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NOTES AND COMMENTS

Sunday Laws

In 1961, a state-wide law to prohibit engaging in certain activities on Sunday was passed by the North Carolina General Assembly.¹ The act was declared unconstitutional by the North Carolina Supreme Court in 1962.² In 1963, the act was rewritten in an effort to remove the objectionable features from it.³ The rewritten statute was declared unconstitutional by the court in 1964.⁴ Thus, Sunday laws are a current issue. This comment will examine them, their constitutionality, and the policy questions involved in the hope of shedding light on their future in North Carolina.⁵

I. HISTORY

"Every effort to remodel existing Sunday legislation, or to forecast its future must be made in the light of the past."⁶ The history in recent centuries begins with the fact that secular work on Sunday was not an offense against the common law.⁷ Consequently,

¹ N.C. Sess. Laws 1961, ch. 1156.

² *G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E.2d 764 (1962).

³ N.C. GEN. STAT. § 14-346.2 (Supp. 1963).

⁴ *Treasure City, Inc. v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964).

⁵ Soon after the cases declaring the state-wide laws unconstitutional, the court held that a city ordinance which regulated activities on Sunday met constitutional requirements. *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 134 S.E.2d 364 (1964). Local level regulations of this type are free of many of the defects contained in the state-wide acts which are the subject of this comment. For discussion of local level Sunday regulation see Note, 32 N.C.L. REV. 552 (1954).

⁶ *Preface* to LEWIS, A CRITICAL HISTORY OF SUNDAY LEGISLATION at vi (1888). For the ancient history of regulation of Sunday activity, see *Rodman v. Robinson*, 134 N.C. 503, 506, 47 S.E. 19, 20 (1904); JOHNSON & YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 219-32 (1948).

⁷ *Rodman v. Robinson*, 134 N.C. 503, 506, 47 S.E. 19, 20 (1904); *State v. Williams*, 26 N.C. 400 (1844). It is also interesting to note that Christianity is not theoretically opposed to secular work on Sunday.

[The] organic [law of Christianity] must be found in the New Testament, and there we shall look in vain for any requirement to observe Sunday, or indeed any day. The Master's references to the Sabbath were not in support but in derogation of the extreme observances of the Mosaic day of rest indulged in by the Pharisees.

Rodman v. Robinson, *supra* at 510, 47 S.E. at 21 (Clark, C.J.) Lewis, an early writer, agreed, saying that:

The first Sunday legislation was the product of that pagan conception, so fully developed by the Romans, which made religion a de-

legal restrictions on activity based upon the fact that the day is Sunday are found in statutory law. English legislation in 1625 prohibited bear-baiting, bull-baiting, common plays, and the leaving of parishes on Sunday.⁸ This statute may have been in force in North Carolina during the seventeenth and eighteenth centuries.⁹ In 1676, the first English statute *prohibiting work* on Sunday was enacted.¹⁰ This enactment became the foundation for nearly all Sunday legislation in the United States.¹¹ It read:

For the better observation and keeping holy the Lord's day . . . all : . . . persons . . . shall on every Lord's day apply themselves to the observation of the same, by exercising . . . the duties of piety and true religion, *publicly and privately* . . . and . . . no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary callings, upon the Lord's day, or any part thereof (work of necessity and charity only excepted;) . . .¹²

In 1715, North Carolina adopted an act "for the better observance of the Lord's Day, called Sunday . . ."¹³ This statute was substantially the same as the 1676 English act. It added a preamble which clearly indicated why the statute was passed.

Forasmuch as by the great neglect in keeping holy the Lord's Day, and the little regard had to all such other days and times appointed to be kept religiously, impiety is like to grow to a very great height (if not timely prevented) to the great dishonour of the Almighty . . .¹⁴

partment of the state. This was diametrically opposed to the genius of New Testament Christianity. It did not find favor in the Church until Christianity had been deeply corrupted through the influence of Gnosticism and kindred pagan errors.

LEWIS, *op. cit. supra* note 6, at vi.

⁸ Lord's Day Act, 1625, 1 Car. 1, c. 1.

⁹ One codifier so reported. Collection of Statutes of England in Force in N.C. 379 (Martin 1792). It is, however, questionable whether the statute was in force because this collection was not entirely accurate. It contained many statutes of England never in force in the colony. *Preface* to 1 Revised Statutes at xii (Nash, Iredell & Battle 1837).

¹⁰ Sunday Observance Act, 1676, 29 Car. 2, c. 7.

¹¹ Rodman v. Robinson, 134 N.C. 503, 506, 47 S.E. 19, 20 (1904). See generally 22 *ENCYCLOPAEDIA BRITANNICA* 656 (9th ed. 1887); Johnson, *Sunday Legislation*, 23 Ky. L.J. 131, 136-37 (1934).

¹² Sunday Observance Act, 1676, 29 Car. 2, c. 7. (Emphasis added.)

¹³ Laws of North Carolina Relating to the Church and Clergy 83 (Trott 1721). (Partially italicized in original.)

¹⁴ Laws of North Carolina Relating to the Church and Clergy 96 (Trott 1721).

The 1715 act was repealed in 1741¹⁵ and replaced by a similar act.¹⁶ It is significant that the 1676 English act and the 1715 North Carolina act called for public *and private* observance of the "duties of piety and true religion."¹⁷ The 1741 act did not call for such *private* observation. Therein lay the only material difference in the three statutes. It led, however, to a sharp difference in the interpretations given the acts in England and in North Carolina. At common law, contracts made on Sunday were valid.¹⁸ The English courts held that the 1676 act invalidated contracts made on Sunday by persons in the exercise "of their ordinary calling."¹⁹ The North Carolina court held that a contract made on Sunday was valid notwithstanding the 1741 act.²⁰ The court reasoned that the 1741 act only regulated public life and only prohibited noisy labor that disturbed the religious devotion of others.²¹ The significance of the 1741 act was reduced also because it lacked sufficient penalty to discourage its breach.²² For many years the statute was "almost completely ignored."²³ It was repealed in 1951.²⁴ North Carolina finished the decade without state-wide regulation. In other

¹⁵ 23 CLARK, THE STATE RECORDS OF NORTH CAROLINA 3 (1904).

¹⁶ N.C. Sess. Laws 1741, ch. 14; Collection of All The Public Acts 142 (Swann 1751); 23 CLARK, *op. cit. supra* note 15, at 173. A religiously oriented preamble is still seen as part of the statute in 1 Public Acts 1715-90, at 52 (Martin 1804), but was dropped in 2 Manual Of The Laws of N.C. 229 (2d ed. Haywood 1808).

¹⁷ See the provisions of the English statute in text accompanying note 12 *supra*, and the North Carolina statute in Laws of North Carolina Relating to the Church and Clergy 96 (Trott 1721).

¹⁸ *Comyns v. Boyer*, Cro. Eliz. 485, 78 Eng. Rep. 736 (B.R. 1596); *Drury v. DeFontaine*, 1 Taunt. 131, 127 Eng. Rep. 781, 783-84 (Com. Pl. 1808). See generally CLARK, CONTRACTS § 155, at 357 (4th ed. 1931).

¹⁹ *Smith v. Sparrow*, 4 Bing. 84, 88, 130 Eng. Rep. 700, 701-02 (Com. Pl. 1827); *Fennell v. Ridler*, 5 B. & C. 406, 108 Eng. Rep. 151 (K.B. 1826).

²⁰ *Melvin v. Easley*, 52 N.C. 356 (1860); *State v. Williams*, 26 N.C. 400 (1844). *Accord*, *Maxton Auto Co. v. Rudd*, 176 N.C. 497, 97 S.E. 477 (1918); *Rodman v. Robinson*, 134 N.C. 503, 47 S.E. 19 (1904).

²¹ *Melvin v. Easley*, *supra* note 20, at 359-60. Furthermore, private activities on Sunday could not have been regulated by the North Carolina act because of N.C. CONST. art. I, § 26: "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences . . ."

²² The offender was not subjected to criminal indictment. *State v. Brooksbank*, 28 N.C. 73 (1845); *State v. Williams*, 26 N.C. 400 (1844). *Accord*, *State v. Medlin*, 170 N.C. 682, 86 S.E. 597 (1915); *State v. White*, 76 N.C. 15 (1877). The sole deterrent was a civil penalty of one dollar. 1 Revised Statutes 607 (Nash, Iredell & Battle 1837).

²³ *State v. McGee*, 237 N.C. 633, 638, 75 S.E.2d 783, 786, *appeal dismissed*, 346 U.S. 802 (1953).

²⁴ N.C. Sess. Laws 1951, ch. 73.

states, laws regulating Sunday activity were beginning to be used for new purposes. With the rise of shopping centers and large "discount houses" that operate seven days a week from their suburban and country highway locations came a revitalization of the long forgotten Sunday laws. These statutes soon faced constitutional tests.

II. CONSTITUTIONALITY

In *McGowan v. Maryland*,²⁵ the United States Supreme Court affirmed the convictions of seven employees of a large highway discount store for violating the state Sunday law.²⁶ The main contention of the defendants was that the law violated the establishment clause of the first amendment to the Constitution of the United States.²⁷ Before ruling on the Maryland statute, Mr. Chief Justice Warren, speaking for the Court, discussed the relation of Sunday laws in general to the establishment clause. After granting that the early Sunday laws were "motivated by religious forces,"²⁸ he made a search of the evolution of these laws to determine "whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character."²⁹ He found that the present purpose and effect of most Sunday laws is to provide a uniform day of rest for all citizens.³⁰ But it was conceded that the defendants had suffered economic injury allegedly resulting from the imposition of a tenet of the Christian religion upon them.³¹ The Court relied upon *Everson v. Board of Educ.*³² for the principle that a statute which has a primary secular purpose (projected into effect), consistent with constitutional guarantees, will be upheld even though it has an incidental, indirect effect that

²⁵ 366 U.S. 420 (1961).

²⁶ MD. ANN. CODE art. 27, § 521 (Supp. 1964). This law prohibits the Sunday sale of all merchandise except specified articles including drugs, gasoline, newspapers, and tobacco.

²⁷ "Congress shall make no law respecting an establishment of religion . . ." This clause was made applicable to the states via the fourteenth amendment in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

²⁸ 366 U.S. at 431.

²⁹ *Ibid.*

³⁰ *Id.* at 445.

³¹ *Id.* at 430.

³² 330 U.S. 1 (1947). In this case the Court upheld a statute authorizing repayment to parents of the transportation expenses of their children to public and Catholic schools. Mr. Justice Black, for the Court, recognized that a religion was incidentally benefited and possibly promoted. However, the primary purpose was found to be the safety of all children and therefore the statute was valid as "public welfare legislation." *Id.* at 18.

would be unconstitutional standing alone.³³ Therefore, it was concluded that as presently written and administered Sunday laws "bear no relationship to establishment of religion as those words are used in the Constitution of the United States."³⁴ In ruling on the Maryland statute, the Court found it to have the same secular character as Sunday laws in general and therefore sustained it on the *Everson* principle.^{34a}

In the *McGowan* case, the appellants were held to lack standing to raise the "free exercise" of religion issue because they did not allege injury to their religious practices. They alleged economic injury which was only sufficient to raise the "establishment" issue.³⁵ The Court did consider the "free exercise" issue in *Braunfeld v. Brown*.³⁶ Appellants were Jewish merchants who sued to enjoin the enforcement of the 1959 Pennsylvania Sunday law.³⁷ One of the appellants alleged³⁸ that since his religion required closing on Saturday, it was economically necessary for him to be open on Sunday; that enforcement of the Sunday law would force him to choose between his religion and his trade; and that the effect would be a

³³ 366 U.S. at 442-45.

³⁴ *Id.* at 444.

^{34a} "[T]he statute's present purpose and effect is not to aid a religion but to set aside a day of rest and recreation." *Id.* at 449. *Accord*, *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961). Mr. Justice Frankfurter substantially concurred with the views of the majority, but decided the establishment issue without relying on the *Everson* case. The test used by Frankfurter would allow a stronger religious purpose and effect than did that of the majority. He looked for the "primary end achieved." 366 U.S. at 466 (separate opinion). If no secular ends served were "wholly independent of the advancement of religion" the "primary end achieved" would be religious and unconstitutional. *Ibid.* This test would uphold a statute with two independent, primary ends—one secular and one religious. However, this permissiveness is qualified by his second, cumulative test: if the statute primarily furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone it cannot be upheld. *Id.* at 466-67. The tests of Frankfurter are a concession to the fact that, in practice, the dissection of the direct and indirect motivating purposes of the legislature—where one purpose is constitutional and another unconstitutional—is slippery business with the possibility of misadventure great. Nevertheless, he too searched for purpose and found it to be the same as did the majority. *Id.* at 470-505.

³⁵ See the discussion by the Court, 366 U.S. at 429. See also *Two Guys From Harrison-Allentown, Inc. v. McGinley*, *supra* note 34a, at 592. Frankfurter agreed with the Court that the appellants in *McGowan* and *Two Guys* lacked standing to raise the "free exercise" issue. *McGowan v. Maryland*, 366 U.S. 420, 468 n.6 (1961).

³⁶ 366 U.S. 599 (1961).

³⁷ PA. STAT. ANN. tit. 18, § 4699.10 (1963).

³⁸ 366 U.S. at 601.

violation of the free exercise clause of the first amendment.³⁹ Mr. Chief Justice Warren, announcing the judgment of the Court, found that the direct purpose of the statute was to achieve a secular goal, *i.e.*, a uniform day of rest,⁴⁰ that the "indirect burden" on appellant's religious practice could not be eliminated by adequate alternative means to the secular end,⁴¹ and that implementation of the direct purpose was valid notwithstanding that there was an indirect burden on appellant's religious practice.⁴² Mr. Justice Frankfurter

³⁹ "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . ." This clause was made applicable to the states via the fourteenth amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁴⁰ 366 U.S. at 607-09.

⁴¹ *Id.* at 608. Most of the commentators have disagreed with this finding. They maintain that a statute allowing an exemption for those who close on another day for religious reasons would be sufficient to provide a uniform day of rest. See Hopp, *Sunday Laws—The McGowan Decision*, 13 BAYLOR L. REV. 225, 231 (1961); O'Toole, *The Sunday Laws*, 74 COMMONWEAL 343, 345 (1961); 30 GEO. WASH. L. REV. 363, 368 (1961); 40 TEXAS L. REV. 702, 707 (1962); 23 U. PITT. L. REV. 222, 229 (1961). But see 7 UTAH L. REV. 537, 545 (1961). Warren granted that this exemption "may well be the wiser solution to the problem," but went on to say that it was not constitutionally necessary to validate the statute. 366 U.S. at 608-09. He reasoned that the exemption would not help eliminate the atmosphere of commercial noise and activity; enforcement problems would be more difficult; an economic advantage might be gained by those allowed to open on Sunday; and employment problems would arise—"exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a state might feel to be opposed to its general policy prohibiting religious discrimination in hiring." *Id.* at 609. In a separate opinion, Brennan said that the difficulties were "more fanciful than real." *Id.* at 615. "[T]he Court . . . has exalted administrative convenience to a constitutional level high enough to justify making one religion . . . disadvantageous." *Id.* at 615-16. The administrative problems are not overwhelming in view of the fact that twenty-one of thirty-four states having general Sunday laws have exemptions of this kind. *Id.* at 614. England also has the exemption. Shops Act, 1950, 14 Geo. 6, c. 28, § 53. The exemption was suggested in conjunction with the 1961 North Carolina Sunday law, N.C. GEN. STAT. § 14-346.2 (Supp. 1963), but after little discussion was not adopted. Raleigh News and Observer, June 22, 1961, p. 6, col. 4.

⁴² 366 U.S. at 607. *Accord*, *Gallagher v. Crown Kasher Super Market, Inc.*, 366 U.S. 617 (1961). The test applied by the Court changes the test for first amendment freedoms which was theretofore in use, and to which Douglas, Brennan, and Stewart would adhere; that is, first amendment freedoms are susceptible to restriction only to prevent great and immediate danger to interests the state may lawfully protect. See *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949); *Saia v. New York*, 334 U.S. 558, 561 (1948); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). For discussion of this "preferred position" test for first amendment freedoms, see 40 TEXAS L. REV. 702 (1962).

Has the Court lost the substance of the issue in the direct-indirect test? A license tax of \$15 per year on distributors of religious literature was

concurred in a separate opinion, treating the "free exercise" issue as a balancing question. He found that the secular purpose outweighed and justified the religious injury inflicted.⁴³

The four Sunday law cases⁴⁴ place singular emphasis on the search for purpose. They hold that the valid purpose which Sunday laws may serve is that of providing a uniform day of rest. However, whether any particular statute has a valid purpose *in fact* is difficult to determine. Appropriate to the Sunday law question is a warning of the Court in a different context: "It is impossible for us to shut our eyes to the fact that many of the laws . . . , while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed for other motives."⁴⁵ The conclusion reached by the Court *concerning the direct purpose* of the Sunday laws has been severely criticized for its imperceptiveness.⁴⁶ The common defect in these

held unconstitutional in *Follett v. Town of McCormick*, 321 U.S. 573 (1944), because it was a *direct* burden on religion. In *Braunfeld* the *indirect* burden was much greater—the possible loss of an entire business enterprise. The burden imposed on minority religions which was upheld in *Braunfeld* is "certainly more serious economically" than the burden held unconstitutional in *Follett*. PFEFFER, CHURCH, STATE, AND FREEDOM 235 (1953), quoted with approval in *McGowan v. Maryland*, 366 U.S. 420, 578 (1961) (dissenting opinion). For further discussion see Donaldson, *Freedom of Religion and the Recent Sunday Closing Law Cases*, 3 WILLIAM & MARY L. REV. 384, 392 (1961); 30 GEO. WASH. L. REV. 363 (1961); 7 UTAH L. REV. 537 (1961).

⁴³ *McGowan v. Maryland*, 366 U.S. 420, 520-22 (1961) (separate opinion applicable to the *Braunfeld* case). Douglas disagreed, finding that the first amendment freedoms are absolute and admit of no balancing. Brennan and Stewart agreed to the balancing test but differed with Frankfurter in application. "[T]he law requires a person 'to choose between religious faith and his economic survival.' This is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness." *Braunfeld v. Brown*, 366 U.S. 599, 615 (1961) (separate opinion of Stewart, J.).

⁴⁴ *Gallagher v. Crown Koshier Super Market, Inc.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).

⁴⁵ *Lochner v. New York*, 198 U.S. 45, 64 (1905) (dictum). This case held that a labor law of the State of New York which provided that no employees in bakeries would be permitted to work more than sixty hours in a week, or ten hours in a day, was not a legitimate exercise of the police power of the state. The *Lochner* case was overruled by *Bunting v. Oregon*, 243 U.S. 426 (1917). Nevertheless, the merit of the quoted dictum is apparent.

⁴⁶ Douglas dissented in all four cases. He said that the present Sunday laws have not outgrown their religious foundations. 366 U.S. at 572-73 & n.6. "The Court picks and chooses language from various decisions to bolster its conclusion that these Sunday laws in the modern setting are

criticisms is that they are mere conclusions. The underlying evidentiary facts need to be explored at some length.

The language used in these statutes aids the search for purpose.⁴⁷ It indisputably shows the religious purposes of the early statutes.⁴⁸ History reveals the gradual disappearance of the religiously oriented language.⁴⁹ The Supreme Court has used this disappearance as an indication of the disappearance of religious purpose.⁵⁰ But such a conclusion does not follow necessarily. For instance, the North Carolina Supreme Court, after the 1951 repeal of the 1741 Sunday

'civil regulations.' 366 U.S. at 572. "Sabbath is no less Sabbath because it . . . has come to be expedient for some nonreligious purposes." *Id.* at 573 n.6. Justice Douglas might well have added the words of Cardinal Cushing, Archbishop of Boston:

The laws . . . reflect the belief of those who formulate them in a personal God and their acceptance of the age-old tradition that one day in seven should be set aside as the Lord's Day. It is extremely disturbing, therefore, to be confronted with this new trend of thought according to which Sunday is to become legally recognized as a day on which people may if they choose seek respite from their ordinary labors.

Quoted in Shaffer, *Sunday Selling*, 1960 EDITORIAL RESEARCH REPORTS, 119, 134 (1960). Professor Hanft seems to agree, saying that "[Sunday observance laws] . . . are a part of a continuing stream of religious thought and expression in the life of the nation." Hanft, *The Prayer Decisions*, 42 N.C.L. REV. 567, 575 (1964): Professor Louissell praised the Douglas position. He said: "May not ultimately there be in this kind of . . . candor . . . more real hope for a *modus vivendi* in the dilemmas of American religious pluralism, than in judicial make-believe such as that Sunday laws are secular?" Louissell, *Douglas on Religious Freedom*, 73 YALE L.J. 975, 998 (1964). Mr. Justice Brennan characterized the decisions as to purpose as "encroachments . . . cloaked in the guise of some nonreligious public purpose." *Braunfeld v. Brown*, 366 U.S. 599, 612 (1961) (separate opinion). For similar thought, see JOHNSON & YOST, *op. cit. supra* note 6, at 231, 255; PFEFFER, *op. cit. supra* note 42, at 229; 8 N.Y.L.F. 403 (1962); 15 OKLA. L. REV. 177 (1962).

⁴⁷ Justice Frankfurter treats the language as helpful though inconclusive in Sunday laws. 366 U.S. at 497-98 (separate opinion). It has been suggested that the language used be accorded more weight. See Hopp, *supra* note 41, at 228.

⁴⁸ See note 28 *supra* and accompanying text. The early cases in North Carolina also reflect the religious purpose. Chief Justice Ruffin spoke of "the legal injunction of all persons to apply themselves on Sunday to the duties of religion," in *Sloan v. Williford*, 25 N.C. 307, 309 (1843) (dictum). (Emphasis added.) However, Ruffin recognized that Sunday laws also served the purpose of providing relaxation and refreshment. *State v. Williams*, 26 N.C. 400, 401, 403-04 (1844). See generally BLAKELY, AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 53 (1911); JOHNSON & YOST, *op. cit. supra* note 6, at 222.

⁴⁹ See, e.g., text within note 16 *supra*. At the time of its repeal, only the phrase "the Lord's day" remained to give religious connotation to the 1741 North Carolina Sunday law. See N.C. GEN. STAT. § 103-1 (1950).

⁵⁰ *McGowan v. Maryland*, 366 U.S. 420, 434-35, 448 (1961).

observance act,⁵¹ said that "its repeal in no sense should be construed as a legislative intent to place the stamp of approval upon the profanation of the Sabbath."⁵² This statement indicates that, notwithstanding the disappearance of the religious language, the original religious purpose of the 1741 act survived until its repeal in 1951.

Sunday laws for religious purposes early presented constitutional difficulties in North Carolina. In 1844, Chief Justice Ruffin said that "however clearly the profanation of Sunday might be against the Christian religion, it is not and could not here be made, merely as a breach of religious duty, an offense"⁵³ He held the 1741 act valid, however, because the Legislature looked upon its violation as detrimental to the State as well as a breach of religious duty.⁵⁴ More emphasis was put on balancing the needs of society and the individual in 1904 when Chief Justice Clark said: "The *only* ground upon which 'Sunday laws' can be sustained is that in pursuance of police power the State can and ought to require a cessation of labor upon specific days *to protect the masses from being worn-out by incessant and unremitting toil.*"⁵⁵ Thus, the rationale that Sunday laws provide a needed rest from labor did not originate with the 1961 Supreme Court cases. It arose during the last century when the needs of labor were truly great and before laws favorable to labor became common. In 1886, a twelve hour work day with neither Sunday nor holiday the year round was prevalent in some occupations.⁵⁶ At the turn of the century, the

⁵¹ See text accompanying notes 15-24 *supra*.

⁵² *State v. McGee*, 237 N.C. 633, 638, 75 S.E.2d 783, 786, *appeal dismissed*, 346 U.S. 802 (1953). Chief Justice Ruffin also had characterized the purpose of the 1741 act as to prohibit the "profanation of Sunday." *State v. Williams*, 26 N.C. 400, 402 (1844).

⁵³ *Id.* at 407.

⁵⁴ *Ibid.*

⁵⁵ *Rodman v. Robinson*, 134 N.C. 503, 508-09, 47 S.E. 19, 21 (1904) (dictum). (Emphasis added.) *Accord*, *State v. McGee*, 237 N.C. 633, 640, 75 S.E.2d 783, 788, *appeal dismissed*, 346 U.S. 802 (1953): "If . . . the cessation of labor or the prohibition or performance of any act were provided by statute for religious reasons the statute could not be maintained." *Rodman v. Robinson*, *supra* at 508, 47 S.E. at 21. Nevertheless, religious reasons continue to induce the enactments. For example, a Charlotte city councilman after voting to enact a Sunday ordinance said in support of his action, "I have been brought up to keep the Sabbath holy." *Charlotte Observer*, March 7, 1964, § A, p. 1, col. 7, at 2, col. 1.

⁵⁶ *LESCOQUIER & BRANDEIS*, 3 *HISTORY OF LABOR IN THE UNITED STATES* 101 (1935). In 1887 North Carolina children six years old worked as much as twelve and a half hours a day. *DAVIDSON*, *CHILD LABOR LEGISLATION IN THE SOUTHERN TEXTILE STATES* 105 (1939).

states had grave doubts about the validity of labor-hours regulation.⁵⁷ In North Carolina, organized labor had no leverage; the general trend was in opposition to legislation touching any labor problem.⁵⁸ The theory and practice of allowing employers and employees to agree upon whatever terms the labor market dictated continued into the early part of the twentieth century.⁵⁹ No doubt the masses needed any rest the Sunday laws might lend.⁶⁰ But has the situation remained so desperate? During the twentieth century, the shift away from judicial and governmental inaction has been so great that a complete cycle in labor relations has occurred.⁶¹ Forty-three states have labor laws regulating either maximum daily hours, maximum weekly hours, or both.⁶² "[F]ederal legislation and collective bargaining contracts have created whole weekends of leisure for most American workers . . ."⁶³ These are the true factors that

⁵⁷ LESCOHIER & BRANDEIS, *op. cit. supra* note 56, at 667.

⁵⁸ DAVIDSON, *op. cit. supra* note 56, at 109, 112-13. The first attempts at labor legislation in North Carolina were toward the establishment of a ten-hour day in 1887. The bill was speedily tabled. *Id.* at 103. See generally *id.* at 102-21.

⁵⁹ "[Y]ellow dog contracts were originally upheld [1915], state legislation interfering with private contracts, by providing for maximum hours of work, denounced [1905], and minimum wages legislation for women invalidated [1923]." FORKOSCH, *LABOR LAW* 15 (1953). See generally PHILLIPS, *FELIX FRANKFURTER REMINISCES* 94-104 (1960).

⁶⁰ The "theory [that Sunday laws provided a day of rest] had particular significance during this nation's period of industrial advancement when laborers were at a bargaining disadvantage in respect to management." Note, 39 B.U.L. REV. 543, 544 (1959). In practice it is doubtful whether they had any significant effect because they were not enforced. *E.g.*, *State v. McGee*, 237 N.C. 633, 638, 75 S.E.2d 783, 786, *appeal dismissed*, 346 U.S. 802 (1953). See also *State v. Atlantic Coast Line R.R.*, 149 N.C. 470, 62 S.E. 755 (1908). Sunday laws are not given a significant role in labor history. *E.g.*, LESCOHIER & BRANDEIS, *op. cit. supra* note 56, at 673. The authors seem uncertain as to whether Sunday laws have any relation to the protection of labor. There is no treatment of Sunday laws in either DAVIDSON, *op. cit. supra* note 56; FORKOSCH, *op. cit. supra* note 59; LIEN, *LABOR LAW AND RELATIONS* (1938); or OAKES, *LAW OF ORGANIZED LABOR* (1927).

⁶¹ The dominant idea today is that of governmental planning for our resources and labor to yield the maximum social welfare. ROTTSCHAEFER, *THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE* 203 (1948).

⁶² U.S. DEP'T OF LABOR, *GROWTH OF LABOR LAW IN THE UNITED STATES* 74 (1962). See, *e.g.*, N.C. GEN. STAT. § 95-17 (Supp. 1963). This statute, originally enacted in 1937, provides in part:

No employer shall employ a female person for more than forty-eight hours in any one week . . . or on more than six days in any period of seven consecutive days.

No employer shall employ a male person for more than fifty-six hours in any one week, or more than twelve days in any period of fourteen consecutive days

protect the laboring classes. Whatever relation Sunday laws had in former times to the public's health, little remains today.⁶⁴

Further insight into the purpose served by the recent Sunday laws can be had by examining the major proponents of the legislation. These proponents are usually the downtown merchants associations.⁶⁵ There have been charges that the Sunday laws have become "a lethal weapon in the economic war of competition."⁶⁶ Today the downtown merchants cannot compete with the highway discount houses that remain open on Sunday. This fact is true whether the downtown merchants open on Sunday or retain their

⁶⁴ Brief for the Retail Clerks Int'l Ass'n, AFL-CIO as Amicus Curiae, p. 3, *Braunfeld v. Brown*, 366 U.S. 599 (1961).

⁶⁵ Nader, *Blue-Law Blues*, 192 NATION 499, 508 (1961). By 1940 the Department of Labor had discounted the usefulness of Sunday laws to labor. *Ibid.*

⁶⁶ The Pennsylvania Retailers' Association intervened in *Braunfeld v. Brown*, 366 U.S. 599 (1961). The recent state-wide Sunday law enactments in North Carolina were proposed by the North Carolina Merchants Association. *Raleigh News and Observer*, May 24, 1962, p. 1, col. 2. See also *Charlotte Observer*, March 17, 1964, § A, p. 5, col. 1; *id.*, March 16, 1964, § B, p. 1, col. 5; *id.*, Feb. 4, 1964, § B, p. 1, col. 8, at 9, col. 1. This association also filed a brief as amicus curiae in *Treasure City, Inc. v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964). On the local government level, the Downtown Charlotte Association, "an organization of downtown business and professional interests," submitted a Sunday closing ordinance to the city council. *Charlotte Observer*, Feb. 4, 1964, § B, p. 1, col. 8, at 9, col. 1.

⁶⁷ Brief for Appellant, p. 28, *McGowan v. Maryland*, 366 U.S. 420 (1961). Metropolitan shopping areas have "been the target of a prolific attack by intown stores which seek to enforce the Sunday laws against their competitors." *Ibid.* "[City] . . . retail merchants are intensifying a campaign to force competitors to keep their doors locked on Sundays." *State v. Fair Lawn Service Center, Inc.*, 20 N.J. 468, 476, 120 A.2d 233, 237 (1956) (dissenting opinion quoting *New York Times*). See KIRSTEIN, *STORES AND UNIONS* 15 (1950); Editorial Note, 12 *RUTGERS L. REV.* 505, 508 (1958). A former Charlotte city attorney, representing a discount house in an attack on a city Sunday ordinance, said that the Sunday laws are economic weapons aimed at discounters by downtown merchants. *Charlotte Observer*, Feb. 4, 1964, § B, p. 1, col. 8. See *id.*, March 16, 1964, § B, p. 1, col. 5; *id.*, March 10, 1964, § C, p. 2, col. 5; *id.*, March 2, 1964, § B, p. 1, col. 8; *id.*, Feb. 29, 1964, § B, p. 2, col. 5 (quoting *Ashville Citizen* editorial); *id.*, Feb. 25, 1964, § B, p. 2, col. 1; *id.*, Feb. 21, 1964, § B, p. 1, col. 5; *Raleigh News and Observer*, Nov. 20, 1964, p. 1, col. 2; *id.*, May 24, 1962, p. 1, col. 3; *id.*, June 22, 1961, p. 1, col. 4. In 1959 the National Council of the Churches of Christ in the U.S.A. warned member churches against joining the struggle for Sunday laws "sought by economic forces as a means to remove . . . competition, rather than for bona fide [purposes] . . ." Quoted in Shaffer, *Sunday Selling*, 1960 EDITORIAL RESEARCH REPORTS 119, 123. In vetoing a 1959 Sunday selling law, Gov. George Dewey Clyde of Utah said: "[T]he major support [for the measure] comes from a group of retail merchants who are seeking by this means to regulate competition within their own industry." Quoted in Shaffer, *supra* at 136.

present practice of closing.⁶⁷ The best solution to the downtown merchants' problem is to seek legislation to eliminate the Sunday market, thereby causing the billions of dollars now spent yearly on Sundays⁶⁸ to be spent on other days, when the downtown merchants are not at such a competitive disadvantage. Could this be the reason these special interest groups seek Sunday closing laws? Statements on behalf of the downtown merchants indicate that if legislation is not passed removing Sunday competition they will themselves open on Sunday in an effort to capture at least part of the Sunday market.⁶⁹ Therefore, in proper perspective it seems that competition, not labor, is in the forefront of the proponents' collective mind.

If the primary purpose of the Sunday laws is to enable the downtown merchants to compete, with certain religions and labor benefitting only incidentally, can the act withstand the constitutional tests, assuming the purpose is projected into effect? Generally, the courts give considerable weight to the decision of the legislature when the police power is involved.⁷⁰ In *Tyson v. Banton*,⁷¹ Mr.

⁶⁷ Most downtown stores could not compete beyond the city limits by opening their own doors on Sunday. Some were forbidden to do so under ordinances that did not apply in adjacent areas; even if there was no legal bar to opening, the downtown location was a handicap on a day when families took to the road. A number of big stores tried to meet the competition by taking telephone orders for articles advertised in the Sunday newspapers. Others opened branches in the suburbs to get the Sunday trade.

Shaffer, *supra* note 66, at 120-121; See generally Editorial Note, 12 *RUTGERS L. REV.* 505, 509 (1958).

⁶⁸ Shaffer, *supra* note 66, at 121.

⁶⁹ "If these seven-day discount stores are permitted to continue to remain open on Sunday and the other six days of the week, it will become necessary for other stores to likewise open on Sunday to compete." Brief for the North Carolina Merchants Ass'n as Amicus Curiae, p. 20. *Treasure City, Inc. v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964). "The retail mercantile field is highly competitive. If one store is wide open . . . others must follow." *Raleigh News and Observer*, Nov. 20, 1961, p. 1, col. 4 (attorney for appellee in oral argument of *Treasure City*). See *State v. Fair Lawn Service Center, Inc.*, 20 N.J. 468, 476, 120 A.2d 233, 237 (1956) (Jersey City Merchants Council solution—a new state Sunday law). The President of the Raleigh Merchants Bureau said: "Rose's in Charlotte does some \$60,000 on Sunday. . . . A man has to protect himself and remain open or seek legislation." *Raleigh News and Observer*, May 24, 1962, p. 40, col. 3. To the same effect see *Charlotte Observer*, March 10, 1964, § A, p. 1, col. 8, at 2, col. 3 (President of Charlotte Merchants Association).

⁷⁰ *Berman v. Parker*, 348 U.S. 26, 32 (1954); *Mays v. Burgess*, 147 F.2d 869, 873 (D.C. Cir.), *cert. denied*, 325 U.S. 896 (1945); *Harlow v. Ryland*, 78 F. Supp. 488, 493 (E.D. Ark.), *aff'd*, 172 F.2d 784 (8th Cir. 1949); *First Nat. Ben. Soc. v. Garrison*, 58 F. Supp. 972, 982 (S.D. Cal.), *aff'd*, 155 F.2d 522 (9th Cir. 1946).

⁷¹ 273 U.S. 418 (1927).

Justice Holmes said

the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.⁷²

Mr. Justice Holmes's fear that the courts will dip into political questions should not, however, prevent courts from recognizing the limitations upon the use of the police power.

To justify the State in . . . interposing its authority . . . it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.⁷³

Essential for the exercise of police power is that protection of a specific public interest is more important than the social interest in personal liberty.⁷⁴ The public interest to be protected by the present Sunday laws is a vague, general one.⁷⁵ On the other hand,

⁷² *Id.* at 446 (dissenting opinion).

⁷³ *Lawton v. Steele*, 152 U.S. 133, 137 (1894). This is the classic statement of the specific criteria for a valid exercise of the police power. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

⁷⁴ See *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111-113 (1928); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924); *Aaron v. McKinley*, 173 F. Supp. 944, 950 (E.D. Ark.), *aff'd sub nom. Faubus v. Aaron*, 361 U.S. 197 (1959). The balancing problem is discussed in *State v. Lawrence*, 213 N.C. 674, 684, 197 S.E. 586, 592 (1938) (dissenting opinion). In *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), the court relied on the dissent "of acknowledged power and force of reason" in *Lawrence* to hold that a statute which required professional photographers to be licensed was beyond the police power. *Id.* at 767, 51 S.E.2d at 733. See generally WILLIS, *CONSTITUTIONAL LAW OF THE UNITED STATES* 728 (1936); Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943 (1927).

⁷⁵ In the *Braunfeld* case, Brennan asked

what overbalancing need is so weighty in the constitutional scale that it justifies this substantial . . . limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society It is not even the interest in seeing that everyone rests one day a week It is the mere convenience of having everyone rest on the same day.

366 U.S. at 614 (separate opinion).

the very real and positive benefits to the particular group at the expense of a loss of liberty by citizens generally is quite tangible.⁷⁰ It seems axiomatic that the police power cannot be used where the primary purpose is not the health, safety, welfare, or morals of the public but rather is to suppress competition.⁷¹ When the *primary*

⁷⁰ In *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940), Justice Seawell warned against the efforts of pressure groups.

[T]he importance of personal liberty is under constant attrition, in the desire for more sweeping governmental control in private affairs and in the development of pressure groups which are unable to reach their objectives through voluntary association and, for reasons not entirely altruistic, demand the powerful aid of the law. The usual symptom is an endemic desire to have the public protected . . . although the public is not sensible of any harm . . . or any need of protection. This *beau geste* should not blind the Court to the fact, when it exists, that the kind of protection afforded . . . is more related to obvious benefits accorded to the group in its private character than to the merely colorable advantage to the public.

Id. at 762, 6 S.E.2d at 865. (Emphasis added.) See also Hanft & Hamrick, *Haphazard Regimentation Under Licensing Statutes*, 17 N.C.L. Rev. 1, 10 (1938). This article shows that many licensing statutes, while ostensibly for the protection of public welfare, are for the real motive of keeping down competition. As long as the legislature continues to serve the aims of pressure groups in the name of public welfare "a horde of guardians of the public health, safety, morals, and welfare will continue to crowd forward." *Id.* at 18.

⁷¹ *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538 (1949); *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925). In *Ex parte Boehme*, 12 Cal. App. 2d 424, 55 P.2d 559 (Dist. Ct. App. 1936), *D* was convicted under a Sunday law prohibiting barber shop operation more than six days a week. The court reversed the conviction. Citing the State's one-in-seven labor law to show that the barber shop closing law was not to provide a uniform day of rest, the court said: "It seems apparent to us that the real object . . . was not to prescribe one day of rest in seven for barbers, but plainly to restrict competition among the owners of the shops. Such an object is certainly not within the police power . . ." *Id.* at —, 55 P.2d at 562.

However, many courts have not agreed with the finding of the *Boehme* case. See *Two Guys from Harrison, Inc. v. Furman*, 32 N.J. 199, 160 A.2d 265 (1960). In this case, the court dismissed the allegation that the statute sought to protect the urban merchant from his highway adversary by declaring that it had no way of knowing that such was the purpose, and that this contention was in the realm of conjecture. *Id.* at 227-28, 160 A.2d at 280. In *Gundaker Central Motors, Inc. v. Gassert*, 23 N.J. 71, 127 A.2d 566 (1956), the court reasoned that since all sellers of the proscribed goods were required to close there was no economic advantage gained and therefore the guarantee of equal protection was met. *Id.* at 81, 127 A.2d at 572. The reasoning is not sound. Suppose *A* and *B* compete in *X* industry. *A* adopts a new practice to gain a competitive advantage over *B* which *B* cannot make up by also adopting the same practice. *B* seeks and gets police power legislation barring the use of the practice in *X* industry. Can it be said that no economic advantage has been gained by *B*? See note 67 *supra* for the indication that the supposition is a true reflection of the facts surrounding the present Sunday law controversies between the

purpose of an act is to suppress competition, the fact that the act would *incidentally* serve an end permissible to the state, *i.e.*, providing a day of rest, ought not save it.⁷⁸

III. WHERE NORTH CAROLINA STANDS

The success of the merchants associations in North Carolina, proposers of the recent Sunday sales acts,⁷⁹ has been prevented only by the North Carolina Supreme Court. The 1961 act⁸⁰ was a substantial copy of the Pennsylvania Sunday law⁸¹ upheld by the United States Supreme Court in the 1961 cases.⁸² A day of rest is ordered

highway discount houses (represented by A) and the downtown merchants (represented by B).

⁷⁸ Stress must be laid on the use of the word "incidentally" here. The word is used in the sense that the unconstitutional, primary purpose and effect so overshadow the indirect effect that the indirect effect does not bear a reasonable relation to the service of an end permissible to the state. An example is *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In this case an Oregon law which made it compulsory for children to attend public schools was held to be beyond the limits of the police power and therefore unconstitutional. Although some public good might have come from the act, the infringement upon the private interests of parochial schools so overshadowed the possible public good that the act was held to bear no reasonable relation to a purpose within the competency of the state. *Id.* at 535.

The police power is in derogation of personal liberty, and extends only to those measures enacted for the good of all citizens that have a *substantial* (not merely an incidental) relation to the public health, morals, safety, or general welfare. *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960) (statute requiring license to solicit students for private schools held unconstitutional); *State v. Brown*, 250 N.C. 54, 108 S.E.2d 74 (1959) (aesthetic conditions alone insufficient to support police power); *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957) (exercise of police power to require a license to lay tile unconstitutional); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949) (police power requiring license to practice photography unconstitutional).

⁷⁹ See note 65 *supra*.

⁸⁰ N.C. Sess. Laws 1961, ch. 1156, § 1. It provides in part:

Any person, firm or corporation who engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, excluding novelties, toys, souvenirs, and articles necessary for making repairs and performing services, shall, upon conviction thereof be fined or imprisoned in the discretion of the court.

⁸¹ PA. STAT. ANN. tit. 18, § 4699.10 (1963).

⁸² *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961). See notes 35-43 *supra* and accompanying text. The constitutionality of the statute considered as an economic weapon to suppress competition was not decided.

only for those who sell at retail a specific list of goods, harmless in themselves. All of the items prohibited from sale on Sunday may be manufactured or processed on Sunday; all of the myriad other articles may be made, processed, advertised, and sold on Sunday; every form of worldly employment may be pursued except the sale of the condemned items. The idea that the 1961 act is designed to protect a day of rest when it only partly closes the places that sell the specified goods, allows the the sale of countless other articles, and virtually grants a public license to all other forms of commercial and industrial business to operate on that day with actual financial advantage, contains within itself its negation.⁸³ The pretension that the statute is to provide a day of rest should not be allowed to hide the obvious fact that the statute is aimed at highway discount houses.⁸⁴

In *G I Surplus Stores, Inc. v. Hunter*,⁸⁵ four highway discount houses operating on Sunday sought to enjoin enforcement of the 1961 act on the sole ground that it was unconstitutionally vague, uncertain, and indefinite. On appeal from a judgment below dismissing the action, the North Carolina Supreme Court reversed. The clause in the act allowing the sale of "articles necessary for making repairs and performing services"^{86a} was deemed so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application."⁸⁶ Therefore, said the court, the act violated article I, section 17, of the North Carolina Constitution^{86a} and the due process clause of the fourteenth amendment to the federal constitution. The reasoning of the court centered the vagueness charge on the word "necessary." Much reliance was placed on a 1962 Kansas case which held the phrase "other

⁸³ These arguments were made against a similar statute in *Two Guys from Harrison, Inc. v. Furman*, 32 N.J. 199, 250-52, 160 A.2d 265, 292-93 (1960) (dissenting opinion).

⁸⁴ As the Court said in *Two Guys*, "[T]he types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute." 366 U.S. at 590-91 (appellant operated a large highway discount department store).

⁸⁵ 257 N.C. 206, 125 S.E.2d 764 (1962).

^{86a} See note 80 *supra*.

⁸⁶ 257 N.C. at 213, 125 S.E.2d at 769.

^{86a} This section of the constitution provides: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

articles of immediate necessity"⁸⁷ unconstitutionally vague⁸⁸ Although the North Carolina court expressly decided only that the means used to implement the end were unconstitutional, considerable insight into the feeling of the court concerning the nature and constitutionality of that end can be had by a closer examination of the decision.

The court might easily have avoided declaring the act unconstitutional. The discount houses sought a constitutional test of the act in an injunctive suit. The general rule is that the constitutionality of an act cannot be challenged in a suit to enjoin its enforcement.⁸⁹ The court, however, said an exception to the rule is allowed "when it clearly appears . . . that . . . fundamental human rights are denied in violation of constitutional guarantees."⁹⁰ There are few cases extending this exception to the general rule to suits based on the "void for vagueness" doctrine, perhaps because freedom from vagueness was not always recognized as a constitutional guarantee.⁹¹ It was originally only a non-decisive part of the rule of strict construction of criminal statutes.⁹² Today, however, it has crystallized into an imposing doctrine of constitutional law based either on the requirement of separation of powers⁹³ or a section of

⁸⁷ Kan. Sess. Laws 1859, ch. 28, § 249.

⁸⁸ *State v. Hill*, 189 Kan. 403, 369 P.2d 365 (1962). The Kansas court said "necessity" has no generally understood objective meaning; that it only had relative, subjective meaning. Therefore it failed to inform men of common intelligence what conduct would render them liable to penalties.

⁸⁹ 257 N.C. at 214, 125 S.E.2d at 770.

⁹⁰ *Ibid.*

⁹¹ 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4920, at 448 (3d ed. 1943). However, such is not to say that the extension is not presently recognized as sound, for in *Baggett v. Bullitt*, 377 U.S. 360 (1964), state loyalty oath statutes were declared unconstitutional for vagueness in an injunctive suit. *Accord*, *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961). This point concerning the form of action is raised merely to shed light on the inclination of the North Carolina court.

⁹² *United States v. Evans*, 333 U.S. 483, 486 (1948). For instance, in *Patten v. Aluminum Castings Co.*, 105 Ohio St. 1, 136 N.E. 426 (1922), 21 MICH. L. REV. 831, a statute was declared void for vagueness independently of constitutional restriction upon legislative action since the required number of judges did not concur in order to declare a statute unconstitutional. See generally Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Note, 23 IND. L.J. 272 (1948); Note, 109 U. PA. L. REV. 67 (1961); 38 HARV. L. REV. 963 (1925).

⁹³ If the statute is so uncertain that a court would have to rewrite it to enforce it, the court should refuse to usurp the legislative function. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927). See generally Collings, *supra* note 92.

a state constitution.⁹⁴ It is usually stated: The terms of a penal statute creating an offense must be sufficiently explicit to inform with reasonable certainty those who are subject to it what conduct is to be penalized.⁹⁵ This is the pot calling the kettle black, for the doctrine is itself too vague to command any consistency in the cases.⁹⁶ A court may rely on often repeated phrases either to strike down a statute⁹⁷ or to uphold it⁹⁸ without really making a pene-

⁹⁴ See, e.g., N.C. CONST. art. I, § 17, quoted in note 86a *supra*.

⁹⁵ E.g., *G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 211, 125 S.E.2d 764, 768 (1962).

⁹⁶ "[B]oth sides cite and rely on the same cases to support their . . . diametrically opposed positions." *Harvey v. Priest*, 366 S.W.2d 324, 327 (Mo. 1963).

⁹⁷ "The dividing line between what is lawful and unlawful cannot be left to conjecture." *Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926). "[I]t will not do to hold an average man to the peril of an indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the results." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927). For similar rationale, see *State v. Hill*, 189 Kan. 403, 369 P.2d 365 (1962); *G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 212, 125 S.E.2d 764, 769 (1962).

⁹⁸ "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *United States v. Petrillo*, 332 U.S. 1, 7 (1947). "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it." *Nash v. United States*, 229 U.S. 373, 377 (1913) (Holmes, J.). Compare the quotations cited in note 97 *supra*. Compare *Great Am. Ins. Co. v. Johnson*, 257 N.C. 367, 371, 126 S.E.2d 92, 95 (1962) and *State v. Hales*, 256 N.C. 27, 33, 122 S.E.2d 768, 773 (1961) (shoplifting statute held not vague), with *G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 212-13, 125 S.E.2d 764, 768-69 (1962).

Line-drawing distinctions based on particular words used in a statute do not completely account for the lack of consistency in the cases. The line-drawing technique usually explores the countervailing pressures which require a line to be drawn somewhere. Those countervailing pressures in the vagueness are on the one hand to allow the legislature to use flexible standards to insure effective application of legislative policy and on the other hand to insure that the standards used provide workable guidelines for those administering and subject to them. The "void for vagueness" cases have not generally reflected these line-drawing pressures. See *Cardinal Sporting Goods Co. v. Eagleton*, 213 F. Supp. 207, 219 (E.D. Mo. 1963). Their "habitual lack of informing reasoning" gives them a "pool-rack-hung-up appearance." Note, 109 U. PA. L. REV. 67, 70-71 (1960). In the *G I Surplus* case the North Carolina court did not discuss whether the phrase "necessary for making repairs and performing services" resulted from the nature of the subject matter, which may impose limitations on exactitude in phrasing in order to implement policy, or from sloppy draftsmanship—which often happens with "floor" amendments; nor whether the vital word "necessary" had been previously employed with success by the legislature; nor whether the phrase must be sufficiently certain to the average man or only to the trained minds of judges. See generally 45 HARV. L. REV. 160

trating analysis of whether the statute conveys sufficient meaning.⁹⁹ This possibility makes the concept of vagueness an "available instrument in the service of other . . . judicially felt needs and pressures" that control the cases and relegate the vagueness of the statutory words to incidental significance.¹⁰⁰ These "spurious void for vagueness" cases seem to have their actual basis in either of two settings: (1) a state imposing more prohibitory regulation than it has a constitutional right to impose,¹⁰¹ or (2) a court actually deciding policy questions avoided in the written opinion as "political questions."¹⁰² These uses of the doctrine, although tending to minimize the number of occasions a court must expressly reach issues of ultimate power, tend to veil the real issue when used in the first kind of case and usurp the legislative function when used in the second.¹⁰³

Evidence that the North Carolina Supreme Court had the first of these uses at least "in the back of its mind" in the *G I Surplus* case is not wanting. It is found in the language quoted with approval by the court: "[A]rbitrary interference with private business and unnecessary restrictions upon lawful occupations are not within the police powers of the state."¹⁰⁴

(1931) (arguing that certainty to judges is sufficient). Is it not just as prejudicial to an individual to measure his rights by vague standards as it is to penalize him with vague statutes?

⁹⁹ Mr. Justice Holmes said that "it is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (dissenting opinion).

¹⁰⁰ Note, 109 U. PA. L. REV. 67, 75 (1960). See Collings, *supra*, note 92, at 212-14 (that this use dominates the doctrine).

¹⁰¹ [T]he void-for-vagueness doctrine may be regarded less as a principle regulating the permissible relationship between written law and the potential offender than as a practical instrument mediating between, on the one hand, all of the organs of public coercion of a state and, on the other, the institution of federal protection of the individual's private interests.

Note, 109 U. PA. L. REV. 67, 81 (1960).

¹⁰² 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4920, at 447 (3d ed. 1943) ("antagonisms to legislative policy rather than uncertainty concerning legislative meaning"); Collings, *supra* note 92, at 195; Note, 23 IND. L.J. 272, 284 (1948).

¹⁰³ See generally *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 770 (1961); Note, 23 IND. L.J. 272, 285 (1948).

¹⁰⁴ 257 N.C. at 210, 125 S.E.2d at 767. The Supreme Court upheld a Pennsylvania Sunday law which only prohibited "certain business activities" in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961). However, the Court made it clear that in Pennsylvania the statute simply supplemented prior regulation which prohibited *all* worldly

The questionable application of the vagueness doctrine to the phrase "necessary for making repairs and performing services" also indicates that the court was doing more than merely insuring fair notice. Words that have a long history of use are generally not declared vague.¹⁰⁵ The concept of excepting necessary activities from the operation of Sunday laws dates from the 1676 English act¹⁰⁶ and today appears in all states that have some sort of general Sunday law.¹⁰⁷ A substantial body of courts, including the North Carolina Supreme Court,¹⁰⁸ have construed the exception for necessary *activity* without finding it so desperately unworkable as to be unconstitutional.¹⁰⁹ Most courts today reject the vagueness attack because they find the word "necessary" in the context of Sunday laws sufficiently definite.¹¹⁰ Indeed, the United States Supreme

employment. *Id.* at 590. The North Carolina court spent three paragraphs of the *G I Surplus* opinion to point out that the 1961 act does not prohibit "all occupations generally" on Sunday, but only "certain business activities." 257 N.C. at 210-11, 125 S.E.2d at 767 (1962). This has nothing to do with vagueness. It is apparent recognition of the trend in other jurisdictions to hold that "Sunday closing laws which are less than universal in their application are unrelated to a universal day of rest in any manner substantial enough to satisfy due-process requirements." Comment, 4 St. Louis U.L.J. 465, 471 (1957) (citing cases from California, Colorado, Florida, Nebraska, New York and Oklahoma).

¹⁰⁵ *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 220-21 (1936) (Cardozo, J.). See also *Campbell v. City of New York*, 244 N.Y. 317, 325, 155 N.E. 628, 630 (1927) (Cardozo, J.).

¹⁰⁶ See text accompanying note 12 *supra*.

¹⁰⁷ *McGowan v. Maryland*, 366 U.S. 420, 551 (1961) (Appendix II to separate opinion of Frankfurter, J.).

¹⁰⁸ *State v. Southern Ry.*, 119 N.C. 814, 25 S.E. 862 (1896) (involving necessity of operation of trains on Sunday).

¹⁰⁹ In general, "necessary" in the context of Sunday laws is something short of absolute or physical need but something more than merely needful, desirable, and convenient. *Williams v. State*, 167 Ga. 160, 162-63, 144 S.E. 745, 746 (1928); *Ungericht v. State*, 119 Ind. 379, 380-81, 21 N.E. 1082, 1083 (1889); *Ex parte Seward*, 299 Mo. 385, 403, 253 S.W. 356, 360 (1923), *appeal dismissed sub nom.* *Seward v. Brady*, 264 U.S. 599 (1924); *State v. James*, 81 S.C. 197, 200, 62 S.E. 214 (1908). OHIO LEGISLATIVE SERVICE COMMISSION, SUNDAY PROHIBITIONS 8-11 (1963) (on file in N.C. Institute of Government Library). The fact that no exact definition of general application can be framed does not constitute vagueness. *Great Am. Ins. Co. v. Johnson*, 257 N.C. 367, 371, 126 S.E.2d 92, 95 (1962).

¹¹⁰ *Cardinal Sporting Goods Co. v. Eagleton*, 213 F. Supp. 207 (E.D. Mo. 1963); *State v. Fantastic Fair*, 158 Me. 450, 186 A.2d 352 (1961); *Marks Furs, Inc. v. City of Detroit*, 365 Mich. 108, 112 N.W.2d 66 (1961); *Commonwealth v. Bauder*, 188 Pa. Super. 424, 145 A.2d 915 (1958); *Mandell v. Haddon*, 202 Va. 979, 121 S.E.2d 516 (1961); *Rich v. Commonwealth*, 198 Va. 445, 94 S.E.2d 549 (1956). The cases holding that the exemptions allowing necessary activity are too vague to be construed are recent and parallel the use of the Sunday laws as an economic weapon to suppress

Court did not find the "necessary" exception contained in one of the two acts challenged in *Two Guys From Harrison-Allentown, Inc. v. McGinley*¹¹¹ to be vague. In that case, the Court upheld two Pennsylvania Sunday acts.¹¹² The first of these acts¹¹³ did not contain an exception for necessary activity. With the addition of the "necessary" exception, it is the act that North Carolina adopted.¹¹⁴ The North Carolina General Assembly obviously adopted a copy of the Pennsylvania act because the act had been upheld against constitutional attack. The addition of the "necessary" exception was not thought of as endangering the constitutionality of the act.¹¹⁵ The legislature's confidence was justified because the second Pennsylvania act¹¹⁶ involved in *Two Guys* contained a "necessary" exception that was upheld also. Although the second act was not expressly attacked as being void for vagueness, the Court must have ruled on the issue inferentially. Since the core of the "void for vagueness" doctrine is that the act is so vague as to be unworkable and meaningless, the Court by implication rejected that view merely by finding the act to be valid and workable.

The word "necessity" has legal significance in such areas as constitutional law,¹¹⁷ contracts,¹¹⁸ county government finance,¹¹⁹

competition. See *State v. Hill*, 189 Kan. 403, 369 P.2d 365 (1962); *Harvey v. Priest*, 366 S.W.2d 324 (Mo. 1963); *G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E.2d 764 (1962); *State v. Woodville Appliance, Inc.*, 171 N.E.2d 565 (Ohio Dist. Ct. 1960).

¹¹¹ 366 U.S. 582, 585, 590 (1961) (by implication).

¹¹² PA. STAT. ANN. tit. 18, §§ 4699.4, .10 (1963).

¹¹³ PA. STAT. ANN. tit. 18, § 4699.10 (1963).

¹¹⁴ N.C. Sess. Laws 1961, ch. 1156.

¹¹⁵ See *ESSER, RESPONSIBILITY OF COUNTY BOARDS OF COMMISSIONERS UNDER CHAPTER 1156, 1961 SESSION LAWS 3* (1962) (on file N.C. Institute of Government Library), saying that "obviously this amendment [the "necessary" exception] is vague and subject to a wide range in interpretation but there is no indication in the opinions of the [United States] Supreme Court that addition of the exclusion would result in tipping the scales toward invalidity."

¹¹⁶ PA. STAT. ANN. tit. 18, § 4699.4 (1963).

¹¹⁷ Mr. Chief Justice Marshall rejected the "absolutely indispensable" definition of "necessary" as used in the necessary and proper clause of the United States Constitution. He said:

Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819).

¹¹⁸ See *Overman & Co. v. Maryland Cas. Co.*, 193 N.C. 86, 136 S.E.

domestic relations,¹²⁰ infants' rights,¹²¹ municipal corporation expenditures,¹²² labor,¹²³ possession of real property,¹²⁴ pleading and parties,¹²⁵ taxation,¹²⁶ and wills.¹²⁷ Furthermore, in *State v. Black-*

250 (1927) (candies, tobacco not necessities under surety bond of highway contract).

¹¹⁹ See *Denny v. Mecklenburg County*, 211 N.C. 558, 191 S.E. 26 (1937) (dwellings for the use of teachers were not "necessary equipment" within statute allowing county bonds for same).

¹²⁰ *E.g.*, *Berry v. Henderson*, 102 N.C. 525, 528, 9 S.E. 455, 456 (1889) (dictum concerning "necessities" husband has duty to provide).

¹²¹ In *Barger v. M. & J. Finance Corp.*, 221 N.C. 64, 18 S.E.2d 826 (1942), an infant was allowed to recover money paid on a contract during minority because the article purchased was not "among those necessities for which a minor may be held liable." *Id.* at 66, 18 S.E.2d at 827. *Accord*, *Jordan v. Coffield*, 70 N.C. 110 (1874).

¹²² There are a great many North Carolina cases construing the "necessary expense" provision of N.C. CONST. art. VII, § 7. This provision forbids North Carolina municipal corporations spending tax money on expenses other than "necessary expenses" without a vote of the people. *Compare Mayo v. Commissioners of Town of Washington*, 122 N.C. 5, 29 S.E. 343 (1898) (finding that street lights were not a necessary expense), *with Fawcett v. Town of Mt. Airy*, 134 N.C. 125, 45 S.E. 1029 (1903) (overruling the *Mayo* case).

¹²³ *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944). *Compare Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942) (maintenance employees necessary and therefore within the provisions of the Fair Labor Standards Act) *and Borden Co. v. Borella*, 325 U.S. 679 (1945), *with 10 East 40th St. Bldg., Inc. v. Callus*, 325 U.S. 578 (1945) (maintenance employees here held not necessary in the same context).

¹²⁴ *Swink v. Horn*, 226 N.C. 713, 717, 40 S.E.2d 353, 356 (1946) (necessity required to recover property subject to wartime rent controls).

¹²⁵ *E.g.*, *Equitable Life Assur. Soc'y. v. Basnight*, 234 N.C. 347, 352, 67 S.E.2d 390, 394-95 (1951) (Ervin, J., defining "necessary parties"); *Pegram v. Wachovia Bank & Trust Co.*, 219 N.C. 224, 225, 13 S.E.2d 249-50 (1941).

¹²⁶ "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ." INT. REV. CODE of 1954, § 162(a). See *Mich. Improvement Ass'n v. Rockwood*, 60-1 U.S. Tax Cas. ¶ 9380 (D.N.D. 1960); *Montgomery v. United States* 63 Ct. Cl. 588 (1927). See generally 1964 P-H FED. TAX SERV. ¶ 11033.

¹²⁷ In *Whitfield v. Garriss*, 134 N.C. 24, 45 S.E. 904 (1903), the court said "that an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." *Id.* at 26, 45 S.E. at 905. (Emphasis added.)

Although some of these uses do not involve criminal statutes, it does not seem that they should be distinguished on that fact alone. The rationale of *State v. Hill*, 189 Kansas 403, 411, 369 P.2d 365, 371 (1962); *State v. Hales*, 256 N.C. 27, 33, 122 S.E.2d 768, 772-73 (1961), that the "void for vagueness" doctrine requires criminal statutes to be more certain than civil statutes is not entirely sound. It has modern basis in the principle that "clearer warning should be given where the conduct will invoke sanctions of greater severity." Note, 62 HARV. L. REV. 77, 85 (1948). A light criminal fine is not as severe as many civil consequences resulting from

welder,¹²⁸ the North Carolina Supreme Court upheld a superior court determination that a municipal ordinance which prevented the selling of a meal on Sunday was an "oppressive . . . unreasonable exercise of the police power . . ."¹²⁹ The rationale of the supreme court is contained in one sentence: "[T]he ordinance in question makes no exception as to 'works of necessity,' among which is generally listed, 'keeping open a . . . dining-room.'"¹³⁰

Therefore, it can be concluded that the court in the *GI Surplus* case could have held the injunctive suit not proper for a decision on the constitutionality of the act; that the court used a doctrine to declare the act unconstitutional which has previously seen substantial use in expressing motivating forces not explicitly spelled out in the decisions; and that such forces may have motivated the decision in the *GI Surplus* case since the application of the doctrine to the 1961 act—solely as a means of getting rid of a vague statute—was highly questionable. The court has been criticized for not trying to construe the clause held vague in *GI Surplus*.¹³¹ Perhaps

construction of the word "necessary" in a statute. See *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958) ("ordinary and necessary" expense decision involving \$41,000); *Lilly v. Commissioner*, 343 U.S. 90 (1952) (same involving \$124,000). It should be noted here, however, that civil fines do not always carry the onerous consequences of a criminal record.

¹²⁸ 186 N.C. 561, 120 S.E. 196 (1923).

¹²⁹ *Id.* at 563, 120 S.E. at 197.

¹³⁰ *Ibid.* The court in *Blackwelder* seems to make the "necessary" exception a constitutional mandate. If so it has the support of McQuillin, who says "certain exceptions [to Sunday law prohibitions] must be made. For example, articles or works of necessity . . . may and must be excepted." 6 McQUILLIN, MUNICIPAL CORPORATIONS § 24.193, at 777 (1949). Yet in *GI Surplus* the court said the statute violated constitutional guarantees because it contained the "necessary" exception. Affording *Blackwelder* the least possible weight, it can be said that the court approved of the exception for "works of necessity." "Works of necessity" might include endless types of work—not merely selling, endless types of sales—not merely retail sales of specific articles, and endless types of necessity—not merely necessary repairs and services. It seems, then, that the phrase deemed essential by the court in *Blackwelder* could be considered more vague than the phrase involved in the *GI Surplus* decision.

¹³¹ See *Cardinal Sporting Goods Co. v. Eagleton*, 213 F. Supp. 207, 219 (E.D. Mo. 1963). The tradition of painstaking construction is strong in North Carolina. "The court must use every authorized means to . . . give . . . intelligible meaning . . ." *State v. Partlow*, 91 N.C. 550, 553 (1884). Intrinsic language difficulties cause problems of meaning in anything that may be written. The giving of meaning is the "essence of the business of judges." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947). Although a court is not at liberty to supply meaning where it is impossible to solve the doubt, the court should avoid "abstract notions about 'indefiniteness.'" *Winters v. New York*, 333 U.S. 507, 526 (1948) (Frankfurter, J., dissenting).

the lack of emphasis the court put on construction can be attributed to the use of the vagueness doctrine more for the purpose of removing an economic weapon from statutory sanction than for the purpose of insuring fair notice to potential offenders.¹³² If such a use is the substance of the *GI Surplus* case, the result reached is to be applauded. However, the means used to reach the result are unfortunate because the vagueness issue veils this inferable holding and reduces the value of the case as a precedent. Viewed solely as a vagueness case, it can be "hung on the rack" to be factually distinguished in future cases. Hopefully, the many forces which seem to have forged and shaped the opinion will be appreciated.¹³³

The decision in *GI Surplus*, however, did not daunt the Sunday law proponents. Within a year, the 1961 act was rewritten.¹³⁴ The "vague" phrase exempting "necessary activity" was not made more certain; it was deleted. The policy which stood back of the phrase was totally abandoned. Also, a provision in the 1961 act which

¹³² *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 134 S.E.2d 364 (1964); *State v. Towery*, 239 N.C. 274, 79 S.E.2d 513, *appeal dismissed*, 347 U.S. 925 (1954); and *State v. McGee*, 237 N.C. 633, 75 S.E.2d 783, *appeal dismissed*, 346 U.S. 802 (1953), do not detract from this conclusion. These cases uphold municipal ordinances prohibiting all occupations generally on Sunday with exceptions allowing certain business activities. The ordinances were attacked on the ground that they contained unreasonable classification distinction between stores allowed to open on Sunday and stores required to close. The cases assume that the purpose of the Sunday ordinances involved is to promote public health and welfare. See *Clark's Charlotte, Inc. v. Hunter*, *supra* at 228, 231, 134 S.E. at 368, 370. On that basis they allow unlimited classification of types of businesses. If a search revealed that the purpose and effect of the ordinances is more to suppress competition than to provide a day of rest, the result should be the same as that which can be inferred from *G I Surplus*—that the purpose underlying the Sunday laws is unconstitutional. See generally text accompanying notes 70-78 *supra*. The cases have avoided the search. They uniformly say that competition between the classes is not the test of reasonableness of the classification. This reasoning overlooks the fact that competition between the classes might have fostered the classification, whereas differences in the types of businesses are only incidentally involved. The reasoning of the court upholds an ordinance where all businesses of a particular type (for instance department stores) are required to close. Is this a sufficient test? Some stores within the type might reap great economic advantage even though they have to remain closed. See text accompanying notes 67-68 *supra*. Labor might only incidentally benefit.

¹³³ The "working room" of the court was partially restricted by the pleadings. The sole attack on the statute was upon the vagueness charge. Finding that two other jurisdictions (Kansas and Ohio) had accepted the contention, the court did not go beyond it to expressly settle the ultimate power issue.

¹³⁴ N.C. GEN. STAT. § 14-346.2 (Supp. 1963). The new act retained the substance of the 1961 act except as hereinafter noted.

allowed local government units to exempt themselves from the act was abandoned in response to a warning in *GI Surplus*¹³⁵ that it might raise constitutional questions. But the effect of the latter provision—lack of uniformity throughout the state—was partially retained. The 1963 act exempted twenty-five counties totally and portions of four others from its operation. The legislature justified the exemption as being to meet the needs of people visiting “resort or tourist” areas.¹³⁶ This justification was expressly rejected in *Treasure City, Inc. v. Clark*.¹³⁷ In this case the court, in reviewing the 1963 act, said:

Consideration of the articles of merchandise to which the 1963 act applies (e.g., business or office furnishings) dispels the suggestion that there exists in a resort area or in a tourist area a need for the sale of such merchandise on Sunday sufficiently distinctive to constitute a reasonable basis for the separate classification of such areas with reference to the sale of such articles of merchandise.¹³⁸

Another explanation of the exemption of the large areas from the act may be possible. The exemption may show that these otherwise unprotected areas are in no need of this type of legislation; that the Sunday sale of the proscribed articles in these areas is not really inimical to either the public health, safety, morals, or welfare.¹³⁹ If this is the reason behind the exemption, the conclusion that recent Sunday laws are a solution to private rather than public problems is strengthened.¹⁴⁰

The *Treasure City* case held the 1963 act unconstitutional. The express holding was based on article II, section 29 of the North Carolina Constitution, which provides in part:

¹³⁵ 257 N.C. at 211, 125 S.E.2d at 768.

¹³⁶ N.C. Sess. Laws 1963, ch. 448, § 1.

¹³⁷ 261 N.C. 130, 134 S.E.2d 97 (1964).

¹³⁸ *Id.* at 134-35, 134 S.E.2d at 100. The court might well have added that the bill to rewrite the 1961 act had itself been amended to exempt many of the counties *before* further amendment classified the exempted counties as “resort or tourist areas.” See Institute of Government Legislative Service, Daily Bulletin, March 14, April 19, 22, May 9, 10, 17, 22 (1963) (legislative history of S.B. 141).

¹³⁹ The thought was suggested in *G I Surplus Stores, Inc. v. Hunter*, 257 N.C. 206, 211, 125 S.E.2d 764, 767-68 (1962).

¹⁴⁰ The fact that the General Assembly also expanded county powers by allowing them for the first time to pass Sunday laws, N.C. GEN. STAT. § 153-9(55) (1964), does not explain the exemptions in the 1963 act. Sixteen counties and portions of three others are excepted from both N.C. GEN. STAT. § 14-346.2, and N.C. GEN. STAT. § 153-9(55). These areas are without effective Sunday laws.

The General Assembly shall not pass any local, private or special act or resolution . . . regulating labor [or] trade. . . . The General Assembly shall have power to pass general laws regulating matters set out in this section.

The court found that the act regulated *trade*,¹⁴¹ was not a general law, and therefore violated the constitutional provision.¹⁴² As in *GI Surplus*, the court neither searched for purpose nor reached the ultimate power question of whether the purpose for which the statute was enacted was constitutional.

However, a certain aura surrounding the recent decisions cannot be overlooked. It indicates that the court is well aware that in recent years the Sunday laws have taken on a new perspective; that the banner for them is carried by business groups engaged in a war of competition; and that when irritation for such legislation comes only from particular interest groups, the objective to be served should be questioned.

¹⁴¹ No mention was made that the act regulated *labor*. It does so only indirectly.

¹⁴² The mere fact that the act involved classification was not the defect. A general law may treat different parts of the state separately. But in order for a law employing classification to be general, it must "apply to and operate uniformly 'on all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law.'" 261 N.C. at 135, 134 S.E.2d at 100. The court found that all areas distinguished by characteristics sufficiently marked and important to make them clearly a class to be treated separately were not treated equally. Many resort areas in North Carolina were not excepted. That finding alone should have been enough to declare the act unconstitutional because even though the legislature has wide discretion in making classification in statutes, it must be based on tangible, intrinsic, germane distinctions and "must affect all within the class uniformly." *McIntyre v. Clarkson*, 254 N.C. 510, 519, 119 S.E.2d 888, 894-95 (1961). If not it would be a denial of the equal protection of law guaranteed under the fourteenth amendment and under N.C. CONST. art. I, § 17. Therefore *Treasure City* should be a valuable precedent in the legislative classification field, where the courts have previously shown a notorious reluctance to supervise. Consider the classes sustained in *State v. Weddington*, 188 N.C. 643, 125 S.E. 257 (1924). The ordinance allowed the sale of meals on Sunday, and with them coffee, tea, or milk. Defendant was subject to criminal conviction for the sale of a Coca-Cola. *Treasure City* inferentially recognizes that the classification issue is the core of the case. The case arose as did *GI Surplus* in an injunctive suit to test constitutionality. Both cases adopted the general rule that constitutionality of an act cannot be challenged in a suit to enjoin its enforcement but took exception because it "clearly" appeared necessary to protect "fundamental human rights." *GI Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 214, 125 S.E.2d 764, 770 (1962). It seems clear that the guarantee of equal protection is the right protected in *Treasure City*.

IV. POLICY CONSIDERATIONS

When the constitutionality of an objective is questionable, policy considerations are generated. Ironically, these added policy considerations are often overlooked in an effort to draft a law which will withstand the constitutional test. The result is a law that may not be suited to the present best interests of the state. A constitution "does not tell us what is presently wise. . . . [It] can do no more than save us, in extreme cases, from folly."¹⁴³ Therefore, more attention should be directed to these policy considerations in deciding whether this type of legislation should be enacted at all.

The legitimate end that Sunday laws allegedly achieve is the procurement of a day of rest for the public. A need for this kind of supplementation of the laws protecting labor in North Carolina has not been sufficiently shown by the proponents.¹⁴⁴ Furthermore, the disadvantages which are necessarily bound up in this type legislation seem to be overbalancing. Classification distinctions allowing certain business activities to continue while most businesses are required to close are inescapable since many types of Sunday labor facilitate making Sunday a day of rest and recreation.¹⁴⁵ The large majority of these classifications in the past have extended beyond the mere exemption of businesses for the purpose of making Sunday a more enjoyable day of rest and relaxation.¹⁴⁶ Many distinctions made to allow one activity on Sunday and disallow another have no logical explanation.¹⁴⁷ These distinctions cause responsible

¹⁴³ O'Toole, *The Sunday Laws*, 74 COMMONWEAL 343, 345, (1961).

¹⁴⁴ The proponents have generally stated their purpose in sponsoring Sunday legislation to be for "the protection and general welfare of the public as a whole and also for the protection of family life and for the general welfare of the people as a whole, including the employee class." Brief for the North Carolina Merchants Ass'n as Amicus Curiae, p. 20, *Treasure City, Inc. v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964).

¹⁴⁵ Frankfurter discusses this problem in *McGowan v. Maryland*, 366 U.S. 420 524-43 (1961) (separate opinion).

¹⁴⁶ This extended classification results either from surrender to special interest groups or from the use of inadvertent language which is too specific. See generally Editorial Note, 12 RUTGERS L. REV. 505, 511-12 (1958). Consider the 1962 Charlotte ordinance excepting real estate dealers; the 1961 act allowing wholesale but not retail sales; and the Asheville ordinance allowing sale of ice cream but not sherbert, milk or butter. Brief for Appellant, p. 5, *State v. Trantham*, 230 N.C. 641, 55 S.E.2d 198 (1949).

¹⁴⁷ See the classifications sustained in *State v. Weddington*, 188 N.C. 643, 125 S.E. 257 (1927), and in *State v. Trantham*, *supra* note 146. The classifications in the Sunday closing ordinance adopted by Charlotte in 1962, CHARLOTTE, N.C., CODE § 13-56 (1964), were widely criticized. A *Charlotte Observer* editorial said that "under the ordinance, as we read it, a drug

public officials—even the most learned in the law—to regard the Sunday laws as “nothing short of ridiculous,”¹⁴⁸ “a miserable farce,”¹⁴⁹ “tyrannical,”¹⁵⁰ and an “unbelievable hodgepodge”¹⁵¹ causing a “vexing state of uncertainty and widespread confusion . . . so notorious as to be the subject of judicial notice.”¹⁵² The classification used in state-wide Sunday laws has also failed to recognize the fact that “the tranquility of the country town may admit of different regulations than the discordant and sometimes raucous atmosphere of the growing cities.”¹⁵³

The Sunday laws are conducive to sporadic enforcement,¹⁵⁴

store may sell a Sunday patron a Band-Aid, but woe be to the food store that does. A golf shop may peddle its golf balls on Sunday, but the sporting goods section of a drug store will have to be roped off.” Charlotte Observer, Feb. 4, 1964, § B, p. 2, col. 1. Furthermore, an exemption to allow “emergency repair services” on Sunday was deleted from the final draft of the ordinance. This deletion seems to indicate, for example, that plumbing or automobile repairs would not be allowed on Sunday even in an emergency. Charlotte Observer, March 6, 1964, § C, p. 2, col. 2.

¹⁴⁸ Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 591 n.6 (1961).

¹⁴⁹ Cheeves v. State, 5 Okla. Crim. 361, 365, 114 Pac. 1125, 1126 (1911).

¹⁵⁰ Lochner v. New York, 198 U.S. 45, 75 (1905) (dictum) (Holmes, J., dissenting).

¹⁵¹ Crown Kosher Super Market, Inc. v. Gallagher, 176 F. Supp. 466, 472 (D. Mass. 1959), *rev'd*, 366 U.S. 617 (1961).

¹⁵² Harvey v. Priest, 366 S.W.2d 324, 327 (Mo. 1963).

¹⁵³ Letter From John T. Morrissey, Sr., Charlotte City Attorney, to Brown Hill Boswell, Sept. 15, 1964.

¹⁵⁴ Enforcement has been neglected throughout the history of Sunday laws. LEFLAR & NEWSOME, NORTH CAROLINA 125 (1954); MYER, YE OLDEN BLUE LAWS 115-16, 119 (1921); 3 SAUNDERS, THE COLONIAL RECORDS OF NORTH CAROLINA 180 (1886) (1715 act “too little regarded”). See generally WHITAKER, THE EIGHTEENTH CENTURY ENGLISH SUNDAY 52-84 (1940). Even after the 1962 Charlotte ordinance was upheld by the North Carolina Supreme Court, the Charlotte Police Chief said that police would not take the initiative nor stringently enforce it. Charlotte Observer, Feb. 3, 1964, § B, p. 1, col. 1. The fact that a short period of accommodation is a customary prelude to strict enforcement of a new penal statute may explain the statement of the Charlotte Police Chief. Correspondence From John T. Morrissey, Sr., Charlotte City Attorney, to Brown Hill Boswell, Sept. 15, 1964. The Charlotte ordinance was repealed before it grew out of this accommodation period. *Ibid.* However, other public officials have expressed the same general attitude toward Sunday laws which have been “in force” for periods of time long past the accommodation stage. For instance, the District Attorney of Lehigh County, Pa., admitted the intentional absence of Sunday law enforcement for many years. Nader, *Blue-Law Blues*, 192 NATION 499, 500 (1961). One reason for lack of enforcement is the administrative unworkability. In Spartanburg County, S.C., opponents of the Sunday laws demanded enforcement against all violators in an effort to demonstrate the administrative unworkability. In three Sundays of enforcement police netted one thousand arrests. Sheriffs and judges

which not only necessarily creates an attitude of disrespect by the public for the authority of the law,¹⁵⁵ but which also is "hardly compatible with the characterization of the statute as a vehicle with which the state seeks to promote the public health and welfare."¹⁵⁶ Sporadic enforcement is also inconsistent with a fundamental principle of ordered liberty: the assurance of "responsible control over the scope and probable regularity of exercise of governmental force."¹⁵⁷ Another significant disadvantage of the Sunday laws is that minority religious beliefs are made more expensive than the beliefs of the majority.¹⁵⁸ This disadvantage, perhaps more than any other, has caused the view that restriction of Sunday activity should come about by voluntary agreement between individuals and not by government force¹⁵⁹ to gain considerable support.¹⁶⁰ The

complained. It cost the state \$25 to collect a \$1 fine. Nevertheless, the law stayed on the books while enforcement lapsed and Sunday selling resumed. Shaffer, *Sunday Selling*, 1960 EDITORIAL RESEARCH REPORTS 119, 127-28.

¹⁵⁵ For comments of the Governor of Utah on this aspect, see *id.* at 136. See generally Editorial Note, 12 RUTGERS L. REV. 505, 508 (1958).

¹⁵⁶ Note, 37 IND. L.J. 397, 415 (1962).

¹⁵⁷ Note, 109 U. PA. L. REV. 67, 90 (1960).

¹⁵⁸ The burden imposed on minority religious beliefs runs throughout the history of this type of law, causing an early writer to remark: "No man can peruse these laws without a chill in every vein, and be ready to disbelieve that so uncharitable a spirit could ever have existed and been exercised in America, in a country whose freedom, civilly and religiously considered, was its boast . . ." THE BLUE LAWS OF NEW HAVEN COLONY at v (1838). That the burdens still exist today—though in less degree—is not denied. Consider the language of Warren: "[T]he statute at bar does not make unlawful any religious practices . . ."; it simply makes the practice "more expensive." *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). Justice Frankfurter says: "[T]he measure of the burden is not . . . beyond the power of the individual to alter." *McGowan v. Maryland*, 366 U.S. 420, 521 (1961) (separate opinion). Frankfurter adds that the severity of the burden "might be offset by the industry and commercial initiative of the individual merchant." *Ibid.* Might not this line of thought maintain any oppressive statute?

¹⁵⁹ This view is stated by Douglas in *McGowan v. Maryland*, 366 U.S. 420, 563 (1961) (dissenting opinion). See generally Fell, *Blue Laws—A Minority Opinion*, 76 CHRISTIAN CENTURY 1375 (1959); Shaffer, *supra* note 154, at 136.

¹⁶⁰ A 1962 resolution by the United Presbyterians' General Assembly said: "The church should not seek nor even appear to seek, the coercive power of the state in order to facilitate the Christian's observance of the Lord's Day." *Newsweek*, June 18, 1962, p. 77. A 1959 report by the National Council of the Churches of Christ in the U.S.A. said: "[T]he general consensus, coming from numerous areas where community-wide efforts against economic encroachments on Sunday have developed, points unquestionably to the greater value and dependability of solutions reached by voluntary agreement rather than by legislative fiat." Quoted in Shaffer, *supra* note 154, at 123-24.

step away from legislation burdened with such difficult problems of constitutionality and policy is commendable.

BROWN HILL BOSWELL

Administrative Law—Judicial Review—Procedural Due Process in Student Disciplinary Proceedings

In the recent case of *In re Carter*,¹ the petitioner, having been suspended from the University of North Carolina at Chapel Hill on a charge of cheating on a quiz, appealed to the state courts for judicial review. The trial court ruled that the evidence offered against the petitioner failed to rebut the presumption of innocence, that the conviction was therefore not in accordance with due process, and that to deny petitioner readmission on the evidence presented would be arbitrary and capricious. But because additional evidence had been disclosed at the trial, the court remanded the case to the Board of Trustees to refer to the proper administrative authorities for a review taking account of the new evidence. Petitioner took no exception to this order and made no appeal, but moved before a subsequent term of court that an order be issued to the Board of Trustees to show cause why an order should not be issued reversing the suspension and directing correction of University records accordingly. It was held that until the administrative hearing on remand was held, petitioner had not exhausted her administrative remedies; the motion and order to show cause were dismissed.

On appeal, the North Carolina Supreme Court affirmed the dismissal. Delegation of authority by the Board of Trustees in matters of student suspension was upheld as "proper and constitutional."² The decision of the Board of Trustees upholding the student honor council and the Chancellor was held to be "the administrative decision of a State board authorized by the Constitution and statutes of the State to make administrative decisions . . .,"³ and the petitioner was thus held to be entitled to judicial review under the state statutes⁴ granting review of administrative decisions. The *Carter* case thus establishes beyond doubt the jurisdiction of the

¹ 262 N.C. 360, 137 S.E.2d 150 (1964).

² *Id.* at 372, 137 S.E.2d at 158.

³ *Id.* at 372, 137 S.E.2d at 159.

⁴ N.C. GEN. STAT. § 143-306 to -316 (1953).

North Carolina courts to exercise judicial review of student suspensions from the University.

Courts have long acknowledged jurisdiction over suits challenging expulsion of students from colleges and universities.⁵ Yet, the basis for their jurisdiction has seldom been clearly articulated. In cases involving private schools, the courts have frequently held the student-school relationship to rest in contract,⁶ thus implicitly founding their jurisdiction on the power to determine disputed contractual rights. Where state schools are involved, jurisdiction may be based, as in the *Carter* case, on state statutes granting authority to administrative boards and officers and establishing powers of review.⁷

Until recently it was thought that the fourteenth amendment of the federal constitution did not apply to cases of student discipline. The only case that had specifically considered the question of due process under the fourteenth amendment had denied its applicability to student disciplinary proceedings in a state-supported institution.⁸ Two recent federal cases, however, specifically grounded federal jurisdiction in cases of student expulsion from state colleges on the due process clause of the fourteenth amendment.⁹ By its terms the fourteenth amendment applies only where state action is involved, and the state action requirement has been applied in the

⁵ *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909); *People ex rel. Cecil v. Bellevue Hosp. Medical College*, 60 Hun 107, 14 N.Y. Supp. 490, *aff'd mem.*, 128 N.Y. 621 (1891); *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. County Ct. 77 (1887). *Contra*, *Carr v. St. John's Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962); *People ex rel. Goldenkoff v. Albany Law School*, 198 App. Div. 460, 191 N.Y. Supp. 349 (1921); *Barker v. Trustees of Bryn Mawr College*, 278 Pa. 121, 122 Atl. 220 (1923). In *Steir v. New York State Educ. Comm'r*, 271 F.2d 13 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960), the majority opinion was that there was no federal jurisdiction over such cases where state schools are involved. The concurring judge and the dissenting judge thought the requisite jurisdiction was present. See generally Annot., 58 A.L.R. 2d 903 (1958); Annot., 50 A.L.R. 1497 (1927); Annot., 39 A.L.R. 1019 (1925).

⁶ See, e.g., *Booker v. Grand Rapids Medical College*, *supra* note 5; *People ex rel. Cecil v. Bellevue Hosp. Medical College*, *supra* note 5.

⁷ See also *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 Pac. 433, *cert. denied*, 277 U.S. 591 (1928).

⁸ *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943). In *Steir v. New York State Educ. Comm'r*, 271 F.2d 13, 22-23 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960), the dissenting judge thought federal courts had jurisdiction of such cases under the due process clause of the fourteenth amendment.

⁹ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), *reversing* 186 F. Supp. 945 (M.D. Ala. 1960); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961).

area of college education.¹⁰ The distinction between public and private educational institutions, so far as application of the due process clause is concerned, may not be made in the future, however, since recent cases have demonstrated a tendency to find state action in the activities of many groups once thought to be private.¹¹

Despite their acknowledgment of jurisdiction over cases of student discipline, the courts have generally expressed reluctance to alter the institution's decision, whether the school be public¹² or private.¹³ The usual statement is to the effect that the courts will not interfere in the absence of an arbitrary or unusual act or abuse of discretion.¹⁴ While this exercise of judicial restraint is commendable when dealing with academic areas in which the courts have no expertise,¹⁵ and while the determination of educational policy per se is the legitimate concern of the institution and not of the

¹⁰ See, e.g., *Guillory v. Administrators of Tulane Univ. of La.*, 212 F. Supp. 674 (E.D. La. 1962).

¹¹ See Comment, 42 TEXAS L. REV. 344, 345-49 (1964), and cases cited therein. The writer there concludes that by analogy to the development in other areas where the services in question were impressed with a deep public interest it is entirely possible that the activities of the private colleges and universities will be held to fall within the limits of the fourteenth amendment. *Id.* at 347-48. See also Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 379-80 (1963).

¹² See, e.g., *Knight v. State Bd. of Educ.*, 200 F. Supp. 174, 179 (M.D. Tenn. 1961); *Smith v. Board of Educ.*, 182 Ill. App. 342 (1913); *Woods v. Simpson*, 146 Md. 547, 551, 126 Atl. 882, 883 (1924); *Gleason v. University of Minn.*, 104 Minn. 359, 362-63, 116 N.W. 650, 652 (1908); *Vermillion v. State*, 78 Neb. 107, 112-13, 110 N.W. 736, 738 (1907); *People ex rel. O'Sullivan v. New York Law School*, 68 Hun 118, 121-22, 22 N.Y. Supp. 663, 665 (1893); *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 113, 171 S.W.2d 822, 827-28 (1942), *cert. denied*, 319 U.S. 748 (1943); *Foley v. Benedict*, 122 Tex. 193, 200, 55 S.W.2d 805, 810 (1932).

¹³ See, e.g., *DeHaan v. Brandeis Univ.*, 150 F. Supp. 626, 627 (D.C. Mass. 1957); *Kentucky Military Institute v. Bramblet*, 158 Ky. 205, 164 S.W. 808 (1914); *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186 (1866); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y. Supp. 435, 439-40 (1928).

¹⁴ *Robinson v. University of Miami*, 100 So. 2d 442, 444 (Fla. App. 1958); *Woods v. Simpson*, 146 Md. 547, 551, 126 Atl. 882, 883 (1924); *Tanton v. McKenney*, 226 Mich. 245, 248, 197 N.W. 510, 511 (1924); *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 216, 263 Pac. 433, 437, *cert. denied*, 277 U.S. 591 (1928); *Vermillion v. State*, 78 Neb. 107, 112-13, 110 N.W. 736, 738 (1907); *Foley v. Benedict*, 122 Tex. 193, 200, 55 S.W.2d 805, 810 (1932).

"We find it to be the unanimous holding of the authorities that the courts will not interfere with the discretion of school officials in matters affecting discipline of students unless there is a manifest abuse of discretion or where their action has been unlawful or arbitrary." *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 113, 171 S.W.2d 822, 827-28 (1942).

¹⁵ See, e.g., *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932).

courts, a more stringent application of judicial review seems appropriate in the area of student disciplinary proceedings.¹⁶ In the field of punitive discipline it is the court rather than the school that has a special expertise.¹⁷ Evaluating facts to determine whether crime has occurred is the normal function of the courts.¹⁸ If the institution's decision is based on specific incidents, rather than on its total experience with the student, the court is as qualified to review this decision as it is those of a trial judge or jury.¹⁹

Moreover, adequate protection of the student's interests may necessitate a more rigorous exercise of judicial review, for in disciplinary matters the college is virtually judge in its own cause and thus acts substantially unrestrained by outside pressures.²⁰ Legislative solutions guarding the student's interests are scarcely to be expected, since the institution has established channels of contact with the legislature while the political influence of students is comparatively quite small.²¹ Further, the objection that judicial review will result in a rash of suits seems untenable, since the number of students willing and able to bear the expense and publicity of litigation is likely to remain small.²²

It is to be expected, however, that growing enrollments and the augmentation in value of education in modern society will result in some increase in adjudications stemming from student disciplinary proceedings. That the subject of student rights in college disciplinary proceedings has acquired increasing significance in recent years is reflected in the work of both courts and commentators.²³ This is scarcely surprising when viewed in light of the current value of education. A college diploma has become a virtual prerequisite to

¹⁶ See Comment, 72 YALE L.J. 1362, 1387-95 (1963).

¹⁷ *Id.* at 1393.

¹⁸ *Id.* at 1394.

¹⁹ *Id.* at 1393.

²⁰ *Id.* at 1388-89, 1394. See also authorities cited note 11 *supra*.

²¹ *Id.* at 1390.

²² *Ibid.*

²³ *E.g.*, BLACKWELL, COLLEGE LAW (1961); Jacobson, *The Expulsion of Students and Due Process of Law—The Right to Judicial Review*, 34 J. HIGHER ED. 250 (1963); Seavy, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Van Alstyne, *Procedural Due Process and State Universities*, 10 U.C.L.A.L. REV. 368 (1963); Comment, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344 (1964); Note, *The College Student and Due Process in Disciplinary Proceedings*, 1962 U. ILL. L.F. 438; Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963); Annot., 58 A.L.R.2d 903 (1958).

success, pecuniary and otherwise. When a student is expelled, barriers are frequently placed in his way which effectively prevent his continuing his education elsewhere. The expelled student "suffers the loss of a status and the destruction of a set of relationships which have unique intrinsic worth."²⁴ When viewed in this context, the propriety of a stricter judicial review is accentuated.²⁵

The necessity of a stricter judicial review is further demonstrated by the total absence of procedural due process accorded to students in many of the recorded cases. It has been held that fair and reasonable notice to the student of the charges against him is not required.²⁶ Several cases hold that no hearing at all is necessary,²⁷ while others have found various forms of informal proceed-

²⁴ Comment, 72 YALE L.J. 1362, 1364 (1963).

²⁵ It has been urged that the courts may not inquire into a complaint on the part of a student that he has suffered unmerited injuries at the hands of his instructors, so long as the latter aver them to have been disciplinary in character. This is a grave proposition when it is considered that there are tens of thousands of youth continually in attendance at colleges, many of whom are of mature age and any of whom may suffer degradation and irreparable injury to reputation as well as pecuniary loss, by the unjust action of a faculty.

It can never be safely admitted that the rights of so large and mostly so worthy a body of our citizens, in whose welfare society has such a deep and abiding interest, shall be utterly deprived in this respect of the protection of the law through its ordinary tribunals. *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. County Ct. 77, 86 (1887).

Dismissal from college affects a student's life too drastically to be left to even the barest possibility of arbitrary action by college administrators. Expulsion carries with it an ineradicable stigma which usually prevents admission to another institution, with the result that a student's chances for higher education may be gone forever. This is much too high a price to pay for a threadbare legal doctrine that blocks judicial review.

Jacobson, *supra* note 23, at 254-55.

²⁶ *Vermillion v. State*, 78 Neb. 107, 110 N.W. 736 (1907); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y. Supp. 435 (1928). *Contra*, *Geiger v. Milford Independent School Dist.*, 51 Pa. D. & C. 647 (1944); *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. County Ct. 77 (1887).

²⁷ *DeHaan v. Brandeis Univ.*, 150 F. Supp. 626 (D.C. Mass. 1957); *People ex rel. Bluet v. Board of Trustees*, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); *Smith v. Board of Educ.*, 182 Ill. App. 342 (1913); *White v. Portia Law School*, 274 Mass. 162, 174 N.E. 187 (1931); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y. Supp. 435 (1928); *Goldstein v. New York Univ.*, 76 App. Div. 80, 78 N.Y. Supp. 739 (1902). In *DeHaan v. Brandeis Univ.*, *supra* at 627, the court said, "While it might be a better policy to hold a hearing whenever any disciplinary action is contemplated, I hold as a matter of law that the defendant is not required to do so." *Contra*, *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961); *Morrison v. City of Lawrence*, 186 Mass. 456, 72 N.E. 91 (1904); *Gleason v. University of Minn.*, 104 Minn. 359, 116 N.W. 650 (1908); *Geiger v.*

ings to be sufficient.²⁸ The right of the accused "to be confronted with the witnesses against him"²⁹ has often been denied in college disciplinary proceedings. It has been said that since honorable students do not like to be known as snoopers and informers against their fellow students, they should not be subjected to cross-examination.³⁰ Further, although the right to be represented by counsel is now regarded as an essential element of our system of criminal justice,³¹ no authority specifically holds accused students entitled to representation by counsel in disciplinary proceedings.³² The want of procedural due process in a case of expulsion from a state university³³ provoked one commentator to remark, "our sense of justice should be outraged by denial to students of the normal safeguards. . . . It is . . . shocking to find that a court supports [college officials] . . . in denying to a student the protection given to a pickpocket."³⁴

Standing in sharp contrast to these cases is the model for procedural due process set forth in *Dixon v. Alabama State Board of Education*,³⁵ the first case to hold that due process requires notice

Milford Independent School Dist., 51 Pa. D. & C. 647 (1944); Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1887). In *Knight v. State Bd. of Educ.*, *supra* at 178, the court felt that

the rudiments of fair play and the requirements of due process vested in the plaintiffs the right to be forewarned or advised of the charges to be made against them and to be afforded an opportunity to present their side of the case before such drastic disciplinary action was invoked by the university authorities.

²⁸ *State ex rel. Crain v. Hamilton*, 42 Mo. App. 24 (1890); *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 Pac. 433, *cert. denied*, 277 U.S. 591 (1928) (meeting with deans' council); *Miller v. Clement*, 205 Pa. 484, 55 Atl. 32 (1903) (hearing before committee of board, reviewed by full board); *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943) (dean stated substance of testimony against relators to faculty committee).

²⁹ See U.S. CONST. amend. VI.

³⁰ *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 110, 171 S.W.2d 822, 826 (1942), *cert. denied*, 319 U.S. 748 (1943). See also *Morrison v. City of Lawrence*, 181 Mass. 127, 63 N.E. 400 (1902); *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 Pac. 433, *cert. denied*, 277 U.S. 591 (1928). In *Steir v. New York State Educ. Comm'r*, 271 F.2d 13, 20 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960), the concurring judge seemed contemptuous of the idea of requiring cross-examination.

³¹ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³² *Geiger v. Milford Independent School Dist.*, 51 Pa. D. & C. 647, 652 (1944), stated obiter dictum that the right to be represented by counsel if the student so elects is an essential element of a proper hearing.

³³ *People ex rel. Bluett v. Board of Trustees*, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956).

³⁴ Seavey, *supra* note 23, at 1406-07.

³⁵ 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1962). The case has been noted extensively: 14 ALA. L. REV. 126 (1961); 50 GEO. L.J.

and some opportunity to be heard before a student at a tax-supported college may be expelled for misconduct. The court there stated that notice to the student should "contain a statement of the specific charges and grounds which, if proven, would justify expulsion. . . ."³⁶ A hearing should be held which allows presentation of both sides of the case in considerable detail.³⁷ While cross-examination is not required, the student should be given the names of the witnesses against him and a report on the facts to which each testifies.³⁸ He should then be given the opportunity to present his own defense against the charges and to produce oral testimony or written affidavits of witnesses in his behalf.³⁹ These rudiments of an adversary proceeding, the court concluded, may be preserved without encroaching upon the interests of the college.⁴⁰

All the procedural safeguards of the *Dixon* model, and more, are incorporated into the University of North Carolina at Chapel Hill system of student discipline, which was at issue in the *Carter* case. North Carolina, both on the state and administrative levels, seems to grant to the student the right to due process. On the state level, the statute on which the court in *Carter* based its right to review provides that the courts may reverse or modify the decision of an administrative agency on the ground, *inter alia*, that it is in violation of constitutional provisions.⁴¹ The State Constitution provides that no person ought to be deprived of his life, liberty, or property, "but by the law of the land."⁴² The "law of the land" is equivalent to "due process of law."⁴³ On the administrative level, the Board of Trustees, as the body entrusted with the management of the University,⁴⁴ has delegated to the faculty and Chancellor the duty of securing to every student the right of due process and a fair hearing.⁴⁵ Various provisions of the Student Constitution and

314 (1961); 75 HARV. L. REV. 1429 (1962); 60 MICH. L. REV. 499 (1962); 38 N.D.L. REV. 346 (1962); 35 TEMP. L.Q. 437 (1962); 15 VAND. L. REV. 1005 (1962).

³⁶ *Dixon v. Alabama State Bd. of Educ.*, *supra* note 35, at 158.

³⁷ *Id.* at 159.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ N.C. GEN. STAT. § 143-315 (1953).

⁴² N.C. CONST. art. I, § 17.

⁴³ *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949); *State v. Collins*, 169 N.C. 323, 84 S.E. 1049 (1915).

⁴⁴ N.C. GEN. STAT. § 116-10 (1960).

⁴⁵ Among the duties of the faculty and Chancellor in each of the

the Student Judicial Procedures Bill⁴⁶ effectuate this delegation of authority.⁴⁷

"Due notice" is guaranteed the student and is defined as notice "seventy-two hours preceding a hearing."⁴⁸ Notice is given by summons⁴⁹ served by the office of the student Attorney General.⁵⁰ The summons must be in writing and must specify, *inter alia*, the nature of the offense.⁵¹ At a preliminary conference with the Attorney General, the student is further informed of the charges against him, the possible penalties, and his rights in relation to the hearing.⁵² As a final guarantee of due notice, the student may move to postpone the hearing on the ground that he "has not been fully informed of the particulars of the charge and is unable to adequately defend himself . . ."⁵³

Further provisions establish the right of the accused student to a fair hearing—a right frequently denied by other academic institutions.⁵⁴ The hearing is held by a council composed of the student's peers, elected under campus geographical apportionment as specified

component institutions of the University of North Carolina shall be included the duty to exercise full and final authority in the regulation of student conduct and in all matters of student discipline in that institution; and in the discharge of this duty, delegation of such authority may be made to established agencies of student government and to administrative or other officers of the institution in such manner and to such extent as may by the faculty and Chancellor be deemed necessary and expedient; provided that in the discharge of this duty it shall be the duty of the faculty and Chancellor to secure to every student the right of due process and fair hearing, the presumption of innocence until found guilty, the right to know the evidence and to face witnesses testifying against him, and the right to such advice and assistance in his own defense as may be allowable under the regulations of the institution as approved by the faculty and Chancellor. In those instances where the denial of any of these procedural rights is alleged, it shall be the duty of the President to review the proceedings.

Resolution, Executive Committee of Board of Trustees of the University of North Carolina, April 15, 1957 (on file in the Consolidated University Offices, Chapel Hill, N. C.).

⁴⁶ Hereinafter cited as "Procedures Bill." Copies of Procedures Bill and U.N.C. STUDENT CONST. are available from Student Government Attorney General, Chapel Hill, N.C.

⁴⁷ See notes 48-53, 55-61, 63-66 *infra*.

⁴⁸ U.N.C. STUDENT CONST. art. II, § 7(c).

⁴⁹ Procedures Bill, art. III, § 2 (1962).

⁵⁰ Procedures Bill, art. III, § 4 (1962).

⁵¹ *Ibid*.

⁵² Procedures Bill, art. IV, § 1 (1962).

⁵³ Procedures Bill, art. VIII, § 3 (1962).

⁵⁴ See cases cited note 27 *supra*.

by the Student Legislature.⁵⁵ The accused student is to be presumed innocent until proven guilty⁵⁶ and is granted the right to a speedy hearing.⁵⁷ The right to a fair trial includes the right to disqualify members of the judicial body from sitting in judgment in the particular case.⁵⁸ And, in cases involving multiple defendants, the accused student has the right to a separate trial if he so elects.⁵⁹

The right to assistance by a defense counsel is granted,⁶⁰ but the counsel must come "from among those students under the jurisdiction of the specific judicial body in which the case arises."⁶¹ The right of the accused student to face his accuser is likewise provided for,⁶² and the right to question any testimony⁶³ assures the privilege of cross-examination. Moreover, the accused student is guaranteed the right to summon material witnesses,⁶⁴ and any student refusing to comply with his obligation to serve as such may be charged by the Attorney General with refusing to accept his responsibility under the Honor System.⁶⁵

Despite these procedural safeguards in the University's system, the need for judicial review endures. While the system itself seems adequate, the possibility of error in the application of the system remains. Where such error is alleged in cases of student discipline, the courts should review the proceedings much as an appellate court does those of a trial tribunal. Whether the *Dixon* model marks a new trend in cases involving state-supported schools and whether the requirements of procedural due process will be applied to private

⁵⁵ U.N.C. STUDENT CONST. art. II, § 3(b), (c).

⁵⁶ U.N.C. STUDENT CONST. art. II, § 7(a).

⁵⁷ Procedures Bill, art. X, § 1 (1962). Cf. U.S. CONST. amend. VI.

⁵⁸ U.N.C. STUDENT CONST. art. II, § 7(h); Procedures Bill, art. IX, § 1 (1962).

⁵⁹ Procedures Bill, art. IV, § 1(g); art. XII, § 2 (1962).

⁶⁰ U.N.C. STUDENT CONST. art. II, § 7(d); Procedures Bill, art. IV, § 1(c) (1962).

⁶¹ U.N.C. STUDENT CONST. art. II, § 7(d). *Quaere* whether an accused student could constitutionally be denied counsel by a member of the bar if he desired it? "It is advisable, although probably not mandatory, that, if [the student] . . . requests the privilege of being represented by counsel selected and employed by him, it be accorded him." Address by Ralph F. Lesemann, National Conference of University Attorneys, Ann Arbor, Mich., April 17, 1961.

⁶² Procedures Bill, art. IV, § 1(k) (1962).

⁶³ U.N.C. STUDENT CONST. art. II, § 7(g).

⁶⁴ U.N.C. STUDENT CONST. art. II, § 7(e); Procedures Bill, art. XI, § 7 (1962).

⁶⁵ Procedures Bill, art. XI, § 7 (1962).

institutions remain to be seen. Whatever the trend in the rest of the country, *In re Carter* indicates that the North Carolina courts stand ready to remedy any deprivation of due process in the application of the student disciplinary system of the University.⁶⁶ As to defects in the system itself, the courts are unlikely to insist that the University establish a microcosm of the common law. They may nevertheless find that the present system in the University lacks some fundamentals of due process to which the student is entitled.⁶⁷

WILLIS PADGETT WHICHARD

Constitutional Law—Extension of the Privilege Against Self-Incrimination

The petitioner in *Malloy v. Hogan*¹ was on probation from a sentence imposed after he pleaded guilty to a gambling charge. He was brought before a referee conducting an inquiry into alleged gambling activity in Connecticut and asked questions about the circumstances surrounding his prior arrest, among which were:

- (1) for whom did he work on September 11, 1959; (2) who selected and paid his counsel in connection with his arrest on that date and subsequent conviction; (3) who selected and paid his bondsman; (4) who paid his fine; (5) what was the name of the tenant in the apartment in which he was arrested; and (6) did he know John Bergoti.²

After refusing to answer each question "on the grounds it may tend to incriminate me," he was adjudged in contempt³ and imprisoned until he would cooperate. He applied for a writ of habeas corpus on the ground that the due process clause of the fourteenth amendment granted a privilege against self-incrimination.⁴ A lower state court denied the writ, and the highest state court affirmed.⁵

⁶⁶ For example, deprivation of due process may result as in *Carter*, where the trial judge found the conviction based upon evidence insufficient to rebut the presumption of innocence.

⁶⁷ For example, the courts might find the denial of counsel by a member of the bar to deprive the student of due process. See note 61 *supra*.

¹ 378 U.S. 1 (1964).

² *Id.* at 12.

³ The referee had the same power to commit a witness for contempt as a judge of superior court. CONN. GEN. STAT. § 52-434 (Supp. 1963).

⁴ U.S. CONST. amend. V, provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." See generally Clafin, *The Self-Incrimination Clause*, 42 A.B.A.J. 935 (1956).

⁵ *Malloy v. Hogan*, 187 A.2d 744 (Conn. 1963).

The state court reasoned that the fourteenth amendment did not protect a *state witness* against self-incrimination and that the petitioner's claim of the state privilege⁶ was not justified because he had failed to show any "real and appreciable" danger of self-incrimination.⁷

The Supreme Court reversed,⁸ holding that the due process clause of the fourteenth amendment includes the fifth amendment privilege against self-incrimination. It also held that the states must apply the standard used by the federal courts to determine whether a witness's claim of the fifth amendment privilege is justified. In applying this standard, the Court held that petitioner's claim of the privilege was justified because a response to the questioning "might furnish a link in the chain of evidence" for future prosecution.⁹

The decision overruled *Twining v. New Jersey*¹⁰ and *Adamson v. California*,¹¹ which held the fourteenth amendment did not include a privilege against self-incrimination, by the incorporation of the fifth amendment or otherwise. In these decisions, the Court had characterized the privilege as a "rule of evidence."¹² and said that it was not inherent in "due process."¹³ *Twining* left the states free to treat the privilege in any manner they deemed proper.

However, all states did have a privilege against self-incrimination, by either constitutional provision¹⁴ or judicial decision.¹⁵ The

⁶ CONN. CONST. art. I, § 9, provides: "In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself"

⁷ See notes 21-22 *infra* and accompanying text.

⁸ 378 U.S. at 3.

⁹ See note 31 *infra* and accompanying text.

¹⁰ 211 U.S. 78 (1908). *Accord*, *Cohen v. Hurley*, 366 U.S. 117 (1961); *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *In re Citroen*, 170 F. Supp. 93 (E.D.N.Y. 1959); *Brown v. State*, 173 Miss. 542, 161 So. 465 (1935); *In re Briggs*, 135 N.C. 118, 47 S.E. 403 (1904).

¹¹ 332 U.S. 46 (1947).

¹² *Twining v. New Jersey*, 211 U.S. 78, 104-05 (1908).

¹³ *But see* Mr. Justice Black's dissent in *Adamson v. California*, 332 U.S. 46, 68 (1947), where he contended that any act which violated the Bill of Rights also violated the fourteenth amendment. See Note, *The Fourteenth Amendment Challenged*, 36 GEO. L.J. 398 (1948). For discussion of the history of the privilege against self-incrimination, see Pittman, *The Colonial and Constitutional History of The Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

¹⁴ *E.g.*, N.C. CONST. art. I, § 11, provides: "In all criminal prosecutions, every person charged with a crime has a right to . . . not be compelled to give self-incriminating evidence." For other jurisdictions, see 8 WIGMORE, EVIDENCE § 2252 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].

¹⁵ *Koenck v. Cooney*, 244 Iowa 153, 55 N.W.2d 269 (1952); *State v. White*, 27 N.J. 158, 142 A.2d 65 (1958).

point where the majority of the states differed from the federal courts was in the test or standard used to determine whether a claim of the privilege was justified in any particular instance.¹⁶ More specifically, these states differed from the federal courts in the manner a judge decided whether an answer might be incriminating. They used the standard of an early English case, *Regina v. Boyes*,¹⁷ in determining whether a claim of the privilege was justified. That standard was stated as follows:

The Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.¹⁸

A trial judge exercised his discretion in determining whether an answer might be incriminating.¹⁹ If there were no evidence from which a judge could infer a reasonable apprehension, he could require a witness to show a possible danger.²⁰ The Connecticut court applied this test in finding the petitioner in contempt. It found that petitioner had no "reasonable ground" to fear self-incrimination because: (1) any prosecution that might arise from answering the first five questions was barred by the applicable statute of limitations;²¹ (2) petitioner refused "to show" how an answer to the first five questions could possibly incriminate him²² and (3) Bergoti was not described or identified on the record as having been engaged in or as having been convicted of any type of unlawful activity.

¹⁶ WIGMORE § 2271.

¹⁷ 1 B. & S. 311, 121 Eng. Rep. 730 (Q.B. 1861). *Accord*, *McCathy v. Clancy*, 110 Conn. 482, 148 Atl. 551 (1930); *Commonwealth v. Joyce*, 326 Mass. 751, 97 N.E.2d 192 (1951); *LaFontaine v. Southern Underwriters*, 83 N.C. 132 (1880). *Contra*, *State v. Chitwood*, 73 Ariz. 314, 240 P.2d 1202 (1952); *Young v. Knight*, 329 S.W.2d 195 (Ky. 1959).

¹⁸ 1 B. & S. at 330-31, 121 Eng. Rep. at 738.

¹⁹ WIGMORE § 2271.

²⁰ See, e.g., *In re Pillo*, 11 N.J. 8, 93 A.2d 183 (1952).

²¹ Questions (1) through (5) were directed to the date of his prior arrest for gambling.

²² Petitioner did not offer evidence that he had left the state during the applicable time so as to stop the statute of limitation from running.

On the other hand, the federal standard as set forth in *Hoffman v. United States*²³ says,

the privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute. . . . However if the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.²⁴

Furthermore, it was said in *Hoffman* that in applying this standard the judge must be "perfectly clear" that the answer "cannot possibly" have a tendency to incriminate.²⁵ But *United States v. Coffey*,²⁶ quoted with approval by the Court,²⁷ indicates that a judge rarely can be "perfectly clear," by saying that "in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be apprehended and achieved by obscure and unlikely lines of inquiry."²⁸ In short, a judge applying the federal standard has little discretion in determining whether an answer might be incriminating.²⁹ The difference between the prevalent state standard and the federal standard is illustrated by the Court's holding in *Malloy* that petitioner's claim was justified.³⁰ The Court's reasoning was that petitioner might apprehend self-incrimination if the person who ran the gambling operation was still engaged in

²³ 341 U.S. 479 (1951).

²⁴ *Id.* at 486-87. See *Aiuppa v. United States*, 201 F.2d 287 (6th Cir. 1952).

²⁵ 341 U.S. at 488.

²⁶ 198 F.2d 438 (3d Cir. 1952).

²⁷ 378 U.S. at 13 n.9.

²⁸ 198 F.2d at 440-41.

²⁹ See WIGMORE § 2271; Falknor, *Self-Incrimination Privilege: "Links in the Chain,"* 5 VAND. L. REV. 479 (1952). But cf. *Hoffman, Whom Are We Protecting? Some Thoughts on The Fifth Amendment*, 40 A.B.A.J. 582 (1954).

³⁰ Mr. Justice Harlan, joined by Mr. Justice Clark, dissented. 378 U.S. at 14. Mr. Justice White, joined by Mr. Justice Stewart, also dissented. *Id.* at 33. This bare minority was of the opinion that the contempt conviction was proper even under the *Hoffman* standard.

unlawful activity. If this were so, said the Court, a response by petitioner might link him with a more recent crime for which he could be prosecuted.³¹ Thus, the real question involved in *Malloy* was whether the federal standard for justifying a claim of the privilege should have been the applicable standard. But, before the federal standard could be applied to the states, the Court had to find that the fourteenth amendment included the privilege against self-incrimination.

In dealing with the constitutional question, the Court emphasized that our system of criminal prosecution is "accusatorial . . . and that the Fifth Amendment privilege is its essential mainstay."³² The Court looked for support to what it regarded as analogous situations in which the due process clause is held to prohibit the states from using either an accused's coerced confession³³ or evidence obtained by illegal search and seizure.³⁴ Mr. Justice Goldberg equated the privilege against self-incrimination with coerced confession and concluded:

Since the Fourteenth Amendment prohibits the States from inducing a person to confess . . . far short of "compulsion by torture" . . . it follows *a fortiori* that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.³⁵

³¹ The investigation was a "wide-ranging inquiry into crime," and the questions attempted to elicit the identity of the person who ran the unlawful gambling operation. It felt that the state failed to take note of the "implications of the question, in the setting in which it [was] asked." 378 U.S. at 14.

³² *Id.* at 7.

³³ *E.g.*, *Spano v. New York*, 360 U.S. 315 (1959). See generally Comment, *The Coerced Confession Cases in Search of A Rationale*, 31 U. CHI. L. REV. 313 (1964).

³⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961). See generally Comment, *The Exclusionary Rule of Illegally Obtained Evidence: Its Development and Application*, 35 So. CALIF. L. REV. 64 (1961).

³⁵ 378 U.S. at 8. The Court began its analogy by citing *Bram v. United States*, 168 U.S. 532, 542 (1897), where it said "whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by . . . the Fifth Amendment [privilege against self-incrimination]" But see WIGMORE § 2266, at 400-01, where it is stated that the two principles are easily "blended" because each protects a person from "guilty facts." *Bram* was cited. *Id.* at 401 n.1. Wigmore has stated

Furthermore, the Court accepted dictum from *Mapp v. Ohio*³⁶ that the fourth and fifth amendments "cojoin" in the fourteenth amendment to prevent an "invasion of the indefeasible right of personal security, personal liberty, and private property" by the states.³⁷ In so doing, the Court concluded that the due process clause of the fourteenth amendment must provide for the privilege against self-incrimination.³⁸

The opinion rejected the idea that the fourteenth amendment applies only "a watered-down, subjected version of the individual guarantees of the Bill of Rights."³⁹ In holding that the fourteenth amendment privilege was the same as the fifth amendment's and that the standard for determining when it can be invoked is the federal standard, the Court relied upon prior decisions maintaining such uniformity in incorporating the first,⁴⁰ fourth,⁴¹ and sixth amendments⁴² into the fourteenth amendment. The Court also stated that it would be inconsistent to have two standards determining whether the same privilege might be invoked.⁴³ The effect of *Malloy* is that a state witness need only say he refuses to answer on the grounds that such might incriminate him, and he then re-

that it is erroneous in history and in policy to compare the two: (1) they evolved one hundred years apart to meet different needs; (2) the privilege is confined to legal testimony, but the confession protection is not confined to such time and place; and (3) the privilege applied to civil proceedings as well as to criminal prosecutions. *Id.* at 401.

³⁶ 367 U.S. 643, 646-47, 657 (1961). See generally Corwin, *The Supreme Court's Construction of The Self-Incrimination Clause* (pts. 1-2), 29 MICH. L. REV. 1, 191 (1931).

³⁷ 378 U.S. at 8-9.

³⁸ Mr. Justice Harlan dissented. 378 U.S. at 14. He feared the decision, while rejecting the "wholesale incorporation" idea, as going too far in accepting the fourteenth amendment as "a shorthand directive to this Court to pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States." *Id.* at 15. For a discussion of "wholesale incorporation," see Note, *Constitutional Law—Was It Intended That the Fourteenth Amendment Incorporate the Bill of Rights*, 42 N.C.L. REV. 925 (1964).

³⁹ 378 U.S. at 10-11. Mr. Justice Harlan did not accept the Court's automatic application of the federal standard. He thought that the Court should decide each case individually and, if a state proceeding did not fulfill the requirements of the fourteenth amendment, that the Court should apply some standard of "fundamental fairness." *Id.* at 20-28.

⁴⁰ *Gitlow v. New York*, 268 U.S. 652 (1925).

⁴¹ *Ker v. California*, 374 U.S. 23 (1963).

⁴² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴³ 378 U.S. at 11.

ceives the same protection from the fourteenth amendment as a federal witness gets under the fifth amendment.

The Supreme Court considered another aspect of the privilege against self-incrimination in *Murphy v. Waterfront Comm'n*.⁴⁴ Petitioners refused to answer questions put to them at a state hearing on the grounds that such might incriminate them. To compel their testimony they were granted immunity from prosecution under state law.⁴⁵ Petitioners then refused to answer on the grounds that their answers might tend to incriminate them under federal law from which the states have no power to grant immunity.⁴⁶ They were held in contempt, and this decision was affirmed by the state court⁴⁷ which said that the only immunity necessary to compel their testimony was the state immunity. The state court reiterated the Supreme Court's holding in *United States v. Murdock*,⁴⁸ which is stated thus:

[T]he lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination.⁴⁹

The Supreme Court, however, rejected⁵⁰ its previous decisions and held that a state witness is protected by the privilege against incriminating himself "under federal as well as state law."⁵¹ The Court further stated "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connec-

⁴⁴ 378 U.S. 52 (1964).

⁴⁵ Being a bi-state body, the Commission granted them immunity from prosecution under the laws of New York and New Jersey. *Id.* at 53 n.2.

⁴⁶ *Jack v. Kansas*, 199 U.S. 372 (1905). See *Feldman v. United States*, 322 U.S. 487, 491-92 (1944); *United States v. Murdock*, 284 U.S. 141, 149 (1931); *State v. Dominguez*, 228 La. 284, 305, 82 So. 2d 12, 19 (1955); *Dunham v. Ottinger*, 243 N.Y. 423, 438, 154 N.E. 298, 302 (1926).

⁴⁷ *In re Application Waterfront Comm'n*, 39 N.J. 436, 189 A.2d 36 (1963). The state court upheld the civil contempt conviction, but reversed the criminal contempt on the ground that the dual proceeding deprived the petitioners of the opportunity to show evidence in their behalf.

⁴⁸ 284 U.S. 141 (1931). This case was discussed in Grant, *Federalism and Self-Incrimination*, 4 U.C.L.A.L. REV. 549 (1957).

⁴⁹ 284 U.S. at 149.

⁵⁰ 378 U.S. at 77.

⁵¹ *Id.* at 78.

tion with a criminal prosecution against him."⁵² To allow the states to compel self-incriminating testimony under the immunity statute, the Court, by exercising its supervisory powers,⁵³ prohibited the federal government "from making any . . . use of compelled testimony and its fruits."⁵⁴ Although the contempt conviction could have been affirmed, the Court vacated it and remanded the case to the state court on the ground that "fairness dictates that petitioners should now be afforded an opportunity, in light of this development, to answer the questions."⁵⁵

The now discarded rule of *Murdock* flowed from the theory that the federal government and the state governments are dual sovereignties, "separate and distinct . . ., acting independently of each other," even though both exercise their powers within the same geographical limits.⁵⁶ The Court emphasized "dual sovereignty" in construing the privilege and consequently held that neither sovereignty had to recognize the possibility of a witness incriminating himself under the laws of the other.⁵⁷ To force a witness to testify, the compelling sovereignty had to grant the witness an immunity that was "coextensive" with the displaced privilege,⁵⁸ i.e., a protection that was equal in scope to the privilege against self-incrimination.⁵⁹ Since a witness was protected only against incriminating

⁵² *Id.* at 79.

⁵³ The Court has "supervisory authority" to formulate rules of evidence in the federal courts. *E.g.*, *McNabb v. United States*, 318 U.S. 332 (1943); *Weeks v. United States*, 232 U.S. 383 (1914).

⁵⁴ 378 U.S. at 79. For discussion of the development of the federal exclusionary rule, see Day & Berkman, *Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio*, 13 W. RES. L. REV. 56 (1962).

⁵⁵ 378 U.S. at 80.

⁵⁶ *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858). See *Feldman v. United States*, 322 U.S. 487 (1944); *United States v. Robinson*, 74 F. Supp. 427 (W.D. Ark. 1947); *State ex rel. Gibbs v. Gordon*, 138 Fla. 312, 189 So. 437 (1939).

⁵⁷ See Grant, *Federalism and Self-Incrimination*, 4 U.C.L.A.L. REV. 549 (1957); Grant, *Immunity From Compulsory Self-Incrimination in A Federal System of Government*, 9 TEMP. L.Q. 194 (1935). Cf. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Comment, *Double Jeopardy and Dual Sovereignty*, 34 WASH. L. REV. 562 (1959).

⁵⁸ *Counselman v. Hitchcock*, 142 U.S. 547 (1892). See *Ullmann v. United States*, 350 U.S. 422 (1956); *In re Watson*, 293 Mich. 263, 291 N.W. 652 (1940).

⁵⁹ For state immunity statutes, see WIGMORE § 2281; for the federal statute see note 69 *infra*. See generally Note, *The Scope of Statutory Immunity Required by The Fifth Amendment Self-Incrimination Privilege*, 57 NW. U.L. REV. 561 (1963).

himself under the laws of the interrogating sovereignty, he had to be protected only against prosecution by that sovereignty in order to compel him to give self-incriminating statements.⁶⁰ Therefore, a state witness could be prosecuted in the federal courts for a crime he had admitted under the compulsion of a state immunity statute.⁶¹

In *Murphy*, the Court rejected the emphasis on "dual sovereignty" because it felt prior decisions were based on a misconception of English law.⁶² A construction of the privilege which recognized and justified a claim of the privilege for fear of subsequent prosecution in another sovereignty was accepted.⁶³ The Court quoted with approval the statement by Chief Justice Marshall that "a party is not bound to make *any discovery* which would expose him to *penalties*"⁶⁴

This extension of the privilege to protect a state witness against

⁶⁰ *United States v. Murdock*, 284 U.S. 141 (1931). *Accord*, *United States v. Pagano*, 171 F. Supp. 435 (S.D.N.Y. 1959); *In re Ferris*, 175 Kan. 704, 267 P.2d 190 (1954); *Wyman v. DeGregory*, 101 N.H. 171, 137 A.2d 512 (1957); *In re Pillo*, 11 N.J. 8, 93 A.2d 176 (1952); *LaFountaine v. Southern Underwriters*, 83 N.C. 132 (1880); *State v. Morgan*, 164 Ohio St. 529, 133 N.E.2d 104 (1956); *State v. Wood*, 99 Vt. 490, 134 Atl. 697 (1926). *Contra*, *United States v. Di Carlo*, 102 F. Supp. 597, 605 (N.D. Ohio 1952) (where the federal investigation concerned violation of state as well as federal law); *State ex rel. Mitchell v. Kelly*, 71 So. 2d 887 (Fla. 1954); *Braden v. Commonwealth*, 291 S.W.2d 843 (Ky. 1956); *Lousiana v. Dominguez*, 228 La. 284, 82 So. 2d 12 (1955); *In re Schniter*, 295 Mich. 736, 295 N.W. 478 (1940).

⁶¹ *Feldman v. United States*, 322 U.S. 487 (1944). Subsequent prosecution would probably be barred if there was evidence of collusion between the federal and the state government. *Id.* at 494 (dictum). Immunity granted by the federal government bars subsequent state prosecution. See notes 69 & 70 *infra*.

⁶² 378 U.S. at 77.

⁶³ The Court cited the following three cases: (1) *United States v. McRae*, L.R. 3 Ch. 79 (C.A. 1867), where the defendant was an alleged Confederate agent in England. Being questioned about his affiliations, he refused to answer on the ground that he could be made to forfeit his property under an American statute. The Court held that the privilege was properly asserted on the basis that there was a justified fear of imminent prosecution in another jurisdiction. (2) *Ballman v. Fagin*, 200 U.S. 186 (1906), which held that a federal witness could not be compelled to testify when his refusal was clearly justified by a fear of subsequent state prosecution. At the time the witness was testifying in the federal court, he was being prosecuted by Ohio. (3) *United States v. Saline Bank*, 26 U.S. (1 Pet.) 100 (1828), where a bill was brought into a federal court to examine the defendant's books. Being an unincorporated bank in violation of a Virginia statute, the defendant refused to answer the questions on the ground of fearing subsequent prosecution in a state court. The Court held that the privilege was properly invoked and the defendant could not be compelled to answer.

⁶⁴ *Id.* at 104. (Emphasis added.)

incriminating himself "under federal as well as state law" left the states unable to compel a witness to testify, because, not having the power to grant immunity from federal prosecution,⁶⁵ they could not give an immunity "coextensive" with the privilege they sought to take away. The Court recognized that the rule which it set forth would prevent the states from compelling valuable testimony. To accommodate state investigation, the Court provided an exclusionary rule which forbids the use of state compelled testimony in federal courts.⁶⁶

While the Court stated that a federal witness is protected against incriminating himself "under state as well as federal law,"⁶⁷ no change in current practice will be required. The Federal Immunity Act⁶⁸ already forbids the use in state courts of testimony compelled under its provisions⁶⁹ and thereby satisfies the requirement of "coextensive" immunity.

In *Malloy* and *Murphy*, the Court took additional steps toward attaining uniformity in criminal procedure. The Court has now extended most of the Bill of Rights' protections, along with their accompanying federal standards, to the states through the fourteenth amendment's due process clause. Among these are freedom from unreasonable searches and seizures,⁷⁰ the right to counsel,⁷¹ freedom from cruel and unusual punishments,⁷² and the privilege against self-incrimination.⁷³ The last major provision of the Bill of Rights which has not been absorbed into the fourteenth amend-

⁶⁵ See note 46 *supra*.

⁶⁶ 378 U.S. at 79.

⁶⁷ *Id.* at 78.

⁶⁸ 18 U.S.C. § 3486 (1959), which provides:

[N]o . . . witness shall be prosecuted . . . on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court.

⁶⁹ *Adams v. Maryland*, 347 U.S. 179 (1954). This federal power was said to be based on the necessary and proper and the supremacy clauses of the Constitution. *Accord*, *Reina v. United States*, 364 U.S. 507 (1960); *Ullmann v. United States*, 350 U.S. 422 (1956) (power was based on the war clause); *Brown v. Walker*, 161 U.S. 591 (1896) (Congress had power to prohibit the prosecution itself through the commerce clause).

⁷⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment).

⁷¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment).

⁷² *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment).

⁷³ *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment).

ment is the fifth amendment protection against double jeopardy.⁷⁴ The Court rejected the incorporation of this protection in *Palko v. Connecticut*,⁷⁵ where it was held that a conviction of first degree murder following a reversal of a verdict of second degree murder at the instance of the state did not violate "fundamental principles of liberty and justice"⁷⁶ In view of the trend towards viewing all Bill of Rights protections as "fundamental principles of liberty and justice,"⁷⁷ it is likely that *Palko* will be overruled when the question arises.⁷⁸

There is also a "dual sovereignty" aspect to double jeopardy. It is best illustrated by *United States v. Lanza*,⁷⁹ in which it was held that there can be successive federal-state trials and convictions for offenses based on the same act. The result was based on the reasoning that neither sovereignty has to recognize a prosecution by the other.⁸⁰ The rejection of "dual sovereignty" as the controlling principle in the "silver platter" situation⁸¹ and in cases involving self-incrimination⁸² does not, however, necessarily herald a rejection of it in the *Lanza* situation. In successive trials by both governments, each sovereignty is protecting interests deemed vital to it, and is not capitalizing on "dual sovereignty" to use evidence which is inadmissible in the courts of the other. However, the Court seems

⁷⁴ U.S. CONST. amend. V, provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb"

⁷⁵ 302 U.S. 319 (1937).

⁷⁶ *Id.* at 328.

⁷⁷ See notes 70-73 *supra*.

⁷⁸ Henkin, "Selective Incorporation" in *The Fourteenth Amendment*, 73 YALE L.J. 74 (1963). The Court should also apply the standard used in the federal courts in determining when jeopardy attaches. This uniform standard would eliminate the variation in state standards. See generally Note, *Criminal Law—Double Jeopardy*, 24 MINN. L. REV. 522 (1940).

⁷⁹ 260 U.S. 377 (1922). See also *Abbate v. United States*, 359 U.S. 187 (1959) (defendant convicted in successive federal-state prosecutions for conspiracy to destroy property); *Bartkus v. Illinois*, 359 U.S. 121 (1959) (defendant acquitted by a federal jury for robbing a bank but subsequently convicted in a state court for the same robbery); *State v. Harrison*, 184 N.C. 762, 114 S.E. 830 (1922) (holding that a federal conviction for a liquor violation does not prohibit a state conviction for the same offense).

⁸⁰ See note 57 *supra*.

⁸¹ The Court has discarded the "silver platter" doctrine whereby a state court could use evidence obtained by an illegal search and seizure by federal officers, and *vice versa*. *Mapp v. Ohio*, 367 U.S. 643 (1961) (dictum); *Elkins v. United States*, 364 U.S. 206 (1960). See generally Comment, *The Exclusionary Rule of Illegally Obtained Evidence: Its Development and Application*, 35 So. CALIF. L. REV. 64 (1961).

⁸² *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

alarmed by the hardships imposed on a defendant by double prosecution and should be ready to re-examine *Lanza*.⁸³

COMANN P. CRAVER, JR.

Constitutional Law—Obscenity

Two recent decisions of the Supreme Court of the United States continue the case by case development of the constitutional standards to be applied in obscenity cases.¹

In the first case, the manager of a motion picture theatre was convicted of violating the Ohio obscenity statute² by possessing and exhibiting a French film, *The Lovers*.³ He waived jury trial and his conviction by a court of three judges was affirmed by the Ohio Court of Appeals⁴ and the Supreme Court of Ohio.⁵ The Supreme Court reversed the conviction in *Jacobellis v. Ohio*.⁶

⁸³ In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Court held that through the passage of the Smith Act Congress has occupied the field of sedition so as to preclude enforcement of state laws on the same subject. This opinion indicated that the Court is looking for congressional intent to pre-empt the field so as to avoid the harsh burden of double prosecution. However, in 1959, the Court reiterated the *Lanza* doctrine in *Bartkus v. Illinois*, 359 U.S. 121 (1959). Mr. Justice Black, joined by Mr. Chief Justice Warren, and Mr. Justice Douglas, dissented. *Id.* at 150. Black emphasized that state prosecution should be upheld only when the federal government had no vital interest in preventing the crime and if there were a conflict of interests, state prosecution should be pre-empted so as to avoid double prosecution. Pre-emption seems too harsh. It predicates state subordination and diminishes the prerogatives of the states. A more suitable solution would be for legislatures of both governments to enact pleas in bar whereby a former prosecution for the same act would prohibit a second trial.

¹ For a criticism of the Court's failure to establish a definite test in obscenity cases, see Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 835 (1964) [hereinafter cited as Gerber]. The opposite view is taken in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 121 (1960) [hereinafter cited as Lockhart & McClure].

² "No person shall knowingly . . . exhibit . . . or have in his possession or under his control an obscene, lewd, or lascivious . . . motion picture film . . ." OHIO REV. CODE § 2905.34 (Supp. 1963).

³ "The *Lovers*' involves a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State's objections are based almost entirely upon that scene." *Jacobellis v. Ohio*, 378 U.S. 184, 195-96 (1964).

⁴ *State v. Jacobellis*, 86 Ohio L. Abs. 385, 175 N.E.2d 123 (Ct. App. 1961).

⁵ *State v. Jacobellis*, 173 Ohio St. 22, 179 N.E.2d 777 (1962).

⁶ 378 U.S. 184 (1964).

The second case, *A Quantity of Copies of Books v. Kansas*,⁷ arose when, acting under a Kansas statute,⁸ the state Attorney General obtained an order from a district court judge which directed the sheriff to seize certain books at the business premises of a magazine dealer. The Attorney General had filed an information identifying fifty-nine novels by title. With the information he submitted copies of seven novels, six of which were named among those specified in the information. All fifty-nine titles specified in the information and the seven novels furnished to the judge were identified on the cover by the legend "This is an original Nightstand Book." The judge conducted a forty-five minute *ex parte* inquiry, "scrutinized" the books, passages of which had been marked by the Attorney General, and stated that the books were apparently obscene, giving the court reasonable grounds to believe that all "Nightstand" books would fall into the same category.⁹ Thirty-one of the titles named in the information were found on the premises of the dealer and all copies of those titles, totaling 1,715 books, were seized. The thirty-one titles were found to be obscene, and the court ordered all copies destroyed. The Supreme Court of Kansas affirmed,¹⁰ the Supreme Court reversed.

Cases involving allegedly obscene material will arise, typically, in one of two contexts. Either an individual will be charged in the traditional criminal proceeding for some dealing with the material, in which case the fact of obscenity becomes one element of the proof,¹¹ or the material itself is questioned in a form of *in rem* pro-

⁷ 378 U.S. 205 (1964).

⁸ KAN. GEN. STAT. § 21-1102c (Supp. 1961).

⁹ The essence of these books may be ascertained with great celerity, so replete are they with passages descriptive of sexual activities running the gamut from ordinary intercourse to lesbianism, sadism, public displays, and group orgies, and so lacking are they of any other content. Moreover, they are so standardized that a judge's estimate concerning the contents of absent books from an examination of seven books before him could be almost as surefire as a similar estimate of the character of unseen Mickey Mouse comic books based on a perusal of seven issues.

378 U.S. at 220 n.3 (Harlan, J., dissenting).

¹⁰ 191 Kan. 13, 379 P.2d 254 (1963).

¹¹ There is at least a philosophic argument that nothing is truly obscene and that a distinction must be drawn between the terms "obscene in fact" and "obscene in law," the former being non-existent, the latter indicating a judicial determination that certain material does not meet standards to be enforced by the particular court. See Miller, *Obscenity and the Law of Reflection*, 51 Ky. L.J. 577 (1963). The philosophic lists will not be entered. As used herein the phrase "obscene in fact" and like terms refer to the

ceeding before or after limited distribution. *Jacobellis* is an example of the former, *Quantity of Books* of the latter. Justices Black and Douglas maintain that the procedural setting is immaterial, inasmuch as both the criminal and the *in rem* action result in an abridgment of the freedom of expression guaranteed by the first and fourteenth amendments.¹² The *in rem* procedure also carries a connotation of prior restraint that may provide a basis for decision on first amendment grounds without the obscenity question being reached.¹³

But because the Court has been unwilling or unable to settle upon any single ground for decision, the cases dealing with obscenity handed down since 1957 have produced a series of multi-opinioned decisions unmatched in any other field of constitutional law. The Supreme Court first applied "modern standards" in obscenity cases in that year.¹⁴ In deciding the consolidated cases of *Roth v. United States* and *Alberts v. California*,¹⁵ the Court, in an opinion written by Mr. Justice Brennan in which four others joined, substantially adopted the Model Penal Code definition of obscenity,¹⁶ and specifically rejected the test first expounded in the early English case, *Regina v. Hicklin*,¹⁷ which "allowed material to be judged merely

establishment through the judicial process that the material in question is such as to be proscribed by statute.

¹² *Marcus v. Search Warrant of Property*, 367 U.S. 717, 738 (1961) (Black, J., joined by Douglas, J., concurring); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 78 (1961) (Douglas, J., joined by Warren, C.J., and Black, J., dissenting); *Smith v. California*, 361 U.S. 147, 155 (1959) (Black, J., concurring); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 690, 697 (1959) (Black, J., concurring; Douglas, J., joined by Black, J., concurring); *Roth v. United States*, 354 U.S. 476, 508 (1957) (Douglas, J., joined by Black, J., dissenting); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 446 (1957) (Douglas, J., joined by Black, J., dissenting).

¹³ *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 222-25 (1964) (Harlan, J., dissenting).

¹⁴ *Slough & McAnany, Obscenity and Constitutional Freedom*, 8 ST. LOUIS U.L.J. 279, 302 (1964) [hereinafter cited as *Slough & McAnany*].

¹⁵ 354 U.S. 476 (1957).

¹⁶ We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), *viz.*: ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters"

Id. at 487 n.20. *Contra, id.* at 499-500 (Harlan, J., separate opinion).

¹⁷ [1868] 3 Q.B. 360.

by the effect of an isolated excerpt upon particularly susceptible persons."¹⁸ Substituted was a test determining "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."¹⁹ It has been suggested that the adoption of this definition required some judicial leapfrogging²⁰ and that the test promulgated in the Model Penal Code and in *Roth* are not, in fact, the same.²¹ Nonetheless, the majority found that the trial judges in *Roth*²² and *Alberts*²³ had used substantially the same test as that

¹⁸ *Roth v. United States*, 354 U.S. 476, 489-90 (1957).

¹⁹ *Id.* at 489.

²⁰ "There is a possibility . . . that Mr. Justice Brennan may have been trying to bring existing law up to the level of the Model Penal Code by the *tour de force* of declaring that it was already there." Schwartz, *Criminal Obscenity Law*, 29 PA. B.A.Q. 8, 11 (1957).

²¹ Gerber 838-40.

²² *Roth* was convicted in the U.S. District Court for the Southern District of New York of violating the federal statute prohibiting the mailing of obscene material. *Roth v. United States*, 354 U.S. 476, 480 (1957). The conviction was affirmed, 237 F.2d 796 (2d Cir. 1956), and heard on certiorari. One of the counts of the indictment

singled out one issue of a quarterly entitled *American Aphrodite* which contained contributions by Herbert Ernest Bates, John Cournos, Pierre Louys, Henry Miller and other authors of popular works. . . . [Other counts] involved advertisements for *American Aphrodite*, *Photo and Body*, and *Good Times*. . . . [Another count] contained an advertisement for *Good Times*. Apparently the jury was convinced that *American Aphrodite* was obscene.

Slough & McAnany 306 n.98.

[T]he trial judge instructed the jury "The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community."

Roth v. United States, *supra* at 490.

²³ *Alberts* was convicted in a municipal court in California by a judge sitting without a jury of violation of a state statute proscribing the wilful distribution of obscene or indecent writings. *Id.* at 479 n.2 The conviction was affirmed, 138 Cal. App. 2d 909, 292 P.2d 90 (1955), and was up on appeal. The material in question consisted of

booklets bearing such titles as *The Prostitute and Her Lover*, *The Picture of Conjugal Love*, *Male Homosexuals Tell Their Stories*, and *The Love Affair of a Priest and a Nun*. Hundreds of items were seized, including indecent pamphlets, bondage pictures, photographs of nude and scantily clad women, stereo slides, and mailing lists.

Slough & McAnany 306. "[T]he trial judge applied the test . . . whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires.'" *Roth v. United States*, *supra* note 21, at 486. "In addition . . . the trial judge indicated

announced by the Court and affirmed the convictions.²⁴ The question of obscenity as a matter of fact was not reached.²⁵ Only Mr. Justice Harlan mentioned the matter.²⁶ Judicial determination of obscenity in fact was postponed.

On the same day that *Roth* and *Alberts* were decided, the Court, in *Kingsley Books, Inc. v. Brown*,²⁷ upheld the constitutionality of a New York statute²⁸ providing injunctive relief to prevent the sale of obscene material.²⁹ Mr. Justice Frankfurter, joined by four others, wrote in the majority opinion that there was little difference between the effect of the injunctive relief provided in the New York procedure with its concomitant safeguards³⁰ and the criminal stat-

that, as the trier of facts, he was judging each item as a whole as it would affect the normal person." *Id.* at 489-90.

²⁴ Mr. Chief Justice Warren concurred in the results but found the language of the majority too broad. *Id.* at 494. Mr. Justice Harlan concurred in the result as to *Alberts* but dissented as to *Roth* on the ground that the federal statute was invalid as against the first amendment guarantees of freedom of expression. *Id.* at 496. Mr. Justice Douglas, with whom Mr. Justice Black joined, dissented in both cases on the grounds that both the federal and the state statutes improperly abridged those guarantees. *Id.* at 508.

²⁵ "[B]oth the *Alberts* and *Roth* cases reached the United States Supreme Court at a very high level of abstraction—a level so high that the facts of the two cases had become literally irrelevant. And both were argued on this level." Lockhart & McClure 25. "An exception is Albert's belated contention that some of the books he handled were not obscene." *Id.* at 25 n.112, citing Brief for Appellant.

²⁶ 354 U.S. at 508 (separate opinion). He found that the material involved in *Roth* was not hard-core pornography.

²⁷ 354 U.S. 436 (1957).

²⁸ N.Y. CODE OF CRIMINAL PROC. § 22-a.

²⁹ The material in question was a series of books entitled *Nights of Horror*. The opinion of the trial court said:

"Nights of Horror" makes but one "contribution" to literature. It serves as a glossary of terms describing the private parts of the human body . . . the emotions sensed in illicit sexual climax and various forms of sadistic, masochistic and sexual perversion. . . . The authors have left nothing to fantasy or to the unimaginative mind. The volumes are vividly detailed and illustrated. The many drawings that embellish these stories are obviously intended to arouse unnatural desire and vicious acts. Violence—criminal, sexual—degradation and perversion—are the sole keynote. . . . In short, the volumes . . . before me are obscene and constitute pornography—"dirt for dirt's sake."

Burke v. Kingsley Books, Inc., 208 Misc. 150, 142 N.Y.S.2d 735, 742-43 (1955).

³⁰ The statute provides for trial of the issue of obscenity one day after joinder of the issue and for decision within two days after the trial is complete. After service of a summons and complaint anyone selling or distributing the material is charged with knowledge of its contents. If a final injunction is ordered the material must be surrendered or it is subject to seizure. See N.Y. CODE OF CRIMINAL PROC. § 22-a.

utes approved in *Roth*.³¹ The case brought forth three dissenting opinions. Chief Justice Warren felt that the manner of use, that is, the conduct of the individual, should be judged rather than the quality of the material. He distinguished the criminal statutes approved in *Roth* from the injunctive procedure in question in that the latter imposed a prior restraint violative of the Constitution.³² Mr. Justice Douglas, joined by Mr. Justice Black, argued for reversal on two grounds: first, that the injunction *pendente lite* gave the state censorship power; second, that restraining distribution by equity decree violates the first amendment.³³ Mr. Justice Brennan objected only to the fact that under the New York procedure there was no provision for a jury determination of the fact of obscenity.³⁴ The appellants did not challenge the finding of obscenity and the nature of the material was not discussed by the Court.³⁵

Finally, this same day produced a per curiam opinion³⁶ wherein the Court upheld the the constitutionality of a Newark, New Jersey, ordinance³⁷ which, in effect, banned burlesque shows.³⁸ The case arose as a declaratory judgment action and the question of obscenity was not presented.³⁹ The Court cited *Roth* and *Kingsley Books* without comment and the case therefore furnished no further insight into the doctrine set forth in the day's major obscenity decisions.

Similar treatment was afforded three cases considered during the next term of the Court. Citing only *Roth* or *Alberts* in per curiam opinions, the Court reversed United States Courts of Appeals

³¹ In fact, said Mr. Justice Frankfurter, the injunctive remedy is to be preferred because the defendant is not subject to criminal prosecution without prior warning. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 442 (1957).

³² *Id.* at 445.

³³ *Id.* at 446.

³⁴ *Id.* at 447.

³⁵ *Id.* at 439.

³⁶ *Adams Newark Theater Co. v. City of Newark*, 354 U.S. 931 (1957), affirming 22 N.J. 472, 126 A.2d 340 (1956).

³⁷ See *Adams Newark Theater Co. v. City of Newark*, 22 N.J. 472, 126 A.2d 340 (1956), *aff'd*, 354 U.S. 931 (1957).

³⁸ *Ibid.*

³⁹ On appeal to the United States Supreme Court, the appellants raised two issues—vagueness and freedom of expression. And once again these issues were presented to the court at a high level of abstraction, for . . . [the appellants] had instituted their action before the city had made any attempt to enforce the ordinances. Lockhart & McClure 31.

decisions which had held obscene a motion picture⁴⁰ (*The Game of Love*),⁴¹ imported magazines⁴² (including *International Journal*),⁴³ a magazine for homosexuals⁴⁴ (*One*),⁴⁵ and two domestic publications⁴⁶ (*Sunshine & Health* and *Sun*).⁴⁷ The cases indicated what

⁴⁰ *Times Film Corp. v. City of Chicago*, 355 U.S. 35, reversing 244 F.2d 432 (7th Cir. 1957).

⁴¹ [F]rom beginning to end, the thread of the story is supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts. In the introductory scenes a flying start is made when a 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl his own age. The erotic thread of the story is carried, without deviation toward any wholesome idea, through scene after scene. The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized. The words spoken in French are reproduced in printed English on the lower edge of the moving film. None of it palliates the effect of the scenes portrayed.

Times Film Corp. v. City of Chicago, 244 F.2d 432, 436 (7th Cir. 1957).

⁴² *Mounce v. United States*, 355 U.S. 180 (1957) (per curiam), *vacating judgment*, 247 F.2d 148 (9th Cir. 1957), *affirming* *United States v. 4200 Copies of Int'l Journal*, 134 F. Supp. 490 (E.D. Wash. 1955).

⁴³ [O]f the twenty-seven publications introduced in evidence as exhibits for the plaintiff, twenty have on the front-cover prominently displayed nude pictures of well-developed, shapely young women. One would have to be naive, indeed, not to appreciate the commercial value of displaying such frontcover material on the news stands. Although an avowed purpose of the books is to explain the nudist movement, its principles and its practices, there are relatively very few photographs of the mixed groups of all ages which ordinarily would be found in a nudist park. The great preponderance of the illustrations depicts shapely, well-developed young women appearing in the nude, mostly in front exposures.

United States v. 4200 Copies of Int'l Journal, 134 F. Supp. 490, 494 (E.D. Wash. 1955).

⁴⁴ *One, Inc. v. Olesen*, 355 U.S. 371 (1958), reversing 241 F.2d 772 (9th Cir. 1957).

⁴⁵ The picture and the sketches are obscene and filthy by prevailing standards. The stories "All This and Heaven Too," and "Not Til the End," pages 32-36 . . . relate to the activities of homosexuals. . . . Such stories are obscene, lewd and lascivious. They are offensive to the moral senses, morally depraving and debasing. Such literature cannot be classed as historical, scientific and educational for any class of persons. Cheap pornography is a more appropriate classification.

One, Inc. v. Olesen, 241 F.2d 772, 778 (9th Cir. 1957).

⁴⁶ *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958), reversing 249 F.2d 114 (D.C. Cir. 1957).

⁴⁷ These magazines contain photographs of naked men, women and children—principally women—clearly revealing . . . portions of the

the Court believed was not obscene, but did not furnish reasons for the beliefs.⁴⁸

The Court did not again consider a case touching upon obscenity until 1959 when, in *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*⁴⁹ it found that the refusal to license the film *Lady Chatterley's Lover*⁵⁰ on the grounds of "immorality" was unconstitutionally violative of the first amendment's guarantee of the "freedom to advocate ideas."⁵¹ The obscenity issue was not reached in the majority opinion. But the decision, while unanimous in result, produced six opinions; three members of the Court stated that the film was not obscene, but gave no explanation for this conclusion.⁵²

A few months after *Kingsley Pictures* was handed down, *Smith v. California*⁵³ added *scienter* as a requirement in criminal prosecutions for violations of obscenity statutes. The Court unanimously determined that the conviction of a news dealer for trading in allegedly obscene materials⁵⁴ under an ordinance not making knowl-

body normally covered in public. It is apparent from advertisements therein contained that they are offered freely for sale to the general public who are not members of the nudist organization. The photographs appear to be obscene and indecent when judged by the ordinary community standards of the vast majority of the citizens of our country.

Sunshine Book Co. v. Summerfield, 128 F. Supp. 564, 573 (D.D.C. 1955).

⁴⁸ "For a brief period following the four *per curiam* pronouncements, the law and obscenity were in limbo. Fortunately, Mr. Average American . . . was not aware of the impact of these reversals without benefit of explanation." Slough & McAnany 314.

⁴⁹ 360 U.S. 684 (1959).

⁵⁰ The dominant theme of the film may be summed up in a few words—exaltation of illicit sexual love in derogation of the restraints of marriage. . . . [The principal characters'] relationship was presented as a true marriage. Their complete surrender to the baser instincts was presented as a triumph over the social mores. Their decision to live in adultery was quietly heralded as a conquest of love over the "form" of marriage. And this entire theme was woven about scenes which unmistakably suggested and showed acts of sexual immorality.

Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y. 4 N.Y.2d 349, 356, 151 N.E.2d 197, 199 (1958).

⁵¹ *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 688 (1959).

⁵² *Id.* at 702 (Harlan, J., joined by Frankfurter and Whittaker, JJ., concurring).

⁵³ 361 U.S. 147 (1959).

⁵⁴ [W]e have considered the book as a whole, under tests that the appellant contends are applicable. There are obvious common-sense limits to the "over all" view. We are not persuaded that a bawdy house is any the less a brothel, because many of the rooms of the

edge of the contents an element⁵⁵ must be overturned. The decision, however, produced five opinions, all of which rested on procedural rather than substantive points.⁵⁶ No clarification of the nature of obscenity was forthcoming. While it established firmly that the dealer had to know that he was trafficking in obscene goods, the Court specifically declined to elaborate upon the nature of the necessary knowledge.⁵⁷

Again two years elapsed before the Court decided a case hinting of censorship. Then, in a five-to-four decision, it upheld a municipal ordinance requiring the submission of motion picture films prior to licensing.⁵⁸ The majority saw nothing to make the ordinance void on its face,⁵⁹ but the minority argued that the procedure allowed unlimited censorship.⁶⁰ What effect the fact that no contention was made that the film was obscene had upon the decision must be left to conjecture, but the Court indicated that the *Roth* doctrine would be broad enough if coupled with *Kingsley Books* to allow some prior restraint.⁶¹

However, the Court would not accept wholesale seizure under a warrant issued before judicial determination that the material was in fact obscene, for during the next term in *Marcus v. Search Warrant of Property*, a case involving search and seizure under a

house may be occupied with dining and dancing, in view of what goes on in the bedrooms. A book is not necessarily clean or not obscene because some of the chapters or paragraphs leading to the bedroom, couch, summerhouse or other available place themselves do not describe the details of adulterous fornication nor rape.

People v Smith, 161 Cal. App. 2d 860, 863, 327 P.2d 636, 638 (1958).

⁵⁵ LOS ANGELES, CAL. MUNICIPAL CODE, § 41.01.1.

⁵⁶ Mr. Justice Brennan, joined by four others, held that by not requiring *scienter* the ordinance would tend to restrict circulation of constitutionally protected material. *Smith v. California*, 361 U.S. 147, 155 (1959). Mr. Justice Black stated that Congress cannot restrict the freedom of speech and press because of first amendment safeguards and that this limitation is carried over to the states by the fourteenth amendment. *Id.* at 159 (concurring opinion). Mr. Justice Douglas would have allowed the suppression of expression only when that expression is inseparable from some illegal action. *Id.* at 168 (concurring opinion). Mr. Justice Frankfurter would have reversed on a due process point regarding the exclusion of testimony concerning the literary merits of the material. *Id.* at 166 (concurring opinion). Mr. Justice Harlan would have remanded for a new trial on substantially the same grounds set forth by Mr. Justice Frankfurter. *Id.* at 171 (separate opinion).

⁵⁷ *Id.* at 154.

⁵⁸ *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

⁵⁹ *Id.* at 50.

⁶⁰ *Id.* at 55, 78 (dissenting opinions).

⁶¹ *Id.* at 48.

Missouri statute,⁶² the Court was unanimous in its belief that constitutional safeguards had been breached.⁶³ The safeguards afforded under the New York procedure approved in *Kingsley Books* provided the basis for distinguishing that case from *Marcus*.⁶⁴ Because the decision turned on this procedural issue, the obscenity of the material was not touched upon by the Court.⁶⁵

A similar procedural decision could have been made a year later when *Manual Enterprises, Inc. v. Day*⁶⁶ was decided. The Post Office Department had determined that the material was unmailable.⁶⁷ Injunctive relief for the owners was denied by the district court⁶⁸ and the court of appeals.⁶⁹ The Supreme Court reversed, but could not agree upon an opinion. The Justices felt that the reversal could be based upon the procedural point that the postal authorities have no statutory authority to determine what should be excluded from the mails,⁷⁰ upon the substantive ground that the

⁶² Under the provisions of Mo. REV. STAT. § 542.380 (1949), a warrant for seizure of allegedly obscene material would issue on the strength of a sworn complaint filed with a judge or magistrate based upon positive fact, rather than information or belief, or if there were presented evidential facts from which the judge or magistrate could determine probable cause. In the case appealed, the owner of the property was not afforded a hearing before the warrant issued; the proceeding was *ex parte*. The statute required that a date not less than five nor more than twenty days after seizure had to be set for a hearing, but no time limit was specified for a decision. If the material was found to be obscene it was destroyed; if not, it was returned.

⁶³ *Marcus v. Search Warrant of Property*, 367 U.S. 717 (1961). Seven members ruled on due process grounds, two on a fourth amendment issue that the warrant was too general.

⁶⁴ *Ibid.*

⁶⁵ "The publications seized included so-called 'girlie' magazines, nudist magazines, treatises and manuals on sex, photography magazines, cartoon and joke books and still photographs." *Id.* at 723 n.8. "Because of the result which we reach, it is unnecessary to decide . . . whether the publications condemned are obscene under the test of . . . [*Roth*]." *Id.* at 753 n.9.

⁶⁶ 370 U.S. 478 (1962).

⁶⁷ Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdy. But this is not enough to make them "obscene." Divorced from their "prurient interest" appeal to the unfortunate persons whose patronage they are aimed at capturing (a separate issue), these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course not every portrayal of male or female nudity is obscene.

Id. at 489-90.

⁶⁸ See *Manual Enterprises v. Day*, 289 F.2d 455 (D.C. Cir. 1961).

⁶⁹ *Id.* at 456.

⁷⁰ *Manual Enterprises v. Day*, 370 U.S. 478, 495 (1962) (separate opinion of Brennan, J., joined by Warren, C.J., and Douglas J.).

material was not obscene,⁷¹ or upon grounds not stated.⁷² There was one dissent,⁷³ and two Justices did not participate. A most significant breakthrough in the decision, however, was the fact that Mr. Justice Harlan's opinion expressed for the first time the theory that the Court had a function of ultimate censorship and that in determining the community standards as required by *Roth* the nation as a whole was the community. He was careful, though, to limit this to federal cases.⁷⁴

Finally, eight months after *Manual Enterprises*, in an eight-to-one decision that produced four opinions, the Court condemned the activities of a legislatively created state commission which attempted to influence book distributors not to handle publications it found objectionable.⁷⁵ Again, due process provided a basis for decision and the obscenity issue was not reached.⁷⁶

Jacobellis and *Quantity of Books* do nothing to assuage the diversity in obscenity decisions⁷⁷ and little to solidify a basis for trial court findings in obscenity cases.⁷⁸ The cases do, however, continue to describe guidelines.

⁷¹ *Id.* at 479 (separate opinion of Harlan, J., joined by Stewart, J.).

⁷² Justice Black concurred without opinion. *Id.* at 495.

⁷³ *Id.* at 519.

⁷⁴ *Id.* at 488.

⁷⁵ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

⁷⁶ "Among the paperback books listed by the Commission as 'objectionable' were [METALIOUS, PEYTON PLACE (1956)] . . . and [MERGENDAHL, THE BRAMBLE BUSH (1958)] . . ." *Id.* at 61-62. "Most of the other 106 publications which, as of January 1960, had been listed as objectionable by the Commission were issues of such magazines as 'Playboy,' 'Rogue,' 'Frolic,' and so forth." *Id.* at 62 n.4.

⁷⁷ In five major obscenity cases, the Court has produced an amazing twenty-two separate opinions: *Roth* (four); *Kingsley Pictures* (six); *Smith* (five); *Manual Enterprises* (three); *Bantam Books* (four). The lines of division have tended to follow the polarities of Justices Black and Douglas, on the one hand, and Justices Frankfurter and Harlan, on the other.

Slough & McAnany 336 n.205. *Jacobellis* and *Quantity of Books* add two cases and nine opinions. The polarity apparently is weakening.

⁷⁸ Seven years after the "standard" was adopted in *Roth*, the lower courts were confused sufficiently to be split on *MILLER, THE TROPIC OF CANCER* (1961). For cases finding the book not obscene, see *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800, cert. denied, 375 U.S. 957 (1963); *Attorney-General v. Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N.E.2d 328 (1962); *McCauley v. "Tropic of Cancer,"* 20 Wis. 2d 134, 121 N.W.2d 545 (1963). For cases finding the book obscene, see *Grove Press, Inc. v. Florida*, 156 So. 2d 537 (Fla. Dist. Ct. App. 1963), *rev'd sub nom. Grove Press, Inc. v. Gerstein*, 377 U.S. 577 (1964) (per curiam); *Yudkin v. State*, 229 Md. 223, 182 A.2d 798 (1962); *People v. Fritch*, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963).

Quantity of Books indicates that any *in rem* proceeding must possess the characteristics of the New York procedure approved in *Kingsley Books* in order to survive the courts, if indeed any such proceeding would now be upheld by the Supreme Court. The Attorney General of Kansas had sought to avoid the pitfalls of *Marcus* even though the Kansas statute was almost identical to that of Missouri. The Court found his attempts lacking.⁷⁹ The Court went to great lengths to distinguish *Kingsley Books* on its facts from both *Quantity of Books* and *Marcus* after flatly stating that the Kansas officials had attempted to avoid the shortcomings found in *Marcus*.⁸⁰ The implication is that the connotation of prior restraint is assuming more importance as a basis for denouncing the *in rem* proceedings in obscenity cases. The growing importance of the prior restraint question, coupled with the separate opinion in *Quantity of Books* arguing for reversal on the grounds that the material was not obscene⁸¹ and the cases holding adversely to the distributor when the substantive findings were not attacked,⁸² now make it doubtful that any obscenity case arising hereafter in the *in rem* context will be argued solely on the procedural issues.

Rather, the Supreme Court may be called upon for ultimate review, for although the Justices were unable to agree upon a majority opinion, *Jacobellis* contains the first judicial recognition that the logical extension of the *Roth* doctrine requires the Court to determine independently the national community standard of obscenity as fact.⁸³ All of the opinions agreed at least upon the point that "obscenity" is difficult of definition. It is possible that the eventual fate of obscenity litigation is indicated by Mr. Justice Stewart's five sentence opinion, which he ends by saying:

I have reached the conclusion . . . that . . . criminal laws in this area are constitutionally limited to hard-core pornography. I

Grove Press was decided by the Supreme Court on the same day as *Jacobellis* and *Quantity of Books*.

⁷⁹ *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 209 (1964).

⁸⁰ *Id.* at 209-13.

⁸¹ *Id.* at 214 (concurring opinion of Stewart, J.).

⁸² See authorities cited notes 24 & 38 *supra*.

⁸³ Separate opinion of Justice Brennan, joined by Justice Goldberg. *Id.* at 189-90. Chief Justice Warren vigorously attacked the propositions that the Court should constitute a "super censor" and that national standards are to be imposed. *Id.* at 200-02. Justice Harlan was equally insistent that the authority of his decision in *Manual Enterprises* for independent review under a national community standard should be limited to the facts of that case, specifically, federal litigation. *Id.* at 203.

shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.⁸⁴

One commentator suggests that the Supreme Court has enunciated a "three-pronged test," to wit, the material must appeal to sexual or scatological interests, it must be considered as a whole, and it must be patently offensive; he then suggests that because this test is impossible of application lawyers in advising their clients and judges in framing their charges in obscenity cases must consider not what the Supreme Court has said but what it has done.⁸⁵ This suggestion overlooks the necessity of also considering the statutes and practice of the jurisdiction.

North Carolina has a forward looking statute dealing with obscenity as a substantive violation.⁸⁶ It was the first state to adopt the Model Penal Code provision,⁸⁷ doing so two weeks before *Roth* was handed down.⁸⁸ These provisions have been criticized for making the intended audience a factor in their test, for making a broad range of evidence admissible to determine the fact of obscenity, and for excluding non-commercial dissemination from liability.⁸⁹ It is submitted that no other criteria is available if the impact upon the intended audience is eliminated as a test and that a broad range of evidence is necessary and desirable to provide a true evaluation of the material;⁹⁰ further, all non-commercial dissemination is *not* eliminated.⁹¹ The Model Penal Code provisions are the most workable yet devised in an area in which the Supreme Court admits probable impossibility of adequate definition.⁹²

North Carolina has no specific procedural provisions for dealing with obscenity. The only legislation in this area merely places an affirmative burden upon the several sheriffs to report violations of the obscenity provisions to the proper judicial officials who are

⁸⁴ *Id.* at 197.

⁸⁵ Gerber 840-41.

⁸⁶ N.C. GEN. STAT. § 14-189.1 (Supp. 1963).

⁸⁷ Schwartz, *Criminal Obscenity Law*, 29 PA. B.A.Q. 8 (1957).

⁸⁸ Note, 36 N.C.L. REV. 189 (1958).

⁸⁹ Gerber 838-39.

⁹⁰ See MODEL PENAL CODE § 207.10, comment (Tent. Draft No. 6, 1957).

⁹¹ N.C. GEN. STAT. § 14-189.1(c)(1) (Supp. 1963).

⁹² Note, 36 N.C.L. REV. 189 (1958). See generally *Jacobellis v. Ohio*, 378 U.S. 184, 191, 197, 199, 204 (1964).

then to issue warrants "to cause such violators to come before their courts for immediate trial."⁹³ It appears that this is no more than a legislative admonition to the named officials to perform their duties. The procedure set forth can not be distinguished from other criminal proceedings. Certainly the provision is not broad enough to support a pre-hearing seizure as attempted in *Marcus and Quantity of Books*. Whether enactment of a provision similar to the New York statute that establishes an injunctive procedure is desirable is a question appropriate and ripe for legislative inquiry.

As a matter of practice, however, North Carolina apparently has not attempted to control judicially the dissemination of literary material. There were no obscenity cases reported in North Carolina prior to the enactment of the present law.⁹⁴ There has been only one since, which dealt with non-commercial exhibition to children rather than commercial dissemination.⁹⁵

It is possible that the insulation of children from certain material may be the primary aim of obscenity legislation.⁹⁶ And if not the primary aim, it may be the only remaining effective use of obscenity statutes. From the cases already decided, some insight is gained into the feeling of the Supreme Court toward printed material now in circulation. It must be remembered that the Court has *not* given blanket approval to *all* printed matter, but an examination of the works so far approved makes it difficult to perceive what might be held obscene. However, the Court steadfastly maintains its resolve to develop the law case by case. Material more offensive than that already presented to the Court or directed at a particular audience, such as children, may well support a proper conviction. Provided the procedural requirements are met, the North Carolina statute appears adequate to limit effectively distribution of salacious material to children.⁹⁷

⁹³ N.C. GEN. STAT. § 14-191 (1953).

⁹⁴ Note, 36 N.C.L. REV. 189, 198 (1958).

⁹⁵ *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961). The defendant was accused of exhibiting obscene photographs to three girls aged fourteen, ten, and eight. His conviction was reversed on the ground that the warrant and indictment, while copying the words of the statutory definition of obscenity, was too indefinite.

⁹⁶ See Hoover, *Combating Merchants of Filth: The Role of the F.B.I.*, 25 U. PITT. L. REV. 469 (1964); Comment, *Youth, Obscenity and the Law*, 1 WASHBURN L.J. 220 (1961).

⁹⁷ See N.C. GEN. STAT. § 14-189.1(c) (Supp. 1963). It has been suggested, however, that the North Carolina statute is constitutionally unsound under the doctrine of *Smith v. California*, 361 U.S. 159 (1959), in that the

The absence of cases of commercial distribution of pornography in the *North Carolina Reports* indicates either that there is no such distribution in this state or that there is no effort to restrict it.⁹⁸

provisions allow *scienter* to be presumed. See Note, 38 N.C.L. REV. 634 (1960).

⁹⁸The possibility also exists that distribution is being effectively restricted without recourse to the appellate courts. Whatever the explanation of the absence of reported "censorship" cases, recent news reports would indicate that the matter is topical.

In a case involving the film *Black Silk and Soft Skin*, a theater operator was arrested and charged with "exhibiting an immoral and obscene motion picture" after a private citizen had filed a complaint and the sheriff had warned the operator to discontinue exhibition. *Charlotte Observer*, Oct. 4, 1964, § C, p. 1, col. 1. The sheriff believed the film to be obscene because "the girls stripped down to their shoes and stockings." *Id.*, Sept. 27, 1964, § C, p. 1, col. 4. The operator was found not guilty in Record's Court, *id.*, Oct. 21, 1964, § B, p. 1, col. 1, thus precluding consideration of the matter by the Supreme Court of North Carolina.

In another county the sheriff appointed a citizens committee to review publications offered for sale in the county. *Id.*, Oct. 7, 1964, § C, p. 1, col. 5. A three man sub-committee apparently decided what was obscene, although all of the publications were not read by all three and there were conflicting reports as to whether the whole committee saw all of the books. The publications were divided among the sub-committee and "perused" with this "rule of thumb" as a standard:

The nude body is not itself obscene; however, when nudity is used to arouse lustful desires, it becomes obscene. The nude body shown in positions or poses normally used by respectable modeling or photography concerns is not obscene.

If, however, the nude body is shown in provocative, suggestive, lewd or other positions which seem to invite sexual activity between men and women, it thereby becomes obscene.

Id., Oct. 4, 1964, § C, p. 1, col. 5.

The committee advised the sheriff that the magazines *Ace*, *Adam*, *Bachelor*, *Calvacade*, *Dude*, *Frolic*, *Gent*, *Gentleman*, *Madcap*, *Modern Man*, *Re-treat*, *Sir*, *Swank*, *Yes*, and the *Police Gazette* and all paperback books published by the Rapture, Leisure, Pillar and Ember companies were obscene. *Id.*, Oct. 2, 1964, § B, p. 1, col. 8. Armed with this report, the sheriff sent letters to selected newsstand operators in the county ordering removal of the publications. After the dealers indicated an unwillingness to comply, the sheriff announced that arrests would be made. Faced with this ultimatum the operators capitulated temporarily. *Id.*, Oct. 3, 1964, § B, p. 1, col. 5. Later, promised financial support by the publishers, the dealers threatened to test the legality of the action. *Id.*, Oct. 6, 1964, § B, p. 1, col. 1.

At this juncture spokesmen for the committee stated that the group had not been too hopeful of success and that it had not been anticipated that the sheriff would take immediate action. A meeting between the operators and the committee was scheduled. *Id.*, Oct. 9, 1964, § C, p. 1, col. 8. At the meeting it was announced that the operators were free to place on the stands any material they thought was not obscene. "And the committee left the unspecified threat of arrest by the sheriff if the voluntary system does not work." *Id.*, Oct. 23, 1964, § C, p. 1, col. 1. The committee attempted to give the dealers some insight into the standards to be used in judging material by using as exhibits two fold-out pictures taken from representa-

Either reason, considered with the growing aversion⁹⁹ toward the *in rem* action, suggests that an injunctive procedure similar to that expressly approved in *Kingsley Books* and used as a standard in *Marcus* and *Quantity of Books* would be unused or unenforceable legislation. The present North Carolina substantive statute, however, provides an adequate basis for criminal prosecution and an acceptable charge to a jury, for in all of the cases since 1957 the majority has accepted the *Roth* doctrine as controlling. This leaves as the crucial question in such prosecution the issue of obscenity in fact, and *Jacobellis* indicates that this point can be settled with finality only by the Supreme Court of the United States.

ROBERT A. MELOTT

Constitutional Law—Right to Retained Counsel at Time of Arrest

*Escobedo v. Illinois*¹ presented once more to the Supreme Court the problem of when the right to counsel attaches. Defendant was brought to police headquarters after being implicated in a murder. At the time of his interrogation, he was not formally charged; but he "couldn't walk out the door."² When told that he had been

tive magazines, *Yes*, which the committee found objectionable, and *Playboy*, which it did not. The spokesman said:

If you look at . . . [the one from *Yes*] you'll see—I don't know what kind of a grimace you would call that on her face It is such grimaces on the faces that would allow lustful desires to be aroused [But] the picture from *Playboy* . . . [is] respectable photography.

Ibid. The dilemma faced by the dealers might have been expressed by the chief of police of the county seat, a member of the committee, who had said "I don't know what's obscene. I'd hate to be the one deciding." *Id.*, Oct. 6, 1964, § B, p. 1, col. 1.

On the limited facts reported by the newspaper the case would appear to be similar to *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), with the position of the committee equally indefensible. See notes 75 & 76 and accompanying text *supra*. But whatever the legality of the action taken, the case illustrates several important points: "obscenity" is a subjective matter difficult of definition, especially by committee; operators of local commercial outlets will resist attempts to control distribution; those operators will be supported in their resistance by financially strong publishers; the most effective control may lie in moral suasion aimed at the general public.

⁹⁹ See text accompanying notes 78-80 *supra*.

¹ 378 U.S. 478 (1964). For a discussion of the case before the Supreme Court decision, see Comment, 73 YALE L.J. 1000 (1964).

² 378 U.S. at 479.

accused, defendant requested to see his lawyer.³ This request was denied. His attorney arrived at the police station, but was not allowed to speak with him even though the attorney reminded the refusing officer of an Illinois statute that allowed the attorney to consult with his client "except in cases of imminent danger of escape."⁴ Defendant confessed to the crime after a four-hour period of interrogation during which he was never advised of the constitutional right to remain silent and never allowed to see his attorney despite repeated requests by him and the attorney that they be allowed to meet. At the trial, defendant's attorney argued that the confession should be excluded since it was obtained after a denial of counsel. This argument was rejected, the confession was allowed, and defendant was convicted. On appeal, the Illinois Supreme Court affirmed.⁵ It stated that a denial of counsel *during interrogation* had not been recognized, in itself, as a denial of due process of law under the fourteenth amendment.⁶ The court recognized that the state statute showed a legislative policy against isolating a person from his attorney, but found that the legislature did not intend to prevent a reasonable interrogation by the police.⁷ The Supreme Court granted certiorari,⁸ and reversed.⁹ The Court stated that when a suspect has requested and been denied an opportunity to see his retained attorney during interrogation and has not been effectively warned of the right to remain silent, he has been denied due

³ Escobedo had retained an attorney prior to this time. He had been arrested on the day of the death, ten days before, and interrogated. After making no statement, he was released on a state court writ of habeas corpus obtained by his attorney. *Ibid.*

⁴ All public officers . . . or persons having the custody of any person committed, imprisoned or restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney at law of this state, whom such person . . . may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody

Ill. Laws 1849, p. 99, § 1, 2. Repealed as of Jan. 1, 1964, in Ill. Laws 1963, p. —, § 126-1.

⁵ *People v. Escobedo*, 28 Ill. 2d 41, 190 N.E.2d 825 (1963).

⁶ *Id.* at 46, 190 N.E.2d at 828. The court added that Escobedo had a ten day period since a prior release in which to consult with his attorney, and that it appeared from the record what advice the defendant thought the attorney would have given since he testified that he saw the attorney make a motion with his head which he took to mean that he should remain silent. *Id.* at 51, 190 N.E.2d at 830.

⁷ *Id.* at 52, 190 N.E.2d at 831.

⁸ *Escobedo v. Illinois*, 375 U.S. 902 (1963).

⁹ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

process of law and no statement obtained by the police during this time may be used against him.¹⁰

The Supreme Court has been presented with few cases involving the right to *retain* counsel for representation during formal state proceedings.¹¹ The right to retain counsel and to appear with him in court has been said to be the "most certain conclusion which can be drawn . . . under the constitutional provisions regarding counsel in forty-seven states and the due process clause of the Virginia constitution."¹² It was formerly unclear, however, at what time before commencement of formal state trial proceedings the right to counsel attached. In order to determine if a defendant had been denied fourteenth amendment due process at any step in the proceedings before trial, the Court established the fundamental fairness rule.¹³ Under this rule, the means of determining the necessity of counsel was through an appraisal of all the facts preceding the trial to see if the absence of counsel resulted in such prejudice to the defendant as to render the trial opposed to the fundamental principles of fairness.¹⁴ If such prejudice did result, the evidence

¹⁰ *Id.* at 490-91.

¹¹ In *House v. Mayo*, 324 U.S. 42, 46 (1945), where the petitioner was forced, over protest, to plead to a burglary charge by information without the aid of retained counsel, the Court said he was denied a fair trial. In *Chandler v. Fretag*, 348 U.S. 3 (1954), the Court said that to refuse a petitioner the opportunity to retain counsel, even though waived on a specific charge, after he learned that he would be tried as an habitual criminal, was a denial of due process.

¹² *BEANEY, THE RIGHT TO COUNSEL* 89 (1955).

¹³ *Lisenba v. California*, 314 U.S. 219 (1941). Convicted of murdering his wife, the defendant argued that his confession was coerced through the lack of food and sleep and continued interrogation which constituted a denial of due process. He also argued that denial of counsel after the time of arrest was a denial of due process. He was allowed counsel the day after his arrest, but the attorney was not present at the time of the accused's incriminating statements. In affirming the conviction upon appeal, the absence of counsel was considered to be only one element of fundamental fairness.

¹⁴ As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt.

Lisenba v. California, *supra* note 13, at 236-37. In the federal courts the denial of counsel is a direct violation of the sixth amendment and grounds for reversal. This applies to the indigent defendant in the non-capital cases as well as the capital proceeding. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The question of when the right attaches has been clarified by two

obtained after a denial of counsel was excluded.¹⁵

The fundamental fairness rule, as it included the right to retained counsel, was closely surveyed by the Supreme Court in two 1958 cases¹⁶ factually similar to *Escobedo*. Defendants confessed to crimes after periods of interrogation during which they were refused an opportunity to consult with counsel. The attorney in each case argued that the confession, even if voluntary, should have been excluded because of the denial of counsel during the interrogation. The majority of the Court rejected the contention of the petitioners that every denial of a request for counsel would be an infringement of due process without regard to the circumstances. In the first case, *Crooker v. California*,¹⁷ the Court recognized the right to counsel before trial as one element of fundamental fairness. However, the Court said that to make it an undeniable right with exclusion of the confession as a penalty for infringement was too

federal decisions. In *McNabb v. United States*, 318 U.S. 332 (1943), the Court passed on a statute, Act of 1894, ch. 301, 28 Stat. 416, which imposed a duty upon the arresting officer to take the arrested, without delay, before the nearest U.S. commissioner or judicial officer for a hearing, bail or commitment. Exercising its supervisory power over the federal courts, the Court held that evidence obtained in violation of this law must be excluded. The rule was later affirmed in *Mallory v. United States*, 354 U.S. 449 (1957), interpreting the same provision in FED. R. CRIM. P. 5(a) along with FED. R. CRIM. P. 5(b), which provides that the commissioner shall inform the arrested of the complaint against him, of his right to *retain* counsel, and allow him a reasonable time to consult with counsel. Since the right attaches when taken before a magistrate and the defendant must be taken to a magistrate without delay, the right to *retained* counsel attaches very close to the time of arrest.

Appointed counsel, also a right under *Johnson v. Zerbst*, *supra*, is covered by FED. R. CRIM. P. 44. If the defendant appears at the arraignment without counsel, the court will assign counsel to represent him at every stage in the proceedings unless he waives counsel or can obtain his own. In order to correct any deficiency in the federal proceedings, as to appointed counsel, an amendment has been proposed to rule 5(b) requiring the commissioner to advise the indigent defendant of his right to appointed counsel at the time of the preliminary hearing. More important, a proposed amendment to rule 44 is designed to provide for the assignment of counsel for indigents at the earliest possible time without waiting until the defendant appears in court. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (Dec. 1962). For the full text, see 31 F.R.D. 665 (1963). For a discussion of the federal rules and the right to counsel in the federal courts, see Note, 39 IND. L.J. 134 (1963).

¹⁵ *E.g.*, *Spano v. New York*, 360 U.S. 315 (1959); *Payne v. Arkansas*, 356 U.S. 560 (1958).

¹⁶ *Cicenia v. Lagay*, 357 U.S. 504 (1958); *Crooker v. California*, 357 U.S. 433 (1958).

¹⁷ 357 U.S. 433 (1958).

devastating since it would "effectively preclude police questioning—'fair as well as unfair'—until the accused was afforded opportunity to call his attorney."¹⁸ That the right to counsel before trial was only an element of fundamental fairness was stated even stronger in *Cicenia v. Lagay*.¹⁹ "Were this a federal prosecution we would have little difficulty in dealing with what occurred under our general supervisory power over the administration of justice in the federal courts But to hold that what happened here violated the Constitution of the United States is quite another matter."²⁰

In *Escobedo*, without expressly overruling *Crooker* and *Cicenia*,²¹ the Court has established a right to retain counsel at the time of arrest. As a result, the fundamental fairness rule has been abolished, and the policy of allowing police officials a reasonable period of interrogation before an accused is entitled to see his lawyer has been terminated.²²

In finding a violation of the fourteenth amendment in *Escobedo*, the Court viewed two factors as controlling: (1) the suspect under-

¹⁸ *Id.* at 441.

¹⁹ 357 U.S. 504 (1958).

²⁰ *Id.* at 508-09.

²¹ The Court said that in these two cases it rejected the right to see counsel during interrogation without regard to the circumstances, and that *Escobedo* differed in that the circumstances necessitated the advice of counsel. To the extent that *Cicenia* and *Crooker* were inconsistent with the principle in *Escobedo*, they were said not to be controlling. *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

²² Even though most of the cases are in the area of the right to counsel in the pre-indictment period, the Court was recently faced with a post-indictment question in *Massiah v. United States*, 377 U.S. 201 (1964). The defendant was indicted for a federal narcotics offense and released on bail after retaining counsel. Federal agents managed to eavesdrop on a conversation between the defendant and an informer by use of an electronic device placed in the informer's car. The Court reversed a conviction on the basis of the sixth amendment right to counsel even though the decision to exclude could have been based on the supervisory power of the Court in federal proceedings. The Court followed the principle, established in *Powell v. Alabama*, 287 U.S. 45 (1932), that the defendant is entitled to counsel during the most critical period of the proceedings and said that the period of consultation, investigation, and preparation was just as critical as the trial itself. The fact that the defendant was not in police custody made no difference to the Court. It was held that this principle, to be effective, must apply to any indirect interrogation as well as that in the jailhouse. As a result, it appears that federal agents are prohibited from eliciting a confession after the right to counsel attaches, regardless of custody. *Quære*, will this rule be applied to the states through the fourteenth amendment? Justice Goldberg seems to think so. See *Escobedo v. Illinois*, 378 U.S. 478, 484-85 (1964). For a discussion of *Massiah* after the circuit court opinion, see 76 HARV. L. REV. 1300 (1963).

going interrogation had been denied his request to consult with his counsel; and (2) the police had not effectively warned him of the constitutional right to remain silent. These two factors must be closely considered in determining whether any limitations may be placed on the right to retained counsel at the time of arrest.

Would the failure of the accused to make an affirmative request for a lawyer constitute a waiver of the right? There is little importance in the failure to request counsel in the *federal* courts since the absence of such a request would be considered a waiver of the constitutional right only if made competently and intelligently.²³ In *Carnley v. Cochran*,²⁴ the question arose as to the application of the principles of waiver to state courts. When the record did not show that an indigent defendant had requested counsel,²⁵ the Florida Supreme Court either presumed that the defendant waived counsel or that the trial judge had made an offer of counsel which the petitioner had declined.²⁶ The Supreme Court stated that the validity of such presumptions was questionable because the only way the accused could have protected himself was to request counsel—"a formality upon which we have . . . said his right may not be made to depend."²⁷ The Court then said that the federal principles were "equally applicable to asserted waivers of the right to counsel in state criminal proceedings."²⁸ Since *Escobedo* establishes a constitutional right to retained counsel at the time of arrest, and since a defendant can make a competent waiver only if he knows of his right; it follows that the police must advise him that he is entitled to consult with his attorney. For the same reason, a mere warning of the right to remain silent would not be sufficient to entitle police officials to a period of interrogation before a person in custody is allowed to speak with his attorney. Also, any failure by a defend-

²³ *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938). In federal proceedings the Court has stated that the sixth amendment is designed to protect those who have no knowledge of the law, *id.* at 465, and that we do not presume acquiescence in the loss of fundamental rights, *id.* at 464.

²⁴ 369 U.S. 506 (1962).

²⁵ See note 27 *infra*.

²⁶ The Court said that it was not clear what the Florida court had presumed. 369 U.S. at 513-14.

²⁷ *Id.* at 514. The Court went further to say that a plea of guilty would raise only a question of fact as to whether there had been a competent and intelligent waiver. For a discussion of the problems of waiver and the implications of a guilty plea before this decision, see Comment, 31 U. CHI. L. REV. 591 (1964).

²⁸ 369 U.S. at 515.

ant to take advantage of his right after being informed of it must be viewed in light of the requirement that a waiver be competent and intelligent.²⁹

While *Escobedo* clears up the problem of when the right to retained counsel attaches in the state pre-trial proceedings, it says nothing about the problem the Court now has to face: should the right to *appointed* counsel attach at the time of arrest for indigent defendants?

The effect of the denial of appointed counsel during state criminal proceedings was first squarely decided by the Supreme Court in the *Scottsboro Cases*.³⁰ The denial of appointed counsel *at or near the time of trial* for one's life was held to be a violation of the fundamental principles of justice. Later, the Court decided that the fundamental principles of justice did not require the appointment of counsel in every case.³¹ In non-capital criminal proceedings, it was decided that due process required state appointed counsel only where special circumstances such as age,³² mentality,³³ or experience³⁴ necessitated the advice of counsel for a fair trial. As a result, the absolute right to counsel was restricted to trials for capital offenses, leaving the right unclearly defined in other cases.

The absolute right to counsel in capital proceedings was expanded in 1961 when it was decided that the right attached at the time of arraignment instead of trial.³⁵ In 1963, attachment of the right to appointed counsel in capital cases was advanced to the time of the preliminary hearing.³⁶ The rationale in both cases was that after a person pleads to a capital charge, the Court will not look to see if the lack of counsel resulted in prejudice to the defendant.³⁷

²⁹ There may be cases in which the law of a state is not settled and the advice of counsel could prevent a confession or plea to the wrong crime. See, *e.g.*, *Carnley v. Cochran*, 369 U.S. 506, 507-08 (1962).

³⁰ *Powell v. Alabama*, 287 U.S. 45 (1932). "[T]he intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 69. For a full discussion of this case, see 31 *NEB. L. REV.* 15, 16 (1952).

³¹ *Betts v. Brady*, 136 U.S. 455 (1942).

³² *E.g.*, *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

³³ *E.g.*, *Reck v. Pate*, 367 U.S. 433 (1961).

³⁴ *E.g.*, *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Crooker v. California*, 357 U.S. 433 (1958).

³⁵ *Hamilton v. Alabama*, 368 U.S. 52 (1961).

³⁶ *White v. Maryland*, 373 U.S. 59 (1963).

³⁷ Prejudice was necessary for a violation of fundamental fairness, the

Each time the attachment of the right was advanced, the Court said that the stage at which the right attached was a critical stage in the proceedings where rights could be won or lost.

The last step taken by the Court with respect to appointed counsel was the decision in *Gideon v. Wainwright*,³⁸ where it was held that an indigent defendant was entitled to appointed counsel at the time of trial for a non-capital felony. The requirement of special circumstances, formally used for determining the necessity of counsel in such cases,³⁹ was abolished in felony cases, thus making the right to counsel *absolute* in all capital and felony cases *at the time of trial*.⁴⁰

With the distinction between the two types of crimes no longer present at the trial stage, it would seem that any advisory safeguards provided in the capital case should be extended to the non-capital situation. If the right to life *and* liberty are equal fundamental human rights, and it now appears that they are,⁴¹ it follows that the absolute right to counsel at the time of the preliminary hearing that now attaches in the proceedings for one's life should be extended to like proceedings for one's liberty. Likewise, to carry this reasoning to the logical extreme, it would seem that any right to retained counsel at the time of arrest should be extended to include a right to appointed counsel at the time of arrest, whether the defendant is to be tried for his *life* or *liberty*. Lending support to this latter conclusion are two considerations: (1) that the time of arrest was considered in *Escobedo* as critical, *i.e.*, a time when rights can be won or lost;⁴² and (2) that the exercise of constitutional rights does not seem to depend on the degree of one's wealth or ability to

standard which formerly governed the necessity of counsel during the pre-trial period. See notes 13-15 *supra* and accompanying text.

³⁸ 372 U.S. 335 (1963). For a discussion of this case, see Comment, 39 NOTRE DAME LAW. 150 (1964); Comment, 73 YALE L.J. 1000, 1006 (1964).

³⁹ See note 31 *supra* and accompanying text.

⁴⁰ Another view is that *Gideon* has abolished the special circumstances rule in all cases, giving an absolute right to counsel even in misdemeanor cases. "The case supports the proposition that the test for the right to counsel is not the severity of the penalty but the *need* for legal assistance." Comment, 39 NOTRE DAME LAW. 150, 157-58 (1964).

⁴¹ *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963).

⁴² *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964). "What happened at this interrogation could certainly 'affect the whole trial,' . . . since rights 'may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic proposes.'" *Ibid.* (Citation omitted.)

pay.⁴³ Such a conclusion, though perhaps constitutionally sound, would present grave problems of application to the states, possibly leading to the necessity of a public defender system in each state in order to comply with due process.⁴⁴

An immediate problem with which the courts must contend is the retrospective application of the *Escobedo* case.⁴⁵ Even though decisions are usually applied retroactively with no discussion,⁴⁶ there are strong arguments to the effect that the Court has the power to define the scope and limits of a new decision and should do so. Mr. Justice Frankfurter has urged that a new requirement of due process does not necessarily have to be applied retrospectively in blind obedience to Blackstone's theory that a newly announced decision is presently and always has been the law.⁴⁷ Instead, he contended that the overruled decision should be considered as sound law up to the time overruled and that the question of retrospective or prospective application of the new rule should be determined by the Court after considering administrative expediency.⁴⁸

An analagous situation was presented by *Gideon v. Wainwright*,⁴⁹ where the question of the retroactivity of the newly announced requirement of appointed counsel in state, non-capital trials remained unanswered. Later, because of denial of counsel at trial, the Court vacated ten non-capital, pre-*Gideon* convictions in a memorandum decision⁵⁰ and remanded the cases to the Florida courts for consideration under the new rule. Mr. Justice Harlan dissented, and without expressing an opinion as to the result that

⁴³ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁴⁴ For a detailed discussion of appointed counsel and this solution for problems arising in the state, see 38 IND. L.J. 623, 632 (1963).

⁴⁵ Retroactivity will not be discussed in detail in this note. For a complete discussion, see Comment, 71 YALE L.J. 907 (1962).

⁴⁶ See, e.g., *Eskridge v. Washington State Bd. of Prison Terms*, 357 U.S. 214 (1958). The Court applied the due process requirement of free transcripts for the appeals of indigent defendants, a requirement announced in 1956 in *Griffin v. Illinois*, 351 U.S. 12 (1956), to the denial of a transcript to a man convicted in 1936.

⁴⁷ *Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (concurring opinion). Blackstone's theory that decisions are only evidence of the law and not sources of the law is fully discussed in GRAY, *THE NATURE AND SOURCES OF THE LAW* 219-22 (2d ed. 1921).

⁴⁸ Justice Frankfurter advocated that such considerations would enable the Court to reverse the old law as to the defendant before the Court without applying the new decision to *anyone* convicted prior to the date of the decision. *Griffin v. Illinois*, *supra* note 47, at 26 (concurring opinion).

⁴⁹ 372 U.S. 335 (1963).

⁵⁰ *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963).

should be reached,⁵¹ said that the retroactivity of *Gideon* should be decided.

The retrospective aspect of the *Gideon* decision was discussed at last by the Second Circuit Court of Appeals when it decided that *Gideon* could be invoked in a habeas corpus proceeding by one who was convicted before *Gideon* was even indicted.⁵² The court said that the question of retroactivity had been settled in the memorandum reversal of *Doughty v. Maxwell*,⁵³ where the defendant was also convicted before *Gideon*'s indictment. The petitioner in *Doughty* had pleaded guilty to rape in 1959 without requesting to see an attorney. He petitioned the Ohio courts for habeas corpus before *Gideon* was decided, and the petition was rejected on the ground that counsel had been waived.⁵⁴ The petition for certiorari was received by the Supreme Court after *Gideon*. The Ohio court was reversed and the case remanded in light of both *Gideon* and *Carnley v. Cochran*.⁵⁵ In addition, the court of appeals said that even if the Court had decided to apply *Gideon* prospectively, it was retroactive at least as to *Gideon* himself because he was to receive a new trial. Therefore, said the court of appeals, the decision must be said to be retroactive to the time of *Gideon*'s conviction and must apply to anyone denied counsel under similar circumstances since that time in order to provide equal protection of the law.⁵⁶ The latter reasoning also applies to the *Escobedo* situation. That is, if it is within the power of the courts to determine a holding to be prospective only, and a court so holds,⁵⁷ *Escobedo* must be applied

⁵¹ *Id.* at 2. In stating that the Court did not have to apply a rule retrospectively simply because changes in constitutional principles had been so applied in the past, Justice Harlan completely agrees with the view of Justice Frankfurter that the Court does have some control over the future scope and application of a new decision. See note 47 *supra* and accompanying text.

⁵² *United States ex rel. Durocher v. LaVallee*, 330 F.2d 303 (2d. Cir. 1964).

⁵³ 376 U.S. 202 (1963).

⁵⁴ *Doughty v. Sacks*, 173 Ohio St. 407, 183 N.E.2d 368 (1962).

⁵⁵ 369 U.S. 506 (1962). See notes 23-29 *supra* and accompanying text. The case was first remanded by the Court in light of *Gideon* in *Doughty v. Maxwell*, 372 U.S. 781 (1963). The Ohio court upheld the conviction on the basis of waiver and when the case came to the Court for a second time, the Court remanded it in light of *Gideon* and *Carnley*. *Doughty v. Maxwell*, 376 U.S. 202 (1963).

⁵⁶ *United States ex rel. Durocher v. LaVallee*, 330 F.2d 303, 310 n.4 (1964).

⁵⁷ It must be remembered that, so far, the Court has not made any such determination. See note 46 *supra* and accompanying text.

from the date of Escobedo's arrest, not just from the date of the decision, in order to provide equal protection of the law to those denied counsel since the time of his arrest under similar circumstances.

Since the question of retroactivity was not before the Court in *Escobedo*, and the Court did not take it upon itself to answer the question,⁵⁸ the lower federal courts will perhaps have to determine its application to prior convictions through petitions for habeas corpus. If it is decided that a change in due process requirements need not be applied retroactively, one of the main considerations in reaching a decision will be the opinion of the court as to the purpose of the *Escobedo* decision.⁵⁹ Was the purpose of the decision only to deter police from denying counsel at this stage of the proceedings, or was it to prevent convictions based on unreliable evidence which was admissible under the rule of fundamental fairness? If the court finds that the decision was simply to extend the right to counsel, it must then be decided if granting trials to those now imprisoned is necessary to deter any future violation. It appears that the old policy of allowing the police a reasonable period of interrogation before the suspect is permitted to see counsel has not resulted in unreliable convictions,⁶⁰ and that the Supreme Court's purpose was just to set a definite stage before trial when the right to counsel attached. If this reasoning prevails, it does not seem that granting new trials to those now imprisoned would be necessary to deter future violations of the right by the police. The exclusion of evidence obtained after a denial of counsel is sufficient to discourage any possible violators of the right.

Finally, it should be noted that a statute⁶¹ similar to that in

⁵⁸ Compare *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). Here the court made a change in the rule for determining sanity and expressly decided that the decision was for prospective application. *Id.* at 874.

⁵⁹ This same analogy was discussed in Comment, 71 YALE L.J. 907, 942 (1962), as to the retroactive application of the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961). See also 110 U. PA. L. REV. 650 (1962).

⁶⁰ If there was prejudice to the defendant there was an automatic reversal of a conviction under the rule of fundamental fairness which was the test for determining the need for counsel at this stage in the proceedings. See cases cited in note 15 *supra*.

⁶¹ N.C. GEN. STAT. § 15-47 (Supp. 1963), which provides:

Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State, with or without a warrant, . . . it shall be the duty of the officer making the arrest . . . to permit the person so arrested to communicate with counsel and friends im-

Escobedo has been the basis for a reversal of convictions by the North Carolina Supreme Court.⁶² Three defendants were arrested, placed in separate jails, and not allowed to contact anyone, including each other. Even though the court stated no flat rule, it said, in construing the statute, that "rights of communication go with the man into the jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities."⁶³ This language implies that the *Escobedo* decision will not necessitate a great change, if any, in North Carolina practices with respect to retained counsel. However, as pointed out elsewhere,⁶⁴ the North Carolina system of providing *appointed* counsel before trial may be inadequate for insuring the guidance of counsel at a sufficiently early stage in the proceedings. The statute dealing with appointed counsel now provides that the judge shall advise the indigent defendant in felony cases that he is entitled to appointed counsel "before he is required to plead."⁶⁵ The inadequacy of this statute in providing for appointed counsel in North Carolina is illustrated in the preliminary hearing procedure. Under the statutory provision for preliminary hearings,⁶⁶ a defendant is not required to plead at the hearing; therefore, the judge is not required to appoint counsel for him at this time.⁶⁷ But, as previously noted, the Supreme Court held in 1963⁶⁸ that the right to appointed counsel in *capital proceedings* attached at the time of the preliminary hearing; it is likely that the holding will be expanded to give the same right in felony cases as well.⁶⁹ Thus, the North Carolina General Assembly is presented with the immediate problem of appointment of counsel at

mediately, and the right of such persons to communicate with counsel and friends shall not be denied.

⁶² *State v. Wheeler*, 249 N.C. 187, 105 S.E.2d 615 (1958). For other cases which have been decided in light of the statutes in other states, see 38 N.C.L. REV. 630 (1960).

⁶³ *State v. Wheeler*, *supra* note 62, at 192, 105 S.E.2d at 620.

⁶⁴ Watts, *Indigent Defendants and Criminal Justice*, 42 N.C.L. REV. 322, 337 (1964).

⁶⁵ N.C. GEN. STAT. § 15-4.1 (Supp. 1963).

⁶⁶ N.C. GEN. STAT. § 15-89 (1953).

⁶⁷ The defendant is entitled to counsel at this time under N.C. GEN. STAT. § 15-87 (1953), the pertinent part of which reads, "the defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel." However, in looking at the language used, it is clear that this provision pertains only to *retained* counsel.

⁶⁸ *White v. Maryland*, 373 U.S. 59 (1963).

⁶⁹ See note 41 *supra* and accompanying text.

this stage in the proceedings.⁷⁰ In addition, the legislature is faced with the problem of deciding whether to provide for appointed counsel at the time of arrest.⁷¹ Even if no immediate statutory action is taken, preparation should be made for the possibility of such a requirement through future Supreme Court decisions.

ROY H. MICHAUX, JR.

Constitutional Law—State Taxation of Interstate Commerce

The State of Washington imposed a tax upon the privilege of a foreign corporation's doing business in that state,¹ the tax being measured by the corporation's gross receipts from sales of motor vehicles, parts, and accessories to independent retail dealers in Washington. The taxpayer, General Motors, protested² the tax on the grounds that it constituted a levy upon the privilege of engaging in interstate business and thus was repugnant to both the due process and commerce clauses of the Constitution. Concluding that "the tax is levied on the incidents of a substantial local business,"³ the Supreme Court of the United States sustained the tax.

As typifies such a corporate giant in this modern era, the sales organization maintained by General Motors is complex.⁴ For pres-

⁷⁰ For a discussion of the amendments proposed in the federal rules to provide for appointed counsel before the defendant ever sees the judge, see note 14 *supra*.

⁷¹ See notes 42 & 43 *supra* and accompanying text for the proposition that appointed counsel should be provided at the time of arrest in all felony cases.

¹ REV. CODE WASH. 82.04.270 (1962).

² The Supreme Court of Washington sustained the tax. *General Motors Corp. v. Washington*, 60 Wash.2d 862, 376 P.2d 843 (1962).

³ *General Motors Corp. v. Washington*, 377 U.S. 436, 439 (1964).

⁴ Chevrolet, Pontiac, Oldsmobile, and General Motors Parts are all substantially independent "divisions" of the corporation. For sales and administrative purposes, each "division" is geographically divided into "zones" which in turn are further sub-divided into "districts." During the period in question, all "divisions" except General Motors Parts maintained formal "zone" offices in Portland, Oregon. In Seattle, Washington, was situated a warehouse operated by the Parts Division and a "branch" office under the Chevrolet "zone" headquarters. There were no offices at the "district" level, and the "district managers" operated largely out of their homes under the jurisdiction of the Portland office. Their primary functions were to oversee the dealer organization and to otherwise work with and advise the dealers in the promotion of sales. It should be noted that these "district managers" had no authority to accept orders from the dealers; this was a function performed at the "zone" level. Note also the fact that executive personnel from the Portland office visited each dealer in the "zone" regular-

ent purposes, its most interesting aspect lies in the fact that, except for one branch office of the Chevrolet Division and a warehouse operated by the Parts Division, the corporation maintained no formal offices in the taxing state. Many of the "District Managers" of the organization were residents of Washington, but the activities of these employees were confined to promotional work and acting as liaison between the far-flung retail dealers and the "zone" office in Portland, Oregon. Orders from the retail dealers for products, and the subsequent sales and deliveries to them, were all approved and handled through the Portland office. Practically speaking then, the state in imposing its tax on the gross receipts from wholesale sales made to its citizens was taxing sales that were consummated entirely outside the state.

In both the due process and commerce clauses of the Constitution, barriers have been found which preclude certain types of state taxation of multistate operations. Satisfaction of the due process strictures requires that the taxing state have some threshold connection with the transaction upon which to base its jurisdiction to tax. This jurisdictional requirement is met when the state can show "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."⁶ As stated by one member of the present Court, this "nexus" between the state and the taxpayer is "the most fundamental precondition on state power to tax."⁶ The very essence of a multistate operation, however, is that a given transaction may be factually connected with a number of states, each of which could rationally claim sufficient "nexus" to tax. Since multiple "nexus" claims are no rarity, the real battleground is at the second of the constitutional barriers—that posed by the commerce clause.

On its face,⁷ the commerce clause prohibits all state interference with interstate commercial activity. As a practical matter, however, the decisions have not attempted to enforce the totality of immunity expressed in that language. State and local enactments which clearly affect such commerce have frequently been sustained in both

ly, although not frequently. See *General Motors Corp. v. Washington*, 377 U.S. 436, 442-46 (1964).

⁶ *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954).

⁶ Brennan, J., in *General Motors Corp. v. Washington*, 377 U.S. 436, 450 (1964) (dissenting opinion).

⁷ "The Congress shall have power . . . To regulate commerce . . . among the several states. . . ." U.S. CONST. art. I, § 8.

regulatory⁸ and tax⁹ spheres. In determining the validity of state action under the prohibitions of the commerce clause, the Court has stated a number of very general rules, none of which offer a reliable standard of constitutionality against which a litigant may measure his case. The Court, when faced with problems of state taxation, has long been torn between conflicting policy considerations: requiring interstate commerce to pay its fair share of the state tax burden¹⁰ and preserving a degree of free trade among the states to which a tariff barrier of state taxation is inimical.¹¹ These conflicting policies have spawned equally conflicting decisions. Stating the time-honored "direct burdens" test of validity, the Court has said that the states are not allowed "one single-tax-worth of direct interference with the free flow of commerce."¹² In other cases,¹³ statutes have been sustained on the grounds that the tax was predicated upon the "local activity" of the multistate operation, thereby affecting interstate commerce only "indirectly," and not to an unconstitutional degree. To the recurring, formalized question of what constitutes "local" activity, the Court has never supplied a uniformly applicable answer.¹⁴

During one period¹⁵ in the recent history of the Court, however, it appeared that the decisions had finally adopted a reasonable and workable approach. Under the guidance of Justices Stone and Rutledge, the Court seemed to abandon the "direct-indirect" test

⁸ *E.g.*, *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950); *Minnesota Rate Cases*, 230 U.S. 352 (1913); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

⁹ *E.g.*, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Wiloil Corp. v. Pennsylvania*, 294 U.S. 169 (1935).

¹⁰ See *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U.S. 252, 259 (1919).

¹¹ See *Freeman v. Hewit*, 329 U.S. 249, 254 (1946) (Frankfurter, J.); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

¹² *Freeman v. Hewit*, *supra* note 11, at 256; *quoted with approval in Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959).

¹³ *E.g.*, *Wiloil Corp. v. Pennsylvania*, 294 U.S. 169 (1935); *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U.S. 252 (1919); *Banker Bros. Co. v. Pennsylvania*, 222 U.S. 210 (1911).

¹⁴ See *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (dissenting opinion of Stone, J.). See generally Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051, 1069-74, 1082-86 (1960).

¹⁵ Roughly, the period was the eight years following the decision in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). The reverse trend was signaled in *Freeman v. Hewit*, 329 U.S. 249 (1946).

of tax validity in favor of an approach founded upon the actual operative impact of the tax in question. Under this theory, assuming sufficient "nexus" to confer jurisdiction, the states were permitted to tax interstate transactions so long as the tax did not subject the taxpayer to the risk of "multiple" tax burdens not borne by competing local activity.¹⁶ This approach represented a radical doctrinal departure from prior decisions. As succinctly put by a leading writer in the field,

the "direct-indirect" burdens test was predicated on the theory that a tax on interstate commerce always is invalid. The "multiple burdens" test, on the other hand, is based on the theory that a tax on interstate commerce is valid if the tax is of such a nature that the taxed facet of interstate commerce cannot be taxed elsewhere, and thus subject interstate commerce to the *risk* of a multiple tax burden not borne by local business.¹⁷

The new rationale offered many advantages over its predecessor. It attempted to assess the actual economic consequences of the tax to the taxpayer and to avoid the imposition of commercial disadvantage upon him. The old formalism was supplanted by substantive inquiry, providing greater flexibility and ease in application to

¹⁶ See, e.g., *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Western Live Stock v. Bureau of Revenue*, *supra* note 15 (alternative holding). See generally Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051, 1074-82 (1960); Hartman, *Sales Taxation in Interstate Commerce*, 9 VAND. L. REV. 138, 185-90 (1956); Hellerstein, *The Power of Congress to Restrict State Taxation of Interstate Commerce*, 12 J. TAXATION 302, 303 (1960). Implicit in the "multiple burdens" approach is the idea that even though a transaction was clearly taxable in several states, a tax in one of them was still valid if the tax were properly apportioned to taxpayer's business activity in the taxing state. See *International Harvester Co. v. Evatt*, 329 U.S. 416 (1947). Thus, for example, if taxpayer's in-state activity relative to a taxed transaction represented 35% of the total activity expended in the entire transaction, a tax rate based on 35% of gross receipts would be valid. The theory here is, of course, that fair apportionment removes the risk of tax duplication elsewhere, since each state will tax only that part of the whole attributable to local activity. It should be noted that the Washington statute employed as its basis 100% of gross receipts to General Motors from sales in Washington, and was, therefore, as the Court pointed out, "unapportioned." 377 U.S. at 448.

¹⁷ Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051, 1076 (1960). It is appropriate to note at this point that Professor Hartman's many excellent contributions to the literature in this area of tax law are invaluable. His lucid analyses of the complexities of state taxation problems have been an indispensable source of aid to this writer.

the cases.¹⁸ The upshot was that while interstate commerce was taxed, it paid only its fair share of the burden.

Just as this formula was gaining acceptance, the Court apparently abandoned it in favor of a return to its previous posture by reasserting its adherence to the "direct-indirect" test.¹⁹ Even this turnabout, however, did not dispose of the problem, for the Court has since vacillated, uttering sometimes the language of the old test,²⁰ sometimes the language of the new,²¹ and more often that of both.²²

Amidst a growing clamor for consistency, the present litigation came before the Court. Arguably, the tax could have been defeated by due process requirements, since "nexus" is indeed slight where a taxpayer's contacts with the taxing state are as limited as were those of General Motors with Washington.²³ But, even having safely skirted the due process barrier, it would still appear that the tax must succumb under the more lethal strictures of the commerce clause, regardless of which test of validity the Court elected to apply.²⁴ The transactions in question, comprised chiefly of sales contracts formed in Oregon with f.o.b. deliveries at the Missouri

¹⁸ See the opinion of Stone, J., in *Di Santo v. Pennsylvania*, 273 U.S. 34, 43 (1927) (dissenting), in which the Justice vented his ire upon the "direct-indirect" formula as being too mechanical and remote from actualities. *Id.* at 44. See generally Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051, 1081-82 (1960).

¹⁹ See *Freeman v. Hewitt*, 329 U.S. 249 (1946).

²⁰ *E.g.*, *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1951).

²¹ *E.g.*, *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948).

²² *E.g.*, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

²³ This was one of the grounds upon which Mr. Justice Goldberg, joined by Justices Stewart and White, dissented from the majority opinion. 377 U.S. at 456. His opinion expressed the view that the decision in *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1950) (which was one of the cases cited by the majority) "rested solidly on the fact that the taxpayer had a branch office and warehouse . . ." situated in the taxing state. 377 U.S. at 456. The three Justices found it "difficult . . . to distinguish between the in-state activities of the [district managers] . . . and the in-state activities of solicitors or traveling salesmen . . .," citing *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944), for the proposition that the activities of the latter group form an insufficient basis for a levy upon interstate sales. 377 U.S. at 456. The *Norton* decision, however, seems to place more emphasis upon "business activity" than upon the location of the formal office. See *Norton Co. v. Department of Revenue*, *supra* at 539.

²⁴ See Note, 38 WASH. L. REV. 277, 280-81 (1963), which was written during the pendency of this litigation before the Supreme Court. Analyzing the decision of the Washington Supreme Court in this case, it was predicted that the tax would be struck down under either approach.

factory, would seem to be clearly interstate in character; and just as clearly, the gross receipts tax seems to be a "direct burden" thereon. On the other hand, since the tax was unapportioned and at least two other states appeared to have a "nexus" claim, there was an apparent risk of tax multiplication which would be anathema to the commerce clause under the "multiple burdens" doctrine.

In its opinion, the Court has missed yet another chance to make a definitive pronouncement in this confused area. Instead, it again seems to have handed down a hybrid decision.²⁵ Starting "with the proposition that '[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden . . .,'" ²⁶ the Court found it "well established that taxation measured by gross receipts is constitutionally proper if it is fairly apportioned."²⁷ Having thus paid lip service to the "multiple burdens" concept, the Court proceeded to recognize that although a state cannot impose a tax on the privilege of engaging in interstate commerce,²⁸ "an in-state activity may be a sufficient local incident upon which a tax may be based."²⁹ This language is clearly that of the pre-"multiple burdens" era, and from the philosophical standpoint, it describes an entirely different concept of constitutionality under the commerce clause. Having thus referred to both tests, the Court does not clearly apply *either*. Addressing itself to the problem of whether the gross receipts from sales were fairly related to General Motors's business activities within the state,³⁰ the Court offered the following:

[The tax] is unapportioned and . . . is, therefore, suspect. We must determine whether it is so closely related to the local activities of the corporation as to form "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."³¹

As discussed above,³² this is the language of the "nexus" test, customarily used to determine whether, under the due process clause,

²⁵ See *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

²⁶ 377 U.S. at 439, *quoting with approval from* *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

²⁷ 377 U.S. at 440.

²⁸ *Id.* at 446.

²⁹ *Id.* at 447.

³⁰ *Id.* at 441.

³¹ *Id.* at 448.

³² See text accompanying notes 5-6 *supra*.

the state has bare jurisdiction to impose *any* tax. In addition to applying the test to resolve the jurisdictional question, it seems that the Court here used "nexus" between the tax and the activity sought to be taxed as a basis for sustaining, in the absence of apportionment, the *measure* of the tax. Thus, it has apparently solved the substantive commerce clause problem of nonapportionment by application of the once purely procedural test of due process.³³

Since the question of apportionment is not pertinent where application of the "direct burdens" formula is sought,³⁴ it may be that the Court attempted to decide the case by a "multiple burdens" approach. The opinion, however, casts doubt upon any such conclusion; for, in closing, the Court "refrained from passing on the question"³⁵ raised by General Motors to the effect that a decision sustaining the present tax would subject the corporation to multiple taxation. The reason given was that there had been no affirmative showing that the transactions had *actually* been subjected to tax elsewhere.³⁶ Although this decision is not the first to require a demonstration of *actual* tax multiplication,³⁷ it hardly comports with the ideas expressed by Mr. Justice Rutledge. To him, the mere *risk* of cumulative burdens was sufficient reason to condemn an unapportioned tax.³⁸ Thus, if the Court employed a "multiple burdens" test in this case, that test has become quite different from the original doctrine.

From the foregoing, it seems abundantly clear that, as between the "direct" and "multiple" burdens approaches, the Court has adopted or abandoned neither; nor has it really assigned to either

³³ This is the basis of the dissenting opinion of Brennan, J. 377 U.S. at 449-51.

³⁴ See note 16 *supra*.

³⁵ 377 U.S. at 449.

³⁶ *Ibid*.

³⁷ See *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 463 (1959), where such a requirement was imposed in a net income tax litigation. This requirement is not to be confused with the question of burdens of proof. State enactments have usually been accorded presumptive validity, and the general rule applied by the Court has been that the burden of rebuttal is on the protesting taxpayer. See *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537 (1951). *But see Freeman v. Hewitt*, 329 U.S. 249, 253 (1946); Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051, 1064-65 (1960).

³⁸ "To require factual determination of forbidden effects in each case would be to invite costly litigation, make decision turn in some cases, perhaps many, on doubtful facts or conclusions . . ." *Freeman v. Hewitt*, 329 U.S. 249, 279 (1946) (concurring opinion of Rutledge, J.).

an ascendant position. In short, the Court has yet to offer a dependable guide in this critical area, but has perhaps further confused the litter upon the commerce clause battleground. It is no doubt true, as suggested by many writers in the tax field,³⁰ that problems of this complexity are more amenable to legislative than to judicial solution. Hopefully, the solution will not be long in coming; for if one thing is certain in light of the ever-increasing economic needs of the states, it is that some consistent guide must be formulated for the convenience and protection of both states and taxpayers. It is submitted that the most equitable approach will be found within the philosophical framework of the "multiple burdens" doctrine in tandem with a realistic system of apportionment. As in other areas of life in this fast-paced world, the efforts expended in seeking absolute resolutions of problems will produce a greater net return if exerted instead in pursuit of equitable compromise.

HENRY STANCILL MANNING, JR.

Corporations—De Facto Corporations—Estoppel—Model Business Corporation Act

Although the submitted articles of incorporation were rejected, the defendant nevertheless began doing business as a corporation. Subsequently, defendant acquired plaintiff's business, giving the purported corporation's note therefor. Shortly thereafter, articles of incorporation were issued; but within six months, the corporation failed and was left without assets. Plaintiff, suing on the note given by the defendant on behalf of the purported corporation, sought to hold defendant personally liable on the basis that no corporation had existed at the time of the purchase. Defendant resisted liability on the grounds that plaintiff had dealt with either a de facto corporation or a corporation by estoppel. Defendant's contentions were rejected in *Robertson v. Levy*,¹ which construed statutory provisions² equivalent to sections 50³ and 139⁴ of the

³⁰ See, e.g., Braden, *Cutting the Gordian Knot of Interstate Taxation*, 18 OHIO ST. L.J. 57 (1957); Annot., 67 A.L.R.2d 1324 (1959). For a view from the other side of the bench, see the opinion of Mr. Justice Frankfurter in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 476-77 (1959) (dissenting opinion).

¹ 197 A.2d 443 (D.C. Ct. App. 1964).

² D.C. CODE ANN. § 29-921c, -950 (1961).

³ Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be

Model Business Corporation Act "to eliminate the concepts of estoppel and de facto corporations"⁵

In situations where defective incorporation precludes de jure existence of a corporation, courts have recognized de facto existence to bar personal liability⁶ where four requisites are met: (1) a valid law under which the corporation could have been formed, (2) a good faith attempt to comply with such law, (3) a "colorable" compliance with such law, and (4) actual user or exercise of corporate powers.⁷ The doctrine supposedly enables courts to analyze the particular facts of each case and thus balance conflicting policy considerations: to discourage unauthorized assumptions of corporateness, and to favor doing justice to the parties and to uphold security of transactions with corporations.⁸

Application of this elastic concept varies with courts⁹ and has been sharply criticized.¹⁰ In fact, the framers of the Model Business Corporation Act intended that section 50, providing that corporate existence begins only upon the issuance of a certificate of incorporation, abolish any significance of de facto corporateness.¹¹ *Robertson* conforms with this intention. The result aids in ending a confusing and unpredictable state of the law.

conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act, except as against this State in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

ABA-ALI MODEL BUS. CORP. ACT § 50 (1953).

⁴ "All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." ABA-ALI MODEL BUS. CORP. ACT § 139 (1953).

⁵ 197 A.2d at 447.

⁶ ROBINSON, NORTH CAROLINA CORPORATION LAW AND PROCEDURE § 11 (1964). Under the de facto doctrine it was held that although the validity of the corporate entity was subject to direct attack by the incorporating state, it was not subject to collateral attack by outside parties. *Ibid.*

⁷ See *Tulare Irrigation Dist. v. Shepherd*, 185 U.S. 1 (1902); *Midwest Air Filters Pac., Inc. v. Finn*, 201 Cal. 587, 258 Pac. 382 (1927); *Mabel First Lutheran Church v. Calwallader*, 172 Minn. 471, 215 N.W. 845 (1927); *Pearson Drainage Dist. v. Erhardt*, 239 Mo. App. 845, 201 S.W.2d 484 (1947); *Hansen v. Village of Ralston*, 147 Neb. 251, 22 N.W.2d 719 (1946); *Culkin v. Hillside Restaurant, Inc.*, 126 N.J. Eq. 97, 8 A.2d 173 (1939).

⁸ STEVENS, CORPORATIONS § 27 (1949).

⁹ See BALLENTINE, CORPORATIONS § 30 (1946).

¹⁰ *E.g.*, *id.* § 20 ("the conglomeration of judicial decisions present a discouraging and baffling maze"); STEVENS, *op. cit. supra* note 8, § 26 ("inaccurate and confusing").

¹¹ ABA-ALI MODEL BUS. CORP. ACT ANN. § 50, ¶ 4 (1960).

Robertson, however, not only denies the de facto doctrine, but also rejects the concept of corporation by estoppel.¹² Although some early cases viewed de facto corporateness as a prerequisite to corporation by estoppel,¹³ the majority now recognizes the two concepts as distinct and capable of independent application.¹⁴ While the de facto doctrine in many cases imparts to a defective corporation a general corporate status,¹⁵ the concept of corporation by estoppel applies only to some particular transaction where there have been dealings on a purportedly corporate basis.¹⁶ However, the term "corporation by estoppel" is somewhat misleading in that it implies the existence of a third type of corporation in addition to corporations de jure and corporations de facto. The term does not refer to an entity, but rather describes a result the courts reach by applying the equitable doctrine of estoppel to the dealings between the parties.

Assuming the desirability of eliminating the conceptualistic de facto doctrine, its benefits may yet be retained by using estoppel concepts to do justice in individual cases and preserve security of transactions.

Estoppel applies where there is a misrepresentation, reliance on the misrepresentation by a third party, and a change of position by the third party.¹⁷ Thus, if an association deals with third parties on a corporate basis despite its failure to file a certificate, it could be estopped from denying its corporate existence where the third party is suing it.¹⁸ Similarly, a third party could be estopped from

¹² Since N.C. GEN. STAT. § 55-8 (1960) is an enactment of section 50 of the Model Business Corporation Act, it seems likely that North Carolina would rule that de facto corporateness was abolished by the enactment of the statute. However, since North Carolina has not enacted section 139 of the Model Act, it seems very unlikely that it would go so far as to hold that corporation by estoppel was also abolished.

¹³ *E.g.*, *Bibb v. Hall*, 101 Ala. 79, 14 So. 98 (1893); *Midland Bank v. Harris*, 114 Ark. 344, 170 S.W. 67 (1914); *Talbert v. Grist*, 198 Mo. App. 492, 201 S.W. 906 (1918).

¹⁴ See LATTIN, CORPORATIONS ch. 4, § 6 (1959); 14 CALIF. L. REV. 486 (1926).

¹⁵ See LATTIN, *op. cit. supra* note 14, ch. 4, § 4.

¹⁶ 14 CALIF. L. REV. 486, 487 (1926).

¹⁷ *Id.* at 486.

¹⁸ See, *e.g.*, *Ehrlich & Co. v. Slater Co.*, 183 Cal. 709, 192 Pac. 526 (1920); *Russell Lumber & Supply Co. v. First Nat'l Bank*, 262 Ky. 388, 90 S.W.2d 372 (1936); *Dobson v. Maytag Sales Corp.*, 292 Mich. 107, 290 N.W. 346 (1940); *Empire Mfg. Co. v. Stuart*, 46 Mich. 482, 9 N.W. 527 (1881); *Perine v. Grand Lodge A.O.U.W.*, 48 Minn. 82, 50 N.W. 1022 (1892); *Jewell v. Grand Lodge A.O.U.W.*, 41 Mich. 405, 43 N.W. 88

denying the existence of the corporation where the corporation is suing the third party.¹⁹ But since the third party has not represented the association as a corporation, there is, strictly speaking, no estoppel.²⁰ However, courts normally say that the third party is "estopped"²¹ since he admitted or acquiesced in the "corporation's" pretension.²² The reasoning for such a holding is more persuasive in the case of a counterclaim by the third party.²³

Courts are split on the question of estoppel in situations where

(1889); Taylor v. Aldridge, 180 Miss. 635, 178 So. 331 (1938); Warren v. Stanton County, 145 Neb. 220, 15 N.W.2d 757 (1944) (dictum); Alco Finance Co. v. Moran, 178 Okla. 575, 63 P.2d 747 (1936); Cavaness v. General Corp., 272 S.W.2d 595 (Tex. Civ. App. 1954); Mauritz v. Schwind, 101 S.W.2d 1085 (Tex. Civ. App. 1937).

¹⁹ See, e.g., California Fruit Exch. v. Buck, 163 Cal. 223, 124 Pac. 824 (1912); California Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 75 Pac. 320 (1904); Grangers' Business Ass'n v. Clark, 67 Cal. 634, 8 Pac. 445 (1885); Flash Cleaners v. Columbia Appliance Corp., 319 P.2d 454 (Cal. App. 1957); Wynn v. Treasure Co., 303 P.2d 1067 (Cal. App. 1956); City of Jefferson v. Holder, 195 Ga. 346, 24 S.E.2d 187 (1943); West v. Flynn Realty Co., 53 Ga. App. 594, 186 S.E. 753 (1936); Lowell-Woodard Hardware Co. v. Woods, 104 Kan. 729, 180 Pac. 734 (1919); McGuire v. Bastain Blessing Co., 275 Ky. 622, 122 S.W.2d 513 (1938); Richards v. Minnesota Sav. Bank, 75 Minn. 196, 77 N.W. 822 (1899); Continental Ins. Co. v. Richardson, 69 Minn. 433, 72 N.W. 458 (1897); Columbia Elec. Co. v. Dixon, 46 Minn. 463, 49 N.W. 244 (1891); Minnesota Gas Light Economizer Co. v. Denslow, 46 Minn. 171, 48 N.W. 771 (1891); Springfield Tobacco Redryers Corp. v. City of Springfield, 293 S.W.2d 189 (Tenn. 1956); Ingle System Co. v. Norris & Hall, 132 Tenn. 472, 178 S.W. 1113 (1915); Dickenson v. Boyd, 167 Va. 90, 187 S.E. 479 (1936).

²⁰ In Mauritz v. Schwind, 101 S.W.2d 1085 (Tex. Civ. App. 1937), the court said:

Estoppel by contract is not, strictly speaking, an estoppel *in pais*, because it lacks several of the essential elements of an estoppel *in pais* but is regarded merely a form of quasi estoppel based on the idea that a party to a contract will not be permitted to take a position inconsistent with its provisions, to the prejudice of another.

Id. at 1092.

²¹ See cases cited note 19 *supra*.

²² "We agree that no full, formal, technical estoppel to deny corporate existence arises from such a state of facts, but we think it accords with modern views of good practice and tends to promote substantial justice. . . ." Lowell-Woodard Hardware Co. v. Woods, 104 Kan. 729, 730, 180 Pac. 734 (1919). "[Y]et as between private litigants they may, by their agreements, admissions, or conduct, place themselves where they would not be permitted to deny the facts of the existence of the corporation." Ingle System Co. v. Norris & Hall, 132 Tenn. 472, 474, 178 S.W. 1113, 1114 (1915).

²³ Mechanics' Lumber Co. v. Yates Am. Mach. Co., 181 Ark. 415, 26 S.W.2d 80 (1930); Wynn v. Treasure Co., 303 P.2d 1067 (Cal. App. 1956); Rialto Co. v. Miner, 183 Mo. App. 119, 166 S.W. 629 (1914); Bell v. Commercial Inv. Trust Co., 118 Okla. 230, 246 Pac. 1102 (1926); Brandtjen & Kluge, Inc. v. Biggs, 205 Ore. 473, 288 P.2d 1025 (1955). See generally Annot., 51 A.L.R.2d 1449 (1957).

a third party, having dealt with a defective corporation on the basis that it is a corporation, attempts to hold the members personally liable.²⁴ It seems the best result is to estop the third party from denying the existence of the corporation,²⁵ except where the members knowingly misrepresented the status of the association.²⁶ To hold otherwise allows the third party a right against the members that he did not bargain for and imposes liability on the members that they did not agree to assume.²⁷ With the flexibility of the estoppel doctrine, applied sparingly where justice demands it, the intention of the parties is carried out and security of transactions is maintained.

On this analysis, the *Robertson* case erred when it abolished both the estoppel and the de facto concepts. The other eight jurisdictions²⁸ that have enacted these two sections of the Model Act have not construed them as abolishing the concept of estoppel. The injustice that would result from abolishing corporation by estoppel as well as de facto corporations seems great. For instance, where a purported corporation has contracted with a third party or otherwise incurred liability before obtaining its certificate, it clearly should not be allowed to escape liability by denying its existence. Another example is illustrated by *Cranson v. International Business*

²⁴ See Frey, *Legal Analysis and the "De Facto" Doctrine*, 100 U. PA. L. REV. 1153, 1178 (1952).

²⁵ See *Whitney v. Wyman*, 101 U.S. 392 (1879); *Magnolia Shingle Co. v. J. Zimmer's Co.*, 3 Ala. App. 578, 58 So. 90 (1912); *Wesco Supply Co. v. Smith*, 134 Ark. 23, 203 S.W. 6 (1918); *Tarbell v. Page*, 24 Ill. 46 (1860); *Heald v. Owen*, 79 Iowa 23, 44 N.W. 210 (1890); *John Lucas & Co. v. Bernhardt's Estate*, 156 La. 207, 100 So. 399 (1924); *Tulane Improvement Co. v. S. A. Chapman & Co.*, 129 La. 562, 56 So. 509 (1911); *Berlin Bank v. Nelson*, 231 Mich. 463, 204 N.W. 92 (1925); *Tisch Auto Supply Co. v. Nelson*, 222 Mich. 196, 192 N.W. 600 (1923); *Lockwood v. Wynkoop*, 178 Mich. 388, 144 N.W. 846 (1914); *A. W. Mendenhall Co. v. Booher*, 226 Mo. App. 945, 48 S.W.2d 120 (1932); *Mason v. Stephens*, 16 S.D. 320, 92 N.W. 424 (1902). For cases contra to this view, see Frey, *supra* note 24, at 1159 n.21.

²⁶ *Hiele v. Torrance Millworks, Inc.*, 272 P.2d 780 (Cal. App. 1954); *Ryan v. Katz*, 126 Conn. 555, 12 A.2d 835 (1940); *Parker Peanut Co. v. Felder*, 200 S.C. 203, 20 S.E.2d 716 (1942).

²⁷ *Carpenter, De Facto Corporations*, 25 HARV. L. REV. 623, 633-35 (1912); *Carpenter, Are the Members of a Defectively Organized Corporation Liable as Partners?*, 8 MINN. L. REV. 409, 421 (1924).

²⁸ ALASKA STAT. ANN. §§ 10.05.261, .810 (1962); COLO. REV. STAT. §§ 31-28-4, -29-4 (Perm. Supp. 1960); ILL. ANN. STAT. ch. 32, §§ 157.49, .150 (1954); IOWA CODE ANN. §§ 496A. 51, 141 (1962); N.D. REV. CODE §§ 10-19-23, -55 (1960); ORE. REV. STAT. §§ 57.321, .793 (1963); UTAH CODE ANN. §§ 16-10-51, -139 (1962); WYO. STAT. §§ 17-36.48, .122 (Supp. 1963).

Machs., Inc.,²⁹ where the defendant had served as an officer and director of what he innocently thought to be a validly organized corporation. Because of an oversight of the attorney, the certificate of incorporation had not been filed at the time the corporation dealt with the plaintiff. When the corporation subsequently failed, the plaintiff sued the defendant individually, contending that the failure to file the certificate precluded *all* corporate existence. Although the court did not decide whether failure to file precluded de facto corporateness, it did expressly hold that estoppel was not precluded by such failure and that the plaintiff was estopped to deny the existence of the corporation and sue the defendant personally.³⁰ With respect to the estoppel question, such a holding seems much sounder than that of *Robertson*.

The *Robertson* holding that a de jure corporation arises only on issuance of the certificate of incorporation leaves uncertain the protection to third parties where the certificate is issued but the corporation does not complete its organization. This problem is most acute where no capital has been paid in. The third party cannot sue the associates personally since de jure corporateness began when the certificate was issued. But, if the corporation is without assets, a suit against it would avail nothing. Statutory solutions to this problem vary. In all but seventeen states a minimum capital must be paid in before a corporation starts its business.³¹ Many of these states, including North Carolina,³² make directors jointly and severally liable to the corporation if it prematurely commences business.³³ Other states expressly provide that the directors are liable to third parties for the debts of the corporation where business is commenced before the required capital is paid into the corporation.³⁴ The most apparent shortcoming of these statutes is that the directors are liable only to the extent of the capital that was required, either by statute or by the articles of

²⁹ 200 A.2d 33 (Md. 1964).

³⁰ *Id.* at 39.

³¹ See ABA-ALI MODEL BUS. CORP. ACT ANN. § 51, ¶¶ 2.02, 2.03 (1960, Supp. 1964).

³² N.C. GEN. STAT. § 55-32(g) (1960).

³³ See ABA-ALI MODEL BUS. CORP. ACT ANN. § 43, ¶ 2.02, at 15 (1960). States which have enacted this section are Alaska, Illinois, North Carolina, North Dakota, Ohio, Oregon, Texas, Wisconsin, and the District of Columbia.

³⁴ *Id.* at 16. States which have enacted this section are Idaho, Kansas, Louisiana, Washington, and Vermont.

incorporation, to be paid in before the corporation was to commence business.³⁵ Nevertheless, statutes of this type offer some protection to third parties who have dealt with such corporations. In addition to this protection, an awareness of this problem by persons who deal with corporations and inquiry by them as to the financial condition of such corporations should do much to protect third parties in this situation.

WILLIAM L. STOCKS

Corporations—Restricted Stock Transfers—First Options Consequent Upon the Death of Shareholder

In the recent case of *Globe Slicing Mach. Co. v. Hasner*,¹ the Court of Appeals for the Second Circuit held that a bylaw² prohibiting the sale or disposition of the capital stock by a shareholder without first offering the same to the corporation or remaining shareholders was inapplicable to a transfer consequent upon the death of a shareholder and effected pursuant to the shareholder's will. The court, interpreting the bylaw provisions under the New York policy of construing first option restraints narrowly, stated: "First option provisions in order effectively to restrain dispositions by will must specifically so provide. This was not done here."³

The question now arises whether or not a narrow construction of such bylaw restrictions is justifiable in view of the reasons for their existence.⁴ The usual purpose of such restrictions is to main-

³⁵ See note 34 *supra*. But see S.C. CODE § 12-14.6(b) (Supp. 1964), which provides:

If a corporation has transacted any business in violation of this section, any person (whether a promoter, incorporator, shareholder, subscriber, or director) who has participated therein, shall be jointly and severally liable for the debts or liabilities of the corporation arising therefrom.

¹ 333 F.2d 413 (2d Cir. 1964).

² No sale or disposition of any shares of the capital stock of this corporation by any stockholder shall be valid unless and until he shall give notice in writing of such intention to the corporation, and to all the present stockholders of the company . . . whereupon the company and all of said stockholders shall jointly and/or severally have the option and right to purchase the same within thirty days after receiving such notice

Id. at 414.

³ *Id.* at 415.

⁴ In the management of corporations few things are more apparent than the desire to keep the control in the same hands of people

tain harmonious control within the corporation. This question becomes especially acute in the case of a close corporation,⁵ where the members or shareholders are working as an incorporated partnership.⁶ The prime objective of the close corporation is to remain close by being able to choose new "partners" in the event of retirement or death of a present shareholder.⁷

In general, the validity of reasonable restrictions⁸ upon the transfer of stock of a corporation where they are imposed by the

who are congenial to the enterprise and to those who manage its affairs. A quarreling directorate is a misfortune to the stockholders of any corporation. When such situations occur, as they often do, there is no objection to the purchase by the corporation of the shares of the disgruntled stockholders and the resale to those more in harmony with the enterprise. In the organization of corporations it is frequently provided in the articles or bylaws that a stockholder shall not sell his stock without first giving a stated period with which the corporation or other stockholders may have an opportunity to purchase. I find nothing in all this against public policy. On the contrary, it has to do solely with common sense and practical business.

Moses v. Soule, 63 Misc. 203, 209, 118 N.Y. Supp. 410, 414 (Sup. Ct.), *aff'd*, 136 App. Div. 904, 120 N.Y. Supp. 1136 (1909).

⁵A close corporation is an enterprise in corporate form in which the management and ownership are substantially identical and the identity results almost in a partnership. See Israel, *The Close Corporation and the Law*, 33 CORNELL L.Q. 488 (1948).

⁶*Ibid.*

⁷Mr. Chief Justice Holmes stated that "Stock in a corporation is not merely property. It also creates a personal relation analogous otherwise than technically to a partnership. . . . [T]here seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm." Barrett v. King, 181 Mass. 476, 479, 63 N.E. 934, 935 (1902).

⁸In Brown v. Little, Brown & Co., 269 Mass. 102, 168 N.E. 521 (1929), the court stated, as to the validity of stock restrictions, "Restrictions on the sale of shares of stock in a corporation are valid and binding. . . . No restrictions can be declared void, unless palpably unreasonable." *Id.* at 110, 168 N.E. at 525. And the court in First Nat'l Bank v. Shanks, 34 Ohio Op. 359, 73 N.E.2d 93 (C.P. 1945), observed "that in practically all of the cases where restrictions have been invalid, the courts have based their judgments on the fact that the restriction was a permanent prohibition." *Id.* at 360, 73 N.E.2d at 95. Examples of the types of restrictions which have been upheld are: (1) consent restraints, requiring the approval of transfers by shareholders or directors or both, (2) first option provisions granting the corporation or other shareholders a pre-emptive right to shares the holder decides to sell or transfer, (3) buy and sell arrangements for the transfer of a deceased holder's shares to the corporation or to other shareholders at a stipulated price or valuation determined by formula, and (4) provisions limiting the transfer to a specific class of persons. See 2 O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE §§ 7.05-14 (1958).

charter or articles of incorporation,⁹ or by the bylaws,¹⁰ has been upheld: provided, however, the certificate itself complies with section 15 of the Uniform Stock Transfer Act.¹¹ But first option sale or transfer restraints have been held not to apply to a sale between shareholders,¹² to a sale by a receiver pursuant to a court order,¹³ nor to a sheriff's sale on execution against a shareholder.¹⁴ Although it would appear that these provisions have been interpreted rather restrictively, the corporation would in all probability remain status quo ante with regard to control and management of its affairs on a sale to a shareholder, if the shareholder acted in good faith and in the interest of the corporation.¹⁵ This would also be true on a sale by a sheriff or receiver, since the corporation could repurchase the stock by becoming the highest bidder at the sheriff's or receiver's sale.¹⁶ But the corporation is not always able to repurchase the shares where the shareholder dies and bequeaths his stock to a legatee who would, in all likelihood, have no interest in the affairs of the corporation; that is, where the legatee would be an "outsider" to the corporation.

Where the restrictive provisions expressly provided that on the death of a shareholder his stock would automatically become the

⁹ *Bloomington v. Bloomington*, 107 Misc. 646, 177 N.Y. Supp. 873 (Sup. Ct. 1919).

¹⁰ *Doss v. Yingling*, 95 Ind. App. 494, 172 N.E. 801 (1930).

¹¹ UNIFORM STOCK TRANSFER ACT § 15 provides:

There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaws of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate.

Section 15 is in force in nearly all states. See, *e.g.*, N.C. GEN. STAT. § 55-89 (1960).

¹² *Gibbon v. 3920 Lake Shore Drive Bldg. Corp.*, 310 Ill. App. 385, 34 N.E.2d 109 (1941); *Rychwalski v. Baranowski*, 205 Wis. 193, 236 N.W. 131 (1931). *Contra*, *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 149 N.W. 754 (1914).

¹³ *In re Trilling & Montague*, 140 F. Supp. 260 (E.D. Pa. 1956); *McDonald v. Farley & Loetscher Mfg. Co.*, 226 Iowa 53, 283 N.W. 261 (1939).

¹⁴ *Barrows v. National Rubber Co.*, 12 R.I. 173 (1878).

¹⁵ A stockholder may purchase the shares in order to become the majority stockholder with the sole intention of "freezing out" the minority stockholders. Such action by the stockholder would, in all likelihood, be unbeneficial to the corporation. For a discussion of majority transactions which "freeze out" the minority, see 35 N.C.L. REV. 271 (1957).

¹⁶ *In re Trilling & Montague*, 140 F. Supp. 260 (E.D. Pa. 1956); *Barrows v. National Rubber Co.*, 12 R.I. 173 (1878).

property of the corporation,¹⁷ or that the corporation or remaining shareholders would have the right to purchase the shares,¹⁸ the courts have consistently held such restrictions valid and binding upon the executor of the deceased shareholder.¹⁹ These provisions have been held valid both on the ground that they were reasonable, in view of the particular corporation,²⁰ and on the ground that they were not testamentary in character and thus not void for failure to comply with the formal requirements of statutes governing wills.²¹

On the other hand, when the provisions did not specifically provide for the death of a shareholder, as in *Globe Slicing Mach. Co.*, the courts generally have held that the provisions are inapplicable to a transfer consequent upon the death of the shareholder.²² This

¹⁷ In *Krauss v. Kuechler*, 300 Mass. 346, 15 N.E.2d 207 (1938), the bylaw provided that the stock "shall automatically become the property of the corporation by paying to the estate of the deceased a sum agreed upon by the remaining stockholders." *Id.* at 347, 15 N.E.2d at 208.

¹⁸ *Schaffer v. Below*, 174 F. Supp. 505 (D. V.I. 1959); *Oakland Scavenger Co. v. Gandi*, 51 Cal. App. 2d 69, 124 P.2d 143 (1942); *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957); *First Nat'l Bank v. Coldwell*, 286 App. Div. 1079, 145 N.Y.S.2d 674 (1955) (agreement between shareholder and corporation); *In re Mather's Estate*, 410 Pa. 361, 189 A.2d 586 (1963); *Covey v. Covey's Little Am., Inc.* 378 P.2d 506 (Wyo. 1963).

¹⁹ The executor must first offer the shares to the remaining shareholders or to the corporation, or otherwise, pursuant to the terms of the provision, before he may distribute to the designated legatees. This raises a collateral problem; that is, how does the corporation afford the price of transfer? In most states the corporation may only repurchase its shares out of surplus. See, e.g., N.C. GEN. STAT. § 55-52(c) (Supp. 1963). This generally means that the corporation must establish a sinking fund if their surplus is small. The method recognized as being most advantageous to the corporation is the taking out of business insurance on the shareholder's life. Cf. *Bohnsack v. Detroit Trust Co.*, 292 Mich. 167, 290 N.W. 367 (1940). In North Carolina, insurance taken out by a corporation is regulated by statute and provides that it may only be taken out on the life of an officer or employee of the corporation. N.C. GEN. STAT. § 55-17(b)(4) (1960); see note 42 *infra*. But since shareholders in a close corporation are usually either officers or employees, insurance is still a workable method for paying the transfer price of the shares. See generally 2 O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE §§ 7.25-28 (1958).

²⁰ *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957).

²¹ *Thompson v. J. D. Thompson Carnation Co.*, 279 Ill. 54, 116 N.E. 648 (1917) (shareholders' agreement); *Chase Nat'l Bank v. Manufacturers Trust Co.*, 265 App. Div. 406, 39 N.Y.S.2d 370 (1943) (agreement between two shareholders).

²² *Stern v. Stern*, 146 F.2d 870 (D.C. Cir. 1945); *Elson v. Security State Bank*, 246 Iowa 601, 67 N.W.2d 525 (1954); *Taylor's Adm'r v. Taylor*, 301 S.W.2d 579 (Ky. 1957); *Kentucky Package Store, Inc. v. Checani*, 331 Mass. 125, 117 N.E.2d 139 (1954); *Lane v. Albertson*, 78 App.

conclusion is most often reached by way of either a strict construction²³ or by holding that the provisions were inapplicable at the time of the shareholder's death, since transmission or devolution of the shares was inevitable.²⁴ In either case, the resolution is congruent and indifferentiable, since the holdings mean that the restrictions only allude to a voluntary sale or transfer and not to one caused by operation of law.²⁵ Extrapolation by the courts has not been evident,²⁶ and their failure to examine the intent of the provisions and the reasons for their existence have led to cursory interpretations. This in turn has opened the door for the entrance of many legatees into the corporate affairs, sometimes causing disharmony²⁷ or liquidation. The provisions were designed and inserted to prevent precisely these contingencies.

The plain objectives of the bylaw provisions require an interpretation that imposes the restrictions on the stock in the hands of the executor notwithstanding the failure to use express, all inclusive, and limiting language.²⁸ Similar provisions, which did not provide for the obvious eventuality of death, have been interpreted as being applicable to the shares at the death of the shareholder and binding upon the executor.²⁹ The court in *Boston Safe Deposit & Trust Co. v. North Attleborough Chapter of Am. Red Cross*,³⁰ in very persuasive language, said:

Div. 607, 79 N.Y. Supp. 947 (1903). Cf. *Vogel v. Melish*, 46 Ill. App. 2d 465, 196 N.E.2d 402 (1964); *Storer v. Ripley*, 12 Misc. 2d 622, 178 N.Y.S.2d 7 (Sup. Ct. 1958).

²³ In *Taylor's Adm'r v. Taylor*, 301 S.W.2d 579 (Ky. 1957), the court stated, "The terms of the bylaw . . . seem to be limited to a voluntary sale, although 'transfer' and 'sale' are stated as alternatives. The use of the word 'transfer' looks to a sale and has no natural application to any other disposition." *Id.* at 583. Compare BALLINTINE, CORPORATIONS § 321 (rev. ed. 1946); UNIFORM STOCK TRANSFER ACT §§ 1, 22.

²⁴ *Stern v. Stern*, 146 F.2d 870 (D.C. Cir. 1945); *Elson v. Security State Bank*, 246 Iowa 601, 67 N.W.2d 525 (1954).

²⁵ See notes 23 & 24 *supra*.

²⁶ See note 22 *supra*.

²⁷ One source of disharmony would be the legatee's failure to consent to an election made by the corporation pursuant to subchapter S of the Internal Revenue Code of 1954 dealing with election of certain small business corporations to their taxable status. See INT. REV. CODE OF 1954 § 1372.

²⁸ *Mathews v. United States*, 226 F. Supp. 1003 (E.D. N.Y. 1964). This case exemplifies the interrelated problem of evaluation of the shares for the purpose of gift and estate taxation.

²⁹ *Boston Safe Deposit & Trust Co. v. North Attleborough Chapter of Am. Red Cross*, 330 Mass. 114, 111 N.E.2d 447 (1953); *Garrett v. Philadelphia Lawn Mower Co.*, 39 Pa. Super. 78 (1909).

³⁰ *Boston Safe Deposit & Trust Co. v. North Attleborough Chapter of Am. Red Cross*, 330 Mass. 114, 111 N.E.2d 447 (1953).

The executors are the present holders and can make the required transfers. Their title to the stock, although it was specifically bequeathed, vested in them upon their appointment. . . . It passed to them by operation of the law notwithstanding the restrictions. . . . Although they hold the stock in the right of another rather than in their own right . . . their power to transfer is not thereby enlarged. . . . They have no greater rights in the stock than did the testatrix and they hold the shares subject to the same restrictions on the transfer which were in effect at the time of her death. . . . [T]he executors are . . . bound by the conditions under which the stock was issued and by the contract of their testatrix.³¹

The court in this case proceeded on the theory that the provisions represented a valid contract³² between the testatrix and the corporation. Many courts³³ have proceeded on the basis that a bylaw is a contract between the shareholder and the corporation and have gone so far as to hold that an invalid bylaw can still be a valid contract as between the shareholder and the corporation.³⁴ On contract and plain objective theory, one court³⁵ has taken issue with

³¹ *Id.* at 117, 111 N.E.2d at 449.

³² The English courts rely almost exclusively on the theory of contract, and, hence, more extensive corporate restrictions on the transfer of stock is allowed. For example, in *In re Smith & Fawcett Ltd.*, [1942] 1 Ch. 304, Lord Greene, M.R., in upholding a provision which in part provided, "the directors may at any time in their absolute and uncontrolled discretion refuse to register any transfer of shares," stated:

Private Companies are in law separate entities just as much as are public companies, but from the business and personal point of view they are much more analogous to partnerships than to public corporations. Accordingly, it is to be expected that in the articles of such a company the control of the directors over the membership may be very strict indeed.

Id. at 306. A private company is a company which: by its articles restricts the right to transfer its shares; limits the number of members to fifty, not including employees and former employees, and where two or more hold one or more shares jointly, they are a single member; prohibits any invitation to the public to subscribe for any shares or debentures of the company. Companies Act of 1948, 11 & 12 Geo. 6, c. 38, §§ 28, 455(1). See generally 6 HALSBURY'S LAWS OF ENGLAND § 526 (3d ed. 1954).

³³ *E.g.*, *Palmer v. Chamberlin*, 191 F.2d 532 (5th Cir. 1951); *Casady v. Modern Metal Spinning & Mfg. Co.*, 188 Cal. App. 2d 728, 10 Cal. Rep. 790 (1964); *Evans v. Dennis*, 203 Ga. 232, 46 S.E.2d 122 (1948); *Bechtold v. Coleman Realty Co.*, 367 Pa. 208, 79 A.2d 661 (1951) (where the contract theory received its ultimate exposition); *Garrett v. Philadelphia Lawn Mower Co.*, 39 Pa. Super. 78 (1909).

³⁴ *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N.E. 432 (1894); *Blue Mountain Forest Ass'n v. Borrowe*, 71 N.H. 69, 51 Atl. 670 (1901).

³⁵ *Mathew v. United States*, 226 F. Supp. 1003 (E.D. N.Y. 1964).

the "canon of interpretation that requires expansive clarity of expression"³⁶ in the bylaws to achieve the desired ends and stated:

[T]he presence or absence in the contract of the words like "executors and assigns" or of expressions to the effect that the contract is to bind the executors and estate of each party, do not operate, *ex proprio vigore*, to make the contract "binding" on the executors after the contracting party's death (for it binds them without those words)³⁷

Thus, the court in disregarding the narrow interpretation has given effect and vitality to the desired ends and plain objectives of the bylaw provisions.

In North Carolina, no cases have arisen that finally determine this issue. In fact, only one case has reached the supreme court concerning restrictions on the transfer of stock.³⁸ In that case, the court adopted a liberal position as to "consent"³⁹ restrictions and held such a restriction valid and not contrary to public policy. The legislature, in the 1955 North Carolina Business Corporation Act,⁴⁰ has provided that a corporation may, if it so desires, place certain restrictions upon the transfer of its stock.⁴¹ The act also provides

³⁶ *Id.* at 1007.

³⁷ *Id.* at 1006.

³⁸ *Wright v. Iredell Tel. Co.*, 182 N.C. 308, 108 S.E. 744 (1921).

³⁹ A "consent" restriction is generally one in which the directors, officers or shareholders of the corporation must consent to a proposed sale or transfer by a shareholder of his stock. This type of restriction is the most advantageous to the corporation, since it does not have to expend any of its surplus or take out business insurance on the shareholders as in a first option or buy and sell arrangement. The consent restriction is also the most disfavored by the courts because it is usually highly arbitrary in its effectuation. See *Finch v. Macoupon Tel. & Tel. Co.*, 146 Ill. App. 158 (1908); *Miller v. Farmers Mill & Elevator Co.*, 78 Neb. 441, 110 N.W. 995 (1907), where it was held to be an unreasonable restraint. See generally O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV. L. REV. 773 (1952).

⁴⁰ N.C. GEN. STAT. §§ 55-1 to -175 (1960).

⁴¹ N.C. GEN. STAT. § 55-16(c) (1960), provides:

The bylaws may contain any provisions for the regulation and management of the affairs of the corporation, including the transfer of its shares, and restrictions on such transfer, not inconsistent with the law or the charter.

N.C. GEN. STAT. § 55-52(c) (Supp. 1963), provides:

Subject to the provisions of subsections (e) and (f) of this section, a corporation may, by the action of its board of directors, purchase and pay for its shares, but only out of surplus and only in the following cases:

(4) From any shareholder in the exercise of the corporation's right to purchase the shares pursuant to restrictions upon the transfer thereof.

a very healthy climate for the close corporation.⁴² The climate includes provisions for business insurance on an employee's life,⁴³ which is the general method by which the corporation is enabled to finance repurchase of the deceased shareholder's stock.⁴⁴ In view of its liberal position on the "consent" restriction and the favoritism shown the close corporation by the legislature, it would seem anomalous for the court to interpret narrowly a bylaw provision restricting the "sale or transfer" of shares of stock merely because there was no provision for the obvious eventuality of death.

It is submitted that the court in *Globe Slicing Mach. Co.* was unjustified in its narrow construction of the bylaw provision.⁴⁵ In view of the reasons for their existence, the broad language seemed quite sufficient to bind the executor and to prohibit from entering the corporate affairs those legatees who could bring disharmony to

Subsections (e) and (f) provide generally that the corporation cannot purchase or redeem its shares if the corporation is unable to meet its obligations as they become due in the ordinary course of business, liabilities would exceed the assets, there is an unpaid accrued dividend on shares entitled to preferential dividends ahead of shares to be purchased, etc. N.C. GEN. STAT. § 55-52(e), (f) (1960).

⁴² N.C. GEN. STAT. § 55-73(b) (1960), provides:

Except in cases where the shares of the corporation are at the time or subsequently become generally traded in the markets maintained by securities dealers or brokers, no written agreement to which all of the shareholders have actually assented, whether embodied in the charter or bylaws or in any side agreement in writing and signed by all the parties thereto, and which relates to any phase of the affairs of the corporation, whether to the management of its business or division of its profits or otherwise, shall be invalid as between the parties thereto, on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners.

For a discussion of this section and the close corporation, see Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, 34 N.C.L. REV. 432, 438 (1956).

⁴³ N.C. GEN. STAT. § 55-17(b) (4) (1960), provides:

In connection with carrying out the purposes stated in its charter . . . every corporation shall also have power: . . .

(4) To procure for its benefit insurance on the life of any employee, including any officer, whose death might cause financial loss to the corporation, and to this end the corporation is deemed to have an insurable interest in its employees and officers.

⁴⁴ See text accompanying note 19 *supra*.

⁴⁵ In this diversity case, the court was compelled to follow the New York law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In so doing, they relied primarily on *Lane v. Albertson*, 78 App. Div. 607, 79 N.Y. Supp. 947 (1903), which was similar in many respects to the present case. But query whether that case established, as a matter of law, the policy of narrow construction of bylaw provisions in New York.

the close corporation and frustrate its continuance. While it is difficult to understand the objectives achieved by the decision, it is in accord with the weight of authority.⁴⁶ It further demonstrates the necessity of providing for every possible contingency which might adversely affect the affairs of the corporation in a sale or transfer of its shares of stock.⁴⁷

THOMAS C. WETTACH

**Labor Law—Secondary Consumer Boycotts, Picketing, and
Publicity—The Landrum-Griffin Amendment to the Labor
Management Relations Act**

In two recent cases, the United States Supreme Court has examined statutory restrictions on secondary boycott activity and, for the first time, the extension of these restrictions in the labor reform legislation of 1959. The Court held in *NLRB v. Fruit & Vegetable Packers*¹ that Congress did not intend that the 1959 Landrum-Griffin amendments² to section 8(b)(4) of the Labor Management

⁴⁶ See note 22 *supra*.

⁴⁷ The need for providing for every contingency is shown in *Albert E. Touchet, Inc. v. Thompson*, 259 Mass. 220, 156 N.E. 41 (1927), where the court held that even though the bylaw of the corporation was binding on the shareholder, his executor, administrator, or assignee to offer the stock for appraisal with rights to purchase it in the corporation, it was not binding on the deceased shareholder's special administrator, since the special administrator had not been provided for in the bylaw. *But see* *Guaranty Laundry Co. v. Pulliam*, 198 Okla. 667, 181 P.2d 1007 (1947), where the court in effect held that restrictions are usually construed to permit the widest range under the language used.

¹ 377 U.S. 58 (1964).

² (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has

Relations Act (Taft-Hartley Act)³ be applied to prohibit secondary consumer picketing when the public is asked "only to boycott the primary employer's goods."⁴ In a companion decision, *NLRB v. Servette, Inc.*,⁵ handed down the same day, the Court held that though Congress had expanded the class protected from inducement by subsection (i) of the amended act from "employees" to "any individual employed by any person," inducement of such individuals was lawful when it was designed to induce "a policy decision"⁶ or was "an appeal for the exercise of managerial discretion."⁷

In *Fruit Packers*, the striking union picketed certain supermarkets that were selling at retail apples packed by the struck employers. Placards worn by the pickets and handbills distributed by them asked customers of the supermarkets not to buy the apples. The customers were not asked to cease dealing with the markets, nor were employees of the supermarkets asked to cease work, to

been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of labor organizations, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704(a), 73 Stat. 542, 29 U.S.C. § 158(b)(4) (Supp. IV, 1963).

³ 61 Stat. 140 (1947). The 1959 amendments to the Taft-Hartley Act (a) changed the phrase "employees of any employer" to "any individual employed by any person engaged in commerce or any industry affecting commerce," (b) eliminated the qualification of a refusal as "concerted," (c) added subsection (ii) prohibiting the threatening, coercing, or restraining of a person engaged in commerce, etc. (d) rewrote the clauses to some extent, shifting certain objects from clause (A) to clause (B), (e) added the proviso to clause (B), and (f) added the second proviso protecting publicity other than picketing.

⁴ 377 U.S. at 63.

⁵ 377 U.S. 46 (1964).

⁶ *Id.* at 49.

⁷ *Id.* at 50 n.4.

refuse to handle the apples, or to honor the picket lines in any way.⁸ Care was taken by the union to make these distinctions as clear as possible to all parties.⁹ In *Servette*, representatives of the striking union asked supermarket managers to cease dealing in products supplied by the struck distributor and warned that handbills would be passed out in front of those markets which continued to deal with the distributor. In some cases handbills were actually passed out, asking customers not to buy the *Servette*-distributed products.

The National Labor Relations Board, following its ruling in *Upholsterers Frame & Bedding Workers (Minneapolis House Furnishing)*,¹⁰ held that the union's actions in *Fruit Packers* were a per se violation of section 8(b)(4)(ii)(B) in that they threatened, coerced, or restrained a person (i.e., a supermarket, a corporate person) engaged in commerce.¹¹ The Board found that the picketing was not aimed at and did not induce the supermarket employees (individuals employed by a person engaged in commerce) and thus did not violate section 8(b)(4)(i)(B), but ruled that, by its very nature, consumer product picketing could not help but threaten, coerce, or restrain the supermarkets.¹² Since the second proviso to section 8(b)(4) expressly excepted picketing from the protection it afforded other truthful publicity, and because *Minneapolis House Furnishing* had already rejected any implied protection it might afford to picketing aimed exclusively at the consumer public, the Board did not find it necessary to discuss the proviso again in this case. The Circuit Court of Appeals for the District of Columbia rejected the Board's holding that picketing was a per se violation of subsection (ii), observing that section 8(b)(7) demonstrated that Congress had been more specific when its purpose was to ban all

⁸ "[P]ickets were . . . instructed 'to patrol peacefully in front of the consumer entrances, to stay away from the delivery entrances . . .'" 377 U.S. at 61.

⁹ *Id.* at 73-76 (Appendix).

¹⁰ 132 N.L.R.B. 40 (1961), *enforcement denied*, 331 F.2d 561 (8th Cir. 1964). In denying enforcement the Court of Appeals for the Eighth Circuit cited the Supreme Court's *Fruit Packers* decision.

¹¹ *Fruit & Vegetable Packers (Tree Fruits Labor Committee)*, 132 N.L.R.B. 1172 (1961).

¹² The purpose of picketing Safeway stores was to persuade consumers not to purchase nonunion Washington State apples which Safeway in turn purchased from members of Tree Fruits. The natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers. *Id.* at 1177.

picketing in a particular circumstance, and held that to find the picketing in this case was unlawful would require a finding that it did *in fact* threaten, coerce, or restrain the supermarkets.¹³ It remanded the case to the Board so that it might hear evidence on this point. The court of appeals read the publicity proviso as protecting publicity, other than picketing, even when it did in fact threaten, coerce, or restrain. Picketing that did not in fact threaten, coerce, or restrain did not need any protection the proviso might have afforded.

On certiorari, the Supreme Court majority rejected both views taken below, reasoning that Congress has prohibited peaceful picketing only when dealing "explicitly with isolated evils which experience has established flow from such picketing,"¹⁴ and holding that no such explicitness concerning product picketing, as contrasted with general secondary picketing, is to be found in the legislative history of the amendment.¹⁵ It thus took the position that, absent the specificity required of picketing ban legislation, secondary consumer picketing that was limited to following the struck product as a matter of law did not threaten, coerce, or restrain the secondary employer. Since the picketing did not threaten, coerce, or restrain, it did not need the protection of the publicity proviso, and thus the Court did not have to deal with the exception of picketing from that protection.

In the companion *Servette* case, the Board, on the basis of a high-low level supervisor-manager test established in *Local 505, Teamsters Union (Carolina Lumber)*¹⁶ and followed in *Minneapolis House Furnishing*, decided that the supermarket managers were high level supervisors whom the union *could* induce or encourage to cease doing business with other persons and thus they were not individuals within the intent of the act.¹⁷ The *Carolina Lumber* test described such high level supervisors as executives who made managerial decisions and who were not likely to neglect their employer's interests because of sympathies in common with rank and

¹³ *Fruit & Vegetable Packers v. NLRB*, 308 F.2d 311 (D.C. Cir. 1962), 62 COLUM. L. REV. 1336.

¹⁴ 377 U.S. at 62-63, quoting *NLRB v. Drivers Local Union*, 362 U.S. 274, 284 (1960).

¹⁵ The Court rejected indications that at least the opponents of the bill understood it to prohibit consumer product picketing. 377 U.S. at 66.

¹⁶ 130 N.L.R.B. 1438 (1961).

¹⁷ *Wholesale Delivery Drivers Union (Servette, Inc.)*, 133 N.L.R.B. 1501 (1961).

file employees. High level supervisors, although they are not individuals within the meaning of subsection (i), are protected from threats, restraint, or coercion by subsection (ii) since it seems clear that "person" in this subsection means both physical and corporate persons. On the other hand, low level supervisors such as gang foremen are not to be induced under this test because they are likely to have interests closely aligned with labor, including occasionally even union membership. This latter class is protected by both subsections, as are non-supervisory employees. There is no clear dividing line that can be drawn between high and low level. Each new case must be considered on all factors of company organization including, but not exclusively, the supervisor-manager's authority and responsibility, his working conditions, his salary, and his benefits.

The Court of Appeals for the Ninth Circuit, taking a literal view of the statute's wording, discarded the *Carolina Lumber* test, but it reversed the Board on the basis that Servette, a distributor, was not a producer within the meaning of the publicity proviso and thus the handbilling activities of the union were not protected by it.¹⁸ This position had been taken by dissenting Board Member Rodgers, who also determined that the handbills distributed by the union had not been truthful.¹⁹ The Board majority did not elaborate its finding that a distributor such as Servette was not a producer, having done so already in a previous case.²⁰

The Supreme Court, in its unanimous decision, supported the Board's view of Servette as a producer²¹ and followed the court of appeals in its rejection of *Carolina Lumber*. It held, in a footnote to its opinion, that the applicability of subsection (i) turned not upon the high-low level supervisor-manager distinction but "upon whether the union's appeal is to cease performing employment services, or is an appeal for the exercise of managerial discretion."²²

The language of section 8(b)(4), before and after the 1959 amendments, has never been a subject of easy interpretation for

¹⁸ *Servette, Inc. v. NLRB*, 310 F.2d 659 (9th Cir. 1962). See *Great Western Broadcasting Corp. v. NLRB*, 310 F.2d 591 (9th Cir. 1962).

¹⁹ 133 N.L.R.B. at 1502. See *Middle South Broadcasting Co.*, 133 N.L.R.B. 1698, 1706 (1961); *Teamsters Union (Lohman Sales)*, 132 N.L.R.B. 901, 910 (1961).

²⁰ *Teamsters Union (Lohman Sales)*, *supra* note 19.

²¹ 377 U.S. at 55.

²² *Id.* at 50 n.4.

the courts.²³ To have construed it literally, prior to the amendment, would have been to ban even primary picketing,²⁴ and this was not the intent of Congress.²⁵ Under the original language, the inducement or encouragement had to be concerted, so that an isolated incident of inducement was not covered.²⁶ Even if the picketing was at the secondary employer's place of business, it was not barred unless its object was to cause the secondary employer's employees to walk out.²⁷ Supervisors, since they were specifically not "employees" as defined by the act,²⁸ could be induced or encouraged to support the union, no matter how low their position.²⁹ And the employees of certain activities, such as government agencies,³⁰ were not covered since these activities were not employers subject to the act.³¹

Congress sought, by the 1959 amendment,³² to clarify and broaden the coverage of this section.³³ In attempting to close the

²³ This section is "surely one of the most labyrinthine provisions ever included in a federal labor statute . . ." Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113 (1960).

²⁴ *International Union of Elec. Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 672 (1961).

²⁵ *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672 (1951).

²⁶ *Id.* at 670-71.

²⁷ *NLRB v. Business Mach. & Office Appliance Mechanics*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956). "It was not shown that the picketing had any tendency to induce the employees to strike or cease performing services." 228 F.2d at 560.

²⁸ Labor Management Relations Act (Taft-Hartley Act) §§ 2(3), (11), 61 Stat. 137 (1947), 29 U.S.C. §§ 152(3), (11) (1959).

²⁹ *Sheet Metal Workers (Ferro-Co Corp.)*, 102 N.L.R.B. 1660 (1953) (substitute foreman); *Local 878, Teamsters Union (Arkansas Express)*, 92 N.L.R.B. 255 (1950) (shipping dock foreman, a union member); *Local 294, Teamsters Union (Conway's Express)*, 87 N.L.R.B. 972 (1949), *aff'd sub nom. Rabouin v. NLRB*, 195 F.2d 906 (2d Cir. 1952) (management representatives).

³⁰ *International Bhd. of Elec. Workers*, 104 N.L.R.B. 1128 (1953).

³¹ Labor Management Relations Act (Taft-Hartley Act) § 2(2), 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1959). See *International Woodworkers (W. T. Smith Lumber Co.)* 116 N.L.R.B. 1756 (1956), *enforcement denied sub nom. W. T. Smith Lumber Co. v. NLRB*, 246 F.2d 129, 132 (5th Cir. 1957) (railroad); *Local 833, UAW (Paper Makers Importing Co.)*, 116 N.L.R.B. 267 (1956) (municipal employees). Compare *DiGiorgio Fruit Corp.*, 87 N.L.R.B. 720, 721 (1949), *enforced*, 191 F.2d 642 (D.C. Cir.), *cert. denied*, 342 U.S. 869 (1951), where a farm labor union was not prohibited from secondary boycott activity since it was not subject to the act.

³² For the text of the amendment, see note 2 *supra*. For the textual changes it made, see note 3 *supra*.

³³ *NLRB v. Servette, Inc.*, 377 U.S. 46, 51 (1964); Aaron, *supra* note 23, at 1114; Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 270 (1959).

loopholes, it included isolated incidents of inducement by eliminating the word "concerted" in subsection (i) and enlarged the class covered by this subsection at the very least to include low level supervisors, by the change in language to "any individual employed by any person." Coverage was extended to threats, coercion, and restraint of any person by the addition of subsection (ii), thus taking in secondary activities not directed solely at employees. Since Senate conferees were unable to persuade their House brethren not to prohibit at least some kinds of secondary picketing, the publicity proviso was added to protect "informational activity short of picketing."⁸⁴ The proviso to clause (B) was added to clarify Congress' intention not to obstruct picketing that was primary. But at least one author of the amendments, and other persons, have expressed the old problems were solved, new ones have arisen in the extension misgivings about the Board's understanding of these changes.⁸⁵ As of coverage to secondary consumer activity, in the addition of the proviso excepting certain kinds of this activity, and in the extension of coverage to a larger class of individuals that are employed. It is in these areas that the Court has spoken in the two instant cases.

In *Fruit Packers*, the Supreme Court majority's distinction between unlawful secondary consumer picketing "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer,"³⁶ and lawful secondary consumer picketing "directed only at the struck product"³⁷ is not a distinction "alluded to in the [Congressional] debates,"³⁸ nor made by commentators on the amendment immediately after its passage.³⁹ It is, however, a distinction made by other authorities,⁴⁰ including the *Restatement*

⁸⁴ 105 CONG. REC. 17898-99 (1959).

⁸⁵ Browne, *The National Labor Relations Board: Labor Law Rewritten*, 49 A.B.A.J. 64 (1963).

³⁶ 377 U.S. at 63.

³⁷ *Ibid.*

³⁸ *Id.* at 64.

³⁹ See, e.g., Aaron, *supra* note 23; Cox, *supra* note 33.

⁴⁰ *Goldfinger v. Feintuch*, 276 N.Y. 281, 286-87, 11 N.E.2d 910, 913 (1937). This case held that a unity of interest would permit struck product picketing at the secondary employer's place of business but contained dictum that picketing asking a withdrawal of business from the secondary employer was illegal. *Id.* at 286, 11 N.E.2d at 912. See 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 123 (1940). Compare *People v. Muller*, 286 N.Y. 281, 36 N.E.2d 206 (1941), permitting more than struck product picketing where the secondary employer uses the services of the

of *Torts*.⁴¹ Here the Court may have chosen to read a distinction not expressly stated by Congress in order to avoid the constitutional question of a blanket ban against picketing.⁴² This possibility was suggested by the concurring opinion of Mr. Justice Black in which he held the section, as applied against product picketing, in violation of the first amendment.⁴³ Black separated the coercive "patrolling" aspect of picketing from the non-coercive "speech"⁴⁴ element and reasoned that since it is the *object* of the picketing (a consumer boycott that threatens, coerces, or restrains a neutral secondary employer) that is determinative of the ban, the amendment is attacking the "speech" element. If the picketing were, for example, a protest against the supermarkets' *own* labor practices, the "patrolling" would be unchanged; only the "speech" would be different and the picketing would be lawful. Mr. Justice Harlan (joined by Mr. Justice Stewart in dissenting) set out a position supported by Black that all secondary consumer picketing is covered by the ban and that none of it is protected by the publicity proviso. But Harlan argued that it is the "patrolling" element that is being restricted, especially since other forms of expressing the same "speech" are permitted.⁴⁵

Restraints on peaceful picketing were broadly condemned by the Court in *Thornhill v. Alabama*.⁴⁶ But this position has been modified so that it is now fairly clear that picketing may be pro-

primary employer, *with* Local 142, Plumbers' Union (Shop-Rite Foods, Inc.), 133 N.L.R.B. 307 (1961).

⁴¹ In all cases, however, the scope of the request must be limited to A and his products. . . . B, the retailer, is also not entitled to complain, since the action is not directed at him and his loss of sales, if any, is due only to the diminution in the prestige of goods which he buys and markets If, however, the third persons are requested not to buy other goods from B because he sells A's soap, the rule stated in this section is inapplicable

RESTATEMENT, TORTS § 799, comment on clause (a) (1939). Cf. RESTATEMENT, TORTS § 801 (1939).

⁴² This is the position of one recent treatment of the case. Note, 42 TEXAS L. REV. 905 (1964).

⁴³ 377 U.S. at 76-80.

⁴⁴ *Id.* at 77. See Mr. Justice Douglas's concurring opinion in *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 775 (1942).

⁴⁵ "[T]hat Congress in prohibiting secondary consumer picketing has acted with a discriminating eye is the very thing that renders this provision invulnerable to constitutional attack." 377 U.S. at 93.

⁴⁶ 310 U.S. 88 (1940). "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Id.* at 102.

hibited if its object is either unlawful⁴⁷ or "far outweighed" by the interests that would be harmed by the picketing.⁴⁸ Even if the picketing is considered to be speech, it may be restricted to the area of the primary dispute.⁴⁹ This line of cases suggests that, recognizing an unequivocal congressional ban on secondary consumer picketing aimed only at the product and thus compelled to deal with the constitutional question, the majority opinion in *Fruit Packers* could be read as exhibiting a willingness to find that the evils seen by Congress justified the prohibition.⁵⁰

In the first attempts at dealing with secondary boycotts, the concern and emphasis was with the detrimental effect on the neutral secondary employer. "Picketing the premises of a secondary is of course a prototype secondary boycott, forbidden by the act."⁵¹ Complications arose in the blending of permitted primary effects and undesired secondary effects of picketing when the primary employer and secondary employer were doing business on common or adjacent premises. These complications led the Board, in *Sailor's Union (Moore Dry Dock Co.)*,⁵² to declare that picketing at a common situs was permitted at times when the primary employer was engaged in normal business on the site of the secondary employer, provided the picketing was performed so as to disclose clearly that the dispute is with the primary employer only. This rule was limited by *Brewery Drivers (Washington Coca-Cola Bottling Works)*⁵³ to situations in which the primary employer had no separate place of business that could be picketed. However, this limitation was at least somewhat removed by *Local 861, Int'l Bhd. of*

⁴⁷ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

⁴⁸ *International Bhd. of Teamsters v. Hanke*, 339 U.S. 470, 477 (1950).

⁴⁹ But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communications to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication.

Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 727-28 (1942).

⁵⁰ See Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591-602 (1951).

⁵¹ Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1374 (1962).

⁵² 92 N.L.R.B. 547 (1950) (primary employer's ship at secondary employer's dock).

⁵³ 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955) (picketing at retail outlets asked public not to buy Coca-Cola).

Elec. Workers (Plauché Elec., Inc.).⁵⁴ Thus, the lawfulness of such picketing in such blended situations remains unclear.⁵⁵

Fruit Packers, however, places little emphasis on the secondary character of the picketing, *i.e.*, that it is on a clearly secondary site.⁵⁶ The Court gives lip service to the strict traditional view that this is a secondary boycott because "its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it,"⁵⁷ but, by implication, seems to move toward abandoning it. The aim of the picketing in *Fruit Packers*, the Court found, was not "to compel [the neutral secondary employer] . . . to stop business with the [primary] employer in the hope that this will induce the [primary] employer to give in to his employees' demands."⁵⁸ Rather, it was primary picketing, in that it was aimed at sales depended upon by the primary employer, with inevitable secondary side effects—a drop in the supermarkets' sales of apples and some contingent economic damage to the markets—which are unfortunate but not the subject of real concern. When the side effects are thus de-emphasized, perhaps the picketing could be viewed as not within section 8(b)(4) at all.⁵⁹ Whether the Court could comfortably make the same de-emphasis if the secondary employer were a one-product retailer is a question raised by

⁵⁴ 135 N.L.R.B. 250 (1962) (workers spending entire day on secondary site after reporting in at primary site).

⁵⁵ See *United Steelworkers v. NLRB*, 376 U.S. 492 (1964), the Court's most recent ruling in this area.

⁵⁶ When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The *site* of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firm are decreased only because the public has diminished its purchase of the struck product.

⁵⁷ U.S. at 72. (Emphasis added.) See also *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961), stating:

Important as is the distinction between legitimate "primary activity" and banned "secondary activity," it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade.

Id. at 673.

⁵⁸ *International Bhd. of Elec. Workers v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950) (L. Hand, J.).

⁵⁹ *Ibid.*

⁶⁰ See Note, 73 YALE L.J. 1265, 1278 (1964). The author there takes the position that "the expansion of the concept of primary dispute to encompass product picketing may run counter to the rationale of many cases involving common situs picketing." *Ibid.*

Mr. Justice Harlan in his dissent.⁶⁰ On its face, the majority's decision in *Fruit Packers* would seem to preclude any other emphasis.

While the above basis can be found for the *Fruit Packers* decision, *Servette* established an entirely new rule of labor law by shifting the test of proscribed section 8(b)(4) inducement from the type of employee or individual induced to the function that he is to perform or not to perform. The Court supplies no definition of the exercise of "managerial discretion"⁶¹ and cites nothing in explanation of the term, either in congressional action or elsewhere.⁶² Though the new rule would not alter the outcome if applied by the National Labor Relations Board in the instant case,⁶³ it cannot be dismissed as dicta.⁶⁴

⁶⁰ *E.g.*, an "independent gas station owner [who] sells gasoline purchased from a struck gas company," as in Harlan's example. 377 U.S. at 83. To the one-product retailer, the distinction is certainly of no comfort. If the picketing is successful, he is put out of business either way. But is his unity of interest with the gas company sufficient to justify this?

⁶¹ *NLRB v. Servette, Inc.*, 377 U.S. 46, 50 n.4 (1964).

⁶² *Quaere*, when is discretion not managerial and its inducement thus presumably unlawful under section 8(b)(4)(i) as a withdrawal of services, if ever? To remain within the *Servette* fact situation, if the union had approached a low level employee, perhaps a union member, who was responsible for storefront displays and induced him not to use *Servette*-distributed products in his displays, would his action be a refusal "to perform . . . services," a "refusal in the course of his employment to use . . . any goods," or an exercise of managerial discretion within the rule? A situation similar to this arose in *Local 294, Teamsters Union (Van Transport Lines)*, 131 N.L.R.B. 242, *enforced*, 298 F.2d 105 (2d Cir. 1961).

⁶³ It is doubtful that use of the managerial discretion test would have changed the results in other cases decided by the Board on the high-low level principle. See, *e.g.*, *Warehouse Employees Union (C. R. Sheaffer & Sons)*, 136 N.L.R.B. 968 (1962) (manager refused to accept delivery of struck products after being informed union would handbill, an activity deemed legal); *Teamsters Union (Editorial "El Imparcial," Inc.)*, 134 N.L.R.B. 895 (1961); *Teamsters Union (Lohman Sales)*, 132 N.L.R.B. 901 (1961); *Excavating & Building Material Chauffeurs Union (Consalvo Trucking, Inc.)*, 132 N.L.R.B. 827 (1961) (*held*, a managerial decision); *Upholsterers Frame & Bedding Workers (Minneapolis House Furnishing)*, 132 N.L.R.B. 40 (1961), *enforcement denied*, 331 F.2d 561 (8th Cir. 1964); *Sheet Metal Workers Int'l Ass'n (S. M. Kisner & Sons)*, 131 N.L.R.B. 1196 (1961) (vice president told union "wished" that a subcontract not be awarded struck employer); *Amalgamated Meat Cutters (Peyton Packing Co.)*, 131 N.L.R.B. 406 (1961) (meat market manager asked to stop or slow down buying from struck employer); *Local 294, Teamsters Union (Van Transport Lines)*, 131 N.L.R.B. 242, *enforced*, 298 F.2d 105 (2d Cir. 1961); *Local 324, Int'l Union of Operating Engineers (Brewer's City Coal Dock)*, 131 N.L.R.B. 228 (1961) (inducement of top supervisor not to accept delivery of struck sand); *Local 505, Teamsters Union (Carolina Lumber)*, 130 N.L.R.B. 1438 (1960).

⁶⁴ Respondent *Servette* argued that the evidence disclosed that the managers in fact had no managerial discretion to exercise in dealing with

The liberal rather than the restrictive approach to statutory interpretation in the labor field is seen in *Servette* in the Court's approach to the subsection (i) phrase "any individual employed by any person." Though Congress intended to close the loophole in the original section 8(b)(4) whereby "supervisors"⁶⁵ were not protected from inducement, any apparent broadening of the protection to all persons employed of whatever description had been severely limited by the Board in decisions following *Carolina Lumber*.⁶⁶ The Court of Appeals for the Ninth Circuit attempted to correct this limitation by reading the new phrase in its plain, literal, and broadest sense.⁶⁷ The Supreme Court agreed,⁶⁸ but to leave this as its decision would limit the union's appeal for support in its dispute to "employers" or "persons engaged in commerce" alone. If the "person" is not an individual proprietorship or a partnership, but a corporation, under this literal reading there is no one within the business enterprise who legally can be induced. To induce the corporate person it is necessary to induce some individual employed by it. To avoid this trap it was necessary for the Court to examine the function that an individual of the now all-inclusive class is to be induced to perform or not to perform.

There is direct support for the Court's reading of "produced" in the publicity proviso as intended by Congress to include activities such as those of *Servette*.⁶⁹ If the Court had been intent in taking the restrictive rather than the liberal approach to statutory interpretation in the labor field, it could have attached "significance to the fact that an earlier version of the proviso read: '... that goods are produced *or distributed* by an employer'"⁷⁰ The omission of the italicized phrase could have been read as a deliberate intention

Servette. They had to consult with their supervisors. Brief for Respondent, pp. 20-22, *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964). It was also argued that corporate officers were not included in "any individual." *Id.* at p. 19. See Upholsterers Frame & Bedding Workers (Minneapolis House Furnishing), 132 N.L.R.B. 40, 66 (1961). Though it was insisted that the plain meaning of the statute should be followed. Brief for Respondent, p. 11.

⁶⁵ Labor Management Relations Act (Taft-Hartley Act) §§ 2(3), (11), 61 Stat. 137 (1947), 29 U.S.C. §§ 152(3), (11) (1959).

⁶⁶ The Board has applied the high-low level test in at least ten other cases. See cases cited note 63 *supra*.

⁶⁷ *Servette, Inc. v. NLRB*, 310 F.2d 659, 665 (9th Cir. 1962).

⁶⁸ 377 U.S. at 49-50.

⁶⁹ "'Produced' means produced, manufactured, mined, *handled* or in any other manner worked on" Fair Labor Standards Act § 3(j), 52 Stat. 1061 (1938), 29 U.S.C. § 203(j) (1958). (Emphasis added.)

⁷⁰ 105 CONG. REC. 17333 (1959). (Emphasis added.)

to exclude distributors' employees from the protection of the proviso rather than an understanding that "produced" included distributing activities. Such an intention, however, would be subject to attack as arbitrary. There is no apparent basis for not extending to distributors' employees a right that seems to be constitutionally guaranteed.

The close distinctions made by the Court in these two decisions seem to have been made with a favorable attitude toward the labor movement. Implicit in them is a view that labor's right to present its case to the public outweighs the damage that may be caused to neutrals by necessary means of presenting that case. Yet the criteria that this view forced upon the Court can be expected to haunt it in later cases and, more certainly, to cause sleepless nights for labor counsel. Will the Court protect consumer product picketing of one-product retailers? If Congress is more explicit in banning such picketing, will the Court respect its wishes? Most difficult, what can the unions ask "any individual" to do or not to do? At first examination, the labor movement might take comfort in answers projected from these two decisions. A wiser approach would be one tempered by caution.

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