UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 55 | Number 3 Article 7

3-1-1977

Notes

North Carolina Law Review

NOTES

Criminal Procedure—The North Carolina Post-Conviction Hearing Act: A Procedural Snare

The federal writ of habeas corpus is available to state prisoners as a guarantee that every allegation of imprisonment violative of constitutional standards will be fully and fairly considered.[1] It is the policy of the federal court system, however, to refrain from " 'upset[ting] a state court conviction without an opportunity to the state courts to correct a constitutional violation.' "[2] State courts can examine and correct these errors either during the criminal trial, on direct appeal, or upon a later collateral attack by means of the common law writs of habeas corpus[3] and coram nobis[4] or of statutorily enacted post-conviction remedies. North Carolina was the second state to adopt such a post-conviction statute.[5] Since the time of adoption, however, judicial limitations and a procedural change have led to the severe diminution of the act's effectiveness, a partial abdication of the state's role as enforcer of federal constitutional law, and a legal dilemma that cannot be remedied through ordinary judicial action.

FEDERAL REVIEW OF STATE CRIMINAL PROCEEDINGS

The federal court system has jurisdiction over all prisoners, both federal and state,[6] who assert the constitutional invalidity of their con-

1. 28 U.S.C. § 2241(c) (1970) provides in part that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ." The legislative policy of granting a federal forum to the constitutional claims of state prisoners has often been noted and approved by the United States Supreme Court. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 430-31 (1963); Townsend v. Sain, 372 U.S. 293, 311 (1963); Hawk v. Olson, 326 U.S. 271, 274 (1945).

2. Fay v. Noia, 372 U.S. 391, 420 (1963) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

3. *See* note 25 *infra.*

4. *See* note 24 *infra.*

5. Case v. Nebraska, 381 U.S. 336, 338 (1965) (Clark, J., concurring). The statute is codified in N.C. GEN. STAT. §§ 15-217 to -222 (1975). Illinois enacted the first post-conviction statute in 1949; it is now codified in ILL. ANN. STAT. ch. 38, § 122 (Smith-Hurd 1973). North Carolina patterned the 1951 version of its law on the Illinois act. Miller v. State, 237 N.C. 29, 51, 74 S.E.2d 513, 528 (1953).

6. [W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, . . . or because . . . the remedy afforded by the state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, *else he would be remediless.*

Ex parte Hawk, 321 U.S. 114, 118 (1944) (per curiam) (emphasis added). 28 U.S.C.

victions.[7] In the interests of federal/state comity, of limiting interference with the judicial processes of the states and of decreasing their own habeas corpus case load, the federal courts have developed philosophical and practical doctrines that transfer portions of the responsibility to the states while allowing the federal courts to continue as ultimate arbiters of the constitutionality of state criminal proceedings.

The first of these doctrines is that of exhaustion of state remedies.[8] The federal courts have declined to grant habeas corpus petitions until the state courts have had an opportunity to pass on all questions raised by the habeas applicant through all appropriate state procedures—that is, until all available state remedies have been exhausted.[9] The exhaustion doctrine is not a limitation on federal habeas corpus jurisdiction, which exists due to the presence of constitutional error in the trial;[10] the doctrine merely postpones the appropriate exercise of that jurisdiction to give the state courts time to correct their own errors and allow their procedure to remain undisturbed.[11]

The second doctrine adopted by the federal courts affects the amount of time the federal district court must expend on consideration of the federal habeas corpus petitions of state prisoners. In *Townsend v. Sain*[12] the United States Supreme Court held that a federal evidentiary hearing would be necessary unless the state trier of fact had previously held a full and fair hearing and found the facts of the case.[13] If a state evidentiary hearing meeting the *Townsend* requirements was held, the federal district court judge is free to accept the facts as found

§ 2254 (1970) provides the statutory guidelines for the grant of federal habeas corpus to state prisoners.

7. 28 U.S.C. § 2241(c)(3) (1970).

8. 28 U.S.C. § 2254(b) (1970) provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

The basic doctrine now codified in § 2254(b) was developed by the United States Supreme Court in *Ex parte* Royall, 117 U.S. 241, 250-53 (1886). For a description of the judicial history of the doctrine of exhaustion of state remedies, see Fay v. Noia, 372 U.S. 391, 417-20 (1962).

9. *E.g.*, Johnson v. Hoy, 227 U.S. 245 (1913); Minnesota v. Brundage, 180 U.S. 499 (1901).

10. Fay v. Noia, 372 U.S. 391, 430-31 (1960).

11. R. SOKOL, FEDERAL HABEAS CORPUS 163-64 (2d ed. 1969); *see, e.g.*, Tyler v. Croom, 264 F. Supp. 415, 418 (E.D.N.C. 1967); Sligh v. North Carolina, 246 F. Supp. 865, 867 (E.D.N.C. 1965) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

12. 372 U.S. 293 (1963).

13. More specifically, a federal hearing is mandatory if: (1) the state court hearing did not resolve the merits of the factual dispute; (2) the state record does not fairly

at that hearing and ordinarily should do so.[14] The district court judge may always, in his discretion, rehear the evidence, despite a previous state hearing and appropriate findings of fact.[15] He may not, however, accept the state court's findings of law: "It is the district judge's duty to apply the applicable federal law to the state court fact findings independently."[16]

These doctrines, then, advance four federal court interests. First, the interest in good federal/state relations is furthered by the states' acceptance of a larger and more autonomous role in the consideration of constitutional errors within their own criminal systems.[17] Second, the federal courts have an interest in maintaining the positions of the state courts as enforcers of federal constitutional law. State court assumption of this responsibility removes from the federal courts the pressure of policing the state courts for constitutional errors while providing for more effective enforcement due to the immediacy of the state court adjudication and the dual nature of the effort.[18] Third, the increased role of the state courts in the determination of the facts behind prisoners' claims greatly decreases the caseload of the federal courts.[19] If the federal district court judge accepts the facts found in a state court hearing, he need only determine whether those facts,

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support the state's determination of fact; (3) the state court's fact finding procedure did not afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the state hearing did not adequately develop material facts; or (6) for some other reason, the state trier of fact did not afford the habeas applicant a full and fair hearing. *Id.* at 312-13. 28 U.S.C. § 2254(d) (1970) codifies all of these conditions of federal rehearing except the fourth, and adds that the state court must have had jurisdiction over the case, appointed counsel when constitutionally required, and generally granted due process of law to the habeas applicant in order for its determination of facts to be presumptively correct.

"This has been succinctly summarized by one distinguished appellate judge as meaning: 'Give the slob a hearing.'" J. Craven, Federal Writs of Habeas Corpus in the Light of Post Conviction Remedies in North Carolina 10 (June 26-29, 1966) (paper delivered at Third Annual North Carolina Trial Judges' Seminar).

14. 372 U.S. at 318.

15. *Id.*

16. *Id.*

17. Federal/state judicial relations undergo an inherent strain produced by the concurrent jurisdiction of the two court systems over these constitutional matters. It is common for states to resent greatly federal court interference with the autonomy and the orderly procedure of their criminal trials. *See* Tyler v. Croom, 288 F. Supp. 870, 873 (E.D.N.C. 1968); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 899 (1966); Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422, 423 (1966).

18. *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094 (1970) [hereinafter cited as *Developments*].

19. *See* Tyler v. Croom, 288 F. Supp. 870, 873 n.6 (E.D.N.C. 1968) (citing U.S. COURTS AD. OFF. ANN. REP. 1967, at 135-37).

as a matter of law, entitle that applicant to habeas corpus relief.[20] The process has been likened to a decision on the pleadings,[21] and it takes a fraction of the time that could otherwise have been necessary for a full habeas corpus proceeding. Finally, it is possible that prisoners may be satisfied with the state remedies provided and never apply for federal habeas corpus relief.[22]

STATE POST-CONVICTION PROCEDURES

In order to further these same interests, the federal courts have encouraged the states to adopt post-conviction statutes.[23] These statutes extend the state court's collateral review of constitutional errors far beyond that permitted by the common law writs of coram nobis[24] and habeas corpus.[25] In order best to advance the federal court purposes such a statutory scheme should allow state review that is as broad as the review available on federal habeas corpus. The statute should afford as much protection to constitutional rights as the writ itself while shifting the full burden of fact finding from the federal to the state courts. Some statutes provide for this desired breadth of remedy,[26]

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20. *See* text accompanying note 16 *supra*.

21. R. SOKOL, *supra* note 11, at 114.

22. Wright & Sofaer, *supra* note 17, at 901 n.21.

23. The most direct encouragement came from Justice Clark, concurring in Case v. Nebraska, 381 U.S. 336 (1965) (per curiam), who stated, "I hope that the various States will follow the lead of Illinois, Nebraska, Maryland, North Carolina, Maine, Oregon and Wyoming in providing this modern procedure for testing federal claims in the State courts and thus relieve the federal courts of this ever-increasing burden." *Id.* at 340. *See also* ABA ADVISORY COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO POST-CONVICTION REMEDIES 2 (Approved Draft) 1968 [hereinafter cited as ABA STANDARDS]: "The continuing need for federal habeas corpus jurisdiction as a post-conviction remedy for state prisoners is thus clearly correlated to the adequacy of processes in the state courts."

24. The writ of coram nobis allows the court that rendered the original judgment in a criminal case to review the case upon a claim of an error of fact. The error must have been in existence at the time of the original proceeding but have been unknown to the court. Further, it must have affected the validity of the original hearing. E. FRANK, CORAM NOBIS: COMMON LAW—FEDERAL—STATUTORY 1 (1953).

25. The common law writ of habeas corpus was available to challenge imprisonment by decree of a court that was without jurisdiction to consider the matter. *Developments, supra* note 18, at 1045.

26. The statute granting habeas corpus jurisdiction over federal prisoners, 28 U.S.C. § 2255 (1970), provides in part:

> A prisoner . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

This federal statute has been used as a model for a state statute that gives the state

while others limit the grounds upon which post-conviction relief can be claimed or the time within which that claim can be made.[27]

Another way that the operation of post-conviction statutes may be made more restrictive than federal habeas corpus is by the imposition of forfeiture rules. These rules hold that applicants have waived constitutional issues if they could have, but did not, raise them on direct appeal within the state court system.[28] If such a waiver occurs, the prisoner has forfeited his right to allege those issues on collateral appeal. According to *Fay v. Noia*,[29] federal habeas corpus will be granted to applicants despite the failure to raise constitutional claims on direct appeal in the state courts unless that failure to appeal is deemed an "intelligent and understanding waiver" of the right to appeal.[30] The *Fay* Court further explained that a federal judge may, upon finding that a habeas applicant has intentionally avoided raising his federal claims under the appropriate state court procedures, deny federal relief to that applicant.[31] But the test of intentional or deliberate bypass is a stringent standard; despite the interest of the federal courts in comity, allegations of unconstitutional restraint will not be ignored solely on the grounds that the habeas applicant has run afoul of state court procedures.[32]

When state procedure utilizes a more stringent waiver of forfeiture standard than the intelligent and understanding measure adopted by the federal courts, the states have again limited their ability to deal with cases cognizable on federal habeas corpus. From the federal court point of view the state forfeiture rules create the same

courts equivalent jurisdiction over state prisoners. A second model is the UNIFORM POST-CONVICTION PROCEDURE ACT, 11 UNIFORM LAWS ANN. 477 (1974), which grants jurisdiction over the same broad subject matter but which, in its original version, limited the consideration by requiring that all grounds for relief be raised in the first post-conviction petition or not at all. *Id.* at 478-79; *accord*, ABA STANDARDS, *supra* note 23, at 3. The revised version of the Uniform Act follows the waiver standards set forth in federal case law. 11 UNIFORM LAWS ANN. at 528.

27. A third model for state statutes is the Illinois Post-Conviction Hearing Act, ILL. ANN. STAT. ch. 38, § 122-1 to -7 (Smith-Hurd 1973). This statute is far more restrictive than the first two; it limits the time for initiation of post-conviction proceedings to 20 years after the applicant's conviction (unless the delay is not due to the applicant's neglect), considers claims not presented in the original or amended petition waived, and limits the subject matter of post-conviction jurisdiction to claims of substantial denial of rights under the United States or Illinois constitutions. *Id.* § 122-1, -3.

28. *Cf.* Note, *supra* note 17, at 433 (referring to this as the problem of waiver).

29. 372 U.S. 391 (1963).

30. *Id.* at 399. The standard used is an extension of the waiver standard developed in Johnson v. Zerbst, 304 U.S. 458 (1938).

31. 372 U.S. at 433.

32. *See* Humphrey v. Cady, 405 U.S. 504, 516-17 (1972).

problems as jurisdictional and time limitations.[33] From the state's standpoint, such a system offers both advantages and disadvantages. On the positive side, it allows that state's procedural network to remain internally pure and consistent. This system not only permits the state to maintain its well-regulated criminal procedure,[34] it also allows the state an enormous amount of control over the timing of constitutional claims which can be permitted only at particular times during litigation. State courts have an interest in having these claims raised and finally adjudicated as quickly as possible. Lengthy delays decrease the accuracy of the fact finding process while making it more difficult to convict a second time should the first conviction be invalidated due to constitutional error.[35]

In *Fay v. Noia*, the Supreme Court recognized the importance of the state's autonomy[36] and the state interest protected by a forfeiture system;[37] in fact, this understanding became part of the concern for comity that underlies the federal court policy of abstention from interference with the states' regulation of criminal justice so long as federal constitutional rights are not thereby weakened.[38] To advance this concern further, the federal courts will enforce such forfeitures themselves if the habeas applicant is found to have deliberately bypassed his state remedies for strategic or tactical reasons.[39] If the state forfeiture rule prevents the state courts from hearing the claim of an applicant who has unintentionally or ignorantly failed to utilize state remedies that are no longer available to him,[40] the federal court will, of course, be forced to hold a full evidentiary hearing on the case.[41]

One disadvantage of a strict forfeiture rule on the state level is that the internal autonomy created is limited and comes at a very high

33. These problems consist of the denial of the federal concerns discussed in the text accompanying notes 17-22 *supra*.

34. *See* State v. White, 274 N.C. 220, 229-30, 162 S.E.2d 473, 478-79 (1968); *cf. Developments*, *supra* note 18, at 1094 (federal/state comity considerations include same concern).

35. Note, *supra* note 17, at 433-34 (1966); *see* Note, *State Post-Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U. L. REV. 154, 161 (1965).

36. 372 U.S. at 419.

37. *Id.* at 431-32.

38. *See* note 17 and accompanying text *supra*.

39. 372 U.S. at 439.

40. For a limited restriction of the application of the understanding and voluntary waiver rule of *Fay*, see Francis v. Henderson, 96 S. Ct. 1708 (1976).

41. *Fay* also held that the exhaustion of state remedies doctrine applies only to state remedies still available at the time the habeas writ is filed. 372 U.S. at 435. Therefore the failure of a habeas applicant to utilize state remedies in the past will not bar habeas corpus consideration.

price. Though the state retains the right to deny relief to any prisoner who has failed to follow the state's procedural rules, and thereby may gain a feeling of independence and full control of the prisoner, it has in fact left many constitutional claims wholly in the lap of the federal court system. Under the forfeiture rule the state courts will be free from the stigma of federal court review of their decisions,[42] but will forego their opportunities to take an active role in the growth and formulation of federal constitutional law[43] as well as their obligation under the supremacy clause[44] and the principles of federalism to enforce the Constitution.[45] The freedom gained is merely that of roaming at will through a severely confined space.

The advantages of this apparent state autonomy are far outweighed by other factors: the strain in federal/state regulations created when the federal courts are forced to hold hearings they feel are more appropriately held at the state level,[46] the increased delay in final adjudication, the state's loss of its proper role in the process of adjudication of federal rights, and the loss of the effectiveness of the forfeiture rule as a way of forcing prisoners to abide by state procedures.[47] For these reasons the most effective and sensible state post-conviction procedures are those that grant jurisdiction as broad as federal jurisdiction of habeas corpus petitions and follow the federal waiver principles.[48]

POST-CONVICTION RELIEF IN NORTH CAROLINA

The majority of states that have some form of statutory post-conviction procedure do not permit a prisoner to use that procedure to

42. Federal court review is a sore point with many state courts. It seems to offend the feeling of the state courts that their supremacy in their own sphere should make them wholly independent and untouchable in their decisions. *See id.* at 446-47 (Clark, J., dissenting); Note, *supra* note 17, at 423.

43. Note, *supra* note 17, at 437-38.

44. U.S. CONST. art. VI, para. 2 provides:

> This Constitution, the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

45. Wright & Sofaer, *supra* note 17, at 899. For a good discussion of whether the state could be required to grant post-conviction review commensurate with the scope of federal habeas corpus under the supremacy clause, see Note, *supra* note 17, at 435-37. The Supreme Court declined to decide this question in Case v. Nebraska, 381 U.S. 336 (1965) (per curiam).

46. *See* text accompanying notes 17-22 *supra.*

47. Note, *supra* note 17, at 437.

48. ABA STANDARDS, *supra* note 23, at 19-20; Note, *supra* note 17, at 428-38; Note, *State Post-Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U. L. REV. 154, 167-69 (1965).

raise any issue that could have been raised on direct appeal.[49] North Carolina is among those states so limiting post-conviction relief. The limitation comes not from the statute itself but from judicial construction of the statute. The original version of the North Carolina Post-Conviction Hearing Act was enacted in 1951[50] and followed the pattern of the Illinois Post-Conviction Hearing Act.[51] The Act was rewritten and broadened considerably in 1965,[52] and exists in roughly the same form at present.[53] The grounds required to activate the

49. Each of the fifty states has some form of statutory post-conviction relief. Statutory writs of habeas corpus are found in: ALA. CODE tit. 15, §§ 1-43 (1958); ARIZ. REV. STAT. ANN. §§ 13-2001 to -2027 (1956); CAL. PENAL CODE §§ 1473-1508 (West 1970 & Supp. 1975); CONN. GEN. STAT. ANN. §§ 52-466 to -468, -470 (West Supp. 1976); HAW. REV. STAT. §§ 660-3 to -32 (Supp. 1975); LA. CODE CRIM. PRO. ANN. arts. 351-376 (West 1967); MASS. ANN. LAWS. ch. 248, §§ 1-34 (Michie/Law. Co-op 1974); MISS. CODE ANN. §§ 11-43-1 to -55 (1972); N.H. REV. STAT. ANN. §§ 534:1 to :32 (1974); N.J. STAT. ANN. § 2A: 67 (West 1976); TEX. CODE CRIM. PROC. ANN. art. 11.01-.64 (Vernon 1966); VA. CODE §§ 8-596 to -609 (1957 & Cum. Supp. 1976); WASH. REV. CODE ANN. §§ 7.36.010 to .250 (1961).

Post-conviction statutes are codified in ALAS. R. CRIM. P. 35 (Supp. 1968); ARK. R. CRIM. P. 1 (Supp. 1975); COLO. R. CRIM. P. 35 (1973); DEL. SUPER. CT. CRIM. R. 35 (1974); FLA. R. CRIM. P. 3.850 (1975); GA. CODE ANN. § 50-127 (1974 & Supp. 1976); IDAHO CODE §§ 19-4901 to -4911 (Cum. Supp. 1976); ILL. ANN. STAT. ch. 38, §§ 122-1 to -7 (Smith-Hurd 1973); IND. CODE ANN. P.C. Rule 1 (Burns 1973); IOWA CODE §§ 663A.1 to .11 (Supp. 1976); KAN. STAT. ANN. § 60-1507 (1976); KY. R. CRIM. P. 11.42 (1972); ME. REV. STAT. ANN. tit. 14, §§ 5502-5508 (1964); MICH. STAT. ANN. §§ 27A.4301 to .4316 (1962); MINN. STAT. ANN. §§ 590.01-.06 (West Supp. 1976); MO. ANN. STAT. §§ 532.400-.710 (Vernon 1953); MONT. REV. CODES ANN. §§ 95-2601 to -2608 (1969); NEB. REV. STAT. §§ 29-3001 to -3004 (1975); NEV. REV. STAT. §§ 177.315-.385 (1973); N.M. STAT. ANN. § 41-23-57 (Supp. 1975); N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1971); N.C. GEN. STAT. §§ 15-217 to -222 (1975); N.D. CENT. CODE §§ 29-32-01 to -10 (1974); OHIO REV. CODE ANN. §§ 2953.21-.24 (Page 1975); OKLA. STAT. ANN. tit. 22, §§ 1080-1088 (West Supp. 1976); OR. REV. STAT. §§ 138.510-.680 (1975); PA. STAT. ANN. tit. 19, §§ 1180-1 to -14 (Purdon Supp. 1976); R.I. GEN. LAWS §§ 10-9.1-1 to -7 (Supp. 1976); S.C. CODE §§ 17-601 to -612 (Supp. 1975); S.D. COMP. LAWS ANN. §§ 23-52-1 to -19 (Supp. 1976); TENN. CODE ANN. §§ 40-3801 to -3812 (1975); UTAH CODE ANN. Rule 65B(i) (Supp. 1975); VT. STAT. ANN. tit. 13, §§ 7131-7137 (1974); W. VA. CODE §§ 53-4A-1 to -11 (Cum. Supp. 1976); WIS. STAT. ANN. § 974.06 (West 1970); WYO. STAT. ANN. §§ 7-408.1-.8 (Supp. 1975). Thirty-four of these states place some sort of forfeiture restriction on the use of the statutory remedy. 24 C.J.S. *Crim. Law* § 1606(9)(b) (1961 & Supp. 1976).

50. 1951 N.C. Sess. Laws ch. 1083, § 1.

51. The present version of the Illinois Act is found in ILL. ANN. STAT. ch. 38, § 122 (Smith-Hurd 1973).

52. 1965 N.C. Sess. Laws ch. 352, § 1.

53. N.C. GEN. STAT. § 15-217 (1975) provides:

> **Institution of proceeding; effect on other remedies.**—Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work under the supervision of the State Department of Correction, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of

remedy are similar to the grounds for federal habeas corpus jurisdiction under 28 U.S.C. section 2255[54] or those of the Uniform Post-Conviction Procedure Act,[55] which purports to create a remedy "fully as broad as habeas corpus."[56] Though no legislative history was kept, at least one commentator felt that the creation of such a broad remedy was the purpose of the North Carolina legislature in the writing of the Act.[57] The 1965 revision also added a second paragraph to section 15-217 that states that the new procedure does not affect or replace any remedy of direct review.[58] The wording of the section does not, however, give any indication of a forfeiture of remedy to be imposed for failure to utilize those direct remedies.

In *State v. White*,[59] despite the realization that the petitioner's failure to raise his constitutional issue on direct appeal would not bar him from federal habeas corpus relief,[60] the North Carolina Supreme Court[61] stated that petitioner's procedural default in the state court system of direct review worked a forfeiture of his rights to collateral review under the Post-Conviction Hearing Act.[62] Reviewing

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alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this Article.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction, but except as otherwise provided in this Article it comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof.

Section 15-217.1 provides for the manner of filing and hearing of the post-conviction petition. Section 15-218 describes the contents of the petition, and states that the applicant waives any constitutional claim not alleged in the original or amended petition. Section 15-219 waives court costs and provides counsel for indigent prisoners. Section 15-220 allows the district attorney 30 days to answer, allows withdrawal or amendment of the petition, and provides for payment for the trial records of indigent prisoners. Section 15-221 describes the post-conviction hearing itself. Section 15-222 provides for appeal of the post-conviction judgment upon application for a writ of certiorari to the North Carolina Court of Appeals.

54. *See* note 26 *supra.*

55. 11 UNIFORM LAWS ANN. 477 (1974).

56. *Id.* at 486 (Commissioners' Comment).

57. Note, *Habeas Corpus—New Post-Conviction Hearing Act*, 44 N.C.L. REV. 153 (1965).

58. For wording of the statute see note 53 *supra.*

59. 274 N.C. 220, 162 S.E.2d 473 (1968).

60. *Id.* at 229, 162 S.E.2d at 478.

61. Review of post-conviction procedures was performed by the North Carolina Supreme Court until October 1, 1967. *See* notes 66-69 and accompanying text *infra.*

62. 274 N.C. at 232, 162 S.E.2d at 480. For a forerunner of *White* in regard to the original statute, see Miller v. State, 237 N.C. 29, 74 S.E.2d 513, *cert. denied*, 345 U.S. 930 (1953).

the federal habeas corpus procedures set out in *Fay* and *Townsend*, the court suggested that a federal judge's discretionary ability to disregard the state findings as unreliable and relitigate the issue eliminates the necessity for state court adjudication of all constitutional errors.[63] The North Carolina Supreme Court therefore seems unwilling to enforce federal law and share in the habeas corpus function of the federal courts. *White* placed a clear limitation on the Post-Conviction Hearing Act: the Act could be used to adjudicate only those constitutional deprivations that petitioner was prevented from raising earlier due to factors beyond his control.[64]

Until 1967 North Carolina's post-conviction procedure was similar to that of other states utilizing a strict forfeiture rule.[65] The situation became unique when the 1967 Session of the North Carolina General Assembly created the North Carolina Court of Appeals,[66] and transferred the final review of post-conviction procedures to that court.[67] After October 1, 1967, post-conviction hearings could be reviewed only upon application for writ of certiorari to the court of appeals; these hearings were the only type of case for which court of appeals review was the final adjudication.[68] Further, the post-conviction hearings present the only situation in which appeals to the court of appeals are not granted as a matter of right.[69]

This procedural change has made it difficult if not impossible to modify judicially the interpretation placed on the Post-Conviction Hearing Act by *State v. White*. The court of appeals, as a lower appellate court, cannot overturn a supreme court decision, but the supreme court is unable to modify its own holding since it no longer reviews post-conviction cases. The court of appeals seems to deal with this situation by deciding cases on non-*White* grounds whenever it is possible to do so.[70] Frequently this is accomplished by refusing relief

63. 274 N.C. at 229, 162 S.E.2d at 479.

64. *Id.* at 226-27, 162 S.E.2d at 477 (quoting Miller v. State, 237 N.C. 29, 51, 74 S.E.2d 513, 528-29 (1953)).

65. *See, e.g., In re* Sterling, 63 Cal. 2d 486, 407 P.2d 5, 47 Cal. Rptr. 205 (1965). *See also* 24 C.J.S. *Crim. Law* § 1606(9)(b) (1961).

66. 1967 N.C. Sess. Laws ch. 108.

67. 1967 N.C. Sess. Laws ch. 108, § 7A-28; *id.* ch. 523.

68. *Id.* ch. 108, § 7A-28. *See* Steed, *The North Carolina Court of Appeals—An Outline of Appellate Procedure*, 46 N.C.L. REV. 705, 709 (1968).

69. Steed, *supra* note 68, at 724.

70. The court of appeals has cited *White* only four times. Of these, only one citation was in reference to the forfeiture standard set forth in that case. *See* State v. Bell, 14 N.C. App. 346, 349, 188 S.E.2d 593, 595 (1972). Even this one usage of *White* was in a situation where the forfeiture it created did not restrict the remedy

on the ground that no substantial constitutional question was raised rather than facing the forfeiture issue raised by *White*.[71] In one case[72] the court of appeals went so far as to order a remand to the trial court, which had held the post-conviction hearing, to make a finding of fact on the substantiality of petitioner's claim that his guilty plea was involuntary.[73] This decision is not erroneous, but it circles the jurisdictional issue of the substantiality of the constitutional claim in order to avoid confronting the fact that *State v. White* might deny jurisdiction automatically for failure to allege coercion on direct appeal.

While the court of appeals' reluctance to follow the rule of *White* appears to minimize the problem presented by the case, in fact this reluctance creates a more formidable obstacle. With *White* on the books superior court judges feel bound to follow it; they are unlikely to be swayed from their refusal to grant post-conviction relief on the ground that the court of appeals seems to ignore the *White* decision. The confusing conflict of *White* and the court of appeals cases makes it difficult for criminal defendants to judge which forum (federal or state) should properly receive their constitutional claims. The existence of *White* also creates a temptation in the trial courts to follow the lead of the court of appeals and decide that no substantial constitutional violation exists so as to avoid the forfeiture problem created by the presence of such a violation. Finally, the discretionary nature of the appeals process in these cases induces the court of appeals to avoid deciding any case raising an unavoidable forfeiture question under *White*.

REFORM OF NORTH CAROLINA PROCEDURE

The *White* decision, then, is not only the product of an unwise and unworthy attempt on the part of the North Carolina Supreme Court to avoid the appropriate role of the North Carolina state courts in the

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further than federal habeas corpus would have. Post-conviction relief could as well have been denied in that case under the voluntary waiver rule of *Fay*. Further, the use of *White* in *Bell* was actually part of a secondary or alternate holding. The primary holding of the case was that defendant's claimed deprivation was so insubstantial as to constitute harmless error. *Id.*

71. *See, e.g.*, State v. Smith, 8 N.C. App. 348, 174 S.E.2d 651 (1970); Dixon v. State, 8 N.C. App. 408, 174 S.E.2d 683 (1970). As there is no post-conviction jurisdiction under § 15-217 and *White* unless a defendant is claiming under a constitutional ground that is substantial and that could not have been raised previously, cases decided in the absence of either of these criteria are correctly decided.

72. Battle v. State, 8 N.C. App. 192, 174 S.E.2d 299 (1970).

73. *Id.* at 195-96, 174 S.E.2d at 301-02.

adjudication of federal constitutional questions;[74] it is an error that, through a procedural fluke, has achieved the unique status of a seemingly immutable precedent. The unfortunate consequence is that it will be extremely difficult to correct this error so that the North Carolina court system can once more exercise its power and autonomy as final fact finder for consideration of the constitutional propriety of the convictions of state prisoners.

Change might be accomplished in one of three ways: first, the court of appeals could reverse the supreme court's decision in *White*. It is arguable that the lower court could do so since they are the final arbiters of post-conviction matters.[75] Such action, however, would violate the standard rules of *stare decisis* and might not be effective due to the misleading nature of a record in which an inferior court has "overruled" the case law of a higher court. Second, the supreme court could consider one post-conviction case in order to overturn the *White* decision. It is possible that some extraordinary writ might be used for this purpose. The highly unusual nature of this remedy, though arguably appropriate in this situation, makes it unlikely that it will be utilized. Further, the supreme court would have to circumvent the fact that the court of appeals is statutorily designated as the court of last resort in such cases.[76] Finally, the statute could be amended to bar the forfeiture doctrine expressed by *White*. This possibility is the most likely and the most effective of the solutions. Although the statute itself seems to present a remedy as extensive as federal habeas corpus, the only way to allow the statute to operate as intended is to amend it expressly to exclude only constitutional deprivations that the applicant knowingly and voluntarily failed to raise on appeal for strategic or tactical purposes.[77]

CONCLUSION

Without a legislative amendment or extraordinary judicial action, the North Carolina criminal justice system will remain a captive of its own procedure. The system will be unable to change, and therefore unable to shape and control the changes in the administration of criminal justice that future conditions may warrant. The result will be a permanent inability to live up to the potential of the North Carolina

74. *See* text accompanying notes 42-45 *supra*.
75. *See* sources cited in note 68 and accompanying text *supra*.
76. N.C. GEN. STAT. § 7A-28 (1969).
77. *See* sources cited in notes 29-32 and accompanying text *supra*.

Post-Conviction Hearing Act, and a permanent strain in state and federal court relations as the federal courts repeatedly discover that "no hearing of any sort was accorded petitioner . . . in the courts of North Carolina despite a modern and enlightened procedural machinery adequately designed to determine the basis of historical facts underlying constitutional questions and to review such questions."[78]

ELLEN KABCENELL WAYNE

Criminal Procedure—United States v. Santana: A Reinterpretation of the Katz Reasonable Expectation of Privacy Test

In its application of fourth amendment protection against unreasonable searches and seizures[1] the United States Supreme Court has become increasingly sensitive to the policies that are the foundation of that amendment since the appearance of the "reasonable expectation of privacy" standard in *Katz v. United States*[2] in 1968. *Katz* represented a philosophical shift in the Court's approach to governmental intrusions into citizens' lives, moving the focus from the location and structural components of the area invaded toward a more flexible and somewhat subjective standard that requires an examination of circumstances in which an individual may justifiably rely upon an expectation of privacy.[3]

In the recent case of *United States v. Santana*[4] the Court appears to have misread and misapplied the *Katz* standards. Officers of the Philadelphia Narcotics Squad, acting on probable cause but without a warrant, had driven to defendant Santana's residence and, finding her in her doorway, proceeded to arrest her. The Court found that San-

78. Anderson v. North Carolina, 221 F. Supp. 930, 931 (W.D.N.C. 1963).

1. The full text of the amendment reads:

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

U.S. CONST. amend. IV.

2. 389 U.S. 347 (1968). The phrase "reasonable expectation of privacy" comes from Justice Harlan's concurring opinion. *Id.* at 361; *see* note 51 *infra.*

3. 389 U.S. at 352-53.

4. 96 S. Ct. 2406 (1976).

tana's visibility in her doorway necessarily demonstrated that she had no expectation of privacy under *Katz* and that her doorway thereby became a "public place."[5] The arrest was therefore held to be valid under a prior ruling[6] that no warrant is necessary to arrest a suspect in a public place when there exists probable cause to arrest.[7] There was no discussion of Santana's actual expectation of privacy, or of the reasonableness of such an expectation, as the *Katz* test would seemingly have required. Although there is some question whether search criteria should be applied to arrests,[8] the importance of *Santana* is that it appears to indicate that the Court will use the *Katz* holding only in a conclusory manner following the determination of the fourth amendment issue according to pre-*Katz* standards. While the result in *Santana* appears justifiable on its facts, the decision represents a severe setback to the individual's right to privacy in an age of advanced surveillance techniques.

On August 16, 1974, an undercover agent of the Philadelphia Narcotics Squad used an intermediary to purchase several packets of heroin from defendant Santana. The agents provided the money and the impetus for the purchase. Immediately after the purchase, the intermediary was arrested within a block and a half of the purchase site (defendant's residence), providing some likelihood that word of the arrest would quickly reach defendant.[9] Acting without a warrant but with sufficient information to satisfy probable cause requirements,[10] agents returned to defendant's residence intending to arrest her.[11]

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5. *Id.* at 2409.

6. United States v. Watson, 423 U.S. 411 (1976).

7. 96 S. Ct. at 2409.

8. The three concurring Justices and the two dissenting Justices argued the case on the basis of seizure rather than search criteria. *Id.* at 2410 (White, Stevens & Stewart, JJ., concurring); *id.* at 2411-12 (Marshall & Brennan, JJ., dissenting). Given the number of state statutes, *see, e.g.*, CAL. PENAL CODE § 844 (West 1970); KY. REV. STAT. § 70.078 (1971); TENN. CODE ANN. § 40-807 (1975), federal statutes, *see, e.g.*, 18 U.S.C. § 3052 (1970) (FBI agents); 18 U.S.C. § 3056(a) (1970) (Secret Service agents); 18 U.S.C. § 3601 (1970) (post office agents); 21 U.S.C. § 878 (1970) (Drug Enforcement Administration agents), and federal court decisions, *see, e.g.*, United States v. McKinney, 379 F.2d 259 (6th Cir. 1967), that would support the action of the agents in this case, it would appear that the case would not have been decided differently under seizure-criteria. *But see* DEL. CODE ANN. tit. 11, § 2305 (1975); VT. STAT. ANN. tit. 13, §§ 4701 & 4702 (1974); ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 220.1 (3) (1975); Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 STAN. L. REV. 995 (1971).

9. 96 S. Ct. at 2412 (Marshall, J., dissenting).

10. That there was a strong case for probable cause was determined by the district court. *Id.* at 2409.

11. *Id.*

When the agents arrived at defendant's residence, she was standing in her doorway; a step forward would have put her outside the house and a step back would have put her within the house.[12] The officers rushed from their van shouting "police," whereupon defendant retreated into her home where officers followed and took her into custody. A search incident to the arrest[13] turned up packets of a substance that later proved to be heroin, as well as some of the marked money that the agents had furnished the intermediary.[14]

At trial in federal district court, defendant Santana moved to suppress the evidence. In an oral opinion, the District Court for the Eastern District of Pennsylvania granted the motion on the ground that the agents failed to obtain a warrant.[15] The Court of Appeals for the Third Circuit affirmed the decision without opinion.[16] The United States Supreme Court reversed, holding that defendant Santana's doorway was a "public place," and that a warrantless arrest does not violate the fourth amendment when an individual is arrested upon probable cause in a public place.[17] The Court found support for its public place determination in language from *Katz* and *Hester v. United States*,[18] to the effect that fourth amendment protection does not extend to those things that one exposes to public view. This portion of the opinion is extremely brief, providing no explanation for the choice of these particular cases and offering scant analysis of their facts in light of their holdings. In addition, the Court avoided holding that one's doorway is a "public place."

A right of personal privacy,[19] as such, is nowhere guaranteed to the individual by the Constitution.[20] Although the Bill of Rights was intended to provide the individual with the maximum feasible pro-

12. *Id.* at 2408 n.1.

13. The packets fell to the floor as the agents apprehended Santana, *id.* at 2408; therefore their seizure of the heroin was not constitutionally invalid. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969).

14. 96 S. Ct. at 2408.

15. *Id.* at 2409.

16. *Id.*

17. *Id.*

18. 265 U.S. 57 (1924).

19. Privacy is defined in many ways, but it seems that the ability to control access to information about oneself is at the heart of the term. One's appearance, actions and thoughts may provide information about one's self. It is the ability to control access to these that gives us a sense of privacy. *See* Fried, *Privacy*, 77 YALE L.J. 475, 482-83 (1968).

20. *But see* Griswold v. Connecticut, 381 U.S. 479, 484 (1965), in which the Court found a constitutional right of privacy to be implied by at least five of the Bill of Rights amendments. *Accord*, Roe v. Wade, 410 U.S. 113 (1973).

tection against governmental intrusion into his or her private life, the right to privacy only became an issue in the courts in the late nineteenth century.[21] In *Boyd v. United States*[22] in 1886, the Court recognized that it was not the danger of physical intrusion that so concerned the drafters of the Bill of Rights, but rather it was the threat of forcible exposure of information that an individual might have expected to keep private that was of primary concern. Governmental search and seizure of personal property involves property rights,[23] certainly, but the fundamental constitutional issue concerns an individual's right to control access to information about himself.[24]

Early in the development of case law analyzing fourth amendment searches, the courts began to require that the individual take some responsibility for the protection of his privacy from governmental intrusion. In 1924 in *Hester v. United States*,[25] the Court approved the actions of government agents who, acting on reliable information, approached to within one hundred yards of defendant's farm house to observe him selling illegal whiskey. This "search" and the subsequent seizure of incriminating evidence were upheld on the ground that the fourth amendment does not protect people who act in "open fields,"[26] though the agents apparently were trespassing on Hester's land at the time of the search and were acting without a warrant.

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21. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). "In very early times . . . the 'right to life' served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; . . . now the right to life has come to mean the right to enjoy life,—the right to be let alone . . . ." *Id.* at 193. *See also* Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891). "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 251.

22. 116 U.S. 616 (1886). The Court reversed a circuit court decision requiring that defendant turn over invoices to federal revenue agents and finding that such compulsory production violated the fourth and fifth amendments. Referring to Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), a case that was viewed as partially responsible for the inclusion of the fourth amendment in the Bill of Rights, the Court said:

> [The principles laid down in *Entick*] apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .

Id. at 630.

23. Katz v. United States, 389 U.S. 347, 350 n.4 (1967) (citing Griswold v. Connecticut, 381 U.S. 479, 509 (Black, J., dissenting)).

24. *See* note 19 *supra*; Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 978 (1968).

25. 265 U.S. 57 (1924).

26. *Id.* at 59.

The open fields doctrine is one of the more conservative applications of the fourth amendment. The appellation "open fields" is misleading, since Hester was actually within the yard of his farmhouse;[27] therefore, in *Hester* the Court restricted fourth amendment protections at least to enclosed spaces, and probably to the home of an individual.[28] The trespass of the searchers in no way invalidated the search,[29] and the line of cases drawing authority from *Hester* has upheld the use of searchlights, high powered field glasses and other surveillance technology.[30]

Olmstead v. United States,[31] decided in 1928 in conjunction with *Hester*, provided the analytical framework for fourth amendment cases for nearly forty years. Out of *Hester* came the line of cases delineating those areas that were subject to fourth amendment protection, while *Olmstead* provided the rationale for dealing with fourth amendment violations of those areas. In *Olmstead*, the Court held that a physical invasion of an area subject to fourth amendment protection was necessary to sustain a violation, and thus, words that leave a home via telephone wires are beyond protection.[32]

The *Hester-Olmstead* cases led to a fairly rigid framework into which the Court had to fit subsequent search and seizure cases. Following *Hester* and *Olmstead* the courts determined, first, whether the area in question could be termed a constitutionally protected area[33] and, second, whether a trespass upon that area had been committed. Under this rationale, constitutionally protected areas came to include,

27. Subsequent case law has held that the area in and around the home is protected from a *trespassory* search. *See* United States v. Molkenbur, 430 F.2d 563, 566 (8th Cir.), *cert. denied*, 400 U.S. 952 (1970); Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968); Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968); Care v. United States, 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956).

28. Justifying the seizure of evidence, the Court said, "This evidence was not obtained by the entry into the house . . . ." 265 U.S. at 58.

29. *Id.*

30. United States v. Lee, 274 U.S. 559 (1927), first approved the use of a searchlight, and analogized it to the use of field glasses, paving the way for a large number of cases that would approve the use of technology-assisted visual searches. *See* United States v. Minton, 488 F.2d 37 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Fullbright v. United States, 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968); Care v. United States, 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956); Commonwealth v. Hernley, 216 Pa. Super. Ct. 177, 263 A.2d 904, *cert. denied*, 401 U.S. 914 (1970). On the use of field glasses and binoculars for searches see On Lee v. United States, 343 U.S. 747 (1952); Annot., 48 A.L.R.3d 1178 (1973).

31. 277 U.S. 438 (1928).

32. *Id.* at 464-66.

33. The phrase itself did not appear until 1951 in United States v. On Lee, 193 F.2d 306, 314 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952).

in addition to one's home,[34] a business office,[35] a store,[36] a hotel room,[37] an apartment,[38] a garage,[39] an automobile,[40] and a taxi cab;[41] trespass came to include governmental intrusion in person,[42] or by microphone or surveillance device.[43]

The inflexibility of this rationale led to a hair splitting analysis that centered upon the physical location of defendant.[44] *Katz v. United States*[45] presented the Court with an excellent opportunity to alter the "constitutionally protected areas" rationale. FBI agents had recorded conversations that were a part of defendant's illegal betting operation by placing an electronic recording device on the outside of a phone booth that was occasionally used for defendant's illegal purposes. Writing for the majority, Justice Stewart noted that the Court would no longer allow the issues to be formulated in terms of invasion of constitutionally protected areas.[46] Laying the foundation for his new framework, Stewart noted that the fourth amendment protects citizens against certain kinds of governmental *intrusion*[47] but that it "protects people, not places."[48] The public-private dichotomy was not to be

34. Olmstead v. United States, 277 U.S. 438 (1928); United States v. Lee, 274 U.S. 559 (1927); United States v. Hester, 265 U.S. 57 (1924).

35. Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

36. Davis v. United States, 328 U.S. 582 (1946); Amos v. United States, 255 U.S. 313 (1921).

37. Parks v. United States, 386 U.S. 940, 951 (1966); Hoffa v. United States, 385 U.S. 293, 301 (1966); United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949).

38. *See* Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 362 U.S. 257 (1960); McDonald v. United States, 335 U.S. 451 (1948).

39. Taylor v. United States, 286 U.S. 1 (1932).

40. Gambino v. United States, 275 U.S. 310 (1927).

41. *See* Rios v. United States, 364 U.S. 253 (1960).

42. *Id.*; Gambino v. United States, 275 U.S. 310 (1927).

43. Silverman v. United States, 365 U.S. 505 (1961); On Lee v. United States, 343 U.S. 747 (1952).

44. In 1964 the Court found that a trespass had been committed when a microphone the size of a thumbtack had been put in a common wall. Clinton v. Virginia, 377 U.S. 158 (1964) (concurring opinion), *rev'g per curiam* Clinton v. State, 204 Va. 275, 130 S.E.2d 437 (1963). Earlier, the Court had held that a microphone placed *against* a partition wall to monitor conversations was not a trespass, Goldman v. United States, 316 U.S. 129 (1942), but that the penetration of a tiny "spike mike" through a wall required the application of the fourth amendment protections. Silverman v. United States, 365 U.S. 505 (1961). Clearly, the intrusion issue became outdated with the advanced surveillance technology developed during this forty year period.

45. 389 U.S. 347 (1967).

46. *Id.* at 349-53.

47. But Justice Stewart also stated that fourth amendment protections are not aimed at guaranteeing a general right to privacy, the protection of which is generally left to the individual states. *Id.* at 350-51.

48. *Id.* at 351.

based upon prior determinations of which enclosed areas were constitutionally protected, but rather upon what an individual knowingly exposed to the public and what he sought to preserve as private.[49] Physical intrusion was no longer an essential factor.[50] Under the new rationale an individual was due the protection of the fourth amendment whenever he justifiably relied upon an expectation of privacy.[51]

In *Santana*, the Court found support for the arrest by looking to another recent case, *United States v. Watson*,[52] in which it was held that the warrantless arrest of an individual in a public place upon probable cause does not violate the fourth amendment. Under the *Watson* rationale, therefore, if the state can show that defendant Santana's doorway is a public place, then the attempted arrest is justifiable, as are the pursuit of defendant Santana into her home in order to complete the arrest[53] and the seizure of the heroin packets spilled

49. *Id.* at 351-52.

50. The Court specifically overruled the trespass requirements stated in Olmstead v. United States, 277 U.S. 438 (1928), and Goldman v. United States, 316 U.S. 129 (1942). 389 U.S. at 353.

51. *Id.* In a concurring opinion, Justice Harlan laid out a two-pronged test that has become commonly used to determine whether an individual justifiably relied on an expectation of privacy: "first, that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). While the test appears to have two parts, it seems unlikely that a court will often make use of the first criterion. It can be assumed that an expectation will be alleged in most cases, and that it will be found lacking only when an individual does something that would clearly undermine that claim, such as the display of contraband in a crowded public area. The second criterion should be determinative in most cases, however. The alleged expectation must appear reasonable in light of the surrounding circumstances and in light of societal values, a standard that is very close to the reasonable man standard found in tort law. *See* Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J. LEGAL REF. 154, 178-79 (1972).

The use of societal values as a standard in the determination provides substantial flexibility in the application of the test, although the obvious difficulties of arriving at an adequate definition of so broad a phrase insured that the Court would rely on the previously determined "constitutionally protected areas" as a starting point for analysis. A particularly good discussion of the *Katz* standards can be found in United States v. Vilhotti, 323 F. Supp. 425 (S.D.N.Y. 1971).

> [T]o ascertain what constitutes an unreasonable search the court must evaluate a person's efforts to ensure the privacy of an area or activity in view of both contemporary norms of social conduct and the imperatives of a viable democratic society. . . .
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> . . . .
>
> . . . [U]nder *Katz*, an agent is permitted the same license to intrude as a reasonably respectable citizen would take. Therefore, the nature of the premises inspected—e.g., whether residential, commercial, inhabited or abandoned—is decisive; it determines the extent of social inhibition on natural curiosity and, inversely, the degree of care required to insure privacy.

Id. at 431.

52. 423 U.S. 411 (1976).

53. *See* Warden v. Hayden, 387 U.S. 294, 298-300 (1966); McDonald v. United States, 335 U.S. 451, 456 (1948).

in the process.[54] Accordingly, the entire case turns on the characterization of defendant's doorway.

On the face of it, the description of the threshold of a residence as a public place appears rather bizarre. A doorway is not a place one expects strangers to cross or gather without having some legitimate business to conduct with the occupant. While not actually within the confines of the "home" a doorway is directly attached to it, and in this case, separated from the public path by some fifteen feet of property that might also be considered private.[55] A comparison with the public place involved in *Watson* adds no greater strength to the *Santana* rationale. Watson was arrested in a public restaurant during the lunch hour, a place where one's claim to a specific spot is temporary, and where one can expect to be surrounded by a substantial number of unknown persons.[56]

To justify the Court's decision in *Santana*, Justice Rehnquist distinguished the private-public dichotomy as it is applied in a common law property context from its application in a fourth amendment context.[57] The common law protected one's home and its immediate grounds from physical trespass because they were considered private. Under *Hester*, Justice Rehnquist indicated, what is not hidden from the view, hearing and touch of the world around the individual is not protected by the fourth amendment.[58] The cases that follow *Hester* support that position,[59] and further, support the proposition that government agents have at least the same right to visual search as would a disinterested citizen since the agents are allowed to trespass upon an individual's property to obtain a view of the "open field." Given this interpretation of *Hester*, Santana's doorway would hardly be a protected area, as she was fully visible from a public street only five feet away. There are, however, no limits that can be drawn on visual (and presumably aural and olfactory)[60] searching under the *Hester* rule. In an age of highly advanced surveillance techniques and equip-

54. *See* note 13 *supra*.
55. 96 S. Ct. at 2408.
56. 423 U.S. at 413.
57. 96 S. Ct. at 2409.
58. The Court could use *Hester* to define the type of "place" in which the defendant was found, because the *Katz* case, while clearly overruling the *Olmstead-Goldman* line of cases, did not overrule the line of cases defining "constitutionally protected areas." *See* 389 U.S. at 352.
59. Fullbright v. United States, 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968); Hodges v. United States, 234 F.2d 281 (5th Cir. 1957); Care v. United States, 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956).
60. *See* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

ment, a simple extension of the *Hester* ruling would require that an individual spend a good deal of his life closing shades and curtains, whispering or writing messages rather than conversing, and burning any trash or garbage that could be marginally incriminating.[61] In contrast, *Katz* offers a more balanced approach to the questions of public versus private places. While not eliminating the locational aspects of the issue altogether, it focuses on the reasonableness of an individual's expectation of privacy. Katz, although in a public place and exposed to public view, could reasonably expect his conversations to remain private.[62]

Rehnquist's use of the *Katz* case in *Santana* indicates that he reads *Katz* as a mere extension of the *Hester* rationale. He quotes, out of context, the rule that "[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection,"[63] never recognizing that in *Katz*, the Court accompanied that rule by another: that "[w]hat [a man] seeks to to preserve as private, even in an area accessible to the public, may be constitutionally protected."[64] There was no discussion in the opinion of whether Santana might have justifiably relied upon an expectation of privacy as mandated by *Katz*, but rather the opinion contained only a simple statement that Santana was not in an *area* where she had any expectation of privacy.[65] The predication of her expectation of privacy upon the area in which she was located looks very much like the application of the "constitutionally protected areas" rationale that was discredited in *Katz*.

Failure to use the *Katz* rationale in this case seems odd. Had *Katz* been applied in full, the Court would probably have reached the

61. An extensive survey of state and federal cases involving governmental surveillance has led one author to conclude that

> we have the specter of a fourth amendment which protects any man who retreats into his home to be free from unreasonable intrusion. Any man, that is, who is wealthy enough to afford a windowless, soundproof house, built on an extensive area of land and surrounded by high fences, and a man who is willing to live the life of a hermit, staying inside his home at all times, prepared to take affirmative action to counter any new technological methods of intrusion with which the government might be equipped.

Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home Is His Fort*, 23 CLEV. ST. L. REV. 63, 72 (1974). *See also* Comment, *Police Helicopter Surveillance and Other Aided Observations: The Shrinking Reasonable Expectation of Privacy*, 11 CASE W. RES. L. REV. 505 (1975).

62. "[W]hat he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." 389 U.S. at 352.

63. 96 S. Ct. at 2409 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

64. 389 U.S. at 351-52.

65. 96 S. Ct. at 2409.

same result. Assuming that Santana had an expectation of privacy, the question becomes whether that reliance was justified. Santana was arguably within her home, an area that is specifically mentioned in the fourth amendment and that the courts have treated as uniquely deserving of protection,[66] but the greater number of cases that argue for special protection for the home are concerned with trespassing rather than visual searches.[67] It could have been argued that while Santana could expect certain types of privacy as she stood in her doorway, she certainly could not expect that her person would not be noticed and identified by the public some fifteen feet away. Katz justifiably relied upon a right to privacy in his conversations, though he could not reasonably expect to be free from visual search. Santana's failure to make any effort to conceal her person destroys any claim to visual privacy that she might have had. Once that privacy is lost, even under *Katz*, her arrest would likely be held valid given the existence of probable cause.[68]

The central issue in *Santana* was not analyzed sufficiently to support the Court's determination; the factual basis for the classification of defendant's doorway as a public place was not discussed in substantial detail, and the *Katz* case was not accurately represented in support of the Court's decision. On the particular facts of *Santana*, the Court's mistreatment of the *Katz* precedent was unnecessary since the Court could have reached the same decision under a strict application of the *Katz* test. The result is one that appears to clear the way for increased governmental surveillance of individuals' lives.

EDWIN P. CHESTER

66. Camara v. Municipal Ct., 387 U.S. 523, 530-31 (1967) ("even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority"); Lewis v. United States, 385 U.S. 206, 211 (1966) ("the home is accorded the full range of Fourth Amendment protections"); Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); Weeks v. United States, 232 U.S. 383, 389-91 (1914) (invasions of the home without a properly attested warrant should find no sanction in the courts).

67. This factor, of course, would have been far more important had the Court not chosen to analyze this case in terms of cases which deal with non-trespassory search.

68. *But see* authorities cited to the contrary in note 8 *supra*.

Grand Jury Secrecy: A Grand Jury Witness' Right to His Own Testimony

Only within the past thirty years have the courts begun to intrude into the theretofore inviolate secrecy of the grand jury process.[1] Defendants have been far more successful in obtaining access to grand jury testimony than have the grand jury witnesses themselves, despite many similarities in circumstance and the logical inconsistencies that such differences in treatment display.[2] Traditionally, courts cite the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts"[3] as a talisman to ward off further analysis of the validity of grand jury secrecy.[4] They have been reluctant to permit access to grand jury testimony except "discreetly and limitedly."[5] The Court of Appeals for the Fourth Circuit, in *Bast v. United States*,[6] used this talismanic approach to deny a grand jury witness a transcript of his testimony despite reasonable, even compelling, justifications for such disclosure as of right.

Plaintiff in *Bast* had testified voluntarily before a grand jury, which subsequently returned no indictments. He was not a probable defendant, nor had he testified under a grant of immunity.[7] Plaintiff claimed that he was entitled to a copy of his grand jury testimony, offering several justifications for his need. The most compelling reasons advanced were the necessity of correcting any inadvertent errors in his testimony and the need to combat rumors he claimed were being circulated that he was a government informer.[8]

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1. This rise roughly coincides with the introduction of Federal Rule of Criminal Procedure 6 in 1946. Comment, *Grand Jury Secrecy: Should Witnesses Have Access to Their Grand Jury Testimony as a Matter of Right?*, 20 U.C.L.A. L. REV. 804, 811 n.36 (1973).

2. As will be shown, an analysis of the reasons for grand jury secrecy presents a far more compelling justification for a witness to obtain a transcript of his own grand jury testimony than for a defendant to obtain testimony of grand jury witnesses.

3. United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958).

4. *See* Justice Brennan's dissent in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 406 (1959): "The Court, while making obeisance to a 'long-established policy' of secrecy, makes no showing whatever how denial of [defendant's] grand jury testimony serves any of the purposes justifying secrecy."

5. United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958).

6. 542 F.2d 893 (4th Cir. 1976). Judge Widener wrote the majority opinion from which Judge Wyzanski dissented.

7. *Id.* at 894.

8. *Id.* Other reasons cited by plaintiff were: (1) he was suing the federal government in the United States District Court for the District of Columbia; (2) a transcript would insure accurate disclosure of his testimony; and (3) he might subsequently be indicted as a result of his appearance before the grand jury.

The district court denied Bast's motion requesting a copy of his grand jury testimony and the Fourth Circuit affirmed.[9] The court of appeals based its decision on the principle, set out in *United States v. Proctor & Gamble Co.*,[10] that release of proceedings of the grand jury should only be granted upon a showing of some "particularized need."[11] The majority in *Bast* did not find persuasive the argument that since Federal Rule of Criminal Procedure 6(e)[12] imposes no condition of secrecy on a grand jury witness there is no justification for nondisclosure.[13] The majority found that there was no evidence of possible transcript error and that there was no substantiation of Bast's claim as to the rumors that he was a government informer.[14]

The dissent in *Bast* noted the factual distinction between this case and *Procter & Gamble*, which it felt rendered *Procter & Gamble* inapposite as precedent.[15] Citing the "equities" of allowing disclosure the dissent felt that plaintiff's voluntary testimony gave him a prima facie right to a copy of his own testimony, absent a showing by the government of some compelling need for secrecy.[16]

An analysis of *Bast* requires a brief review of the historical development of grand jury secrecy.[17] Although the grand jury may have

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9. *Id.* at 897.

10. 356 U.S. 677 (1958).

11. *Id.* at 683.

12. FED. R. CRIM. P. 6(e) provides in part:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for the use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occuring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment . . . . No obligation of secrecy may be imposed upon any person except in accordance with this rule.

13. 542 F.2d at 896.

14. *Id.* at 896-97.

15. *Id.* at 898 (Wyzanski, J., dissenting). Judge Wyzanski cited with approval the reasoning of Judge Frankel in United States v. Projansky, 44 F.R.D. 550 (S.D. N.Y. 1968), and Judge Hufstedler in Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). *Id.* at 897.

16. *Id.* at 898-99. Although not mentioning Rule 6(e) specifically, Judge Wyzanski discussed the illogic of refusing to give plaintiff a copy of his testimony although he was free to divulge its contents. He also cited the ability to correct mistakes in the record as another factor militating for disclosure. *Id.* at 898.

17. *See generally* Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461 (1959); Comment, *Secrecy in Grand Jury Proceedings: A Proposal for a New Federal Rule of Criminal Procedure 6(e)*, 38 FORDHAM L. REV. 307 (1969); Comment, *supra* note 1.

had its deepest roots in Roman, Scandinavian and Greek criminal law,[18] its common law inception occurred in 1166 with the Grand Assize.[19] The Grand Assize served more of a prosecutorial, as opposed to investigatorial, function and its deliberations were open to the public.[20] In 1368, after the slow decline of the Grand Assize, a new body arose—*le grande inquest*—which was charged with lodging all criminal prosecutions. This body adopted the custom of hearing witnesses in private.[21] Secrecy, however, did not become institutionalized until the trials of Stephen College[22] and the Earl of Shaftesbury[23] at which time it became a method of preventing influence and control of the grand jury by the Crown.[24]

The grand jury was brought to America with the same basic premise of secrecy.[25] Eventually, fear of government abuse of the grand jury process subsided and government prosecutors were permitted to be present during testimony.[26] Governmental influence on the grand jury has increased and today the prosecutor often directs and controls the grand jury.[27] Secrecy is no longer juxtaposed between the grand jury and the government[28] but is used, instead, to shield the witnesses[29] from the defendant.

18. Whyte, *supra* note 17, at 462. *See also* Kuh, *The Grand Jury "Presentment": Foul Blow Or Fair Play?*, 55 COLUM. L. REV. 1103, 1106 (1955).

19. Calkins, *supra* note 17, at 456-57.

20. *Id.* at 456-57. "This was an age when little regard was given to the rights of private citizens." *Id.* at 456.

21. *Id.* at 457.

22. 8 How. St. Tr. 550 (1681). The grand jury demanded to hear evidence of College's treason against Henry II in private. After considering the matter the grand jury refused to indict College. G. EDWARDS, THE GRAND JURY 28-29 (1906).

23. 8 How. St. Tr. 759 (1681). This was another case involving treason against Henry II. After initially being forced to hear the witness' testimony in public the jury requested and was finally granted the right to hear him in private. The jury refused to indict based on the evidence heard in private. Calkins, *supra* note 17, at 457.

24. Calkins, *supra* note 17, at 458. One article, Tigar & Levy, *The Grand Jury as the New Inquisition*, 50 MICH. ST. B.J. 693, 694 (1971), asserts that secrecy was for the protection of the private individual while Watts, *Grand Jury: Sleeping Watchdog or Expensive Antique?*, 37 N.C.L. REV. 290, 292 (1959), claims that secrecy arose for the protection of the defendant.

25. Comment, *supra* note 1, at 806. In the American case of Peter Zenger, 17 How. St. Tr. 675 (1735), closely paralleling those of College and Shaftesbury, an American grand jury used secrecy to protect the accused from political pressure by the governor of New York. Although the grand jury refused to indict Zenger for his newspaper attacks on the governor, he was finally charged by information. *See* Kuh, *supra* note 18, at 1108-09.

26. Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MAR. J. PRAC. & PROC. 18, 19 (1967).

27. *See, e.g.*, Comment, *supra* note 1, at 807-08.

28. *See In re* Russo, 53 F.R.D. 564, 569 (C.D. Cal.), *aff'd*, 448 F.2d 369 (9th Cir. 1971).

29. *See* Calkins, *supra* note 26, at 20.

The majority's opinion in *Bast* is paradigmatic of the approach that most courts take in this area.[30] The court cited with approval the "historic" justifications for grand jury secrecy and cited precedents that uphold the sanctity of secrecy,[31] but failed to evaluate the validity of these reasons in the context presented. A contextual analysis of grand jury secrecy reveals that not only are there no justifications for imposing secrecy in this instance,[32] but there are compelling reasons why disclosure should be granted as a matter of right to such a witness.[33]

The initial question in the analysis of a grand jury witness' right to a copy of his own testimony[34] is whether any of the historical justifications for secrecy are viable in this context.[35] Modern courts have generally summarized these historical justifications in five reasons:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trials of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated . . . .[36]

This analysis must be carried out in light of Federal Rule of Criminal Procedure 6(e), which imposes no bond of secrecy on a grand jury witness and allows him freely to disclose what has transpired during his presence as a witness.[37] Thus, the witness is allowed to disclose

30. *See generally In re* Grand Jury Witness Subpoenas, 370 F. Supp. 1282 (S.D. Fla. 1974); *In re* Alvarez, 351 F. Supp. 1089 (S.D. Cal. 1972).

31. 542 F.2d at 894-95.

32. *See* text accompanying notes 37-42 *infra.*

33. *See* text accompanying notes 73-78 *infra.*

34. Under FED. R. CRIM. P. 6(e) the court has the power to order disclosure. *In re* Minkoff, 349 F. Supp. 154, 155-57 (D.R.I. 1972).

35. This analysis assumes, as was true in *Bast*, that the grand jury has already been dismissed. "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940).

36. United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)). These reasons were first set out in United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931).

More recent discussions of these reasons for secrecy tend to combine reason (1) with (3) as a single policy consideration. *See In re* Russo, 53 F.R.D. 564, 569 (C.D. Cal.), *aff'd*, 448 F.2d 369 (9th Cir. 1971). *See also* 8 J. WIGMORE, EVIDENCE § 2360, at 734-35 (McNaughten rev. 1961).

37. *See In re* Disclosure of Evidence Before October, 1959 Grand Jury, 184 F. Supp. 38 (E.D. Va. 1960).

the very information of which he is trying to obtain a transcribed copy.[38]

The grand jury's deliberation and vote are in total secrecy and disclosure of a witness' recorded testimony does not interfere with the jurors' freedom.[39] Thus the second reason is inapposite. At first blush, the first and third reasons seem persuasive, but, since the witness is free to disclose all that he knows, the "evil" is in the witness' freedom to disclose, not in furnishing him with a transcript. The last justification is perhaps the most persuasive, but again the witness' freedom to disclose his own testimony makes production of a written copy no more damaging to the grand jury's secrecy. Continued existence of Rule 6(e) impliedly indicates that the innocent accused has not suffered under this rule of disclosure.

The remaining justification for secrecy is to encourage free disclosure by grand jury witnesses without fear of retaliation. This rationale is also inapplicable when the witness is seeking his own testimony. If the witness has the right to disclose his own testimony, then furnishing him with a recorded transcript in no way further violates the protection that he has essentially waived.

It is important to note that allowing a witness to obtain a recorded copy of his testimony in no way *forces* him to divulge the contents of his testimony. Existing practices that prevent disclosure of the witness' testimony absent some "compelling necessity"[40] are logically consistent with disclosure to the witness, since the privilege of non-disclosure is that of the witness himself.[41] Thus the major distinction in *Bast* is that the witness is seeking his own testimony, and in light of Rule 6(e) none of the justifications for secrecy seem valid.[42]

The majority in *Bast* cited *United States v. Procter & Gamble Co.* for the proposition that grand jury testimony will not be disclosed without a showing of "particularized need."[43] An examination of the factual setting in *Procter & Gamble* indicates that the pronouncement may

38. It is evident from the fact that Rule 6(e) has been in effect for over 30 years without substantial change that its policy of allowing a witness the freedom to disclose his own testimony is sound and that freedom has not undermined the grand jury's effectiveness. *See In re* Russo, 53 F.R.D. 564, 570-71 (C.D. Cal.), *aff'd*, 448 F.2d 369 (9th Cir. 1971).

39. *See* Calkins, *supra* note 26, at 25.

40. *See* Arlington Glass Co. v. Pittsburgh Plate Glass Co., 24 F.R.D. 50, 52 (N.D. Ill. 1959).

41. 8 J. WIGMORE, *supra* note 36, § 2362, at 736.

42. *See* Dennis v. United States, 384 U.S. 855, 872 n.18 (1966).

43. 542 F.2d at 895 (citing 356 U.S. at 681-82). In 1957, in Jencks v. United

not be applicable in the *Bast* situation.[44] *Procter & Gamble* involved a defendant in a civil antitrust suit who sought discovery under Federal Rule of Civil Procedure 34[45] of the *entire* grand jury transcript. The Court, in denying defendant discovery, relied heavily upon one justification of the rule of secrecy: "To encourage all witnesses to step forward and testify freely without fear of retaliation."[46] In the context

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States, 353 U.S. 657 (1957), a case dealing with a criminal defendant's right to review secret FBI reports, the Court announced a broad policy of disclosure. 353 U.S. at 667-72. Because the language was so broad, many commentators interpreted this policy to include grand jury testimony. Comment, *supra* note 1, at 812.

The next year the Court, in *Procter & Gamble*, retreated from this broad policy and announced the "particularized need" test. *See* 356 U.S. at 681-82. The formulation of this test was never clear. Justice Douglas listed examples of situations where particularized need was shown, such as: (1) to impeach a trial witness, (2) to refresh a trial witness' recollection and (3) to test credibility of a trial witness. *Id.* at 683. But the Court failed to announce any specific criteria. Referring to the case at hand the Court held that no compelling necessity had been shown "for *wholesale* . . . production of a grand jury transcript," *id.* at 684, indicating that perhaps defendant's transgression was to ask for too *broad* a discovery. Indeed, it should also be kept in mind that the defendant was seeking discovery under FED. R. CIV. P. 34, which specifically requires a showing of "good cause."

44. In the year following the *Procter & Gamble* decision the Court extended the "particularized need" test to cover a criminal defendant's attempt to discover a trial witness' grand jury testimony. In Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1958), the majority refused to allow disclosure over the strong dissent of four Justices who felt that the majority had "exalt[ed] the principle of secrecy for secrecy's sake." *Id.* at 407. The dissenters in *PPG* were particularly disturbed by the majority's reliance on *Procter & Gamble* as precedent, since in *PPG* defendant was seeking only a particular portion of the grand jury testimony rather than the whole testimony. They felt that the purpose of the "particularized need" test was to prevent "fishing expeditions," not to deny defendant this type of legitimate access. *See* Comment, *supra* note 1, at 814.

The specific holding in *PPG* has been changed by statute. The 1970 amendment to the Jencks Act, 18 U.S.C. § 3500 (1970) provides in part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.
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> . . . .
>
> (e) The term "statement," as used in subsection (b) . . . means—
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> . . . .
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

45. FED. R. CIV. P. 34 provides in part:

> Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control
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> . . . .

46. 356 U.S. at 682.

of *Procter & Gamble* this protection of the witness by non-disclosure may be valid.[47] Providing a witness with his own testimony, however, is not inconsistent with this policy.

The court of appeals ignored the most recent examination by the Supreme Court of grand jury secrecy. In *Dennis v. United States*,[48] the Court reversed a criminal defendant's conviction and remanded for a new trial because the trial court had refused defendant's request seeking disclosure of grand jury testimony of four government witnesses.[49] The trial court had based its denial on defendant's failure to show "particularized need."[50] The majority, finding that defendant had demonstrated a "particularized need,"[51] recognized the long-established policy of secrecy but emphasized "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[52]

The significance of *Dennis* is that for the first time the Supreme Court took a pragmatic approach to the scope and intended purpose of the secrecy doctrine.[53] The implication of *Dennis* seems to be that the "particularized need" test of *Procter & Gamble* is simply a balancing test, weighing the traditional reasons for secrecy against the need for disclosure.[54] In fact, the Court seemed to be citing *Procter & Gamble* as one in a line of cases in the trend of liberalizing disclosure of grand jury testimony.[55] Thus, even under the "particularized need" test, if there is no need for secrecy, the grand jury testimony should be disclosed.[56]

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47. In the *Procter & Gamble* context, where the grand jury testimony of a witness is being sought by another person (there a defendant) at least reason (4) has some validity. *But see* 8 J. WIGMORE, *supra* note 36, § 2362, at 736.

48. 384 U.S. 855 (1966).

49. *Id.* at 875.

50. *Id.* at 868.

51. *Id.* at 872.

52. *Id.* at 870.

53. Calkins, *supra* note 26, at 32.

54. One commentator has argued that the factors that the Court in *Dennis* relied on as supporting defendant's "particularized need" were so general and confusing as seemingly to render the test a nullity. *See* Note, *Impeaching the Prosecution Witness: Access To Grand Jury Testimony*, 28 U. PITT. L. REV. 338, 341-42 & n.21 (1966). *See also* United States v. Projansky, 44 F.R.D. 550 (S.D.N.Y. 1968).

In criticizing the majority's use of the "particularized need" test, the dissent in *PPG* stated: "Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted . . . ." 360 U.S. at 403 (Brennan, J., dissenting).

55. 384 U.S. at 869-71.

56. "[W]hen once the reasons for a policy to be pursued no longer exist, certainly

It is clear from recent developments in statutory law that the validity of this policy of liberalizing disclosure has been recognized.[57] Federal Rule of Criminal Procedure 16(a)(1)(A) provides in part: "Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph . . . recorded testimony of the defendant before a grand jury which relates to the offense charged." It is clear from the 1975 amendment to Rule 16, which changed the Rule's language from "the court may order" to "the government shall permit,"[58] that a defendant's right is not subject to the court's discretion.[59] Disclosure to the defendant of his grand jury testimony is mandated by the growing recognition of the proper mode of criminal prosecution and by the recognition that providing a defendant with his own testimony does not violate any of the traditional justifications for grand jury secrecy.[60]

The dissent in *Bast* argued that it follows *a fortiori* from Rule 16(a)(1)(A) that a voluntary witness has a right to a copy of his own grand jury testimony.[61] The analogy to 16(a)(1)(A) is convincing especially in light of the previous conclusion that secrecy has no validity with respect to a witness' own testimony. The dissent felt that, analogous to a defendant's right under Rule 16(a)(1)(A), a witness was entitled to a transcript of his testimony as of right, absent a showing by the government of compelling grounds for non-delivery.[62]

Another recent extension of this liberalized disclosure policy is seen in the 1970 amendment to the Jencks Act.[63] This statute, passed in response to the Supreme Court's decision in *Jencks v. United*

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the requirement to pursue that policy ends." Atwell v. United States, 162 F. 97, 99 (4th Cir. 1908).

57. The majority in *Bast* saw FED. R. CRIM. P. 16(a)(1)(A) as a method by which plaintiff could obtain his testimony *if* he was indicted. 542 F.2d at 897. No analogy was drawn between a criminal defendant's rights under the rule and the rights of plaintiff in this case.

58. Many courts interpreted the old language as implying that disclosure was discretionary. The change reflects the policy that, not only is a defendant's right to his own testimony mandatory, but the defendant need not even seek court approval for disclosure. *See* 1975 Comm. Note to FED. R. CRIM. P. 16.

59. For a case anticipating the non-discretionary nature of Rule 16(a)(1)(A) discovery see United States v. Projansky, 44 F.R.D. 550 (S.D.N.Y. 1968).

60. *See* 8 J. MOORE, FEDERAL PRACTICE ¶ 16.05[2], at n.20 (1976). *See also* Dennis v. United States, 384 U.S. 855, 871-72 & n.18 (1966).

61. 542 F.2d at 899 (Wyzanski, J., dissenting).

62. *Id.* "It is not suggested in the case at bar that the government has shown or could show any extraordinary circumstances militating against disclosure . . . . Nor is it indicated that . . . plaintiff would be unwilling to meet his fair share of any expense already incurred or hereafter to be incurred." *Id.* at 897.

63. 18 U.S.C. § 3500 (1970), *quoted in* note 44 *supra.*

States,[64] allows a criminal defendant to discover pretrial statements of a witness after the witness has testified at trial.[65] The most significant provision of the amendment broadens the scope of the defendant's discovery to allow a witness' grand jury testimony to be discovered.[66] The underlying policy is that once a grand jury witness testifies at trial there is no longer any need for secrecy of his grand jury testimony, and the possibility of inconsistencies because of perjury or the passing of time militates for discovery.

This statutory development of liberalized disclosure in favor of the criminal defendant and the lack of statutory provisions for disclosure to the grand jury witness is not a rejection of the witness' concomitant rights to discovery of his own testimony. It is merely a recognition of the urgent need for expanding the rights of the criminal defendant, especially in light of the reluctance that the courts have traditionally displayed.[67]

Implicit in the disclosure policies of Rule 16(a)(1)(A) and the Jencks Act, as well as in a witness' request for a transcript of his grand jury testimony, is the assumption that such a transcript exists. Presently, there is no requirement that testimony before a federal grand jury be recorded verbatim.[68] Acknowledged to be the "better procedure,"[69] it is argued by commentators that recording should be made mandatory.[70] Failure to record circumvents the usefulness of statutory discovery procedures[71] such as Rule 16(a)(1)(A) and the Jencks Act as well as the benefits flowing from disclosure to the witness.[72]

It is perhaps not enough to say that there is merely no valid justification for non-disclosure of a witness' testimony. It is clear, though, that disclosure aids the criminal process in several ways. Some of these reasons were expounded in Judge Ferguson's opinion in *In re Russo*,[73] a case involving the right of a grand jury witness to condition

64. 353 U.S. 657 (1957).
65. The pre-1970 Act did not include a witness' grand jury testimony. *See* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398 (1959).
66. *See* note 44 *supra*.
67. *See* Comment, *supra* note 1, at 816.
68. *See* 8 J. MOORE, *supra* note 60, at ¶ 6.02[2][d] n.24.
69. United States v. Cramer, 447 F.2d 210, 214 (2d Cir. 1971).
70. *See* 8 J. MOORE, *supra* note 60, at ¶ 6.02[2][d] nn.24 & 24.1. *See also* Comment, *supra* note 1, at 821.
71. *See* the dissent in United States v. Cramer, 447 F.2d at 223.
72. *See* text accompanying notes 73-77 *supra*.
73. 53 F.R.D. 564 (C.D. Cal.), *aff'd*, 448 F.2d 369 (9th Cir. 1971).

his testimony on receiving a transcribed copy afterwards.[74] Judge Ferguson felt that a written transcript would insure that the witness' attorney was provided with an *accurate* record of the proceedings.[75] A written transcript would also minimize the possibility of the witness' publicizing false information regarding the grand jury proceedings.[76] Judge Ferguson was especially impressed by the opportunity a written transcript would give the witness and his attorney to correct errors in the transcript or inadvertent mistakes in the testimony itself.[77] After examining the traditional justifications for secrecy, in the light of Rule 6, and finding none of them applicable when a witness seeks his own testimony, Judge Ferguson held that a witness could obtain a copy of his testimony upon "show[ing] only that his testimony was recorded and a transcript could be made."[78]

Jurisprudential thought has progressed substantially from Learned Hand's pronouncement, in *United States v. Garsson*, that "the accused

74. The case involved the grand jury testimony of Anthony Russo concerning his connection with the Pentagon Papers episode. Russo was subpoenaed to appear before the grand jury but refused, claiming a privilege against self-incrimination. At the government's request, the district court granted him immunity, but Russo still refused to testify. He was then held in contempt and committed to custody.

The litigation in *Russo* involved Russo's motion to submit to grand jury questioning if a copy of his testimony were supplied to him. The district court had approved Russo's motion, but after testifying, he was refused a transcript. Although the question raised was whether the court had "the power to purge the witness of civil contempt of court by accepting his promise to testify if he is furnished a transcript of his testimony," 53 F.R.D. at 566, Judge Ferguson considered the issue of whether a grand jury witness had any right to a transcript of his testimony and held that he did. *Id.* at 572.

75. 53 F.R.D. at 571. Disclosure not only assures that errors in transcripts can be detected but also gives the witness' attorney an opportunity to discover governmental excesses. *See* Comment, *supra* note 1, at 819.

See also Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972), in which the court held that a grand jury witness could obtain a copy of his testimony in order to protect him from repetitious questions, unless the government could show "some particularized and substantial reason why this should not be allowed." *Id.* at 1080.

76. The opposite side of this coin was presented in *Bast*, where the witness wanted a copy of the testimony to counter rumors that he was a government informer. *See* 542 F.2d at 894.

77. 53 F.R.D. at 571. As Judge Ferguson said:

> Any attorney who has ever undertaken the laborious process of deposing witnesses knows how errors and mistakes creep into the reporter's transcript. Any trial judge who has had to determine motions to correct transcripts knows that mistakes are made and how vitally important it is that they be corrected immediately when the testimony is still fresh in the minds of the court, counsel and witnesses.

Id. at 571-72.

The dissent in *Bast* also cited correction of errors as a motivation for disclosure. 542 F.2d at 898. This motivation does not require any showing of actual mistake or even probability of actual mistake.

78. 53 F.R.D. at 572. *See also In re* Craven, 13 CRIM. L. REP. (BNA) 2100 (N.D. Cal. 1973).

has every advantage."[79] The development of the defendant's rights to discovery have included substantial rights to examine heretofore secret grand jury testimony. Unfortunately, concomitant rights of the grand jury witness have not developed as rapidly. Too often the courts, in denying the witness a copy of his own grand jury testimony, refuse to examine the present validity of the "historical" justifications for grand jury secrecy. Such an examination leads inexorably to the conclusion that these justifications are not viable where the witness is seeking his *own* testimony, and that the benefits of disclosure mandate it *as of right.*

ALAN A. HARLEY

Labor Law—Application of Right-To-Work Laws in Multistate Workforce Situations

Sections 8(a)(3)[1] and 14(b)[2] of the Labor Management Relations (Taft-Hartley) Act[3] provide that union[4] and agency[5] shop agree-

79. 291 F. 646, 649 (S.D.N.Y. 1923).

1. 29 U.S.C. § 158(a)(3) (1970). This section provides in part:

> (a) It shall be an unfair labor practice for any employer—
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . .

2. 29 U.S.C. § 164(b) (1970). This section provides: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

3. Act of June 23, 1947, ch. 120, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-187 (1970)).

4. Section 8(a)(3), passed in 1947 as a reaction to widespread abuses of closed shop agreements originally allowed under § 8(3) of the National Labor Relations Act, Act of July 5, 1935, ch. 372, sec. 8(3), 49 Stat. 452, bans the closed shop in industries covered by federal labor law, but continues to permit union shops subject to § 14(b). The union shop requires the employee to join the union within a specified time after hiring, whereas the closed shop requires union membership as a prerequisite to both initial and continued employment.

5. It is well settled that § 14(b) applies to the agency shop as well as the union shop agreement. *See* Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963).

ments are valid except when they conflict with a state's right-to-work law.[6] Congress, by its passage of the Taft-Hartley Act, chose not to establish a uniform national rule allowing the union shop, and left the states free to pursue more restrictive policies concerning union security agreements.[7] However, "the language of § 14(b) provides no clear guidance for determining" which, if any, state's law "should prevail in a multijurisdictional situation."[8] In a case of first impression, *Oil, Chemical & Atomic Workers Union v. Mobil Oil Corp.*,[9] the United States Supreme Court held that the employees' predominant job situs is the controlling factor in determining which state is empowered to prohibit agreements requiring union membership as a condition of employment.[10]

Mobil Oil Corporation Marine Transportation Department, Gulf-East Coast Operations (Company), is headquartered in Beaumont, Texas, from which it operates a fleet of eight ocean-going oil tankers.[11] The Oil, Chemical and Atomic Workers International Union, AFL-CIO, with its Local 8-801 (Union), is the exclusive collective bargaining representative of 289 unlicensed seamen who man the Company's

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Under the agency shop, union membership is not a condition of continued employment; in lieu of such membership, however, employees are required to pay union dues and initiation fees as if they were members. The agency shop agreement was designed to curb the abuses of compulsory unionism while at the same time preventing "free riders" who benefited from union representation without having to pay union dues. S. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407 (1948).

6. *See generally* Morgan, *Right-to-Work Laws: The Current State of Affairs*, 23 CASE W. RES. L. REV. 570 (1972); Skinner, *Legal and Historical Background of the Right-to-Work Dispute*, 9 LAB. L.J. 411 (1958).

7. *See* Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301, 313-14 (1949). Section 14(b) "was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements. . . . It was desired to 'make certain' that § 8(a)(3) could not 'be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy.' " Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746, 751 (1963) (quoting H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 60 (1947)). "By [the enactment of § 14(b)], Congress has not only authorized multiformity on [union security agreements], but practically guaranteed it." Motor Coach Employees v. Lockridge, 403 U.S. 274, 317 (1971) (White, J., dissenting). "There is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws . . . ." Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963).

8. Oil, Chem. & Atomic Workers Union v. Mobil Oil Corp., 96 S. Ct. 2140, 2151 (1976).

9. 96 S. Ct. 2140 (1976).

10. *Id.* at 2144.

11. *Id.* at 2143. Additionally, all personnel records are maintained in Beaumont, and all final hiring decisions are made there. *Id.*

tankers.[12] These seamen perform all of their duties aboard ship, and eighty to ninety percent of their work is performed while the ships are on the high seas, outside the territorial bounds of Texas.[13]

In 1969 the Company and the Union entered into a collective bargaining agreement that contained an agency shop clause.[14] This clause compelled all employees to decide within thirty-one days from the date of employment either to join the union or pay the regular union dues and initiation fees.[15] In 1971 the Company initiated a declaratory judgment action under section 301 of the Taft-Hartley Act[16] to determine the validity of the agency shop clause. The Company contended that the clause violated the Texas right-to-work laws and was, therefore, void and unenforceable.[17] In response, the Union asserted that the job situs of the seamen was predominantly on the high seas, outside the State's territorial bounds, and that the Texas right-to-work laws should not be applied to the union security provision.[18]

The district court, after a full evidentiary hearing, found that Texas was more closely connected with the company/seamen employment relationship than any other state, and, therefore, Texas law ap-

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12. *Id.* at 2142 n.3, 2143. Of the 289 seamen in question, 123 were residents of Texas and 60 were residents of New York. The others were spread over 21 states. Sixty percent of the workers applied for their jobs in Beaumont and forty percent applied in New York. Beaumont, New York City and Providence, R.I., comprised the three cities designated by the seamen as "home port," but this designation was used solely for determining travel allowances to and from their residences. *Id.* at 2143.

13. *Id.* The seamen have the option of drawing their wages aboard ship, having allotments sent from Beaumont to designated payees, or both. *Id.*

14. *Id.* at 2142-43. The collective bargaining agreement was negotiated and executed in New York and was re-executed in Texas. *Id.* at 2143.

15. *Id.* at 2143; *see* note 5 *supra.*

16. 29 U.S.C. § 185 (1970).

17. 96 S. Ct. at 2143. It was conceded by the parties that Texas law forbids both union shop and agency shop agreements. *Id.* The following statutes are in point:

> It shall be unlawful for any labor union, any labor organizer, any officer, any agent or representative or any member of any labor union to collect, receive or demand, directly or indirectly, any fee, assessment, or sum of money whatsoever, as a work permit or as a condition for the privilege to work from any person not a member of the union . . . .

TEX. REV. CIV. STAT. ANN. art. 5154a, § 8a (1971);

> It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

Id. art. 5154g, § 1;

"No person shall be denied employment on account of membership or nonmembership in a labor union." *Id.* art. 5207a, § 2.

In addition, the Texas Attorney General has decided that union shop agreements violate the above statutes. OP. ATT'Y GEN. TEX. No. WW-1018 (March 14, 1961).

18. 96 S. Ct. at 2144.

plied to terms of the collective bargaining agreement.[19] Accordingly, the court declared that the agency shop clause was invalid in contravention of the Texas right-to-work laws. A three-member panel of the Court of Appeals for the Fifth Circuit reversed.[20] On rehearing en banc,[21] however, the full court vacated the panel's decision and held that Texas law was applicable despite the fact that the employees' job situs was on the high seas.[22]

The Supreme Court reversed. Writing for a majority of five,[23] Justice Marshall stated that section 14(b) of the Taft-Hartley Act does not authorize the operation of a state's right-to-work laws to void a union security agreement, permitted under section 8(a)(3), when the employees' job situs is located outside the state having such laws.[24] The Court concluded that since the employees' predominant job situs was on the high seas, Texas' right-to-work laws could not apply to the agency shop provision.[25]

19. Mobil Oil Corp. v. Oil, Chem. & Atomic Workers Union, 81 L.R.R.M. 2051, 2052 (E.D. Tex. 1972).

20. Mobil Oil Corp. v. Oil, Chem. & Atomic Workers Union, 483 F.2d 603 (5th Cir. 1973), *noted in* 11 HOUS. L. REV. 709 (1974). The panel was divided with Judge Thornberry dissenting. The majority emphasized the predominant importance of the employees' job situs. Since state right-to-work laws can only apply to employees of that particular state and since the seamen's principal place of employment was on the high seas, the majority concluded that the seamen were not employees of Texas or any other state for the purposes of the collective bargaining agreement and, therefore, that state right-to-work laws could not apply. 483 F.2d at 610.

21. Mobil Oil Corp. v. Oil, Chem. & Atomic Workers Union, 504 F.2d 272 (5th Cir. 1974) (en banc), *noted in* 88 HARV. L. REV. 1620 (1975) *and* 44 U. CIN. L. REV. 384 (1975). Judge Thornberry wrote for the majority in an eight to six decision. Judge Ainsworth wrote a dissenting opinion, and Chief Judge Brown wrote a separate dissent. Brown, joined by Judge Dyer, stated that the case should rest in the primary jurisdiction of the NLRB. 504 F.2d at 287-89.

22. 504 F.2d at 275. After a careful analysis of the relevant contacts that Texas had with the seamen in question and the purposes of the Taft-Hartley Act, the court held that "the federal labor legislation, the predominance of Texas contacts over any other jurisdiction, and the significant interest which Texas has in applying its right-to-work law to this employment relationship warrant application of the Texas law and, consequently, invalidation of the agency shop provision." *Id.*

23. Justice Stevens joined the majority except for the suggestion that federal policy favors permitting union security agreements. 96 S. Ct. at 2147-48. Chief Justice Burger concurred in the majority's judgment, *id.* at 2147, as did Justice Powell. Powell, however, stated in a separate opinion that the job situs test is neither appropriate nor required. He felt that seamen, as wards of admiralty, maintain a special status with respect to the regulation and control of their employment, and that they should be exempt from the operation of § 14(b). *Id.* at 2148; *see* text accompanying notes 51 & 52 *infra*. Justice Stewart, joined by Justice Rehnquist, dissented, stating that the place of hiring is a more appropriate test in determining the choice of law for union security agreements. *Id.* at 2148-55; *see* text accompanying note 33 *infra*.

24. 96 S. Ct. at 2144. The Court held that "it is the employees' predominant job situs rather than a generalized weighing of factors or the place of hiring that triggers the operation of section 14(b)." *Id.*

25. *Id.* at 2147. The Court emphatically concluded that if the employees' predomi-

To reach this result without any explicit statutory basis, the majority relied first upon its statutory interpretation of section 14(b) as it applies to section 8(a)(3). To the Court, section 8(a)(3), in dealing with union and agency shop agreements, directly relates to post-hiring conditions, both in "effect and purpose."[26] The Court reasoned that section 14(b) is simply a reflection of section 8(a)(3) in that the former section focuses on state regulation of the post-hiring employment relationship, the center of which is the job situs.[27] Additionally, the majority ascertained from the legislative history to the Taft-Hartley Act a congressional intent that the job situs was of central concern to section 14(b).[28]

The Court was impressed by two practical considerations for the use of the job situs test. First, it concluded that the test minimized "the possibility of patently anomalous extra-territorial applications of any given State's right-to-work laws."[29] Secondly, the job situs test was

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nant job situs is outside the bounds of any state, then no state has "sufficient interest" in the employment relationship to be able to apply its own right-to-work laws. *Id.* This conclusion effectively excludes all seamen in the maritime industry from state right-to-work laws. Although the Court stated that under this test it has not created an exemption for the entire maritime industry (*e.g.*, longshoremen and other workers whose job situs is still ashore), *id.*, it has done judicially for the majority of maritime workers what the 1951 Railway Labor Act Amendment, 45 U.S.C. § 152(11) (1970), did legislatively for railway and airline workers, that amendment having exempted rail and air transport unions from state right-to-work laws. By the mere fact that the Court settled on the job situs test, rather than a substantial contacts or place-of-hiring test, it excluded the operation of § 14(b) from the mobile maritime industry, for under the other tests state right-to-work laws would be allowed to extend out on the high seas.

26. 96 S. Ct. at 2145. This view is contrary to that of Judge Thornberry in his opinion for the Fifth Circuit, 504 F.2d at 277, and to that of Justice Stewart in the Supreme Court dissent, 96 S. Ct. at 2153, both of which saw the emphasis on the hiring process itself. The Court here properly concluded that the abuses of the hiring process were eliminated with the outlawing of the closed shop and with it, the hiring hall, and that, therefore, Congress' concern over the hiring process was exhausted upon its passage of § 8(a)(3). *Id.* at 2144-45; *see* note 1 *supra*. The focus is no longer on the hiring process but on conditions to be imposed upon an employee only after he is hired. *See* S. REP. No. 105, 80th Cong., 1st Sess. 6-7 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407 (1948). *See also* NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963). The post-hiring conditions concern the benefits to be gained by union representation during the employment period, while the worker is on the job. 96 S. Ct. at 2145.

27. 96 S. Ct. at 2146. The Court emphasized the importance of the job situs to the employment relationship in describing it as that "place where the work that is the very *raison d'être* of the relationship is performed." *Id.*

28. *Id.* The House Committee Report on the Taft-Hartley Bill concluded that union or agency shop agreements would be valid "only if they are valid under the laws of any State in which they are to be performed." H.R. REP. No. 245, 80th Cong., 1st Sess. 34 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 325 (1948). The Court held that union security agreements are "performed" on the job situs. 96 S. Ct. at 2146.

29. 96 S. Ct. at 2146.

recognized as facilitating the determination of the validity of a union security agreement by parties who are in the collective bargaining process.[30]

In his dissent, Justice Stewart, on the other hand, felt that the place of hiring is the critical factor in the analysis of the choice of state law.[31] He buttressed this position with the conclusions: (1) the legislative intent of the Texas right-to-work laws focused on the hiring process;[32] (2) the state of the place of hiring is most deeply concerned with the conditions of hire; and (3) the state of the place of hiring normally provides the largest portion of the workforce.[33]

Although the Supreme Court majority in *Mobil* presented a tenable argument that Congress in 1947 intended for the job situs to be the focal concern of the operation of section 14(b), the dissent presented an equally plausible argument that Congress simply neglected to confront the choice of law problems in multistate workforce situations. Hence, reliance on the language of the statute and legislative history of section 14(b) as an approach to this issue results in tenuous legal conclusions at best. Therefore, the determination of which test to apply is better understood in light of the historical background and practical considerations that underlie the right-to-work controversy.

The National Labor Relations Act of 1935 (Wagner Act),[34] through the legalization of union security agreements, especially the

30. *Id.* at 2146-47.

31. *Id.* at 2152-53.

32. *Id.* at 2152. Finding no guidance from the language or legislative history of § 14(b), the dissent turned to the Texas statutes for assistance, weakly rationalizing that since § 14(b) allowed the individual states to prohibit union security agreements in accordance with their own state's policy, an analysis of Texas' policy concerning such agreements could shed light on how § 14(b) should be applied. *Id.* at 2152-53. Just because Texas right-to-work laws reflect a state concern over the hiring process, however, one cannot infer that all other states with right-to-work laws enacted them primarily because of the same concern. It appears to be arbitrary and capricious to impose upon all states a test that merely reflects one state's purpose in enacting its own right-to-work laws and to ignore the many and varied policies of the other right-to-work states. Otherwise, to allow the dissent's approach would be to narrow this decision to the application of Texas right-to-work laws only. Accordingly, the Court would subsequently have to analyze the right-to-work policies of every other state with a right-to-work law and formulate a test for each state in accordance with those policies. Needless to say, there could be as many tests as states, and the result would be an unworkable mixture of conflicting state policies being applied in a criss-cross fashion over the entire nation.

33. *Id.* at 2153. The dissent seems to have misinterpreted the Texas statutes as even applying to the hiring process, for concern over the hiring process as controlled by union security agreement was eliminated with the banning of the closed shop. Right-to-work laws reflect concern over conditions of employment *after* hiring. *See* note 26 *supra.*

34. 29 U.S.C. §§ 151-168 (1970).

closed shop, increased tremendously the power of labor unions at the expense of management by allowing the unions to control the hiring process.[35] By 1947, Congress felt that this authority had created an overshifting of power in labor's favor and that a necessary realignment should be imposed upon union/management relations in order to readjust this imbalance.[36] As a result, Congress passed the Taft-Hartley Act, which specifically outlawed the closed shop and, through the controversial section 14(b), allowed the individual states to outlaw all other forms of union security agreements.[37] The passage of the Taft-Hartley Act, viewed by the labor unions as a large set-back to their movement,[38] created the impetus for the current right-to-work controversy.[39]

Debate on the right-to-work laws has flourished ever since.[40] Proponents of these laws bridle at the thought of compulsory union membership.[41] The fact that federal labor policy[42] allows for fifty-one percent of the employees in an employment relationship to impose union membership upon the remaining forty-nine percent without the latter's consent raises for right-to-work proponents an emotional issue primarily based on morality and individual freedom.[43] Opponents of these laws argue that without the authority to make union security

35. *See also* Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pt. II), 61 HARV. L. REV. 291 (1948); Skinner, *supra* note 6, at 416.

36. 96 S. Ct. at 2150; *see* S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407 (1948). *See also* notes 4 & 26 *supra.*

37. *See* notes 2 & 5 *supra.*

38. *See generally* Cox, *supra* note 35, at 296; Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233, 242 (1959).

39. *See* notes 6 & 7 *supra.* In fact, the nation's first right-to-work law was passed in Florida in 1944, three years before the Taft-Hartley Act. FLA. CONST. OF 1885, Declaration of Rights, § 12 (1944) (now FLA. CONST. art. I, § 6). The constitutionality of the right-to-work law was sustained by the Supreme Court in Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949), and AFL v. American Sash & Door Co., 335 U.S. 538 (1949). In *Lincoln Federal* the Court stated, "States have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of a federal constitutional prohibition or federal law." 335 U.S. at 536.

40. *See generally* Cox, *supra* note 35; Dempsey, *The Right-to-Work Controversy*, 16 LAB. L.J. 387 (1965); Eissinger, *The Right-to-Work Imbroglio*, 51 N.D.L. REV. 571 (1975); Morgan, *supra* note 6; Pollitt, *supra* note 38; Skinner, *supra* note 6; Warshal, *"Right-to-Work," Pro and Con*, 17 LAB. L.J. 131 (1966). Eleven years after the enactment of the Taft-Hartley Act, one index contained 23 typewritten pages on articles dealing with the right-to-work issue. *See* Hutchinson & Patterson, *List of Publications on the Right-to-Work Question* (1958), *cited in* Pollitt, *supra* note 38, at 234.

41. Eissinger, *supra* note 40, at 575.

42. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

43. *See* Pollitt, *supra* note 38, at 264.

agreements, unions become ineffective and unable to represent properly their members because of a dilution of their economic strength and power base.[44]

With the passage of section 14(b), Congress determined not to force a uniform union security policy upon the states, but to allow each state to enact laws to reflect its own policy.[45] Under the authority of section 14(b), nineteen states[46] have enacted right-to-work laws with the power to interpret and enforce union and agency shop restrictions within their own jurisdictions.[47] Yet until *Mobil* no case had discussed the applicability of a state's right-to-work laws when the situs at which all the employees covered by a union security agreement performed the bulk of their work was located outside the state having such laws.[48] An analysis of the Court's selection of the job situs test as opposed to a "place of hiring" or a "substantial contacts" test[49] results in a realization that the job situs test is the only practical solution to this right-to-work issue if the national labor policy,[50] as legislatively enacted, is to continue as intended.

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44. *See id.* at 266. The issue is seen as a "conflict . . . between labor's right to organize, solidify its strength and preserve the group interest [and] the individual worker's right to obtain and keep his job . . . unfettered by organizational entanglements he may not want." Eissinger, *supra* note 40, at 575.

45. *See* note 7 *supra.*

46. Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Four states—Delaware, New Hampshire, Maine, and Indiana—passed and then repealed right-to-work laws. Twenty states have specifically rejected them. Louisiana's law pertains only to agricultural workers. Two states, Colorado and Wisconsin, allow union security agreements; however, they have enacted regulatory laws over such agreements. *See* Morgan, *supra* note 6, at 572-575; Skinner, *supra* note 6, at 419.

47. *See* Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96 (1963); Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963); NLRB v. General Motors Corp., 373 U.S. 734 (1963).

48. The cases that can be labelled closest to precedent on this issue were decided under § 9(e)(1), 29 U.S.C. § 159(e)(1) (1970), which requires the NLRB to supervise employee elections to authorize the negotiation of union security agreements. In Giant Food Shopping Center, Inc., 77 N.L.R.B. 791 (1948), and Western Elec. Co., 84 N.L.R.B. 1019 (1949), the Board held that the job situs at the time of the election determines which state law applies to multistate workers, and that a state's laws outlawing such agreements could not apply to workers whose job situs was in another state. *See* note 65 *infra.*

49. In addition to the dissent's place of hiring test and the Fifth Circuit's substantial contacts test, other discussed solutions besides the job situs test were: (a) maritime exemption for seamen, supported both by Justice Powell, 96 S. Ct. 2148; *see* note 23 *supra,* and Judge Ainsworth in his dissent, Mobil Oil Corp. v. Oil, Chem. & Atomic Workers Union, 504 F.2d 272, 282 (5th Cir. 1974); (b) the laws of the state where the bargaining agreement was negotiated, 96 S. Ct. at 2153 (dissent); *see* note 62 *infra*; and (c) the laws of both places of hire, in this case, Texas and New York. *See* 88 HARV. L. REV. 1620, 1629-30 (1975). *See also* note 62 *infra.*

50. *See* text accompanying note 42 *supra.*

Although *Mobil* involved a labor dispute in a maritime work environment, the maritime element was merely secondary to a broader issue. Primarily at issue was the application of a state's right-to-work laws on an employment relationship involving workers who perform their jobs outside the bounds of that state. The job situs test relied upon by the Court is applicable to both terrestrial and maritime labor relations. An approach to this case solely on the maritime issue, as advocated by Justice Powell in his concurring opinion,[51] would have affected the maritime industry in exactly the same manner as the majority's decision,[52] but it would have done no more. The *Mobil* majority did not view the case as a decision concerning the imposition of state laws in the maritime field only, and the absence of discussion related to maritime law in the majority's decision is relevant in appreciating their expanded view of the problem.

This broad perspective[53] places heavy emphasis on the policies and purposes of the national labor laws, which allow for conflicting policies among the states concerning the applicability of right-to-work laws within each state.[54] Because the right-to-work law greatly affects conditions of employment among the workers in a state, this national policy can be interpreted to express the importance for each state to have the power to control employment conditions according to its view of its own commercial and business affairs. If the federal government fully recognizes state authority to legislate right-to-work laws,[55] it follows that state governments are also required to recognize another state's authority in this area.

The job situs test is the only one of the proposed tests that fully recognizes state jurisdiction over union membership as a condition of employment within state boundaries. Before *Mobil*, the nineteen states with right-to-work laws had the power to enforce them within their own boundaries.[56] The remaining thirty-one states either favored or allowed under certain conditions the formation of union security agree-

51. 96 S. Ct. at 2148; *see* notes 23 & 49 *supra.*

52. Under Justice Powell's approach, the seamen would be placed in an exceptional status, under the regulation of federal statutory and admiralty law removed from the operation of § 14(b). The practical result is that union and agency shop agreements would be permissible, which is the same result reached by the majority. *See* note 25 and accompanying text *supra.*

53. Both the Supreme Court dissent, 96 S. Ct. at 2148, 2150-55, and the court of appeals, 504 F.2d at 274-82, viewed the issue from this broader perspective.

54. *See* note 7 *supra.*

55. The only exception to this is the Railway Labor Act. *See* note 25 *supra.*

56. *See generally* Morgan, *supra* note 6, at 572-73; Skinner, *supra* note 6, at 419.

ments within their territorial bounds.[57] No state had imposed its right-to-work law on a non-right-to-work state. After *Mobil*, with a job situs test for multistate workforce situations, the same nineteen states can apply their right-to-work laws to employment relationships with predominant job sites within their territorial bounds, and the same thirty-one states without right-to-work laws cannot be affected by the right-to-work laws of the other nineteen. With this test, right-to-work laws cannot be forced upon employee-employer relationships in states that, under section 8(a)(3), have permitted the existence of union and agency shop agreements. This result appears to be a rational conclusion of congressional intent reflected in sections 8(a)(3) and 14(b) of the Taft-Hartley Act.

Not only does the job situs test maintain the intent of the national labor policy, but also it provides for certainty in application of the law.[58] If the predominant job situs is located within a particular state, that state's laws on union security agreements will apply. This predictability of law allows collective bargaining parties to determine in advance whether a union security agreement will be permitted to cover employees at a certain job situs.[59]

The place of hiring test advocated by the Supreme Court dissent is at least equally certain of application.[60] If this test were to be applied, however, it is conceivable that the right-to-work states, if they were the places of hiring, could impose their right-to-work laws on all the other non-right-to-work states.[61] The place of hiring test could induce employers to forum shop to establish their place of hiring in a right-to-work state.[62] In effect, this test would defeat the purpose of section 14(b) to allow the states to govern union security agreements

57. *See* Morgan, *supra* note 6, at 572; Skinner, *supra* note 6, at 419.

58. 96 S. Ct. at 2146-47.

59. *Id.* at 2147.

60. See note 32 *supra*, however, for a criticism of the dissent's rationale in reaching this test as one to be applied uniformly to all union security agreements regardless of the state.

61. 96 S. Ct. at 2146.

62. *Id.* The dissent claims that there is nothing illegal or unethical about a company's relocating to seek more favorable labor laws, 96 S. Ct. at 2153 n.10; however, in criticizing a test based upon the state where the bargaining agreement was negotiated, the dissent attacks it as one that would encourage forum shopping. 96 S. Ct. at 2153. Admittedly, a corporate relocation entails a much greater burden than the selection of a site to negotiate a new employment contract; yet, the dissent still appears to condone forum shopping in support of the place of hiring test while attacking it in criticizing an opposing test. *Id.* Also, a company could legitimately locate its place of hiring separately from its corporate location with very little burden and without taint of evasion of labor laws.

since the employer, by its choice of place of hiring, could govern which state's laws would control its employment relationships regardless of the job situs. Forum shopping under the job situs test would be a useless procedure, for regardless of the employer's forum, its employees would be subject to the laws of the state of their job situs.

Application of the place of hiring test would also create the question of which state law should apply to the employment relationship upon a change of the place of hiring.[63] Such a change, if made between a right-to-work state and a non-right-to-work state, "could easily disrupt the management of labor relations and would create unjustifiable uncertainties in the law."[64] Such disruptions, as a result of the place of hiring test, would definitely not promote "[t]he goal of national labor policy, [which] is to promote industrial peace and stability."[65]

The Fifth Circuit's substantial contacts test, with its weighing of factors approach,[66] provides for a more flexible resolution of this issue

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63. For example, if employees were hired in Maryland to work predominantly at a Virginia job site, they would be bound, under the place of hiring test, by their union shop agreement despite Virginia's right-to-work laws. If the employer then changed its place of hiring to Virginia, a determination would have to be made on whether the place of the employees' actual hiring or the new location of the hiring office would be the controlling factor on which state's law applied. Under the former alternative, the union shop could continue to exist even when Maryland no longer had any interest in the employment relationship. Additionally, any new employees would be hired in Virginia subject to Virginia right-to-work laws and would be working alongside employees compelled by Maryland law to have joined the union. Under the latter alternative, with the abrupt change of the place of hiring, the union shop agreement would be abolished, an event that would also create problems for management of labor relations in addition to distrust and uncertainty between collective bargaining parties over the formation of union security agreements.

64. 96 S. Ct. at 2153 n.9 (dissent). The dissenters argue against this frictional situation in opposing a solution that would allow the law of more than one state to apply to union security agreements. For the solution they were opposing, see 88 HARV. L. REV. 1620 (1975).

65. Eissinger, *supra* note 40, at 593. The *Mobil* decision covers only the situation where *all* of the employees under a union security agreement perform most of their work outside a state having right-to-work laws. 96 S. Ct. at 2144. In this manner the Court has assured that uniformity of laws will exist for all of the employees of the collective bargaining unit, a result that aids in the peace and stability of labor relations.

A collective bargaining unit consisting of employees, some who work in a right-to-work state and others who work in a non-right-to-work state, cannot practically all be subject to one union security agreement. A possible solution to this dilemma facing the union that desires to organize under such an agreement is to create smaller bargaining units to encompass those areas whose right-to-work laws are similar in purpose and application. This approach was suggested under a different fact situation by the NLRB. *See* note 48 *supra*. The majority in *Mobil* noted that their job situs test was consistent with that of the NLRB's construction of the application of § 14(b) under § 9(e)(1) of the Wagner Act. 96 S. Ct. at 2147 n.11.

66. *See* note 22 *supra*.

than the rigid job situs test; and concededly, the substantial contacts test could often produce results parallel to those of the job situs test.[67] Despite its favorable points, however, the substantial contacts approach is hampered by the uncertainty of the identification and balancing of factors in each employment relationship.[68] Such uncertainty gives rise to an unpredictability in the determination of the validity of proposed union security provisions. For this reason, reliance on the job situs standard, with its certainty of application, is more desirable, since it enables collective bargaining parties to know in advance what laws will apply to their employment relationship.

Despite its practicality, the job situs test cannot possibly cover every conceivable employment relationship, and even when the standard is utilized, courts may be called upon to determine which job situs in an employment relationship is the predominant one. In some situations, courts may conclude that no job situs is so predominant as to be the controlling factor in the determination of state right-to-work law applications, and therefore, some reliance on a substantial contacts approach may be necessary. As long as right-to-work laws remain valid, however, the job situs test represents the best practical solution that recognizes the intent of the Taft-Hartley Act and the national labor policy to deal with multistate workforce situations.

JONATHAN ADAMS BARRETT

Labor Law—J.P. Stevens: Searching for a Remedy To Fit the Wrong

The stated purpose and policy of the National Labor Relations Act (NLRA or Act)[1] is to prescribe the rights of employees and employers in their interactions and to encourage the collective bargaining process.[2] Section 7 of the NLRA[3] guarantees to employees the right

67. The Supreme Court majority conceded this possibility in its criticism of the substantial contacts approach. *See* 96 S. Ct. at 2147.

68. *Id.*

1. 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975).

2. *Id.* § 151.

3. *Id.* § 157.

to organize themselves, to form, join or assist labor organizations, or to refrain from such activities. In a determined campaign to prevent or forestall unionization of its Southern plants, the J.P. Stevens Company has effectively negated these purposes, policies and guarantees. This campaign has involved numerous flagrant unfair labor practices, including coercive interrogation of union adherents,[4] surveillance of union organizers,[5] appeals to racial animosities,[6] threats of plant closings,[7] and economic reprisals such as extensive discriminatory discharges.[8] Neither fifteen adverse National Labor Relations Board (NLRB or Board) decisions, most of which have been enforced by circuit courts of appeals,[9] nor two contempt orders, issued by the

4. *See, e.g.*, J.P. Stevens & Co. [*Stevens II*], 163 N.L.R.B. 217, 218, *enforced as modified sub nom.* Textile Workers Union v. NLRB, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

5. *See, e.g.*, J.P. Stevens & Co. [*Stevens I*], 157 N.L.R.B. 869, 923 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

6. *See Oversight Hearings on the National Labor Relations Act Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong., 2d Sess. 181 (1976) [hereinafter cited as *1976 Hearings*].

7. *See, e.g.*, J.P. Stevens & Co. [*Stevens VII*], 179 N.L.R.B. 254, 257-58 (1969), *enforced*, 441 F.2d 514 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971).

8. *See, e.g.*, J.P. Stevens & Co. [*Stevens I*], 157 N.L.R.B. 869 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

9. For ease of reference, and following the pattern used by the NLRB and the courts of appeals, these cases will be cited as follows:

Stevens I: J.P. Stevens & Co., 157 N.L.R.B. 869, 872 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

Stevens II: J.P. Stevens & Co., 163 N.L.R.B. 217, *enforced as modified sub nom.* Textile Workers Union v. NLRB, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

Stevens III: J.P. Stevens & Co., 167 N.L.R.B. 266 (1967), *enforced as modified*, 406 F.2d 1017 (4th Cir. 1968).

Stevens IV: J.P. Stevens & Co., 167 N.L.R.B. 258 (1967), *enforced as modified*, 406 F.2d 1017 (4th Cir. 1968).

Stevens V: J.P. Stevens & Co., 171 N.L.R.B. 1202 (1968), *enforced*, 417 F.2d 533 (5th Cir. 1969).

Stevens VI: Black Hawk Corp., 177 N.L.R.B. 944 (1969), *enforced in part and denied in part*, 431 F.2d 900 (4th Cir. 1970).

Stevens VII: J.P. Stevens & Co., 179 N.L.R.B. 254 (1969), *enforced*, 441 F.2d 514 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971).

Stevens VIII: J.P. Stevens & Co., 181 N.L.R.B. 666 (1970), *enforced in part and denied in part*, 449 F.2d 595 (4th Cir. 1971).

Stevens IX: J.P. Stevens & Co., 183 N.L.R.B. 25 (1970), *enforced*, 461 F.2d 490 (4th Cir. 1972).

Stevens X: Black Hawk Corp., 183 N.L.R.B. 267 (1970).

Stevens XI: J.P. Stevens & Co., 186 N.L.R.B. 180 (1970), *enforced without opinion*, 455 F.2d 607 (5th Cir. 1971).

Stevens XII: J.P. Stevens & Co., 190 N.L.R.B. 751 (1971), *remanded*, 475 F.2d 973 (D.C. Cir.) (per curiam), *modified*, 205 N.L.R.B. 1032 (1973).

Stevens XIII: J.P. Stevens, 217 N.L.R.B. 513 (1975), *enforced*, 93 L.R.R.M. 2262 (4th Cir. 1976).

Second[10] and Fifth[11] Circuits, have deterred J.P. Stevens' anti-union animus. Not even the payment of $1.3 million in backpay awards to approximately 300 discriminatorily discharged workers has slowed the J.P. Stevens crusade.

The Textile Workers Union of America (TWUA) and the Industrial Union Department of the AFL-CIO launched their coordinated campaign to organize approximately twenty-five of the forty J.P. Stevens plants in North and South Carolina in the Spring of 1963.[12] Prior to the coming of the union, plants had been operated in a permissive manner. The Company was tolerant, even lenient, in such matters as absences, work breaks, transfers and re-hirings.[13] This pattern was quickly changed with the advent of the union. In the initial months of its campaign the union succeeded in enlisting a substantial number of employees, many of whom sent letters to Stevens notifying it of their support for the TWUA.[14] Subsequently, J.P. Stevens reprimanded and/or discharged many of these workers because of their union support; discharges followed as quickly as pretext could be found.[15]

This pattern of disregard for the dictates of the NLRA, with the added refinements of plant closings and unlawful refusals to bargain with NLRB recognized unions, has continued to the present. As the Fifth Circuit Court of Appeals stated in *Stevens VII*,[16] "Stevens' intransigent recidivism is patent and overt. . . . [N]either passage of time nor the admonishments of judicial tribunals have caused the Company

Stevens XIV: J.P. Stevens & Co., 219 N.L.R.B. 850, *enforced*, 93 L.R.R.M. 2262 (4th Cir. 1976).

Stevens XV: J.P. Stevens & Co., 220 N.L.R.B. No. 34 (1975).

10. NLRB v. J.P. Stevens & Co., 464 F.2d 1326 (2d Cir. 1972) (per curiam).

11. NLRB v. J.P. Stevens & Co., 538 F.2d 1152 (5th Cir. 1976).

12. For a factual history of the J.P. Stevens situation, see *1976 Hearings*, *supra* note 6, at 178-93. Ironically, J.P. Stevens, the second largest textile manufacturer in the South, with some 46,000 workers, was chosen as the target for this campaign because it was thought that J.P. Stevens would be more receptive to unionization than would Burlington Industries, the largest textile manufacturer in the South. Interview with Daniel H. Pollitt, Professor of Law, in Chapel Hill, N.C. (Jan. 7, 1977).

13. *Stevens I*, 157 N.L.R.B. 869, 963-64 (1966), *enforced as modified*, 380 F.2d 292, 296 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

14. This was done to ensure compliance with a Board requirement that in order to prove a discriminatory discharge in violation of section 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), it must be shown that the employer had knowledge of the worker's union affiliation. *See generally* Comment, *Employer Discrimination under Section 8(a)(3)*, 5 U. TOL. L. REV. 722 (1974).

15. *See Stevens I*, 157 N.L.R.B. 869 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

16. 441 F.2d 514 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971), *enforcing* 179 N.L.R.B. 254 (1969).

to alter its now all too familiar pursuance of full-scale war against unionization."[17] The economic rationale behind this "intransigent recividism" is obvious: the Company has saved untold millions of dollars by refusing to cooperate in collective bargaining. One estimate has placed the value of J.P. Stevens' unlawful conduct at $18,400 *per hour*.[18]

As long as violation of federal law wins financial enrichment for the wrongdoer, there remains a continuous and open invitation to ignore the law. This incentive to violate the NLRA emphasizes the need for a proper remedy for the J.P. Stevens situation. The Board and the courts must be especially concerned not only with the narrower context of struggle between union and employer but also with respect for the mandates and policies of the NLRA.[19] Neither the Board in its remedial orders[20] nor the courts in their contempt orders[21] have adequately confronted the need for an extraordinary remedy for the J.P. Stevens situation. It has become clear that only an order that requires, or holds out the promise that it may require, Stevens to pay out an amount of money commensurate with the amount it has saved by avoiding a collective bargaining contract[22] will serve to halt the J.P. Stevens anti-union crusade.

BOARD REMEDIES

The National Labor Relations Board has been given broad powers

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17. 441 F.2d at 521. *See also* the Second Circuit's contempt citation, in which the court stated:

> [R]espondents have flouted our prior decrees in many ways. In a continued attempt to dissuade employees from joining the Textile Workers Union of America, the company and its management personnel in various plants, despite our prior orders, have continued to resort to such unlawful tactics as engaging in surveillance of organizing activities, interrogating employees about their union inclinations, threatening pro-union employees with discharge and other reprisals, discriminatorily altering their working conditions and discharging them because of their union sympathies. In fact, one of the employees so discharged had been illegally terminated before, was reinstated by our prior order, but was then illegally discharged again.

NLRB v. J.P. Stevens & Co., 464 F.2d 1326, 1328-29 (2d Cir. 1972) (per curiam) (footnote omitted).

18. *1976 Hearings, supra* note 6, at 164; *see* 464 F.2d at 1329.

19. *See* SPECIAL SUBCOMM. ON LABOR OF THE HOUSE COMM. ON EDUCATION AND LABOR, 90TH CONG., 2D SESS., NATIONAL LABOR RELATIONS ACT REMEDIES: THE UNFULFILLED PROMISE (Comm. Print 1968).

20. *See, e.g., Stevens I*, 157 N.L.R.B. 869 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

21. *See 1976 Hearings, supra* note 6, at 184. The Fifth Circuit has not yet formulated its order. NLRB v. J.P. Stevens & Co., 538 F.2d 1152 (5th Cir. 1976).

22. *See* text accompanying note 18 *supra*.

to remedy unfair labor practices through section 10(c) of the NLRA.[23] The Supreme Court has often expressly acknowledged that broad discretion has been vested in the Board by Congress to formulate remedies.[24] Nevertheless, the Court has imposed two significant limitations on the Board's discretion: the sanction applied must be remedial rather than punitive,[25] and it must be appropriate to the particular situation before the Board.[26] In *Republic Steel Corp. v. NLRB*[27] the Court justified the punitive-remedial distinction as being in keeping with the remedial tone of the Act read as a whole.[28] Consequently, the Board cannot justify an order solely by showing that the remedy will deter unfair labor practices.[29] Rather, the remedy must be a reasonable attempt to compensate for the damage caused by the unfair labor practice. The second limitation is essentially a corollary of the first; a remedy not appropriate to the particular circumstances before the Board will be oppressive. Furthermore, an inappropriate remedy will fail to effectuate the policies of the Act.[30]

Within these limitations the Board may properly exercise considerable discretion. Too often, however, the NLRB resorts to preordained formulas that fail to safeguard adequately the rights guaranteed by the Act in the precise context before the Board.[31] In the J.P. Stevens cases the Board has restricted itself to the traditional framework of a cease and desist order accompanied by reinstatement with backpay and posting of notice orders. Only within the posting requirement has the NLRB attempted to tailor a remedy to fit the precise circumstances. Recognizing that the effects of Stevens' unfair labor practices extend beyond the plants directly involved, the Board in

23. 29 U.S.C. § 160(c) (1970) provides that, upon a finding that an unfair labor practice has occurred, the Board "shall issue and cause to be served . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]."

24. *E.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); International Ass'n of Machinists v. NLRB, 311 U.S. 72, 82 (1940).

25. Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938).

26. NLRB v. Cheney Cal. Lumber Co., 327 U.S. 385 (1946); NLRB v. Express Publishing Co., 312 U.S. 426 (1941).

27. 311 U.S. 7 (1940).

28. *Id.* at 10.

29. Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 658 (1961) (Harlan, J., concurring).

30. *See* NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

31. *See* Note, *The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. PA. L. REV. 69 (1963).

Stevens I[32] and *II*[33] directed that the notice be mailed to each employee of the Stevens plants in North and South Carolina and copies posted at all such plants. The NLRB further ordered that the notice be read to all employees, convened during working time, by a Company spokesman.[34]

In *Stevens XII*[35] the NLRB found that Stevens, in violation of section 8(a)(4)[36] of the NLRA, had discriminated against two workers for having testified on behalf of the union at a hearing. The Board's remedy consisted only of an order to cease and desist and to post compliance notices at the plant where the violations occurred. Acting upon the TWUA's petition for review of the NLRB order, the Court of Appeals for the District of Columbia Circuit remanded the case to the Board for consideration of a more stringent remedial order.[37] In response, the Board granted only the Union's request that additional material be added to the notice and directed that it be posted at all of J.P. Stevens' plants in North Carolina, South Carolina and Georgia.[38]

The ineffectiveness of such orders is amply demonstrated by the continuing stream of unfair labor practice charges involving J.P. Stevens that have been brought before the NLRB. Currently, ninety-four such charges are pending.[39] There is no question that the Board can and should take J.P. Stevens' history of recalcitrance into account in designing its remedy.[40] The Board's challenge, then, is to construct a sanction severe enough to deter Stevens' anti-union campaign while complying with the punitive-remedial distinction imposed by the Supreme Court.[41] Although under Supreme Court standards, deter-

32. 157 N.L.R.B. 869 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

33. 163 N.L.R.B. 217, *enforced as modified sub nom.* Textile Workers Union v. NLRB, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

34. This part of the order was later modified by the court of appeals to allow Stevens the option of having a Board representative read the notice. *Stevens I*, 380 F.2d at 304-05; *Stevens II*, 388 F.2d at 903-04.

35. 190 N.L.R.B. 751 (1971), *remanded*, 475 F.2d 973 (D.C. Cir.) (per curiam), *modified*, 205 N.L.R.B. 1032 (1973).

36. 29 U.S.C. § 158(a)(4) (1970).

37. 475 F.2d 973 (D.C. Cir. 1973) (per curiam).

38. 205 N.L.R.B. 1032 (1973).

39. *See Oversight Hearings on the National Labor Relations Board before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 128 (1975) (testimony of NLRB Chairman Betty Murphy). It should be noted that these 94 charges all involve discriminatory discharges and, hence, may not constitute a complete list of J.P. Stevens cases pending before the NLRB.

40. *Cf.* NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969) (cost of Board delay properly borne by wrongdoing employer).

41. *See* text accompanying note 25 *supra*.

rence in itself is not sufficient to justify a Board order it is certainly desirable that a properly remedial order have that effect.[42]

The net effect of fourteen years of unfair labor practices by J.P. Stevens has been to deny Stevens' employees their section 7[43] guaranteed rights to organize and bargain collectively.[44] Effective redress for this ultimate violation of section 8(a)(1)[45] should both compensate the party wronged and withhold from the wrongdoer the fruits of its violation.[46] Only the unique remedy of monetary compensation for loss of section 7 rights will serve directly to accomplish both these ends.

While employees choose to be represented by a union for a variety of reasons, it is axiomatic that the principal reason is economic. Employees want the opportunity to bargain collectively through a union because invariably there is a significant and direct monetary gain to them as a result of the first collective bargaining contract.[47] Thus, the economic value of the right to organize is the monetary gain that the employee may reasonably expect to obtain if the employer cooperates in the collective bargaining process. A compensatory remedy would direct Stevens to make its employees whole for the lost wages.

Correspondingly, the economic benefit to the employer may be measured by the increased wages not paid to its employees.[48] A related benefit to J.P. Stevens lies in the weakened support of the TWUA by Stevens' employees. As a result of Stevens' flagrant unfair labor

42. Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 659 (1961) (Harlan, J., concurring).

43. 29 U.S.C. § 157 (1970).

44. In light of this pattern of unfair labor practices it seems doubtful that Stevens' employees can freely exercise their right to organize. *See* Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. REV. 209 (1963). This study of 20,153 elections (of which 267 were re-runs) held between 1960 and 1962 shows that in over two-thirds of the cases in which re-run elections were held the party who caused the election to be set aside by its unfair practices won the re-run election. *See id.* at 212. Further, certain unfair labor practices are more effective than others in destroying election conditions. Threats of economic reprisals are clearly the most effective. *See id.* at 216. Finally, time appears to be a major factor. The study shows that if the re-run is held within thirty days of the election or more than nine months after, the chances of a different result are only one in five. *Id.* at 221. Thus, it appears unlikely in the J.P. Stevens situation that the union can expect an untainted election in the near future.

45. 29 U.S.C. § 158(a)(1) (1970) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

46. *See* Montgomery Ward & Co. v. NLRB, 339 F.2d 889, 894 (6th Cir. 1965).

47. *See* Ross, *Analysis of Administrative Process Under Taft-Hartley*, in 1966 LABOR RELATIONS YEARBOOK 299, 306; Schlossberg & Silard, *The Need for a Compensatory Remedy in Refusal-to-Bargain Cases*, 14 WAYNE L. REV. 1059, 1082-85 (1968).

48. The average pay of textile workers, excluding overtime pay, is $3.38 per hour, as compared to an average of $4.84 for all manufacturing production workers. *1976 Hearings, supra* note 6, at 153.

practices, the union has proven itself too weak to bargain effectively when it has reached the bargaining table.[49] A final benefit inuring to Stevens lies in its improved competitive position in the marketplace as a result of its artificially low labor costs.[50] This last benefit should be of special concern to the NLRB in that it would seem to act as a continuous inducement for other employers, particularly other textile manufacturers, to violate flagrantly the NLRA. Thus, an order designed to make Stevens employees economically whole for the denial of their guaranteed right to organize is appropriate.[51]

In the context of J.P. Stevens' massive violations of section 8(a)(1), a make whole order cannot be classified as punitive. Employees would not be enriched by such a remedy; rather, they would merely be afforded monetary compensation equivalent to the loss sustained. Arguably, an order directing Stevens to make its employees whole for lost wages is less than fully compensatory in that it fails to account for the intangible benefits of a collective bargaining contract such as dignity and job security.[52] Nor can this make whole remedy be dismissed as speculative.[53] The rule barring recovery of uncertain damages does not preclude the recovery of damages that are definitely attributable to the wrong and only uncertain as to their amount.[54] When the nature of the wrongful act itself precludes the ascertainment of the

49. The TWUA won an election at the J.P. Stevens plant in Roanoke Rapids, North Carolina on August 28, 1974. No contract has resulted, however. Rather, the union has filed refusal to bargain charges with the NLRB, under § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970). *Id.* at 191-92.

50. *See* note 48 *supra.*

51. The economic value of the right to organize is borne out by a recent study that found that a collective bargaining contract resulted in 86% of the cases in which the union was recognized by the employer as required by law. Ross, *supra* note 47, at 306. It should be noted that the appropriateness of this remedy is not undermined by recognition of the fact that section 7 also guarantees the right to refrain from self-organization. The reasonable expectation of monetary gain from the collective bargaining process is not dependent upon whether an employee supports the union or not. Rather, that expectation is a constant, an objective factor that must be weighed by the fully informed employee in deciding whether he wants union representation. In this context, the economic value of the right foregone is equal to that of the right exercised.

52. In theory, a make whole remedy is less oppressive than the common reinstatement with backpay remedy for discriminatory discharge cases. There the employer must in essence pay twice for the same work—once to the discharged worker and once to the worker hired to replace him. *See* Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), *enforcement denied sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971) (per curiam).

53. For a discussion of the mechanics of determining the amount of compensation, see Note, *Monetary Compensation as a Remedy for Employer Refusal to Bargain*, 56 GEO. L.J. 474, 497-504 (1968).

54. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931).

amount of damages with certainty, the wrongdoer must bear the risk of the uncertainty that he has created.[55] Without question the Board is empowered to order relief that merely approximates the conditions that would have prevailed in the absence of an unfair labor practice.[56]

The Board's decision in *Ex-Cell-O Corp.*[57] raises a more significant objection. In that case the NLRB denied a union's request for a make whole remedy on the ground that such an order would constitute a compelled agreement in violation of section 8(d) of the NLRA.[58] *Ex-Cell-O Corp.*, however, involved a section 8(a)(5) unlawful refusal to bargain.[59] In that context, the make whole remedy operates as a direct, though retroactive, intervention in the bargaining process. In contrast, the J.P. Stevens make whole order would be designed to remedy violations of section 8(a)(1).[60] Presumed contracts benefits, in the form of lost wages, merely serve, in the section 8(a)(1) context, as a device to measure the injuries sustained by Stevens employees. The Board would not be interfering in any ongoing bargaining process. Thus, the J.P. Stevens make whole order cannot be characterized as a compelled agreement, "any more than a statutory treble damage action under the antitrust laws becomes a 'contract' action" merely because the plaintiff's damages "are measured in part by the estimated more favorable contract terms [he] would have secured but for the unlawful conspiracy."[61]

As an alternative to this section 7 make whole remedy, the NLRB might direct J.P. Stevens to bargain with the TWUA, despite the union's failure to win a representation election. The Supreme Court, in *NLRB v. Gissel Packing Co.*,[62] specifically authorized such a bargaining order. Balancing the sometimes conflicting goals of deterring employer misbehavior and effectuating employee free choice, the Court found that two circumstances justify the bargaining order remedy. First, even when a union has never demonstrated majority support

55. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. at 265.

56. *See* NLRB v. Mooney Aircraft Inc., 375 F.2d 402 (5th Cir.), *cert. denied*, 389 U.S. 859 (1967); F.W. Woolworth Co. v. NLRB, 121 F.2d 658 (2d Cir. 1941).

57. 185 N.L.R.B. 107 (1970), *enforcement denied sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971) (per curiam).

58. 29 U.S.C. § 158(d) (Supp. V 1975) prohibits the Board from compelling either party to agree to a proposal or make a concession. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

59. 29 U.S.C. § 158(a)(5) (1970).

60. *Id.* § 158(a)(1).

61. St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039, 1053 (1968).

62. 395 U.S. 575 (1969).

in an appropriate unit, the Board may issue a bargaining order when the employer's unfair labor practices are so "outrageous" and "pervasive" that their " 'coercive' effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."[63] Second, when the employer's unfair labor practices are less pervasive, the Board may issue a bargaining order upon a finding, not only that a fair election is improbable, but also that at one point the union had majority support.[64] The rationale behind the Court's decision is clear: if the Board could enter only a cease and desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him to profit from his wrongful acts, while at the same time severely curtailing the employees' right freely to determine whether they desire union representation.[65] The Board, however, has traditionally been reluctant to issue a bargaining order without a finding that the union at one time had majority support.[66]

The NLRB has issued a bargaining order in only one of its fifteen *Stevens* decisions.[67] In enforcing that order, the court of appeals held that, though the Board had carefully based its order upon a finding of majority status, a bargaining order would have been appropriate even if the Union had never possessed majority support.[68] This holding lends considerable support to the proposition that the Stevens situation fits well within the first set of circumstances that the Supreme Court found to justify a bargaining order and, consequently, it should be unnecessary for the Union to prove it once had majority support. The efficacy of a bargaining order in the J.P. Stevens context, however, remains open to question. In theory, the bargaining order deters interference with employees' rights to organize by making such unfair labor practices unprofitable. That deterrent force is completely undercut when the employer is willing, as J.P. Stevens obviously is,[69] to continue its unfair

63. *Id.* at 613-14 (quoting NLRB v. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967)).

64. *Id.* at 614-15.

65. *See* Franks Bros. Co. v. NLRB, 321 U.S. 702 (1943).

66. *See, e.g., Stevens I,* 157 N.L.R.B. 869, 877 (1966), *enforced as modified,* 380 F.2d 292 (2d Cir.), *cert. denied,* 389 U.S. 1005 (1967); *Stevens VII,* 179 N.L.R.B. 254, 254 n.2 (1969), *enforced,* 441 F.2d 514 (5th Cir.), *cert. denied,* 404 U.S. 830 (1971).

67. *Stevens VII,* 179 N.L.R.B. 254 (1969), *enforced,* 441 F.2d 514 (5th Cir.), *cert. denied,* 404 U.S. 830 (1971).

68. 441 F.2d at 522.

69. J.P. Stevens' reaction to the bargaining order in *Stevens VII* was to refuse to bargain in good faith. Finally, in 1975, Stevens closed down the plant involved, allegedly for economic reasons. *1976 Hearings, supra* note 6, at 187-88.

labor practices by refusing to bargain in good faith. Experience has indicated that the Board is unable to devise an adequate remedy for section 8(a)(5) refusals to bargain.[70]

The same practical considerations militate against an order directing the employer to negotiate contract benefits retroactively to the time the bargaining would have occurred if the employer had accepted its statutory responsibility.[71] Given J.P. Stevens' history of anti-unionism, it seems likely that such an order would only reinforce Stevens' intransigence. Therefore, it appears that only the section 7 make whole remedy will serve to deter Stevens' unfair labor practices and to compensate its employees. While both the bargaining order and the retroactive bargaining order hold out the promise of deterrence and compensation, in practice it appears that neither are adequate to counter J.P. Stevens' "intransigent recidivism."

CONTEMPT REMEDIES

Section 10(e) of the NLRA[72] provides that the Board may petition the federal courts of appeals for enforcement of its orders. As the Supreme Court has recognized,[73] this section contemplates that a future contempt proceeding may be necessary either to ensure compliance with or punish disregard for the court-enforced order. The contempt power is particularly well suited for cases of repeated flagrant violators of the NLRA such as J.P. Stevens. Unrestricted by statutory limitations, a court's power to design contempt sanctions to fit the circumstances of the case before it is almost completely discretionary.[74]

In most cases the civil contempt power, as opposed to the criminal contempt power,[75] is more suitable to the labor law con-

70. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970). *See also* Schlossberg & Silard, *supra* note 47, at 1059.

71. *See A Survey of Labor Remedies*, 54 U. VA. L. REV. 38, 52 (1968).

72. 29 U.S.C. § 160(e) (1970).

73. *See* NLRB v. Warren Co., 350 U.S. 107 (1955).

74. *See* Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966) (auxiliary deputy deprived of badge). *See generally* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 267-82 (1971).

75. In contrast to civil contempt cases, use of the criminal contempt power brings into play the constitutional safeguards of the criminal process. In the context of a labor law violation, two of these safeguards are problematical. The criminal process requires proof beyond a reasonable doubt, a standard of proof that might cause many violations to go unpunished given the abundant possibilities for inventing legitimate sounding excuses for many unfair labor practices. Further, the court may not order imprisonment of more than six months without affording the contemnor the right to a jury trial—and juries have often reached questionable results in the controversial atmosphere of labor trials. *See* Bok, *The Regulation of Campaign Tactics in Representa-*

text.[76] A civil contempt order may be coercive, compensatory or both, while, in contrast, the purpose of a criminal contempt proceeding is to vindicate the court's authority.[77] The Second Circuit's 1972 civil contempt order against Stevens,[78] however, failed to accomplish either end. In its order, the Second Circuit, rather than directing a monetary penalty, attempted to protect the union's organizational activities by affording the union "similar facilities" to respond to the Stevens' anti-union representations.[79] The order has failed to deter Stevens' anti-union campaign; in 1973 the NLRB filed a second petition for adjudication in civil contempt with the Second Circuit.[80] A third petition was filed in 1976.[81]

A more viable alternative to the Second Circuit's approach is suggested by the Fifth Circuit's recent contempt orders in *NLRB v. Schill Steel Products Inc.*[82] and *NLRB v. Johnson Manufacturing Co.*[83] In *Schill Steel Products*, the court found that the company had arbitrarily refused to sign an agreed-upon contract in violation of an earlier court order to bargain in good faith.[84] In its purgative order the court directed the company, in addition to executing the contract, to make its employees whole for all wages and benefits lost as a result of the company's refusal to sign the agreement.[85] In *Johnson Manufacturing Co.* the Fifth Circuit held the company in contempt of an earlier contempt order to bargain in good faith.[86] In its contempt order, the court fashioned a make whole remedy for the union, directing the company to reimburse the union for its expenses incurred by reason of the company's failure to comply with the first contempt order.[87]

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tion Elections under the National Labor Relations Act, 78 HARV. L. REV. 38, 125-26 (1964).

76. The most significant limitation on the civil contempt power as a tool in enforcing the NLRA is the Board's traditional reluctance to petition for adjudications in contempt. During fiscal 1975, only 30 petitions for adjudication in contempt for noncompliance with decrees enforcing Board orders were filed, 29 seeking civil contempt relief and 1 seeking criminal sanctions. 40 NLRB ANN. REP. 172 (1975).

77. *See* Dobbs, *supra* note 74, at 235-49.

78. NLRB v. J.P. Stevens & Co., 464 F.2d 1326, 1348 (2d Cir. 1972).

79. *See 1976 Hearings, supra* note 6, at 184. The Fifth Circuit has not yet issued its contempt order.

80. *Id.* at 169-70.

81. *Id.*

82. 480 F.2d 586 (5th Cir. 1973).

83. 511 F.2d 153 (5th Cir. 1975).

84. 480 F.2d at 592-93.

85. *Id.* at 598.

86. 511 F.2d at 154. The earlier order is reported in NLRB v. Johnson Mfg. Co., 458 F.2d 453 (5th Cir. 1972).

87. 511 F.2d at 157.

Given the particular circumstances of the J.P. Stevens situation, it apparently is within the court's contempt power to construct a remedy designed to make Stevens employees whole for the losses sustained as a result of Stevens' flagrant unfair labor practices.[88] The chief advantage of such an order is its effect of removing the profit factor from the past contemptuous violations of court-enforced NLRB orders.[89] The contempt stage is crucial to the statutory scheme for preventing unfair labor practices; it is incumbent upon the courts to design contempt orders that, in the precise context of the cases before the court, will deter violations of the NLRA.

CONCLUSION

J.P. Stevens, by its adamant refusal to recognize its employees' rights to self-organization, has challenged the integrity of the NLRA. In *Stevens III*,[90] Trial Examiner Boyd Leedom, a former Chairman of the NLRB, suggested that it may be impossible within the framework of the NLRA to devise a remedy that will right the wrongs of an employer who persists in violations in the manner that Stevens has persisted. Such defeatism belies the considerable discretion vested in the Board's remedial powers and the court's contempt powers. As Justice Whittaker noted in *Local 60 v. NLRB*,[91] "It is certain that Congress did not intend by the Act 'to hold out to [employees] an illusory right for which it was denying them a remedy.' "[92]

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88. *See* text accompanying notes 47-52 *supra*.

89. In contrast, the coercive fine is purely prospective. Its intent is merely to forestall future violations. Although a coercive fine might serve as a valuable adjunct to a make whole order, such a fine alone would allow Stevens to retain a handsome profit from its past violations.

90. 167 N.L.R.B. 266, 303 (1967), *enforced as modified*, 406 F.2d 1017 (4th Cir. 1968).

91. Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651 (1961).

92. *Id.* at 662 (Whittaker, J., dissenting) (quoting Graham v. Brotherhood of Firemen, 338 U.S. 232, 240 (1949)) (brackets in original).

Professional Responsibility—A Constitutional Challenge to Disciplinary Rule 7-109(C)

In a recent and unprecedented decision[1] a federal district court ruled that the application of Disciplinary Rule 7-109(C)[2] of the New York State Code of Professional Responsibility,[3] which prohibits the payment of expert witnesses on a contingent fee basis, violates the equal protection and due process clauses of the fourteenth amendment. The memorandum and order in *Person v. Association of the Bar of New York*[4] grants to all litigants in the Eastern District of New York involved in civil actions the right to retain expert witnesses on a contingent payment basis. The court premised its holding on a finding that the rule "must particularly forbid to the less affluent and to the indigent a means of obtaining an equal hearing to that accorded to a more affluent adversary in the same case."[5] *Person* marks an unwarranted expansion of the due process and equal protection tests prescribed by the United States Supreme Court[6] and heralds the disintegration of a heretofore unquestioned standard of legal ethical conduct.[7]

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1. Person v. Association of the Bar of New York, 414 F. Supp. 144 (E.D.N.Y. 1976).

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-109(C) provides:

> A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
> (1) Expenses reasonably incurred by a witness in attending or testifying.
> (2) Reasonable compensation to a witness for his loss of time in attending or testifying.
> (3) A reasonable fee for the professional services of an expert witness.

3. The instant case dealt specifically with the Lawyers Code of Professional Responsibility promulgated by the Association of the Bar of New York City. Reference will be made, however, to the ABA Code of Professional Responsibility, since the New York Bar and every state bar association (with the exception of California) have adopted the ABA Code of Professional Responsibility in whole or in part. *See* ABA ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY i (unverified draft 1975).

4. 414 F. Supp. 144 (E.D.N.Y. 1976).

5. *Id.* at 146.

6. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 377-80 (1971) (absent countervailing state interest of overriding significance, persons forced into judicial process must be given a meaningful opportunity to be heard; a person may not be deprived of a fundamental right regardless of validity of the legitimate exercise of state power); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (reasonable basis test); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (compelling governmental interest necessary to penalize the exercise of a constitutional right).

7. *Cf. In re* Shapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911) (holding contingent compensation agreements with witnesses violative of public policy); S. WILLISTON, CONTRACTS § 1716, at 879 (3d ed. 1972) (stating the basic premise of the

Person,[8] an attorney prosecuting an antitrust case, applied for the convening of a three judge court[9] to enjoin the enforcement of DR 7-109(C).[10] He alleged *inter alia* that the cost of the antitrust litigation had become so prohibitive that his client, plaintiff in the pending litigation, could not bear the expense of hiring an expert witness, although in contrast, wealthy industrial defendants in such cases usually could afford and did retain experts to aid in their defense.[11] It was further alleged that the application of the rule resulted in a legally enforced disparity in treatment that transgressed the litigant's constitutional right to access to the courts.[12] Person reasoned that the denial of the right to retain an expert witness essentially denigrates the right to litigate fully one's civil action, since expert testimony is often indispensable in the prosecution of antitrust litigation.

After a consideration of New York law,[13] the district court found

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rule); ABA ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 98-99 (unverified draft 1975) (no state has made significant changes in the rule).

8. A question arose whether Person had standing to bring suit on behalf of his clients. Judge Dooling addressed this point in cursory fashion as follows:

> It is the plaintiff who is the one directly restricted by the Rule and rendered less effective than . . . he would be if able [to retain] expert testimony uninhibited by [DR 7-109(C)] . . . .
>
> . . . [B]ut while the disciplinary rule, of necessity, directly affects the lawyer, it affects the client's underlying interest [in having genuine access to the courts] more drastically.

414 F. Supp. at 145.

The case was decided on the basis of the client's right of access to the courts. In regard to whether Person's interest and his relationship to his clients were substantial enough to confer standing upon him, see Singleton v. Wulff, 96 S. Ct. 2868, 2871-76 (1976); Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

9. Pursuant to Act of June 25, 1948, ch. 646, 62 Stat. 988 (formerly 28 U.S.C. § 2281 (1970)), which required that no injunction restraining the enforcement, operation or execution of any state statute due to its unconstitutionality shall be granted unless the application therefor is heard and determined by a district court of three judges. This statute was later repealed. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

10. Person v. Association of the Bar of New York, 414 F. Supp. 139 (E.D.N.Y. 1976). Two opinions are dealt with in this Note. The first, reported at 414 F. Supp. 139 (E.D.N.Y. 1976), dealt with the denial of the convening of a three judge court. The second, reported at 414 F. Supp. 144 (E.D.N.Y. 1976), declared DR 7-109(C) unconstitutional.

11. 414 F. Supp. at 140. It was also alleged that experts who regularly testify for large industrial concerns are influenced as expert witnesses due to a continuing relationship between the two. *Id.*

12. *Id.*

13. *Id.* at 143. The court cited *In re* Schapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911); Laffin v. Billington, 86 N.Y.S. 267 (App. Div. 1904); and ASSOCIATION OF THE BAR OF NEW YORK COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 213 (1932) & No. 76 (1927-1928), all of which give support to DR 7-109(C). Wellington v. Kelly, 84 N.Y. 543 (1881), stands as virtually the only New York case allowing a contingent payment agreement with a witness for the production of critical testimony.

that the New York State Bar Committee would not likely acquiesce in Person's prospective violation of DR 7-109(C) in view of that state's strong renunciation of contingent payments to witnesses.[14] Since Person had not as yet contracted with an expert witness, however, any enforcement of DR 7-109(C) in the form of a disbarment proceeding was necessarily premature.[15] Therefore, the district court correctly denied Person's motion to convene the three judge panel.

Three months later Person moved for a summary declaratory judgment[16] to invalidate DR 7-109(C) based essentially on the allegations filed in the earlier action.[17] The court accepted without question plaintiff's contention that he was disadvantaged in the pending antitrust case because of his client's financial inability to obtain accounting and economic testimony.[18] Apparently without supporting facts, the court also accepted that this predicament recurred frequently in the plaintiff's antitrust practice.[19] Having identified a pattern of "recurrent" discrimination as a result of imminent state enforcement of DR 7-109(C), the court, relying on *Boddie v. Connecticut*[20] and *Winters v. Miller*,[21] found a deprivation of plaintiff's access to the courts. In light of traditional constitutional practice,[22] the court then balanced the denial of plaintiff's access to the courts with the basis and purpose of the rule.

The court observed that DR 7-109(C) condones non-contingent payment to expert witnesses if such payment is reasonably measured by time spent by the expert, difficulty of the problem, and the inconvenience imposed upon the expert.[23] The recognition of a reasonableness requirement in DR 7-109(C) indicated to the court the ABA's awareness that any payment to an expert witness might prove an incentive to untruthful testimony. On that basis, the court concluded that

14. 414 F. Supp. at 143.
15. *Id.* at 141, 144.
16. 414 F. Supp. at 144.
17. *Id.* at 145.
18. *Id.*
19. *See id.*
20. 401 U.S. 371 (1971).
21. 446 F.2d 65 (2d Cir. 1976).
22. The court concluded that the case was partly governed by United States v. Kras, 409 U.S. 434 (1973) (no denial of due process or equal protection when indigents are incapable of paying filing fees in bankruptcy proceedings); Lindsey v. Normet, 405 U.S. 56 (1972) (double-bond prerequisite for appealing a forcible entry and detainer action a violation of equal protection); and Boddie v. Connecticut, 401 U.S. 371 (1971) (denial of due process when indigents incapable of paying court fees denied access to court in divorce proceedings). 414 F. Supp. at 145.
23. *Id.* at 146.

contingent payment to an expert witness will create no more of an incentive for perjury than any other payment if the contingent payment is reasonable.[24] Stated another way, the court found no good reason for the exclusion of contingency of payment as a relevant factor in a determination of reasonableness of payment. Thus, when the right to full and equitable litigation was balanced against a rule of questionable effectiveness and validity[25] that categorically denied a less than affluent party the right to retain an expert witness, the court determined the application of DR 7-109(C) to be "too irrational to survive Fourteenth Amendment analysis."[26]

The court in *Person* did not clearly indicate which form of "Fourteenth Amendment analysis" was applied in the invalidation of DR 7-109(C).[27] Under both due process and equal protection analysis the Supreme Court in recent years has steadfastly employed a balancing test in cases in which personal and state interests are in conflict.[28] Inherent in this balancing test is the necessity that the infringed right be of a "fundamental" nature, or at least of a certain "constitutional level."[29] The determination of whether the individual or state right will take precedence is achieved through a weighing of the significance that the court gives to the underlying rationales of the two conflicting interests.[30] In the due process cases the state must adduce a "countervailing"[31] interest to overcome a claimant's personal right; in the equal protection cases the state must exhibit a "compelling governmental interest."[32] The distinction is largely one of semantics.

Alternatively, if the right sought to be preserved does not achieve a level of constitutional importance, the Supreme Court has applied a rational justification test.[33] Under this less stringent test, the consti-

24. *Id.*

25. *Id.* at 146. The court stated:

> The interest in access to the courts on a basis of equality may not exact redress of every imbalance that disparity of means can produce, but it is of such fundamental importance that it cannot be subjected to a constraint that is not adapted to effective achievement of its professed goal and which exacts a sacrifice which must, in any case, be disproportionate to the merely conjectured probability of occurrence of the wrong aimed at.

Id.

26. *Id.*

27. *See* note 22 *supra.*

28. *See* cases cited note 6 *supra.*

29. *See, e.g.*, United States v. Kras, 409 U.S. 434, 444 (1973).

30. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 380-82 (1971); Shapiro v. Thompson, 394 U.S. 618, 633-38 (1968).

31. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

32. Shapiro v. Thompson, 394 U.S. 618, 634 (1968).

33. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972).

tutionality of a law is upheld upon a showing that it rests upon a non-arbitrary and rational basis.[34]

In *Boddie v. Connecticut*,[35] a case upon which the court in *Person* heavily relied, appellant welfare recipients challenged Connecticut's requirements for payment of court fees alleging that such costs denied them access to the courts in their attempt to bring an action for divorce.[36] The decision, sounding in due process, recognized the basic importance to the public interest of the marriage relationship,[37] the indispensability of access to the courts in dissolving a marriage,[38] and the state's "monopoly" in the control of the marriage relationship.[39] Having established the importance of access to the courts, the Supreme Court balanced it against any possible countervailing state interest of overriding significance, and, finding none sufficient,[40] ruled that the requirement of the fee denied appellants due process. The Court, however, tempered its holding with a caveat:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for . . . in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship.[41]

Although *Boddie* was determined solely on due process grounds, its rationale can be logically applied to cases arising under the equal protection clause, particularly when the essential grievance to be redressed is that of invidious discrimination whereby a fundamental right has been denied.[42] The line of demarcation between due process and

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34. *Id.* at 79.

35. 401 U.S. 371 (1971).

36. *Id.* at 372.

37. *Id.* at 377; *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

38. 401 U.S. at 381 & n.8 (citing Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 1056, 296 N.Y.S.2d 74, 87 (Sup. Ct. 1968)).

39. 401 U.S. at 374. These factors led the majority of the Court to the view that "although [appellants] assert here due process rights as would-be plaintiffs, we think [their] plight . . . is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes." *Id.* at 376.

40. *Id.* at 380-82. The state's interests were (1) "prevention of frivolous litigation," (2) "use of court fees and process costs to allocate scarce resources," and (3) the "balance between the defendant's right to notice and the plaintiff's right to access." *Id.* at 381.

41. *Id.* at 382-83.

42. Mr. Justice Douglas in his concurrence with the result achieved by the majority in *Boddie* criticized the mode of decision stating:

equal protection has never been clearly defined, and, in many instances both have been applied to the same set of circumstances.[43] In *United States v. Kras*,[44] decided two years after *Boddie*, the Supreme Court held that denial to Kras of access to a discharge in bankruptcy due to his inability to meet fee requirements was not a denial of due process nor of equal protection of the law.[45] The district court,[46] relying on *Boddie*, had ruled that the required fees served to deny Kras "his Fifth Amendment right of due process, including equal protection."[47] It also held that a discharge in bankruptcy was a "fundamental interest" that could be denied only when a "compelling government interest" was demonstrated.[48] In reversing the district court, the Supreme Court delimited and clarified its holding in *Boddie*,[49] which theretofore had been seen by some as a gateway to increased procedural rights for indigent civil litigants tantamount to those afforded indigent defendants in criminal actions.[50]

> The Court today puts "flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. . . .
>
> . . . .
>
> An invidious discrimination based on poverty is adequate for this case
>
> . . . .
>
> . . . Affluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate.

Id. at 384-85, 386. Mr. Justice Brennan in his concurrence simply stated: "The validity of this partial denial . . . can be tested as well under the Equal Protection Clause." *Id.* at 388.

43. *E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (in criminal proceedings due process requires that all persons have access to the courts; equal protection requires that the poor have the same access as the wealthy); *see, e.g.*, United States v. Kras, 409 U.S. 434 (1973); Nebbia v. New York, 291 U.S. 502 (1934).

44. 409 U.S. 434 (1973).

45. *Id.* at 443-46.

46. *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971).

47. *Id.* at 1212.

48. *Id.* at 1214.

49. *Boddie* was distinguished on several grounds: (1) access to courts is not the only conceivable relief available to bankrupts; (2) the interest in a discharge in bankruptcy does not attain the same constitutional level of fundamentality as the interest in the dissolution of the marital relationship; and (3) "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy." 409 U.S. at 446. The Court, upon these determinations, found the rational justification test a more appropriate test of the fee requirement's validity and dispensed with the more stringent fundamental rights test. *Id.* at 445-49.

50. *See, e.g.*, Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971), *denying cert. to* 225 Ga. 91, 166 S.E.2d 88 (1969), in which Mr. Justice Black, the only dissenter in *Boddie*, evidenced a change of heart:

> In my view, the decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney. . . .

Two predicates emerge from *Kras*: (1) in civil cases the fundamentality of the right of access to the courts is made contingent upon the nature of the wrong sought to be redressed; and (2) if the underlying right is not of a substantial constitutional level such as the right to free speech or marriage the appropriate test is the "rational justification" test and not the "compelling governmental interest" test applied in *Boddie*.

The court in *Person* summarily dispensed with *Kras* in the belief that that decision was based primarily on the assumption that alternatives to bankruptcy appeared to be available in that case and that no such alternatives to antitrust litigation are available.[51] It would appear, however, that there are as many alternatives to antitrust litigation as there are to bankruptcy.[52] Thus *Person* and *Kras* are not logically distinguishable on this ground and are perhaps even analogous.

It is difficult to ascertain the true nature of the right actually sought to be protected in *Person*. The court apparently believed it was protecting plaintiff's right of access to the courts.[53] This view is somewhat misguided, however, since DR 7-109(C) prohibits payment to expert witnesses on a contingent basis and affects only the quality of the case, not the right to commence litigation. The deprived litigant is not denied access to the courts, but only the aid of an expert witness.[54]

> [P]eople might recognize that this constitutional decision will eventually extend to all civil cases but believe that it can only be enforced slowly . . . so that the country will have time to absorb its full import.

Id. at 955-56.

51. 414 F. Supp. at 145.

52. The primary alternative offered by the court in *Kras* was negotiated agreement with the bankrupt's creditors. The alternative to antitrust litigation would similarly be a settlement. Neither possibility is particularly viable. Observations such as this led Justice Black, in his dissent from the denial of certiorari in several access to the court cases, to conclude that exclusivity of redress in the courts was no limit at all to open access to the courts. This was premised on the fact that the "States and the Federal Government hold the ultimate power of enforcement in almost every dispute" and that "the alternatives [to litigation in other areas of law] are exactly the same as in a divorce case." Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 956-57 (1971), *denying cert. to* 225 Ga. 91, 166 S.E.2d 88 (1969).

53. In *Person*, the court cited as supporting its decision Winters v. Miller, 446 F.2d 65 (2d Cir. 1971) (forced medication on a woman of questionable sanity in violation of her belief in the Christian Science faith held violative of her first amendment rights without a prior adjudication of her sanity having been made). 414 F. Supp. at 146. In *Winters* the court stated: "Under our Constitution there is no procedural right more fundamental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal." 446 F.2d at 71.

54. Reliance on the right to an expert witness in *Person* necessarily imports an expansion of procedural due process in civil trials. Such procedural rights as this, though afforded to criminal defendants, have been extended no further than *Boddie* (as limited by *Kras*) permits. *See* Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (per curiam). The

Even if the right in issue is conceded to be plaintiff's access to the courts—on the assumption that denial of an expert essentially denies one a proper trial—it is apparent, in light of *Kras*, that in *Person* that right cannot be considered to be of a fundamental nature as it was found to be in *Boddie*. It is evident that the right to vindicate one's property rights in antitrust litigation is more closely akin to the right to a discharge in bankruptcy than to the right to the dissolution of a marriage. Like the right to seek a declaration of bankruptcy,[55] the right to bring an antitrust action[56] is a statutorily created benefit of Congress, and is not of a constitutional nature.[57] Furthermore, in the antitrust situation, as in the bankruptcy case, there is no "adjustment of . . . fundamental human relationship[s]"[58] at stake as was the case in *Boddie*. Consequently New York should only have been required to show that it had a rational basis in enforcing DR 7-109(C) to the purported disadvantage of impoverished litigants.

On its face, DR 7-109(C)[59] exhibits a compelling state purpose in maintaining the integrity of the judicial system. The payment to a witness of an amount contingent upon the outcome of the case and in some instances upon the favorable content of the witness' testimony can serve only as an invitation to prevarication. Such concern is magnified in the case of the expert witness whose testimony is "difficult, often inscrutable and, therefore, especially open to calculated distortion."[60] The court in *Person*, however, attacked not the premise upon which the rule was based, but the application of the rule in categorically denying to all litigants, regardless of the intent of the parties or the reasonableness of the agreement, the ability to retain an expert on a contingent payment basis.[61]

Prior to the ABA's adoption of the Code of Professional Responsibility in 1969, no specific prohibition against contingent payment to expert witnesses had been enunciated. Before its amendment in 1937,[62] Canon 39, the predecessor to DR 7-109(C), provided that any

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general sentiment, however, is to the contrary. *See* note 49 *supra*; Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968); Note, *The Indigent's Right to Counsel In Civil Cases*, 76 YALE L.J. 545 (1967).

55. 11 U.S.C. § 11 (1970).
56. 15 U.S.C. § 15 (1970).
57. *See* United States v. Kras, 409 U.S. 434, 446-47 (1973).
58. Boddie v. Connecticut, 401 U.S. 371, 383 (1971).
59. *See* note 2 *supra*.
60. 414 F. Supp. at 142.
61. 414 F. Supp. at 146.
62. ABA CANONS OF PROFESSIONAL ETHICS No. 39.

compensation demanded or received by any witness in excess of statutory allowances should be disclosed to the court and adverse counsel.[63] Implicit in this rule was the possibility that an attorney, if forced to acquire an expert witness on a contingent payment basis, might do so if the court were informed of the agreement.

In re Schapiro,[64] a New York decision, illustrates the basic approach that courts have taken in dealing with contingency fees for expert witnesses. Schapiro, an attorney, was coerced by a physician into entering a contingent fee agreement on threats that if forced to appear under subpoena the physician would testify adversely to the attorney's cause unless he were paid one-third of the judgment in the case.[65] At trial, the doctor had testified on cross-examination that he had no interest in the litigation whatsoever. Schapiro was disbarred for gross misconduct in acquiescing to the physician's demands and failing to inform the court of the witness' substantial interest in the case.[66]

Paramount in the *Schapiro* court's analysis was a judicial concern for the maintenance of the orderly and efficient administration of justice. Such contingent witness payment contracts, regardless of the form of the arrangement, were condemned as violative of public policy in their tendency to promote perjured testimony and unjust awards from juries unaware of biased testimony.[67] Nevertheless, the court did recognize that the attorney had a duty to inform the court of the unlawful agreement so that the jury in its consideration of the testimony could weigh its credibility.[68]

Despite a sparse caselaw foundation,[69] it appears that the absolute prohibition against contingent payment to expert witnesses is founded on the policy exemplified by *In re Schapiro*. However, a literal reading of the rule allows no credence to the implication that informing a jury

63. ABA OPINIONS OF THE COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES WITH ABA CANONS OF PROFESSIONAL ETHICS No. 39.

64. 144 App. Div. 1, 128 N.Y.S. 852 (1911).

65. *Id.* at 4, 128 N.Y.S. at 855. The physician's testimony was vital in establishing the attorney's client's recovery. *See id.*

66. *Id.* at 12, 128 N.Y.S. at 860.

67. *Id.* at 9, 128 N.Y.S. at 858-59.

68. *Id.* at 11, 128 N.Y.S. at 859-60.

69. Footnote 90 to DR 7-109(C) makes reference to *In re* O'Keefe, 49 Mont. 369, 142 P. 638 (1914). *O'Keefe* dealt *solely* with contingent payment to ordinary fact witnesses, not experts, and the court took into consideration O'Keefe's honest intentions in reducing his penalty from disbarment to suspension for 30 days. It is unusual that no reference was made to *In re Schapiro*, a case so solidly in line with the prohibition of the rule.

of an expert's interest in the outcome of a case will alleviate the possibility of unjust results from perjured testimony. Nor does the rule allow any review of the intent of the parties or of the particular factors precipitating the contingent fee arrangement.

In *Barnes v. Boatmen's National Bank*[70] the Missouri Supreme Court demonstrated a willingness to examine all aspects of a particular contingent payment relationship. It upheld a contract for the contingent payment of $25,000 to a psychiatrist testifying in a will contest. The court rejected the common presumption,[71] adopted at least vicariously by the ABA, that every contingent payment contract with an expert witness is ipso facto void as against public policy.[72]

Rule 7-109(C) permits reasonable noncontingent compensation to an expert for his time and labor in preparing to testify.[73] In *Person* the court found it irrational that reasonable compensation was permitted but that contingent compensation, regardless of its reasonableness, would never be permitted.[74] The court's analysis implies that a twenty percent stake in the outcome of a case would be considered unreasonable, whereas a payment of ten dollars an hour contingent upon success at trial would be reasonable and therefore permitted.[75] In the former arrangement the more the expert exaggerated and colored his testimony, the greater would be his compensation; such inducement would be dissipated in the latter instance. Although the inducement to perjure himself is reduced, the expert is still faced with a win or lose proposition and some incentive to lie remains. On the other hand, there appears to be no greater inducement to prevarication than is present in any case involving the testimony of an interested witness such as a party to the litigation.[76] Courts have consistently allowed interested

70. 348 Mo. 1032, 156 S.W.2d 597 (1941).

71. *See* Laos v. Soble, 18 Ariz. App. 502, 503 P.2d 978 (1972); Burchell v. Ledford, 226 Ky. 155, 10 S.W.2d 622 (1928); Sherman v. Burton, 165 Mich. 293, 130 N.W. 667 (1911); Griffith v. Harris, 17 Wis. 2d 255, 116 N.W.2d 133, *cert. denied*, 373 U.S. 927 (1962).

72. 348 Mo. at 1040-41, 156 S.W.2d at 602.

73. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C)(3).

74. *See* text accompanying note 24 *supra*.

75. *See* 414 F. Supp. at 146, where the court stated: "It is not meant to suggest that in the case of the expert a fee measured as a percentage of the recovery might not generally or in particular cases be regarded as *per se* unreasonable."

76. At common law interested parties were disqualified from testifying on the premise that their interest in the outcome would induce them to perjure themselves. *See, e.g.*, Taber v. Perrott & Lee, 13 U.S. (9 Cranch) 39 (1815); DeFarges v. Ryland & Brooks, 87 Va. 404, 12 S.E. 805 (1891). Exceptions were made, however, in cases where no other means of proof were available. *See, e.g.*, United States v. Murphy, 41 U.S. (16 Pet.) 203, 210 (1842).

witnesses to testify after cautioning the jury about the possible biased nature of their testimony.[77] There is no logical reason why testimony of an expert witness paid on a contingent basis could not be conditioned in the same manner.[78]

On its face DR 7-109(C) makes no distinction among different types of litigation in prohibiting contingent payment to experts. Given the necessity of expert testimony and the diverse roles experts play in certain areas of the law, however, it would appear that consideration of such factors would be warranted in a determination of the propriety of a contingent fee arrangement. It is not coincidental that the majority of disputes over contingent payment to expert witnesses have arisen in the area of personal injury suits.[79] In such cases the doctor who treated the plaintiff and who is retained on a contingent fee to give expert testimony is in a particularly favorable position to perjure himself, since he has personal knowledge of the facts of his client's treatment to which the opposing party's expert has no access. These facts may be exaggerated and distorted by the expert in his formulation of an opinion about the extent of injuries and length of recovery period in order to increase the amount of his compensation without serious refutation from an opposing expert. Conversely, in the areas of antitrust and products liability both experts have equal access to data and facts from which they formulate opinions, and an objective review of the veracity of those opinions is available to discount the injurious effects of one or both experts perjuring themselves.

These observations serve to point out some of the considerations absent in the ABA's promulgation of DR 7-109(C). A less rigid application of the language of the rule would serve to reduce the unjust results achieved when a party due to his indigency is categorically de-

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77. The common law prohibition has been put to rest and disqualification by interest has been removed by statute in almost all jurisdictions in this country. *See, e.g.*, Sanderson v. Paul, 235 N.C. 56, 61, 69 S.E.2d 156, 160 (1952); Stream v. Barnard, 120 Ohio 206, 209, 165 N.E. 727, 728 (1929). Renunciation of the prohibition was due to acceptance of the theory that it is better to receive testimony, however biased, leaving credibility of witnesses to the jury. Griswold v. Hart, 205 N.Y. 384, 395, 98 N.E. 918, 921-22 (1912).

78. *See* 31 AM. JUR. 2d *Expert and Opinion Evidence* § 181 (1967), where it is stated that "[i]t is generally recognized that the relative weight and sufficiency of expert and opinion testimony is peculiarly within the province of the jury to decide, considering [*inter alia*] . . . his possible bias in favor of the side for whom he testifies, [and] whether he is a paid witness . . . ."

79. *E.g.*, Sherman v. Burton, 165 Mich. 293, 130 N.W. 667 (1911); *In re* Schapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911); Davis v. Smoot, 176 N.C. 538, 97 S.E. 488 (1918).

nied the vital use of an expert at trial. The rule as it stands necessarily overreaches its purported goal of reducing the possibility of perjury in that it applies to all instances of contingent payment to an expert, regardless of the motivating factor behind such arrangements and regardless of the particular circumstances of the arrangement.

Nevertheless it is doubtful that such considerations are within the ambit of constitutional review in this case. The degree of scrutiny that a statute comes under in testing its rationality is commensurate with the value and significance of the interest upon which that statute purportedly infringes[80]—the higher the value of the interest, the more intense the scrutiny. An analysis of *United States v. Kras* revealed that in an access to the court case the Supreme Court centered its attention on the right to a discharge in bankruptcy.[81] The right was declared to be of an economic and social nature and therefore more deference was granted to the legislative purpose in requiring the payment of court fees[82] than was conceded in *Boddie* where marital rights were involved. Because marital rights are protected under the first amendment, the court utilized a more intense scrutiny of the statute requiring payment of court fees to find that requirement unconstitutional.[83]

Like the right to a discharge in bankruptcy, the right to bring an antitrust action is an economic right. Therefore if there is some rational basis for a law that infringes upon that right, the court will not scrutinize the application of the law intensely but will defer to what appears on the face of the statute to be a rational justification.[84] DR 7-109(C) clearly exhibits a rational basis in upholding the principles of judicial and legal ethics and in its concomitant objective of reducing fraud and perjury in civil proceedings. If precedents such as *Cohen v. Beneficial*

80. *Cf.* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 658-63 (9th ed. 1975) (summarizing old and new forms of equal protection analysis).

81. *See* text accompanying notes 44-52 *supra.*

82. *See* United States v. Kras, 409 U.S. 447-48 (1973).

83. *See* Boddie v. Connecticut, 401 U.S. 380-82 (1971).

84. Dictum in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1948), exhibited the Supreme Court's reluctance to delve into the intricacies and theories supporting a state law if the law were shown to have a rational basis. Petitioners in *Cohen* challenged the constitutionality of a New Jersey statute requiring small shareholders bringing stockholders' derivative actions to post security for expenses incurred by the corporation in prosecuting the action. In upholding the statute on equal protection and due process grounds, the Court found sufficient justification for the law in its positive action taken toward alleviating the corporation's burden of dealing with fraudulent suits. And though other plausible means for achieving the result desired were feasible, the Court did not invalidate the state legislation because it failed "to embody the highest wisdom or provide the best conceivable remedies." *Id.* at 550-51. *See also* Dandridge v. Williams, 397 U.S. 471, 485-87 (1970).

Loan Corp.[85] that exhibit extreme deference to legislative purpose are given credence, alternatives to the rule will warrant little consideration in the face of a rule replete with valid, justifiable objectives and the support of a vast majority of cases.

However, the deferential manner in which a court might deal with this issue should not preclude a reconsideration of the policy behind DR 7-109(C). It is apparent that in many instances the prohibition of the rule does render an injustice. If contingent payment to expert witnesses were tempered by requirements that the payment be reasonable and that there be full disclosure to the court, jury and opposing counsel, such agreements could be permissible.

Although the decision in *Person* has no further jurisdictional reach than the boundaries of the Eastern District of New York, it may spark the ABA and state bar associations to institute changes in DR 7-109 (C). Total revocation of the rule would inevitably lead to abuses of a privilege that should be reserved for exceptional situations. Retention of the rule and its arbitrary and categorical denial of expert testimony to those who cannot afford such testimony is itself an abuse of justice. Difficulty of administration should not prevent the amendment of a rule unyielding in its absolute denial of the only means an indigent plaintiff might have for obtaining fair treatment at trial.

MICHAEL A. HEEDY

Taxation—The Twilight Zone of Charity: The IRS Denies Exemption for a Free Tax Planning Service Under Section 501(c)(3)

The Internal Revenue Service (IRS) exercises a major influence over the development of public charities through its power to characterize an organization as "charitable" under section 501(c)(3)[1] of the

85. 337 U.S. 541 (1948); *see* note 84 *supra.*

1. I.R.C. § 501 provides in part:

(a) EXEMPTION FROM TAXATION.—An organization described in subsection (c) . . . shall be exempt from taxation . . . .

. . . .

(c) LIST OF EXEMPT ORGANIZATIONS. . . .

. . . .

(3) Corporations, and any community chest, fund, or foundation, organ-

Internal Revenue Code. An organization denied the protection of tax exempt status normally suffers a severe shortage of income since contributions given to it are not deductible as "charitable contributions" under section 170(c)(2).[2] Unless overruled by federal court decisions or congressional action, the IRS determines whether the activities of a particular organization should be supported by tax exempt public contributions. In Revenue Ruling 76-442[3] the IRS ruled that an organization that offers free personal tax planning services to those who wish to make charitable gifts is not operated exclusively for charitable purposes, and hence does not qualify as a 501(c)(3) organization. This restrictive ruling represents an overly narrow perception of the primary policy of section 501(c)(3), which is to encourage charitable giving and can be viewed as inconsistent with previous interpretations of the statute.

The organization discussed in Revenue Ruling 76-442 employed a staff of salaried attorneys to provide its services. It did not charge fees for its services although obviously its clients were generally not indigent. The organization derived most of its income from public contributions but was not affiliated with any particular charity or group of charities. Rather, it encouraged its clients to give to charities of their personal choice.[4]

The IRS focused on whether the organization could be considered to serve a public rather than a private interest[5] and concluded that in aiding individuals in tax planning the organization was providing a commercially available service to people who could afford it rather than a

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ized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

2. *See* 4 T. RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 59.01(2), at 5903b (1976). The definition of organizations eligible to receive deductible charitable contributions found in § 170(c)(2) mirrors the language of § 501(c)(3) except that trusts are also eligible, the organization must be created in the United States or under United States law, and, curiously, "testing for public safety" is not mentioned.

3. 1976-46 I.R.B. 12.

4. *Id.*

5. *Id.* at 13 (citing Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1959), which provides: "An organization is not organized or operated exclusively for charitable purposes . . . unless it serves a public rather than a private interest.")

charitable activity in the legal sense.[6] This private purpose was held to be predominant although the public could benefit from funds being made available to charity as a result. The public benefit was thought to be tenuous; the fact that charitable gifts were contemplated in the plans drawn up could not transmute such services into a charitable activity.[7]

Case law and IRS ruling policy in this area must be understood against the common law background of charity. The federal tax laws have traditionally acknowledged that charities "lessen the burdens of government"[8] by providing what government might otherwise be obligated to perform. For this reason Congress has granted favored tax status to charities and charitable giving. In this respect the Code is no innovation; instead it generally incorporates the common law principles of charity[9] as developed mainly through the law of charitable

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6. The IRS's working definition of "charitable" is found in its Regulations:

> The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959). This definition includes some of the terms other than "charitable" found in § 501(c)(3). *See* note 1 *supra*. The Code should be understood as treating "charitable" as inclusive of these types of activities as well (since all of § 170(c) is under the heading of CHARITABLE CONTRIBUTION DEFINED), although the full meaning of charity is not exhausted by any checklist of activities. *See* Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A.J. 525, 526 (1958).

7. 1976-46 I.R.B. at 12, 13.

8. The definition of "charitable" in the Treasury Regulations scarcely differs in substance from the classic definition formulated by Justice Gray of Massachusetts:

> A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556 (1867). *See also* Statute of Charitable Uses, 1601, 43 Eliz. 1, c. 4.

9. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959), *quoted in* note 6 *supra* ("The term 'charitable' is used . . . in its generally accepted legal sense . . . ."); Reiling, *supra* note 6, at 526; Thrower, *IRS is Considering Far Reaching Changes in Ruling on Exempt Organizations*, 34 J. TAX. 168 (1971); *cf.* Green v. Connally, 330 F. Supp. 1150, 1157 (D.D.C.), *aff'd*, 404 U.S. 997 (1971) (" 'strong analogy' can be derived from the general common law of charitable trusts, at least for close interpretive questions"). *But cf.* Faulkner v. Commissioner, 112 F.2d 987, 992 (1st Cir. 1940) ("Interpretation of the word 'charitable' in a federal revenue act is a matter of federal, not local, law.").

trusts. These flexible common law principles allow great latitude for diverse organizations to be brought within the ambit of section 501(c)(3). These very characteristics of flexibility and generality, however, inhibit the development of concrete guidelines for eligibility under the exemption and result in a certain inconsistency of interpretation.[10] Court decisions and revenue rulings often fulfill a rulemaking function only by default. While organizations factually similar to organizations previously ruled upon are likely to be analyzed and treated similarly, articulable rules can be discerned only with difficulty. This result is attributable to the inherently amorphous character of any conception of what is charitable.

Another factor that further hampers the emergence of precise rules is the frequent mandate from the federal courts that the charitable exemption and deduction statutes, unlike other tax statutes, should be liberally construed in the favor of the taxpayer in order to encourage charitable activity. According to Judge Augustus Hand:

> The policy of exempting these [charitable] corporations is firmly established and has been continuously expanding ever since the system of income taxation was adopted. The statute [predecessor of section 501] should be read, if possible, in such a way as to carry out this policy and not to make the result turn on accidental circumstances or legal technicalities.[11]

In place of "legal technicalities" the courts and the IRS have closely scrutinized proffered charitable activity in order to decide whether its particular factual characteristics comport with abstract notions of what is "religious, scientific, [or] educational . . . ." A broad construction of such charitable categories will generally result in an expansive reading of section 501(c)(3).

One common touchstone that underlies this scrutiny and serves as a prerequisite for a finding of charitability is the extent to which an activity is conducted for the public benefit.[12] There are two aspects

10. *See* Reiling, *supra* note 6, at 525. In a sense it is fortunate that rigid rules have not crystallized. Otherwise, the creative process of founding new types of charitable activity might be curbed, or at least shunted into certain prescribed directions. A Commissioner of the IRS once recognized the growth of innovative types of charitable organizations. Thrower, *supra* note 9, at 168.

11. Slocum v. Bowers, 15 F.2d 400, 403 (S.D.N.Y. 1926), *aff'd*, 20 F.2d 350 (2d Cir. 1927). *See also, e.g.*, United States v. Pleasants, 305 U.S. 357, 363 (1939); Helvering v. Bliss, 293 U.S. 144, 150-51 (1934); Threlfall v. United States, 302 F. Supp. 1114, 1118 (W.D. Wis. 1969).

12. The Code does not use the term, but it is implicit in Gray's definition of charity as being "for the benefit of an indefinite number of persons." *See* note 8 *supra*. The Regulations specify that a charitable organization must serve "a public rather than a private interest." Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1959).

to this inquiry in the context of section 501(c)(3): on the one hand, an activity must be "public" in that it benefits an indefinite number of persons[13] rather than ascertainable individuals,[14] while on the other, it must be of "benefit" to the community.[15] Such a concept as "public benefit" is of dubious utility without examination of those factual patterns where public benefit has necessarily been found by virtue of the granting of the exemption.[16] Difficult cases arise where any perceived public benefit is indirect or tenuous, as when some of the organization's activities are clearly not charitable. Examples of these problems are readily found in the treatment of legal or law-related organizations. The facts that the advocacy element associated with traditional legal services often injects an aspect of personal benefit into the activity and that legal services cannot be easily placed in the separately enumerated charitable categories give rise on occasion to strained apologia for findings of public benefit. The legal aid society that provides free services to indigent persons who could not otherwise afford them is a type of legal service organization that readily qualifies under traditional notions of charity. This sort of activity is clearly subsumed under charity in its most popularly understood guise, expressed in the IRS's definition as "[r]elief of the poor and distressed or of the underprivileged."[17] Accordingly the IRS has always held such organizations to be exempt.[18]

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13. *See* note 8 *supra*; Estate of Carolyn E. Gray, 2 T.C. 97, 103 (1943). The class to be directly benefited need not encompass the entire public. It is enough that the community benefits by the aid given to the class. *Id.*

14. This also proscribes individuals from profiting by operating the organization. The provision in § 501(c)(3) requiring that "no part of the net earnings of which inures to the benefit of any private shareholder or individual" expresses this principle. *See* Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1959). Payment of reasonable salaries, however, does not violate the inuring doctrine. Mabee Petroleum Corp. v. United States, 203 F.2d 872, 876 (5th Cir. 1953).

15. The statute states that an organization must be "organized and operated exclusively for . . . charitable . . . purposes." In actual practice this is satisfied by being "primarily" or "dominantly" charitable. *See* Treas. Reg. § 1.501(c)(3)-1(c) (1959); Passaic United Hebrew Burial Ass'n v. United States, 216 F. Supp. 500, 505 (D.N.J. 1963). It is more difficult to reach a consensus on the meaning of "primarily" in a given situation than on "exclusively." This gloss on the wording of the statute serves to add confusion to uncertainty. *See* Keir, *What is a Charity: Statutory Definition; Exclusively; Lobbying*, in N.Y.U., PROCEEDINGS OF FOURTEENTH ANN. INST. ON FED. TAX. 19, 22 (H. Sellin ed. 1958). "The basic question, however, as to the 'primary' purpose of an organization is factual and not always of simple solution." *Id.*

16. *Cf.* Goldberg & Cohen, *Does Higher Authority than IRS Guidelines Exist for Public Interest Law Firms?*, 34 J. TAX. 77 (1971) (the phrase "broad public interest" adds little to case law or policy); Reiling, *supra* note 6, at 595 (whether the public interest is served by an exemption is a matter of generally accepted opinion).

17. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

18. Rev. Rul. 69-161, 1969-1 C.B. 149. It is also considered charitable for a legal

In Revenue Ruling 72-559[19] the IRS granted exempt status to a legal aid society whose means clearly had personal benefit aspects, but that were subsidiary to an overall charitable purpose. There the purpose was to provide free legal services to low income residents of economically depressed communities through subsidizing recent law school graduates who were willing to commit themselves to such work. The IRS ruled that although the organization provided professional training and a salary to the interns, who were not themselves members of a charitable class, the organization's principal purpose remained charitable in view of the fact that the interns were to be the instruments through which the charitable purpose was to be accomplished.[20] This ruling thus stands for the proposition that personal benefit to individuals, which is not of itself charitable, will not preclude a finding of a primarily charitable purpose if the personal benefit is necessary for the accomplishment of the charitable objectives.[21] A charity may work through indirection; a noncharitable activity may induce further activity which is charitable—all for an overriding resultant charitable purpose.

Such circuitous public benefit has also been found in the operation of law libraries and the activities of bar associations. In *United States v. Proprietors of Social Law Library*[22] an organization was held to be charitable as furthering an educational purpose even though use of the law library that it operated was confined to dues-paying subscribers and though law students were excluded altogether. The First Circuit addressed itself to the fact that the specialized learning offered by a law library is not itself directly useful to the general public. It found indirect public benefit by reasoning that the opportunity for research in the law by those in a position to affect or apply an understanding of it helps to strengthen those principles of law on which government

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aid society to post bail or pay bondsmen's fees for indigent persons accused of crimes. Rev. Rul. 76-21, 1976-3 I.R.B. 5; Rev. Rul. 76-22, 1976-3 I.R.B. 6.

19. 1972-2 C.B. 247. The organization trained young lawyers, set them up in practice and compensated them for three years. During this time they were required to perform free legal services, and after three years were expected to have their own paying practice and to devote a substantial amount of time to providing free legal services to low income residents.

20. *Id.*

21. An alternative analysis could have been that subsidizing the interns was equivalent to paying reasonable salaries to employees and hence did not violate the inuring doctrine. *See* Mabee Petroleum Corp. v. United States, 203 F.2d 872, 876 (5th Cir. 1953).

22. 102 F.2d 481 (1st Cir. 1939).

rests—a process vital to the public at large.[23] Self interest is even more obvious and the finding of public benefit more strained in the cases dealing with bar associations, *Dulles v. Johnson*[24] and *St. Louis Union Trust Co. v. United States*,[25] in which charitable deductions for contributions to such organizations were upheld under the estate tax analogue of section 170(c).[26] In each case, while some of the association's activities were clearly charitable (*e.g.*, publishing legal articles, extending legal services to the poor, educating laymen on the law), others such as regulating the unauthorized practice of law, disciplining the profession, and advocating legislation, presented the issue of whether the bar associations were primarily protecting their own commercial interests. Both courts found the regulatory function of the bar associations to be in the public interest in the sense of helping to preserve the integrity and competence of the legal profession, which serves the public and in whom the public places its trust.[27] *Union Trust* also found that the social activities sponsored by the bar association, while not in themselves charitable, were only incidental to the other charitable activities.[28]

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23. *Id.* at 484; *accord*, Rev. Rul. 75-196, 1975-1 C.B. 155, which also points out that the fact that users may derive personal benefit is just a logical by-product of the educational process. The court also stressed the library's directly educational purpose in that not only law books, but also books on government, history, and other general interest topics were included, and that the class of beneficiaries was not small or closed in that membership was open to others besides members of the bar. 102 F.2d at 483.

24. 273 F.2d 362 (2d Cir. 1959), *cert. denied*, 364 U.S. 834 (1960).

25. 374 F.2d 427 (8th Cir. 1967).

26. I.R.C. § 2055(a)(2).

27. 273 F.2d at 365-66; 374 F.2d at 436. "We think the government overemphasizes the incidental economic benefits and unjustifiably would taint with an accusation of commercialism legal activity which is dedicated to the public good." *Id.* at 435. Moreover, the court in *Dulles* found that what the bar association did in attempting to influence legislation was not the "attempting . . . to influence legislation" proscribed by § 2055(a)(2) since it was only directed to form, clarity of expression, and the legislation's relation to other law, rather than to the serving of any selfish motive. 273 F.2d at 367.

28. 374 F.2d at 438. *Dulles* and *Union Trust* may serve to illustrate that a finding of public benefit may be as much an assumption as a conclusion. A given set of ambivalent facts can be made to support either a positive or a negative finding depending upon which aspect—public or personal—a court places its emphasis. The holding in *Union Trust*, however, is tempered by an acknowledgement that each case turns on its facts and that some bar associations might not qualify. 374 F.2d at 440. The IRS has expressed its disapproval of these cases in denying § 501(c)(3) status to a bar association and will not use them as precedents for exemption questions under this section. Rev. Rul. 71-505, 1971-2 C.B. 232. Bar associations do qualify as exempt "business leagues" under § 501(c)(6). *Id.* In the above ruling the IRS found such activities as promulgating minimum fee schedules, directing programs aimed at making the practice of law more profitable, and sponsoring social activities to be "substantial" noncharitable purposes. This demonstrates that—as in the public-private benefit distinc-

A recently developed form of legal services organization to which the IRS has granted exempt status is the public interest law firm. The requisite public benefit[29] derived from the features that distinguish this type of law firm from an ordinary commercial law firm. To qualify, such firms must pursue the interests of the public (such as environmental issues or governmental abuses) in such a form that there is no direct representation of the private financial interest of individual clients (as through class actions or injunctions against government).[30] Furthermore they may neither solicit nor accept attorneys' fees from clients.[31] The exemption is denied if a public interest firm too closely resembles a commercial firm.[32] Practically, this means that aside from having to refuse fees, the firm must also ordinarily accept work only when the individual interests are so diffuse that commercial firms would find it economically unfeasible to accept the case.[33]

Another form of indirectly charitable activity that does not involve legal services per se is assistance to charitable organizations for the purpose of facilitating their charitable activities. These services are of indirect public benefit in the sense that only charitable organizations are directly served, but the public at large benefits from the resultant increase in efficiency of the charities so served. Otherwise these activities are closely akin to ordinary commercial services. In Revenue Ruling 69-572[34] an organization formed to construct and maintain a facility to house member agencies of a community chest (all of which were exempt under 501(c)(3)) was granted exempt status.[35] The

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tion—the line between "substantial" and "incidental" is one more of emphasis than substance.

29. This activity is charitable not because the viewpoints it may advance are necessarily the most auspicious for the public as a whole, but because it helps to illuminate the issues of significant public interest that might otherwise be ignored. Rev. Rul. 75-74, 1975-1 C.B. 152, 153. *See generally* Goldberg & Cohen, *supra* note 16; Note, *The Tax-Exempt Status of Public Interest Law Firms*, 45 So. CAL. L. REV. 228 (1972).

30. Rev. Proc. 71-39, 1971-2 C.B. 575, 576 (guidelines for issuing advance ruling of exemption to public interest law firms).

31. Rev. Proc. 75-13, 1975-1 C.B. 662 (amplifying Rev. Proc. 71-39). They may, however, accept out-of-pocket expenses or court-awarded fees from opposing parties. *Id.*

32. *See* Rev. Rul. 75-75, 1975-1 C.B. 154, which denied an exemption to a firm that charged and accepted attorneys' fees when clients were willing to pay. The fees never exceeded actual costs and were much less than those charged by commercial firms.

33. *See* Rev. Rul. 75-74, 1975-1 C.B. 152, 153.

34. 1969-2 C.B. 119.

35. What distinguished this organization from an ordinary landlord was that rental income was only equivalent to operating costs (significantly below the fair market value

provision of this facility was judged to further a charitable purpose by encouraging coordination among the member agencies and aiding the more efficient use of their labor resources, thus enhancing the performance of their respective charitable functions.[36] A comparable aid to charity is the management or consulting service. In Revenue Ruling 71-529[37] an organization formed to help 501(c)(3) charities manage their funds more effectively was held to be performing a charitable function itself.[38]

Against this background, those attributes of the organization in Revenue Ruling 76-442 that would tend to obstruct a finding of charitability are readily apparent. The essential reason for the negative finding appears to be the refusal by the IRS to recognize the indirect public benefit of increased charitable giving derived from the tax counseling services. As pointed out above, when an activity serves both a private and a public interest, the conclusion as to which "predominates" is largely a matter of emphasis.[39] As in the bar association and law library cases,[40] individuals may receive a direct benefit, but that does not necessarily preclude a finding that an indirect public benefit overbears the significance of the private benefit.

A narrow focus upon the act of tax planning or even of giving, independent of the ultimate charitable use of the funds, would support a finding that the organization's activity is not directly charitable. Nevertheless, tax planning directly facilitates charitable activity through

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of comparable office space) and that certain amenities were provided, such as a large central meeting room for the free use of the lessees. *Id.*

36. *Id.* "The performance of a particular activity that is not inherently charitable may nonetheless further a charitable purpose. The overall result in any given case is dependent on why and how that activity is actually being conducted."

37. 1971-2 C.B. 234.

38. The fact that the organization was controlled directly by a membership composed of exempt colleges and universities, was funded by capital received from these institutions, and charged fees to its members of less than 15% of cost, distinguished its service from that of a commercial consulting firm. *Id.* Other organizations providing similar services, however, have been denied exemption as being too akin to a trade or business. Rev. Rul. 69-528, 1969-2 C.B. 127. One basis of the denial was that if a tax exempt organization performed such a service on a fee basis it would result in taxable unrelated business income. *Id.* at 128. This infirmity was not overcome even when the services were provided at cost and exclusively for exempt organizations. Rev. Rul. 72-369, 1972-2 C.B. 245.

39. *See* note 27 *supra.* The IRS's position in the instant ruling that "[a]lthough funds may ultimately be made available to charity as a result of the organization's planning assistance to individuals, the benefits to the public are tenuous in view of the predominately private purpose served by arranging individuals' tax and estate plans" betrays this tacit bias. Rev. Rul. 76-442, 1976-46 I.R.B. at 13.

40. *See* notes 22-28 and accompanying text *supra.*

serving a middleman function of bringing contributor and charitable organization together. This function is analogous to that of those organizations such as the consulting service and the landlord whose charitable purposes are to promote the efficiency of other charitable organizations[41] and are thus inextricably intertwined and dependent upon the existence of other organizations' charitable activities.[42]

The direct benefit to the individual client derived from the organization's services should not of itself preclude a finding of charitability. Directly apposite on this point is the ruling granting exemption to the legal aid society that subsidized legal interns in order that they might provide free legal services to the indigent. There, the IRS stated:

> The fact that recipients of the organization's financial assistance, the legal interns, are not themselves members of a charitable class does not mean the organization is not operating primarily for charitable purposes. The interns are merely the instruments by which the charitable purposes are accomplished. Therefore, the fact that they derive personal gain from the arrangement does not detract from the organization's charitable purposes.[43]

In the instant ruling the individual clients are analogous to the interns. Since they are the contributors to charity, they are the indispensable "instruments" for accomplishment of the charitable purpose of making more funds available for charitable use. Without some support (*i.e.*, personally advantageous tax planning) it is likely that they could not be induced to give as much or at all to charity. The fact that clients *could* afford legal tax planning services (whereas young lawyers could not afford to work for free without starving) should not necessarily mean that free tax planning is not indispensable to the furthering of the organization's eleemosynary purpose. It is probable that high income taxpayers who would make charitable gifts as part of their estate and tax plans in any case would not avail themselves of this service, but would instead utilize private firms. When large deductions hinge on reliable tax advice high income taxpayers are likely to place their trust in the commercial services of the tax bar rather than in free legal services. The middle income taxpayers who have a desire to contribute to charity, however, may be deterred from doing so if they have

41. *See* notes 34-38 and accompanying text *supra.*

42. Perhaps "meta-charitable" would be an apt description of this function. This should be distinguished from the charity that dispenses funds through a second tier of foundations and the non-exempt § 502 "feeder organization," which distributes its profits to exempt § 501 organizations.

43. Rev. Rul. 72-559, 1972-2 C.B. at 247-48; *see* text accompanying notes 19-21 *supra.*

to retain high priced counsel in order to take advantage of the inducements that the tax law provides for charitable giving.[44]

The IRS perhaps unduly emphasized the assumed ability to pay on the part of the organization's clients in concluding that the "commercial" nature of the service taints any charitable purpose.[45] Whether an activity is "commercial" and hence noncharitable entails a broader inquiry than payment by clients, even though otherwise charitable organizations, such as a public interest law firm[46] and a charitable consulting service,[47] have been disqualified solely for receipt of fees. For instance, the IRS distinguishes public interest law firms from commercial law firms not only because they accept no fees, but also because they perform work that commerical law firms ordinarily do not.[48] Commerical law firms routinely engage in estate and tax planning on a profitable basis. In addition, tax planning in its most immediate context benefits only the individual, not the public. Since any individual in a position to avail himself of such services is almost certainly not indigent, the organization could not be said to benefit the class of the "poor and distressed" as the legal aid organization does in providing admittedly ordinary legal services.[49]

Nevertheless, if the tax counseling organization's services would for the most part be sought by those who would not otherwise seek to retain tax counsel, then the argument that this service is "commercial" is somewhat specious. The services performed by legal aid societies are also obtainable from ordinary law firms, but that fact alone does not render them commercial. What the IRS seems legitimately concerned with in Revenue Ruling 76-442 is not so much that a benefit may inure to those who operate the service if payment is accepted, but rather that its clients will abuse the service by obtaining free advice and at the same time deduct any fees they might choose to pay[50] for

44. In this respect, the provision of legal services for the middle income class of citizens, who are in general not well provided for by the legal profession, could be viewed as a directly charitable activity, though as yet there is no precedential support for this proposition.

45. "The organization is providing commercially available services to individuals who can afford them." Rev. Rul. 76-442, 1976-46 I.R.B. at 13.

46. *See* note 32 *supra.*

47. *See* note 38 *supra.*

48. *See* notes 29-33 and accompanying text *supra.*

49. *See* notes 17-21 and accompanying text *supra.*

50. The ruling does not state that the organization does in fact accept fees for service. Nevertheless, the statement that it "does not require any payment for its services" implies that it does not refuse such payment. Rev. Rul. 76-442, 1976-46 I.R.B. at 12.

these services as "charitable contributions" under section 170. Taxpayers would be obtaining a deduction for learning how to obtain deductions, a situation that would understandably displease the IRS. Section 170 itself, however, is sufficient to prevent this undue advantage even if the instant organization were granted exemption under section 501(c)(3).

Since the definition of "charitable contribution" in section 170(c) almost precisely parallels section 501(c)(3),[51] any deduction allowed under section 170 must a priori be to an organization qualifying under section 501(c)(3). Therefore, all of the considerations germane to the latter section are encompassed by section 170 as well, with the additional requirement that the proffered contribution not be made with the expectation that the donor will receive a consideration for his payment. The concept of public benefit permeates section 170 as well: a payment made for the receipt of a personal benefit precludes the contribution from being charitable. The test is objective, centering not on the donor's subjective intent, but rather on what he actually receives for what he pays.[52] The characterization of the payment made by the donor or the donee is not determinative. If the benefits to the contributor are not "substantial" then the deduction is allowed for the reason that the benefits flowing to the public offset the benefits flowing to the contributor.[53]

An example of this categorization process is provided by *Oppewal v. Commissioner*,[54] in which a taxpayer's contributions to a religious education society that operated a school supported entirely by public contributions were held to be nondeductible when the taxpayer's children attended the school.[55] The First Circuit reasoned that the payments should be regarded in substance as tuition since such payments, though not required, served the same function as tuition in supporting the operation of the school. This focus upon value allows those contributions that are in excess of the fair market value of the consideration received to be deductible to the extent of the excess.[56]

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51. *See* note 2 *supra*.

52. Crosby Valve & Gage Co. v. Commissioner, 380 F.2d 146, 146-47 (1st Cir.), *cert. denied*, 389 U.S. 976 (1967).

53. Singer Co. v. United States, 449 F.2d 413, 423 (Ct. Cl. 1971).

54. 468 F.2d 1000 (1st Cir. 1972), *noted in* 8 SUFF. L. REV. 349 (1974).

55. *Id.* at 1002. See DeJong v. Commissioner, 309 F.2d 373 (9th Cir. 1962), for another school contribution qua tuition case.

56. *See* Rev. Rul. 67-246, 1967-2 C.B. 104 (deductibility of payments in connection with participation in fund-raising activities for charity).

The IRS would clearly be justified under this judicially developed principle of section 170 in disallowing deductions by the Revenue Ruling 76-442 organization's clients for their donations to the extent the value of the donations equals the cost of comparable tax planning services. This action would substantially exorcise those dimensions of commercialism and private benefit to which the IRS objected. Such an approach would have been preferable to denying 501(c)(3) status altogether, for the prior decisions and policy of section 501 would support a finding by a federal court that the organization qualifies for the exemption. Section 501 as manipulated in Revenue Ruling 76-442 is simply too blunt an instrument for use in deterring individual taxpayers from utilizing the charitable exemption as a subterfuge by which otherwise nondeductible personal legal expenses are transformed into charitable gifts. Section 170 could accomplish this result more directly and with more finesse. Such an alternative approach would permit the organization to continue to pursue its purpose of encouraging gifts to charity without imposing a tax burden of atonement on the organization itself for the possible sins of its clients.

FRANK LANE WILLIAMSON

Zoning—Arlington Heights v. Metropolitan Housing Development Corp.: An Implicit Endorsement of Exclusionary Zoning?

In recent years there has been considerable uncertainty in the federal courts about the precise nature of the equal protection standards applicable to cases of allegedly exclusionary zoning.[1] Lower federal

1. *See* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 799-800 (1969). *Compare* Comment, *Challenging Exclusionary Zoning*, 10 RICH. L. REV. 646, 686 (1976) (courts will apply rational basis test, so challenge will usually fail) *and* Comment, *Does a Zoning Ordinance with Racially Discriminatory Effects Violate the Constitution? Metropolitan Housing Development Corporation v. The Village of Arlington Heights*, 7 LOY. CHI. L.J. 141, 157 (1976) ("steadily expanding limits of the equal protection clause of the fourteenth amendment have now infringed on the formerly solid police powers of local governments to determine land use") *with* Note, *Challenging Exclusionary Zoning: Contrasting Recent Federal and State Court Approaches*, 4 FORDHAM URB. L.J. 147, 157 (1975) (ordinance that perpetuates residential segregation likely to fall, as federal court will apply strict scrutiny test).

courts have upheld the claims of low and moderate income plaintiffs seeking adequately priced housing in the suburbs where the activities of the municipality were overtly discriminatory,[2] but courts have found it more difficult to deal with cases in which discrimination is more subtle but equally effective.[3] While generally disfavoring the claims of low income plaintiffs,[4] the United States Supreme Court had, until recently, avoided deciding exclusionary zoning cases on equal protection grounds. The recent case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[5] is the first instance in which the Supreme Court has directly met the substantive equal protection issue, and its decision implies that plaintiffs will have to carry a heavy burden to be successful in the federal courts.

Arlington Heights, a suburb about twenty-five miles northwest of Chicago, consists primarily of single family homes that accommodated a population that was 99.6% white in 1970.[6] In 1970, the Clerics of St. Viator (a religious order) decided to develop fifteen acres located within Arlington Heights for low and moderate income housing. The Metropolitan Housing Development Corporation (MHDC), a nonprofit housing developer that had constructed similar projects in nearby suburbs, was given a ninety-nine year lease on the property with an option to purchase contingent upon obtaining federal financing and the

2. *See* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (within two months of HUD approval of a housing project, all-white area incorporated itself and zoned out low and moderate income housing); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir.), *cert. denied*, 401 U.S. 1010 (1970) (city rezoned plaintiff's land for park, declared building moratorium, and mayor refused to sign form that would allow plaintiff's project to tie onto city sewer system); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (city's refusal to rezone plaintiff's property contrary to recommendation of city planning director).

3. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 97 S. Ct. 555 (1977). This case was perhaps the first in which a court of appeals found no discriminatory intent on the part of defendants, and yet found for plaintiffs. *See* text accompanying notes 18 to 25 *infra*. *See also* Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 294 (9th Cir. 1970).

4. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975), in which non-resident low and moderate income blacks challenged the zoning ordinance of a municipality as unconstitutional because it reserved only two percent of the land for non-single-family residential use. The Court held for defendants on procedural grounds, but Justice Brennan, dissenting, wrote that "the opinion . . . can be explained only by an indefensible hostility to the claim on the merits." *Id.* at 520. *See also* James v. Valtierra, 402 U.S. 137 (1971) (upholding state constitutional amendment that would require that residents of a municipality approve by referendum the location, construction or purchase of low income housing in their jurisdiction).

5. 97 S. Ct. 555 (1977).

6. *Id.* at 558.

town's approval of a zoning change.[7] The MHDC contracted with an architect to draw up plans for the proposed development. The final plans provided for 190 units of two-story townhouses, over half of which were to be particularly suited to elderly residents, and also provided that sixty percent of the land would be devoted to green space.[8]

MHDC applied to the Village of Arlington Heights for a zoning change, but this request was denied.[9] The fifteen acre parcel had been zoned R-3 (for single family dwellings), and would have to be rezoned to R-5 (for multi-family dwellings) in order for the townhouses to be built.[10] The town's zoning plan called for an R-5 zone to be designated only as a buffer between single family homes and such incompatible uses as manufacturing or commercial areas. The parcel under consideration faced single family dwellings on two sides and the open areas of the church land on the other two sides. The Village Plan Commission turned down the request to rezone after a series of public meetings[11] and despite MHDC's revision of the project design to meet the village's technical objections.[12]

The plaintiffs, MHDC and individuals representing those moderate income minority members who worked or desired to work and live in Arlington Heights but could not find decent and reasonably priced

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7. *Id.* at 559. Initially MHDC intended to use the federally subsidized § 236 program but that program was halted in 1973 and MHDC had since indicated its willingness to participate in the federally subsidized § 8 housing program of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437f (Supp. V 1975), *as amended by* Housing Authorization Act of 1976, Pub. L. No. 94-375, § 2, 90 Stat. 1068. *Id.* at 558 n.2.

8. 97 S. Ct. at 559; Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 411 (7th Cir. 1975); Brief for Respondents at 7, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977).

9. 97 S. Ct. at 559-60. Two members of the Arlington Heights Planning Board who dissented from the decision to deny the rezoning noted that there was no separate classification for townhouses in the Arlington Heights zoning plan and that R-5 was applied only because it was as close an approximation as was available. They further noted that professional planners tend to treat townhouses as more akin to R-3 than R-5. Comment, 7 LOY. CHI. L.J., *supra* note 1, at 142 n.7.

10. 97 S. Ct. at 558-59.

11. *Id.* at 559. Plaintiff MHDC attempted to impress upon the Court the explicitly racial nature of the community response to the project that was evidenced at three public meetings, in the local press, and in letters sent to town officials. Brief for Respondent at 16-19. The Court, however, preferred to emphasize the positive concerns voiced by the town officials in reaching the decision. 97 S. Ct. at 559-60.

12. Following the zoning change request investigations were undertaken and reports issued by the local fire chief, building commissioner, director of public works and acting director of engineering. Only one problem was mentioned, that of surface water runoff, and the plans were changed to ameliorate that impact. Plaintiffs' Complaint at 13, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208 (N.D. Ill. 1974); *see* 97 S. Ct. at 559.

housing,[13] filed suit in the federal district court alleging that the village's refusal to rezone perpetuated segregation,[14] denied plaintiff developer's right to use its property in a reasonable fashion under the fourteenth amendment of the United States Constitution,[15] and denied individual plaintiffs' rights under the fourteenth amendment, 42 U.S.C. sections 1981, 1982 and 1983, and the Fair Housing Act.[16] The district court found that the village's motivation in denying the rezoning was based on its concern for property values and the integrity of its zoning plan, and that there was no act of invidious discrimination that would require the showing of a compelling state interest.[17]

On appeal[18] the Seventh Circuit Court of Appeals looked closely at the evidence to determine if the Village had applied its zoning laws with particular strictness in this case. It could not find clearly erroneous the trial court's determination that the village's purpose in denying the rezoning application was a legitimate concern with the integrity of the zoning plan.[19] The court recognized that the town's failure to rezone had a disproportionate effect on Blacks in the Chicago area, but in light of the Supreme Court's recent decision in *James v. Valtierra*,[20]

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13. The Court ruling devotes substantial space to the matter of plaintiffs' standing. 97 S. Ct. at 561-63. In Warth v. Seldin, 422 U.S. 490 (1975), the Court had denied similar claims by nonresident plaintiffs seeking low income housing in the suburbs, organizations that owned land in the defendant community, and builders' organizations whose members had been economically injured. Denying standing to all plaintiffs, the Court indicated that only those who were prepared and able to build a home or who would be eligible to inhabit a particular project currently precluded and had been denied the right either by the local ordinance or its enforcement would have standing to use the courts. *Id.* at 516. Under *Warth*, MHDC could challenge an ordinance or its enforcement on due process grounds as arbitrary, capricious or unreasonable under Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), but it could not assert the rights of others with respect to an equal protection challenge. Plaintiff Ramson was empowered to assert the equal protection claim because he would qualify for and would like to reside in MHDC's project if it were built, and then if MHDC's claims were successful the court could have a practical way of granting relief to him. *See* 97 S. Ct. at 563.

14. Plaintiffs' Complaint at 15, 21.

15. *Id.* at 22.

16. 42 U.S.C. §§ 3601-3631 (1970 & Supp. V 1975).

17. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974).

18. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).

19. That evidence showed that the town had rezoned land from R-3 to R-5 60 times. In about two-thirds of the cases the action had complied with the zoning plan. Of the 15 stated failures, only four were clear violations, and in a number of cases where the rezoning was denied the town was applying its buffer zone policy. *Id.* at 412.

20. 402 U.S. 137 (1971). In *James*, the Court upheld a provision of the California Constitution requiring that state-developed housing for low income persons be approved only after approval by community referendum.

the Seventh Circuit could not infer racial discrimination from disproportionate impact alone.

The court did not stop its inquiry at this point, but went on to assess the town's decision in light of its historical context and ultimate effect.[21] It noted that the Chicago metropolitan area had a long history of segregated housing patterns. Although it did not suggest that Arlington Heights was responsible for these segregated patterns,[22] the court did find that Arlington Heights had exploited those extensive patterns of segregation by failing to integrate its community[23] and was in this case again attempting to avoid its responsibility by rejecting "the only present hope of . . . making even a small contribution toward eliminating the pervasive problem of segregated housing."[24] Unable to find a compelling state interest that would justify the rezoning denial, the court implied that Arlington Heights had a duty to alleviate the problem of segregated housing.[25]

After the Supreme Court granted certiorari[26] but before the case was argued, the Court decided *Washington v. Davis*,[27] a case involving employment discrimination.[28] In *Washington* the Court cited several cases, among them the Seventh Circuit's *Arlington Heights* decision, as incorrect applications of equal protection law.[29] Writing for the

21. 517 F.2d at 413-14.

22. While not directly responsible for the areawide pattern, the court noted that plaintiffs' demographic expert had testified that Arlington Heights was the *most* segregated community in the Chicago metropolitan area among municipalities of greater than 50,000 residents. *Id.* at 414 n.1.

23. The court's exploitation charge was based on a Seventh Circuit case in which a builder was held liable for charging inflated prices for housing in black neighborhoods as compared with similar housing it had constructed in white neighborhoods. Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974).

24. 517 F.2d at 415. Although the court did not cite any cases, there is precedent in state courts for requiring that a town take into account the regional housing situation in enacting and enforcing its zoning plans. *See* cases cited notes 88-91 *infra*. *But see* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

25. 517 F.2d at 414. Whether the court would require that the town take affirmative steps to alleviate the problem or that it merely refrain from frustrating any attempted solution is not clear, but the latter possibility seems more probable. For a discussion of the merits of the remedy that would require affirmative action, see note 88 *infra*.

26. 423 U.S. 1030 (1975).

27. 426 U.S. 229 (1976).

28. The case involved unsuccessful black applicants for police training in Washington, D.C., who were challenging the use of a written examination testing verbal skills as a criterion for selection of candidates. The Court denied their claim that the test was a denial of equal protection because it excluded a higher proportion of blacks than whites. *Id.*

29. *Id.* at 244 n.12. Other cases cited, all of which dealt with housing and zoning

majority Justice White said, "[w]e have not held that a law, neutral on its face and serving ends otherwise within the power of the government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[30] Disproportionate impact was held to be relevant to the inquiry, but not determinative.[31]

While the Court could have simply remanded *Arlington Heights*[32] for reconsideration in light of *Washington v. Davis*,[33] the Court chose to use the case to elaborate on the *Washington* ruling. Writing for the majority, Justice Powell held that proof of the racially discriminatory intent or purpose that would be necessary to invoke the Court's strict scrutiny test was to be determined by "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[34] Disproportionate impact might provide an important starting point, but would not be determinative, absent a stark pattern of discrimination.[35]

In the usual case alleging racial discrimination, at least three factors might be considered: "a series of official actions taken for invidious purposes";[36] "a specific sequence of events leading up to the challenged decision";[37] and departures from normal substantive and

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and had been finally decided, were Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) (public housing); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (zoning); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291 (9th Cir. 1970) (zoning); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968) (urban renewal); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (public housing).

30. 426 U.S. at 242.

31. *Id.* at 242-43.

32. 97 S. Ct. 555 (1977).

33. In his dissent, Justice White indicated that he would have preferred not to decide the case at all, but would rather have followed the Court's usual practice and remanded the case to the lower court for reconsideration in light of *Washington v. Davis*. *Id.* at 567.

34. *Id.* at 564.

35. *Id.* Here the Court used as an example Gomillion v. Lightfoot, 364 U.S. 339 (1960), a case in which a state legislature changed the boundaries of a town from a square to an irregular 28-sided figure, effectively eliminating 99% of the town's black voters from the voting rolls.

36. 97 S. Ct. at 564, citing the following cases: Griffin v. County School Bd., 377 U.S. 218 (1964) (school desegregation); Lane v. Wilson, 307 U.S. 268 (1939) (voting rights case in which there had been a long history of racial discrimination and a series of contemporary activities that left little doubt of discriminatory intent); and Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949) (voting rights).

37. 97 S. Ct. at 564. Here the Court cited Reitman v. Mulkey, 387 U.S. 369 (1967), a case in which the Court had held invalid a recently passed California state constitutional amendment that would have prohibited the state from interfering with

procedural sequences.[38] In extraordinary cases, the legislative or administrative history of the particular actions or statutes may be considered.[39] Applying these criteria to the case before it, the Supreme Court noted the district court's finding that racial discrimination had not motivated defendant;[40] that the circuit court had determined that the zoning ordinance had not been applied more harshly in this case than it had been in most similar instances and thus there was no series of discriminatory official acts;[41] and that there was no evidence of discrimination in the legislative and administrative history.[42] Having decided the constitutional issue, the Court remanded the case to the circuit court to pass on plaintiffs' complaint under the Fair Housing Act.[43]

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private discrimination in the lease or sale of real property, and Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), in which the court of appeals had granted plaintiffs an injunction against the town when it was shown that the town had declared a moratorium on subdivision construction and rezoned the land on which plaintiffs had planned to construct low and moderate income housing immediately after the town had become aware that the project was being planned.

38. 97 S. Ct. at 564 (citing Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970), in which the defendant city refused to rezone a parcel of land for low income housing against the advice of its planning directors, and without a valid reason).

39. *Id.* at 565. The Court is clearly not suggesting use of legal and administrative history except in a very unusual case. Tenney v. Brandhove, 341 U.S. 367 (1951), and United States v. Nixon, 418 U.S. 683, 705 (1974), indicate that a high degree of privilege is accorded to legislators and lawmakers.

40. 97 S. Ct. at 565.

41. *See* note 19 *supra.*

42. The Court emphasized that the Planning Commission and Village Board were apparently concerned with the integrity of the town zoning ordinance. The Court refused to speculate on reasons why the Village Planner was never asked his opinion on the proposed project. 97 S. Ct. at 566 n.19.

43. *Id.* The district court did not consider the Fair Housing Act claim because no section was specifically pleaded and the court did not think any section was specifically applicable to the facts of the case. 373 F. Supp. at 209. Section 3601 of the Act states, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1970). Whether the Fair Housing Act will be useful in the present case is not clear from court decisions. The one exclusionary zoning case decided on the basis of the Fair Housing Act, United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975), held that the *effect* of defendant's actions was racial discrimination and required the defendants to demonstrate a compelling state interest. The denial of certiorari in this case may have been an early signal from the Court that it would be willing to allow the evidence of a racially discriminatory effect to affect the outcome of a civil rights case based on a statutory claim, when it would not allow effect to play any significant role in those cases based on constitutional claims. In Washington v. Davis, 426 U.S. 229 (1976), the Court recognized that under Title VII of the Civil Rights Act (equal employment opportunity) a prima facie showing of a racially disproportionate impact would trigger increased judicial scrutiny, but declined to extend that standard to a constitutional claim. *Id.* at 246-48. The remand of the *Arlington Heights* case may well indicate that the Court is suggesting that it is up to the Congress to prescribe or the

The holdings in *Washington v. Davis* and *Arlington Heights* make a finding of racial discrimination much less likely by prohibiting courts from inferring intent from disproportionate impact except in the most outrageous cases,[44] and by requiring a specific showing of intent to discriminate.[45] This approach is arguably not suitable for most equal protection cases, and is particularly inappropriate in the field of zoning and housing.

In restricting the inquiry to the intent or purpose rather than the impact of an official action or statute, the Court has limited the lower courts to two types of evidentiary sources, both of which contain fundamental weaknesses. A court may look to an official action or series of actions that may have led up to the challenged zoning action, or a court may scrutinize the words or writings of those responsible for the official action or statute in order to determine whether racial factors motivated their decision.

The actions of officials prior to the passage of the challenged statute or taking of the action cannot be expected to provide much assistance in the determination of discriminatory purpose or intent. From the cases cited by the Court in *Arlington Heights*,[46] it is clear that an application of the Court's level of scrutiny will curb only the most blatant and obvious examples of discrimination.[47] Few municipal or state officials would be expected to exhibit their prejudices or those of their constituency so flagrantly.

The second consideration suggested by the Court is words or writings of the officials responsible for the challenged action. To rely on the words or writings of the officials responsible presents a number of evidentiary problems in any equal protection case. First, the court

lower courts to apply similar standards for the adjudication of equal rights claims in cases involving something less than overt discrimination. *See* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128 (1976). *But see* Boyd v. Lefrak Org., 509 F.2d 1110, 1113 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975). *See generally* Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834 (1969).

44. For examples of challenges likely to be sustained even under *Arlington Heights*, see Buchanan v. Warley, 245 U.S. 60 (1917), and cases cited note 2 *supra*.

45. For a thorough discussion of motivation as evidence in constitutional cases, see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

46. 97 S. Ct. at 564; *see* notes 36 & 37 *supra*.

47. *See, e.g.*, Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961), in which a Park Board condemned plaintiffs' land within three months of plaintiffs' receiving city approval to build a subdivision that would be integrated. *See also* Crow v. Brown, 475 F.2d 788 (5th Cir. 1972).

is likely to find a multiplicity of constitutional and unconstitutional purposes not only within the deliberative body, but also within any of the individual members of that body. To attempt to determine the part that the discriminatory purpose played in the decision would be extremely difficult.[48] Second, even assuming that the motivation of the officials could be determined by looking at their words and writings, at least with regard to this part of the test, the same act once struck down as discriminatory could possibly be repassed following the recitation of more constitutionally permissible words or writings.[49] Third, the purpose or motive behind an official act or statute does not necessarily control the actual impact or effect of the act—good intentions might produce unconstitutional acts and unconstitutional motives might produce constitutionally acceptable acts.[50] Finally, the Supreme Court has recognized that an in-depth inquiry into purposes of legislation for the purpose of validating its constitutionality would be an unnecessary or unwise intrusion into a coordinate branch of government.[51]

In light of these evidentiary difficulties, it appears that any plaintiff will bear a very heavy burden of proof when he challenges an official act as discriminating under the equal protection clause. The nature of zoning law is such that the burden of proof may be insurmountable in the case of challenges to zoning decisions. First, the acts of local officials have traditionally been accorded a presumption of validity by the courts, so the burden is immediately placed on the challengers of a zoning ordinance to establish that the regulation is clearly arbitrary or unreasonable.[52] Second, while open to the challenge that

48. The Court would appear to be aware of the difficuly of attempting to divine the true intent of the legislature. *See, e.g.*, McGinnis v. Royster, 410 U.S. 263, 276-77 (1973); Palmer v. Thompson, 403 U.S. 217, 224-25 (1971); United States v. O'Brien, 391 U.S. 367, 383-84 (1968).

49. Palmer v. Thompson, 403 U.S. 217, 224-25 (1971). Under a *combined* actions-words test, however, a court might well find discriminatory intent sufficient to strike down the second act, although under a pure words-writings standard, plaintiffs would have no argument.

50. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("good intent or absence of discriminatory intent does not redeem . . . procedures or . . . mechanisms" that inhibit racial integration and are not related to job performance); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith.").

51. *See* McGinnis v. Royster, 410 U.S. 263, 276-77 (1973); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

52. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."); *see* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974); Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928); 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 5.18-.19 (1975); 1A *id.* § 7.18 (1974).

they do not serve a permissible purpose, zoning regulations are to a great extent insulated from this type of challenge. Protection of property values has long been a constitutionally accepted objective of zoning,[53] and the discrimination inherent in the ordinance is primarily economic discrimination.[54] The direct effect of that economic discrimination, however, is racial discrimination, because the poor include a disproportionate number of minority individuals.[55] Because local officials have a judicially acceptable rationale for zoning out the poor,[56] and are accorded a presumption of validity in their acts, proof of a racially discriminatory *intent* or *purpose* sufficient to require the strict scrutiny of the Court will be inordinately difficult to obtain.

In many ways *Arlington Heights* represents the Court's reaffirmation of some of its long-standing principles. First, the Court has a long history of avoiding the issues involved in land use legislation.[57] After

53. *See* Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953); 1 N. WILLIAMS, AMERICAN PLANNING LAW §§ 5.04, 15.01 (1974). Mr. Williams, who spent ten years reading over 10,000 cases involving zoning and land use, *id.* at vii, suggests that in practice, the real motive could be stated in terms of "ensuring an increase" in property values, and that the result of a court's analysis of zoning issues in terms of the protection of property values rationale is normally, though not overtly, an anti-social one, typically involving racial or economic discrimination. *Id.* § 15.04.

54. Protection of property values is achieved not only by preventing incompatible or unsightly uses near residential areas, but also by zoning out uses that would allow high-density developments and mobile homes—uses that are *thought* to put a strain on the local tax base and increase property tax rates. *See* L. SAGALYN & G. STERNLIEB, ZONING AND HOUSING COSTS 3-4 (1972). There is substantial evidence, however, that apartments and high density uses, even with regard to school costs, more than pay their way. *See* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATIONS AND HOUSING IN THE SEVENTIES 53 (1973) [hereinafter cited as BABCOCK]. In the case of MHDC there was also substantial evidence that the project would more than pay its way. Brief for Respondents at 9, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977).

The discrimination is economic in a broader sense also. For any community to act for the good of the larger metropolitan area (by accepting its fair share of low and moderate income housing) would be to put itself in a less competitive situation (and thus, to lower property values) in comparison with neighboring communities that do not choose to accept their fair share. *See* ADVISORY COMM. TO DEP'T OF HUD, NATIONAL ACADEMY OF SCIENCES-NATIONAL ACADEMY OF ENGINEERING, FREEDOM OF CHOICE IN HOUSING: OPPORTUNITIES AND CONSTRAINTS 31 (1972).

55. In 1967, 41% of the total non-white population was poor while only 12% of the white population was poor. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 45 (1968) [hereinafter cited as BUILDING].

56. *See* authorities cited notes 52 & 53 *supra*.

57. *See* James v. Valtierra, 402 U.S. 137 (1971) (the people of a community have a right to decide whether they want low and moderate income housing). *See also* Hawkins v. Town of Shaw, 461 F.2d 1171, 1173 (5th Cir. 1972), *aff'g on rehearing en banc per curiam* 437 F.2d 1286 (5th Cir. 1971) ("Federal Courts are reluctant to enter the field of local government operations.").

it validated the concept of a zoning ordinance and the deprivation of property rights which that might entail in the 1920's,[58] the Court, with only two exceptions,[59] remained silent on these issues until the 1970's.[60] The fact that neither the "Roosevelt Court" nor the "Warren Court," with their activist approaches to the role of the judiciary and respect for contemporary social issues, ever became involved in these issues has left zoning law without any precedent that would justify significant judicial intervention.[61]

Second, the Court was apparently unwilling to revive two equal protection issues on which it might have based a decision favorable to the plaintiffs in *Arlington Heights*—that wealth is a suspect classification or that housing is a fundamental interest. The Court appears to be holding to its decision in *San Antonio Independent School District v. Rodriguez*[62] that wealth is a suspect classification only when an individual is denied a benefit because of his poverty and thereby suffers an "absolute deprivation of a meaningful opportunity to enjoy that benefit."[63] Regardless of whether housing is a benefit that might be entitled to protection, the fact that plaintiffs were not suffering an absolute deprivation appears to vitiate any claim they might have under *Rodriguez*. The right to housing of a particular quality has been specifically denied status as a fundamental interest,[64] although arguably *Arlington Heights* does not involve the right to inhabit housing of a particular quality, but rather the right to inhabit housing in a particular location.

58. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183, 187(1928).

59. Goldblatt v. Hempstead, 369 U.S. 590 (1962) (upheld mining restrictions on a gravel pit within the city limits that made property virtually useless); Berman v. Parker, 348 U.S. 26 (1954) (validated exercise of eminent domain powers in urban renewal program).

60. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (validation of a local zoning ordinance that placed restrictions on the definition of family as it appeared in the ordinance); James v. Valtierra, 402 U.S. 137 (1971) (upholding provision of state constitution requiring that state-developed housing for low income persons be approved only after community approval by referendum).

61. *See* 1 N. WILLIAMS, *supra* note 53, § 4.03. At one point, however, Justice Douglas seems to have recognized the problem. Concurring in Reitman v. Mulkey, 387 U.S. 369 (1967), he wrote, "[L]eaving the zoning function to groups which practice racial discrimination and are licensed by the States constitutes state action in the narrowest sense in which Shelley v. Kraemer . . . can be construed." *Id.* at 384-85. *See also* Justice Marshall's dissent in Village of Belle Terre v. Boraas, 416 U.S. 1, 14 (1974).

62. 411 U.S. 1 (1973).

63. *Id.* at 20.

64. Lindsey v. Normet, 405 U.S. 56 (1972).

Finally, in remanding the case for consideration of the statutory claim,[65] the Court appears to reiterate its preference for requiring the legislative branch of government to make those decisions that will have substantial economic or social impact.[66] In *Washington* the Court made it clear that where statutory and constitutional claims overlap, it prefers to require that a plaintiff carry a heavy burden of proof (absent overt discrimination) with regard to the constitutional claim, leaving it to the legislature, if it so desires, to prescribe more liberal standards in a statutory context.[67]

The Court's deference to the decisions of local officials and its attempt to place the responsibility for the integration of housing upon the legislative branch is a short-sighted and dangerous avoidance of its responsibility. Numerous non-partisan groups have come to the conclusion that the present pattern of racial segregation in housing is a very unhealthy and potentially explosive feature of this society.[68] On the whole, to deny any group of persons access to reasonably priced housing in the suburbs is to deny that group access to a higher quality education,[69] to diminish its ability to compete for new jobs in expanding industries,[70] and to deny it amenities like fresh air, open space, and

65. *See* text accompanying note 43 *supra*.

66. Kahn v. Shevin, 416 U.S. 351 (1974); Evans v. Abney, 396 U.S. 435 (1970); Commissioner v. Brown, 380 U.S. 563 (1965).

67. 426 U.S. at 246-48.

68. *See* H. FRANKLIN, D. FALK, & A. LEVIN, IN ZONING: A GUIDE TO INCLUSIONARY ZONING 3 (1974) [hereinafter cited as IN ZONING]; NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 1, 219 (1968) [hereinafter cited as CIVIL DISORDERS]; *Testimony of P. Davidoff*, in HOUSE COMM. ON BANKING, CURRENCY & HOUSING, HEARINGS, 94th Cong., 2d Sess. 69-70 (1976) [hereinafter cited as HOUSING COMM. REP.]; U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 64-66 (1974) [hereinafter cited as SUBURBIA]; U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 167 (1975) [hereinafter cited as BROWN].

That the segregation in housing patterns is increasing is clear. *See* SUBURBIA, *supra*, at 4.

69. Due to the broad disparities in fiscal resources available to school districts, the wealthier suburbs have better schools than do the central cities. A comparison of expenditures per pupil and pupil/teacher ratios between central city, and suburban schools shows that expenditures per pupil in suburbs are about 35% greater and that pupil/teacher ratios are about 35% lower. Based on these and other facts, a Senate committee on equal opportunity in education has recommended that HUD take an active role in the encouragement of low and moderate income housing opportunities outside areas of present concentration. SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY, TOWARD EQUAL EDUCATION OPPORTUNITY, 92d Cong., 2d Sess., 44-45, 51-52, 148 (1972) [hereinafter cited as EDUC. OPP. REP.]. *See also* IN ZONING, *supra* note 68, at 3.

70. *See Opening Remarks*, in HOUSING COMM. REP., *supra* note 68, at 6; *Testimony of P. Davidoff*, in *id.* at 69-70. It should be noted that of the blacks who lived in ghettos that were racked by the riots of the 1960's, almost half of the respondents to a survey attributed the riots, at least in part, to discrimination and unfair treatment, and

a lower crime rate.[71]

The movement of job opportunities to the suburban areas has been well documented.[72] Attracted by the lower property tax rates and increased space available in suburban locations, businesses and manufacturers have located their new facilities there to the extent that from 1952 to 1972 over eighty percent of the newly created jobs in large metropolitan areas were located in suburban areas.[73] A large portion of these are blue collar jobs that are usually filled by individuals who would be eligible for low and moderate income housing, but who have difficulty finding adequately priced housing near those jobs.[74] As a result, some areas are now suffering substantial labor shortages.[75] Individuals who are forced to commute from the central cities, if it is possible to commute, receive much lower wages for their work when the time and expense of the daily trip to work are factored in.[76]

The society as a whole also pays a high price for these segregated housing patterns. By insisting on the integration of schools but not of

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nearly a quarter mentioned the unemployment situation. "Better employment" was chosen almost two-to-one over any other action which the government might take to prevent future disturbances. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, SUPPLEMENTAL STUDIES 48 (1968). For a thorough description of the social and economic effects that unemployment and underemployment have on inner city residents, see CIVIL DISORDERS, *supra* note 68, at 121-23.

71. The number of arrests per thousand residents is about 50% greater in central cities than in suburban areas. M. HINDELANG, S. DUNN, A. AUMICK & L. SUTTON, SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS—1974, at 336, 341 (1975). In a survey of black workers in Baltimore, the three community problems most cited were, in order, robbery, vandalism and violence. D. SOBIN, THE WORKING POOR 98 (1973).

72. *See* BUILDING, *supra* note 55, at 47-48; CIVIL DISORDERS, *supra* note 68, at 217; HOUSING COMM. REP., *supra* note 68, at 69-70; NATIONAL COMM. AGAINST DISCRIMINATION IN HOUSING, THE IMPACT OF HOUSING ON JOB OPPORTUNITIES 21 (1968); SUBURBIA, *supra* note 68, at 24.

73. EDUC. OPP. REP., *supra* note 69, at 121. Estimates vary as to the precise magnitude of the trend toward job concentration in the suburbs. Another study cites figures indicating that over 85% of the new jobs were located in the suburbs during the last half of the Sixties. SUBURBIA, *supra* note 68, at 24.

74. CIVIL DISORDERS, *supra* note 68, at 217; SUBURBIA, *supra* note 68, at 25.

75. BABCOCK, *supra* note 54, at 51, 54. For a discussion of the relation between land use controls and the proper functioning of the labor market, see Evans & Vestal, *Local Growth Management: A Demographic Perspective*, 55 N.C.L. REV. 421 (1977).

76. A study of five major metropolitan areas found that in those cities that had transit systems capable of transporting inner city residents to suburban job locations, travel time could range from an hour and a half to five hours a day and might entail three or four transfers. The cost of transit fares ranged from $4 to $15 per week. These figures indicate that a worker earning $150 for a 40-hour week, or $3.75/hour, could be effectively earning only $2.25/hour when transit time and expense are accounted for. *See* BUILDING, *supra* note 55, at 48.

While a white collar suburbanite who commutes into the city may lose a significant portion of his effective wages to transit costs too, he probably had an opportunity to choose his home site.

housing,[77] the courts have put a heavy burden on already strained school budgets[78] and have diminished the concept of neighborhood schools through the forced busing of school children. The cost in terms of lost natural energy and community spirit is enormous.[79] A factor that ought not be overlooked is the loss of integrity that results from a society that claims to be a melting pot, that prides itself on social mobility and yet manages to deny to a significant portion of the population the means to effectuate these principles.[80]

The segregated housing patterns that are in large part responsible for these deficiencies are not necessarily the result of overt racial discrimination. Racial motivations can easily be hidden using accepted practices to manipulate the real estate market without any diminution of the segregative effect.[81] Racial motivations can likewise be easily hidden by zoning officials who offer the protection of property values as a justification for the exclusion of low and moderate income families.[82] For the Court to appraise local zoning decisions in light of the traditional standards of review is a shallow and ineffective approach that is certain to avoid confronting the real inequities engendered by many local land use regulations.[83] The unwillingness of the

77. A study in 1974 concluded that school systems in many of the largest cities and metropolitan areas are becoming *increasingly* segregated as a result of segregated housing patterns. BROWN, *supra* note 68, at 177-78. *See also* CIVIL DISORDERS, *supra* note 68, at 236-37, 240-41, 245; *Testimony of P. Davidoff*, in HOUSING COMM. REP., *supra* note 68, at 69.

78. SUBURBIA, *supra* note 68, at 64.

79. For a good discussion of the difficulties encountered in school desegregation attempts, and an analysis of the community control movement, see M. FANTINI, M. GITTELL & R. MAGAT, COMMUNITY CONTROL AND THE URBAN SCHOOL 3-22, 77-100 (1970).

80. *See* BABCOCK, *supra* note 54, at 50; CIVIL DISORDERS, *supra* note 68, at 1-2; IN ZONING, *supra* note 68, at 3; SUBURBIA, *supra* note 68, at 14.

81. One study provides a particularly good description of how covert discrimination in the housing market can be equally effective through the steering of prospective buyers to particular neighborhoods, control of the listings of available housing, refusal of financial institutions to provide mortgages in certain areas under certain conditions, and the generally negative attitudes of the real estate brokers and organizations. SUBURBIA, *supra* note 68, at 16-23.

That this subtle discrimination is racial and not only economic is suggested by other studies showing that residential segregation based on race is greater than residential segregation based on economic class. *See* EDUC. OPP. REP., *supra* note 69, at 120. *See also* CIVIL DISORDERS, *supra* note 68, at 119.

82. *See* notes 53-55 and accompanying text *supra*.

83. 1 N. WILLIAMS, *supra* note 53, § 5.04. Williams refers to this stage in the development of land use controls as "Faith in Local Autonomy" and compares it to the next stage of "Sophisticated Judicial Review," which is

> a wiser, more sceptical, and more realistic view of local government and of the various parties in interest . . . [characterized by]

legislative branch to slow or reverse this trend[84] is evidenced by the inefficacy of the Fair Housing Act.[85] It is at just such a point[86] that the Court has previously accepted its responsibility to act to protect the basic democratic values of the society from the parochial and self-serving actions of local governments.[87]

> A more realistic analysis of . . . the relation between private rights and public needs . . . .
> A clearer definition of basic democratic values and their implications for land use controls . . .
> . . . .
> . . . [And] a more active judicial review, examining local action with care and ready to carry out its constitutional responsibility for enforcing basic values.

Id. § 5.05, at 107-08.

84. One of the major difficulties with the Court's apparent reliance on congressional activity in this field is that those persons presently trapped in inner city areas do not have the political power to force congressional action. The departure of substantial numbers of the middle classes to the suburbs has left the cities weakened politically. BUILDING, *supra* note 55, at 7; H. ROSE, THE BLACK GHETTO 107-09, 139-40 (1971).

85. Among the complaints are that HUD is grossly understaffed to deal with the number of complaints it receives, and that HUD has not pursued the provisions of the Act with any particular zeal. *See* BROWN, *supra* note 68, at 167-68, 174; SUBURBIA, *supra* note 68, at 40-42; NATIONAL COMM. AGAINST DISCRIMINATION IN HOUSING & URBAN LAND INSTITUTE, FAIR HOUSING LEGISLATION AND EXCLUSIONARY LAND USE 11 (1974) [hereinafter cited as FAIR HOUSING].

86. The need for the Court, in particular, to act now is acknowledged by a number of authorities:

> [T]he relative weakness and lack of success of nonlitigative approaches to the problem of exclusionary land use have made the resort to litigation necessary . . . . [T]he fact that litigation has assumed central importance in the attack on exclusionary barriers is . . . a reflection of the relative failure thus far to develop other techniques . . . .

FAIR HOUSING, *supra* note 85, at 11.

After noting that the Federal government had started late and had done a lot of talking about dispersal, but had catered to the exclusionary desires of suburban whites and failed to provide effective action either legislatively or administratively, the United States Civil Rights Commission decided that "only in Federal and State adjudication of exclusionary land use issues are there signs of an understanding of the steps which must be taken if there is to be a real commitment to dispersal." BROWN, *supra* note 68, at 167-68.

87. This would not be the first instance in which the Court had enforced a right not traceable to any specific constitutional provision. In 1941 the Court was faced with a California statute that made it a crime to assist indigents entering the state. Holding the statute invalid, the Court stated that no state could wall itself off from national problems by erecting barriers to interstate migration. Edwards v. California, 314 U.S. 160, 162-63 (1941). The right to interstate migration is not specified in the Constitution, but the Court recognized that such a right exists under the fourteenth amendment. *Id.* at 163.

In 1953 the Court found that education of school children was so important to the individuals and the society that children could not be denied the benefits of racially desegregated school systems. Brown v. Board of Educ., 347 U.S. 483, 493 (1953). The right to an education in a desegregated school system, however, is nowhere specified in the Constitution, and the equal protection clause would seem, on its face, to justify separate but equal schools.

In 1968 the Court was confronted with a state statute that prohibited the use of

The Supreme Court could have begun to remedy some of these deficiencies without a major break with precedent. The regional perspective taken by the court of appeals could have been implemented either by imposing an affirmative duty upon communities to provide in their zoning ordinances for housing for families at all income levels, or by prohibiting a town from frustrating the actions of those who would attempt to provide housing for low and moderate income groups when alternative housing was not available in the area.

There is substantial precedent in at least three states for the first alternative.[88] Courts in Pennsylvania,[89] New Jersey[90] and New York[91]

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contraceptives. Griswold v. Connecticut, 381 U.S. 479 (1965). Speaking for the Court, Justice Douglas looked to the "penumbra" of five of the Bill of Rights amendments to find a right of privacy to protect the sanctity of the marital relationship. *Id.* at 481-86. *See also* Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317, 318-19 (1955).

Although the Court has not recognized the quality of housing as a fundamental interest, it has often recognized the importance of equal opportunities in housing. *See* Hunter v. Erickson, 393 U.S. 385 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Reitman v. Mulkey, 387 U.S. 369 (1967); Shelley v. Kraemer, 334 U.S. 1 (1948); Block v. Hirsh, 256 U.S. 135 (1921).

88. In addition to the precedents, however, there are numerous reasons why the first alternative is the more attractive of the two. An affirmative duty has the advantage of requiring that a community plan for the inclusion of low and moderate income housing. Low income plaintiffs, then, would not be required to go to the expense of purchasing a parcel of land and drawing up project plans in order to provide the requisite standing to bring suit, as was required in Warth v. Seldin, 422 U.S. 490 (1975), discussed in note 13 *supra*. The community and the court are not then restricted to the specific parcel of land selected by the plaintiffs (and probably chosen for its price and not because it was the logical location for multifamily housing) in fashioning a remedy. *See generally* Moskowitz, *Standing of Future Residents in Exclusionary Zoning Cases*, 6 AKRON L. REV. 189 (1973).

The affirmative duty remedy can easily be linked to a region-wide determination of housing needs and the regional needs-affirmative duty approach appears better to match the solution with the problem. Numerous studies have discussed the exclusionary effects of allowing each small incorporated community to use the police power to zone its land. *See, e.g.*, BUILDING, *supra* note 55, at 18-20; SUBURBIA, *supra* note 68, at 29-33. *See also* Reitman v. Mulkey, 387 U.S. 369, 384-85 (1967) (Douglas, J., concurring). The self-protective act of a single community, by itself, does not really have a substantial effect on the metropolitan housing market. But when seen in concert with similar acts by like communities, each acting in its own best interest, the pattern and effects become obvious. *See* E. BERMAN, ELIMINATING EXCLUSIONARY ZONING 6 (1974).

The affirmative duty approach has the further advantage of eliminating the competitive disadvantages to which specific communities might be put under the second alternative. Where each community is required to accept a proportion of low and moderate income housing needs of the region, each suffers the same "loss," if there is one, and none is unfairly disadvantaged.

89. *In re* Kit-Mar Builders, Inc., 439 Pa. 466, 474-76, 268 A.2d 765, 768-69 (1970) (no township has the power to decide who may or may not live there while disregarding the interests of the entire area); *In re* Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (township may not exclude uses that are in demand); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 527-28, 215 A.2d 597, 610

have accepted in varying form and degree the concept of a regional perspective in the matter of zoning for low and moderate income housing. New Jersey, for example, requires that a developing municipality make realistic, through its zoning regulations, the accommodation of its fair share of the region's low and moderate income housing needs.[92]

In the federal courts there is some precedent for the latter alternative.[93] A number of lower courts[94] have based their holdings in exclusionary zoning cases on the availability of land for low and moderate income housing in the region. While those courts almost unanimously have held for the defendant municipalities,[95] their use of the regional perspective indicates that it is not unreasonable to consider the acts of a single municipality as they may affect a larger metropolitan area. Further, in *Hills v. Gautreaux*,[96] a case involving discrimination in public housing,[97] the Supreme Court held permissible an inter-jurisdictional remedy without having found an inter-jurisdictional violation, when that type of relief was the only reasonable alternative.[98]

(1965) (local governments may not use zoning to deny to the growing population of an area sites for residential development).

90. Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied and appeal dismissed*, 423 U.S. 808 (1975) (developing municipality must provide for its fair share of regional needs for low and moderate income housing).

91. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (town growth management plan must provide for assimilation of regional population expansion).

92. Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 174, 336 A.2d 713, 724, *cert. denied and appeal dismissed*, 423 U.S. 808 (1975).

93. United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972). *See also* Shannon v. HUD, 436 F.2d 809, 821 (3d Cir. 1970).

94. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 97 S. Ct. 555 (1977); Ybarra v. City of Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974); Acevedo v. Nassau Co., 369 F. Supp. 1384, 1390 (E.D.N.Y.), *aff'd*, 500 F.2d 1078 (2d Cir. 1974); Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 962 (1st Cir. 1972).

95. The sole exception was the Seventh Circuit's decision in *Arlington Heights*.

96. 425 U.S. 284 (1976).

97. Plaintiffs, black tenants and applicants for public housing in Chicago, brought class actions against the Chicago Housing Authority and HUD. The action against the authority alleged that it had deliberately selected public housing sites in Chicago to avoid integrating white neighborhoods in violation of 42 U.S.C. § 1983 (1970) and the fourteenth amendment. The action against HUD was based on 42 U.S.C. § 2000d (1970) and the fifth amendment. *Id.* at 286.

98. The particular facts of the case, however, may have had a lot to do with the remedy. Chicago was found to have actively discriminated on the basis of race in its site selection process, and the remedy would not require the redrawing of any jurisdictional boundaries because HUD could enforce the remedy. Note, however, that the Court held, at least in dictum, that the district court had the power to fashion a remedy for

The case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.* presented the court with an opportunity to elaborate on its recent equal protection standards and to deal with the segregative effects of exclusionary zoning. The Court used *Arlington Heights* as a vehicle to demonstrate its aversion to equal protection claims based on a racially discriminatory impact. It also foreclosed, for the present, the use of the fourteenth amendment as a means to assure integrated housing and its attendant societal benefits.

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violation from among " 'all reasonable methods . . . available to formulate an *effective* remedy.' " *Id.* at 297 (quoting North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971)) (emphasis added).