Annual Survey of Massachusetts Law

Volume 1973 Article 17

1-1-1973

Chapter 14: Constitutional Law

Michael J. Vartain

Ellen Segal Huvelle

James Anthony Frieden

Ronald E. Lasky

CHAPTER 14

Constitutional Law

STUDENT COMMENTS

§14.1. Political advertising in newspapers: Unconstitutionality of legislative compulsion to publish: *Opinion of the Justices to the Senate.*[1] The 1973 Massachusetts legislative session yielded evidence of an increasing desire on the part of the General Court to regulate the political advertising policies of newspapers during election campaigns. Proposed legislation in the form of a bill, House Doc. No. 3460, would have required that a newspaper or magazine, which circulates among the general public, print all paid election advertising if it had previously published paid advertising relating to the same election campaign.[2] Although the bill was apparently designed to provide for a right to reply with a responsive paid newspaper advertisement, the bill was drafted so as to require publication of any political advertising if the newspaper or

---

§ 14.1 1 1973 Mass. Adv. Sh. 1061, 298 N.E.2d 828.

2 1973 Mass. Legis. Doc., House No. 3460 [hereinafter cited as House Doc. No. 3460] provides:

> If the owner, editor, publisher or agent of a newspaper or other periodical of general circulation publishes any paid political advertisement designed or tending to aid, injure or defeat any candiate for public or political office or any position with respect to a question to be submitted to the voters, he shall not refuse to publish any paid political advertisement tending to aid, injure or defeat any other candidate for the same public or political office or any other position with respect to the same question to be submitted to the voters in the primary or election unless such publication would violate section forty-two or any other provision of this chapter.
>
> Whoever refuses to comply with this section may be ordered to comply therewith in a suit in equity commenced by any aggrieved candidate or other person or persons and shall forfeit to him or them not less than one hundred dollars. The court may award such additional damages as it may deem proper, together with costs of suit, including a reasonable attorney's fee.
>
> The owner, editor, publisher or agent of a newspaper for other periodical of general circulation shall not charge for the publication of any paid political advertisement an amount greater than the local display rate charged for a paid nonpolitical advertisement offered under similar circumstances and of comparable size, complexity, and location in the same edition or issue of such newspaper or periodical.
>
> A candidate or other person or persons aggrieved by a violation of this section may recover treble the differential between the amount charged and the amount that should have been charged, plus court costs, and a reasonable attorney's fee.

magazine had printed any other advertisement relating to the same election campaign, although the second advertisement supports the first one.[3] Although the bill failed to pass the Massachusetts Legislature,[4] it raised such important freedom of the press issues that the Legislature, before final action was taken, requested a constitutional analysis of the proposal from the Supreme Judicial Court[5] in the form of an Advisory Opinion of the Justices to the Senate.[6] The advice of the Justices, that the bill would be unconstitutional if enacted, may have induced the Legislature's subsequent refusal to pass it.[7] Although the Advisory Opinion adjudicates no case and holds no value as precedent,[8] it raises important questions concerning the constitutional power of the Commonwealth to impose, through the legislative process, a duty upon the press to provide a paid access to a publication as a forum for election debate.

In rendering its Advisory Opinion, the Justices of the Supreme Judicial Court sought to answer the specific question whether a state legislature may compel the press to publish paid election advertising without violating the First Amendment to the Constitution of the United States,[9] which guarantees the "freedom of the press." In advising that such a regulation would be unconstitutional under the First Amendment, the Justices rendered an opinion without the benefit of a particular fact situation to which the merits of arguments advanced in favor of the bill's constitutionality could have been applied. The absence of facts places the Justices' opinion in a theoretical context. Thus, it is hoped an extended analysis will demonstrate the significance of the issue of whether the constitutionality of House Doc. No. 3460 can be justified in an effort to balance the First Amendment right of newspapers to publish without editorial restriction with the public's First Amendment right of access to the press.[10]

This comment will initially focus upon the provisions of the proposed

---

3 See House Doc. No. 3460.

4 House Doc. No. 3460 contained two sections. Enactment of the first section, which would have required publication of paid election advertising, was defeated by a floor vote in the Legislature. The second section, which would have regulated the price of paid election advertising, was enacted by the Legislature which then failed to override the Governor's veto of that enactment. 1973 Mass. Legis. Rec. 266A (Nov. 30, 1973).

5 Mass. Const. pt. 2, ch. 3, art. 2 imposes an obligation upon the Supreme Judicial Court to give advisory opinions to the other branches of state government. See also Answer of the Justices to the Senate, 358 Mass. 833, 835, 276 N.E.2d 694 (1970).

6 1973 Mass. Adv. Sh. 1061, 298 N.E.2d 828.

7 1973 Mass. Legis. Rec. 266A (Nov. 30, 1973).

8 See, e.g., Opinion of the Justices to the Senate and House of Representatives, 341 Mass. 738, 748, 167 N.E.2d 745, 750 (1960).

9 U.S. Const. amend. I states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibition the free exercise thereof; or abridging the freedom of speech, or the press . . . ."

10 See generally Barron, Access to the Press—a New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

legislation and the Opinion of the Justices of the Supreme Judicial Court. Secondly, background for a consideration of the constitutional issues will be provided by means of an analysis of the newspaper's duty to the advertising public at common law. Next, this common law duty of newspapers to the advertising public will be contrasted with the constitutional argument that the contemporary newspaper's power to control the citizens' exercise of freedom of speech through its advertising policies should be limited in some cases under the state action doctrine.[11] Finally, the rationale and the limits of the constitutional power of government to regulate radio and television broadcast licensees will be analyzed in order to decide if that rationale will constitutionally support a government regulation of newspapers and magazines such as the compulsion to publish election advertising embodied in House Doc. No. 3460. In this way, this note will hopefully show the broader implications of the Justices' Advisory Opinion, which was rendered without application to a particular fact situation.

I. THE BILL AND THE OPINION

If enacted into law, House Doc. No. 3460 would have required that newspapers and periodicals offered for general distribution to the public publish paid election campaign advertisements under certain conditions. The election advertisements within the scope of the requirement fell into two categories: first, those advertisements addressed to any election for public office in the Commonwealth;[12] and second, those addressed to issues to be submitted to the voters, such as referendums, initiatives and recall petitions. The conditions upon which the duty to publish the paid advertising would have attached were similar for both categories. Where the particular newspaper or magazine publication had previously printed any other paid advertising concerning an election campaign, it would have been required to publish any offered advertisement addressed to the same campaign. Where the publication had previously published any paid advertisement aiming to influence the vote on a ballot issue, it would have had to print any other paid advertisement on that issue irrespective of its position.[13]

The fact that the proposed bill mandated that a newspaper print *any* other advertisement would have permitted anyone, including individuals, corporations, political committees, or special interest groups, to submit an advertisement. The remedy available to the plaintiff whose election ad was refused would have included the right to compel publication through a suit in equity, and recovery of at least one hundred dollars in

11 U.S. Const. amend. XIV, §1.
12 House Doc. No. 3460.
13 Id.

punitive damages, plus costs of the suit.[14] The publication's liability to the plaintiff would also have included "such additional damages as [the court] might deem proper."[15]

The first section of House Doc. No. 3460 may be termed the "compulsion to publish" element of the bill. This term refers to that type of regulation of the press which requires it to publish material, rather than that type which seeks to restrict or censor what is published.[16] An example of a presently enforced "compulsion to publish" is the federal statute requiring radio and television broadcasters to provide equal time for the candidate whose opponent appeared over the station during non-news programming.[17] A second example is the so-called "fairness doctrine," which is also implemented by a federal statute and which compels broadcasters to air competing viewpoints on controversial issues of public importance.[18] Thus, the "compulsion to publish" present in the fairness doctrine defines "fairness" on the basis of the material presented. However, the "compulsion to publish" contained in House Doc. No. 3460 sought not only to increase the fairness of the material presented by increasing the variety of political opinion available to readers, but also sought to increase the diversity in the sources of that material. Thus House Doc. No. 3460 may be seen as a "compulsion to publish" which affects what is said as well as who will have access to speak.

The second section of House Doc. No. 3460, which was passed by the Legislature but was killed by means of a veto by the Governor,[19] sought to limit the price to be charged for political advertisements in newspapers and periodicals published in Massachusetts. It would have limited the price to that which the publication normally charged for non-political advertising of the same quality.[20] Substantially similar price regulation of political advertising in the press has existed in many states[21] and has not fallen to constitutional attack[22] based on the First Amendment. The Opinion of the Justices found no constitutional difficulty with this price regulation, and upheld it as a valid business regulation.[23]

The primary issue with regard to the first section of House Doc. No. 3460 was the constitutionality of the compulsion to publish mandate under the First Amendment. In advising that such a legislative mandate would violate the guarantee of freedom of the press contained in the

---

14 Id.
15 Id.
16 1973 Mass. Adv. Sh. at 1065, 298 N.E.2d at 832.
17 47 U.S.C. §315(a) (1970).
18 47 U.S.C. §315(a)(4) (1970).
19 1973 Mass. Legis. Rec. 266A (Nov. 30, 1973).
20 House Doc. No. 3460.
21 1973 Mass. Adv. Sh. at 1071, 298 N.E.2d at 835.
22 Id.
23 Id.

First Amendment,[24] the Justices distinguished the compulsion to publish type of regulation from other forms of regulation of the press. First, the Advisory Opinion pointed out that this section of the bill, unlike the second section, was not a general business regulation falling incidentally upon a newspaper as a business operation. The Justices did recognize the line of United States Supreme Court precedent[25] which holds that the press's constitutional immunity from government regulation does not insulate newspapers from reasonable legislative regulation of their business practices, unless the regulation would result in a financial burden that would be likely to impair the ability of the newspaper to publish.[26] However, the Opinion pointed out that the compulsion to publish in House Doc. No. 3460, being a regulation of the content of the publication, was aimed at the editorial policy rather than the business policy of the publication. Admitting that in certain cases the government may be afforded a narrow area in which to constitutionally regulate even editorial policy, the Justices noted that this limited area encompasses only editorial policy which involves *commercial speech*[27] such as help wanted advertisements,[28] rather than editorial policy which involves the expression of *political opinion:* "However, when dealing with the First Amendment rights, the Supreme Court of the United States has been traditionally unwilling to uphold State regulation of political views."[29]

The Justices also distinguished the compulsion to publish imposed on broadcasters licensed by the federal government from one imposed on a newspaper or magazine publisher, whose right to print is not conditioned on the granting of a government license.[30] Noting the federal statutory requirement that broadcast licensees operate in the public interest,[31] which requirement is implemented by Federal Communication Commission regulation of the editorial policy and the content of broadcaster programming,[32] the Advisory Opinion pointed out that at least four Justices of the Supreme Court of the United States have recognized that regulations that are constitutionally permissible when applied to broadcast

---

24 Id. at 1070, 298 N.E.2d at 835.

25 See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 383 (1973) (citing cases).

26 See Grosjean v. American Press Co., 297 U.S. 233, 244-45 (1936).

27 1973 Mass. Adv. Sh. at 1069, 298 N.E.2d at 834. See also Valentine v. Chrestensen, 316 U.S. 52 (1942) (handbill advertising a commercial service for profit is commercial speech not accorded full First Amendment protection).

28 See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (finding no violation in a government regulation of help wanted newspaper advertising promulgated in order to prevent job discrimination).

29 1973 Mass. Adv. Sh. at 1065, 298 N.E.2d at 832.

30 Id. at 1066-67, 298 N.E.2d at 833.

31 47 U.S.C. §315(a)(4) (1970).

32 The rule making authority of the Federal Communications Commission is provided by 47 U.S.C. §315(c). The rules are published in 47 C.F.R. 0.1-81.1.

licensees are not permissible when applied to newspaper publishers.[33] In support of this point, the Justices reasoned that:

> The process of communication by printed word presents certain different considerations from those applicable to the broadcast media. The physical limitations inherent in the use of the airwaves have necessitated governmental regulation with the unavoidable result that, even assuming the financial capacity to do so, not everyone has access to the means of broadcasting his views.[34]

Having used this reasoning process to conclude that the compulsion to publish within House Doc. No. 3460 was a regulation of political speech, the Justices then rejected the contention of the supporters of the bill that because the legislation may have provided the public with fuller and more balanced political advertising, it would have advanced the policies behind the First Amendment.[35] By subjecting publications to a burden of publishing an unascertainable amount of advertising and by providing for extensive potential liability[36] for violation of the law, the legislation, in the judgment of the Justices, would actually have encouraged the publisher to refuse any election advertising and thus escape from the duty to publish the responsive advertisements:

> House No. 3460 presents a paradox because its enactment, instead of achieving a fairer dissemination of political advertising, may produce the chilling effect of discouraging newspapers and other affected publications from accepting any political advertisements. A newspaper or other publisher of general circulation may decide to publish no political advertisements on an election issue rather than expose itself to a commitment to publish all responsive advertisements.[37]

In one area the Justices' opinion left open to speculation the actual breadth of their constitutional condemnation of the compulsion to publish. The Opinion stated that the almost unanimously accepted rule that a newspaper has the unfettered freedom to publish or refuse to publish advertising "might be different if the particular publication involves state action within the meaning of those words under the Fourteenth Amendment."[38] However, the Justices failed to outline under what circumstances an application of the Fourteenth Amendment under the state action doctrine would permit governmental regulation of the press. The Opinion of the Justices did strongly disapprove of one argument advanced in

---

33 1973 Mass. Adv. Sh. at 1067, 298 N.E.2d at 833.
34 Id. at 1066-67, 298 N.E.2d at 833.
35 Id., 298 N.E.2d at 833-34.
36 House Doc. No. 3460.
37 1973 Mass. Adv. Sh. at 1068, 298 N.E.2d at 833-34.
38 Id. at 1064, 298 N.E.2d at 832.

support of the validity of House Doc. No. 3460, namely, that the compulsion to publish is justified by the need to counterbalance the " 'monopolistic' status of certain news publications"[39] which might use their position of monopoly power to act as a private censor of the flow of political opinion through the advertising medium.[40]

It is submitted that a surface analysis of House Doc. No. 3460 could give rise to the inaccurate, but tempting conclusion that the Commonwealth of Massachusetts has the constitutional power to prohibit what may be viewed as private censorship of the flow of political opinion to the public. Such an opinion is based on the principle that although the First Amendment prohibits only government censorship, powerful newspapers are armed with a market monopoly,[41] often encouraged by federal legislation.[42] Supporters of such a position would contend that the use

---

[39] Id. at 1070, 298 N.E.2d at 835.

[40] See, e.g., Tornillo v. Miami Herald, 42 U.S.L.W. 2073 (Fla. July 18, 1973), appeal docketed, No. 73-797, 42 U.S.L.W. 3319 (U.S. Nov. 19, 1973). In this case, the Supreme Court of Florida upheld the constitutionality under the First Amendment of a state "right to reply" statute. The statute requires newspapers to provide free space for candidates for public office who have been criticized in the news and editorial columns of the newspaper. The statute further requires the newspaper to provide space in the amount and quality of space used to express the criticism of the candidate. Fla. Stat. Ann., Title IX, section 104.38 (1971). The majority opinion reasoned that the statute would encourage fuller presentation of the election issues by giving the candidate an opportunity to respond. The majority saw the statute as a legitimate response to the monopolistic influence of the mass media over the right of the public to receive both sides of the issues. However, the Florida court did not consider whether the statute would discourage the newspaper from exercising First Amendment rights by imposing such broad duties upon the newspaper whenever matter "critical" of a candidate is published. Even though the United States Supreme Court may hold the statute unconstitutional, such a decision would likely not determine the constitutional issue of political advertising regulation. The United States Supreme Court has noted that it will hear argument on this case. 42 U.S.L.W. 3405 (U.S. Jan. 8, 1974).

[41] Statistics show that communities are increasingly becoming one-newspaper towns. J. Wiggins, Freedom or Secrecy 178 (1956). The author cites statistics: as of 1951, 85% of the 1500 American cities served by any daily newspaper had access to only one daily. Another 10% of the cities had access to two dailies operating under a single ownership. Id. The decreasing number of daily newspapers is indicated by the following:

U.S. dailies in 1909	2,202
U.S. dailies in 1953	1,760
U.S. cities with competing dailies in 1909	684
U.S. cities with competing dailies in 1953	87
U.S. cities with non-competing dailies in 1909	518
U.S. cities with non-competing dailies in 1953	1,361

Presently there are approximately 1800 dailies publishing in the United States. Massachusetts has 54 dailies and 198 weekly newspapers reaching only 151 of the 351 cities and towns. Ayer Directory of Publications at VI (1973); Official Census of Massachusetts (1971).

[42] See Newspaper Preservation Act, 15 U.S.C. §1801 et seq. (1970). See discussion infra at notes 73-85.

by a newspaper of its editorial policy to decide what political opinion, in the form of election advertising, reaches the public is state action equivalent to government censorship.[43] It would then be argued that a state may, in the exercise of its general police power, regulate such newspaper conduct by enacting legislation like House Doc. No. 3460. This contention is also based on the belief that because such legislation aims at greater expression of political opinion, it would be furthering First Amendment values, although limiting the editorial freedom of the publisher. Although the Supreme Judicial Court did not accept this argument, it did not completely analyze its merits or discover its weaknesses. It is tempting to conclude that a state may regulate the press with the rationale that it is only limiting a quasi-governmental censor in order to further First Amendment values. However, it will be submitted that this rationale will not adequately support such a conclusion. In order to understand better the development and the weaknesses of the rationale supporting a compulsion to publish upon the press, it will be helpful to consider the treatment of regulation of the press at common law.

II. The Common Law Duty of the Newspaper to the Advertising Public

House Doc. No. 3460 would have regulated advertising policies of the press in Massachusetts only in the area of paid *political* advertising during election campaigns. A discussion of the common law duty of the press with respect to business as well as political advertising is important because it is this common law which would have been altered by the House Doc. No. 3460 compulsion to publish. With only one notable exception, the common law has protected a newspaper publisher's absolute freedom to accept or reject advertising at will. In that case, *Uhlman v. Sherman*,[44] a frustrated merchant brought suit against a local newspaper which had refused to print his advertisements while continuing to publish the advertisements of his competitors. In finding for the plaintiff, the Ohio court imposed a common law duty upon the newspaper to accept all offered advertising of a class which it generally printed. The court imposed an obligation on the newspaper to refrain from discrimination in allocation of advertising space, an obligation similar to that proposed by House Doc. No. 3460. In imposing the duty upon the local newspaper, the court in *Uhlman* placed newspapers acting as forums for advertising in

---

43 For the purposes of this argument, both state governmental and federal governmental action are included within the scope of the state action doctrine. See Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 651 n.15 (D.C. Cir. 1971), rev'd on other grounds sub. nom. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

44 22 Ohio N.P. (n.s.) 225 (1919).

the category of quasi-public entities, which are normally subject to a duty to deal with the public without discrimination. Relying on evidence of extreme community dependence upon newspapers for advertising, the court refused to wait for the legislative imposition of the duty.[45]

However, the *Uhlman* holding is clearly an exceptional view of the common law duty of the private newspaper. Courts have generally refused to impose on newspapers any duties to the advertising public.[46] Even the fact that a newspaper's advertising policy may favor one advertiser over his commercial competitor has not persuaded the majority of courts to agree with *Uhlman*.[47] In *Shuck v. Carroll Daily Herald*[48] a merchant operating a dry cleaning establishment was refused advertising space by the county's only newspaper, which continued to accept advertising from the merchant's competitors. The Supreme Court of Iowa refused to compel publication on the ground that a newspaper is a purely private business and not a quasi-public corporation, even if it were assumed that the plaintiff suffered economic injury. Although a Michigan court in *Bloss v. Federated Publications*[49] also recognized the harmful economic consequences to a movie theater owner who lost his customary advertising space in the area's only newspaper, it followed the *Shuck* decision upon the reasoning that the newspaper business is not affected with a public interest and thus not within the group of quasi-public corporations like transportation and utilities companies, which have a duty to deal with the public without discrimination.

Although the issue was not specifically raised in the *Shuck* and *Bloss* cases, the judiciary does attribute some significance to the monopoly status of newspapers in the process of defining their duty to the advertising public. The Massachusetts Supreme Judicial Court first spoke on the relevance of the monopoly status of newspapers in *Commonwealth v. Boston Transcript Co.*[50] That case involved the validity of a state statute penalizing a newspaper which refused to print legal notices when directed to do so by the state minimum wage board. Because the Commonwealth failed to prove that there was such a scarcity of newspapers so as to justify requiring any one newspaper to publish the notices, the court found insufficient state interest to warrant interfering with the newspaper's *freedom of contract:*

> There is nothing in the record to indicate that the public board did not have ample opportunity to print its notice in other newspapers than that published by the defendant at the statutory price.

---

45 Id. at 234.
46 Annot., 18 A.L.R.3d 1286, 1287.
47 Id.
48 215 Iowa 1276, 247 N.W. 813 (1933).
49 145 N.W.2d 800 (Mich. App. 1966).
50 249 Mass. 477, 144 N.E. 400 (1924).

> *It does not appear that there . . . is any difficulty about procuring the adequate publications at reasonable rates. It is difficult, if not impossible, in the present state of civilization to imagine the existence of such conditions.* It cannot be thought the Legislature acted on such facts.[51]

The Supreme Judicial Court refused to depart from the majority definition of the newspaper's common law status and place newspapers in the category of quasi-public entities whose freedom of contract is subject to pervasive legislative regulation. Nevertheless, its emphasis on the lack of scarcity of newspapers can be interpreted as an indication that, were there an increased monopolization of the market and consequent greater scarcity of newspapers, the court would be more willing to uphold a limitation on the newspaper's freedom of contract as contained in a statutory compulsion to publish.

However, the increasing scarcity of newspapers in Massachusetts[52] has induced no change in the definition of their advertising responsibilities under the common law of this state. In *J.J. Gordon v. Worcester Telegram Publishing Co.*,[53] the Supreme Judicial Court upheld a demurrer to a cause of action based on the allegation that the defendant, who owned all three newspapers in the relevant market region, refused the plaintiff advertising space for his real estate business. In holding that there was no duty to print the plaintiff's advertising, despite the defendant's monopoly, the Supreme Judicial court ignored its own dicta in *Boston Transcript*,[54] where it had implied that the quantity of newspapers available is relevant to the nature of the newspaper's duty to the advertising public. Instead, the Supreme Judicial Court in *Worcester Telegram* relied on the common law rule, followed generally in Massachusetts and elsewhere, that newspapers are not public utilities and thus are under no compulsion to deal with the public.[55] The court reached this conclusion without even reaching a potential second line of defense for the newspaper—its constitutional guarantee under the First Amendment freedom of the press.

Though the common law cases have generally refused to impose upon the press a duty to refrain from discriminatory advertising policies, they have indicated that state legislative power was available to create such a duty. In *Shuck*[56] and in *Bloss*,[57] language in a prior Louisiana case was cited with approval:

---

51 Id. at 484, 144 N.E. at 402 (emphasis added).
52 See note 41 supra.
53 343 Mass. 142, 177 N.E.2d 586 (1961).
54 249 Mass. at 484, 144 N.E. at 402.
55 343 Mass. at 143, 177 N.E.2d at 587.
56 215 Iowa at 1280, 247 N.W. at 814-15.
57 145 N.W.2d at 803.

> The weight of authority is . . . the publishers . . . are free to contract and deal or refuse to contract and deal with whom they please. . . . And at any rate, it is for the Legislature, and not for the courts, to declare that a business has become impressed with a public use.[58]

In sum, efforts to curtail the editorial freedom of newspaper publishers through the development of a common law doctrine placing the newspaper, and especially the monopoly newspaper, in the category of a quasi-public entity, have generally failed. Thus, the present state of the law in Massachusetts and in other jurisdictions would require legislative action if one desired to compel equality among those seeking to purchase newspaper space for communication.

As a result, the provisions of the United States Constitution have been cited to support the contention that the editorial freedom of newspapers can be legislatively curtailed in order to foster greater public access to the forums of communications embodied in the advertising pages of the press. Supporters of such a position have relied on the Fourteenth Amendment to show that the press has evolved into an institution in this country which, for various reasons, is not significantly different from the government; and hence, is an institution whose First Amendment freedom of speech can be regulated by the government in order to promote the First Amendment rights of the public. Although such an argument seems persuasive on public policy grounds, an examination of it on constitutional grounds demonstrates important weaknesses.

III. The Fourteenth Amendment: "State Action" and Newspapers

Although the First Amendment outlines government's relationship to the press, it does not impose upon a private newspaper any obligation to the public.[59] However, when the press is operating as an arm of the government, definition of the press's obligations to the public is available without legislation, for the press is then subject to the prohibitions of the Fourteenth Amendment under the "state action" doctrine. In *Radical Lawyers Caucus v. Pool*,[60] the plaintiffs were members of the Texas Bar who were refused advertising space in the official state Bar journal. They sought to purchase the space to encourage fellow members to the Bar to participate in their political meeting at the annual Bar convention. The District Court for the Western District of Texas held that since the defendant was the editor of the official publication of what

---

58 Friedenberg v. Times Publishing Co., 170 La. 3, 127 So. 345 (1930).

59 See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114-15 (1973).

60 324 F. Supp. 268 (W.D. Tex. 1970).

it held to be a state agency, and since he had published political ads for other persons, his refusal was discriminatory state action. The court held this a violation of the Fourteenth Amendment,[61] which forbids state governmental abridgment of the First Amendment freedom of speech.[62] The *Pool* holding delineated a right of access to an organ of the press, which together with its corresponding compulsion to publish, would aid members of the state Bar wishing to use the Bar journal to reach their colleagues. However, such a right would seem to be of little aid to citizens refused advertising space by privately owned and operated newspapers, since the First Amendment prohibits only censorship by federal or state governmental action, and not censorship on the part of private entities.[63]

Yet the merchant or political activist, like the lawyers in *Pool*, desire their advertising to reach a large and geographically dispersed audience. That type of audience makes the more traditional methods of communication such as handbilling, leafletting, and streetcorner oratory ineffective, and requires the use of newspapers, which are more effective in reaching the audience but less accessible to the speaker. Furthermore, the contemporary speaker often depends on the one or two newspapers that service the relevant market region. Whether the refusal to print his advertisement is made by private or official governmental publications, it is clear that the suppression of free and full discussion antithetical to the First Amendment goals[64] is the result. A remedy is available where the publisher can fairly be said to be the government, but is not currently available where the newspaper has a private monopoly over access to the market. Because the result is the same whether the censorship is private or governmental, there is the temptation to argue that the state can legislate to prevent private censorship. Thus, supporters of that position seek to have such private censorship defined as governmental censorship by reference to the state action doctrine in order to place the private newspaper in the same category as is the state journal in *Pool*, and thus impose the duty not to discriminate among advertisers.[65]

In *Resident Participation, Inc. v. Love*,[66] an association of Denver residents, protesting the construction of a plant in their neighborhood, brought an action to compel publication by two local newspapers of their paid editorial advertisement. The court rejected the plaintiff's contention that state governmental payments to the defendants for printing of legal notices, state jury exemption for certain newspaper employees, and state permission for operation of newspaper vending machines on public

---

61 Id. at 270.
62 Gitlow v. New York, 268 U.S. 652, 666 (1925).
63 412 U.S. at 114-15.
64 Associated Press v. United States, 326 U.S. 1, 20 (1945).
65 See, e.g., Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1669 (1967).
66 322 F. Supp. 1100 (D. Colo. 1971).

property all amounted to such a state subsidization of the newspapers, which held a monopoly in the community, as to infuse their refusal to publish with the character of official state action. Although the defendants were shown to have received commercial benefit from these interactions with the state, the court held that neither the editorial nor business policies of the newspapers could be fairly said to be so interconnected with the state as to place them within the scope of the *Pool* rule.[67] In *Burton v. Wilmington Parking Authority*,[68] the Supreme Court of the United States enunciated a test to determine when conduct by private entities becomes so interconnected with the government as to warrant holding that conduct to the same standard of conduct imposed upon the state government by the Fourteenth Amendment. There, the state of Delaware had leased part of the publicly owned parking facility it operated to a privately owned restaurant, which refused to serve the plaintiff because of his race. The Supreme Court found that the fact that part of the restaurant's revenues were channelled directly to the state as part of its rental arrangement, the fact of state ownership of the property housing the restaurant, and the benefit of patronage received by the restaurant's proximity to the parking lot all operated to create such a degree of governmental involvement with the operation and with the success of defendant's private activity as to make its discriminatory action tantamount to state action.[69] Because the plaintiff residents' association in *Resident Participation, Inc. v. Love* could prove no similar degree of state power behind the newspapers, the court was unable to find any Fourteenth Amendment duty of the defendant-newspapers to accept the plaintiff's editorial advertising.[70] However, the *Burton* application of the doctrine of state action is not the only one that has been pressed upon courts as relevant to the duty of newspapers.

It has been suggested that the monopolistic position of many contemporary newspapers is sufficient to warrant the application of the state action doctrine to them, especially where that monopolistic position is permitted or even encouraged by the state or federal government. The source of the problem of the plaintiff in *Love* was the monopoly which the defendant-newspapers held and the consequent lack of alternative newspapers available to the plaintiff when refused advertising space by the defendants. The relevance of this lack of alternative newspapers to the application of the doctrine of state action was raised by the plaintiff in *Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co.*[71] There, the plaintiff argued that the monopolistic status of the defendant-newspapers in a field of great public importance, with

---

67 Id. at 1103.
68 365 U.S. 715 (1961).
69 Id. at 724.
70 322 F. Supp. at 1103.
71 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971).

a consequent lack of alternative forums for communication with the public, required the newspapers to grant the paying advertiser a right of access to their advertising columns. In *Chicago Tribune*, a labor union sought space in each of the four newspapers in Chicago, all owned by the three defendants. The union sought to publicize its version of the facts of a labor dispute. The Court of Appeals for the Seventh Circuit affirmed the summary judgment in favor of the defendants, relying on the *Burton* definition of state action. The court implicitly rejected the plaintiff's alternative argument that the monopoly status of the defendant-newspapers in an area of public concern was itself a fact sufficient to bring the papers within the state action doctrine.

> Apart from the question of appropriateness of the use of such a standard [a monopoly in an area of public concern as equivalent to state action] . . . *if the monopoly is not one conferred by the State* or does not involve the exercise of a *quasi-governmental* function, a question we need not here decide, it has no application in the instant case. Neither [defendant] enjoys a monopoly in the relevant area . . . .[72]

Thus, the court in *Chicago Tribune* did leave the implication that, although a newspaper's simple possession of a monopoly is not sufficient to trigger the application of the state action doctrine, its rejection of advertising might be held to constitute state action and a violaion of the Fourteenth Amendment on either of two grounds: first, that the government has conferred the monopoly on the newspaper; or second, that the newspaper can fairly be said to be exercising a quasi-governmental function.

Although the court in *Chicago Tribune* indicated that governmental conferral of a monopoly upon a newspaper could bring the newspaper within the scope of the state action doctrine, it was not until 1970, when Congress enacted the Newspaper Preservation Act,[73] that the argument was raised that federal or state government is involved with the conferral of a monopoly upon newspapers. Prior to that time, federal policy was opposed to the monopolization of the newspaper market.[74] This policy was evidenced in successful antitrust prosecutions by the United States against both news gathering agencies,[75] and newspapers.[76]

---

72 435 F.2d at 477.

73 15 U.S.C. § 1801 et seq. (1970). The Act exempted certain newspapers from application of the federal antitrust laws upon specified conditions.

74 See, e.g., Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); Associated Press v. United States, 326 U.S. 1 (1945).

75 In Associated Press v. United States, 326 U.S. 1 (1945), the Sherman Act complaint alleged that defendant association of newspaper publishers had conspired to restrict commerce in the distribution of news and to acquire a monopoly over that business and the business of publishing newspapers by enacting bylaws prohibiting the sale of news

The 1970 Newspaper Preservation Act, by allowing newspapers to combine under certain circumstances, has substantially ended the federal policy of using antitrust prosecutions of newspapers to remove those restrictions on the free flow of information that result from monopolization in the newspaper publishing industry.

The Newspaper Preservation Act legitimizes joint-operating agreements among newspapers which result in the removal of commercial competition but the maintenance of editorial competition among the papers. While the immediate aim of the legislation was to insulate from antitrust prosecution the twenty-two joint-operating arrangements among forty-four metropolitan newspapers,[77] it also expresses a congressional awareness that the character of the contemporary marketplace imposes an economic limit on the number of newspapers that can survive even where the capital to begin the enterprise is available.[78] The policy of the Act is to preserve the independent editorial voices of existing newspapers,[79] rather than to allow destructive commercial competition to decrease further the number of newspapers in operation. The legislative history of the Act indicates that Congress decided that removal of commercial competition may be necessary to assure the survival of many newspapers and enacted the legislation in order to overrule the most recent Supreme Court affirmance[80] of an antitrust conviction of two newspapers which had combined to remove competition between them.[81] It has been proposed that the exemption from antitrust prosecution provided by the Act to newspapers which have ended commercial competi-

---

collected by it to any non-member newspaper and allowing any member newspaper to prevent the membership of a competitor. Although the Supreme Court held the conviction of the defendant in the lower court not violative of First Amendment freedom of the press because it was a regulation of business rather than editorial policy, the Court also noted that the First Amendment does not operate to limit the government's power over the press where exercised to limit private interruption or censorship of the free flow of information. The Supreme Court pointed out that the First Amendment conferred no antitrust immunity, where the interruption is caused not by individual editorial policy but by conspiratorial business policy.

76 See, e.g., Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

77 H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 3-4 (1970).

78 Id.

79 Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155, 1158 (N.D. Cal. 1972).

80 Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). A profitable Tucson, Arizona daily had contracted in 1940 with its less successful competitor to combine all plant operations and to establish a joint company to formulate and execute the common business decisions to be made for the two newspapers. The contract empowered the joint company to set prices for copies and for advertising space, to pool and redistribute profits, and to prevent officers of either newspaper from organizing a competitor. Editorial and reportorial staffs and decision making authority were retained by each publication. However, the Court rejected the defendant's claim of financial necessity on the particular facts of the case, and upheld the conviction in the lower court.

81 H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 3-4 (1970).

tion and formed a joint-operating business arrangement works such a governmental assistance of, and interaction with, private entities as to bring these private papers within the scope of the state action doctrine.[82]

In *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*,[83] the defendant joint-operating company controlling the business and advertising policies of the only two local dailies, and operating under the antitrust shield of the Newspaper Preservation Act, established an advertising policy that would operate to compel them to refuse the plaintiff's movie ads. The court there rejected without comment the plaintiff's contention that the federal antitrust exemption so colored defendant's refusal of the advertising with federal law as to constitute state action abridging its freedom of speech.[84] However, it is clear that the antitrust exemption afforded the defendant newspapers did not sanction what a single newspaper acting alone was prohibited from doing. Thus, since the common law previously imposed no duty to publish advertising on a single newspaper, the defendant-newspapers joint decision to refuse the advertising was protected by the exemption. The federal law conferred no greater rights on the newspapers acting jointly than those possessed individually.[85] Perhaps that is why the question was not raised as to whether there was specific governmental involvement in the challenged newspaper policy so as to set into operation the doctrine of state action. Such an argument, if accepted, could lead to a holding that those newspapers operating in a joint-business combination under the antitrust exemption, though not an obvious arm of the state, as was the state bar journal in *Radical Lawyers Caucus v. Pool*,[86] would acquire the *Pool* compulsion to publish under the state action doctrine. However, it is submitted that not only is the nexus between newspapers operating under the Newspaper Preservation Act and the government insufficient to bring the doctrine of state action into play, but also that the very nature of the First Amendment protection of the press precludes the application of the doctrine of state action in this area.

The second arguable ground for finding state action in a newspaper's monopoly, thus triggering a constitutional duty not to discriminate among prospective advertisers, is the "public function" application of the state action doctrine. The public function doctrine requires that where property, though privately owned, has become so dedicated to a public

---

82 See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 144-45 & n.15 (1973).

83 347 F. Supp. 328 (N.D. Ind. 1972).

84 Id, at 335.

85 Id. at 334. The Newspaper Preservation Act grants the newspapers participating in the joint operating arrangement an antitrust exemption for those acts performed in concert which would be legal if performed by a single newspaper. See H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 11 (1970).

86 324 F. Supp. 268 (W.D. Tex. 1970).

use,[87] open to unrestricted access to the public,[88] or put to a use to which governmental or public property is normally put,[89] the property owner acquires the governmental obligation not to abridge the public's First Amendment freedoms of expression.

Rather than performing a function for which the government has historically been responsible, the press's role has always been viewed as the forum for communication of its observation and criticism of government.[90] The founding fathers' great fear of government control of the press arose from this view of the role of the press in a free society.[91] For that reason the Sedition Act of 1798,[92] which made criticism of government officials a criminal offense, was universally seen as violative of the First Amendment.[93] While the press is given protection in order that it can act as an independent source of information and discussion, the press's unique public function in this respect is far different from those functions that are public because they are within the normal duties and functions of state or federal governments. Since the press does not carry on a public function in the sense that would make it an arm of the government, the First Amendment rights of newspapers cannot be subordinated to the right of the public to access to the press. Newspapers have their own freedom of speech,[94] and any regulation by the state limiting their editorial discretion, even as to advertising policies, constitutes a

---

87 See Evans v. Newton, 382 U.S. 296 (1966). An urban park originally operated in a non-discriminatory fashion by the city in its capacity as a testamentary trustee, reverted back to private trustees, who then refused to admit black people to the park. The Supreme Court held that the park had achieved such a public character and function while under city control that a mere reversion to private title did not remove that character. Thus, the Court held, under the Fourteenth Amendment state action doctrine, that the trustees could not discriminate on the basis of race.

88 See Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). But see Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

89 See Marsh v. Alabama, 326 U.S. 501 (1946). The appellant was a member of the Jehovah's Witnesses and was convicted under an Alabama anti-trespassing statute for distributing literature on the shopping district corner of a wholly-owned company town. In reversing the conviction, the Supreme Court held that private ownership of property does not empower the owner to eliminate freedom of speech where the owner performs what is normally a state or municipal function.

90 See New York Times v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring). See generally Z. Chafee, Free Speech in the United States 18, 19 (1941).

91 See Madison, Report on the Virginia Resolutions, in 4 J. Elliot, Debates on the Federal Constitution 561-76 (2d ed. 1861).

92 Act of July 14, 1798, ch. 74, §2, 1 Stat. 596.

93 See Madison, supra note 91, at 561-76. Madison specifically wrote:

> Let it be recollected, lastly, that the right of electing members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, *and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.* [Emphasis added.]

94 See Mills v. Alabama, 384 U.S. 214 (1966).

governmental limitation of that freedom.[95] Though the publisher's freedom of the press has been held subject to some limited abridgment in the area of commercial advertising,[96] the Supreme Court has emphasized that the publication of paid political advertising by newspapers should receive full immunity from governmental regulation.[97] It is this very type of advertising that the Massachusetts Legislature would seek to regulate by House Doc. No. 3460. It would be a twisted application of the state action doctrine to hold that the press, which under the First Amendment is free from government interference, can be rendered subject to government interference by a determination that it is so closely intertwined with the government as to effectively "become" the government.[98] Thus, it is submitted that the state action doctrine is not applicable to create a power in the state to regulate a newspaper's editorial policy because that would operate to abridge the paper's First Amendment freedom of expression. Though the Supreme Court has not yet specifically addressed itself to the validity of the state action doctrine as a means of imposing a compulsion to publish political advertising upon newspapers, it will be submitted that its recent refusal to apply that doctrine to radio and television broadcasters[99] further supports this conclusion.

Even if the state action doctrine were held an applicable means of legislatively limiting the First Amendment freedom of the press, it is submitted that virtually no institutions of the printed press have a sufficient nexus with the government that is required under contemporary standards of state action. First, newspapers are not property which is dedicated to a public use so as to have a quasi-governmental character. Whereas the public function branch of the state action doctrine has been applied to place limits on *property* rights, if that branch of the doctrine

---

95 See New York Times v. Sullivan, 376 U.S. 254, 266 (1964).

96 See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-85 (1973); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

97 In the *New York Times* case, the Court refused to deny the newspaper's First Amendment rights merely because those rights had been exercised in a commercial setting:

> The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, 'commercial' advertisement. . . .
>
> The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. . . . That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.

376 U.S. at 265.

98 See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 133 (1973) (Stewart, J., concurring).

99 Id. at 120-21.

were applied to newspaper publishers by the judiciary, it would operate to limit First Amendment rights. Such an application of the doctrine by the courts would not only be a perverted use of the public function theory of state action, but in itself might be prohibited because it would constitute action by government abridging the publishers' First Amendment freedoms.[100] Indeed, the public function theory of state action has never been held applicable to a newspaper.

A second reason why newspapers fail to fall within the scope of the state action doctrine is that the antitrust exemption afforded certain newspaper combinations does not involve the government in the editorial policies of the press. Rather than seeking to regulate the editorial policies of the press and thus align the government with the press, the Newspaper Preservation Act aims to preserve independent editorial policies.[101] Further, the legislation creates no more state-conferred rights on the joint newspaper operation than were held by the individual papers without the intervention of legislation. Whereas the State of Delaware in *Burton v. Wilmington Parking Authority* received payments in rent from the private entity and owned the property operated for a profit by the latter, neither the federal government nor any state government has an equivalent financial or property relationship with newspapers. For those private newspapers having monopoly status without the antitrust exemption afforded by the Newspaper Preservation Act, the courts have been unable to find any relationship with government sufficient to arguably put them within the state action doctrine.[102]

That the state action doctrine is presently unavailable as a source of constitutional power for the Commonwealth of Massachusetts to compel press publication of paid political advertising is clear from a recent decision[103] of the Supreme Court of the United States holding that doctrine unavailable to require acceptance of political advertising by the broadcasting press—radio and television.

IV. Broadcasters and Publishers

Unlike newspaper publishers, radio and television broadcast licensees have been held constitutionally subject to governmental regulation of their editorial policies, notwithstanding the First Amendment guarantee of the freedom of the press.[104] These regulations, which embody the fair-

---

100 Cf. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

101 H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. (1970).

102 See Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune, 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971).

103 Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

104 Compare Mills v. Alabama, 384 U.S. 214 (1966), with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

ness doctrine,[105] are enforced by the Federal Communications Commission, which decides the merits of broadcasters'[106] license renewal applications partly by the results of investigation into the broadcasters' past compliance with the fairness doctrine. The nature of the federal regulation of broadcasters' editorial policy is analogous to that of the compulsion to publish regulation of newspaper editorial policy which is contained in House Doc. No. 3460. Radio and television broadcast licensees are compelled to broadcast the opinions of opponents of political candidates who had previously been granted time to appear over the station,[107] and are also compelled to broadcast the replies of victims of character attacks made over the station.[108] The fairness doctrine requirement that broadcasters present "discussion of conflicting views on issues of public importance"[109] imposes day-to-day editorial obligations on broadcast licensees as part of the fulfillment of their statutory duty to operate in the public interest.[110]

The constitutional power of the federal government to require that broadcasters operate in the public interest and to implement that requirement by regulating editorial policies of broadcasters was upheld in *Red Lion Broadcasting Co. v. FCC.*[111] There, the Supreme Court indi-

---

105 See 47 U.S.C. §315(a)(4) (1970), where Congress expressed statutory approval of the fairness doctrine. In Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), the Supreme Court of the United States described the editorial policy regulations contained in the fairness doctrine:

> There is a twofold duty laid down . . . . The broadcaster must give adequate coverage to public issues . . . and coverage must be fair in that it accurately reflects the opposing views. . . . This must be done at the broadcaster's own expense if sponsorship is unavailable. . . . Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source.

Id. at 377-78.

106 47 U.S.C. §309 (1970).

107 47 U.S.C. §315(a). This "equal time" rule does not operate to a candidate's benefit where his opponent had merely appeared on news programming. Id.

108 395 U.S. at 378.

109 47 U.S.C. §315(a)(4) (1970).

110 See National Broadcasting Co. v. United States, 319 U.S. 190 (1943), where broadcast licensees challenged the authority of the FCC to issue regulations barring from license renewal a broadcaster who had agreed with a network not to broadcast programs aired by other networks. The Supreme Court held that the FCC's duty to prescribe conditions for license renewal which will advance the "public interest, convenience, and necessity" was not limited to engineering and technological conditions but extended also to conditions affecting content of programming. The Court reasoned that if the allowable conditions for license renewal were limited to those based on the engineering capabilities of the license applicant, there would be no standards which the FCC could utilize to decide among competitors for the same license with equal engineering capabilities. The Court consequently held that FCC regulation of the programming of broadcast licensees was an essential means of executing its duty to protect the public interest.

111 395 U.S. 367 (1969).

cated that the benefits accruing to the public from the creation of "an uninhibited marketplace of ideas in which truth will ultimately prevail"[112] outweighs the private freedom of speech rights of the broadcaster.[113] The Court reasoned that since the right to broadcast derives from the public, who owned the airwaves, the federal government, as proxy for the public, is constitutionally free to condition that right to broadcast upon adherence to defined editorial standards.[114] Using a balancing test of the public versus the private interests in the broadcasting medium, the Court stated that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[115] The Court in *Red Lion* justified the governmental intervention into the broadcasting media by citing the need to allocate the scarce number of frequencies of the public airwaves among the many wishing to use them for communication. Convinced that government licensing of those granted the privilege to broadcast was a reasonable consequence of the scarcity of frequencies, the Court was persuaded that since the licensing of the few bars the many from the use of the media, the government may constitutionally require the few to operate for the benefit of the many:[116]

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[117]

The *Red Lion* Court also justified the constitutionality of governmental regulation of the editorial policies of broadcasters on the rationale that the specific FCC regulations, promulgated to benefit the public, actually advanced the policies behind the First Amendment guarantees of a free press. The Court reasoned that the federal government, by requiring presentation of discussion of public issues, presentation of competing opinions on those issues, and provision of airtime for reply by victims of character attacks made on the air, was advancing the reality of a true marketplace of ideas[118] and thus furthering, rather than hindering, the implementation of the ultimate goal of the First Amendment.

Thus it can be contended that the United States Supreme Court, if presented with House Doc. No. 3460, might find some merit in the policy

---

112 Id. at 390.
113 Id. at 387.
114 Id. at 389-90.
115 Id. at 390.
116 Id. at 389. The Court pointed out that rather than conferring a monopoly over a particular frequency upon a licensee and conditioning the existence of that monopoly status on adherence to certain editorial policies, the Government could have decided to confer no monopolies, but to allot an equal portion of broadcast time to each individual desiring to use it. Id. at 390-91.
117 Id. at 388.
118 Id. at 392, 394.

behind the compulsion to publish on the ground that it too sought to increase the presentation of competing opinion on issues. For if House Doc. No. 3460 was redrafted to prevent the newspaper from escaping a statutory duty to print additional election advertising by not printing any at all, the Supreme Judicial Court's objection that the legislation would actually discourage publication of election advertising[119] would be overcome. In that way the proposed legislation would increase the dissemination of political opinions and advance the reality of the marketplace of ideas.

However, it is precisely because the compulsion to publish seems appealing from the policy viewpoint that the constitutional issue must not be forgotten. The Court in *Red Lion* emphasized that it was the peculiar characteristics of the broadcasting media that gave the federal government the constitutional power to impose these policies upon broadcasters. No matter how beneficial and harmless the policy to be imposed upon newspapers is in the judgment of legislators and courts, that fact does not remove the issue of whether government has the power to impose the editorial policy on newspapers. The Supreme Court gave expression to this view in the case of *Mills v. Alabama,*[120] involving a state statute which prohibited election day newspaper editorials in order to effectuate a policy of assuring a sober intellectual climate during election day. The Court held that the First Amendment precludes governmental dictation of editorial policy to those who would speak or publish, even where the government's interest in presiding over the elections is involved.

Although the legislative history of the Newspaper Preservation Act indicates a congressional awareness of an *economic limit* to the number of newspapers available in any given market,[121] there has been no argument that the newspaper publishing business, like the broadcasting industry, is a scarce publicly owned resource for communication, having an inherent *physical limit* on the number of persons able to express themselves through it and thus subject to governmentally defined duties to operate in the public interest. Indeed, it has been suggested that technological innovations, such as cable television, may remove the inherent physical limitation to the number of television frequencies available for communication.[122] Such a change in the need for allocation of the resource of the broadcasting frequencies could necessitate a review of the constitutional power of the government to allocate the frequencies by licensing and to condition the granting of the license to a broadcaster

---

119 1973 Mass. Adv. Sh. at 1068, 298 N.E.2d at 833-34.

120 384 U.S. 214 (1966).

121 H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 3-4 (1970).

122 Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 157-58 & n.8. (1973) (Douglas, J., concurring).

upon the adherence to certain editorial regulations.[123] Thus, if the inherent physical limit to the number of broadcasting frequencies were removed, the constitutional power of the federal government to allocate the frequencies and regulate the editorial policy of the broadcasters might also be removed. Since there has been no argument that there is any inherent physical limit to the number of newspapers such as would necessitate government licensing, the rationale for the constitutionality of legislative regulation of broadcaster editorial policy would seem inapplicable to newspapers.

Thus, it appears that not only does the regulation of newspaper editorial policy through legislation have little constitutional support, but also that regulation implemented by an application of the doctrine of state action is not constitutionally justifiable. Recently, the Supreme Court rendered a decision dealing with broadcasters which casts great doubt upon the validity of the state action doctrine as authority for the sort of regulation of political advertising policies of newspapers which was embodied in House Doc. No. 3460. In *Columbia Broadcasting System, Inc. v. Democratic National Committee,*[124] it was held that the relationship between the federal government and broadcasting was not of such a nature as would justify a conclusion that broadcasters' refusal to sell airtime for political advertising was tantamount to government censorship violative of the First Amendment.[125] While this case did not specifically refer to the rights of newspapers, an application of its holding to newspapers substantially weakens the persuasiveness of the argument that newspapers holding a monopoly over the market, whether or not conferred by federal legislation, fall within the state action doctrine so as to require that newspapers refrain from discriminating among prospective advertisers under the Fourteenth Amendment. Although *Columbia Broadcasting* spoke of the doctrine of state action in terms of the federal government and the First Amendment, its reasoning also applies to the doctrine of state action as applied to the states and the Fourteenth Amendment.[126] In support of the argument that the government-broadcaster relationship brought the broadcasters within the state action doctrine, Justice Brennan, in his dissent, cited four facts.[127] First, the public owns the property, that is, the airwaves, which the private licensee is utilizing for its business. Second, the broadcasters' privilege to broadcast is derived directly from the federal government. Third, the success of a broadcaster's business is to a large degree a result of a government grant

123 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969).

124 412 U.S. 94, (1973).

125 Id. at 119.

126 See Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 651 n.15 (D.C. Cir. 1971), rev'd on other grounds sub nom. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

127 Id. at 173-77 (Brennan, J., dissenting).

of a monopoly over his assigned frequency, rather than as a result of the operation of the free market. Finally, there is implicit government support of broadcasters' advertising policy, because the federal government pervasively regulates other aspects of broadcaster editorial policy but specifically refuses to regulate political advertising policy. Although the majority in *Columbia Broadcasting* assumed the validity of the justifications in *Red Lion*[128] for the constitutional power of the federal government to limit the absolute freedom of speech of the broadcast licensees,[129] it refused to extend *Red Lion* to hold that broadcasters "are" the government and thus are constitutionally required to refrain from discrimination against prospective political advertisers.[130]

The reasoning of the majority opinion of Chief Justice Burger rested on the Court's rejection of the respondents' argument that the federal government was a partner in the effectuation of the broadcasters' discriminatory political advertising policy.[131] The Court noted that mere governmental acquiescence in the challenged advertising policy does not make the federal government a partner of the broadcaster with respect to that policy.[132] This would seem especially true where it is clear that the broadcaster is not performing a quasi-governmental public function, but is a private entity with its own First Amendment rights, which are abridgeable where necessary to serve the public interest.[133] Because the broadcasters have their own First Amendment rights, the Chief Justice indicated that the state action argument is inapplicable to convert the action of private entities into that of the state or federal government:

> [I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government.[134]

Both Mr. Justice Stewart[135] and Mr. Justice Douglas[136] wrote opinions expressing the potential danger in adopting a constitutional doctrine which says the broadcasters "are" the government. Both saw that this application of the state action doctrine would completely strip the broad-

---

128 395 U.S. 367 (1969).
129 412 U.S. at 101-02.
130 Id. at 114-15, 117-21.
131 Id. at 117-18.
132 Id.
133 395 U.S. at 387.
134 412 U.S. at 120-21.
135 Id. at 132-33.
136 Id. at 150.

casters of their First Amendment freedoms, since if defined as government, they would no longer qualify for that protection *from* government intrusion which the First Amendment guarantees.[137] Such an application of the state doctrine would subvert the intent behind the First Amendment of insuring a press free from governmental control.

Whether or not state action is a persuasive argument for requiring broadcast licensees to accept paid political advertising, *Columbia Broadcasting* substantially destroys the persuasiveness of the state action argument to support a requirement that newspaper publishers accept paid political advertising such as was contained in House Doc. No. 3460. There is a much lesser degree of interaction between newspaper publishers and government than between broadcast licensees and government. Unlike the broadcasting market, the newspaper publishing market is not inherently limited by physical elements. Further, there is no pervasive state regulation of newspapers which would imply a state approval of a newspaper's policy of refusing any paid political advertising from its failure to regulate this area. While a particular newspaper's monopoly status may be supported by the federal Newspaper Preservation Act, its editorial policies with respect to political advertising can in no way be connected with the government. Most importantly, newspapers, unlike broadcast licensees, are not required to obtain a government license in order to publish. The First Amendment grants newspapers a right, not a license or privilege, to publish, and this right cannot be conditioned upon adherence to governmentally defined editorial standards. Therefore, even assuming that the state action argument is applicable in the area of the First Amendment, that argument is especially weak when applied to newspapers.[138]

V. CONCLUSION

At common law, newspapers have been viewed as purely private entities and have thus not been subject to a duty to allocate their advertising space in a non-discriminatory fashion. Although the judicial refusal to alter the common law rule and impose that duty has been made without a reliance upon or a reference to the First Amendment right to freedom of the press, such a reference is required where it is the state legislature that is proposing to alter the common law rule. The legislative policy behind the compulsion to publish paid political advertising in House Doc. No. 3460 is not obscure. It is to encourage fairer elections more accurately reflecting public sentiment. The legislative instrument of implementing this policy is to provide a purchased right to express political opinion in

---

137 Id. at 139, 150.

138 Even the dissenting opinion of Justice Brennan in *Columbia Broadcasting* agreed that the state action argument was inapplicable to newspapers. Id. at 181 n.12.

the newspaper and thus provide for a greater amount and diversity of opinion that may reach the electorate. However, a determination that the particular legislative policy is desirable does not foreclose the need for a decision upon whether it has the constitutional power to mandate the policy. The unique aspects of the broadcast media that create the constitutional power in the federal government to impose editorial policy upon broadcast licensees has been shown not applicable to newspapers and other institutions of the press, which do not derive their ability to publish from a governmentally conferred license or privilege.

The argument that a legislature may impose upon the press a duty to publish political advertising by virtue of the state action doctrine is a weak effort to justify House Doc. No. 3460 and the resulting restriction on the press's freedom of expression. Not only is the nexus between the government and newspapers insufficient for state action standards, but the application of such a doctrine to institutions of the press would unite the government and the press when the First Amendment requires the two to be separate. Upon analysis of the state action doctrine, it is clear that the Commonwealth of Massachusetts lacks the constitutional power to impose editorial duties upon the press. The First Amendment, which seeks to assure an independent press, forecloses the use of a doctrine which says that the press "is" the government. Hence, the First Amendment forecloses dictation of editorial policy to the press. If the Massachusetts Legislature has the constitutional power to dictate to the press what it shall print because the Legislature feels it is dictating a desirable policy, then it would have the power to impose any governmentally-desired editorial policy upon the press.

MICHAEL J. VARTAIN

§14.2. Incarceration in the Charles Street Jail violates inmates' constitutional rights: *Inmates of Suffolk County Jail v. Eisenstadt.*[1] Plaintiffs, named inmates of the Suffolk County Jail in Boston (commonly known as the Charles Street Jail), brought a civil rights action[2] in federal district court on behalf of all inmates of the institution against state, county and city officials[3] alleging that their conditions of confinement violated rights guaranteed under the First, Sixth, Eighth and

---

§14.2. 1 360 F. Supp. 676 (D. Mass. 1973).

2 This action arose under section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983 (1970), which provides:

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

3 The named defendants were the Sheriff of Suffolk County, the master of the jail, the Commissioner of Correction for the Commonwealth, and the Mayor and the nine

Fourteenth amendments.[4] Most of the inmates in the plaintiff class were pretrial detainees,[5] men and women who had not been convicted of a crime but who were unable to post bail or were charged with a non-bailable offense. The objectionable jail conditions included severe overcrowding; poor ventilation, heating and lighting; antiquated and deteriorated plumbing; roaches, mosquitoes and rats; inadequate safeguards against the likelihood of fire; lack of recreational facilities; and unsanitary eating and kitchen facilities. In addition to the fundamental structural inadequacies and unsanitary conditions of the jail, plaintiffs claimed that they suffered from a lack of clean clothing and of the necessary provisions for personal hygiene, an insufficient diet, inadequate medical and psychiatric care, and insufficient opportunities for exercise. The inmates also charged that the stringent limitations imposed upon visits by family, friends and attorneys, the censorship of mail, and prohibitions of reading materials were overly restrictive.[6] It was contended that the cumulative effect of these squalid and dehumanizing conditions on the physical and mental health of the inmates reached constitutional proportions requiring extensive equitable relief.[7]

The court, on the basis of expert testimony, the submitted stipulation of facts, numerous affidavits of inmates, documentary evidence, and personal observation by the court during an overnight stay at the jail,[8] HELD: "the quality of incarceration at Charles Street is 'punishment' of such a nature and degree that it cannot be justified by the state's interest in holding defendants for trial; and therefore it violates the due process clause of the Fourteenth Amendment."[9] In addition, the court found that the conditions in the jail could be considered cruel and unusual punishment in violation of the Eighth Amendment.[10]

The court concluded, based upon its findings of fact[11] and the com-

---

City Councillors of the City of Boston. 360 F. Supp. at 678. Under G.L. c. 34, §4, the Mayor and Councillors are county commissioners for Suffolk County and as such have both executive and legislative powers. Therefore, they share responsibility for providing a "suitable jail" under G.L. c. 34, §3. The Commissioner of Correction has general supervisory powers and duties over the jail. G.L. c. 124, §1(a).

4 360 F. Supp. at 678.

5 The court found that since Jan. 1, 1970, the average male population in the jail had been 340—290 detainees awaiting trial and 50 prisoners sentenced for short terms. The average female population was found to be between 20 and 25. Id. at 681. It was approximated that 85% of the population at the jail were awaiting trial. Id. at 685.

6 Id. at 678-79.

7 Brief for Petitioner at 23, Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973).

8 360 F. Supp. at 678.

9 Id. at 686.

10 Id. at 688.

11 Id. at 679-84. The findings were summarized as follows:

[A]n inmate at Charles Street who merely stands accused spends from two to six months or longer awaiting trial. Each day he spends between 19 and 20 hours in

munity consensus as to the unsuitability of the jail,[12] that for the defendants to provide confinement consistent with constitutional principles, the century-old Charles Street Jail[13] had to be replaced with a new facility.[14] Pursuant to this conclusion, the court enjoined the use of the jail after June 30, 1976.[15] In addition, the court fashioned an interim order[16] to provide relief consistent with the physical limitations of the present facility. To alleviate overcrowding,[17] the court prohibited double occupancy of cells by pretrial detainees as of November 30, 1973. A physical examination was required for all inmates remaining in the jail for over seven days[18] and for all kitchen workers. Free institutional clothing and weekly laundry service were ordered. In addition, the court granted increased hours for attorney-client visits and one additional

---

a cell with another, strange, and perhaps vicious man. When both inmates are in the cell, there is no room effectively to do anything else but sit or lie on one's cot. The presence of a cellmate eliminates any hope of privacy; an inmate may not use the toilet except in the presence of a stranger mere feet away. He passes his confined hours in a dank, decrepit room, often smelling of human excrement, usually in clothes which he cannot keep clean, and able to see nothing outside the cell except parts of the catwalk and outside wall. His mental stability may be affected. His food is often cold and dirty and must be eaten in a corridor that cannot be kept clean. In the three or four hours a day outside his cell, he has few opportunities for meaningful physical exercise, effectively none in the colder months.

Id. at 687. See also note 61 infra.

12 Id. at 681, 687, 689. The court cited seven governmental commission studies, all of which condemned the jail and most of which recommended that it be abandoned and a new facility be constructed. The governmental agencies sponsoring or conducting the studies were the City of Boston (1949), the Governor's Committee (1962), the Municipal Research Bureau (1962), the Finance Commission (1963), the Redevelopment Authority (1966), the National Council on Crime and Delinquency (1968) and a Special Legislative Study Commission (1970). Id. at 681.

13 The jail has been in continuous use since its construction in 1848. Id. at 679.

14 Id. at 686-87.

15 Id. at 691.

16 Id. Two stipulated partial judgments were entered previously by the court. These judgments are reported in 360 F. Supp. at 691, 692. The matters agreed to related to limitations on the use of solitary confinement, health and sanitary protections for those so confined, expanded opportunities for visitations, prohibitions on the censoring of outgoing mail, and the hiring of more Spanish-speaking personnel.

17 The jail contains 180 cells for men and 48 for women and was originally designed for confinement of one prisoner per cell. In addition, over the years many cells have become unusable because of defective plumbing or locking mechanisms—only 142 cells for males were considered operable at the time of suit. Due to the expanding jail population (an average daily male population of 340 since Jan. 1, 1970), double occupancy in the 8′ x 11′ x 10′ cells became a necessity. Id. at 679, 681.

18 An estimated 60% of the inmate population were drug users prior to admission. At the time of trial, the medical staff at the jail consisted of two full-time nurses and a doctor who spent one-half to three hours a day, Monday through Friday, at the jail. Id. at 681. Considering the severe medical and psychiatric problems that are probably encountered, the court's order in this respect seems totally inadequate.

hour away from the cells during daylight (four hours total, excluding meal times) and prohibited jail personnel from opening mail from attorneys except in the presence of the inmate. The above orders were to be implemented no later than 30 days from the date of the order. Lastly, upon the attainment of single occupancy, pretrial detainees were to have daily access to pay phones free from monitoring or wiretapping and the removal of age and family restrictions on visitors. The court ordered the defendants to file progress reports and retained jurisdiction to allow for continuing supervision of the implementation of its order.[19]

This note will briefly discuss the history of "jail suits,"[20] a relatively recent development in the law. The constitutional theories considered in *Eisenstadt* and other jail suits will then be examined in an attempt to evaluate their effectiveness as standards for assessing jail conditions of pretrial detainees. Lastly, possible guidelines for providing judicial relief and alternative legislative remedies will be considered.

Changes in the law and in attitudes during the last decade have made possible the recent success of "jail suits"—challenges by pretrial detainees to the totality of conditions and practices within jails. In the past, courts were reluctant to inject themselves into the internal administration of jails and prisons because they felt that such matters were beyond their expertise and because they feared undermining the disciplinary powers of prison officials. In addition to this "hands-off" policy, federal courts, in deference to the principles of federalism and separation of powers, refused to redress the grievances of inmates in state penal institutions.[21] The Supreme Court, however, facilitated judicial intervention in prison and jail administration when it ruled in the early 1960's that the Eighth Amendment applied to states[22] and that the doctrines of federal abstention[23] and exhaustion of state remedies[24] were not barriers to suits by prisoners in state institutions.[25] Finally, the

---

19 Id. at 691.

20 Jails are usually short-term holding facilities, under city or county control, designed to detain those who are awaiting trial and to house convicted misdemeanants—convicts sentenced to less than one year. Prisons, maintained by a state or the federal government, are used for incarcerating felons—convicts sentenced to a year or more. Turner, Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation, 23 Stan. L. Rev. 473, 475 (1971). See also Note, 18 Wayne L. Rev. 1601, 1602-03 (1972).

21 See generally Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review Complaints of Convicts, 72 Yale L.J. 506 (1963).

22 Robinson v. California, 370 U.S. 660 (1962).

23 Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (reversal of dismissal of prisoner's suit based on grounds, inter alia, of federal abstention doctrine).

24 Monroe v. Pape, 365 U.S. 167 (1961) (exhaustion of state remedies is not a condition precedent to a federal court's accepting jurisdiction under the Civil Rights Act of 1871).

25 Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 Va. L. Rev. 841, 842-43 (1971); Turner, supra note 20, at 507.

prisoner rebellions at Attica and Walpole and disorders at prisons and jails throughout the country in the early 1970's focused national concern on the conditions within prisons and jails. In response to these events, the "hands-off" attitude of the courts slowly yielded to a new approach which recognized the legitimacy of judicial intervention when conditions deteriorated to such an extent that they constituted a deprivation of constitutional rights.[26]

Although the first "jail suit" by pretrial detainees was brought in 1968,[27] the case that firmly laid the groundwork for broad challenges to conditions and practices within jails was *Holt v. Sarver,* in which the living conditions in the Arkansas penitentiary system were found to be so "shocking to the conscience" as to constitute cruel and unusual punishment in violation of the Eighth Amendment.[28] *Holt* established the principle that the application of the Eighth Amendment was not limited to instances in which a particular prisoner is subjected to corporal punishment.[29] The court in *Holt* recognized that the cumulative effect of squalid and inhumane conditions in the prison inflicted cruel and unusual punishment upon the entire prisoner population.[30]

Although *Holt* involved prisoners in the state penitentiary, its rele-

---

26 360 F. Supp. at 684. See also Comment, Incarcerating the Innocent: Pretrial Detention in our Nation's Jails, 21 Buffalo L. Rev. 891, 907-12 (1972). Although the hands-off doctrine no longer presents a serious obstacle to prisoner and jail suits, a modified version was followed in two recent cases, Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), and Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). The court in *Sostre* stated:

> Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us *as a federal court* to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or *personally* repugnant. As judges we are obliged to school ourselves in such objective sources as historical usage . . . before we may responsibly exercise the power of judicial review to declare a punishment unconstitutional . . . .

Id. at 191.

27 Inmates of Cook County Jail v. Tierney, Civil No. 68 C 504 (N.D. Ill., Aug. 22, 1968), in which Judge Julius Hoffman refused to dismiss a civil rights action by jail inmates, finding that if the allegations of jail conditions were proven, they would amount to cruel and unusual punishment. The case was settled on assurances by the defendant officials that they were effecting fundamental improvements.

28 309 F. Supp. 362, 372-73 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971). *Holt* was initiated shortly after the Arkansas prison scandal broke in 1968. After several skeletons were found in a field at the Cummins Prison Farm, it was discovered that numerous murders had taken place on the farm over the past several decades. In addition, a state prison report previously suppressed by Governor Faubus was released. It told of the deplorable disciplinary measures used at Cummins and Tucker Prison Farms. Time, Feb. 9, 1968, at 74.

29 309 F. Supp. at 372-73. Previously, in Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968), then Circuit Judge Blackmun, writing for the court, enjoined the use of a strap as a disciplinary measure in the Arkansas prison system on the grounds that it violated the Eighth Amendment.

30 309 F. Supp. at 380-81.

vance to pretrial detainees confined in city and county jails was obvious. Conditions in local jails are often as bad as, if not worse than, those in state prisons;[31] more importantly, inmates in jails are for the most part pretrial detainees, and therefore are presumed to be innocent of any crime under our system of justice. Even if deplorable conditions for convicted criminals can be justified as part of their punishment, such conditions are theoretically inappropriate for innocent persons who are confined to jail because they cannot afford bail. Whereas rehabilitation, punishment and deterrence are legitimate purposes for incarcerating persons convicted of a crime,[32] pretrial detainees are confined only because their presence at trial must be assured. Consequently, the standard of treatment for pretrial detainees should be higher than that for convicted prisoners.[33] Following this reasoning, many courts have upheld the claim of pretrial detainees that the totality of conditions and practices within a jail deprive them of their constitutional rights.[34]

Several different constitutional theories have been used to uphold the claims of pretrial detainees, *i.e.*, the due process and equal protection clauses of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment. As pointed out by Judge Tuttle in *Anderson v. Nossar*, "There are many roads to Rome, and while one is clearly marked 'Eighth Amendment,' I agree that passage can be had along that wide familiar boulevard known as 'Due Process.' "[35] Although it is true that jail conditions are susceptible to attack on several grounds, it is submitted that the due process clause of the Fourteenth Amendment, as used by the court in *Eisenstadt*,[36] provides a more appropriate approach for analyzing jail conditions than does the Eighth

---

31 For a description of typical jail conditions see Note, Pre-Trial Detention in New York City Jails, 7 Colum. J.L. & Soc. Prob. 350, 354-65 (1971); Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941, 941-46 (1970); N.Y. Times, Feb. 17, 1974 §6 (Magazine), at 14.

32 See generally Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941, 956-57 (1970).

33 Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971).

34 Rhem v. Malcolm, — F. Supp. — (S.D.N.Y. Jan. 7, 1974), summarized in 14 Crim. L. Rep. 2345 (1974) (the Tombs); Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972) (Baltimore City Jail); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972) (the Greystone section of the Santa Rita Rehabilitation Center); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) (Pulaski County Jail); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971) [Jones I]; Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) [Jones II] (Lucas County Jail); Commonwealth ex rel. Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971) (Holmesburg Prison) (the only case to grant relief in a habeas corpus proceeding as opposed to a civil rights action).

35 456 F.2d 835, 843 (5th Cir. 1972) (Tuttle, J., concurring in part and dissenting in part).

36 360 F. Supp. at 686, 688.

Amendment or the equal protection clause of the Fourteenth Amendment.

A majority of the decisions finding conditions within jails and prisons to be unconstitutional have relied upon the Eighth Amendment.[37] Nevertheless, courts have yet to develop a precise definition of the standard to be used in determining whether jail conditions constitute cruel and unusual punishment. Three basic formulations have been used.[38] One approach for evaluating jail conditions in terms of the Eighth Amendment is to ask whether they "shock the conscience."[39] A second method is to examine the nature of the offense in relation to the severity of the punishment to determine if the punishment is disproportionate.[40] A third approach would find Eighth Amendment violations when conditions or practices extend beyond what is necessary to achieve a legitimate penal goal.[41] All three of these tests have been applied with reference to community values, "the evolving standards of decency that mark the progress of a maturing society."[42]

It is submitted that these formulations do not provide a workable standard for courts to use in assessing the constitutionality of jail conditions. A pretrial detainee should not have to suffer any punishment, regardless of whether or not it is shocking to the conscience.[43] Moreover, any punishment beyond detainment of an innocent person is disproportionate to the nonexistent offense, and unnecessary to the achievement of any legitimate penal goal. Nevertheless, courts have relied upon the cruel and unusual punishment clause to assess the constitutionality of jail conditions, even though the above formulations do not provide clear

---

37 See, e.g., Anderson v. Nosser, 438 F.2d 183, 190-93 (5th Cir. 1971), aff'd on rehearing on other grounds, 456 F.2d 835, 838 (5th Cir. 1972) (en banc) (the court on rehearing concluded that the §1983 cause of action sounded more in the nature of deprivation of due process through infliction of summary punishment rather than the imposition of cruel and unusual punishment); Hamilton v. Schiro, 338 F. Supp. 1016, 1019 (E.D. La. 1970); Jones v. Wittenberg, 323 F. Supp. at 99; Commonwealth ex rel. Bryant v. Hendrick, 444 Pa. at 98, 280 A.2d at 117; Wayne County Jail Inmates v. Wayne County Board of Commissioners, Civil No. 173-217, (Cir. Ct., Wayne County Mich., May 18, 1971). See generally, Note, Recent Application of the Ban on Cruel and Unusual Punishments: Judicially Enforced Reform of Nonfederal Penal Institutions, 23 Hastings L.J. 1111 (1972).

38 See Anderson v. Nosser, 438 F.2d at 191; Note, supra note 25, at 848-50; Note, supra note 37, at 1124-25. See also the principles enunciated by Justice Brennan in Furman v. Georgia, 408 U.S. 238, 282 (1972).

39 See, e.g., Anderson v. Nosser, 438 F.2d at 191; Hamilton v. Schiro, 338 F. Supp. at 1019; Commonwealth ex rel. Bryant v. Hendrick, 444 Pa. at 97-98, 280 A.2d at 117.

40 See, e.g., Anderson v. Nosser, 438 F.2d at 193.

41 See, e.g., Hamilton v. Schiro, 338 F. Supp. at 1019.

42 Trop v. Dulles, 356 U.S. 86, 101 (1958). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Id. at 100.

43 Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971).

guidelines for distinguishing between simple punishment which is permitted by the Eighth Amendment, and cruel and unusual punishment, which is forbidden. As a result, courts have tended in practice to invalidate only those conditions which sink to the level of being inhuman, barbarous or tortuous—the truly shocking conditions.[44] Moreover, the subjectivity of the shocking to the conscience standard has led to inconsistent results.[45] In short, the cruel and unusual punishment clause appears to be helpful only in abating the most outrageous conditions since it imposes a standard no greater than minimal decency, and it is unpredictable because of its reliance on an individual judge's conception of justice.

The court in *Eisenstadt* declined to rely on the Eighth Amendment and instead found that the jail conditions in Charles Street violated the rights of pretrial detainees under the due process clause of the Fourteenth Amendment.[46] It is submitted that the due process clause provides a more appropriate analytic framework for judicial review, and consequently provides a greater opportunity for effective relief. Under the American system of justice, a person is presumed innocent until proven guilty, and under the due process clause, a person cannot be subjected to punishment without a judicial determination of guilt. Although the Supreme Court has implicitly recognized that detention or custody may be constitutionally permissible to ensure appearance for trial,[47] any deprivation of liberty which is not necessary to this holding function will constitute punishment in violation of the due process clause.[48] In addition to the need for a rational relationship between the state's purpose and the means used, courts have required that the governmental "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of *less*

---

44 For examples of cases relating to prison conditions, see Novak v. Beto, 453 F.2d 661, 665-66 (5th Cir. 1971); Sostre v. McGinnis, 442 F.2d 178, 186 (2d Cir. 1971) (declaring the solitary confinement not "unendurable or subhuman or cruel and inhuman in a constitutional sense"); Sinclair v. Henderson, 331 F. Supp. 1123, 1126 (E.D. La. 1971) (since food was not contaminated on a regular basis, and as a general rule, food servers were not unclean, the claim did not reach the proportion of a constitutional violation). For examples of cases relating to pretrial detainees, see Rogers v. Westbrook, 362 F. Supp. 353 (E.D. Mo. 1973); Woods v. Burton,— Wash. App.—, 503 P.2d 1074 (1972). See also, Note, 4 Toledo L. Rev. 262, 263 (1973).

45 Compare cases cited in note 44 supra with those cited in notes 29 and 34 supra and note 89 infra.

46 360 F. Supp. at 688.

47 Stack v. Boyle, 342 U.S. 1, 4 (1954).

48 360 F. Supp. at 686. See also Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), aff'd on this ground on rehearing, 456 F.2d 835, 840 (5th Cir. 1972) (en banc); Brenneman v. Madigan, 342 F. Supp. at 136-38; Hamilton v. Love, 328 F. Supp. at 1191-93; Jones v. Wittenberg, 323 F. Supp. at 99-100; Note, supra note 31, at 950-53.

drastic means for achieving the same basic purpose."[49] In short, all restrictions on pretrial detainees must be reasonably related to the state's interest in ensuring their presence at trial and the means used must be no more restrictive than is necessary to accomplish that limited purpose.[50]

Thus, under the "least restrictive means" test used in *Eisenstadt,* the state has the burden of justifying any restrictions upon detainees which unnecessarily or unreasonably infringe upon their "basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness, and personal privacy."[51] Although custody, which includes the need to preserve the security and orderly administration of the jail, legitimizes some restrictions, many conditions would be subject to attack, including regulations as to visitors, confinement in cramped quarters, restrictions on mail privileges and denial of recreation and exercise.[52] In addition under the "least restrictive means" approach, pretrial detainees need only show that conditions and practices are more restrictive or oppressive than is necessary to maintain custody. In other words, the detainees no longer have to prove "cruel and unusual," as required by the Eighth Amendment, but only "punishment."[53] As a result, under a due process approach an isolated practice or condition could be subject to judicial review without the necessity of demonstrating that the totality of circumstances is so oppressive as to warrant judicial intervention; each restraint can be evaluated in terms of the state's purpose and the less drastic alternatives for accomplishing that purpose without having to amass sufficient indignities to satisfy the ambiguous threshold required by the cruel and unusual punishment clause.

A second test for measuring due process claims was used by the court in *Eisenstadt* to buttress its conclusion under the "least restrictive means" approach. The court reasoned that since conditions of confinement for sentenced inmates in state prisons were less oppressive than those in Charles Street,[54] the pretrial detainee was being "punished" in violation

---

49 360 F. Supp. at 686, citing Shelton v. Tucker, 364 U.S. 479, 488 (1960) (emphasis added). See also Covington v. Harris, 419 F.2d 617, 623-24 (D.C. Cir. 1967).

50 Note, supra note 31, at 950. See also Hamilton v. Love, 328 F. Supp. 1182, 1191-93 (E.D. Ark. 1971).

51 360 F. Supp. at 686.

52 Note, supra note 31, at 950.

53 See Jones v. Wittenberg, 323 F. Supp. at 100.

54 360 F. Supp. at 686-88. The court found that inmates in Massachusetts state prisons have more liberal visiting privileges—attorneys may visit on any day and at any reasonable hour without permisson and family, friends and children may visit for two to three hours, three times a week. In addition, state prisoners occupy single cells, are only required to be in their cells from 10:00 P.M. to 6:00 A.M., and are permitted to have televisions and radios in their cells. Inmates in state institutions are also given clean clothes, free weekly laundry service and a complete physical examina-

of the due process clause.[55] Under this test, "conditions for pre-trial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed. . . ."[56]

This standard is also appropriate to an analysis under the equal protection clause,[57] which requires that those similarly classified must be similarly treated and that the classification system must bear a rational relationship to a legitimate state purpose.[58] In terms of treatment accorded them, the state has placed pretrial detainees in a single class together with those persons sentenced to prison following conviction of a crime. But persons who are presumed innocent are being detained only to assure their presence at trial, whereas convicted persons can legitimately be subjected to mandatory punitive, rehabilitative and deterrent measures. Thus, it is unreasonable to classify detainees with convicts for purposes of determining the conditions of detention.[59] In short, under either a due process or an equal protection analysis, if conditions of confinement of pretrial detainees are inferior or equal to those of convicted prisoners, the detainees are subject to "punishment" without due process or are denied equal protection.

It is submitted that this latter approach of comparing jails with prisons may not be as useful as the "least restrictive means" test because such a comparison may not always provide a rigorous standard of review. Considering the prison conditions described in *Holt*,[60] it would not be advantageous for detainees to argue that jail conditions in Arkansas should merely be superior to those in Cummins State Farm. In addition, since rehabilitation, deterrence and punishment are recognized goals of confinement for convicts, prisons necessarily have to be built to accommodate programs which will further these aims. However, it may be improper for jail authorities to require detainees to participate in rehabilitation programs.[61] Due to these differences in state purposes, prison life cannot readily be used as a standard for assessing jail conditions. In

tion upon admission to the prison. Id. at 683-84. In contrast, pretrial detainees at Charles Street are locked up in a cell with another inmate for 19 hours a day; receive no clothing, laundry service, or physical examinations; and are limited to three visits a week of one hour each from only adult members of their family and visits from lawyers, unless they receive permission, from 9:00 to 11:00 A.M. and 12:00 to 4:00 P.M., Monday through Saturday. Id. at 682-83.

55 Id. at 686-88.

56 Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971).

57 See Brenneman v. Madigan, 343 F. Supp. at 138.

58 Note, supra note 31, at 947. For an extensive discussion of the standards used to evaluate classifications for equal protection purposes, see Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1067, 1076 et seq. (1969). See also Tussman & ten Broek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949).

59 See, e.g., Rhem v. Malcolm, — F. Supp. — (S.D.N.Y. Jan. 7, 1974), summarized in 14 Crim. L. Rep. 2345 (1974); Brenneman v. Madigan, 343 F. Supp. at 138; Hamilton v. Love, 328 F. Supp. at 1191; Jones v. Wittenberg, 323 F. Supp. at 100.

60 309 F. Supp. at 373-81.

61 Hamilton v. Love, 328 F. Supp. 1182, 1192 (E.D. Ark. 1971).

contrast, the "least restrictive means" test establishes a more uniform, stringent standard of review; it is only necessary to consider jail conditions in terms of the state's sole purpose of assuring appearance of the detainee at trial, rather than comparing them to prison conditions, which inevitably vary from state to state.

In addition to the Eighth Amendment and the two due process formulations used by the *Eisenstadt* court, additional arguments for challenging jail conditions can be advanced on the basis of the equal protection clause. According to this analysis, citizens detained pending trial are part of a class of arrested persons in whom the state's only interest is to ensure their presence at trial. Within this class of arrested persons, a distinction is made between those who are detained, either because they cannot afford bail or because they are accused of a non-bailable offense (usually a capital crime), and those who are released on bail. The only basis for the distinction between bailees and detainees is the state's determination that there is a need to maintain custody of the latter.[62] Beyond this distinction, there is "no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself."[63] Under this test, as under the due process clause, conditions of incarceration must be rationally related to the state's holding function and must "cumulatively, add up to the least restrictive means of achieving the purpose. . . ."[64]

An alternative analysis under the equal protection clause could be based on the *Griffin*[65]-*Douglas*[66] line of cases.[67] The Court's holding in *Griffin* has been interpreted in at least one jail suit, *Brenneman v. Madigan,* as requiring a more stringent review ("strict scrutiny") than is regularly mandated under the equal protection clause because wealth classifications in the area of criminal prosecutions are considered to be "suspect."[68] Following this reasoning, any restriction or deprivation imposed upon those in the class of accused defendants who are detained due to their inability to post bail must be strictly related to the state's purpose, and secondly, the classification must be based on a "compelling state interest."[69] It is submitted that no "compelling state interest" could

---

62 Note, supra note 31, at 947-48.

63 Butler v. Crumlish, 229 F. Supp. 565, 567 (E.D. Pa. 1964).

64 Hamilton v. Love, 328 F. Supp. 1182, 1192 (E.D. Ark. 1971). See Note, supra note 31, at 949-50.

65 Griffin v. Illinois, 351 U.S. 12 (1956) (a defendant cannot be denied access to an effective appeal due to his indigency).

66 Douglas v. California, 372 U.S. 353 (1963) a defendant has a right to counsel for his first appeal regardless of wealth).

67 See Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 25 n.55 (1969).

68 343 F. Supp. at 138.

69 Michelman, supra note 67, at 20 n.34; Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1101-04 (1969).

be established for the proposition that people without the financial means to post bail present a greater risk of non-appearance than those who do have the means.[70] Thus, assuming that *Griffin* does require a strict standard of review of wealth classifications in the area of criminal prosecutions,[71] this standard could not be applied to indigent detainees without arriving at the logical conclusion that the whole principle of release on the basis of ability to pay would be subject to attack.[72] Since it is unlikely that any court would arrive at this conclusion,[73] the test has to be restated, as was done in *Brenneman,* to provide that "any restrictions and deprivations . . . beyond those which inhere in the confinement itself, must be justified by a compelling necessity."[74] In effect, under this strict equal protection standard, identical treatment for detainees and bailees would be required insofar as is possible given that a detainee's freedom to come and go as he pleases is limited. In order to achieve this standard, jails would have to become similar to hotels, with the only limitation being that the "clientele" could not leave. It is suggested that this would be an impractical standard for a court to apply.

Moreover, it appears that an equal protection analysis comparing detainees with bailees under either of the two-tiered tests—the strict scrutiny test suggested in *Griffin* or the rational relationship test—is less likely to succeed than a challenge based on the due process clause. There has been a noted reluctance on the part of courts to find a denial of equal protection based on an asserted common classification of bailees and detainees. For example, the majority of courts have denied relief to detainees who claimed that they were denied equal protection by being compelled to appear in lineups for crimes not included in their indictments, even though those free on bail could not be forced to do so without first being arrested and charged with the specific crime for which the lineup was being conducted.[75] In addition, the Supreme Court in *McGinnis v. Royster*[76] upheld a New York law which denied pretrial detainees good time credit for presentence incarceration in county jails. The Court explicitly declined to apply the strict scrutiny test but instead relied upon the rational relationship test.[77]

---

70 See study by the Vera Institute, The Manhattan Bail Project, at 7 (1970), cited in McGinnis v. Royster, 410 U.S. 263, 281 n.4 (1973) (dissenting opinion).

71 This analysis of *Griffin* has been criticized by Michelman, supra note 67, at 24-33.

72 Note, supra note 31, at 947 n.52.

73 As pointed out by the court in *Hamilton*, 328 F. Supp. at 1192, "[a] distinction [between bailees and detainees] is implicitly recognized in the Constitution when it provides that, 'excessive bail shall not be required . . . .' U.S. Const. Amend. VIII."

74 Brenneman v. Madigan, 343 F. Supp. at 138.

75 See, e.g., United States v. Jones, 403 F.2d 498 (7th Cir. 1968); Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965), cert. denied, 384 U.S. 975 (1966); United States v. Scarpellino, 296 F. Supp. 269 (D. Minn. 1969). Contra, Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964).

76 410 U.S. 263 (1973).

77 Id. at 276-77.

In summary, the *Eisenstadt* court correctly chose the least restrictive means test over the Eighth Amendment as a tool for analyzing conditions of pretrial detention.[78] The least restrictive means test provides the more exacting standard of review for assessing jail conditions because it analyzes them in terms of the state's sole purpose of assuring appearance at trial and thus avoids subjective judgments as to what is shocking to the conscience. It is also preferable to comparing jail conditions to those in prisons under either the due process clause or the equal protection clause since this latter formulation lacks uniformity due to the substantial differences among prisons. Lastly, the least restrictive means/due process test is not only a more practical standard but is also more likely to be accepted than an equal protection claim that is based upon an asserted common classification of bailees and detainees.

Once a court has found that the conditions in a jail violate the inmates' constitutional rights under any of the above tests, it still must grapple with the problem of providing affirmative relief. For the *Eisenstadt* court this was less of a problem since the necessity for a new jail relieved the court of having to develop extensive guidelines and timetables.[79] The court, after enjoining the use of the Charles Street Jail as of June 30, 1976,[80] ordered only minimal improvements in the existing facility. Despite the court's admission that, in principle, nearly all relief requested by the inmates should be granted,[81] the physical limitations of the jail restricted the extent to which the court could order compliance with the due process clause.[82] In terms of reducing the overcrowding, the court suggested that the number of usable cells could be increased through renovation and that consideration should be given to transferring the sentenced prisoners in Charles Street (mostly people convicted of public drunkenness) to other state institutions, the women inmates to M.C.I. Framingham, and the juveniles to the Division of Youth Services.[83]

Another method of relief, other than ordering a new jail, has been to base the remedy upon state or city housing and sanitation codes. This technique was used in Detroit where it was found that the state and city housing and building codes were applicable to jails.[84] These regulations provide clear and concise requirements as to room size and density, quality of plumbing, and amount of ventilation and lighting. As a result, the court has a practical tool for effectuating improvements in the jail.

78 360 F. Supp. at 688.

79 See also Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971).

80 360 F. Supp. at 691.

81 Id. at 689.

82 Id.

83 Id. at 690.

84 Wayne County Jail Inmates v. Wayne County Board of Commissioners, Civil No. 173-217 (Cir. Ct., Wayne County, Mich., May 18, 1971). See Note, 18 Wayne L. Rev. 1601 (1972).

A similar result was reached in *Jones v. Wittenberg,* where the court interpreted certain regulations of the Toledo District Board of Health as being applicable to the Lucas County Jail.[85] This approach could be used in Massachusetts if a court were willing to interpret the state sanitation code as being applicable by analogy, for unlike the Michigan laws which specifically apply to jails, Massachusetts has no such provision in its code.[86]

A court could also formulate guidelines for relief by adopting the standards promulgated by either the American Correctional Association[87] or the Federal Bureau of Prisons.[88] Reference to these sources was made in several suits challenging the use of solitary confinement in prisons.[89] Lastly, it is suggested that state statutes providing for minimum standards for jails could be an appropriate grounds upon which to base relief.[90] Unfortunately, the Massachusetts legislature has failed to provide any comprehensive standards governing conditions, maintenance, and administration of jails.[91]

Although the judiciary has provided extensive relief in recent years for inmates in both prisons and jails, it is clear that "[c]ourts can perform only a small part of the role of overseeing the correctional system."[92] Courts are limited to ordering injunctive or declaratory relief affecting only one institution at a time; they cannot institute rehabilitative programs, allocate the funds for new jails or additional personnel, or hire qualified staff.[93] Thus, the solutions to the complex problems in our jails and prisons will ultimately rest with the legislatures.

---

85 330 F. Supp. 707, 715-16, 721 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

86 Massachusetts Department of Public Health, State Sanitary Code, Art. II (1969), adopted pursuant to G.L. c. 111, §5.

87 The American Correctional Association, Manual of Correctional Standards (3d ed. 1966).

88 Bureau of Prisons, U.S. Department of Justice, Manual of Policy Statements (Nov. 28, 1966).

89 See, e.g., Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967); Jordan v. Fitzharris, 257 F. Supp. 674, 683 (N.D. Cal. 1966). See generally Hirschkop & Milleman, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 820-21 (1969). For a criticism of this approach, see Turner, Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation, 23 Stan. L. Rev. 473, 511 (1971).

90 See, e.g., Holland v. Donelon, No. 71-1442 (E.D. La. June 6, 1973), summarized in 2 Prison L. Rptr. 375 (1973); Taylor v. Sterrett, 344 F. Supp. 411 (N.D. Tex. 1972).

91 See G.L. c. 127, §§1-151. Although this chapter covers prison and jail conditions and administration, few standards for detainees are provided, i.e., a physical examination is required in both prisons and jails for inmates who are committed for 30 days or more, id. at §16; inmates are not to occupy the same room unless the crowded state of the institution so requires, id. at §22; detainees are not to be confined with convicts, id.; and limitations are placed upon the use of isolated units, id. at §§40-41.

92 Goldfarb & Singer, Redressing Prisoners' Grievances, 39 Geo. Wash. L. Rev. 175, 320 (1970).

93 See Jones v. Wittenberg, 330 F. Supp. at 712-13.

Although a cogent argument can be made for the abolition of jails due to the social[94] and economic[95] costs to society, it is unlikely that this extreme step will be taken in the near future. Nevertheless, many realistic legislative reforms designed to relieve overcrowding and to limit the length of stay in jails have been suggested.[96] The first and most obvious measure is to provide defendants with a "speedy trial" as required by the U.S. Constitution.[97] The court in *Eisenstadt* found that the average time spent by detainees awaiting trial in Suffolk Superior Court is from five to six months, except that defendants charged with capital crimes customarily wait eight months to a year or longer.[98] The court attributed this delay partially to

> a puzzling refusal by a majority of Massachusetts legislators to increase the size of the state trial court. . . . The total annual cost to the Commonwealth of the increases sought would be less than the cost of constructing a single mile of superhighway. Yet since 1967 the legislators have turned a deaf ear.[99]

Additional suggestions for limiting the length of detention include mandatory release after a determined period of dentention,[100] and giving priority on court calendars to those in jail.[101] Other corrective measures designed to alleviate overcrowding include transferring sentenced prisoners in detention facilities to state prisons and removing convicted alcoholics and drugs addicts to rehabilitation programs.[102]

Lastly, it is submitted that the most effective remedial measure is legislation that establishes procedures designed to ensure the release of most accused persons. For instance, Massachusetts has recently enacted a Bail Reform Act[103] which provides that a defendant's ties to his community, rather than the seriousness of his charge and past convictions, are the most important determinants in any decision whether to detain

---

94 See President's Commission on Law Enforcement and Administration of Justice, Challenge of Crime in a Free Society 325, 398 (1968). See also Rankin, Effect of Pretrial Detention, 39 N.Y.U.L. Rev. 641 (1964), which reported that detained persons are more likely to be sentenced to prison than bailed persons regardless of whether high or low bail amounts had been set. Id. at 641-43.

95 In 1969, the Suffolk County jail cost the taxpayers a total of $1,060,657, or $3,536 per capita. Center for Corrections and the Law, Metropolitan Boston Detention Study 51-52 (1972).

96 See generally Center for Correction and the Law, supra note 95, at 52-98 (1972); Note, Incarcerating the Innocent: Pretrial Detention in Our Nation's Jails, 21 Buffalo L. Rev. 891, 919-28 (1972).

97 U.S. Const. amend. VI.

98 360 F. Supp. at 681.

99 Id. at 685.

100 Note, Pre-Trial Detention in New York City Jails, 7 Colum. J.L. & Soc. Prob. 350, 379 (1971).

101 Note, supra note 96, at 923.

102 Id. at 920.

103 G.L. c. 276, §58.

or release a person. The Act is applicable to all offenses not punishable by death and is based upon the fundamental premise that a person who is presumed innocent should be released on his own recognizance unless a judge believes that such a release will result in the risk of default. It has further been suggested that this expanded use of release-on-recognizance should be coupled with additional legislative reforms, such as a program allowing provisional release to the custody of a third person or half-way house, a five percent deposit bail provision, and part-time release programs for persons who must be confined to jail but want to go to school or work.[104] Pretrial release reforms are not only consistent with fundamental notions of human rights and freedoms, but they would also allow "circumvention of the tremendous social damage wrought by the moral contamination that occurs in . . . jails."[105]

ELLEN SEGAL HUVELLE

§14.3. The Massachusetts "Corrupt Practices Act": Corporate right to freedom of speech: *First National Bank v. Attorney General.*[1] In the 1972 general elections a proposed constitutional amendment empowering the General Court to impose a graduated income tax on both corporations and individuals was submitted to the voters.[2] A Massachusetts statute that had been in effect for many years, G.L. c. 55, §7, specifically prohibited corporate expenditures to influence or affect the vote on referendum questions except those "materially affecting any of the property, business or assets of the corporations."[3] In 1962 the Supreme Judicial Court, in construing the statute, held that a proposal to allow the imposition of graduated taxes on personal and corporate income would materially affect corporations within the meaning of section 7.[4] On June 7, 1972, before the campaign on the proposed constitutional amendment began, the General Court amended section 7 to provide that "[n]o question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation."[5] In a separate action, the General Court attached an emergency preamble to the amendment to section 7.[6] This required that the

---

104 Center for Correction and the Law, supra note 95, at 56-74 (1972).

105 McGee, The Administration of Justice: The Correctional Process, 5 N.P.P.A. J. 225, 228 (1959).

§14.3. 1 1972 Mass. Adv. Sh. 1711, 290 N.E.2d 526.

2 The proposed constitutional amendment is quoted in full in 1972 Mass. Adv. Sh. at 1712 n.2, 290 N.E.2d at 528 n.2.

3 G.L. c. 55, §7, quoted at length in the text at note 15 infra.

4 Lustwerk v. Lytron, Inc., 344 Mass. 647, 651-53, 183 N.E.2d 871, 873-75 (1962).

5 Acts of 1972, c. 458.

6 Id.

amendment become effective upon signature by the Governor, rather than after the usual ninety-day waiting period. Shortly thereafter, several large corporations instituted a declaratory judgment action challenging the constitutionality of the statutory amendment.[7] They alleged that they intended to expend funds to oppose the proposed graduated income tax.[8] The Attorney General of the Commonwealth stated that if they did, he would prosecute them for violating section 7, as amended.[9] In *First National Bank v. Attorney General,*[10] the Supreme Judicial Court declared that G.L. c. 55, §7 was ineffective to prohibit the expenditure of corporate funds to oppose the graduated income tax referendum.

Justice Quirico, in an opinion in which two other justices concurred, read the amendment to section 7 as prohibiting corporate expenditures only as to those referenda which solely concerned the taxation of the income of individuals. Since the question on the 1972 ballot concerned the taxation of corporations as well as individuals, he reasoned that corporate expenditures to influence the vote on the measure were not prohibited by the statutory amendment. Justice Quirico justified this interpretation by referring to the maxim of statutory construction which requires that, when faced with a choice between two possible interpretations of a statute, one of which raises serious constitutional questions as to the validity of the statute, a court will choose the interpretation which will not place the validity of the statute in question.[11] In a separate opinion, Chief Justice Tauro, with one justice concurring, found clear indications of a legislative intent to prohibit corporate expenditures to oppose the proposed graduated income tax amendment, but refused to enforce the statute because he found that it abridged the freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article Sixteen of the Massachusetts Declaration of Rights.[12] In the election campaign that followed, corpora-

---

7 The plaintiffs were the First National Bank of Boston, the New England Merchants National Bank of Boston, the John Hancock Mutual Life Insurance Company and the Wyman-Gordon Company. 1972 Mass. Adv. Sh. at 1712 n.1., 290 N.E.2d at 528 n.1.

8 Id. at 1712, 290 N.E.2d at 528.

9 Id. at 1712-13, 290 N.E.2d at 529.

10 1972 Mass. Adv. Sh. 1711, 290 N.E.2d 526.

11 Id. at 1735, 290 N.E.2d at 542.

12 The status of the two opinions in this case is the subject of some confusion. It is the practice of the Supreme Judicial Court to sit with only five of seven justices present. Presumably there are procedures whereby the other two justices can be called in to decide cases where there is a three to two disagreement. In any case, it seems that the circumstance of two factions reaching the same result for opposed reasons is not sufficient to warrant calling upon the other members. Since only three of the seven justices subscribed to Justice Quirico's opinion, it would seem that his opinion does not have the precedential value of a majority decision, despite representing a majority of the panel which heard the case. Chief Justice Tauro's opinion, subscribed to by only two justices, would seem to have even less precedential value, despite the fact that it is placed first in order and is referred to as the opinion of the court.

tions contributed large amounts of money in an effort to defeat the graduated income tax amendment. As a result of these contributions, opponents of the measure enjoyed a significant financial advantage over those favoring its adoption.[13] The proposed amendment was overwhelmingly defeated.[14]

This note will examine the disagreement between the justices about the meaning of the amendment to G.L. c. 55, §7 and then, assuming that the statutory amendment did prohibit expenditures to oppose the proposed constitutional amendment, will discuss the issues raised by the Chief Justice relative to the rights afforded to corporations by the constitutional guarantees of freedom of speech.

I. The Meaning of the Statutory Amendment

The relevant language of G.L. c. 55 §7, as amended in 1972, provides:

> No . . . business corporation . . . shall . . . give, pay, expend or contribute . . . any money for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. *No question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.*[15]

The administrative procedures of the court might explain why an opinion concurred in by only two justices is placed before an opinion concurred in by three. Before a case is decided, one justice is appointed to write the opinion of the court. His assignment is withdrawn only if he dissents from the *result*, but not if he concurs for reasons other than those relied on by the remainder of the court. Thus, even if his opinion is diametrically opposed to that of the other justices, and even though the adherents to another thesis outnumber the adherents to his, his opinion will be the opinion of the court.

[13] According to the files of the Division of Public Records of the Office of the Secretary of the Commonwealth, the Coalition for Tax Reform, the committee which organized proponents of the measure, collected $6,464. The Committee for Jobs and Government Economy, which opposed the graduated tax, collected $119,291. Of this amount, corporations gave approximately $92,000. The current income tax is a flat rate tax, according to which everyone, regardless of the amount of his income, pays the same percentage to the state. The opponents of the graduated income tax used their campaign funds to convince the voters that replacement of the flat rate tax with a graduated tax would actually increase the amount of tax most people would have to pay. See Boston Evening Globe, Nov. 1, 1972 at 1, and Nov. 2, 1972 at 1 and 24. See also Herald Traveler & Boston Record American, Nov. 3, 1972 at 3.

[14] The vote was 712,030 for the proposed constitutional amendment and 1,455,639 against. J. F. X. Davoren, Secretary of the Commonwealth, Election Statistics, Commonwealth of Massachusetts—1972, Publication No. 4m-4-73-074933.

[15] G.L. c. 55, §7, as amended by Acts of 1972, c. 458.

The Court split on the question of whether the language of the statute prohibited corporate expenditures to oppose a question concerning graduated taxes on corporate as well as individual income.

Chief Justice Tauro, with Justice Reardon concurring, found that the statute did prohibit corporations from making expenditures to oppose such referendum questions. He read section 7 to say that, regardless of whether a referendum question contained provisions which might materially affect a corporation, if it dealt at all with the taxation of individuals it was not to be deemed to materially affect the corporation for the purposes of the statute. The Chief Justice also noted that if the General Court had intended that referendum questions which concern *only* the taxation of individuals were not to be deemed to materially affect the corporation, it could easily have made its intent clear by placing the word "solely" before the word "concerning." He also pointed to the emergency preamble. No other question concerning the taxation of individuals was scheduled to be on the November ballot. An emergency preamble must be approved by each house of the Legislature on votes which are separate from the votes on the actual measure. The Chief Justice therefore found that the only logical explanation for this separate action was that the General Court desired to regulate the imminent campaign on this particular referendum question.[16]

Despite these arguments, Justice Quirico, joined by Justices Braucher and Kaplan, found that section 7, as amended, did not prohibit corporations from making expenditures to oppose adoption of a referendum question concerning graduated taxes on the income of individuals where the question also dealt with graduated taxes on the income of corporations. They read the statutory amendment as removing from the general prohibition only those questions which *solely* concern the taxation of the income of individuals. They were unwilling to believe that the General Court intended to suspend the "materially affecting" test whenever any part of a question submitted to the voters dealt with the taxation of the income of individuals.

Justice Quirico's interpretation was also based on the maxim of statutory construction that "[w]hen the validity of [a legislative enactment] is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court . . . will first ascertain whether a construction of the statute is fairly possible, by which the question may be avoided."[17] If the statutory amendment were interpreted to prohibit expenditures on *all* referendum proposals concerning

---

16 1972 Mass. Adv. Sh. at 1716-21, 290 N.E.2d at 531-34.

17 1972 Mass. Adv. Sh. at 1735, 290 N.E.2d at 542, quoting Crowell v. Benson, 285 U.S. 22, 62 (1932).

the taxation of individuals, regardless of the fact that other provisions of the proposal materially affected a corporation, then corporate expenditures to oppose the 1972 graduated income tax proposal would be illegal and the plaintiffs' challenge to the constitutionality of the statutory amendment would have to be faced. Justice Quirico expressed the suspicion that the decision on the constitutional issue would invalidate the statute. If, on the other hand, the statutory amendment were interpreted to prohibit corporate expenditures on those referenda questions which solely concern the taxation of individuals, the expenditures which the plaintiff corporations desired to make to oppose the 1972 graduated income tax proposal would not be illegal, and the constitutional issues would not be raised.[18]

Justice Quirico alluded to the emergency preamble only in passing.[19] It is significant that he did not attempt to refute the Chief Justice's conclusion that the only explanation for enacting it with the statutory amendment was to regulate the upcoming referenda campaign on the proposed constitutional amendment.

It is a general principle that when statutory language is ambiguous, courts attempting to construe it ought to make use of everything which may be of assistance in determining the proper application of the statutory language to the circumstances giving rise to the dispute.[20] The emergency preamble seems to be a clear indication of legislative intent. Chief Justice Tauro's argument that the 1972 graduated income tax proposal was the only referendum question to which the emergency preamble, and therefore the statutory amendment, could have referred is convincing, and stands uncontradicted by Justice Quirico.

If Justice Quirico's interpretation is to prevail, it must do so on the strength of his maxim's preference for interpretations which do not question the constitutionality of a statute. While he does not discuss the emergency preamble or what it implies about legislative intent, Justice Quirico finds that this maxim of statutory construction controls the interpretation of the statutory amendment. Whatever he sees as the

---

18 A strong argument could be made that even a referendum question solely concerning the taxation of the income of individuals materially affects the interests of the corporation. See Lustwerk v. Lytron, Inc., 344 Mass. 647, 651-53, 183 N.E.2d 871, 873-75 (1962) and text at notes 89-91 infra. It could be argued that Justice Quirico's interpretation does not preserve the constitutionality of the statute but only prevents the court from reaching the question of constitutionality in the case presently before it. This same charge has been leveled against opinions of the United States Supreme Court which have applied variants of the maxim. See United States v. CIO, 335 U.S. 106, 129-132 (1948) (concurring opinion).

19 1972 Mass. Adv. Sh. at 1732-33, 290 N.E.2d at 541.

20 See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 542 (1947), in which John Marshall is quoted. "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived . . . ." United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

implications of the emergency preamble, he considers them to be outweighed by the strength of the maxim.[21]

The maxim derives from the doctrine of the separation of powers and the limitations inherent in the judicial process.[22] A just respect for the role and prerogatives of the legislative branch has made courts reluctant to hold any act of a legislature unconstitutional. If there are two possible interpretations of a statute, one of which raises serious constitutional questions while the other does not, it is felt to be an infringement on the legislature's proper role to assume that it intended to pass an act of doubtful constitutionality when another "fairly possible" interpretation would unquestionably be valid.[23]

The beneficial effects of this doctrine may be seen in situations where the constitution allows the legislative branch only a portion of the powers sought to be exercised through a statute and where the boundaries of the constitutionally permissible exercise of power can be clearly delineated. If a court employs the maxim to limit legislative intent to what is constitutionally permissible, the legislature will not be completely frustrated in its attempt to deal with the situation.[24] Quirico's interpretation could be seen as limiting the meaning of the statutory amendment to avoid raising constitutional questions. But to interpret the statutory amendment to G.L. c. 55, §7 so that it does not even refer to the graduated income tax referendum is to conclude that the General

---

21 In the legislative session following the decision in *First National Bank*, the General Court amended G.L. c. 55, §7 by inserting the word "solely." The statute then read: "No question submitted to the voters *solely* concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." Acts of 1973, c. 348 (emphasis added). This conformed the statute to Justice Quirico's interpretation but did not necessarily imply that his interpretation of the legislative intent in passing the 1972 statutory amendment was correct. In view of the opinions in *First National Bank*, the General Court could reasonably have assumed that a statute would be declared unconstitutional in which corporate expenditures were prohibited on referendum questions concerning the taxation of individuals regardless of whatever else the same referendum question might concern.

22 The policy's ultimate foundations . . . lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.
Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).

23 United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1909).

24 See, e.g., Demetropolos v. Commonwealth, 342 Mass. 658, 660, 175 N.E.2d 259, 261 (1961). See text at note 33 infra.

Court had no logical reason to affix the emergency preamble to the statutory amendment and renders that action superfluous.

The proper use of the maxim has been the subject of controversy among judges and commentators.[25] Most of the disagreement has centered around the issue of the proper weight to be afforded the maxim when it conflicts with other evidence of legislative intent.[26] While there is some room for dispute, employing the maxim to render meaningless a separate and distinct action of the legislature seems to be a misuse of it. An obvious corollary to the principle of the separation of powers and the respect for enactments of the legislative branch of government is that the judiciary can invalidate an act of the legislature only if it finds that the act violates the constitution. The maxim is applied prior to reaching any decision on the issue of constitutionality, but only upon the court's doubt that the outcome of that inquiry would favor the validity of the statute.[27] It would seem that the General Court, having gone to the trouble of passing a separate resolution making the statutory amendment effective for the election of 1972, would have preferred a full hearing on the constitutionality of that attempt before it was completely frustrated.

Justice Quirico cited numerous precedents for his interpretation and asserted that they required the result he reached. Actually, all but one of the precedents cited stand for variants of the general proposition that courts should be reluctant to declare statutes unconstitutional. They do not speak to the crucial issue of whether signs of legislative intent which clearly indicate a desire on the part of the legislature to pass a statute of doubtful constitutionality can be outweighed by the maxim. For example, *Perkins* v. *Westwood*[28] and the cases cited therein[29] are used as authority for the proposition that a statute "will not be declared void unless it is *impossible* by any reasonable construction to interpret its provisions in harmony with the Constitution."[30] This language is derived from a different maxim of statutory construction which provides that:

> where a statute has been passed which from its nature is necessarily to be referred to the exercise of powers granted by a particular

---

25 See Bernard, Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment, 50 Mich. L. Rev. 261 (1951); Note, 53 Colum. L. Rev. 633 (1953); Note, 22 Md. L. Rev. 348 (1962).

26 Some commentators have found that the maxim establishes a presumption that in the absence of a clear indication to the contrary the legislature did not intend to exceed its constitutional powers. See, e.g., Bernard, note 25 supra. Others have hypothesized that the weight of the maxim varies with the strength of the controversy around the constitutional issues in question. Note, 53 Colum. L. Rev. 633 (1953).

27 United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1909).

28 226 Mass. 268, 115 N.E. 411 (1917).

29 Id. at 271, 115 N.E. at 412.

30 1972 Mass. Adv. Sh. at 1735, 290 N.E.2d at 542, quoting Perkins v. Westwood, 226 Mass. 268, 271, 115 N.E. 411, 411-12 (emphasis added). The quoted language is dicta.

> clause in the constitution, under one branch of which it would be clearly invalid, but under another it might be sustained as being within the limits of constitutional authority, it is the duty of this court to presume that the legislature intended to act under that portion [of the constitution] which will support the statute and give it validity, unless [the statute's] language is so clear and explicit as to render it impossible by any reasonable construction so to interpret it.[31]

This second maxim is based on the same general judicial reluctance to invalidate acts of the legislature as the maxim sought to be applied by Justice Quirico. However, Justice Quirico's maxim seeks to determine legislative intent, while the other refers to the question of which grant of legislative power will be used to measure the validity of a statute whose meaning is clear or whose meaning has already been determined. In the effort to determine whether unambiguous legislative intent is constitutional, respect for a co-equal branch of government requires that the court give the legislature a fully considered decision on the constitutional question before refusing to enforce its intent. If *any* provision of the constitution would sustain the power of the legislature to enact the statute, it must be upheld. The only exception is where it is impossible by any reasonable construction to interpret the statute with reference to that constitutional provision which would have to sustain it. On the other hand, if the court fails to construe a statute in a way clearly favored by indicia of legislative intent, it will have frustrated that intent without affording the legislature a full decision on the constitutional issue. This result is contrary to the respect owed to the legislative branch by the judiciary. Thus, it seems that the maxim should be limited to those cases in which legislative intent will be saved or in which there are two *fairly possible* interpretations.

Only one case cited by Justice Quirico, *Demetropolos* v. *Commonwealth*,[32] supports the use of the maxim to outweigh the usual signs of legislative intent.[33] The defendant in *Demetropolos* was prosecuted for

---

31 Commonwealth v. People's Five Cents Savings Bank, 87 Mass. (5 Allen) 428, 431-32 (1862). While it is not immediately clear from *Perkins* that the quoted language derives from the second maxim, each of the cases cited in *Perkins* as authority for the language quoted by Justice Quirico employ the second maxim without exception. Those cases are alluded to by Justice Quirico as authority for the quoted language. Only one of those cases mentions the maxim sought to be applied by Justice Quirico. In that case it plays only a minor role and is overshadowed by the second maxim.

32 342 Mass. 658, 660, 175 N.E.2d 259, 261 (1961).

33 Except for *Demetropolos*, Justice Quirico's Massachusetts citations either deal with other maxims derived from the courts' reluctance to declare legislative enactments unconstitutional or with the maxim sought to be applied by him, but in circumstances where extrinsic signs of legislative intent are absent or point to the same interpretation favored by the maxim. The circumstances of *First National Bank* include clear in-

selling pornographic magazines. The statute under which he was charged did not expressly require a finding that the seller was aware that the magazines were pornographic. Another statute prohibited the sale of pornographic books and was identical to the statute prohibiting the sale of pornographic magazines except that it did expressly require a finding of intent to sell pornography. The legislature is presumed to know its own enactments. The usual inference drawn from statutes which are identical except for a provision included in one but not in the other is that the difference was intentional. The omitted provision will not be read in by implication. This rule would ordinarily have led the court in *Demetropolos* to find that the statute prohibiting the sale of pornographic magazines did not include intent as an essential element of the crime. The United States Supreme Court, however, had recently ruled that a statute criminalizing the sale of pornographic materials must require a finding of intent in order to pass constitutional muster.[84] The Supreme Judicial Court viewed the statutory language as having two possible interpretations. One, following the usual rule of statutory construction, would not imply the requirement of a finding of intent. The other would require such a finding for conviction. The Supreme Judicial Court then applied the maxim and, despite the implications of the usual rule of construction, found an implied requirement of intent to sell pornography.[85] The situation in *Demetropolos* is distinguishable from that of *First National Bank* because the force of a separately enacted emergency preamble would seem to be greater than the implications of the differences between similarly worded statutes. More importantly, the Court in *Demetropolos* was apparently trying to save what it could of the statute. While Justice Quirico can be said to have saved some of the statutory amendment, he makes no effort to show that he saved any of the emergency preamble.

Justice Quirico also cites *United States* v. *UAW*,[86] a United States Supreme Court case dealing with the prohibition of union "expenditures" in federal elections.[87] *UAW* does not apply the maxim, and in

---

dicia of legislative intent pointing to an interpretation of the statute which would raise constitutional issues. They are, therefore, different in important respects from the circumstances of the cases cited. Justice Quirico described these cases as justifying the application of the maxim in the circumstances of *First National Bank* but he gave no reasoning to justify the extension of their holding to cover the changed circumstances.

84 Smith v. California, 361 U.S. 147 (1959).

85 342 Mass. at 661; 175 N.E.2d at 262.

86 352 U.S. 567 (1957).

87 The relevant statute, 18 U.S.C. §610, prior to its amendment by the Federal Election Campaign Act of 1971, provided:

> It is unlawful . . . for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in . . .

fact refuses to apply it in the presence of clear indications of legislative intent. A union was prosecuted for sponsoring a television program in which a candidate for Congress was endorsed. The lower court attempted to avoid constitutional issues and applied the maxim to carve out an exception to the total prohibition.[38] It interpreted the term "expenditure" so as not to include funds spent to purchase television time and dismissed the indictment. The Supreme Court reversed and remanded for trial and determination of the statute's constitutionality.[39] In reviewing the history of congressional attempts to purify elections, the Court found, in the committee reports on the bill that became the statute and in the remarks of the sponsor of the bill, an intent to include the purchase of television time for a candidate within the meaning of the term "expenditure." The maxim was held not to apply.[40]

The voice of a majority of the legislature voting in favor of an emergency preamble is, if anything, an even stronger indication of legislative intent than the history of the statute, the committee reports and the remarks of the sponsor. If these considerations are strong enough to prevent the maxim from applying, an emergency preamble should also be strong enough to prevent its application.[41]

When beneficially used, the maxim preserves legislative intent. But its use always involves a tension between the desire to avoid constitutional issues and the courts' responsibility to come to a full decision on the constitutional issue actually raised before it refuses to enforce legislative intent. Use of the maxim to render meaningless the separate action of the legislature in passing the emergency preamble does not serve legislative intent but rather sacrifices it without a decision on the constitutional issue. Based on legislative intent, the more reasonable interpretation of the statute seems to be that of Chief Justice Tauro.

Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . .

38 United States v. UAW, 138 F. Supp. 53 (E.D. Mich. 1956). In this case, the strength of the maxim was enhanced in the light of Congress' express desire not to pass an unconstitutional statute.

39 *UAW* is an excellent example of how the use of the maxim differs from the use of other principles designed to avoid the decision of constitutional issues. While finding that the expression of legislative intent was so strong that the constitutional issue was not to be avoided by strained interpretation, the Court declined to decide the important constitutional issue presented by the case until it had the benefit of the lower courts' consideration of it.

40 352 U.S. at 589.

41 *UAW* is one of three United States Supreme Court cases which construed the former version of 18 U.S.C. §610, note 37 supra, cited by Justice Quirico and in which statutory construction is discussed. The other two cases are United States v. CIO, 335 U.S. 106, 120-21 (1948), and Pipefitters Local 562 v. United States, 407 U.S. 385, 401 n.12 (1972).

II. Freedom of Speech and Corporate Expression

Chief Justice Tauro, joined by Justice Reardon, felt that he could not ignore the emergency preamble. He interpreted the statutory amendment to mean that *no* referendum question which concerned the taxation of the income of individuals could be considered to "materially affect" the interests of the corporation within the meaning of G.L. c. 55, §7,[42] regardless of other parts of that referendum that might in fact materially affect corporations.[43] He therefore found corporate expenditures to influence the vote on the 1972 graduated income tax proposal prohibited by G.L. c. 55, §7.

The Chief Justice divided his analysis into two parts. First, he found that corporations are afforded at least some First Amendment rights by the due process clause of the Fourteenth Amendment with respect to referenda which materially affect them. The legal theory from which he derived these rights is not clearly spelled out in the opinion. Freedom of speech has been held to be one of the fundamental personal rights and liberties protected by the due process clause.[44] Chief Justice Tauro's opinion indicates that he based the existence of a corporate right of free speech upon the premise that corporations are "persons" within the meaning of the due process clause, and therefore qualify for its protection. However, the only reason expressly given to justify the result of his holding relates to the right of the voters to be informed on referendum issues. This implies a rationale for the decision which extends constitutional protection to corporate speech, not to protect the right of corporate "persons" to speak, but to protect the right of the "persons" who make up the general public to hear what the corporations have to say.

Once he determined that corporate speech is constitutionally protected, the Chief Justice turned to the question of whether the prohibition enforced by the statute was a permissible regulation of corporate speech. The state may not regulate constitutionally protected speech unless certain stringent criteria are met. The interest of the state must be a compelling one and the means employed to further that interest must be the least restrictive which would be effective to attain the state's goal.[45] The Chief Justice concluded that

---

42 The relevant portions of G.L. c. 55, §7 appear in the text at note 15 supra.

43 1972 Mass. Adv. Sh. at 1716-21, 290 N.E.2d at 531-34. For a more general discussion of this problem, see Garrett, Corporate Contributions for Political Purposes, 14 Bus. Law. 365, 368 n.7 (1959).

44 See, e.g., Gitlow v. New York, 268 U.S. 652, 666 (1925); Near v. Minnesota, 283 U.S. 697, 707 (1931). The Chief Justice also mentioned the coverage of corporations as persons under the equal protection clause of the Fourteenth Amendment. It would seem that the meaning of the word person as used in both these clauses of the Amendment would be the same. In any case, his analysis of the constitutional implications of the statute refers only to due process standards.

45 See, e.g., Thomas v. Collins, 323 U.S. 516, 530 (1945); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963); Bridges v. California, 314 U.S. 252, 263 (1941).

> [a]lthough a corporation's expression on political issues is subject to some restraint, we hold that in the absence of a compelling State interest showing that *any* amount of corporate expression, however small, on election questions results in undue influence over the electoral process, corporations may not be *totally* prohibited from expressing their views on issues that materially affect them. The voters have a right to be informed on referenda issues. The statutory amendment does not meet the requirements of a narrowly drawn law, circumscribing only the evil to be curtailed.[46]

The final portion of this comment will first describe the limits of the holding of the Chief Justice's opinion. It will then examine the basis on which the Chief Justice extends constitutional protection to corporate speech. Finally, it will discuss the Chief Justice's conclusion that a complete prohibition of corporate speech is *not* the least restrictive means of satisfying the state's compelling interests in limiting corporate speech.

The holding of the Chief Justice's opinion can be stated very narrowly. It deals with restrictions on corporate expenditures to influence the vote on substantive proposals submitted to the people for their approval or rejection. It refrains, at least ostensibly, from dealing with campaigns for elective office. In the case of a referendum question, the state's primary interest is in preventing one side from being so well financed that the debate over the proposal is not a clear exposition of the issues. In elections at which public officials are to be chosen the state has the additional interest of preventing corruption. The opinion does not address the question of whether the added weight of the state's interest in preventing corruption would justify a complete prohibition of corporate speech in elections at which public officials are to be chosen. Were the question of a corporation's right to contribute funds in aid of a candidate for public office ever presented, its resolution would not then be conclusively governed by considerations dealt with by Chief Justice Tauro in *First National Bank.*

Another situation outside the ambit of the holding is the matter of the corporate right to speak on questions submitted to the voters which do not materially affect the interests of the corporation.[47] The Chief Justice

---

46 1972 Mass. Adv. Sh. at 1729-30, 290 N.E.2d at 539. The Chief Justice also found corporate speech to be protected by Article Sixteen of the Massachusetts Declaration of Rights. Article Sixteen protects the "liberty of the press" and right of "free speech." Chief Justice Tauro saw "no reason why such freedoms should not also be afforded to the corporations in the instant case . . . ." Id. at 1726, 290 N.E.2d at 537. The Chief Justice gave no separate analysis of whether the statutory amendment exceeded the General Court's power to regulate speech protected by Article Sixteen. Evidently he was persuaded that, at least as applied to the circumstances of *First National Bank,* Article Sixteen echoed the guarantees of the federal constitution. A similar approach was taken in Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 69 N.E.2d 115 (1946), in which the Supreme Judicial Court decided an Article Sixteen question on the basis of First Amendment precedents.

47 1972 Mass. Adv. Sh. at 1724, 290 N.E.2d at 536.

specifically excluded corporate speech on such referenda from the scope of his holding.[48] In so doing, he seems to be leaving open the possibility that corporations might be found to have no right to speak on questions submitted to the voters which do not materially affect corporate interests. Further, the opinion does not attempt to delineate the particular aspects of the proposed graduated income tax amendment which do materially affect the interests of the plaintiff corporations. The 1972 graduated income tax proposal would have allowed the General Court to impose graduated taxes on both corporate and personal income. It is obvious that such a proposal materially affects the interests of corporations. It is also obvious that a proposal to impose a tax on corporate income alone would materially affect the interests of corporations. The questions of whether a referendum which solely concerned the taxation of the income of individuals would also be found to materially affect a corporation and whether a prohibition on corporate expenditures to influence the vote on such a referendum question would therefore be unconstitutional are not determined.[49] Finally, the opinion does not purport to set limits upon the power of the General Court to regulate corporate expenditures to influence the vote on questions submitted to the people, except to disallow a complete prohibition of corporate speech regarding questions that materially affect the interests of the corporation.[50] Here the Chief Justice seems to have suggested that the imposition of less restrictive, but still severe, limits on corporate political expenditures might be upheld.[51] Narrowly stated, Chief Justice Tauro's opinion only finds unconstitutional complete prohibitions on corporate expenditures to influence the vote on referendum questions which "materially affect" the interests of a corporation.[52]

III. The Basis of the Corporate Right to Speak

The First Amendment prohibits the federal government from abridging the freedom of speech.[53] Its restrictions have been applied to the states by the Fourteenth Amendment.[54] The traditional means of invok-

---

48 Id.

49 Referenda solely referring to the taxation of individuals might very well be held to materially affect corporations. See text at notes 91-92 infra.

50 1972 Mass. Adv. Sh. at 1730, 290 N.E.2d at 539.

51 Id.

52 Id.

53 The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of their grievances." U.S. Const. amend. I.

54 The due process clause of the Fourteenth Amendment provides that: "No state shall . . . deprive any person of life, liberty, or property without due process of law

ing the protection of these provisions is for the aggrieved party to assert that his rights under the Constitution have been violated by the state. Under the traditional analysis, a party would argue that he was a "person" who was being deprived of his "liberty" to speak.[55]

An alternate way to justify the extension of freedom of speech to a party is to find that the protection of the rights of someone else depends on giving rights to the claimant.[56] The heart of such an approach are the premises that the people are the ultimate sovereign; that public discussion is the only way the people can decide a public issue; and that the First and Fourteenth Amendments guarantee them the public discussion that they need for the proper exercise of their sovereign power.[57] If a given type of speech will help the people to decide the issues before them, their right to hear that speech gives the speaker the right to say it, even though he may have no independent right to speak on his own. Under this analysis, the "persons" who are being protected by the Fourteenth Amendment are the members of the general public. The "liberty" being protected is their right to hear.

The Chief Justice addresses the threshold question of whether corporations can lay any claim at all to constitutional protection, with the justification for that protection to be found in the nature and status of corporations themselves. He explicitly found that corporations are "persons" within the meaning of the due process clause of the Fourteenth Amendment and that their right to speak is a "liberty" protected by that Amendment.[58] In two of the cases which the Chief Justice cited as pre-

. . . ." U.S. Const. amend. XIV. Through this language the First Amendment has been applied to the states. See Gitlow v. New York, 268 U.S. 652, 666 (1925).

55 See, e.g., Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

56 See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

57 Id. at 267-83. In *New York Times* the police commissioner of a southern town obtained a libel verdict in state court against the Times for printing an advertisement purchased by civil rights activists which contained some inaccuracies marginally relating to the commissioner. A verdict of $500,000 was awarded to the plaintiff. The Times asserted that the state libel laws were unconstitutional abridgements of freedom of speech and of the press. The Supreme Court agreed, holding that inaccurate statements about public officials were inevitable in the "uninhibited, robust and wide-open" public debate envisioned by the First Amendment. Id. at 270. The Court reasoned that subjecting the people and the press to the danger of large libel judgments where statements about public officials were merely inaccurate, would cause them to withhold comments unless they were sure that their allegations were true. The Court was of the opinion that such "self-censorship" would prevent full discussion and disclosure of the conduct of public officials. The Court regarded such discussion as protected by the First Amendment and essential to a democratic society. In order to protect the right of the people to hear the facts essential to the intelligent exercise of their franchise, the right of others to engage in debate about public officials without this restraint must be guaranteed.

58 The Chief Justice quoted Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) in noting that " 'a corporation is a "person" within the meaning of the equal protection and due process clauses . . . .' " 1972 Mass. Adv. Sh. at 1722-23, 290 N.E.2d at 535.

cedents for his decision, *Covington & Lexington Turnpike Rd. Co. v. Sanford*[59] and *Smyth v. Ames*,[60] the Supreme Court found that states had taken corporate property without due process of law in violation of the Fourteenth Amendment. *Covington* and *Smyth* provide no reasoning to support their assertion that corporations are "persons" within the meaning of the Fourteenth Amendment.[61] The first case cited by both of them is *Santa Clara County v. Southern Pacific R.R.*[62] The portion of that case in which corporations were held to be protected by the due process clause was affirmed by the Supreme Court without comment. The lower court had reasoned that since the value of the shares of corporate stock held by individuals is dependent on the value of the property owned by the corporation, any seizure of corporate property by the government would necessarily reduce the value of each share owned by an individual. Such a reduction in the value of stock takes the individual shareholder's property. Therefore, the conditions under which the government may take corporate property must be the same as the conditions under which it may take an individual's property, *i.e.*, only with due process of law.[63] All of the other authorities on which *Covington* and *Smyth* rely for their flat statements that corporations are "persons" within the meaning of the due process clause depend on the rationale of the lower court opinion in *Santa Clara*.[64] Despite the fact that for decades the Supreme Court has

---

The Attorney General attacked the proposition that corporations were "persons" whose "liberty" was protected by the Fourteenth Amendment. He cited a number of cases which had specifically rejected that proposition, e.g., Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906). 1972 Mass. Adv. Sh. at 1722, 290 N.E.2d at 535. He attempted to distinguish prior cases which had held corporations to be protected by First Amendment liberties applied to the states by the due process clause of the Fourteenth Amendment by showing that all of those corporations had been in the business of communications and were classifiable as "press." The plaintiffs in *First National Bank* were engaged in general business pursuits and the Attorney General argued that the "liberties" of such corporations had never been found to be protected, and in fact, had been found to be unprotected.

The Chief Justice went to great lengths to refute the importance of the press/non-press distinction. He noted cases where corporations involved in the production of motion pictures, books and magazines sold for a profit had been found to be protected from state abridgement of their activities. However, he could find no convincing reason to deny the distinction's validity and was forced to make the lame conclusion that "we believe it is a distinction that does not defeat the Plaintiffs' right to First Amendment protection . . . ." 1972 Mass. Adv. Sh. at 1724, 290 N.E.2d at 536.

59 164 U.S. 578 (1896).

60 169 U.S. 466 (1898).

61 164 U.S. at 592; 169 U.S. at 522.

62 118 U.S. 394, 396 (1886), aff'g County of Santa Clara v. Southern Pacific R.R., 18 Fed. 385 (C.C.D. Cal. 1883).

63 County of Santa Clara v. Southern Pacific R.R., 18 Fed. 385 (C.C.D. Cal. 1883).

64 See Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888); Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 28 (1889); Charlotte, C. & A. R.R. v. Gibbes, 142 U.S. 386, 391 (1892); Gulf, Colorado & Santa Fé Ry. v. Ellis, 165 U.S. 150, 154 (1897).

relied on flat assertions that corporations are "persons" protected by the due process clause, it appears that corporate property is protected by the due process clause only because the protection of corporate property is essential to the protection of the personal property of the owners of the corporate stock. The "persons" being protected are the individuals who own stock.[65] The "property" being protected is the value of that stock.

Strictly applied, the *Santa Clara* approach is not authority for a corporate right to speak as a means of protecting the right to speak of the owners of the corporation. By prohibiting corporations from speaking, the government does not deprive the natural persons who own the corporation of their own right to speak. Thus, although the value of each individual stockholder's property is necessarily reduced when corporate property is reduced, the individual stockholder's right to speak and expend funds for political purposes remains unaffected when the corporation's ability to expend funds on political issues is restricted.[66] However, there is a right of natural persons which might not be protected unless corporate speech is protected, *i.e.,* the right of the general public to be informed on referendum issues. Granting constitutional protection to corporations when such protection is necessary to secure the rights of the *owners* of the corporation is one step removed from granting constitutional protection to corporations when such protection is necessary to secure the rights of natural *persons other than the owners.*

That step seems to have been taken in *Grosjean v. American Press Co.*[67] and its progeny,[68] which were also cited by the Chief Justice in his attempt to demonstrate that corporation themselves are "persons" within the meaning of the due process clause. *Grosjean* involved a challenge, by corporations which owned and operated newspapers, to a statute

---

[65] The situations in which corporations have been held to be "persons" within the meaning of the due process clause all appear to be circumstances in which corporate property was held to be protected or where corporations in the business of communications successfully maintained that their freedom of the press was being violated.

[66] It could be argued that the owner's right to associate for political purposes was being abridged by the prohibition on corporate political expenditures. The United States Supreme Court has disposed of similar contentions in its interpretation of the former version of 18 U.S.C. §610. That statute contained a flat prohibition on union activity in federal elections. In Pipefitter's Local 562 v. United States, 407 U.S. 385 (1972), the Court interpreted the prohibition so as not to forbid voluntary associations which paralleled the structure of the union and whose funds were solicited by the same union representatives who collected dues. By analogy, the Court arguably would allow some corporate support for efforts of controlling shareholders or officers to solicit funds from shareholders and employees. The associational rights of shareholders would thus be preserved. However, the requirement that the funds of the voluntary association be kept separate from accumulated corporate funds would protect the public's interest in limiting corporate political expenditures.

[67] 297 U.S. 233, 244 (1936).

[68] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

which imposed an advertising tax on all newspapers with a circulation over a certain number. The Supreme Court found such taxes to be among the restraints on the press which were often imposed under English law of the colonial period and which the First Amendment had been specifically intended to deny to the new government,[69] and explicitly stated that corporations are "persons" protected by the due process clause of the Fourteenth Amendment,[70] citing *Covington* and *Smyth*.[71] However, the root justification for the result reached by the Court is the function of a free press in providing the information necessary to enable the people to make informed decisions on public issues.[72] In *Grosjean* it seems clear that the Court based its decision on the latter consideration. *Covington*[73] and *Smyth*,[74] the cases cited to support the Court's statements that corporations are protected by the due process clause, involved challenges to state action depriving corporations of property. *Grosjean* involved a tax which, if unconstitutionally applied, would result in the deprivation of corporate property, but the Court dismissed the importance of these considerations.

> The tax here involved is bad not because it takes money from the pockets of [the corporations]. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.[75]

For *Grosjean* to require the result which Chief Justice Tauro reaches in *First National Bank,* the freedom of expression of general business

---

69 297 U.S. at 245-49.

70 Id. at 244.

71 Id.

72 The Court in *Grosjean* quoted 2 Cooley's Constitutional Limitations 886 (8th ed.): The Evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.
297 U.S. at 249-50.

73 164 U.S. 578 (1896).

74 169 U.S. 466 (1898).

75 297 U.S. at 250. Minority opinions in two United States Supreme Court cases also support the proposition that corporations have a right to speak which is derived from the people's right to hear, as opposed to any inherent right in corporations. See United States v. CIO, 335 U.S. 106, 144, 154-55 (1948), and United States v. UAW, 352 U.S. 567, 593, 597 (1957). See also King, Corporate Political Spending and the First Amendment, 23 U. Pitt. L. Rev. 847 (1962).

corporations must be required for the proper functioning of democracy.[76] The Chief Justice assumes that a prohibition on corporate speech will completely silence the corporate point of view.[77] If this is true, in view of the important role of corporations in American life, the people would not be provided with sufficient information to make intelligent decisions at the polls.

In this way the Chief Justice's assertion that the people have a right to be informed comes together with the holdings of the cases he uses as authority to support his conclusion. However, the Chief Justice never distinguished between a corporate right to speak derived from rights inherent in corporations as "persons" and a corporate right to speak derived from the people's right to be informed. This confusion allowed him to make assumptions which, when viewed in the framework of the people's right to hear, do not seem as self-evident as they do when viewed in the framework of an inherent corporate right to speak.

Specifically, if corporations were found to have an inherent right to speak, it is obvious that a complete prohibition on corporate speech would violate their First and Fourteenth amendment rights. But when the complete prohibition is viewed from the standpoint of the people's right to hear, it is not self-evident that a complete prohibition on corporate political speech would deprive the people of exposure to the corporate point of view. Many corporations will have spokesmen in those citizens whose financial interests in the corporation are sufficient to motivate them to protect its interests. This could include directors and employees as well as stockholders. Thus, a statute prohibiting the use of corporate funds in political campaigns would, for many corporations, merely throw the burden of paying for political expression on the real parties in interest, *i.e.,* the citizens with a stake in the corporation. The Chief Justice, viewing the prohibition from the point of view of a right to speak inherent in corporations, did not discuss this question. From the standpoint of the right of the hearer, the question is a close one and needs to be discussed.[78] It is submitted that if the full Court ever con-

---

[76] *Grosjean* has been referred to as a precursor of the line of cases granting First Amendment rights on the basis of the people's right to hear. Comment, Freedom to Hear: A Political Justification of the First Amendment, 46 Wash. L. Rev. 311, 335 (1971). The *Grosjean* Court's citations of *Smyth* and *Covington* and its reliance on flat statements that corporations are protected by the due process clause might possibly be traced to its uncertainty about the right of the hearer rationale. Since the decision in *Grosjean*, however, the right of the hearer has become an established feature of First Amendment analysis. See, e.g., New York Times v. Sullivan, 376 U.S. 254 (1964).

[77] 1972 Mass. Adv. Sh. at 1721, 1724, 1729, 290 N.E.2d at 534, 536, 539. The Chief Justice does not provide any reasoning or factual material to support his assumption.

[78] It is conceivable that there may be some corporations whose stock is so widely dispersed and whose officers serve at such low rates of compensation that no individual will have the incentive to protect his interests by giving voice to its views. It may be important to the public that the views of such corporations be aired, and to enforce

siders the constitutionality of legislative prohibitions on corporate speech, the justices should consider it in the framework of the people's right to hear. If they do, the first question to be answered is whether a complete prohibition on corporate speech would effectively silence the corporate point of view as to any issue. If it is found that a prohibition on corporate speech will effectively style some corporate points of view, the constitutionality of the statute will turn on whether the public's interest in hearing the corporate speech is outweighed by the state's interest in limiting it.[79]

In *First National Bank* two justices found a prohibition on corporate speech to be unconstitutional and three justices had serious doubts about its constitutionality. Regardless of the theory on which these decisions were based, prohibitions on corporate speech do not seem to be favored by the Supreme Judicial Court. Whatever the outcome of any future dispute over the constitutionality of a complete prohibition on corporate political speech, it is hoped that a decision will be based exclusively on the people's right to hear and not be confused with the consideration of any inherent right of corporate "persons" to speak.[80]

IV. The Limitation of the Holding to Those Referenda Questions Which Materially Affect the Corporation

The Chief Justice found that corporations are protected by constitutional guarantees of freedom of speech "at least in circumstances where they seek to express their views to the public on referenda issues that materially affect them."[81] This phrase was appended to his finding that

---

a prohibition on corporate speech that would muzzle such views would be counter to the public interest.

79 One interest which the state has in limiting or prohibiting corporate speech has not been mentioned in the literature and should be noted; i.e., that of refraining from fostering inequalities in the ability of citizens to express themselves. Cf. Columbia Broadcasting Sys. v. Democratic Nat'l Committee, 412 U.S. 94, 121 (1973). Corporate speech is controlled by those who control the corporation, although they may not necessarily own all or even a majority of the stock. Furthermore, if the stockholder or director had to pay for political advertisements out of his own stock dividends or salary, he would have to pay graduated income taxes on such funds. On the other hand, employees, conservationists and consumers have no access to corporate speech and must pay personal income taxes on any funds used for political contributions above certain small exemptions.

80 The state's next move may be to put severe limits on corporate speech. The Chief Justice left the door open for this type of regulation. 1972 Mass. Adv. Sh. at 1730, 290 N.E.2d at 539. The fact that many corporations have shockholders, employees or directors who will express their point of view lessens any interest in allowing corporate speech, and the state's interests in preventing corruption and undue influence and in limiting the advantages in expressing political views that the tax and incorporation laws give to those in control of corporations would seem to justify a severe restriction on corporate speech.

81 1972 Mass. Adv. Sh. at 1724, 290 N.E.2d at 536.

corporate speech is protected, and is not discussed further. It may merely represent an attempt to limit the scope of the opinion to the circumstances of *First National Bank*. Nevertheless, as it is used, the limitation of constitutional protection of corporate speech to referendum issues which materially affect the interests of the corporation may also be interpreted to mean that corporate speech needs some special qualification to claim constitutional protection. As such, it may be viewed as a new test for determining the constitutional protection afforded to corporate speech.

Except to say that the people have a right to be informed on referendum issues, the Chief Justice said nothing about how a constitutional "materially affecting" test would segregate expression that the First Amendment was intended to protect from expression which is not sufficiently related to First Amendment goals to merit its protection. One possible dividing line suggests itself. Corporations play such an important role in the modern economy that the people should know how they will be affected by proposed changes in the law. Their need to hear what the corporation has to say is most acute when corporate speech deals with those issues which materially affect the corporation. On the other hand, a state may have an interest in restricting a corporation from speaking on issues that don't materially affect it, interests in addition to preventing undue influence.[82] One such interest could be that of preventing those who control a corporation and determine what it shall say from appropriating for their own political purposes funds which would otherwise be paid out as dividends to all the stockholders. Where a referendum question affects a corporation, it may be assumed that those who control the corporation, management or a controlling group of stockholders, can be relied upon to represent the interests of the corporation. But corporate speech on a referendum proposal that does not materially affect the corporation could be an abuse of corporate funds by those in control of the corporation for the purpose of furthering their own political views. The state could have a strong interest in preventing such expenditures to protect minority stockholders. This interest, together with the interest in preventing undue influence, might even justify a complete prohibition of corporate speech.

The Chief Justice gave us little guidance in determining whether such a material effect exists as to a referendum question other than a tax on the incomes of corporations and individuals. Used as a constitutional test, the "materially affecting" standard is not the same concept of "materially affecting" that remains embodied in G.L. c. 55, §7. The test by which referendum questions are determined to materially affect a corporation under the statute depends upon a fair construction of the statutory language and the legislative intent. That intent was interpreted

---

82 Cf. United States v. CIO, 335 U.S. 106, 134 (1948).

to include issues of graduated income taxes in *Lustwerk v. Lytron Inc.*,[83] but that interpretation was supplanted by the General Court when it adopted the statutory amendment.[84] The materially affecting standard used by the Chief Justice in *First National Bank* includes issues of graduated income taxes on both corporations and individuals. It is a judicially promulgated standard and does not depend upon legislative intent.

If it is a new constitutional standard, the Chief Justice was casual about its promulgation. Except for a reference to *Lustwerk*,[85] we are not afforded the means to determine whether a referendum question can be fairly said to materially affect the corporation. The Chief Justice spoke only of issues "materially affecting the plaintiffs' business,"[86] or more simply, of issues that "materially affect [corporations]."[87] The language of the statute speaks of issues "materially affecting any of the property, business or assets of the corporation."[88] The Chief Justice did not state whether he is using a shorthand term equivalent to the longer phrase used in the statute or whether the difference in language means that the standard for determining that which materially affects the interests of a corporation in *constitutional* terms is different than the standard for determining that which materially affects the interests of a corporation in terms of the *statute*.

The practical problems in applying the materially affecting test are immense. The debate as to the materiality of the effect on corporations of a referendum question solely concerning the graduated income tax of individuals provides a good example of this.[89] In both *First National Bank* and *Lustwerk*, corporations argued that a tax on personal income materially affected their property, business and assets. Their reasons ranged from the effect that such a tax would have on the general business climate of the Commonwealth to the effect it would have on the willingness of highly paid executives to come to Massachusetts to work for the corporation and the salaries that the corporations would have to pay all their personnel.[90] Both *Lustwerk* and *First National Bank* also involved

---

83 344 Mass. 647, 183 N.E.2d 871 (1962).

84 G.L. c. 55, §7, as amended by Acts of 1972, c. 458.

85 The reference is general in that the Court notes that *Lustwerk* held graduated income taxes to materially affect corporations and assumes throughout the opinion that the 1972 graduated income tax proposal would materially affect corporations. See, e.g., 1972 Mass. Adv. Sh. at 1718, 290 N.E.2d at 532.

86 1972 Mass. Adv. Sh. at 1724, 290 N.E.2d at 536.

87 Id.

88 G.L. c. 55, §7 (1972). See text at note 15 supra.

89 Such an example is particularly relevant because Justice Quirico interpreted G.L. c. 55, §7, as amended, to bar corporate expenditures on referendum questions which solely concerned personal income taxes, and because in 1973, after the decision in *First National Bank*, the General Court amended the statute again and conformed it to Justice Quirico's interpretation. See note 21 supra.

90 1972 Mass. Adv. Sh. at 1734, 290 N.E.2d at 541; 344 Mass. at 650, 183 N.E.2d at

taxes on corporate income, thereby justifying a finding of a material effect without an exploration of the effects on corporations of a tax solely on personal income. Yet neither case rejected the corporations' assertion that a tax solely on personal income would materially affect them. Chief Justice Tauro in a footnote indicated that the mere indirectness of the effect that a measure, such as one proposing a tax solely on individual income, might have on a corporation would not necessarily disqualify it from being material, and therefore protected, under his opinion.[91] Nevertheless it seems that some questions that would impinge to some degree on the corporation would have so immaterial an effect as not to be within the class of issues on which it is helpful for the people to hear the corporate point of view. For example a corporation could argue that a referendum question on school busing would affect its ability to recruit employees from out of state. Conceivably, any question submitted to the voters might be cast in a light emphasizing as material an effect upon the corporation which in reality is quite ephemeral. Officers or controlling stockholders might be tempted to devise ingenious characterizations in order to harness corporate funds to voice their own individual viewpoints. Indeed, the energetic corporate opposition to the 1972 proposal for a graduated income tax is not free from criticism that it was primarily impelled by corporate officers and controlling stockholders fearful of high-bracket status under the *individual* income tax provisions of the proposal.

Similar problems arise in determining the degree of effect which is "material." It could be argued that anything that takes any money from the corporation is material to its interests. Perhaps the answer is a common sense test based on the circumstances of each particular case. However such a test would be exceedingly difficult to apply since each set of circumstances is different, and would lead to litigation as to the legality of prohibitions on corporate expenditures on each individual referendum issue as applied to each general type of corporation. Each decision would depend upon a myriad of factors, and general rules would be difficult to develop. In addition, these factors change over time; decision in any one case would not necessarily be dispositive of the relationship between the general type of corporation and the general type of referendum question since the state or corporation could later argue that the circumstances of the prior case had been altered by intervening developments.[92]

---

873. It should be noted that these discussions related to the statutory "materially affecting" test.

91 Id. at 1719 n.12, 290 N.E.2d at 533 n.12.

92 These considerations raise doubts as to the constitutionality of the "materially affecting" test, which is still embodied in G.L. c. 55, §7. Statutes limiting First Amendment rights must be clearly drawn to prevent allowed speech from being chilled by the apprehension of prosecution. United States v. CIO, 335 U.S. 106, 141-42 (1948) (concurring opinion).

The problems in applying a "materially affecting" test are formidable. The Supreme Judicial Court would be well advised not to adopt it if there is any viable alternative. Rather, the court should view the use of the test in the Chief Justice's opinion as merely a convenient means of limiting the holding in *First National Bank.*

CONCLUSION

Justice Quirico, in applying the maxim that statutes are to be interpreted in such a manner that they will not be unconstitutional, crossed over the line between saving a statute and frustrating legislative intent because of mere suspicions of a statute's constitutionality. In so doing he invalidated an act of the legislature without a full decision on its constitutionality.

Chief Justice Tauro found that the "liberty" of corporate "persons" was protected by the due process clause of the Fourteenth Amendment and that therefore corporate speech was protected from abridgement by the Commonwealth. He justified his opinion by referring to the right of the people to be informed on referendum issues. Despite the Chief Justice's reliance on a right of corporations themselves to speak, the exact holdings of the precedents which he cites and his own justification for his decision indicate that corporate speech is protected to ensure the people's right to be informed rather than any inherent right of corporations to speak.

Because the Chief Justice conceptualized the issue in terms of an inherent right of corporate "persons" to speak rather than the right of the people to be informed, he assumed that a complete prohibition on corporate speech would impose impermissible restrictions on the dissemination of the corporate point of view. In doing so he failed to discuss adequately the question of whether corporations themselves need to speak in order that the people be informed of their views on referendum issues which affect them.

JAMES ANTHONY FRIEDEN

§14.4. Obscenity revisited: Recent Supreme Court decisions. Ever since the first recorded obscenity decision in America came down in 1821,[1] the standards promulgated by the courts to determine what is obscene have changed considerably with the times. The United States Supreme Court's 1973 obscenity decisions[2] are the products of a long and

§14.4. [1] This first decision was a Massachusetts case brought against the book later to be known as "Fanny Hill." D. Gillmor & J. Barron, Mass Communication Law 315 (1969).

[2] Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-Ft. Reels, 413 U.S. 123 (1973).

tortured evolution. In order fully to understand and appreciate the nature of the changes in the law of obscenity wrought by these decisions, it will be helpful first to examine briefly the more modern line of cases in this area beginning with the 1957 landmark decision of *Roth v. United States.*[3]

In *Roth* the Supreme Court held that obscenity is not protected by the First Amendment because it does not contain ideas of social importance.[4] The Court held that all ideas having even slight social importance have the full protection of the First Amendment unless they encroach upon the limited areas of more important interests.[5] The *Roth* Court also stated that "[s]ex and obscenity are not synonymous"[6] and that "[o]bscene material is material which deals with sex in a manner appealing to prurient interest."[7] The test of obscenity, said the Court, was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[8] It is important to note, however, that the Court in *Roth* never defined the term "prurient interest." Later, in 1964, the Court in *Jacobellis v. Ohio,*[9] after reiterating its belief that obscenity is not entitled to First Amendment protection because it is " 'utterly' without social importance,"[10] held that the contemporary community standards of the *Roth* test were those of the "national community."[11] In so holding, the Court reasoned that although communities vary in many respects other than their tolerance of alleged obscenity, such variances have never been considered to require or justify a varying standard for application of the Federal Constitution.[12] It is natural, said the Court, to use national contemporary community standards to determine what is obscene, for "[i]t is, after all, a national Constitution we are expounding."[13]

In 1966 the Supreme Court, due to confusion in the state and lower federal courts over the proper interpretation of the *Roth* test, again had occasion to clarify its definition of obscenity. In *Memoirs v. Massachusetts,*[14] the Court overturned a decision of the Massachusetts Supreme Judicial Court which had held that a book need not be "unqualifiedly worthless" before it can be deemed obscene and that a work may be

---

3 354 U.S. 476 (1957).
4 Id. at 484.
5 Id.
6 Id. at 487.
7 Id.
8 Id. at 489.
9 378 U.S. 184 (1964).
10 Id. at 191.
11 Id. at 195.
12 Id. at 194.
13 Id. at 195.
14 383 U.S. 413 (1966).

considered obscene if it lacks "social importance."[15] The Supreme Court held this to be error and stated that "[a] book cannot be proscribed unless it is found to be *utterly* without redeeming social value."[16] The Court incorporated this standard into a new three point test under which a work could be classified as obscene:

(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and
(c) the material is utterly without redeeming social value.[17]

In *Ginzburg v. United States*,[18] also decided in 1966, the Supreme Court held that the manner in which a purveyor of a book or magazine displays his work is also an element to be considered in ascertaining whether that work is obscene. "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications," said the Court, "that fact may be decisive in the determination of obscenity."[19] Under this view, where it is otherwise debatable whether a particular work is obscene, the fact of "pandering" in the merchandising or dissemination of the work will tip the scales in favor of a finding of obscenity.[20]

In the interval between the *Roth* and *Ginzburg* cases, the Supreme Court failed to affirm a single obscenity conviction. It was for this reason that many saw *Ginzburg* as a frantic effort to re-balance the scales in favor of the censors after a decade of tipping them in favor of free expression.[21] The *Ginzburg* decision introduced considerable confusion in the obscenity area, as did the other 1966 Supreme Court obscenity decisions, which produced fourteen separate opinions and numerous tests of obscenity.[22] In fact, in none of these decisions, nor in any other

---

15 Id. at 419.
16 Id. (emphasis added).
17 Id. at 418.
18 383 U.S. 463 (1966).
19 Id. at 470.
20 "Pandering" was defined by the *Ginzburg* Court as "the business of purveying textual or graphic matter openly advertized to appeal to the erotic interest of . . . customers." Id. at 467, citing Roth v. United States, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring).
21 D. Gillmor & J. Barron, Mass Communication Law 327 (1969).
22 Mr. Justice Black and Mr. Justice Douglas consistently maintained that government is wholly powerless to regulate any sexually oriented matter on the ground of its obscenity. . . . Mr. Justice Harlan, on the other hand, believed that the Federal Government in the exercise of its enumerated powers could control the distribution of "hard core" pornography, while the States were afforded more latitude to "[ban] any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat sex in a fundamentally offensive

Supreme Court decision handed down after the *Roth* case, decided in 1957, and up until *Miller v. California,*[23] decided in 1973, did any one test of obscenity receive the approval of a majority of the Court. As of 1967 there was so much confusion and disagreement among the members of the Court that it adopted, in *Redrup v. New York,*[24] the policy of issuing per curiam opinions in obscenity cases.

In 1968, the Court in *Ginzberg v. New York*[25] was called upon to determine whether a state could proscribe the distribution to minors of materials that were admittedly suitable for adults.[26] The Court answered this question in the affirmative, suggesting that different treatment for adults and minors was justified on the grounds that a legislature could rationally find certain material to be harmful to minors but not harmful to adults.[27] Subsequent to such a finding, said the Court, the legislature could bar distribution of the material to minors as an aid to parents, who have the primary responsibility for their children's well-being.[28] The power to do this, the Court stated, was derived from the state's

---

manner, under rationally established criteria for judging such material." . . . Mr. Justice Stewart regarded "hard core" pornography as the limit of both federal and state power.

. . .

Mr. Justice Clark believed that "social importance" could only "be considered together with evidence that the material in question appeals to prurient interest and is patently offensive." . . . Similarly, Mr. Justice White regarded "a publication to be obscene if its predominant theme appeals to the prurient interest in a manner exceeding customary limits of candor . . . ."

Paris Adult Theatre v. Slaton, 413 U.S. 49, 80-82 (1973) (Brennan, J., dissenting).

In addition to the above views, Mr. Chief Justice Warren and Mr. Justice Fortas believed the government could regulate obscenity by use of the *Memoirs* test if the standards used in the determination of obscenity were local community standards. Mr. Justice Brennan agreed with the above view, except that he believed that national community standards should be used in the determination of obscenity. 413 U.S. at 81.

23 413 U.S. 15 (1973).

24 386 U.S. 767 (1967).

25 390 U.S. 629 (1968).

26 Appellant Ginzberg was convicted under a New York statute, Law of March 12, 1909, ch. 88, §484-h, [1909] N.Y. Penal Law 39 (repealed in 1967), which made it an offense to knowingly sell to a minor under 17: (a) any picture which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors and (b) any magazine which contains such pictures and which, taken as a whole, is harmful to minors. The statute also stated that "harmful to minors" meant:

that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, and (iii) is utterly without redeeming social importance for minors.

390 U.S. at 645-46.

27 Id. at 638.

28 Id. at 639.

power to protect the health, safety, welfare and morals of the community.[29]

The most recent Supreme Court pronouncements in the obscenity area are contained in an assemblage of cases decided on June 21, 1973,[30] and have been designed by the Court as a comprehensive alteration and restatement of the law of obscenity. One of the Court's obvious purposes in rendering these decisions was to eliminate the confusion in this area and to create a standard which a majority of the Court could approve and adopt. While the Court succeeded in formulating such a standard, it is questionable whether in redefining the law the Court has removed the confusion. This article will attempt to explain the latest Supreme Court decisions and will seek to analyze them to determine how they have changed the law, whether they have clarified the law, and whether they introduce new uncertainties.

I. Holdings of Miller v. California and Companion Cases

A. Miller v. California

In *Miller v. California*,[31] the defendant, who had mailed sexually explicit material to adults who had not solicited it, was tried in a state court for violation of a statute which made it a misdemeanor to knowingly distribute obscene matter. The test utilized by the trial court to determine whether the material in question was obscene was virtually identical to the *Memoirs* test of obscenity. The judge instructed the jury, however, that when applying this test it should use the contemporary community standards of the state of California and not those of the nation. The defendant's conviction was affirmed on appeal. On appeal to the United States Supreme Court, the Court reaffirmed its position that obscene material is not protected by the First Amendment and stated:

> [T]he States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.[32]

The Court also recognized, however, the inherent constitutional dangers involved in an attempt to regulate any form of expression. It declared that obscenity statutes must be carefully limited, and it confined the

---

29 Id. at 636, citing Bookcase, Inc. v. Broderick, 18 N.Y. 2d 71, 75, 218 N.E.2d 668, 671, 271 N.Y.S.2d 947 952 (1966).

30 See note 2 supra.

31 413 U.S. 15 (1973).

32 Id. at 18-19.

permissible scope of such regulation to works which depict or describe *sexual conduct.*[33] Moreover, "[t]hat conduct must be specifically defined by the applicable state law, as written or authoritatively construed."[34]

The new test of obscenity adopted by a majority of the Court is:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[35]

In creating this new standard, the Court in *Miller* altered the *Memoirs* test in three important respects. First, the Court held that the "contemporary community standards" to be applied were not those of the nation but those of the "community"—a term which it never defined. Secondly, the new test also renders the "utterly without redeeming social

---

33 Id. at 24. Prior to *Miller,* the permissible scope of proscription extended to the description or representation of *sexual matters.* The term "sexual matters" includes in its definition pictures and descriptions of naked bodies in which no conduct is depicted or described. This type of activity, a major source of pornographic effort in the past, is now viewed by the Court as protected by the First Amendment, and thereby free from state regulation.

34 Id. The dissenters in *Paris* believe that this requirement invalidates the obscenity statutes of every state except Oregon, which revised its statute to prohibit only the distribution of obscene materials to juveniles and unconsenting adults. 413 U.S. 49, 95 n.13 (Brennan, J. dissenting). The majority in *Miller,* however, does not require that the statute on its face specifically define proscribed conduct, but permits a statute which simply prohibits "that which is obscene" to be *construed by a court* as limiting the permissible scope of proscription to the description of specified types of sexual conduct. In this way state courts can prevent such statutes from being declared unconstitutional. In fact, the Appeals Court of Massachusetts purported to do just this in Commonwealth v. Chaflin, 1973 Mass. App. Ct. Adv. Sh. 475, 298 N.E.2d 888, a case decided subsequent to *Miller.* The court upheld a conviction for violating G.L. c. 272, §28A, which prohibits the sale of anything "which is obscene." While the statute on its face is not sufficiently definite to pass constitutional muster, the court noted that the Massachusetts Supreme Judicial Court has traditionally construed this statute in the light of the definitions of obscenity employed in *Roth* and subsequent Supreme Court decisions, and upheld the statute on that ground. The Court did not, however, specifically state that it would henceforth read into the Massachusetts obscenity statute the examples given in *Miller* of conduct which a state could constitutionally proscribe. See note 102 infra. The court apparently did not feel it necessary to do so since the case before it invalidated a conviction rendered prior to the *Miller* decision and was therefore governed by the standards laid down in *Roth* and *Memoirs.* It would seem, however, that for future convictions to be upheld, the Massachusetts courts will have to incorporate into the obscenity statute the examples set forth in the examples in *Miller.* See Literature v. Quinn, 482 F.2d 372 (1st Cir. 1973).

35 413 U.S. at 24.

value" test of *Memoirs* obsolete since it only requires the state to prove that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[36] The reason for this change, said the Court, is that when the prosecution is forced to prove that work is utterly without redeeming social value it must prove a negative, and that this is a burden virtually impossible to discharge under our criminal standards of proof.[37] It should be noted, however, that the *Miller* "serious value" test also requires the prosecution to prove a negative—namely, that the work is without serious value. It may therefore be questioned whether the new test substantially lightens the prosecution's burden of proof. Thirdly, the Court held that only those who sell or expose obscene materials depicting "hard-core" sexual conduct specifically defined by state statute as written or authoritatively construed can be constitutionally subjected to criminal prosecution.[38] This prerequisite is necessary, the Court found, to provide one who deals in such materials with fair notice that his activities may result in prosecution.[39] As an aid to the states, the Court listed the following as examples of what a state statute could define for regulation:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[40]

B. Paris Adult Theatre v. Slaton

In *Paris Adult Theatre v. Slaton*,[41] the State of Georgia had filed civil complaints in state court to enjoin a theater owner from exhibiting to the public films that were allegedly obscene and in violation of a Georgia criminal statute.[42] The theaters in which the films were exhibited did not

---

36 Id. The "serious value" test, by definition, assumes that works which contain *some* value can nevertheless be termed obscene and therefore be proscribed. The view that this impinges upon the protection given to free speech by the First Amendment was summarized by Justice Brennan in his *Paris* dissent:

> That result is not merely inconsistent with our holding in *Roth;* it is nothing less than a rejection of the fundamental First Amendment premises and rationale of the *Roth* opinion and an invitation to widespread suppression of sexually oriented speech. Before today, the protections of the First Amendment have never been thought limited to expressions of *serious* literary or political value.

413 U.S. at 97.

37 Id. at 22.

38 Id. at 27.

39 Id.

40 Id. at 25.

41 413 U.S. 49 (1973).

42 Id. at 51. The statute, Geo. Code Ann. §26-2101 (1972), defines obscenity as follows:

display pictures at their entrance, but had signs which advertised that they exhibited "Atlanta's Finest Mature Feature Films." On the door of the theaters involved was a sign stating: "Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter."

The trial judge, after viewing the films and assuming that obscenity was established, dismissed the complaint, stating:

> It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.[43]

The Georgia Supreme Court reversed on the ground that "the sale and delivery of obscene material to willing adults is not protected under the first amendment."[44]

The United States Supreme Court, in a five to four decision, affirmed the state supreme court's decision with this language:

> [T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.[45]

The Court also stated that there is an arguable correlation between obscene material and crime, that the state of Georgia may assume that such a correlation exists, and that it may consequently prohibit such material to protect "the social interest in order and morality."[46] It pointed out that judges and legislators have always acted upon un-

---

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters . . . .

43 413 U.S. at 53.

44 Id.

45 Id. at 57-58.

46 Id. at 61. This statement appears to be inconsistent with what the Court said in Stanley v. Georgia, 394 U.S. 557 (1969), in which it stated:

> Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

Id. at 566-67.

provable assumptions and that "[s]uch assumptions underlie much lawful state regulation of commercial and business affairs."[47]

In addressing itself to the right of privacy argument propounded by the petitioner, the Court declared that "[n]othing . . . in this Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation."[48] In so holding, the Court declined to extend the rule previously enunciated in *Stanley v. Georgia*[49] that a person may, within the privacy of his home, lawfully possess obscene materials.[50] The Court in *Paris* went on to add that it was not error for the trial court to fail to require expert affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. Obviously, said the Court, the films "are the best evidence of what they represent."[51]

C. *United States v. Orito*

In *United States v. Orito*,[52] the defendant was prosecuted in federal district court for violating a federal statute prohibiting the transportation of lewd, lascivious and filthy materials in interstate commerce.[53] Defendant contended that since *Stanley v. Georgia* established the right to possess obscene material in the privacy of the home, it followed that a person may transport such material in the privacy of his automobile. The defendant argued that the statute was unconstitutionally overbroad since it prohibited the transportation of obscene material by private as well as by public carrier. The court rejected this argument and held that the zone of privacy protected under *Stanley* does not extend beyond the home, nor does it imply any correlative right to transport obscene material to the home in interstate commerce.[54]

In addition to rejecting the defendant's right to privacy argument, the Court stressed

---

47 413 U.S. at 61.
48 Id. at 66.
49 394 U.S. 557 (1969).
50 Id. at 564.
51 413 U.S. at 56.
52 413 U.S. 139 (1973).
53 The statute, 18 U.S.C. §1462 (1970), provides:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

54 413 U.S. at 141-42.

the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature.[55]

D. United States v. 12 200-Ft. Reels

In *United States v. 12 200-Ft. Reels*,[56] a forfeiture action was brought by the United States in federal district court under a federal statute which prohibited the importation of obscene material and which provided that such material was subject to seizure and forfeiture.[57] On direct appeal from the district court's finding that the statute was overly broad and an unconstitutional invasion of privacy, the Supreme Court held that the government could constitutionally prohibit the importation of obscene material even though it is intended for purely private use.[58] It further added that the right to possess obscene material in the privacy of one's home does not afford a similar right to acquire, sell or import such material.[59] In reversing the district court, the Court also recognized "the plenary power of Congress to regulate imports"[60] and "the complete power of Congress over foreign commerce."[61]

III. The Use of Community Standards

A. What is the "Community"?

In *Miller* the Court declared that in judging whether or not certain material is obscene, local "community" standards would henceforth be used rather than the "national" standard previously required. However, the Court never specifically defined the meaning of "community." While the Court did allow California to define community as the entire state, it did not say that this was the only permissible definition. It can be argued that under *Miller* the states are free to define community as the entire state, a county of the state, a city within the state, or even a neighborhood within a city. Until the Supreme Court expressly declares

---

55 Id. at 144.

56 413 U.S. 123 (1973).

57 Id. at 124. The statute, 19 U.S.C. §1305 (1970), provides that: "[a]ll persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing . . . or other article which is obscene or immoral . . . ."

58 Id. at 128.

59 Id.

60 Id. at 126.

61 Id.

that the community may be a geographical area smaller than the state, this question will remain in doubt. Even assuming that an area smaller than the state can be considered a community, the question remains as to who has the power to define the community in each state: the legislature, the highest court of the state, or both?

B. Effect upon Interstate Commerce

Individual Supreme Court justices have in the past made the argument that interstate commerce in books, movies, magazines and other materials would be inhibited by the use of community rather than national standards. In *Jacobellis v. Ohio*,[62] Justices Brennan and Goldberg expressed their belief that application of community standards would run the risk of preventing dissemination of materials in some places because sellers would be unwilling to risk criminal prosecution by testing variations from place to place.[63] The *Miller* Court discounted this argument with the assertion that:

> The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes.[64]

This argument is based on the premise that under a national standard materials found tolerable in some places will not be available there. In all likelihood, however, if books, movies, and magazines are acceptable in a community, sellers and distributors of these materials will not be prosecuted. If this is the case, these materials will generally be available where acceptable even though they are not acceptable under national criteria.

If "community" is defined as the entire state, it is quite possible that interstate commerce in books, movies, magazines and similar material will be substantially and adversely affected by the Court's holding in *Orito* that the federal government has the power to prohibit interstate commerce in obscenity. In this regard, the following possibilities may be considered: first, the transportation of materials from a state in which they have been declared not to be obscene to a state in which they have been found obscene or in which no judicial determination has yet been made as to their obscenity, and second, the transportation of materials

---

62 378 U.S. 184 (1964).
63 Id. at 194.
64 413 U.S. at 32 n.13.

from a state that has declared them to be obscene to a state that has found them to be acceptable or which has not yet determined whether they are acceptable or not. Does either act constitute the transportation of obscene material in interstate commerce? The threshold question which must first be answered is whether the material must be judicially declared obscene in both the sending and the receiving states before the transporter can be convicted of knowingly transporting obscene material in interstate commerce in violation of 18 U.S.C. §1462.[65] No precedent provides an answer to this question.

If the Court upholds a conviction upon a finding that the material is obscene in only the sending state, this may greatly inhibit interstate commerce in the following manner: if a nationwide publisher or distributor of books, movies or magazines were located in Massachusetts, he would be precluded from distributing to the other forty-nine states any work held to be obscene by the Massachusetts courts, even if the material was constitutionally protected in every other state. Conversely, if the Court upholds convictions under the statute when the transported material has been declared obscene in only the receiving state, interstate commerce in these materials will be greatly burdened when a publisher or distributer wishes to transport material between two states where it is acceptable and all or most of the states between them have declared the material to be obscene. The only possible way for the publisher to avoid prosecution in such a case would be for him to transport the materials by air, a requirement that would certainly burden interstate commerce in these materials, if not eliminate it entirely.

After a consideration of the above examples, a sound argument can be made that if the community standards of a given state through which materials pass are particularly stringent as compared to those of other states where the materials either originate or are destined, application of that state's obscenity statutes will substantially and unreasonably affect interstate commerce in books, films and other related material and therefore must be considered unconstitutional.[66] It is doubtful, however, that the Supreme Court would be amenable to such an argument and more probable that it would consider the state statute merely an indirect intrusion into the area of interstate commerce and a valid exercise of the state's police power. An insight into the Court's thinking on this issue may be gleaned from its statement in *Miller* that:

---

[65] See note 52 supra.

[66] If interstate commerce is substantially and unreasonably affected in any of the above situations, the state statutes involved must be considered unconstitutional. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). If such state regulation were found merely to have an indirect or incidental effect upon interstate commerce, however, the states could continue to regulate it. See, e.g., Head v. New Mexico Board, 374 U.S. 424 (1963); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Breard v. Alexandria, 341 U.S. 622 (1951).

> Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines.[67]

Perhaps the Court in making this statement simply neglected to consider the possibility that the effect on interstate commerce of a state's obscenity statutes might prove to be substantial and adverse rather than merely incidental. What is more likely, however, is that the Court did consider the question and that its statement must be viewed as an indication that it will not be disposed in the future to see the effect as substantial.

C. The Need for Expert Witnesses

The Court's holding in *Paris Adult Theatre* that there is no constitutional requirement for expert testimony in obscenity cases[68] has raised questions concerning the application of the community standards test. If community standards are considered to be those of the entire state, Massachusetts for instance, how is a jury comprised entirely of Bostonians to know whether the material in question appeals to the prurient interest, is patently offensive and lacks serious value as judged by the standards of people from Springfield, Pittsfield or Worcester? In what way other than expert testimony will the Boston jury be informed of statewide standards? If the Boston jury is not so informed how can it be said that a statewide standard is being applied? While an argument can be made that in some states the standard would not vary from community to community, this would not necessarily be true in many of the states, especially those having both rural and urban areas. And even urban (or rural) areas may differ within a state. It cannot be said, for instance, that a Los Angeles jury and a San Diego jury could always agree that a particular book or movie is obscene. Failure to offer expert testimony on statewide community standards permits a juror to apply only the standard of the area in which he resides, or worse yet, his own personal standard, *i.e.*, whether he as an individual likes or dislikes the particular book, movie or magazine.

D. Are Community Standards to Be Applied to All Three Parts of the Miller Test?

Although the Court substituted community standards for national standards in the test it formulated in *Miller*, it is arguable that

---

[67] 413 U.S. at 32-33 n.13.
[68] Id. at 56.

community standards are to be applied only to part (a)[69] of that test since it is only in that part that they are mentioned, and the questions raised in parts (b)[70] and (c)[71] can be answered without reference to community standards. A counterargument would be that since the national standards utilized by the Court in *Roth* and *Memoirs* were held to apply to all three parts of their tests of obscenity even though they were not mentioned in each part, the community standards of *Miller* would likewise apply to all three parts of that test. This counterargument is further supported by the Court's statement in *Miller* that "we . . . hold that obscenity is to be determined by applying 'contemporary community standards' . . . ."[72] Since the term "obscenity" refers to the result reached after an application of all three parts of the *Miller* test, a logical conclusion would be that "community standards" apply to all three parts.

Irrespective of the persuasiveness of the above arguments, it is questionable whether local community standards should be used in determining whether material has "serious . . . value" under the part (c) test. The Court appeared to recognize this when it stated: "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, *regardless of whether the government or a majority of the people approve of the ideas these works represent.*"[73] The italicized language seems to imply that a work cannot be found to lack serious value through the application of local community standards, and that, therefore, national standards must be utilized. An argument in support of this view would develop as follows: Although certain material may be considered obscene in Massachusetts because it appeals to the prurient interest of Massachusetts citizens and is patently offensive to them, the same work might not affect the citizens of Virginia in the same way and would therefore not be obscene in Virginia. However, it would be illogical to assert that the same work can have serious value in one state and lack such value in another state. Serious value is a term of art which should not vary from state to state; it is for this reason that the Court declared that once serious value is shown to exist, the First Amendment protects a work from proscription regardless of whether or not the government or a majority of the people (the "community,") approve of the ideas it expresses.

---

69 Part (a) of the *Miller* test is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ." Id. at 24.

70 Part (b) of the *Miller* test is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . ." Id. at 24.

71 Part (c) of the *Miller* test is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id. at 24.

72 Id. at 36-37.

73 Id. at 34 (emphasis added).

A contrary argument can be formulated in the following manner: if a given work appeals to the prurient interest of and is patently offensive to Massachusetts citizens, then, at least as to them, it can be said to lack serious value. If the same work, however, does not appeal to the prurient interest of citizens of Virginia and is not patently offensive to them, then at least for them, there is nothing to prevent it from having serious value. The fallacy in this argument, however, is that it would render the serious value test unnecessary because it would permit a finding of obscenity solely upon a determination of whether or not the particular material appeals to prurient interest and is patently offensive. It would render the requirement, separately stated in *Miller,* that the material be found to be without serious value, redundant and superfluous. To prevent such a result—a result which the Court could not have intended—a national standard should be used in applying the serious value test.

E. Effect upon Federal Statutes

If, as the Court states in *Miller,* the use of national standards is "an exercise in futility"[74] and "unrealistic,"[75] and if the standards themselves are "hypothetical and unascertainable,"[76] will the Court nevertheless mandate that national standards still be utilized in federal cases? If so, and if a federal jury composed exclusively of Bostonians will continue to use them, why is it that the same jury cannot use those very standards in state court proceedings? It appears that the Court has a choice to make: either national standards are acceptable in all obscenity cases in both state and federal courts, or they are acceptable in none and therefore should be replaced by local community standards.

If federal juries are henceforth to utilize the standards of the state in which the federal district court sits, the problem described above will not occur. However, another problem may arise. If each federal jury, for instance, uses the community standards of the state in which it sits to determine whether or not the federal statute which prohibits the mailing of obscene material[77] has been violated, the statute will not be applied uniformly since fifty or more separate standards will be utilized. Under such a system, if a person mailed identical material in both Massachusetts and Connecticut, he might be convicted of mailing obscene material in one of these states and acquitted in the other. If the defendant had in fact mailed the material, the difference in result would be attributable to the application of two different standards to determine whether the material was obscene. It is inconceivable that Congress intended, or even

---

74 Id. at 30.
75 Id.
76 Id. at 31.
77 18 U.S.C. §1461 (1970).

contemplated, that the place of mailing would determine whether the statute was violated.

These and other considerations prompted the United States Court of Appeals for the First Circuit, in *United States v. One Reel of Film*[78] and *United States v. Palladino*,[79] to mandate that in First Circuit prosecutions under the federal statute prohibiting the mailing of obscene materials,[80] national rather than community standards would be applied.[81] The court felt free to do so because it noted that while the Supreme Court in *Miller* "made it clear that the elements of obscenity which it spelled out for states also applied to federal statutes . . . [it] stopped short of applying to federal statutes its holding as to community standards in evaluating those elements."[82] In addition to noting that the use of national standards would avoid "serious constitutional problems of due process and equal protection,"[83] the court also stated that the use of local community standards

> would open the possibility of senders of identical materials from the same state to be found guilty or not, depending on the course of transit or state of delivery of their materials. The vice of selective prosecution would also be present, as well as the anomalous situation of having prosecution under a national law depend upon the laws of the least permissive states. None of these eventualities would promote the uniform application normally attributed to federal legislation.[84]

The court went on to say that even though the concept of national standards is elusive and will be marred by serious dispute, "the effort to identify a national standard of tolerance would seem to differ only in degree from the effort, upheld in *Miller*, to identify a state-wide standard in such a large, populous, and variegated state as California."[85]

F. Effect upon Appellate Review

The Court in *Miller* said that under its new test of obscenity it is still possible for appellate courts to conduct an independent review of con-

---

78 481 F.2d 206, 208 (1st Cir. 1973).

79 United States v. Palladino, Civil No. 72-1005 (1st Cir., filed Jan. 7, 1974). The original case was United States v. Palladino, 475 F.2d 65 (1st Cir. 1973), and was reheard in light of *Miller, Paris, Orito,* and *Reels*

80 18 U.S.C. §1461 (1970).

81 United States v. Palladino, Civil No. 72-1005 at 6.

82 Id. at 5.

83 Id. at 6-7.

84 Id. at 7.

85 Id. at 8.

stitutional claims when necessary.[86] To accomplish this when community standards are used, state and federal courts must be able to determine what a state's community standards are before they can conduct an independent review to determine whether or not they have been properly applied. Federal appellate courts might have to ascertain the standards of the several states within their jurisdictions, and the Supreme Court might have to familiarize itself with the different standards of all fifty states. This number will be greatly increased if the "community" in some or all of the states is held to consist of numerous geographical areas within a given state. The difficult question that must be answered is whether these courts will be able to conduct an independent review of a community standard that may not be enunciated in the trial record. Since expert testimony on what the community standard actually is in each state is no longer required in obscenity cases, it is difficult to see how an appellate court can independently review an obscenity case to determine whether that standard was properly applied without having the standard before it.

III. Problems of Vagueness

A. Use of the terms "Prurient Interest" and "Patently Offensive" to define "Obscenity"

In *Miller* the Court listed what it termed "a few plain examples" of the conduct state statutes could proscribe. They were: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[87] The question raised herein is whether these examples are any more definite and certain than the requirements for obscenity mandated by the *Memoirs* test. Are these examples of conduct specifically defined? What constitutes an "ultimate sexual act," and when does an exhibition of the genitals become lewd?[88] Is "patently offensive" a specific term? Does it convey the same meaning to most people?

Terms such as "patently offensive" and "prurient interest" are vague, ambiguous terms that are utilized because neither courts nor legislatures have been able to define precisely the term obscenity. The fact that the Supreme Court resorted to the use of such terms indicates that they cannot define what has been deemed "indefinable" by one member of the

---

86 413 U.S. at 25.

87 Id.

88 For a discussion of this problem, see Paris Adult Theatre v. Slaton, 413 U.S. 49, 99 (Brennan, J., dissenting).

Court.[89] These terms clearly do not distinguish between protected and unprotected speech in any comprehensible manner. The *Paris* dissenters agreed with Chief Justice Warren's statement in *United States v. Harriss*[90] that "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[91] They also noted a previous statement by the Court that

> stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.[92]

It may be questioned whether the Court's holdings in *Miller, Paris, Orito* and *12 200-Ft. Reels* violate these principles.

It appears that the five justices who joined in the majority opinions in these cases believe that the terms "patently offensive" and "prurient interest" do define what is obscene with sufficient precision and provide adequate notice of what conduct is forbidden, since in *United States v. 12 200-Ft. Reels* they reviewed a federal statute which prohibited the importation of articles which were "obscene" or "immoral"[93] and held:

> If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U.S.C. § 1305 (a) and 18 U.S.C. § 1462 . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hardcore" sexual conduct given as examples in *Miller v. California* . . . .[94]

In so stating, the Court in effect has made the terms "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" synonymous with

---

89 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

90 347 U.S. 612 (1954).

91 Id. at 617.

92 Smith v. California, 361 U.S. 147, 151 (1959). The dissenters' agreement with this statement appears to be inconsistent with their intimation that it may be permissible for the state to protect children and unconsenting adults by prohibiting the sale or exposure of obscene material to them. They justify this difference in treatment with the rationale that the state interest in protecting children and unconsenting adults stands on a different footing from the state interest presented when only consenting adults are involved. 413 U.S. 49, 106 (Brennan, J., dissenting). If, as they have said, "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials . . .," id. at 103, then how can a state statute which purports to do just that be deemed constitutional if addressed only to minors and unconsenting adults, but unconstitutional if applied to persons in general?

93 19 U.S.C. §1305 (1970).

94 413 U.S. at 130 n.7.

"patently offensive." Can it be said that by defining the term "obscene" as "patently offensive" the Court has transformed a vague, ambiguous term into a meaningful definition of proscribed conduct which gives the average citizen adequate notice of what conduct is forbidden by an obscenity statute? The majority apparently believed so since it said in *Miller:*

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.[95]

B. The Use of Community Standards

One of the reasons advanced by the *Miller* Court in support of its substitution of community standards for national standards was that "[t]he adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law."[96] However, when the Court allows jurors to determine whether the average person applying contemporary community standards would find that a work appeals to the prurient interest or is patently offensive, it is not limiting jurors to instructions on the law, but rather is inviting them to classify as obscene any work that they believe is in "bad taste" or is "dirty," or any work that they simply do not like. It does so by the use of vague, indefinite, subjective standards which do not have to be enunciated by the prosecution at trial, thereby making it impossible for an appellate court to determine whether they were properly applied. A juror instructed that he is to determine whether the average person applying contemporary community standards would find that certain material appeals to the prurient interest or is patently offensive, but given no expert testimony as to what the contemporary community standards are at that time, will tend to think that he is an average person, that he knows what the community standards are, and that all he need do is determine whether or not the work appears to be obscene to him. To allow a juror to draw upon the standards of the community to determine whether crimes such as armed robbery, kidnapping or rape were committed—crimes whose elements are relatively clear and comprehensible to the average juror—is vastly different from

---

[95] Id. at 27.
[96] Id. at 30.

permitting that same juror to determine whether a work appeals to the prurient interest and is patently offensive.

The United States Court of Appeals for the First Circuit appears to be in accord with this view, for when it first heard *United States v. Palladino*,[97] it held that expert testimony was required in federal obscenity cases because

> Without some guidance from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting first amendment protection to this or any other literature.[98]

The court was of the opinion that fundamental fairness, and therefore due process, required the assistance of expert witnesses and stated that if it were mistaken in this conclusion, it would reach the same result through the use of its supervisory powers because it believed that jurors are just as much in need of such assistance in wrestling with obscenity tests as they are in evaluating a defense based on insanity or other mental or emotional illness.[99]

Another reason advanced by the Supreme Court in *Miller* for the substitution of community standards for national standards is that "[w]hen triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation."[100] The question here is whether the formulation of "national" standards is any more abstract than that of "community" standards. In each instance the juror is required to base his findings on what an "average person" believes and not on his own personal opinions. It does not, it is submitted, matter a great deal whether that average person is taken from the nation as a whole or from the state in which the juror resides.[101]

IV. Proposed Solutions to the Vagueness Problem

A. Introduction

There are two aspects to the vagueness problem: first, an individual will often be uncertain as to whether or not certain contemplated action

---

97 475 F.2d 65 (1st Cir. 1973).

98 Id. at 74, citing United States v. Groner, 475 F.2d 550, 554 (5th Cir. 1972).

99 475 F.2d at 73.

100 413 U.S. at 30.

101 Accord, United States v. One Reel of Film, 481 F.2d 206, 208 n.2 (1st Cir. 1973); United States v. Palladino, Civil No. 72-1005 at 8 (1st Cir., Jan. 7, 1974).

will violate the applicable state obscenity statute, and second, assuming he knows that his acitons will violate the statute, he may not know whether or not the statute is constitutional. The second problem will to a large extent ultimately be resolved in the following manner: new state obscenity statutes patterned after the examples given by the Court in *Miller*[102] may be presumed to be constitutional. This is necessarily so since the Court expressly stated that these examples would pass constitutional muster.[103] Existing state statutes which have not yet been changed, but which are construed by state courts as limiting state regulation to works which contain types of conduct given as examples in *Miller,* must be considered constitutional for the same reason. The constitutionality of newly enacted legislation which is not precisely patterned after the examples in *Miller* will depend on how specifically the conduct it prohibits is defined, and will remain in doubt until the Supreme Court decides the question.

The first question—whether or not certain contemplated action violates the applicable state statute—is more difficult to resolve. Vagueness will not be cured by a statute specifically defining prohibited conduct, since the specific conduct cannot constitutionally be prohibited unless it is "patently offensive," and such determinations will frequently be the subject of considerable doubt. This section will briefly discuss and analyze a few proposed solutions to this particular aspect of the vagueness problem.

B. Administrative Censorship

To implement administrative censorship, a state would have to authorize the creation of a censorship agency. This procedure would also necessitate the passage of a state obscenity statute similar to the one given as an example in *Miller.*[104] The state could then enact a statute providing criminal penalties for the display, sale, and transportation of certain materials before the censor had declared them not to be obscene, and a further law prohibiting the prosecution of an individual for violation of the obscenity statute prior to a finding by the agency that the material is obscene. However, if such statutes are enacted, the state is required by *Freedman v. Maryland*[105] to place upon the censor the burden of proving that the material is unprotected expression, and to provide

---

102 The examples given by the Court are:
(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. 413 U.S. at 25.

103 413 U.S. at 25.

104 See note 102 supra.

105 380 U.S. 51 (1965).

for prompt judicial review of the censor's decisions.[106] Since this procedure would constitute prior restraint and would considerably endanger free expression, *Freedman* requires the censor to decide whether or not the material is obscene within a brief period that must be specified in the statute.[107] The Court in *Freedman* held that without these safeguards a distributor or exhibitor may find it burdensome to seek review of the censor's determination and may instead elect to distribute or exhibit his materials elsewhere, thus depriving the locality of the materials.[108]

Under administrative censorship as described above, an exhibitor or purveyor of certain material would receive fair notice that his contemplated conduct in exhibiting, selling or transporting that material is prohibited by the state criminal obscenity statute. However, while this system, as well as those that will be discussed in subsequent sections,[109] will not deprive an exhibitor or seller of *liberty* wtihout due process of law, an argument can be formulated that it will deprive certain individuals of *property* without due process of law. For instance, if it is granted that obscenity statutes cannot provide publishers or writers with sufficient notice that their contemplated conduct is prohibited *before* they begin to either publish or write a particular work, these individuals might invest substantial sums of money and a substantial amount of time in the creation of works only to be informed in subsequent administrative proceedings that their work violates the state obscenity statute and cannot be exhibited, sold or transported. Arguably, such a system results in a denial of property—albeit not also a denial of liberty—without due process of law. From the publisher's viewpoint, a partial solution might be to send a draft of the particular work to the censor for a determination as to whether or not it is obscene before numerous copies are printed up for sale. While this practice would solve one aspect of the problem, it would not solve the problem of the potential loss by the publisher of an advance payment made by him to the writer for the exclusive rights to publish the work. Nor is there a readily apparent solution for the plight of the writer whose labor has already been invested in the work.

The Court in *Miller,* however, has made it clear that it will not consider this type of due process argument if the states pattern their obscenity statutes after the examples given by the Court. Nevertheless, it does seem likely that whatever state obscenity statutes are enacted, or however existing statutes are construed by the courts, the writing or

---

106 Id. at 58-59.

107 Id. at 59.

108 Id.

109 Subsequent sections discuss the feasibility of declaratory judgment actions, suits for injunction, public nuisance actions and in rem proceedings against the offending material.

publication of a novel or the production of a movie will necessarily be attended by some risk and uncertainty. The value of an administrative censorship program such as that outlined above is that it will limit this risk and uncertainty to the financial area and will prevent a situation from arising whereby an individual could face a jail sentence for conduct which he could not know to be criminal at the time he acted. This would be a considerable improvement over the system as it presently operates in most states.

C. Declaratory Judgment Action

Another method of solving the vagueness problem would be the enactment of state statutes authorizing declaratory judgment actions to determine whether or not certain material is obscene.[110] Such a statute could contain a provision that an individual bringing such an action could not be prosecuted under the state's criminal obscenity statutes until a final judgment was rendered, and then only if the material were found to be obscene and the individual persisted in selling, transporting or exhibiting it. The state could also be given the right to bring a declaratory judgment action, and the statute might provide that no criminal charges could be brought against a defendant until after he has dealt in materials previously declared to be obscene in either a declaratory judgment action or in some other non-criminal proceeding designed to determine whether the materials are of a prohibited nature. It should be noted, however, that such a system would not eliminate all risks and uncertainties in the writing, publication or production of novels, movies and other related material.

D. Suit for Injunction

A similar solution would be for the state to enact a statute requiring state officials to sue for a civil injunction before prosecuting publishers, sellers or exhibitors under criminal statutes for dealing in allegedly obscene material. The statute could provide that no one shall be prosecuted under the state's criminal obscenity statutes unless he deals in materials which have already been declared obscene in a civil injunction suit. The statute should further provide that an injunction prohibiting the sale

---

110 The Supreme Court in *Paris* recognized that this type of proceeding is an excellent way to provide an individual with advance notice that the material in which he proposes to deal is prohibited by law. In discussing the Georgia practice of permitting state officials to bring civil suits to enjoin the exhibition of allegedly obscene material, the Court said: "This procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action, prior to any exposure to criminal penalty." 413 U.S. at 55 n.4.

or exhibition of allegedly obscene material shall not be issued until after the material has been found obscene in an adversary proceeding in which the material has been viewed by a court. The statute could provide, however, for the *ex parte* issuance of a temporary injunction restraining the respondents from destroying the material or removing it from the court's jurisdiction.

The civil injunction proceeding is a common practice in some states. In fact, it was the type of proceeding which was employed by the Georgia authorities in *Paris* and which the Supreme Court in that case described as a "procedure [which] provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation."[111] It should be pointed out, however, that in *Paris* the Georgia authorities were *permitted* to bring a civil suit for injunction, but were not *required* to do so, prior to commencing criminal proceedings. A preferable procedure from the standpoint of notice and fairness would be to require the bringing of such a suit or the commencement of some other civil proceeding—such as the declaratory judgment action mentioned above—prior to the initiation of any criminal action.

E. Public Nuisance Action

A solution similar to both the declaratory judgment action and the suit for injunction is the public nuisance action. A state could enact a statute which specifically provides that the sale or exhibition of obscene materials constitutes a nuisance, defines obscenity in the same terms used in the state criminal obscenity statute, and authorizes private individuals as well as the Attorney General to bring suits in equity to obtain injunctions. The theory behind such an injunctive proceeding, of course, would be that an individual, by showing an obscene movie or by selling obscene books and magazines, is creating a nuisance which is injurious to the welfare and morals of the public.

One virtue of a statute authorizing private individuals to bring public nuisance actions is that if a court determines that the sale or exhibition of the materials is a nuisance it can issue an injunction instead of a prison sentence. If the injunction is issued, the seller, publisher, distributor or exhibitor will be provided with excellent notice that his contemplated conduct might violate the state criminal obscenity statute. Another advantage is that it permits the man who believes he is harmed by obscenity to become a "private attorney general." The benefit to the state, in addition to providing its citizens with an opportunity to influence or even change their environment, is that the private citizen or citizen group will bear the expense of the suit.

---

111 Id. at 55.

However, if the court finds that the materials are not obscene and therefore not a nuisance, the state could still bring criminal charges against the individual since such a prior adjudication would not be considered res judicata in a criminal proceeding.[112] The major defect in a nuisance action is that fair notice would not be provided to defendants that their contemplated conduct is prohibited.

F. Massachusetts Procedure

The Commonwealth of Massachusetts already has the statutory authority to implement procedures similar to those mentioned above, at least in regard to the sale of books.[113] The statute authorizes the Attorney General, or any district attorney within his district, to bring an information or petition in equity in superior court directed against the book by name.[114] If a justice of the superior court upon summary examination of the book finds that there is reasonable cause to believe that the book is obscene, indecent or impure, he may issue an order of notice, returnable in thirty days, addressed to all persons interested in the publication, sale, loan or distribution of the book, affording them the opportunity to show cause why the book should not be judicially declared obscene, indecent or impure.[115] Any person interested in the publication, sale, loan or distribution of the book may appear and file an answer and may claim a right to trial by jury on the issue of whether the book is obscene, indecent or impure.[116] If this is done, the case is given a speedy hearing, but a "default and order" is first entered against those persons who did not appear and file an answer.[117]

It should be noted that while the statute does not provide for a civil injunction nor afford persons interested in the sale of the book a chance to bring a similar action, it does provide to persons interested in the book fair notice that their contemplated conduct is forbidden by the

---

112 The party claiming res judicata by reason of a prior adjudication must establish that the prior action was "(1) between the same parties; (2) concerned the same subject matter; and (3) was decided adversely to the party seeking to litigate the subject matter again." Fabrizio v. U.S. Suzuki Motor Corp., 1972 Mass. Adv. Sh. 1531, 289 N.E.2d 897, 898.

113 G.L. c. 272, §§28C-F. It is unfortunate that this statute was last used over eight years ago against the book Memoirs of a Woman of Pleasure. Telephone interview with Dennis M. Sullivan, Assistant Attorney General, in Boston, Oct. 23, 1973.

114 G.L. c. 272 §28C. Although the statute is limited to proceedings against books, there is no apparent reason for doing so, and the Legislature perhaps should expand it to include films, magazines and other like materials.

115 G.L. c. 272, §28C.

116 G.L. c. 272, §28D.

117 G.L. c. 272, §28F.

state's obscenity statute. Like the civil injunction suit brought by the state authorities in *Paris,* this Massachusetts in rem procedure is authorized but not required. A preferable alternative would be to require the bringing of such an action, or a similar civil proceeding, prior to the commencement of criminal proceedings.

RONALD E. LASKY