad and as long as such discretion is exercised in good faith and is not patently arbitrary or unreasonable, this Court will not interfere to aid those whom the Board does not choose to employ."

22 Taken as a whole *Cafeteria Workers* is neither a good nor an easily understood tool. Mr. Justice Stewart seems to want the best of both worlds: "We may assume that Rachel Brawner could not constitutionally have been excluded . . . if the announced grounds . . . had been patently arbitrary . . . . It does not follow, however, that she was entitled to a hearing when the reason advanced for her exclusion was . . . entirely rational . . . ." This reasoning appears sound until one realizes that the reason advanced was that she lost her clearance, but there was no reason given why she lost her clearance.

23 36 NOTRE DAME LAWYER 576, 580 (1961); 36 N.Y.U. L. REV. 506, 513 (1961).

24 Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 73 (1961).

25 Justice Stewart's opinion leaves room to make broad subjective evaluations of the harm suffered. For example, Justice Stewart said: "There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities anywhere else . . . ." As pointed out by commentators, "the only other job offered by her employer, which she could not accept, was in an inconvenient out-of-town location . . . ." Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 73 (1961). In the Court's view the injury was *de minimis;* in another's eyes it was substantial.

26 397 U.S. 254 (1970).

27 *Id.* at 263. There has also been use of the clear statement that due process negates any concept of inflexible procedures. Escalera v. New York City Housing Authority, 425 F.2d 853, 861 (2d Cir. 1970).

This balancing test or formula for weighing the governmental interest against the individual interest has as a necessary element the implicit recognition that where fundamental rights are in jeopardy the scale will not always be tipped in favor of the individual. As Justice Brennan noted in his concurring opinion in *United States v. Robel,* "It is true . . . that Congress often regulates indiscriminately, through preventive or prophylactic measures, . . . and that such regulation has been upheld even where fundamental freedoms are potentially affected . . . ."[28]

The competing interests of the state and the individual must be balanced and fully developed before the court can determine whether minimum procedural requirements are appropriate. The courts, in dealing with the procedural due process required by the fourteenth amendment, have not questioned the reasonableness of the classifications of tenured and nontenured teachers.[29] However, in cases where individuals have properly alleged violations of a constitutionally protected right or privilege, there has been extensive examination of the reasons for nonretention.[30] If the courts find under the due process clause of the fourteenth amendment that all nontenured teachers must be given the panoply of procedural safeguards proposed (such as those given in *Roth*), then the classifications as they now exist will be destroyed and the states effectively prohibited from utilization of tenure systems.[31]

One of the purposes of tenure statutes in general was outlined in *Ehret v. Kulpmont School District:*

> [T]o maintain an adequate and competent teaching staff, free from political and personal arbitrary interference, whereby capable and competent teachers might feel secure and more efficiently perform their duty of instruction, but it was not the intention of the legislature to confer any special privileges or immunities upon professional employees to retain permanently their position . . . .[32]

It is clear that tenure is intended to secure certain benefits to the individual for his well-being and the well-being of the school system. Moreover, legislatures

28 389 U.S. 258, 270 (1967). For a discussion of the recently defined "compelling interest test," see 45 NOTRE DAME LAWYER 142 (1969).

29 Even Judge Doyle noted in Roth v. Bd. of Regents, 310 F. Supp. 972, 979 (W.D. Wis. 1970): "This standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure . . . ." This recognizes the classification and seemingly places the stamp of approval on the classification per se. It soon became apparent, however, that the standard for judging the board's action would not be as lax as might be gathered. In the companion case, Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984, 992 (W.D. Wis. 1970), it was held that there was a genuine issue as to whether the plaintiffs had been "given a reasonably complete statement of the basis of decision . . ." which might cause the plaintiffs to limit their "response to one factor or a few factors, following which the Board proceeded to base its decision on a wider range of factors." Courts have questioned the reasonableness of a particular rule relating to tenure. In Richardson v. Bd. of Education, 6 Cal. 2d 583, 58 P.2d 1285 (1936) the Supreme Court of California affirmed a district board's action in fixing the minimum number of days attendance necessary to qualify for one-year probationary status. *See generally* 3 HAMILTON, SCHOOL LAW, 4118 (rev. ed. 1965-1966).

30 Hanover Tp. Fed. of Teach. v. Hanover Commun. Sch. Corp., 318 F. Supp. 757 (N.D. Ind. 1970).

31 Thaw v. Bd. of Public Instruction, 432 F.2d 98, 100 (5th Cir. 1970). The court said: "the requirement . . . would nullify the probationary system, whose purpose is to provide the school board a short-term test period during which the fledgling teacher may be examined, evaluated, and, if found wanting for any constitutional reason, not rehired."

32 333 Pa. 518, 524, 5 A.2d 188, 191 (1939).

provided a probationary period to insure that security afforded by tenure will not unduly inhibit administrators in selecting teachers on the basis of merit.

> It [the Act] established *merit* as the essential basis for the *right* of permanent employment . . . . [I]t is equally clear that . . . [it] does not impair *discretionary* power of school authorities to make the best selections consonant with the public good . . . .[33]

How would requiring a public institution to give a nontenured teacher prior, specific statements of the reasons for nonretention and a hearing thereon affect the tenure system? One significant result might be that administrators would confuse the prerequisites of "cause" with the statement of reasons and hesitate to enter an adverse decision that would culminate in a formal grievance or court action. Moreover, "[d]isclosure would undoubtedly have a chilling effect on unfettered discussion among the responsible persons."[34] While some individuals or associations might be willing to risk the erosion of distinctions, it is the courts' obligation to determine what the erosion would mean to the system of classification desired by the legislature and the great bulk of the profession alike.

An example of procedures now used in dismissals for cause can be found in the American Association of University Professors' [AAUP] *Statement on Procedural Standards in Faculty Dismissal Proceedings, 1958* and the *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments*.[35] Read together, these documents reveal that the tenured professor has a right to: (1) notice of dismissal, including a statement with "reasonable particularity" of the ground for the dismissal; (2) a hearing; (3) assistance of counsel; (4) an opportunity to speak in his own behalf; (5) confrontation of witnesses; (6) an opportunity to question witnesses who testify orally; and (7) a stenographic record of the proceedings. The *Roth* case and its companion case *Gouge* hold that the nontenured professor has a right to: (1) notice of nonretention, with a "reasonably complete" statement of the basis of nonretention; (2) a hearing; and (3) an opportunity to speak in his own behalf. The only hard distinctions that now exist between the AAUP tenured ideal and nontenured reality as posited by *Roth* are: (1) assistance of counsel; (2) right to confront witnesses;

33 McSherry v. City of St. Paul, 202 Minn. 102, 108, 277 N.W. 541, 544 (1938). Brief for Bd. of Governors of State Colleges and Universities of Illinois, the Bd. of Regents of Regency Universities of Illinois, the Bd. of Trustees of Southern Illinois University, the American Ass'n of State Colleges and Universities, the American Council on Education and the Ass'n of American Colleges as Amici Curiae at 8-9, Roth v. Bd. of Regents, 310 F. Supp. 972 (W.D. Wis. 1970), *appeal docketed*, No. 18490 (7th Cir., filed —— 1970) [hereinafter referred to as Brief for Bd. of Governors]. There are other significant benefits that accrue to the institution as a result of the tenure system. These benefits may be extremely important under the stresses on modern university communities.

> The tenured faculty . . . bring experience and wisdom. They are leaders in their disciplines. For the most part they have a more mature sense of the long-term values of the university, its purposes and potential . . . . [T]heir role is to temper the enthusiasms of youth and the insensitivities of administrators. They have a long-term interest in the institution and must live with the consequences of today's action, in contrast to the nontenured faculty and the students, who are for the most part transient . . . .

Miller, *Tenure: Bulwark of Academic Freedom and Brake on Change*, 51 ED. REC. 241, 243 (1970).

34 Brief for Bd. of Governors at 9.

35 44 AAUP BULL. 272-74 (1958); 56 AAUP BULL. 323-26 (1970).

and (3) right to a stenographic record.[36] It takes little imagination to see that the erosion of the distinctions has neared the point of collapse of classifications.

Benjamin Solomon and Dr. Ida Lalor have discovered that the Illinois Supreme Court is unwilling to risk erosion of the tenure system. In an opinion by Mr. Justice Kluczynski delivered on January 25, 1971, the court adopted the approach of *Jones v. Hopper*. While affirming the summary judgment of the circuit court on procedural grounds, the Illinois Supreme Court felt compelled to add:

> [I]f the issue were before the court we would be inclined to find that a Board has a right, summarily, to terminate a probationary teacher's employment at the end of his employment term, and that he has no constitutional right to continued employment.[37]

The court continued:

> In a recent Federal case, *Jones v. Hopper* . . . in which *certiorari* was denied by the United States Supreme Court on March 23, 1970, the court considered a complaint by a probationary teacher who contended that his constitutional rights were violated when he was not retained because he had sought to exercise his constitutional rights of speech, publication and religion. The court held that the complaint did not state a cause of action, that the college had a right not to renew his contract, and that a probationary teacher's expectancy of continued employment, after expiration of the term for which he was employed, did not constitute a right, privilege or immunity secured to him by the constitution or by the law, and was not an interest protected under the Civil Rights Act. We agree, and find that if a probationary teacher has no constitutional right to continued employment under such circumstances, the Board would have no duty to provide him with specific reasons for his nonretention.[38]

It would be tempting to claim that the opinion of the Illinois Supreme Court represents nothing more than a nonthinking acceptance of *Jones,* or that the opinion of the court adds no original thought or imaginative legal interpretation. Yet the significance of the comments made by the court represent much more than mere stare decisis. The fact that the court wrote their opinion after considering both the liberal approach of *Roth* and the stolid conservative view of *Jones,* makes it evident that a conscious choice was made to draw a line and stand with the governing boards of state-supported institutions rather than individual probationary teachers supported by their unions. Distrust between publicly employed teachers and their governing boards seems to be most acute when probationary teachers are involved. This may be due to the fact that boards have traditionally had nearly unlimited control over the immediate destiny of the nontenured

36 In Sindermann v. Perry, 430 F.2d 939, 944 (5th Cir. 1970) the court held that:
> if a teacher determines to assert that such non-renewal is really a form of punishment for his exercise of constitutional rights or otherwise constitutes some actionable wrong, the teacher should notify the institution . . . . Upon the receipt . . . the institution should constitute a tribunal to conduct . . . a hearing . . . .
> This hearing must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses . . . .

37 *Id.* at 6-7.
38 *Id.* at 7.

teacher. Summary dismissal, it could be argued, will always stimulate resentment and a fear of the unknown. Increased communication between governing boards and probationary teachers who are not going to be retained might have the twofold effect of forcing the board to insure that there is a rational basis for their action and smoothing the troubled minds of nontenured employees. The Illinois Supreme Court has cast its lot with the governing boards. Its decision represents an act of faith in the board and leaves the formulation of constructive policies to the board's judgment.

It is interesting to note that the Illinois Supreme Court was undoubtedly aware that *Roth* was on appeal to the United States Court of Appeals for the Seventh Circuit. By taking a stand in opposition to *Roth* the Illinois Supreme Court may be setting the stage for a federal-state confrontation.

Probationary teachers and their supporters will continue to argue that: "The issue, properly stated, is not whether the plaintiff had an unqualified right to an 'expectation . . .' but, rather, whether he had a right to exercise his first amendment rights free from retaliatory state action in the form of its control over public employment . . . ."[39] Nevertheless, the opinion of the Illinois Supreme Court and the preponderance of federal cases indicate that however the issue is framed, a nontenured teacher who seeks disclosure in the face of a reluctant board will be forced into the courts to gain vindication.[40] It goes without saying that the decision of the Seventh Circuit in *Roth* will be closely watched by all parties involved in these increasingly frequent controversies.

Mark T. Dunn

CRIMINAL LAW—CONSTITUTIONAL LAW—THE F.B.I.'S RIGHT TO RETAIN AND DISSEMINATE ARREST RECORDS OF PERSONS NOT CONVICTED OF A CRIME MAY BE LIMITED BY THE FIRST AND FIFTH AMENDMENTS.—On August 10, 1965, Dale Menard, a nineteen-year-old college student, was taken into custody by the Los Angeles police on suspicion of burglary. After being incarcerated for two days, Menard was allowed to go free since there existed no evidence with which to connect him to the crime. Pursuant to California law,[1] the police forwarded a record of Menard's arrest, along with a copy of his fingerprints, to the F.B.I.[2] This record, including information regarding the disposition of the case, is presently on file with the F.B.I.

39 42 COLUM. L. REV. 129, 131 (1970).

40 Professors Solomon and Lalor have filed a petition for rehearing with the Illinois Supreme Court.

1 CALIF. PENAL CODE § 1115 (West 1970).

2 Menard's file contained a card with the following information:

Date Arrested or Received—8-10-65
Charge of Offense—459PC Burglary
Disposition or Sentence—8-12-65
Released — Unable to connect with any felony or misdemeanor at this time
Occupation—Student
Residence of Person Fingerprinted—Saticoy and Canoga Canoga Park.

After the initiation of this suit, one amendment was added to the record:

Disposition or Sentence—8-12-65—Released—Unable to connect with any felony or misdemeanor—in accordance with 849b(1)—not deemed an arrest but detention only.

Menard instituted an action in the District Court for the District of Columbia to have his record purged from the files of the F.B.I. The fundamental thrust of his argument was based upon an interpretation of §849b(1) of the California Penal Code.[3] Under this section, a person who is taken into custody and subsequently released without charges having been lodged against him is deemed to only have been detained rather than arrested. Menard attempted to prove that his detainment could not be utilized in formulating a criminal record.[4] The district court rejected Menard's contention; on appeal, the Court of Appeals for the District of Columbia *held*: there were insufficient facts to rule that the power of the F.B.I. to retain and disseminate arrest records of a person not convicted of a crime may be limited by the individual's rights guaranteed by the first and fifth amendments. *Menard v. Mitchell,* 430 F.2d 486 (D.C. Cir. 1970).

In denying the appellant's motion for summary judgment, the court cursorily glazed over the appellant's contention. Although in his opinion, Chief Judge Bazelon did not explicitly express the basis for this cursory treatment, he did indicate two reasons for the court's action. First, the federal court was not certain that the California courts would classify, for the purpose of compiling records, "detainment" as something different from an arrest with a subsequent release.[5] Second, they were somewhat uncertain that the state law would be binding upon the federal agency even if the appellant's interpretation was correct.[6]

After the court disposed of the appellant's reasoning for summary judgment, they turned to the disposition of the appellee's cross-motion for summary judgment. In responding to the appellee's cross-motion for summary judgment, which had been granted in the court below, the court was forced to address itself to the difficult problem of reconciling the rights of society as a whole with the rights of the individual. The government strongly contended that if the detainment were classified as an arrest, then the problem would be readily solved since the federal police agency has been granted the power to retain criminal records.[7] The court, however, felt that this point was not quite that easily resolved.[8] The ultimate solution is interwoven with intricacies and complications that promise to give resounding implications to society as well as the individual.

In light of these facts, Chief Judge Bazelon, speaking for the court, said:

> The very seriousness of the problem underscores the necessity for a clear and complete factual record as a basis for adjudication. . . . The short of the matter is that the facts established on cross motions for summary judgment were simply inadequate for proper resolution of the complex questions presented.[9] (Footnotes omitted.)

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3 Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without warrant whenever:
1. He is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest shall include a record of the release hereunder and thereafter shall not be deemed an arrest but a detention only. CALIF. PENAL CODE § 849b(1) (West 1970).

4 Brief for Appellant at 8-10, Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).

5 Menard v. Mitchell, 430 F.2d 486, 489 (D.C. Cir. 1970).

6 *Id.* at 490.

7 28 U.S.C. § 534(a)(1) (Supp. V, 1970).

8 430 F.2d at 490.

9 *Id.* at 494-95.

The "complex questions" involved the almost insurmountable task of establishing the pinpoint balance at which the rights of society and the rights of the individual are in harmony. Although it is true that the individual must to some degree subordinate his own interest to those of society, there must be drawn, as the court indicated, a line where this ceases to be.[10] In evaluating exactly where the line is to be drawn, many important factors must be taken into consideration.

Actually, the power of the F.B.I. to retain and disseminate (to some degree) arrest records is just a natural outgrowth of society's right to protect itself from the criminal actions of individuals and organizations. In 1930, Congress explicitly empowered the F.B.I. to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records."[11] Although there have been subsequent changes in the text, the main import of the enactment remains fundamentally the same.[12] The primary reason for dispute and the most abundant source of litigation has been the breadth of this power which society has granted to police organizations.

Of those cases which have considered this problem, most have been concerned with state laws and state agencies.[13] In the early part of the century, it was generally accepted that the decision to release or to retain arrest records was within the realm of police discretion. Case law has upheld the proposition that the police, in protecting society, should be granted broad authority to choose those implements including arrest records which will enable them to most efficiently and effectively discharge this duty.[14] The aforementioned premise was held valid whether the legislature had made a specific grant of such power or not.[15] The retention by police of an individual's arrest record was considered "a humiliation to which he must submit for the benefit of society."[16] For the most

10 *Id.* at 492.

11 5 U.S.C. § 340 (1930), *repealed*, Pub. L. No. 89-554 § 8(a), 80 Stat. 632, 648 (1966). Present authority is based on 28 U.S.C. § 534(a)(1) (Supp. V, 1970).

12 28 U.S.C. § 534(a)(1) (Supp. V, 1970).

13 These cases can be noted more for their consistency than their legal reasoning. The basic premise that emerged was that the individual must suffer some hardship for the sake of society as a whole. This concept was based upon a balancing of public policy rather than legal theorizing. Since the individual's right of privacy was still in the embryonic stage and the dispersement of arrest records was unlikely due to the immobility of society, the courts perceived no great difficulty in placing this added burden upon the individual. In recent years, society has changed vastly and these propositions do not necessarily hold true. Since the resolution of these cases was based upon policy judgments rather than legal concepts, this comment does not attempt to devolve an in-depth historical development of these cases. Rather, the general policy propositions for which they stand are set out.

14 Mabry v. Kettering, 89 Ark. 551, 117 S.W. 746 (1909); Shaffer v. United States, 24 App. D.C. 417 (1904), *cert. denied*, 196 U.S. 639 (1905); State *ex rel.* Bruns v. Clausmeier, 154 Ind. 599, 57 N.E. 541 (1900); State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946), 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed*, 333 U.S. 834, *reh. denied*, 333 U.S. 858 (1948); Downs v. Swann, 111 Md. 53, 73 A. 653 (1909); Miller v. Gillespie, 196 Mich. 423, 163 N.W. 22 (1917); State *ex rel.* Reed v. Harris, 348 Mo. 426, 153 S.W.2d 834 (1941); Bartletta v. McFeeley, 107 N.J.Eq. 141, 152 A. 17 (1930), *aff'd.*, 109 N.J.Eq. 241, 156 A. 658 (1931); McGovern v. Van Riper, 140 N.J.Eq. 341, 54 A.2d 469 (1947); Fernicola v. Keenan, 136 N.J.Eq. 9, 39 A.2d 851 (1944); Roesch v. Ferber, 48 N.J. Super. 231, 137 A.2d 61 (1957); Molineux v. Collins, 177 N.Y. 395, 69 N.E. 727 (1904); People *ex rel.* Joyce v. York, 27 Misc. 658, 59 N.Y. Supp. 418 (1899); Hansson v. Harris, 252 S.W.2d 600 (Tex. Civ. App. 1952); Hodgman v. Olsen, 86 Wash. 615, 150 P. 1122 (1915).

Two more recent decisions are: Herschel v. Dyra, 365 F.2d 17 (7th Cir. 1966); Sterling v. City of Oakland, 208 Cal. App.2d 1, 24 Cal. Rptr. 696 (1962).

15 *Id.*

16 Fernicola v. Keenan, 136 N.J.Eq. 9, 10, 39 A.2d 851 (1944).

part, the individual could only hope for comfort when a Rogues' Gallery was involved. Here, most cases held that the display of an innocent person's photograph in a Rogues' Gallery was a public affront to him and that this was an overextension by society and its legally sanctioned protector—the police.[17] Apart from those Rogues' Gallery public display cases, the courts generally held that otherwise, the individual was injured only minimally, if at all, by the retention of his record.[18]

Many of the foundations for granting such broad power to the police were and are still very viable. Allowing the police broad discretion enables the personnel trained in this field to best utilize facilities for combating crime.[19] Even though the retention of some criminal records is indispensable to protecting society from the criminal element, one must decide at what point and under what circumstances the rights of the few must be sacrificed for those of the many.

There are other reasons which militate against the purging of these records. In many instances, the files remain incomplete as to the disposition of a particular case, and such a record may become vital if the person disappears or becomes a fugitive from justice.[20] Following the same theory, many cases have never been resolved and the suspects on record with the F.B.I. have never been exonerated.[21]

Finally, with the expansion of organized crime, arrest records may be a vital force in helping to curb this growth.[22] Oftentimes an individual whose arrest record is extensive and who is without any subsequent convictions goes free because of the aid of shrewd lawyers or other forms of coercion such as blackmail or bribery. This appalling reality can be seen most vividly in the case of the leaders of organized crime. It was aptly expressed in *Fernicola v. Keenan*:

> In every large community are men who have never been convicted of an indictable offense, but whose associations and manner of life are such that the police feel reasonably assured that such a one, unless he turn over a new leaf, will eventually be guilty of a serious crime.[23]

With the increased mobility of society and the tremendous upsurge of criminal activity, police organizations such as the F.B.I. should be given the necessary tools to keep abreast of the situation. Possibly the retention of all arrest records is one of these tools, but the need for them must be weighed against the damage which they will inflict upon the innocent victims. It is, precisely, an earnest present-day concern for properly balancing the individual's rights against

17 State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946), 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed,* 333 U.S. 834, *reh. denied,* 333 U.S. 858 (1948); Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228 (1906); Schulman v. Whitaker, 117 La. 704, 42 So. 227 (1906); Downs v. Swann, 111 Md. 53, 73 A. 653 (1909); State *ex rel.* Reed v. Harris, 348 Mo. 426, 153 S.W.2d 834 (1941); McGovern v. Van Riper, 140 N.J.Eq. 341, 54 A.2d 469 (1947); Fernicola v. Keenan, 136 N.J.Eq. 9, 39 A.2d 851 (1944).

18 *See* note 14 *supra.*

19 Hoover, *Law Enforcement States Its View,* 12 VILL. L. REV. 457 (1967).

20 W. LAFAVE, ARREST 303-16 (1965); J. SKOLNIK, JUSTICE WITHOUT TRIAL 73-90 (1966).

21 *Id.*

22 H. OVERSTREET & B. OVERSTREET, THE F.B.I. IN AN OPEN SOCIETY 347-74 (1969) [hereinafter referred to as OVERSTREET].

23 136 N.J.Eq. 9, 10, 39 A.2d 851 (1944).

society's needs which makes it imperative that added safeguards be installed where needed to protect the rights of the individual.

In a society characterized by vast networks of telecommunications and advanced transportation, the individual has less and less room in which to seek self-solitude. Privacy has become almost as sacred as it was in Orwell's *1984*. Legal authorities have realized that it is a value that should be increasingly protected. Charles Reich observed:

> But today more and more of our wealth takes the form of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. . . .[24]
>
> . . . .
>
> The most obvious penalty is simply a denial or deprivation of some form of wealth or privilege. . . .[25]

He continues and postulates that this emerging attack upon privacy is a "new and unusual punishment."[26] Other authors have expressed the same or similar sentiments that "personal freedom is perhaps more imperiled than at any time in our history."[27] Little insight is necessary to correlate the loss of individual privacy with the retention and dissemination of arrest records. This is not a moot question but one that looms large in the realm of harsh reality. Its implications are resounding.

At an earlier time in our history the retention and possible dissemination of an arrest record would be of slight detriment to the individual. This was principally attributable to the rather immobile state of society at the time. However, in today's highly mobile society, the retention by police of an innocent individual's arrest record creates a stigma which can directly bear on the functions which that person can perform.

These far-reaching stigmas which individuals must bear are inflicted upon a substantial portion of our society each year. Although accurate tabulations have not been kept, there exists sufficient information to calculate that the number is alarmingly high. In 1962, 750,000 adults were arrested in California; of this group 180,000 had action taken against them. This means that for a period covering a single year in a single state, there were 570,000 innocent people bearing the burden of possessing an arrest record.[28] This is not an isolated example; it seems to manifest the trend in most areas of the country. In New York, a recent study showed that 45% of the people arrested for felonies were released without charges having been filed.[29] Owing to the present system, a sizable segment of society will have to compete with one strike already against it since to much of the outside world an arrest record is tantamount to a conviction.

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24 Reich, *The New Property*, 73 YALE L.J. 733, 738 (1964).
25 *Id.* at 755.
26 *Id.*
27 Affeldt & Seney, *Group Sanctions and Personal Rights — Professions, Occupations and Labor Law*, 11 S. LOUIS L.J. 382, 386 (1967).
28 Comment, *Guilt by Record*, 1 CAL.W. L. REV. 126, 126 n.1 (1965).
29 GOVERNOR ROCKEFELLER'S CONFERENCE ON CRIME 23 (1966).

These records can haunt an individual for the rest of his life. In seeking employment, he is at a tremendous disadvantage. A recent survey has shown that 75% of the employment agencies in New York refused to recommend an individual with an arrest record regardless of whether it was followed by a conviction or not.[30] If a person is required to disclose that he has an arrest record to a prospective employer, he has two alternatives open to him. First he can explain the circumstances surrounding the unfortunate event and hope that the employer will be sympathetic to his plight. With the expanded pool of possible employees from which to choose, it is highly unlikely that the employer would be willing to expend the funds necessary to verify the authenticity of the prospective employee's story.[31] The second option is also of dubious consolation. He can deny the existence of his arrest record and hope that the employer does not receive a copy of his file.

The area of employment is not the only instance in which the specter of a past record will pervade his later life. Other endeavors in which a previously arrested person might venture may equally be thwarted. For many licensing boards and agencies, an absence of an arrest record is one of the criteria employed in evaluating whether or not a candidate is qualified to receive a license.[32] It is said that even a mountain guide in the West must now be a man of "good moral character."[33] Likewise in many of the professional fields, the board of examiners will frequently consider an arrest record in deciding whether a person should be allowed to practice his chosen profession.[34] Educational opportunities may be withheld from a record holder for the very same reason.[35] Law enforcement personnel and the courts frequently take the past record into consideration if the individual has a later encounter with the law.[36] The problem is dangerously intensified if the person not only has to admit that he has a record, but if the employer, agency, etc., receives a copy of the file itself.

If the files are dispersed outside police circles, which it seems they are, the individual has to function under a considerably increased burden. The President's Crime Commission Report found that 35% of all records were incomplete and deficient in regard to the final disposition of the case.[37] With the final disposition lacking, a file would be totally misleading. J. Edgar Hoover, Director of the F.B.I., has candidly admitted: "In the hands of an inexperienced person who is unfamiliar with its purpose, an F.B.I. report can be a dangerous instrument of injustice."[38] Hoover continues to comment, "It must also be understood that the overwhelming majority of F.B.I. reports do not tell a complete story."[39]

30 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967) [hereinafter referred to as Report].
31 *See* note 28 *supra,* at 127 n.4.
32 Affeldt & Seney, *Group Sanctions and Personal Rights — Professions, Occupations and Labor Law,* 11 ST. LOUIS L.J. 382, 399-410 (1967).
33 WYO. STAT. ANNOT. § 23-55 (1957).
34 State *ex rel.* McAvoy v. La. St. Bd. of Medical Examiners, 238 La. 502, 115 So. 2d 833 (1959).
35 Due v. Florida A. & M., 233 F. Supp. 396 (N.D. Fla. 1963).
36 W. LAFAVE, ARREST 141-42 (1965); Suggs v. United States, 132 U.S. App. D.C. 337, 340, 407 F.2d 1272, 1275 (1969); Russell v. United States, 131 U.S. App. D.C. 44, 45, 402 F.2d 185, 186 (1968).
37 Report at 268.
38 Hoover, *The Confidential Nature of F.B.I. Reports,* 8 SYRACUSE L. REV. 1, 5 (1956).
39 *Id.* at 4.

This fact is especially important in light of the F.B.I.'s failure to evaluate or make clarifying recommendations on these files; they merely distribute them.[40] Once a file leaves the F.B.I. office, the agency in a practical sense loses all physical control over the material.[41]

The likelihood that this information will fall upon the untrained ear of the outside world is fairly substantial. Although the act of Congress which granted the F.B.I. this power has a restraining clause allowing for cancellation in the case of dissemination outside police circles, the restraining clause has only been paid lip service.[42] Attorney General John Mitchell believes that the information can also be dispersed to most banks, insurance companies, and railroad police.[43] Realistically, the material could even be distributed to newspapers if the party were subsequently charged with a serious crime.[44]

The results of various research studies on the dissemination of arrest information overwhelmingly show a rampant trend of dispersement throughout society. Estimates place the F.B.I. distribution of arrest records at a minimum of 100,000 files per month to federal agencies alone.[45] A California employer recently commented that he could acquire the "rap sheet" on each applicant if he could afford the price of having the data processed.[46] In New York several hundred employees of a security firm lost their jobs because they had "criminal records." The security agency received their information through a chain of distribution with the ultimate link being that of the files of the F.B.I.[47] These are but a few examples of the widespread dissemination that these files receive.

Faced with the injustice that such a system thrusts upon an individual, several courts have recently been more receptive to his plight. Observing recent drastic redefinitions of individual rights, courts have surmised that possibly the individual is disproportionately injured by the retention and threatened dissemination of arrest records. This new outlook was succinctly described by Chief Judge Cancio in *United States v. Kalish*:

> [W]hen an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is [*sic*] invaded as long as the Justice Department retains criminal identification records, criminal arrest, fingerprints and rogues' gallery photograph .
>
> This preservation of records constitutes an unwarranted attack upon his character and reputation and . . . violates his dignity as a human being.[48]

There have been numerous instances in recent years in which courts have purged

40 OVERSTREET at 380-87.
41 *Id.*
42 Menard v. Mitchell, 430 F.2d 486, 495 n.52 (D.C. Cir. 1970).
43 28 C.F.R. § 0.85(b) (1970).
44 28 C.F.R. § 50.2(b)(3)(i) (1970); 28 C.F.R. § 50.2(b)(4) (1970)
45 Hoover, *supra* note 38, at 15.
46 Comment, *Guilt by Record*, 1 CAL. W. L. REV. 126, 132 (1965).
47 New York Times, Feb. 5, 1970, at 1, col. 2.
48 271 F. Supp. 968, 970 (D.C.P.R. 1967).

the files of innocent people.[49] In all cases, the underlying rationale used was that the record would not serve to protect society and could have a definite detrimental effect upon the innocent recipients.[50] Presently these attacks have been limited to a case-by-case method; but with strong constitutional arguments being offered, the future retention of *all* arrest records is at least cloudy.

Chief Judge Bazelon expressed his doubts as to the constitutionality of the existing situation in this way. "It is difficult to find constitutional justification for its memorialization in the F.B.I.'s criminal files."[51] The judge continued by noting "there is a limit beyond which the government may not tread in devising classifications that lump the innocent with the guilty."[52] This latter statement is an extension of the same court's view in a non-criminal context presented in the first amendment case of *Boorda v. Subversive Activity Control Board.*[53] "Therefore, in weighing the public interest in disclosure, we must weigh a different quantity: since innocent members may easily be separated from guilty ones, the public interest in exposure of the guilty cannot be used to justify exposure of the innocent."[54]

Following a similar vein, the argument is advanced that this retention and dissemination violates the due process requirement of the fifth amendment. With the tremendously adverse effect which this record may have upon the individual, a modern postulation asserted is that the government is invading his right to life and liberty without the due process guaranteed by the fifth amendment.[55] Although this argument has appeal, it has yet to be effective as a constitutional challenge.

The right of privacy embodied in the first amendment has received the most serious consideration. Privacy has been described as "the right to be let alone" the "most comprehensive of rights," the one "most valued by civilized man."[56] At least one court has decided that society is inflicting a gross injustice upon a right guaranteed by the Constitution by forcing certain individuals to face public disclosure of records that are not of a "public" nature. The District Court for the Western District of North Carolina struck down a North Carolina law allowing retention of the arrest records of innocent people as being violative of their rights guaranteed by the first amendment.[57] The case has been appealed to the Supreme Court upon these grounds, but the Court has yet to take any action of a definite nature upon it.[58]

It is quite possible that the nexus of the conflict does not necessarily have to be positioned on the side of one extreme or the other. In *Menard* the Court indicated that it might be possible to establish a point of equilibrium without destroying one interest or the other. This suggestion would be accomplished by

49 United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); Wheeler v. Goodman, 306 F. Supp. 581 (W.D.N.C. 1969); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968); United States v. Kalish, 271 F. Supp. 968 (D.C.P.R. 1967).
50 *Id.*
51 Menard v. Mitchell, 430 F.2d 486, 492 (D.C. Cir. 1970).
52 *Id.*
53 421 F.2d 1142 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 1042 (1970).
54 *Id.* at 1149.
55 Brief for Appellant at 10-11, Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).
56 Olmstead v. United States, 277 U.S. 438, 478 (1928).
57 Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).
58 Goodman v. Wheeler, *appeal docketed* No. 1273, 38 U.S.L.W. 2304 (Mar. 4, 1970).

allowing retention while strictly limiting dissemination. Chief Judge Bazelon, in his opinion, frequently spoke of the use to which the records might be put. At one point, he observed: "if the person arrested has been exonerated it is difficult to see why he should be subject to continuing punishment by adverse use of his 'criminal record.' "[59] In a later footnote comment, he continued: "Similarly, those responsible for maintaining a system of information must bear the responsibility in the first instance for assuring that inaccurate or misleading information is not used to an individual's detriment."[60]

These passages must be read in light of another excerpt in which he noted:

> Obviously, those responsible for investigating and prosecuting criminal activity should have the primary responsibility for determining what information will be most helpful in carrying out their task; and so long as they do not infringe on the rights of the individuals, the court may not interfere.[61]

It thus would appear that the judge is advocating a position in which the rights of both sides may be protected.

This reasoning seems to be a sound solution to a prickly legal question. If the plan becomes operative, it would protect both the rights of society as well as the rights of the individual. Undoubtedly some people will argue that such a move would handicap the police in fulfilling its role,[62] while others will deem this type of action as insufficient protection for the individual.[63] If a workable method of allowing retention while limiting dissemination could be devised, it would relegate these contentions to the sphere of the theoretical.

The court in promulgating this position was not offering a completely novel idea. The act which empowers the F.B.I. to retain records has a cancellation clause in the event of overzealous dissemination.[64] The President's Crime Commission recommended a similar policy when it said:

> There should be a national law enforcement directory that records an individual's arrest for serious crimes, the disposition of each case, and all subsequent formal contacts with criminal justice agencies related to those arrests. *Access should be limited to criminal justice agencies.*[65] (Emphasis added.)

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59 430 F.2d at 494.
60 *Id.* at 494 n.51.
61 *Id.*
62 Address of J. Edgar Hoover delivered by John Bugas, reprinted in *Faith, Freedom and Law,* 47 MICH. ST. B.J. 29, 31 (April 1968).
63 Three basic reasons indicating why control of dissemination would not be sufficient were expounded in *In Re Smith:*

> . . . it appears insufficient for several reasons:
> 1. Employers could nevertheless secure Court and arrest records through requiring a waiver of confidentiality;
> 2. Use of the records by law enforcement officers themselves is unjustifiable and potentially harmful; and
> 3. Preservation of the records even with this would not erase the fear of their disclosure and the appearance of unfairness.

In Re Smith, 63 Misc. 2d 198, 204 n.13, 310 N.Y.S.2d 617, 623 n.13 (1970).
64 28 U.S.C. § 534(b) (Supp. V, 1970).
65 Report at 268.

Finally, in a footnote which actually conceptualized the main thrust of the decision, a warning is issued. The court's comment indicated that if the present procedure were not revised, then the records of innocent individuals would not be allowed to be retained in files subject to dissemination.[66] In the cases of the innocent, the court's anouncement would be the only feasible means of protecting the individual.

Louis Nizer once noted that in cases involving the right of privacy,

> . . . the court is called upon to find the point where the rights of the individual (to be let alone) and the right of society (to know the truth and to protect public safety) are in equilibrium; a succession of such points constitutes the line in which the privacy doctrine has progressed.[67]

In *Menard* the Court of Appeals for the District of Columbia has clearly indicated that the privacy doctrine has moved a few more cautious steps along the line of protecting individual rights and, in doing so, has elevated the right of privacy to the same pinnacle to which other individual rights have recently been lofted.

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66 430 F.2d at 494 n.51.
67 Nizer, *The Right of Privacy,* 39 MICH. L. REV. 526, 529 (1941).