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Notes

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NOTES

Civil Procedure—*Bowen v. Hodge Motor Co.*: Abandonment of Appeal in North Carolina

It is a well settled rule in North Carolina that appealing a case[1] removes it from the jurisdiction of the trial court. Thereafter, while the appeal is pending, the trial judge is without further authority over the case.[2] The general rule, however, is subject to the exception or qualification that "the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned" and thereby regain jurisdiction of the cause.[3] In the recent case of *Bowen v. Hodge Motor Co.*,[4] the North Carolina Supreme Court

1. N.C.R. APP. P. 3(a), (b), enacted in June 1975, continues the traditional code practice that permitted an appeal to be taken from judgment either orally at trial or by written notice. *See* Code of Civil Procedure of N.C. § 300 (1868) (presently codified as amended at N.C. GEN. STAT. § 1-279 (Cum. Supp. 1977)).

2. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 735-36, 133 S.E.2d 659, 662 (1963); Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 375, 42 S.E.2d 407, 408 (1947); Bledsoe v. Nixon, 69 N.C. 81 (1873); N.C. GEN. STAT. § 1-294 (1969); 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1799, at 236-37 (1956).

The result of this rule is that oral notice of appeal given in open court forecloses post-verdict motions for relief from judgment at the trial court level that would otherwise have been available prior to the appeal. N.C.R. APP. P. 3 points out the timetable advantage of giving written notice of appeal rather than oral notice. Written notice of appeal must be given within 10 days after the entry of judgment. N.C.R. APP. P. 3(c), however, contains an important innovation derived from FED. R. APP. P. 4(a) which "causes the running of appeal time to be tolled by the filing of a post-verdict motion under either Rule 50, 52, or 59 of the Rules of Civil Procedure, with the period recommencing upon the entry of an order upon the motion." N.C. APP. P. 3, Drafting Comm. Note. Prior to the enactment of rule 3(c), this effect was given only to N.C.R. CIV. P. 59 (new trial) motions. N.C.R. APP. P. 3, Drafting Comm. Note. Thus, giving written notice of appeal allows time to consider alternate post-verdict motions whereas immediate oral notice of appeal removes jurisdiction from the trial court and forecloses post-verdict motions at the trial court level. Such motions may nevertheless be entertained if the appellant abandons his appeal or falls within the term rule exception to the general rule. *See* note 3 and accompanying text *infra*. *See also* N.C. GEN. STAT. § 15A-1448 & Official Commentary (Cum. Supp. 1977) (trial court retains jurisdiction after a criminal defendant has given oral or written notice of appeal for any time remaining in the 10 day appeal period). The problem, inherent in oral notice of appeal, does not arise in the federal courts, which permit only written notice of appeal. *See* FED. R. APP. P. 3(a).

3. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 735-36, 133 S.E.2d 659, 662 (1963). In addition, there are two other exceptions to the general rule. "[T]he trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered [the term rule exception] and (2) for the purpose of settling the case on appeal." Bowen v. Hodge Motor Co., 292 N.C. 633, 635-36, 234 S.E.2d 748, 749 (1977); *see* Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 375-76, 42 S.E.2d 407, 408 (1947); N.C. GEN. STAT. § 1-283 (Cum. Supp. 1977) (second exception); N.C.R. APP. P. 11(c).

4. 292 N.C. 633, 234 S.E.2d 748 (1977).

clarified whether an appearance of the parties before the trial court on a post-verdict motion constitutes an abandonment of appeal. The *Bowen* court held that plaintiffs' motion for a voluntary dismissal and the appearance of the parties at a hearing on the motion pending an appeal did not constitute an abandonment of the appeal and consequently did not revest jurisdiction of the cause in the trial judge.[5]

Plaintiffs in *Bowen* brought an action for property damage to their automobile allegedly resulting from defendant's negligent repair.[6] The trial court denied defendant's motion for a directed verdict at the close of plaintiffs' case and again at the close of all the evidence. On the following day, the judge reconsidered and granted defendant's motion for a directed verdict. Plaintiffs subsequently gave notice of appeal in open court.[7] Thereafter, plaintiffs filed a rule 41(a)(2)[8] motion for voluntary dismissal without prejudice.[9] After the trial court granted plaintiffs' motion for voluntary dismissal,[10] defendant filed a motion to vacate the order allowing the dismissal on the ground that plaintiffs' notice of appeal from the directed verdict divested the trial court of jurisdiction.[11] Defendant appealed the

5. *Id.* at 638, 234 S.E.2d at 751.

6. *Id.* at 634, 234 S.E.2d at 748.

7. *Id.* at 634, 234 S.E.2d at 749.

8. N.C.R. Civ. P. 41(a)(1) provides that plaintiffs have a right to a voluntary dismissal without order of the court "(i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." Rule 41(a)(2) provides that, except as provided in 41(a)(1), "an action or any claim . . . shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires." *Id.* 41(a)(2).

9. The N.C.R. Civ. P. 41(a)(2) motion was grounded upon additional evidence that had not been presented at trial and that was in part not known to plaintiffs' attorney at that time. 292 N.C. at 635, 234 S.E.2d at 749.

10. On appeal in *Bowen*, the question whether a rule 41(a)(2) motion could be granted after the entry of a directed verdict was raised. Although the supreme court did not reach the issue, the court of appeals concluded that a voluntary dismissal could be granted after the entry of a directed verdict, noting that "[t]he rule prescribes no time limit on the right of the plaintiff to move for a voluntary dismissal with the court's permission" and that there was no showing that the trial judge had abused his discretion when he granted the motion. 29 N.C. App. 463, 466-67, 224 S.E.2d 699, 702 (1976). In support of its conclusion, the court of appeals cited Kelly v. International Harvester Co., 278 N.C. 153, 158, 179 S.E.2d 396, 398 (1971) (stating in dicta that "[w]hen a motion for a directed verdict . . . is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under Rule 41(a)(2)"), and King v. Lee, 279 N.C. 100, 107, 181 S.E.2d 400, 404-05 (1971) (after sustaining the trial court's grant of a motion for a directed verdict, the supreme court remanded the case to the trial court for the purpose of permitting plaintiff to consider making a motion for a voluntary dismissal). 29 N.C. App. at 466-67, 224 S.E.2d at 702. *See generally* W. Shuford, North Carolina Civil Practice and Procedure §§ 41-3 to -5 (1975).

11. 292 N.C. at 635, 234 S.E.2d at 749. After plaintiffs' notice of appeal and the court's direction to defendant to present judgment, the notation "Court expires" appears in the court's minutes. *Id.* The supreme court upheld the court of appeals' decision that the session of court had adjourned. Since the session of court at which the appeal was entered had ended, the trial court did not have jurisdiction to consider the motion under the term rule exception. *Id.* at 638-39, 234 S.E.2d at 751; *see* note 3 *supra*.

order allowing plaintiffs' voluntary dismissal and the denial of his motion to dismiss the order for lack of jurisdiction.

The court of appeals affirmed, holding on the basis of the North Carolina Supreme Court's decision in *Sink v. Easter*,[12] that plaintiffs' rule 41(a)(2) motion and the subsequent appearance of the parties at the hearing on the motion constituted an abandonment of plaintiffs' appeal from the directed verdict.[13] The North Carolina Supreme Court reversed the court of appeals, pointing to *Wiggins v. Bunch*[14] as the controlling case.[15] The supreme court also explained that the court of appeals' reliance on *Sink* was misplaced and that *Sink* "should not be interpreted as holding that the mere filing of a motion . . . and the appearance at a hearing thereon constitutes an abandonment of the prior appeal, nothing else appearing."[16]

Historically, the qualification that a trial judge can, upon proper showing, judge an appeal abandoned applied principally to situations in which an appellant failed to prosecute his appeal.[17] When an appellant had not timely docketed the appeal, the appellee could either move in the supreme court to docket and dismiss the appeal according to rule II, section 7 of the Rules of Practice in the Supreme Court of North Carolina[18] or have the superior court, upon proper notice, determine that the appellant had abandoned his appeal and proceed in the case as if no appeal had been taken.[19] The alternative of having the appeal adjudged abandoned at the trial court level was a product of case law;[20] the essential procedures constituting an abandonment were not delineated as they were for the docket and dismiss rule.

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12. 288 N.C. 183, 217 S.E.2d 532 (1975).

13. 29 N.C. App. 463, 466, 224 S.E.2d 699, 702 (1976). The court of appeals also relied on Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975), which followed *Sink* in holding that, pending appeal from summary judgment, the hearing on plaintiff's subsequent motion to set aside summary judgment constituted an adjudication by the trial court that plaintiff's prior appeal had been abandoned.

14. 280 N.C. 106, 184 S.E.2d 879 (1971); *see* text accompanying notes 49-56 *infra*.

15. 292 N.C. at 636, 234 S.E.2d at 750; *see* text accompanying note 57 *infra*.

16. 292 N.C. at 636, 234 S.E.2d at 750.

17. *See* Avery v. Pritchard, 93 N.C. 266, 267 (1885).

18. N.C. Sup. Ct. R. II, § 7, 89 N.C. 598 (1884), stated that:

> If the appellant in a civil action shall fail to bring up and file a transcript of the record before the call of causes from the district from which it comes is concluded during the week appropriated to the district, at a term of this court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal comes, or a certified transcript of the record . . . may move to have the appeal docketed and dismissed at appellant's cost, with leave to the appellant during the term and after notice to the appellee, to apply for the re-docketing of the cause.

Avery v. Pritchard incorrectly cited *id.* II, § 8 as the docket and dismiss procedure. 93 N.C. 266, 267 (1885). Rule II, § 8 provided that an appeal should not be reinstated until appellant paid or offered to pay appellee's costs of having the appeal dismissed under § 7.

19. Avery v. Pritchard, 93 N.C. 266, 267 (1885).

20. *Avery v. Pritchard* was one of the first cases to state the abandonment rule. *See id.*

The trial courts, however, consistent with rule II, section 7,[21] have required that an appellee seeking an adjudication of abandonment prove that the record and transcript were not docketed on time.[22] The rationale behind both procedures was that an appellee should have the fruit of his judgment promptly and thus is entitled to have an appeal that was taken but not prosecuted dismissed.[23]

The modern counterpart to the procedures allowing an appellee to dismiss an appeal for failure of the appellant to comply with the rules for prosecuting an appeal is rule 25 of the North Carolina Rules of Appellate Procedure,[24] which has its origin in part in rule II, section 7 of the Rules of Practice in the Supreme Court of North Carolina.[25] Rule 25 dispenses with the docket and dismiss procedure but continues the traditional authority of the trial court to dismiss appeals prior to docketing upon an appropriate showing. The rule makes explicit what was implicit in the abandonment procedure: first, that the method for having an appeal adjudged abandoned is a motion to dismiss by the appellee; and second, that the "proper showing" to support the motion consists of affidavits or copies of the record showing appellant's failure to take timely action or otherwise prosecute the appeal.[26]

There are no provisions governing dismissal of an appeal by an appellant in either the old Rules of Practice in the Supreme Court of North

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21. *See* note 18 *supra*.

22. *See* Pentuff v. Park, 195 N.C. 609, 611, 143 S.E. 139, 140 (1928).

23. Jordan v. Simmons, 175 N.C. 537, 540, 95 S.E. 919, 921 (1918) (concurring opinion) (attacking failure to perfect appeals as a cause of delay in the courts and endorsing adjudications of abandonment as the speedier of the two methods); Avery v. Pritchard, 93 N.C. 266, 267 (1885).

24. The North Carolina Rules of Appellate Procedure supersede the Rules of Practice in the Supreme Court of North Carolina and the Rules of Practice in the Appellate Court of North Carolina. *See* 4A N.C. GEN. STAT. app. I (Cum. Supp. 1977). N.C.R. APP. P. 25 states:

> If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in the appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court.

The Drafting Committee comments that the "rule states a blanket authority in the appropriate courts to dismiss cases on appeal for failure to take any timely action in the appellate process, from serving proposed case on appeal to filing the record on appeal" except that failure to file timely briefs is dealt with separately. *Id.*, Drafting Comm. Note. The rule also allows the court to excuse untimely action for good cause. This replaces the reinstatement procedure of N.C. Sup. Ct. R. II, §§ 7, 8, 89 N.C. 598 (1884); *see* note 18 *supra*.

25. N.C.R. APP. P. 25, Drafting Comm. Note. N.C. Sup. Ct. R. II, §§ 7, 8 was renumbered as rules 17 and 18 in 1889. *See* 104 N.C. 633 (1889). Rules 17 and 18 continued basically unchanged and were incorporated as N.C. Ct. App. R. 17, 18, 1 N.C. App. 632, 639 (1968).

26. N.C.R. APP. P. 25.

Carolina,[27] the Rules of Practice in the Appellate Court of North Carolina[28] or the North Carolina Rules of Appellate Procedure.[29] Furthermore, there is little early case law developing the procedure by which an appellant could abandon an appeal. Appellants can, nevertheless, abandon their appeals. Since 1947, the original limitation of the abandonment rule to appellees has apparently been discarded.[30] Both appellants and appellees can prove abandonment and thereby revest jurisdiction in the trial court. Moreover, the "proper showing" requirement of the abandonment rule has been extended to appellants.[31] Thus, an appellant could, in the discretion of the trial court, withdraw his appeal by making application for leave to dismiss and by showing that the appellee would not be prejudiced by the withdrawal.

The first indication by the North Carolina Supreme Court that a motion in the trial court by an appellant while his appeal was pending could constitute an abandonment of that appeal came in *Leggett v. Smith-Douglass Co.*[32] Plaintiffs in *Leggett* appealed an order of the trial court sustaining defendants' demurrer and dismissing the action. Plaintiff-appellants gave notice of appeal to the supreme court but subsequently failed to draft and serve a copy of the case on defendants; the appeal was never perfected.[33] Thereafter, appellants took a voluntary nonsuit[34] in superior court and instituted another action against defendants. The state supreme court held that under those circumstances "the taking of a voluntary nonsuit

27. 254 N.C. 783 (1961) (superseded 1975).

28. 1 N.C. App. 632 (1968) (superseded 1975).

29. *But cf.* N.C. GEN. STAT. § 15A-1450 (Cum. Supp. 1977) (express statutory authority for withdrawal of appeal by a criminal defendant).

30. In Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 376, 42 S.E.2d 407, 408 (1947), where the general rule and its exceptions were first consolidated, the abandonment rule was cited as a qualification to the general rule that jurisdiction is removed from the trial court pending appeal without reference to who may invoke the rule or under what conditions it may be invoked. Prior to this time the abandonment rule as set forth in Avery v. Pritchard, 93 N.C. 266 (1885); *see* text accompanying note 17 *supra*, had been cited only in cases in which the appellee was dismissing an appeal not prosecuted by the appellant. *Avery* was cited only once after *Hoke. See* Jones v. Brinson, 238 N.C. 506, 511, 78 S.E.2d 334, 339 (1953). Thereafter, *Hoke* was cited for the proposition that an appellant could abandon his appeal at the trial court prior to docketing. *See, e.g.*, McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960); State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959); Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947). The recent litigation raising the abandonment issue has resulted from appellants' attempts to abandon appeal in order to seek other affirmative relief at the trial court level. *See* text accompanying notes 6-11 & 48-53 *infra*.

31. McDowell v. Town of Kure Beach, 251 N.C. 818, 821, 824-25, 112 S.E.2d 390, 393, 395 (1960); *accord*, Town of Davidson v. Stough, 258 N.C. 23, 24, 127 S.E.2d 762, 763 (1962).

32. 257 N.C. 646, 127 S.E.2d 222 (1962).

33. *Id.* at 648, 127 S.E.2d at 223.

34. The nonsuit was pursuant to former § 1-224, 2 Hen. IV c. 7 (1400), *as adopted* by Rev. Code of N.C. ch. 31, § 110 (1855) (formerly codified as N.C. GEN. STAT. § 1-224 (1954)) (repealed 1967). Prior to the adoption of the North Carolina Rules of Civil Procedure, a plaintiff was allowed to take a voluntary nonsuit at any time before the verdict as long as the defendant had not asserted a counterclaim or a demand for affirmative relief. *Id.*

before the clerk of the superior court is tantamount to an abandonment or withdrawal of the appeal."[35] The notion that an appeal could be abandoned without a formal motion for abandonment was later endorsed in *Sink v. Easter*[36] and relied upon by the court of appeals in *Bowen*.[37]

Sink v. Easter involved a complex procedural tangle[38] that the *Bowen* court likened to a "Gordian knot."[39] On March 21, 1974 the trial judge entered a judgment granting defendant's rule 60(b)(6)[40] motion and dismissing plaintiff's case for lack of jurisdiction. In response, plaintiff filed a rule 60(b)(1) and (2) motion for relief from judgment on grounds of mistake, inadvertance and newly discovered evidence.[41] On the same day, the trial judge filed a Correction of Judgment and an order denying plaintiff's rule 60(b) motion.[42] Plaintiff gave notice of appeal from both of these actions by the trial court.[43] Thereafter, the trial judge, acting on his own motion,[44] set

35. 257 N.C. at 648, 127 S.E.2d at 224; *accord*, Williams v. Asheville Contracting Co., 257 N.C. 769, 770, 127 S.E.2d 554, 555 (1962) (per curiam).

36. 288 N.C. at 198, 217 S.E.2d at 542.

37. 29 N.C. App. 463, 465-66, 224 S.E.2d 699, 701 (1976). The supreme court in *Bowen*, however, summarily distinguished *Leggett*. *Leggett* "dealt with [North Carolina's] old voluntary nonsuit practice under which plaintiff had an absolute right voluntarily to nonsuit his action without prejudice up to the time a verdict was rendered against him." 292 N.C. at 638, 234 S.E.2d at 751. N.C.R. Civ. P. 41(a)(2), which was at issue in *Bowen*, does not convey an absolute right to dismiss the action without prejudice. The court further distinguished *Leggett* on the basis that plaintiff had failed to perfect his appeal prior to taking the nonsuit. Although in Williams v. Asheville Contracting Co., 257 N.C. 769, 127 S.E.2d 554 (1962) (per curiam), a case following *Leggett*, the time for perfecting the appeal had not expired at the time plaintiff filed a nonsuit, the *Bowen* court pointed out that plaintiff thereafter failed to perfect the appeal and it was subsequently dismissed by the supreme court. 292 N.C. at 638, 234 S.E.2d at 751.

38. *Sink* involved two actions commenced on September 3, 1971, for personal injuries and medical expenses resulting from an automobile accident. One action was instituted by Sherry Sink for injuries and expenses incurred subsequent to her majority; the other was instituted by Sherry Sink's father, James Sink, for Sherry's medical expenses prior to her majority. James Sink's action was litigated and ultimately remanded by the North Carolina Supreme Court with instructions to dismiss for lack of jurisdiction due to insufficiency of service of process. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

Sherry Sink's action remained in limbo until after James Sink's action was dismissed. Defendant then filed a N.C.R. Civ. P. 60(b)(6) (relief from judgment) motion to dismiss Sherry Sink's action on the ground that the court's prior denial of defendant's rule 12(b) motion to dismiss filed in March 1972 was "irregular and void" by reason of the decision in James Sink's action. Sink v. Easter, 288 N.C. at 188, 217 S.E.2d at 535. The *Sink* court pointed out that defendant's rule 60(b)(6) motion was mislabeled since it was made in response to the denial of defendant's rule 12(b)(5) (insufficiency of service) motion, an interlocutory order, while rule 60(b) applies only to final judgments. The *Sink* court elected, therefore, to treat defendant's rule 60(b)(6) motion as a motion for summary judgment based on collateral estoppel and to treat the trial court's granting of the rule 60(b)(6) motion as a granting of a rule 56 motion for summary judgment. *Id.* at 196-97, 217 S.E.2d at 540-41.

39. 292 N.C. at 636-37, 234 S.E.2d at 750.

40. N.C.R. Civ. P. 60(b)(6); *see* note 38 *supra*.

41. 288 N.C. at 190, 217 S.E.2d at 536.

42. *Id.* at 190, 217 S.E.2d at 536-37.

43. *Id.* at 190, 217 S.E.2d at 537 (appeal from corrected judgment granting defendant's N.C.R. Civ. P. 60(b)(6) motion); *id.* at 191, 217 S.E.2d at 537 (appeal from denial of plaintiff's N.C.R. Civ. P. 60(b)(1), (2) motion).

44. Since this action took place at a new session of court, the trial judge no longer had

aside his order denying plaintiff's rule 60(b) motion because he had erred in determining that he was without discretion to consider the motion.[45] The trial judge proceeded, over defendant's objection, to conduct a hearing on plaintiff's motion.

The question before the supreme court in *Sink* was whether plaintiff had properly abandoned her appeal from the denial of the rule 60(b) motion in order to revest jurisdiction in the trial court. In answering this question affirmatively, the supreme court construed the hearing on the rule 60(b) motion attended by both parties as constituting an adjudication by the trial court that plaintiff, by appearing at the hearing, gave proper notice of her intention to abandon her prior appeal from the denial of her motion.[46] The court concluded that the trial court had jurisdiction to reconsider plaintiff's 60(b) motion.[47]

The supreme court in *Bowen*, in rejecting *Sink's* holding that the proceedings alone constituted an abandonment of appeal,[48] gave controlling authority to an earlier decision, *Wiggins v. Bunch*.[49] The issue in *Wiggins* was whether motions filed pursuant to rules 59[50] and 60,[51] pending appeal, affected the general rule that an appeal removes the case from the jurisdiction of the trial court.[52] The trial court had granted defendants' motion to dismiss at the close of plaintiff's evidence; plaintiff gave notice of appeal in open court. Nearly two months after the judgment of dismissal, plaintiff moved to set aside the judgment and for a new trial pursuant to rules 59 and 60 on the grounds of newly discovered evidence. After a hearing on the motion, the trial court set aside the dismissal and granted plaintiff a new trial.[53]

The supreme court held that, because the time limit for a rule 59 motion is ten days after the entry of judgment,[54] rule 59 did not apply and that if

jurisdiction of the case under the term rule exception. *Id.* at 198, 217 S.E.2d at 542; *see* note 3 *supra*.

45. 288 N.C. at 190-91, 217 S.E.2d at 536. "As is recognized in many cases, a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Id.* at 198, 217 S.E.2d at 541.

46. *Id.* at 198, 217 S.E.2d at 542.

47. The events in *Sink* were further complicated because plaintiff gave notice of appeal on two issues. *See* text accompanying notes 62-71 *infra*.

48. 292 N.C. at 636, 234 S.E.2d at 749.

49. 280 N.C. 106, 184 S.E.2d 879 (1971); *see* text accompanying note 14 *supra*.

50. N.C.R. Civ. P. 59; *see* note 2 *supra*.

51. N.C.R. Civ. P. 60.

52. *See* text accompanying note 2 *supra*.

53. 280 N.C. at 107, 184 S.E.2d at 879.

54. N.C.R. Civ. P. 59(b) states: "A motion for a new trial shall be served not later than 10 days after entry of the judgment."

plaintiff were entitled to any relief it would have to be under rule 60.[55] *Wiggins* concluded that the general rule that an appeal divests the trial court of jurisdiction was not changed by the time limits for moving under rules 59 and 60 of the newly adopted North Carolina Rules of Civil Procedure.[56] Hence, even though plaintiff was within the time limit of rule 60 when he made his motion, the prior appeal had removed jurisdiction from the trial court, and the trial court was, therefore, without authority to vacate the judgment.

In giving controlling authority to *Wiggins, Bowen* emphasized that, although the court in *Wiggins* recognized the qualification to the general rule that an appeal divests the trial court of jurisdiction,[57] it found no occasion to apply the qualification in that case.[58] Instead, *Wiggins* held that motions filed pursuant to rules 59 or 60 could not properly be addressed to the trial court pending appeal.[59] Moreover, according to *Bowen*, "[t]here was no suggestion [in *Wiggins*] that the mere filing of the motions and the appearance of the parties for a hearing thereon constituted an abandonment of the appeal by the moving party."[60] If the filing of the motions and the appearance of the parties at a hearing did constitute an abandonment, the *Wiggins* court could have found an abandonment of appeal in that case. The *Bowen* court attempted to reconcile the apparent conflict between the implication in *Wiggins* that plaintiff's appearance at a hearing on his rule 59 and 60 motions did not constitute an abandonment of appeal and the express

55. 280 N.C. at 109, 184 S.E.2d at 880. N.C.R. CIV. P. 60(b) states: "The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation." Plaintiffs moved for a new trial on the grounds of newly discovered evidence under rule 60(b)(2). 280 N.C. at 107, 184 S.E.2d at 879.

56. 280 N.C. at 111, 184 S.E.2d at 882. The court was guided by interpretations of the nearly identical Federal Rules of Civil Procedure, FED. R. CIV. P. 59, 60. *See* Norman v. Young, 422 F.2d 470 (10th Cir. 1970) (when defendant filed an appeal before arguing his FED. R. CIV. P. 60(b) motion, the case was taken out of the trial court's jurisdiction); Switzer v. Marzall, 95 F. Supp. 721 (D.D.C. 1951) (when a motion for a new trial is filed and an appeal is taken thereafter, the case is removed from the trial court which no longer has jurisdiction over the rule 60(b) motion); Daniels v. Goldberg, 8 F.R.D. 580 (S.D.N.Y. 1948) (the district court has power to correct clerical errors in the record before the appeal is docketed in the appellate court and thereafter with leave of the appellate court under FED. R. CIV. P. 60(a), but this does not confer on the district court the power to vacate a judgment after an appeal has been filed); *cf.* Keyser v. Farr, 105 U.S. 265 (1881); Draper v. Davis, 102 U.S. 370 (1880) (in pre-Rules setting, after an appeal was allowed and security for appeal taken, the lower court was without jurisdiction).

57. *See* 280 N.C. at 108, 184 S.E.2d at 880.

58. 292 N.C. at 636, 234 S.E.2d at 750.

59. 280 N.C. at 111, 184 S.E.2d at 882. Plaintiff in *Bowen*, by making a N.C.R. CIV. P. 41(a)(2) motion for a voluntary dismissal grounded on newly discovered evidence rather than a rule 59 motion, may have been trying to avoid the effect of *Wiggins*. *Sink*, discussed at text accompanying notes 38-47 *supra*, was not decided until several weeks after the 41(a)(2) motion was made in *Bowen*.

60. 292 N.C. at 636, 234 S.E.2d at 750.

statement in *Sink* that the appearance of plaintiff at a hearing on her 60(b) motion did constitute an abandonment by narrowing *Sink* in light of later procedural events in the latter case.[61]

In doing so, however, the supreme court has apparently oversimplified the analysis in *Sink*. The *Bowen* court treated the procedural events in *Sink* as if there were only one appeal and interpreted *Sink* as holding that plaintiff's abandonment of her rule 60(b) motion was effective *only* in relation to plaintiff's later express abandonment of the same appeal.[62] The *Sink* court, however, had expressly maintained that it was "important to remember"[63] that two appeals were pending: an appeal from the order of dismissal and an appeal from the order denying plaintiff's rule 60(b) motion.[64] Plaintiff in *Sink* did not expressly abandon her rule 60(b) appeal,[65] but rather expressly abandoned her appeal from the judgment of dismissal subsequent to the initial, implied abandonment.[66] Therefore, even if the appeal from the rule 60(b) motion was effectively abandoned by the appearance of the parties at the hearing, the trial court in *Sink* still did not have sufficient jurisdiction to grant the rule 60(b) motion because the first appeal from the judgment of dismissal was still pending.

When the *Sink* court held that the hearing on the rule 60(b) motion constituted an abandonment of the appeal from the denial of that motion, it did not claim that the hearing on the rule 60(b) motion *also* constituted an abandonment of the appeal from the judgment of dismissal. On the contrary, *Sink* recognized that after the trial court regained jurisdiction over the rule 60(b) motion by virtue of the abandonment, it then faced the only issue that was before the court in *Wiggins*—the effect of a pending appeal on the trial court's power to grant relief under the 60(b) motion.[67] Following the practice of the federal courts,[68] the *Sink* court suggested that it could have

61. *Id.* at 636-37, 234 S.E.2d at 750.

62. "Plaintiff's position relative to her appeal on 1 April 1974 [the proceedings at which the trial court reconsidered its prior denial of plaintiff's rule 60(b) motion] must be considered in the context of her later *express* abandonment of *that* appeal and the court's order allowing the abandonment." *Id.* at 637-38, 234 S.E.2d at 750 (second emphasis added).

63. 288 N.C. at 198, 217 S.E.2d at 542.

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

65. 288 N.C. at 191, 198, 217 S.E.2d at 535-36, 542; *see* text accompanying notes 45-47 *supra*.

66. 288 N.C. at 200, 217 S.E.2d at 543.

67. *Id.* at 199, 217 S.E.2d 542; *see* 280 N.C. at 110, 184 S.E.2d at 881.

68. Earlier federal cases held that the district court had no power to consider a rule 60(b) motion pending appeal and required the party making the motion to first present his grounds to the appellate court which could remand the case or give permission to the district court to rule on the motion. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2873, at 263-65 (1973). The practice of making a 60(b) motion in the appellate court is referred to in *Wiggins*, where the court stated that plaintiffs had failed to make the 60(b) motion in the appellate court within the time limit of the rule. 280 N.C. at 111, 184 S.E.2d at 882; *accord*, Rhodes v.

treated the order granting plaintiff relief under rule 60(b) as a " 'clear indication' " of how the trial court would rule were the cause remanded to the trial court.[69] Remanding the cause became unnecessary, however, because plaintiff expressly abandoned her appeal from judgment of dismissal prior to the granting of the rule 60(b) motion.[70] The *Sink* court stated that only after plaintiff expressly abandoned her appeal from dismissal for lack of jurisdiction by successfully filing a motion to withdraw the appeal was the trial judge revested with jurisdiction over the "entire cause."[71] It was not until after this motion to withdraw the appeal from the judgment of dismissal was granted that the trial court ruled on plaintiff's rule 60(b) motion, set aside the judgment of dismissal and denied defendant's motion to dismiss for lack of jurisdiction.

Much of the problem in *Sink* arises from an overly broad interpretation that in all circumstances proceedings on a post-verdict motion made in the trial court pending a prior appeal constitute an abandonment of that appeal. *Bowen* was correct in holding that this is not a proper interpretation of *Sink* and that the implied abandonment in *Sink* must be viewed in light of its procedural context.[72] *Bowen*, however, by failing to distinguish between the two appeals in *Sink*, derived the rule that an express abandonment is required in all cases in order to revest jurisdiction in the trial court.[73] This holding does not adequately account for the relationship between the proceedings constituting an abandonment and the later procedural events in *Sink*. The *Sink* rule allowing the proceedings on the rule 60(b) motion to constitute an abandonment is limited to the situation where there is an appeal both from judgment and from a rule 60(b) motion properly made in the trial court prior to appeal and where the abandonment only vests jurisdiction in the trial court for the purpose of "reconsidering" the rule 60(b) motion pending either remand or express abandonment of the still pending appeal from judgment.[74]

To hold in that narrow context, as *Sink* does, that the proceedings

Henderson, 14 N.C. App. 404, 409, 188 S.E.2d 565, 568 (1972); A. MCINTOSH, *supra* note 2, § 1800(7), at 242 & § 1720, at 94 (1956 & Supp. 1970).

Other cases developed a procedure, recommended by Wright and Miller, C. WRIGHT & A. MILLER, *supra* § 2873, at 256-66, and suggested by Sink, 288 N.C. at 199-200, 217 S.E.2d at 543, whereby the district court could consider the rule 60(b) motion and, if it were inclined to grant it, application could be made to the appellate court for remand. The result is that while the district court could deny the motion, it could not grant it until there had been a remand. 7 MOORE'S FEDERAL PRACTICE ¶ 60:30(2), at 420-22 (2d ed. 1970).

69. 288 N.C. at 199-200, 217 S.E.2d at 543.

70. *Id.*

71. *Id.* at 200, 217 S.E.2d at 543.

72. *See* text accompanying note 61 *supra*.

73. *See* text accompanying note 62 *supra*.

74. *See* text accompanying notes 64-66 *supra*.

constituted an abandonment of the rule 60(b) appeal is not inconsistent with *Wiggins*, in which the rule 60(b) motion was not made in the trial court until after an appeal from judgment had been taken.[75] The trial court in *Wiggins* never had jurisdiction over the rule 60(b) motion that could be revested. Furthermore, the jurisdiction purportedly conveyed by the proceedings on the motion was not to reconsider the post-verdict motion but to rule on the pending appeal. Thus, the court's conclusion in *Bowen* that the filing of a rule 41(a)(2) motion and the appearance at a hearing did not constitute an abandonment of appeal absent express abandonment of the appeal and a judgment of the trial court to that effect elaborates the holding in *Wiggins* and clarifies the requirements for abandonment of appeal by appellants.

The need to abandon an appeal in order to seek post-verdict relief in the trial court could be reduced by more cautious use of oral notice of appeal.[76] When it is necessary to abandon an appeal, any remaining uncertainty surrounding the procedures for voluntary abandonment by an appellant could be eliminated by adopting a provision for voluntary dismissal by appellants similar to that governing dismissals by appellees.[77] The drafters of the Federal Rules of Appellate Procedure have recognized the need for such a provision[78] and perhaps *Wiggins, Bowen* and *Sink* reveal the need for such a provision in North Carolina.

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75. *See* text accompanying notes 49-56 *supra*.
76. *See* note 2 *supra*.
77. *See* note 24 and text accompanying notes 27-31 *supra*.
78. FED. R. APP. P. 42 provides:

(a) **Dismissal in the District Court.**
If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.
(b) **Dismissal in the Court of Appeals.**
If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Id.

Constitutional Law—*Pacifica Foundation v. FCC*: First Amendment Limitations on FCC Regulation of Offensive Broadcasts

The Federal Communications Commission (FCC) has enormous power over broadcasters, and it has not hesitated to use that power to enforce its own views of what constitutes good radio and television programming. Among the FCC's goals has been the expurgation of "offensive" language from the airwaves. To this end, the FCC has used its powers to assess forfeitures,[1] to deny license renewal applications[2] and to exert indirect pressure on licensees.[3] The FCC's efforts have not been limited to obscene speech. The Commission has argued that the unique nature of the broadcasting medium justifies restrictions, even on speech that does not meet the Supreme Court's definition of obscenity.[4] In *Pacifica Foundation v. FCC*,[5] the United States Court of Appeals for the District of Columbia reversed an FCC order[6] prohibiting the broadcast of certain "offensive" words. The court held that the order violated both the Communications Act of 1934[7] and the first amendment. Although the court left open the general question whether the FCC can ever prohibit the broadcast of nonobscene speech, the opinions in the case suggest that such Commission action will not be upheld.

On October 30, 1973, radio station WBAI in New York City was broadcasting its regularly scheduled "Lunchpail" program.[8] As part of the program, the host played a prerecorded monologue called "Filthy Words,"[9]

1. 47 U.S.C. § 503(b) (1970) authorizes the Commission to assess fines, called "forfeitures," against licensees. Such a forfeiture was assessed for the broadcast of indecent language in WUHY-FM, 24 F.C.C.2d 408 (1970).

2. Palmetto Broadcasting Co., 33 F.C.C.2d 250 (1962), *reconsideration denied*, 34 F.C.C.2d 101 (1963), *aff'd per curiam on other grounds sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

3. *See* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 407-10 (D.C. Cir. 1975) (Bazelon, C.J., stating why he voted to grant rehearing en banc). The FCC's own proud description of how it browbeat the networks into adopting the "Family Viewing" period is found in FEDERAL COMMUNICATIONS COMMISSION, REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL, 51 F.C.C.2d 418, 420-24 (1975). Its tactics on that occasion were later held to violate the first amendment. Writers Guild of Am., W., Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976).

4. *See* text accompanying notes 120-24 *infra*.

5. 556 F.2d 9 (D.C. Cir. 1977), *cert. granted*, 98 S. Ct. 715 (1978) (No. 77-528), *rev'g* 56 F.C.C.2d 94 (1975).

6. Pacifica Foundation, 56 F.C.C.2d 94 (1975).

7. Ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.). The section involved in *Pacifica* was 47 U.S.C. § 326 (1970).

8. This was a live discussion program that focused on a different topic each day. It involved commentary from a host and discussions between him and listeners who called in. On that day the topic was contemporary society's attitudes toward language. 56 F.C.C.2d at 95.

9. The monologue was cut five of side two of the album "George Carlin, Occupation: FOOLE," (Little David Records, LD 1005). It was broadcast at approximately two p.m. on a Tuesday. *Id.* A transcript of the monologue appears as an appendix to Judge Leventhal's dissenting opinion. 556 F.2d at 37 app.

in which comedian George Carlin discussed "the words you couldn't say on the public . . . airwaves, . . . the ones you definitely couldn't say, ever."[10] Because the monologue included numerous repetitions of those words, WBAI preceded the broadcast with a warning that the language might offend some listeners.[11]

One listener complained to the FCC.[12] The FCC responded by issuing an order banning the broadcast of the words listed by Carlin.[13] It did so on the authority of 18 U.S.C. § 1464,[14] a criminal statute that outlaws the broadcast of obscene, indecent or profane language. Arguing that the restriction would not stifle free speech, the FCC said that few words were indecent and that even indecent words "conceivably might be broadcast"[15] late at night, when children would not be listening.[16]

Pacifica Foundation, holder of WBAI's broadcasting license, appealed the order. The court of appeals reversed the FCC by a vote of two to one.[17] Judge Tamm, who wrote for the court, voted to reverse the order on the ground that it violated 47 U.S.C. § 326,[18] which denies the FCC the power

10. 556 F.2d at 38 (appendix to dissenting opinion of Judge Leventhal). " 'The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.' " *Id.* (quoting the Carlin monologue, *see* note 9 *supra*).

11. *Id.* at 11.

12. *Id.* This listener heard the broadcast while driving in his car with his young son. There were no other complaints to either the FCC or WBAI. *Id.*

13. The order declared "that words such as 'fuck,' 'shit,' 'piss,' 'motherfucker,' 'cocksucker,' 'cunt' and 'tit' depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." 56 F.C.C.2d at 99. In a later clarification, the FCC stated that it would not hold licensees responsible for offensive language used in live news broadcasts of public events. "Petition for Clarification or Reconsideration" of a Citizen's Complaint against Pacifica Foundation, 59 F.C.C.2d 892, 893 n.1 (1976).

14. 18 U.S.C. § 1464 (1970) provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." In addition, 47 *id.* § 503(b)(1)(E) empowers the Commission to impose forfeitures on licensees for violations of § 1464.

15. "[D]uring the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value." 56 F.C.C.2d at 100. Elsewhere in its opinion the Commission stated this exception somewhat differently: "When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used. . . . [W]e would . . . consider whether the material has serious . . . value . . . ." *Id.* at 98. Neither formulation commits the FCC to making any exception at all. The Commission continued to hedge in "Petition for Clarification or Reconsideration" of a Citizen's Complaint against Pacifica Foundation, 59 F.C.C.2d 892 (1976): "We intimated that such language could be broadcast . . . when the number of children in the audience was reduced to a minimum . . . . Having said this, we will not comment on the various hypothetical situations posed . . . ." *Id.* at 893.

16. The declaratory order was not accompanied by any attempt to assess a fine against WBAI. 56 F.C.C.2d at 99.

17. 556 F.2d 9 (D.C. Cir. 1977). Each judge on the three-judge panel wrote an opinion.

18. 47 U.S.C. § 326 (1970) provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

of censorship. He noted that the speech in question was not obscene[19] under the test enunciated by the Supreme Court in *Miller v. California*,[20] but he did not pass on the Commission's argument that "indecent" speech was not constitutionally protected. Even if this were so, he concluded, the order was overbroad and vague.[21]

In a concurring opinion, Chief Judge Bazelon agreed that section 326 had been violated on its face.[22] Nevertheless, he did not base his decision on that statute because he thought the scope of the protection afforded by section 326 was limited to that already provided by the first amendment.[23] He therefore reached the constitutional issue and decided that Carlin's seven words would have been protected by the first amendment had they been disseminated through any other medium[24] and that none of the differences between broadcasting and other media justified greater restrictions on such language.[25]

Judge Leventhal dissented, in part because he interpreted the FCC order as prohibiting only the reiterated use of the offensive words in the early afternoon.[26] He thought such regulation valid under *Miller*,[27] especially when used to protect children who might be in the audience.[28] While admitting to some discomfort over the inexactness of the order, he concluded that this was not a serious problem because judicial review was available to safeguard constitutionally protected speech.[29]

Section 1464 lists three kinds of speech that may not be broadcast: the

19. 556 F.2d at 16.

20. 413 U.S. 15 (1973). The *Miller* test of obscenity has three elements:

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

Id. at 24.

21. 556 F.2d at 16. The overbreadth arose because the order barred even nonoffensive uses of the seven words. *Id.* at 17. Although Judge Tamm declined to attempt to construe the term "indecent" in § 1464, *id.* at 15, he apparently assumed that nonoffensive language could never be indecent.

The fatal vagueness in the order was its failure to define "children." *Id.* at 17. Judge Tamm did not discuss two uncertainties in the Commission's statement of the times during which the words could not be broadcast. (1) When are there few enough children in the audience? *See* notes 102 & 103 and text accompanying notes 100-03 *infra*. (2) At those times, is the standard different? *See* note 15 *supra*. The order also did not make clear whether it banned only repetitive use of the seven words. *Compare* 556 F.2d at 19 n.2 (Bazelon, C.J., concurring) *with id.* at 31-32 (Leventhal, J., dissenting).

22. 556 F.2d at 18-19 (Bazelon, C.J., concurring).

23. *Id.* at 20.

24. *Id.* at 20-24.

25. *Id.* at 24-30.

26. *Id.* at 31-32 (Leventhal, J., dissenting).

27. *Id.* at 32-33. *See also* text accompanying notes 74-79 *infra*.

28. 556 F.2d at 32-35.

29. *Id.* at 35.

"obscene," the "indecent" and the "profane."[30] The few reported cases interpreting "indecent" and "profane" provide little guidance on the meaning of those terms. Although the Supreme Court has made strenuous efforts over the last two decades to define "obscene,"[31] it has done so in the context of printed material and motion pictures rather than radio and television broadcasts. The most recent major obscenity case is *Miller*, which held that material is obscene if and only if it appeals to the prurient interest, offensively depicts sexual conduct and lacks serious value.[32]

The only reported case upholding a criminal conviction for broadcasting profanity is *Duncan v. United States*.[33] In *Duncan*, the United States Court of Appeals for the Ninth Circuit, relying on state cases that viewed profanity as abuse of religious terms,[34] held profane a radio broadcast that "used the expression 'By God' irreverently."[35] Thirty-five years later, in *Gagliardo v. United States*,[36] the same circuit found no profanity in a citizens' band radio broadcast that included the words "God damn it."[37] *Duncan* was cited but not distinguished with any clarity.[38] In *Tallman v. United States*,[39] the United States Court of Appeals for the Seventh Circuit suggested in dictum that "profane" referred to personal epithets that might provoke violence or are grossly offensive.[40] This definition might include

30. *See* note 14 *supra*.

31. For the history of the Court's struggle to define obscenity, see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 78-93 (1973) (Brennan, J., dissenting).

32. *See* note 20 *supra*.

33. 48 F.2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931).

34. *Id.* at 133. The definitions stated in these nonbroadcasting cases included "[a]ny words importing an imprecation of divine vengeance or implying divine condemnation, so used as to constitute a public nuisance," Gaines v. State, 75 Tenn. 410, 411 (1881), and "language irreverent toward God or holy things," City of Georgetown v. Scurry, 90 S.C. 346, 349, 73 S.E. 353, 354 (1912). The *Duncan* court did not specifically approve any particular definition.

35. 48 F.2d at 134. Defendant-appellant, owner of radio station KVEP in Portland, Oregon, also "referred to an individual as 'damned,' . . . and . . . announced his intention to call down the curse of God upon certain individuals." *Id.* Although this language was used in the course of an attack on a local school board member, among others, the court did not discuss whether the first amendment protected the speech.

36. 366 F.2d 720 (9th Cir. 1966).

37. *Id.* at 725.

38. The court said, "Since the only words attributed to appellant which could even remotely be considered as being 'profane' were 'God damn it,' which were . . . uttered in anger, there is no basis for holding that the language was 'profane' within the meaning of the statute." *Id.* This may mean that words uttered in anger are never profane. Another interpretation was accepted by the Alabama Court of Appeals in reviewing a conviction for disturbing the peace by profane language. That court cited *Duncan* and *Gagliardo* and inferred from them "that to constitute profanity an accused must imprecate divine vengeance upon an individual and that while the expression 'God damn you' is considered profanity, 'God damn it' is not." Baines v. City of Birmingham, 46 Ala. App. 267, 271, 240 So. 2d 689, 692, *cert. denied*, 286 Ala. 732, 240 So. 2d 694 (1970), *vacated and remanded on other grounds*, 403 U.S. 927, *rev'd per curiam on other grounds*, 47 Ala. App. 737, 253 So. 2d 58 (1971).

39. 465 F.2d 282 (7th Cir. 1972).

40. *Id.* at 286. The comment was dictum because the court found that appellant had been tried solely for using obscene language and that his language was indeed obscene. *Id.* at 287. For this reason, the trial judge had not defined the terms "indecent" and "profane" and appellant could not challenge the meanings of those terms. *Id.* at 286.

some nonreligious epithets,[41] but exclude "God damn you" as being too mild by today's standards to provoke violence or to be grossly offensive.

There is no authoritative interpretation of the term "indecent" as it is used in section 1464.[42] Both *Duncan* and *Tallman* appear to treat "indecent" as synonymous with "obscene." The *Duncan* court stated the test for obscenity, discussed several cases applying this test to allegedly obscene statements and concluded that appellant's language was neither obscene nor indecent—with no independent analysis of indecency.[43] Nevertheless, *Gagliardo* expressly rejected this interpretation of *Duncan*.[44] That court reversed a section 1464 conviction because of the trial judge's failure to define "indecent" for the jury,[45] but offered no guidance as to how it should be defined after the remand. Petitioner in *Tallman* challenged the constitutionality of the ban on indecent speech. The court upheld section 1464[46] on the authority of *Roth v. United States*,[47] in which the Supreme Court held that obscene material was not protected by the first amendment.[48] The reliance

41. *But see* Stewart v. United States, 428 F. Supp. 321 (D.D.C. 1976) (shout of "m—f—" at policeman in the District of Columbia is neither provocative of violence nor grossly offensive).

42. *See* 556 F.2d at 15; 56 F.C.C.2d at 97.

43. 48 F.2d at 132-33.

44. 366 F.2d at 725 n.7.

45. *Id.* at 725.

46. 465 F.2d at 285.

47. 354 U.S. 476 (1957).

48. The statutes upheld by the Court in *Roth* (and in its companion case, Alberts v. California, 354 U.S. 476 (1957)) resembled § 1464 in that they were not confined to "obscene" material. One was a federal statute that prohibited the mailing of "[e]very obscene, lewd, lascivious, or filthy book." Act of June 25, 1948, ch. 645, § 1461, 62 Stat. 683 (formerly codified as 18 U.S.C. § 1461 (1952)) (amended 1955). The other, a California law, made it a misdemeanor to keep for sale "any obscene or indecent . . . book." Law of April 17, 1952, ch. 23, § 4(3), 1953 Cal. Stats., 1952 1st Extraordinary Sess. 380 (formerly codified as CAL. PENAL CODE § 311 (West 1955)) (amended 1969). Nevertheless, the opinions considered only the constitutional status of obscene material. In *Roth*, the trial judge's instructions to the jury gave the words "obscene," "lewd" and "lascivious" a single meaning, one that the Court approved. 354 U.S. at 486. The trial judge's definition of "filthy," however, distinguished that term from "obscene," saying that obscene material promoted impure thoughts while filthy material aroused revulsion. 237 F.2d 796, 799 (2d Cir. 1956). The United States Court of Appeals for the Second Circuit had rejected defendant's challenge to this definition of "filthy" because that court thought the definition correct and because defendant had not raised the issue at trial. *Id.* at 799-800. The definition is apparently inconsistent with the Supreme Court's insistence on appeal to the prurient interest. *See* 354 U.S. at 487-88. In rejecting the vagueness challenge to the terms in the statute, the Court said, "These words, *applied according to the proper standard for judging obscenity*, . . . give adequate warning of the conduct proscribed . . . ." *Id.* at 491 (emphasis added). Presumably, either Roth did not press the contention that he might have been unconstitutionally convicted for mailing a filthy but nonobscene book, or the Supreme Court agreed with the Second Circuit that he had waived this objection.

The California state courts' interpretations of the state law challenged in *Alberts* had not distinguished between "obscene" and "indecent" material. *See* People v. Alberts, 138 Cal. App. 2d 909, 911, 292 P.2d 90, 91 (1955). The California definition of the phrase "obscene or indecent" met the United States Supreme Court's requirements for the definition of "obscene." 354 U.S. at 486. Thus neither *Roth* nor *Alberts* required the Court to consider the constitutionality of censoring nonobscene material.

The Court has indicated its willingness to construe federal statutes using "indecent" (or

on *Roth* suggests that the *Tallman* court considered the obscene to be the same as the indecent, but the decision was on the ground of obscenity.[49]

The Federal Communications Act empowers the FCC to assess forfeitures against licensees who violate section 1464.[50] In the absence of a judicial definition of "indecent," the FCC has developed its own interpretation. The leading case is *WUHY-FM*.[51] The Commission assessed a forfeiture against a Philadelphia radio station, WUHY-FM, because it had broadcast a prerecorded interview in which the words "shit" and "fucking" were apparently used frequently.[52] While conceding that the broadcast was not obscene,[53] the FCC held it to be indecent.[54] The opinion defined the term "indecent" to mean that "the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value."[55] This standard simply restated the then-prevailing definition of obscenity, as announced in *Memoirs v. Massachusetts*,[56] minus the first element of that definition: appeal to the prurient interest. The Commission found this broadcast patently offensive, although neither the FCC nor the

similar words) as encompassing only the obscene, should such construction be necessary to avoid constitutional problems. *See* United States v. 12 200-Ft. Reels of Super 8Mm. Film, 413 U.S. 123, 130 n.7 (1973). This limiting construction was actually applied to an amended version of the unmailable-matter statute, 18 U.S.C. § 1461 (1970), in Hamling v. United States, 418 U.S. 87, 114 (1974), to avoid vagueness problems. Judge Bazelon has interpreted *Hamling* as requiring a similar construction of § 1464 "by necessary implication." Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 418 n.46 (D.C. Cir. 1975) (Bazelon, C.J., stating why he voted to grant rehearing en banc). The Supreme Court has never heard a case arising under § 1464. When it does, § 1464 could be distinguished from § 1461 on the ground that the FCC, by taking care to set out its interpretation of "indecent," *see* text accompanying note 55 *infra*, has sufficiently clarified that term to save § 1464 from unconstitutional vagueness. Of course, it could still be unconstitutional for overbreadth, *see* text accompanying notes 69-139 *infra*, and any particular order issued under it could be unconstitutionally vague.

49. *See* note 40 *supra*.

50. 47 U.S.C. § 503(b)(1)(E) (1970).

51. 24 F.C.C.2d 408 (1970). This case is occasionally cited as *Eastern Education(al) Radio*.

52. The broadcast was the January 4, 1970, edition of a weekly program, "Cycle II," described by the station as "concerned with the avant-garde movement in music, publications, art, film, personalities, and other forms of social and artistic experimentation." The program was designed to reach college students and other "alienated" young people. Letter from WUHY-FM to FCC (Feb. 12, 1970), *quoted in* 24 F.C.C.2d at 408 n.1. It aired at 10 p.m. Sunday. 24 F.C.C.2d at 408. The FCC objected to such usages as "S—t man" and "Political change is so f——g slow." *Id.* at 409. *See also id.* at 416-17 (excerpts from interview transcript).

53. 24 F.C.C.2d at 412.

54. *Id.* at 414.

55. *Id.* at 412.

56. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966). This case is frequently cited simply as *Memoirs v. Massachusetts*. The *Memoirs* standard was that

> three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id. at 418.

station had received any complaints about it from listeners.[57] It also found the broadcast to be without redeeming social value, although the dissenters argued that such language was important as a reflection of the culture and life style of disaffected young people.[58]

The *WUHY* opinion paid little attention to possible first amendment problems, because of what the FCC called the "vital consideration"[59] that judicial review was available to protect freedom of speech. No such review was sought in *WUHY*. The FCC's definition of "indecent" has been challenged in only one reported case.[60] On that occasion the United States Court of Appeals for the District of Columbia upheld the assessment of a forfeiture because it found the broadcast in question obscene, and thus did not reach the issue of indecency.[61]

Judge Tamm's opinion in *Pacifica* also did not reach this issue. Dispositive of the case for Judge Tamm was the statutory prohibition against censorship in section 326.[62] He considered and rejected the FCC's argument that its order merely "channeled" speech.[63] Holding that the order censored speech, he concluded that it violated section 326 and was therefore invalid, whatever the constitutional status of the speech sought to be suppressed.[64]

57. 24 F.C.C.2d at 409 n.2. The FCC apparently made no effort to determine the community's reaction to such language. *Id.* at 423 (Johnson, Comm'r, preliminarily dissenting).

58. Commissioner Johnson quoted Professor Ashley Montagu's belief that swearing has social value. *Id.* at 424 (Johnson, Comm'r, preliminarily dissenting). Commissioner Cox thought young people used such language partly because "it is *intended* to show disrespect for the standards of their elders, which they regard as outmoded, without real basis, and 'irrelevant.' " *Id.* at 419 (Cox, Comm'r, concurring in part and dissenting in part). He also accepted the station's contention that " '[t]he challenged language . . . reflected the personality and life style of' " the interviewee, Jerry Garcia, the leader of the rock band "The Grateful Dead." *Id.* (quoting letter from WUHY-FM to FCC, *supra* note 52). Some of Commissioner Cox's arguments show a concern, not that the language per se had social value, but that the necessity of keeping it off the air would impair the social value of the rest of the program. "It might have been difficult for Mr. Garcia to change his habits of speech without interfering with the flow of his ideas—or he might simply have refused to give the interview at all on those terms." *Id.* at 419. Deleting offensive words would be such an inconvenience to the station that it might well choose not to interview such people at all. *Id.* at 420-21.

59. *Id.* at 415.

60. Sonderling Broadcasting Corp., 27 RADIO REG. 2d (P & F) 285, *reconsideration denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975). *See also* Apparent Liability of Station WGLD-FM, 41 F.C.C.2d 919 (1973) (texts of FCC news release on, and Comm'r Johnson's dissent in, *Sonderling*).

61. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 403 n.14 (D.C. Cir. 1975). The Commission had applied the *WUHY* definition of indecency to an explicit discussion of oral sex. "Femme Forum," a live call-in program, was broadcast every weekday from 10 a.m. to 3 p.m. on WGLD-FM, Oak Park, Illinois. *Id.* at 401. On February 23, 1973, the subject discussed was oral sex. Women in the audience called the station and described their own oral sex experiences in explicit terms. *Id.* The FCC held that the broadcast was obscene under the *Memoirs* test, *id.* at 403-04, and added, as an alternative ground for the decision, that the broadcast was also indecent under the *WUHY* test, *id.* at 403 n.14. There is no indication in the FCC or court of appeals opinions that any of the words later proscribed in *Pacifica* were used. The alleged indecency arose strictly from the subject matter and what was said about it.

62. 556 F.2d at 15.

63. *Id.* at 13.

64. *Id.* at 15.

This position, however, gives no effect to section 1464 or to the FCC's power to enforce that section.[65] The language of section 1464 was originally enacted as the second sentence of section 326 of the Communications Act of 1934.[66] Because Congress, when it banned censorship, simultaneously banned the broadcast of certain speech and later gave the FCC the power to enforce the latter ban,[67] the categories of speech so proscribed must be considered exceptions to the statutory rule that the FCC may not engage in censorship.[68]

The major issue raised by *Pacifica* is the extent to which the first amendment prohibits the FCC from censoring offensive speech. The Commission could, as it did in *Sonderling Broadcasting Corp.*,[69] defend the constitutionality of a given restriction in two ways. First, it could argue that the particular broadcast in question was not protected speech because it fell within one of the currently recognized exceptions to the first amendment's coverage, such as obscene speech[70] or "fighting" words.[71] Second, the Commission could argue that the courts should withhold constitutional protection from a newly recognized category of unprotected speech, the indecent, which might be limited to broadcast speech.[72]

The FCC apparently did not consider the first argument applicable to the facts of *Pacifica*, as it did not consider the Carlin monologue obscene.[73] Judge Leventhal, however, thought that the monologue could be included within *Miller*'s expanded definition of obscenity.[74] The *Miller* Court included in its opinion an example of a standard a state legislature might constitutionally adopt: "Patently offensive representations or descriptions of . . . excretory functions."[75] The Court offered this as an acceptable standard for defining "patently offensive," the second of the three elements

65. *See* note 14 *supra*.

66. Ch. 652, § 326, 48 Stat. 1064 (presently codified at 18 U.S.C. § 1464 (1970); 47 *id.* § 326). This sentence was shifted to Title 18 in 1948 as part of the revision of the United States Criminal Code. Act of June 25, 1948, ch. 645, § 1464, 62 Stat. 683 (codified at 18 U.S.C. § 1464 (1970)).

67. Communications Act Amendments of 1960, Pub. L. No. 86-752, § 7a, 74 Stat. 889 (codified at 47 U.S.C. § 503(b) (1970)).

68. Chief Judge Bazelon thought it unclear how much power the FCC had under 47 U.S.C. § 503(b)(1)(E) (1970); *see* note 1 *supra*. 556 F.2d at 20 n.7 (Bazelon, C.J., concurring). Although he cited that section and § 1464, he rejected Judge Tamm's argument for a different reason. He thought that Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975), limited § 326 so that it provided no greater protection of offensive speech than did the first amendment. *See* 556 F.2d at 20 (Bazelon, C.J., concurring).

69. 27 RADIO REG. 2d (P & F) 285, *reconsideration denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

70. *See* Roth v. United States, 354 U.S. at 485.

71. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

72. *See* 556 F.2d at 24 (Bazelon, C.J., concurring). These two alternatives are not exclusive.

73. 56 F.C.C.2d at 94-95.

74. 556 F.2d at 32-33 (Leventhal, J., dissenting).

75. 413 U.S. at 25.

of obscenity.[76] Judge Leventhal, however, interpreted it as an acceptable standard for defining "obscene" and thought that *Miller* therefore authorized the expansion of the concept of obscenity to include material not appealing to the prurient interest.[77] Judge Bazelon disagreed, reading *Miller* as requiring appeal to the prurient interest whether or not there was offensive representation of excretory functions.[78] Judge Leventhal's interpretation, if accepted, would have major consequences for FCC regulation of offensive speech: regulation would be constitutional even without a finding of appeal to the prurient interest and, presumably, even without a finding of lack of serious value.[79]

The FCC's opinion in *Pacifica* abandoned the obscenity argument. It rested on a finding of fact that the Carlin monologue was indecent[80] and on the legal theory, first applied in *WUHY*, that nonobscene but indecent broadcasts could constitutionally be banned.[81] The Commission departed from the *WUHY* definition of indecency, however, by changing its second element—that "the material broadcast . . . [be] utterly without redeeming social value."[82] Some revision was clearly justified in light of *Miller*. The obvious change would have been to require, as the second element, that the material broadcast lack serious literary, artistic, political or scientific value.[83] Instead, the Commission went much further and greatly weakened,

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76. After setting out the three-part standard, *see* note 20 *supra*, the Court said, "It is possible . . . to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*: . . . (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25.

77. The pre-*Miller* rulings had always defined "obscene" in terms of what appeals to the lewd and prurient interest . . . . But *Miller* expanded on this—to include "patently offensive representations or descriptions of . . . excretory functions." . . . This is in substance a stretch of the prohibition to go beyond the lewd obscene to the excretory indecent.

556 F.2d at 32-33 (Leventhal, J., dissenting) (citations omitted).

78. *Id.* at 21 n.11 (Bazelon, C.J., concurring).

79. Judge Leventhal limited his argument in *Pacifica* to the contention that appeal to the prurient interest is not a necessary element of obscenity. *See* note 77 *supra*. He did not say whether lack of serious value remains an element. Nevertheless, his logic seems to imply that it does not. Assuming that "offensive representations or descriptions of excretory functions" is an example merely of *patent offensiveness*, the second *Miller* element, *see* note 20 *supra*, such representations do not necessarily satisfy the requirement that the material appeal to the prurient interest, the first element, *see id. Miller* made clear that the conjunction of all three elements is necessary to a finding of obscenity. Therefore, Judge Leventhal's argument is sound only if "offensive representations or descriptions of excretory functions" is an example of *obscenity*. In that case there need be no additional proof either of appeal to the prurient interest or of lack of serious value.

80. 56 F.C.C.2d at 99.

81. *Id.* at 97-98.

82. WUHY-FM, 24 F.C.C.2d at 412; *see* text accompanying note 55 *supra*.

83. *See* note 20 *supra*. The second element of the *WUHY* definition of indecency was modeled on the third element of the *Memoirs* definition of obscenity. *See* text accompanying note 56 *supra*. Since *Miller* changed the latter, 413 U.S. at 24-25, it would have been appropriate for the FCC to change the former to maintain the parallelism.

perhaps eliminated,[84] the requirement that the banned broadcast be valueless. It held that "when children may be in the audience, [indecent language] cannot be redeemed by a claim that it has literary, artistic, political, or scientific value."[85] The FCC argued[86] that this approach did not violate the first amendment because of the Supreme Court's holding in *Ginsberg v. New York*.[87] In *Ginsberg*, the Court upheld the conviction of a newsdealer who had sold two "girlie" magazines to a sixteen-year-old boy. The magazines would not have been considered obscene for adults. The statute under which the newsdealer had been convicted prohibited the sale to minors of material meeting the statutory definition of "harmful to minors."[88]

The FCC did not discuss two important differences between the holding in *Ginsberg* and its own *Pacifica* rule. The first is that *Ginsberg* still requires a finding that the challenged material be obscene as to children. *Ginsberg* was decided in 1968, when the prevailing standard of obscenity was that set forth in *Memoirs*.[89] The New York statute upheld by the *Ginsberg* Court simply added the words "of minors" or "for minors" to each of the three parts of the *Memoirs* definition of obscenity.[90] In particular, the statutory proscription applied only to material that was "utterly without redeeming social importance for minors."[91] Although the Supreme Court has not yet had occasion to consider the impact of *Miller* on the

84. The "definition of 'indecent' language in *WUHY* . . . is clarified by *eliminating* the test 'utterly without redeeming social value' which the Supreme Court *modified* in *Miller* . . . ." FEDERAL COMMUNICATIONS COMMISSION, *supra* note 3, at 425 (discussing *Pacifica*) (emphasis added).

85. 56 F.C.C.2d at 98 (footnote omitted). The *WUHY* definition of "indecent," omitting appeal to the prurient interest as an element, has never been passed on by a court. *See* text accompanying notes 60 & 61 *supra*. The FCC's *Pacifica* rule goes beyond *WUHY* by disallowing the defense of redeeming social value. *But see* note 15 *supra*.

86. 56 F.C.C.2d at 98 n.6.

87. 390 U.S. 629 (1968).

88. *See* note 90 *infra*.

89. *See* note 56 *supra*.

90. The statute read:

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

Law of June 7, 1965, ch. 327, § 1, 1965 N.Y. Laws 1066 (formerly codified as N.Y. PENAL LAW § 484-h(1)(f) (McKinney Cum. Supp. 1966)) (repealed 1967) (current version at N.Y. PENAL LAW § 235.20(6) (McKinney Cum. Supp. 1977-1978)).

"Harmful to minors," so defined, was made an element in a finding that the sale of the material to minors was prohibited. Law of June 14, 1965, ch. 372, § 1, 1965 N.Y. Laws 1135 (formerly codified as N.Y. PENAL LAWS § 484-i (McKinney Cum. Supp. 1966)) (repealed 1967) (current version at N.Y. PENAL LAWS § 235.21 (McKinney Cum. Supp. 1977-1978)).

91. Law of June 7, 1965, ch. 327, sec. 1, § 484-h(1)(f)(iii), 1965 N.Y. Laws 1066 (repealed 1967), *quoted in* note 90 *supra*.

definition of obscenity for children,[92] it is not difficult to envision the new test. It would stand in the same relationship to the *Miller* test as the *Ginsberg* test did to that of *Memoirs*, and thus would require that the material lack serious literary, artistic, political or scientific value for children.[93] *Ginsberg*, therefore, does not support the FCC's refusal to consider the possible redeeming value of an offensive broadcast.

The second major problem with the FCC's reliance on *Ginsberg* is that broadcasting reaches adults as well as children. In *Butler v. Michigan*,[94] the Supreme Court overturned the conviction of a defendant who had sold books not suitable for minors. The actual purchaser was an adult (a plainclothes policeman), but the statute barred the sale of such materials to anyone.[95] The state's contention that the materials were unsuitable for minors was not disputed. Nevertheless, the Court found the statute unconstitutional because it "reduce[d] the adult population of Michigan to reading only what is fit for children."[96] The *Ginsberg* Court was careful to distinguish *Butler* by pointing out that the New York statute barred only sales to minors.[97] With regard to material that is not obscene for adults but is obscene for children, therefore, the first amendment allows a ban on distribution to children (*Ginsberg*) but prohibits a ban on distribution to adults (*Butler*). This doctrine is easily applied to printed materials. Because each copy of a book or magazine is sold to one purchaser, print media allow for what could be called the discrete distribution of obscene material.[98] Broadcasting, on the other hand, reaches many people simultaneously. A court reviewing a restriction on the broadcasting of *Ginsberg*-type material must accept one of two unattractive alternatives: either the first amendment protects the distribution to children of material that is obscene for them or it does not protect the distribution to adults of material that is not obscene for them. The same

92. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 n.10 (1975).

93. The other two elements would be (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest of minors, and (b) whether the work depicts or describes in a way patently offensive to minors sexual conduct specifically defined by the applicable state law. *See* note 20 *supra*; *cf.* N.Y. PENAL LAW § 235.20 (McKinney 1967 & Cum. Supp. 1977-1978) (similar wording in 1974 amendment to New York law).

94. 352 U.S. 380 (1957).

95. The statute read in part, "Any person who shall . . . sell . . . any book . . . containing obscene, immoral, lewd or lascivious language . . . tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth, . . . shall be guilty of a misdemeanor." Law of May 15, 1953, Pub. Act No. 74, 1953 Mich. Pub. Acts 71 (formerly codified at MICH. COMP. LAWS § 750.343 (MICH. STAT. ANN. § 28.575 (Callaghan 1954))) (repealed 1957).

96. 352 U.S. at 383.

97. 390 U.S. at 634-35.

98. *Cf.* Classroom lecture by Professor Harry Kalven, University of Chicago Law School (Apr. 15, 1974) (class notes of James Beckwith, Assistant Professor of Law, North Carolina Central University) (copy on file in office of *North Carolina Law Review*). Professor Beckwith believes Professor Kalven used the word "discreet"—*i.e.*, circumspect or prudent—as opposed to "discrete"—*i.e.*, individually distinct.

problem arises whenever the content of a broadcast is regulable with respect to only a part of the broadcast audience.[99]

The unattractiveness of the second alternative is diminished, the FCC argued in *Pacifica*, by the nature of the order's restriction on offensive words. Such language was not totally excluded from the airwaves; rather, it was "channeled"[100] into those time periods when fewer children would be exposed to it. *WUHY* was based in part on protecting children from exposure to offensive language aired between 10 and 11 p.m.,[101] so the restricted language might well be banned until 11 p.m. or even later.[102] By prohibiting such broadcasts during most of the day, the FCC's order imposed a substantial burden on constitutionally protected speech.[103]

Because of these two differences between *Ginsberg* and *Pacifica*, the FCC's censorship of offensive broadcasts would represent a significant extension of *Ginsberg*, one not justified by the *Ginsberg* Court's reasoning. The first reason the *Ginsberg* Court gave for affirming the conviction was that parents have a traditional right to control their children's upbringing.[104] Some parents would not want their children to read pornography, and the New York statute helped them enforce that desire.[105] The Court took care to point out that other parents were free to buy the magazines themselves and give them to their children.[106] Restrictions on the content of broadcasts, however, leave no room for parental choice. The Court's other basis for

99. The basis for regulating the Carlin monologue would be indecency rather than obscenity. The FCC opinion leaves open the possibility that the monologue would be regulable even with respect to adults. *See* 56 F.C.C.2d at 98. If it were, the problem of indiscreteness would be avoided entirely. The problem would also be avoided if the monologue, because of its serious value, were held to be nonregulable even with respect to children. *See* text accompanying notes 89-93 *supra*.

100. 56 F.C.C.2d at 98. The Commission analogized the regulation of offensive broadcasts to nuisance law: "The law of nuisance does not say . . . that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place . . . ." *Id.*

101. *See* note 52 *supra*.

102. The Commission's *Pacifica* opinion referred variously to "times of the day when there is a reasonable risk that children may be in the audience," 56 F.C.C.2d at 98 (footnote omitted); times "[w]hen the number of children in the audience is reduced to a minimum, for example during the late evening hours," *id.*; and simply "the late evening hours," *id.* at 100.

103. Judge Tamm cited studies showing "that large numbers of children are in the broadcast audience until 1:30 a.m." 556 F.2d at 13-14. As Judge Bazelon noted, the effect of the order was to make the material unavailable to adults with normal sleeping habits. *Id.* at 19-20, 27 (Bazelon, C.J., concurring). The severity of this burden on the speech distinguishes *Pacifica* from Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). In that case the Supreme Court upheld a restriction on the location of "adult" movie theaters. The challenged ordinance burdened speech only slightly because the theaters retained adequate opportunities to enter the market. *Id.* at 62.

104. 390 U.S. at 639.

105. *Id.* The Court distinguished between imposing morality on the child and supporting the parent's right to decide what the child would see. *Id.* at 639 n.7 (quoting Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 n. 68 (1963)).

106. *Id.* at 639.

affirming the conviction in *Ginsberg*—the state's independent interest in the welfare of children[107]—may well be inapplicable to cases involving offensive but nonobscene speech. This state interest was held to justify the prohibition because the legislature could rationally find pornography to be harmful to children.[108] The evidence cited in *Ginsberg*, however, concerned only the effects of material that appealed to the prurient interest; it is not clear that the FCC could rationally find any danger in material that lacked this element of obscenity.[109] Furthermore, the magazines in *Ginsberg* concededly had no redeeming social importance for minors.[110] *Ginsberg* does not hold that it is rational to find material harmful to minors while ignoring any value that it has for them.

The preceding discussion has distinguished *Ginsberg* from *Pacifica* on the assumption that print media distribute obscene material discretely. An adult purchaser of a book or magazine, however, may reconvey it to a child. The Supreme Court has taken note of this " 'outside business' in these materials"[111] and has drawn the conclusion that they cannot be kept out of the hands of children once they are sold. This suggests an inconsistency between *Ginsberg* and *Butler*: the state interests that supported the law upheld in *Ginsberg*[112] would also be served by the law struck down in *Butler*.

There are two theories on which these cases might be reconciled. The first is that an adult's interest in receiving the material always outweighs the state's interest in keeping it from children.[113] Censorship of speech that is not obscene for adults is constitutional only if no adult's rights are affected. This interpretation would limit permissible censorship of such speech to cases in which a minor was the only recipient of the material. Censorship of

107. *Id.* at 640.

108. *Id.* at 639, 641.

109. Regulation of obscene material is frequently defended on the ground that consumers of such material may be moved by it to commit antisocial sexual acts. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 n.8 (1973). This danger would presumably be absent if the material were completely nonsexual.

110. *See* 390 U.S. at 635.

111. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 n.7 (1973). *See also* United States v. 12 200-Ft. Reels of Super 8Mm. Film, 413 U.S. 123, 129 (1973); Kaplan v. California, 413 U.S. 115, 120 (1973). All three of these cases involved materials that were obscene for both adults and children.

112. *See* text accompanying notes 104-08 *supra*.

113. See Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 7, for a similar interpretation of *Butler*. There might be an exception to this principle when children are both the intended and the primary audience of the broadcast. In Mishkin v. New York, 383 U.S. 502 (1966), the Court allowed a jury to determine the obscenity *vel non* of the material with reference to a special group (homosexuals) rather than to the general population, when the material was "designed for and primarily disseminated to" that group. *Id.* at 508. Judge Leventhal, by contrast, would consider the presence of children in the audience if the broadcast were "geared to children—or [if] . . . a *substantial number* of children are likely to be in the audience without parental supervision." 556 F.2d at 36 (Leventhal, J., dissenting) (emphasis added) (footnote omitted).

nonobscene broadcasting, therefore, would never be allowed. The other reading of *Butler* and *Ginsberg* is that, although a state may protect children, it may do so only by acting against the person who directly conveys unsuitable material to a child. Earlier links in the chain of distribution may not be made unlawful, because no children are affected by them. This interpretation would allow censorship of broadcasting because the broadcaster himself takes the last step and reaches children directly.

The language used in the *Butler* and *Ginsberg* opinions suggests that the Court was acting on the first of these two theories. Had the *Butler* Court been following the second theory, it would have justified the reversal of the conviction on the ground that the law did not serve the state interest (because defendant bookseller was not the person who had directly conveyed any material to children). Instead, it reasoned that the Michigan law was not the least restrictive means of achieving the state's goal because it infringed on the first amendment rights of adults.[114] Similarly, the *Ginsberg* Court could have distinguished *Butler* on the ground that the defendant newsdealer in *Ginsberg* had himself sold pornography to a minor. In fact, however, the Court distinguished the statute on the ground that the New York law challenged in *Ginsberg* did not prohibit sales to adults.[115] In *Pacifica*, Judge Tamm[116] and Chief Judge Bazelon[117] appeared to follow the Supreme Court in adopting the first theory, while the FCC[118] and Judge Leventhal[119] acted on the second.

In addition to its expressed desire to protect children from offensive language, the FCC has argued, in *Pacifica*[120] and other cases,[121] that broadcasting is properly subject to stricter regulation because of its intrusive nature. A broadcast can reach unconsenting adults who did not know what they would hear when they tuned in to the program. Because this intrusion occurs in the home, the privacy interest involved is especially important. A case frequently cited by the FCC to support media content regulation is *Rowan v. United States Post Office Department*.[122] The Supreme Court in *Rowan* held it constitutionally permissible for the Post Office to honor postal patrons' requests that they not receive mail containing sexually explicit advertising.[123] The Court gave as one of its reasons the importance

114. *See* text accompanying note 96 *supra*.
115. 390 U.S. at 634-35.
116. *See* 556 F.2d at 17.
117. *See id.* at 27-28 (Bazelon, C.J., concurring).
118. *See* 56 F.C.C.2d at 97.
119. *See* 556 F.2d at 36 (Leventhal, J., dissenting).
120. 56 F.C.C.2d at 98-99.
121. *See, e.g.*, WUHY-FM, 24 F.C.C.2d at 411.
122. 397 U.S. 728 (1970).
123. The Post Office does so under 39 U.S.C. § 3008 (1970).

of protecting the individual's right to be free of unwelcome intrusions in the home.[124]

Rowan does provide some support for the FCC's position with respect to broadcast media. The intrusion on privacy was only fleeting, as the recipient could discard the offensive mail upon realizing its nature; nevertheless, the interest in not receiving it at all was held sufficient to justify the statute. This interest is similar to the interest of a dial-scanner in not hearing a single vulgar word. The major difficulty in applying *Rowan* to broadcasting is the distinction between the discrete and the indiscrete distribution of obscene or other offensive material. The mail is a discrete medium, so the enforcement of the statute on behalf of those postal patrons offended by the advertisements posed no threat to others' first amendment interests in being able to receive such material.

The Supreme Court has considered the problem of invasion of privacy through indiscrete media in two important cases. Appellant in *Cohen v. California*[125] had entered the Los Angeles County Courthouse wearing a jacket inscribed "Fuck the Draft." His conviction on a charge of disturbing the peace was reversed. In *Erznoznik v. City of Jacksonville*[126] the owner of a drive-in movie theater had been forbidden to show movies including any nudity, even if the movies were not obscene, because the screen was visible from the public highway. This municipal ordinance was held unconstitutional.[127] In each case the Court held that the appellant's activities were protected by the first amendment, although recognizing that there was a danger that the "speech" might reach the eyes of people who would find such expression offensive.[128] Balancing these interests, the Court held the former to be greater, especially since the offended onlookers could protect their privacy by averting their eyes.[129] By analogy, an offended recipient of a radio or television program can "avert his ears" by turning the dial.

Judge Leventhal rejected this analogy on the ground that, in both *Cohen* and *Erznoznik*, no one was offended except in a public place.[130] He accepted the FCC's argument that broadcasts of indecent language reach

124. 397 U.S. at 736-37.

125. 403 U.S. 15 (1971).

126. 422 U.S. 205 (1975).

127. *Id.* at 217. In addition, the city was barred from ordering the owner to build fences to block the view. *See id.* at 211 n.8.

128. *See* 422 U.S. at 212; 403 U.S. at 22.

129. The Court in *Cohen* held that the state could prevent intrusions only when "substantial privacy interests [were] being invaded in an essentially intolerable manner." 403 U.S. at 21. Because offended onlookers could be free of the intrusion simply by averting their eyes, *Cohen* was not such a case. *Id.* Nor was *Erznoznik*, for the same reason. 422 U.S. at 211-12.

130. 556 F.2d at 33 (Leventhal, J., dissenting). *Cohen* specifically acknowledged the greater privacy interest in being free from unwanted expression in the home. 403 U.S. at 21-22.

people in their homes, where their interest in privacy is entitled to greater protection. It is true that, while in their homes, people usually expect to be relatively unaffected by events in the outside world, but a broadcast interferes with no one who does not take affirmative steps to receive it. When someone in a house does turn on a radio or television set, he does so for the precise purpose of being affected by the outside world. It seems most reasonable to say that to turn on a radio or television set is to enter a public "place," no matter where the set happens to be located.[131] Modern technology makes it possible to leave one's home without leaving the house.

Under this analysis, broadcasting is not similar to the sound truck blaring in the street.[132] A better analogy would be to a person living across the street from the Los Angeles County Courthouse, who complained that, by standing on a chair and looking through a window with a pair of binoculars, he could see through the courthouse window and read the lettering on Cohen's jacket. His argument that the privacy of his home had been invaded would not be accepted, even though the offensive speech did enter his home. The very purpose of his action was to overcome the barrier placed between him and the world by the walls of his house. Having thus voluntarily exposed himself to a public place, he must take the consequences.

Given that the airwaves constitute a public "place" in some sense of that term, it is for the government to decide what sort of place it should be. Under some circumstances a municipality may, to preserve the peaceful character of a public park, ban all speeches and rallies in it.[133] This kind of

131. *See* Pacifica, 556 F.2d at 17; *id.* at 26-27 (Bazelon, C.J., concurring); Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 618 (1975). The FCC has drawn a distinction between the continuing affirmative steps required by one reading a book (the reader must continue reading and turning pages) and the single affirmative step required by broadcast media (the listener may turn a radio or television set on and then do nothing more). *See, e.g.*, 556 F.2d at 33 (Leventhal, J., dissenting); WUHY-FM, 24 F.C.C.2d at 411. It is not clear why the Commission considers this distinction to be of any importance. Even the listener has taken an affirmative step. Conceivably the FCC is concerned with protecting the right of an individual to give his consent to the intrusion and then withdraw that consent without having to turn the set off. *Cf.* Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (broadcast messages may have greater impact than written ones because an habitual watcher must take affirmative action to avoid them).

132. Those offended by sound trucks in residential areas could not avert their ears. *See* Cohen v. California, 403 U.S. at 21.

133. *See generally* Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975) and sources cited therein.

In addition to arguing that broadcasting is intrusive, the FCC has sought to distinguish it from other media by citing the scarcity of spectrum space. *See, e.g.*, Pacifica, 56 F.C.C.2d at 97. The Supreme Court has relied on this factor in holding that broadcast speech is entitled to less first amendment protection than is printed speech. *Compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (not unconstitutional to require broadcasters to provide equal time to opposing views), *with* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (similar law applied to newspapers is unconstitutional). Scarcity poses the danger that important points of

censorship promotes the public use of the park. The FCC has made an analogous argument for its regulation of offensive broadcasts, arguing that, if indecent language became widespread,

> it would drastically affect the use of radio by millions of people. No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism. Very substantial numbers would either curtail using radio or would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program.[134]

As an empirical prediction, this seems dubious. The FCC received no complaints about the interview in the *WUHY* case,[135] the broadcast of which raised this specter in the Commission's deliberations. The Carlin monologue in *Pacifica* drew one complaint.[136] In neither *WUHY* nor *Pacifica* did the Commission provide any evidence to substantiate its fears.[137]

Even if the FCC is correct on this point, it has established only that society would be better off if the public "place" of the airwaves were regulated to remove this danger, not that such regulation would be constitutional. The Court in *Cohen* said that the strongest argument for upholding the conviction was "that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary."[138] This is a policy consideration similar to the FCC's asserted role as guardian

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view will not be aired. For this reason, Commissioner Johnson has adhered to a distinction between affirmative obligations (*e.g., Red Lion*) and negative prohibitions, arguing that only the former serve to increase the diversity of programming. *See* Apparent Liability of Station WGLD-FM, 41 F.C.C.2d 919, 921-22 (1973) (Johnson, Comm'r, dissenting in *Sonderling*). The Court in *Red Lion* agreed that prohibitions were harder to justify. *See* 395 U.S. at 396. *See also* Banzhaf v. FCC, 405 F.2d 1082, 1100 n.76 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

134. WUHY-FM, 24 F.C.C.2d at 411.

135. *Id.* at 409 n.2.

136. 556 F.2d at 11. *See also* Sonderling Broadcasting Corp., 41 F.C.C.2d 777, 780 n.10 (1973) (Commission denies reconsideration of its earlier decision, 27 RADIO REG. 2d (P & F) 285 (1973), discounting claim of public opposition to censorship because it has received "only" four complaints about the earlier decision).

137. Even without FCC censorship, economic factors would severely limit offensive broadcasts. *See* 556 F.2d at 18; WUHY-FM, 24 F.C.C.2d at 421 (Cox, Comm'r, concurring in part and dissenting in part); Note, *supra* note 131, at 615. The Supreme Court has upheld an ordinance requiring the dispersal of "adult" movie theaters, but only after determining that there was a factual basis for the city's justification for controlling them. Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976).

The Court in *American Mini Theatres* also distinguished that case from *Erznoznik*. In *Erznoznik* Jacksonville's goal was to prevent the dissemination of offensive speech, while in *American Mini Theatres* Detroit sought to prevent the "secondary effect[s]" of clusters of "adult" theaters. *Id.* at 71 n.34. The FCC could argue that public abandonment of dial-scanning is such a secondary effect, but the effect is linked to the offensiveness of the speech to some citizens. *American Mini Theatres* included in its list of secondary effects the attraction of undesirables to the area and an increase in the crime rate. *See id.* at 55.

138. 403 U.S. at 22-23.

of the public airwaves. Nevertheless, the Court in *Cohen* rejected this justification for censorship. Freedom of speech, it said, also includes offensive speech, and putting up with the latter is the price that must be paid for the former.[139]

The Court in *Miller* reaffirmed the holding in *Roth* that the first amendment does not protect obscene speech—a position that has been vigorously disputed on both sides.[140] Nevertheless, the Burger Court has shown no willingness to create another category of unprotected speech. *Rowan* demonstrated the Court's concern for the unconsenting adult, but the Court has elswhere noted that " '[t]he radio can be turned off . . . .' "[141] *Erznoznik* demonstrated that the goal of protecting children from offensive material will not be allowed to override the first amendment interests of adults. On the basis of these precedents, it seems unlikely that the FCC will be successful in its attempts to sanitize the language used in some of our most important public fora—the broadcast media.

JAMES M. LANE

Federal Jurisdiction—*Vendo Co. v. Lektro-Vend Corp.*: The Interface of the Clayton Act and the Anti-Injunction Act

In *Vendo Co. v. Lektro-Vend Corp.*,[1] the United States Supreme Court had, and failed to take advantage of, the opportunity to define more clearly the exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283,[2] which prohibits the enjoining of state court proceedings. Specifically, the Court had before it the issue whether section 16 of the Clayton Act,[3] which

139. *Id.* at 24-26.

140. *See generally* Symposium, *Obscenity and the Law*, 28 HASTINGS L.J. 1275 (1977).

141. Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (quoting Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)).

1. 97 S. Ct. 2881 (1977).

2. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1970).

3. Clayton Act § 16, 15 U.S.C.A. § 26 (West Cum. Supp. 1977), provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . .

provides private injunctive relief in federal courts against Sherman Antitrust Act[4] violations, qualifies as an exception to the Anti-Injunction Act. In its attempt to construe section 2283, the Court became so embroiled in the language of the statute and the case law interpreting it that it all but ignored the policy behind the Act—"to prevent needless friction between state and federal courts."[5] The ultimate determination of the issue in *Vendo* may reflect this policy, but the focus of the opinions raises the question whether section 2283 has become so mechanically applied that it has lost its effectiveness.

The case came before the federal courts[6] when Lektro-Vend, Harry B. Stoner and Stoner Investments brought an antitrust action against Vendo. As part of that action, plaintiffs prayed that Vendo be temporarily enjoined from collecting a seven million dollar judgment granted it by the Illinois Supreme Court.[7] Vendo had obtained the Illinois judgment in a suit brought against Stoner for breach of a covenant against competition in his employment contract.[8] It was this restrictive covenant, along with the state court action to enforce it, that formed the basis of the alleged antitrust violation in Stoner's federal action.[9] The district court granted the injunction, finding "evidence that Vendo had used litigation as a method of harassing and eliminating competition."[10] The United States Court of Appeals for the Seventh Circuit affirmed.[11] Both courts held that section 16 of the Clayton

4. 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

5. Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 9 (1939).

6. Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. 527 (N.D. Ill. 1975), *aff'd*, 545 F.2d 1050 (7th Cir. 1976), *rev'd*, 97 S. Ct. 2881 (1977).

7. Vendo Co. v. Stoner, 58 Ill. 2d 289, 321 N.E.2d 1 (1974), *cert. denied*, 420 U.S. 975 (1975).

8. Vendo purchased Stoner Manufacturing Company from Harry B. Stoner and gave him a five year employment contract that included a ten year, world-wide restrictive covenant against competition. While employed by Vendo, Stoner, as an individual and through his company Stoner Investments, invested in the embryonic Lektro-Vend Corporation. Stoner's financial support and public backing of Lektro-Vend formed the basis of Vendo's state court action against Stoner. 403 F. Supp. at 530-31.

9. A peripheral aspect of the *Vendo* litigation was the question whether the federal antitrust laws can be asserted as an affirmative defense in the state courts. Lektro-Vend and Stoner tried to assert such a defense at the trial level in the Illinois courts; this defense was ordered stricken. Lektro-Vend Corp. v. Vendo Co., 545 F.2d at 1054 n.4. Although this ruling was reversed on appeal, Vendo Co. v. Stoner, 105 Ill. App. 2d 261, 245 N.E.2d 263 (1969), Lektro-Vend and Stoner withdrew the defense in the second round of the state court litigation. 545 F.2d at 1054 n.4.

The jurisdiction of state courts to hear federal antitrust defenses has been a matter of some dispute. *See* Recent Cases, *State Court Denies Jurisdiction in Contract Action to Hear Defense of Illegality Based on Federal Antitrust Laws*, 46 MINN. L. REV. 1135 (1961). Justice Stevens, in his dissenting opinion and without any dispute from the majority, appears to have assumed that the state court did, indeed, have such authority. *See* 97 S. Ct. at 2904 (Stevens, J., dissenting).

Although this attitude on the part of the Court would appear to open up the state courts for the assertion of federal antitrust defenses, it may be of limited utility. State courts cannot accord full relief under the antitrust laws, *id.*, a fact that will probably encourage persons so aggrieved to continue to seek their remedies in the federal courts.

10. 403 F. Supp. at 534.

11. 545 F.2d 1050 (7th Cir. 1976).

Act was an "expressly authorized" exception to section 2283, when, as here, the state court action is itself part of the anticompetitive scheme.[12] The district court further held that the injunction was "necessary in aid of its jurisdiction," and therefore permissible under section 2283.[13]

The Supreme Court, in a splintered decision, reversed.[14] Justice Rehnquist, writing the opinion of the Court in which two other justices joined,[15] held that section 16 is not an "expressly authorized" exception to section 2283, and that the district court did not act "in aid of its jurisdiction."[16] Justice Stevens wrote for the four dissenters[17] who found section 16 injunctions to be expressly authorized exceptions to section 2283.[18] Justice Blackmun and Chief Justice Burger conceded that section 16 can be an expressly authorized exception to section 2283, but cast the deciding votes denying the injunction[19] on the ground that the bringing of the Illinois suit was not a violation of the Sherman Act.[20]

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12. *Id.* at 1055; 403 F. Supp. at 536. Before *Vendo*, few courts squarely faced the issue of whether § 16 is an exception to § 2283. A few lower courts have denied § 16 injunctions against state court actions, but they have generally done so on the grounds that the state action sought to be enjoined is not a violation of the Sherman Act. *See* Response of Carolina v. Leasco Response, Inc., 498 F.2d 314 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974); Red Rock Cola Co. v. Red Rock Bottlers, Inc., 195 F.2d 406 (5th Cir. 1952); *cf.* Helfenbein v. International Indus., Inc., 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 879 (1971) (suggesting that had the state suit been an antitrust violation, the injunction would have been granted).

13. *See* note 2 *supra*. The district court held that collection of the judgment would place the two corporate plaintiffs under Vendo's control, thereby eliminating the case or controversy. 403 F. Supp. at 535.

14. 97 S. Ct. 2881 (1977).

15. Justices Stewart and Powell.

16. 97 S. Ct. at 2893.

17. Justices Stevens, Brennan, White and Marshall.

18. 97 S. Ct. at 2898 (dissent).

19. The concurrence of Blackmun and Burger created an anomalous result. Six justices (Blackmun, Burger, Stevens, White, Marshall and Brennan) found § 16 to be an expressly authorized exception, and seven (Stevens, White, Marshall, Brennan, Rehnquist, Stewart and Powell) possibly conceded that the state court action could have been found to be a Sherman Act violation. The plurality opinion did not reach the question. *See id.* at 2889 n.6. But because of the three-way split, the injunction was struck down.

20. *Id.* at 2893-94 (Blackmun, J., concurring). Justice Blackmun's opinion relies on Supreme Court cases granting governmental dealings immunity. In Eastern R.R. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the Court held that political lobbying is not a Sherman Act violation, even if the political activity incidentally results in a restraint on trade. Individuals and groups have the right to petition and attempt to influence their government; the Sherman Act may not interfere with this political sphere. This immunity was extended in UMW v. Pennington, 381 U.S. 657 (1965), to include attempts to influence administrative officials, even with an anticompetitive intent.

In California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Court invoked the "sham" exception recognized by *Noerr* and limited the immunity. "[T]here may be instances where the alleged conspiracy 'is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.' " *Id.* at 511 (quoting Eastern R.R. Conf. v. Noerr Motor Freight, Inc., 365 U.S. at 144) (citation omitted). The Court distinguished the political campaign of *Noerr*, in which misrepresentation and unethical tactics are to be expected, and the bringing of litigation in *California Transport*: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 513.

Justice Blackmun contended that the present action does not qualify as an exception to the

Congress enacted section 2283 as part of the Judiciary Act of 1793.[21] The original provision allowed no exceptions on its face.[22] This seemingly absolute prohibition did not prevent federal court judges from molding necessary modifications; injunctive relief under six federal statutes was universally accepted before 1941.[23] Federal courts were also willing to enjoin state cases involving the same res over which a federal court had first acquired jurisdiction,[24] state court judgments obtained by fraud,[25] and cases in which parties attempted to litigate issues in state court already decided in federal suits.[26]

In a startling turnabout in 1941, Justice Frankfurter, in his opinion for the Court in *Toucey v. New York Life Insurance Co.*,[27] held that the statutory exceptions and the res exception were the only ones to be recognized by the federal courts.[28] Congress reacted to this change in judicial attitude by amending the statute[29] to except from the general prohibition those injunctions "expressly authorized by Act of Congress,[30] or where

immunity conferred under *California Transport* because "a pattern of baseless, repetitive claims or some equivalent showing of grave abuse of the state courts must exist before an injunction would be proper. No such finding was made by the District Court in this case." 97 S. Ct. at 2893 n.*. This is a narrow reading of *California Transport*. *See* Associated Radio Serv. Co. v. Page Airways, Inc., 414 F. Supp. 1088 (N.D. Tex. 1976).

21. Ch. 22, § 5, 1 Stat. 334.

22. "[N]or shall a writ of injunction be [granted by any court of the United States] to stay proceedings in any court of a state . . . ." *Id.*

23. These exceptions were bankruptcy, removal, limitation of shipowner's liability, interpleader, the Frazier-Lemke Farm-Mortgage Act, and habeas corpus proceedings. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 47, at 203 nn.31 & 32 (3d ed. 1976).

24. *See* Kline v. Burke Constr. Co., 260 U.S. 226 (1922).

25. *See* Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920).

26. *See* Julian v. Central Trust Co., 193 U.S. 93 (1904).

27. 314 U.S. 118 (1941), *rev'g on rehearing* 313 U.S. 538 (1940) (per curiam) (mem.).

28. *Id.* at 139. *Toucey* involved a question of relitigation. Toucey brought an action in state court against defendant insurance company in 1935 for reinstatement of his insurance policy on the ground that the company had fraudulently cancelled by concealing from Toucey a provision that if he were to become disabled, premiums were waived. Toucey claimed he was disabled in 1933 and that the company cancelled his policy for nonpayment of premiums. The case was removed to federal court on diversity grounds. The federal district court dismissed the action, finding that Toucey was not disabled. There was no appeal. *Id.* at 126-27.

In 1937, Shay, purporting to be Toucey's assignee, brought the same action against the insurance company in the Missouri state courts. The insurance company brought an action in the federal district court to enjoin that action and any further actions by Toucey on the policy. The injunction was granted on the grounds that the federal court had already ruled against Toucey on the essential question of his purported disability. The district court held that the anti-injunction provision did not bar a federal injunction of state court actions when necessary to "effectuate the lawful decrees of the federal courts." *Id.* at 127. The Supreme Court, after initially affirming by an equally divided vote, 313 U.S. 538 (1940) (per curiam) (mem.), reversed on rehearing, holding the relitigation exception invalid. 314 U.S. at 139-41.

29. Act of June 25, 1948, ch. 646, § 2283, 62 Stat. 869. The Reviser's Note indicates that the amendment "restores the basic law as generally understood and interpreted prior to the Toucey decision." 28 U.S.C. § 2283, Reviser's Note (1970).

30. 28 U.S.C. § 2283 (1970) (footnote added). Lektro-Vend claimed, and the district court found, that an injunction under § 16 of the Clayton Act is "expressly authorized by Act of Congress." 403 F. Supp. at 536.

necessary in aid of [the federal court's] jurisdiction,[31] or to protect or effectuate [the federal court's] judgments."[32]

It is this more detailed statute that the Court had to consider in *Vendo*. Justice Rehnquist, writing the opinion of the Court, dealt primarily with the "expressly authorized" exception of section 2283, which he held inapplicable.[33] Justice Rehnquist recognized that a statute need not refer to either section 2283 or a state court proceeding to qualify as an exception. He observed, however, that the statutes that have been held exceptions "necessarily interact with or focus upon, a state judicial proceeding."[34] The removal process, for example, stays state court proceedings by its very nature.[35] Section 16, by contrast, merely extends to private parties the right to seek injunctive relief against antitrust violations; it in no way "focuses" upon state court actions.[36]

This requirement of "focus" is closely connected with the test for an

31. 28 U.S.C. § 2283 (1970) (footnote added). The Reviser's Note indicates that this second exception allows injunctions in connection with the removal of actions to federal courts. *Id.*, Reviser's Note. Justice Rehnquist had a different theory; he cited C. WRIGHT, *supra* note 23, § 47, at 204, to support his contention that this exception refers to the in rem exception. 97 S. Ct. at 2892.

In Capital Serv., Inc. v. NLRB, 347 U.S. 501 (1954), the Supreme Court held that the "necessary in aid of jurisdiction" exception allowed an injunction "where Congress . . . has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions." *Id.* at 504. Accordingly, the employer was enjoined by the federal court from enforcing a state court injunction of union activity, clearly not an in rem action. The Supreme Court again addressed the jurisdiction exception in Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970). "[I]t is not enough that the requested injunction is related to that jurisdiction, but it must be '*necessary in aid of*' that jurisdiction." *Id.* at 295. The exception implies "that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Id.* As in *Capital Service*, the case involved the enjoining of union activity, certainly not a situation involving the in rem exception.

32. 28 U.S.C. § 2283 (1970). The third exception is designed to prevent relitigation in state courts of issues already resolved in federal courts—the situation involved in the *Toucey* case. C. WRIGHT, *supra* note 23, § 47, at 204.

33. 97 S. Ct. at 2893. Rehnquist also held that the injunction could not be sustained on § 2283's second exception—that the injunction was necessary in aid of the district court's jurisdiction. Rehnquist suggested that this language refers only to in rem actions. *Id.* at 2892. The Supreme Court, however, has used the exception to allow injunctions of in personam actions. *See* note 31 *supra*. Nevertheless, Justice Rehnquist is probably correct in his conclusion that the facts of the case do not warrant application of the exception. Even if collection of the state court judgment were to reduce the corporate plaintiffs to Vendo satellites, Harry Stoner as an individual plaintiff could preserve the case or controversy, and the court's jurisdiction would be intact.

34. 97 S. Ct. at 2892.

35. While traditionally the removal of a case from state to federal court stayed all proceedings in the state court, 28 U.S.C. § 1446(e) (1970), in 1977 the statute was amended to provide in the case of criminal prosecutions that the state court proceeding can continue, but no judgment of conviction may be entered unless, and until, the federal court denies the removal petition. Act of July 30, 1977, Pub. L. No. 95-78, § 3, 91 Stat. 320 (codified at 28 U.S.C.A. § 1446(c)(3) (West Supp. Pamphlet No. 3 1977)).

36. 97 S. Ct. at 2888.

expressly authorized exception developed in *Mitchum v. Foster*.[37] The *Mitchum* Court held that 42 U.S.C. § 1983[38] is an expressly authorized exception under section 2283. The test articulated by that Court "is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding."[39] The Court in *Mitchum* relied on the legislative history of section 1983, which clearly showed congressional concern that state courts would be used to deprive citizens of their federally protected rights.[40] Because this concern was a basic factor in the enactment of section 1983, the Court found that that provision could realize its "intended scope" only if federal courts held injunctive power over state court actions that violate it.[41]

Because Congress was not overtly concerned with state court proceedings as violative of the Sherman Act when it enacted section 16 of the Clayton Act, Justice Rehnquist denied the existence of an exception on the ground that "[t]he critical aspects of the legislative history . . . are wholly absent . . . . This void is not filled by other evidence of congressional authorization."[42] Rehnquist rejected the possibility that the strong congressional policy and national interest in enforcing the antitrust laws could conceivably fill the void.[43] He instead maintained that "the importance of the federal policy to be 'protected' by the injunction is not the focus of the inquiry."[44] Citing two earlier Supreme Court cases,[45] he warned that section 2283 is not a principle of comity and federalism that allows federal courts to balance federal and state interests, but a strict prohibition to be guarded from judicial improvisation.[46]

In the first of the cases cited by Rehnquist, *Amalgamated Clothing Workers of America v. Richman Brothers Co.*,[47] Justice Frankfurter, writing for the Court, held that a district court could not restrain a state court from enjoining a labor union engaged in peaceful picketing.[48] Frankfurter

37. 407 U.S. 225 (1972).

38. 42 U.S.C. § 1983 (1970) (originally enacted as Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13).

39. 407 U.S. at 238.

40. *Id.* at 240-42 (citing CONG. GLOBE, 42d Cong., 1st Sess. 361, 374-76, 385, 416, 429, 653 (1871)).

41. *Id.* at 242-43.

42. 97 S. Ct. at 2888-89.

43. *Id.* at 2889.

44. *Id.*

45. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970); Amalgamated Clothing Workers of Am. v. Richman Bros. Co., 348 U.S. 511 (1955).

46. 97 S. Ct. at 2893.

47. 348 U.S. 511 (1955).

48. The Court recognized that the state court had intruded into the federal domain created by the Taft-Hartley Act. The suit, however, was brought by the union, a private party, and therefore did not qualify as an express exception. *Id.* at 517. Section 101, § 10(j), (*l*) of the

rejected the union's argument that the section 2283 bar applied only to cases in which the state and federal courts have concurrent jurisdiction, finding the "[l]egislative policy . . . expressed in a clear-cut prohibition qualified only by specifically defined exceptions."[49] As section 2283 did not specifically list exclusive federal jurisdiction as one of its exceptions, the prohibition against injunctions applied.[50]

The second case Justice Rehnquist relied on, *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,[51] also involved a labor dispute. Again the Court denied federal power to restrain a state court injunction against union picketing. Justice Black reiterated the Court's position—a federal court may not interfere in a state court action "merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear."[52] The Court rejected the contention that the Act merely establishes a principle of comity; any injunction against state court proceedings had to be based on a section 2283 exception.[53]

Justice Stevens, speaking for the dissenters in *Vendo*, distinguished that case from *Atlantic Coast Line* and *Richman* on the ground that neither considered an allegation of an exception expressly authorized by act of Congress.[54] Stevens was not trying to create an extrastatutory exception based on the importance of federal antitrust policy, the sort of judicial improvisation condemned by *Atlantic Coast Line* and *Richman*. Instead, he argued that the language and history of the Clayton Act warrant a holding that an injunction against state court action under section 16 is expressly authorized by act of Congress, and is thus an exception included within the language of section 2283.[55]

The Supreme Court has interpreted the antitrust laws to evidence a congressional desire for strong enforcement against violations in whatever guise.[56] Stevens contended that this policy, coupled with the grant of federal injunctive power in section 16,[57] constitutes an expressly authorized exception.[58] The language of the Sherman Act defining violations is deliberately vague and intended to include "every conceivable act which could possibly

Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 160(j), (*l*) (1970), authorizes injunctive relief only at the request of the NLRB.

49. 348 U.S. at 515-16.
50. *Id.* at 515-18.
51. 398 U.S. 281 (1970).
52. *Id.* at 294.
53. *Id.* at 286-87.
54. 97 S. Ct. at 2899 n.23 (Stevens, J., dissenting).
55. *Id.* at 2894-98.
56. United States v. American Tobacco Co., 221 U.S. 106, 181 (1911).
57. *See* note 3 *supra*.
58. 97 S. Ct. at 2896-98 (Stevens, J., dissenting).

come within the spirit or purpose of the prohibitions of the law,"[59] whether or not the form of restraint was actually contemplated by Congress. From this basis, Stevens reasoned that section 16 allows injunctions against "violations of the Sherman Act," it has been judicially established that state court actions may be such violations,[60] and therefore section 16 allows injunctions against state court actions.[61] Stevens also maintained that the statute qualifies as an exception under the *Mitchum* test.[62] Section 16 was enacted to give private citizens an antitrust remedy before a violation produces irreparable harm.[63] This "intended scope" will be defeated unless the federal courts can restrain state court actions such as the Illinois action in *Vendo* that cause such harm in violation of the Sherman Act.[64]

Justice Stevens was accurate in his observation that neither *Richman* nor *Atlantic Coast Line* dealt with situations involving the "expressly authorized" exception to section 2283. The broad holding of both opinions was that if an injunction cannot be classified under one of the stated exceptions (as exclusive federal jurisdiction could not in these cases), the prohibition is absolute.[65] These cases, however, should not be summarily

59. United States v. American Tobacco Co., 221 U.S. 106, 181 (1911).

60. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509 (1972) ("concerted action . . . to institute state and federal proceedings to resist and defeat applications . . . to acquire operating rights"); United States v. Otter Tail Power Co., 360 F. Supp. 451, 451 (D. Minn. 1973) ("repetitive use of litigation . . . timed and designed principally to prevent the establishment of municipal electric systems and thereby preserve defendant's monopoly").

61. 97 S. Ct. at 2898 (Stevens, J., dissenting).

62. *Id.* at 2899-901; *see* text accompanying notes 37-39 *supra*.

63. 97 S. Ct. at 2900.

64. *Id.*

65. *But see* Younger v. Harris, 401 U.S. 37, 46 (1971) (recognizing that federal intervention may be appropriate if the state court action is in bad faith, for the purposes of harassment and threatens irreparable harm that is " 'both great and immediate' " through violation of the defendant's constitutional rights (quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926))). Justice Stewart in his *Mitchum* decision noted the inconsistency of *Younger* with *Atlantic Coast Line* and held that the portion of *Younger* recognizing an exception when the state court action threatens constitutional rights would have to be overruled if § 1983 were not "expressly authorized." 407 U.S. at 231; *see* text accompanying notes 37-41 *supra*.

A second extrastatutory exception was established by the Supreme Court in Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957), and reaffirmed in NLRB v. Nash-Finch Co., 404 U.S. 138 (1971). Both cases allowed an injunction of state court actions when the United States as sovereign is the party seeking injunctive relief. The *Leiter* court upheld the injunction on the ground that when the United States seeks a stay to prevent injury to a national interest, there is less danger of state-federal conflict than there is when a private party is plaintiff. 352 U.S. at 225-26. *Nash* extended "sovereignty" to the NLRB as a public agency acting in the public interest—the chosen instrument of protection. The rationale for this extension was that § 2283's purpose is not "the frustration of federal systems of regulation." 404 U.S. at 146.

In Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966), the Second Circuit held that the *Leiter/Nash* implied sovereignty exception should make the § 2283 bar inapplicable when the federal action is based on a federal statute designed to protect the public sector through the creation of private claims for relief. *Id.* at 697-98. The *Studebaker* court allowed an injunction under § 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(u)(e) (Supp. V 1975); the court implied that the same result would be reached if the federal action were based on § 16 of the Clayton Act. 360 F.2d at 698; *cf.* Tampa Phosphate R.R. v. Seaboard Coast Line R.R., 418

dismissed as totally inapplicable to the *Vendo* case. Together with *Mitchum*, they are the most important indications of the Court's interpretation of the 1948 amendment of section 2283, and their tone is restrictive. Dictum in *Atlantic Coast Line* indicates that that Court was also concerned with unwarranted expansion of the three exceptions beyond the scope of Congress' intent.[66]

Section 16 can, nevertheless, reasonably be found to be within the scope of the section 2283 "expressly authorized" exception. Since 1793, the Supreme Court has been more willing to except federal statutes from section 2283's prohibition than Justice Rehnquist's requirement of "focus" suggests, a tradition continued by *Mitchum*. Six statutes[67] were "implied exceptions" before *Toucey*, and were retained even by that restrictive opinion.[68] After the *Toucey* decision, the Supreme Court in two cases[69] established a seventh statutory exception—the Emergency Price Control Act,[70] which, as Justice Rehnquist conceded, does not "focus" on a state court action.[71]

The 1948 revision of section 2283 was not meant to restrict these exceptions, but rather to return the law to the more liberal interpretations of the pre-*Toucey* decisions.[72] Furthermore, the 1948 revision, as evidenced by *Mitchum*, was not meant to restrict statutory exceptions to those already recognized. The *Mitchum* Court's basis for finding section 1983 to be an express exception was the legislative intent and history behind the statute;[73] the history of the Clayton Act provides a similar basis.

In 1914, Congress reaffirmed its commitment to strict enforcement of the antitrust laws with the passage of the Clayton Act.[74] Section 16 expressly granted federal injunctive relief to private citizens to allow them to protect themselves from violations of the Sherman Act before suffering financial ruin.[75] Congress may not have been specifically concerned with state court

F.2d 387 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (same result and reasoning under the Interstate Commerce Act, ch. 104, pt. 1, § 1, 24 Stat. 379 (1887) (formerly codified, as amended, at 49 U.S.C. § 1(20) (1970)) (repealed 1976)).

Justice Stevens observed that United States Attorneys acting under the Sherman Act can ask for injunctions against violations, including state court actions. As the Clayton Act was to extend to private parties the same litigation powers possessed by the government, it is an expressly authorized exception. 97 S. Ct. at 2896 nn.9 & 10 (Stevens, J., dissenting).

66. 398 U.S. at 287.

67. *See* note 23 *supra*.

68. *See* 314 U.S. at 139.

69. Porter v. Dicken, 328 U.S. 252 (1946); Bowles v. Willingham, 321 U.S. 503 (1944).

70. Ch. 26, § 205(a), 56 Stat. 23 (1942). The act authorized the Price Administrator to apply to the "appropriate court" for an injunction against "any acts or practices which constitute or will constitute a violation of any provision . . . of this Act." *Id.*

71. 97 S. Ct. at 2892 n.10.

72. *See* note 29 *supra*.

73. 407 U.S. at 242.

74. Ch. 323, 38 Stat. 730 (1914).

75. 97 S. Ct. at 2897 n.11 (Stevens, J., dissenting).

actions as violations, but, as subsequent case law recognized, Congress deliberately defined Sherman Act violations generally to cover all attempts at circumvention of the Act's prohibitions.[76] Congress intended its grant of private federal injunctive relief to be broad enough to curtail all attempts to restrain trade illegally. To limit this relief by holding the section 2283 bar applicable to section 16 would infringe on the intended scope of the statute; thus, section 16 appears to satisfy the *Mitchum* test and should qualify as an expressly authorized exception to section 2283.

Although plaintiffs lost their injunction, *Vendo's* impact will not seriously weaken the antitrust laws; a majority of the justices held that section 16 is an express exception under section 2283.[77] Nor should the decision cause state courts to fear a steady stream of encroachments on their freedom from review by federal district courts; the opinion advocating the exception focused on the unique nature of the antitrust laws.[78] The *Vendo* decision does, however, raise the question of the continuing usefulness of section 2283, particularly in its present form, as a mechanism for preventing needless friction between state and federal courts.

The likely effect of the decision is to allow Lektro-Vend's probably meritorious[79] antitrust claim to go unheard. In issuing its injunction, the district court was not attempting to review the decision of the Illinois Supreme Court; the injunction was issued to temporarily restrain collection of the judgment against Lektro-Vend to allow the company sufficient independence and financial resources to press its antitrust claim.[80] Denying the federal courts the latitude to hear a complaint grounded on a matter within exclusive federal jurisdiction for the sake of immediate enforcement of a state court judgment seems to be an inappropriate method of avoiding conflict between the two judicial systems.

Justice Rehnquist refused to balance the importance of the federal policies behind the Anti-Injunction Act and the antitrust laws, stating that Congress, in enacting section 2283, reserved this judgment for itself.[81] His refusal, although supported by the language of *Atlantic Coast Line* and *Richman*[82] and a fair reading of the language of section 2283, is founded on a uniquely inflexible interpretation of the statute. Even Justice Frankfurter, author of the *Toucey* and *Richman* opinions, was willing to allow an extra-statutory exception, when he recognized the implied sovereignty exception.[83]

76. *See* United States v. American Tobacco Co., 221 U.S. 106, 181 (1911).
77. *See* note 19 *supra*.
78. 97 S. Ct. at 2895-901 (Stevens, J., dissenting).
79. Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. at 532.
80. *See id.* at 535.
81. 97 S. Ct. at 2891.
82. *See* text accompanying notes 47-53 *supra*.
83. Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957). The exception was not

In addition, Congress, by allowing exceptions to its original flat prohibition,[84] recognized that there are federal policies that supersede that of the Anti-Injunction Act. The question is whether the determination of what these policies are is strictly reserved to Congress. The Reviser's Note indicates that section 2283 was amended to restore the state of the law to the more liberal pre-*Toucey* era.[85] If this was indeed Congress' intention, the language of the statute enumerating acceptable exceptions and the Court's conclusion that these exceptions are to be construed narrowly, may have circumvented it. The language of the statute was tailored to one restrictive Supreme Court decision and was intended to expand rather than contract allowable section 2283 exceptions.[86] A literal reading of the language of section 2283, particularly in light of *Atlantic Coast Line* and *Richman*, has not led to this result.[87]

The strongest protection the states have against federal interference with their judicial proceedings is the self-restraint federal courts exercise in deference to the concept of federalism.[88] During the early years of the judiciary's growth, the Anti-Injunction Act may have been necessary to define the state-federal judicial relationship and to emphasize to the federal court judges that they were not to attempt any review function over state court proceedings. The Act has served its purpose. Federal courts generally recognize that even when an injunction is permissible under section 2283, the court must determine whether such an injunction would violate general principles of comity and federalism.[89]

The Anti-Injunction Act was revised by Congress in 1948 and must be adhered to by the federal courts. It is questionable, however, how effective the provision is in its function of preserving state-federal relations. Justice Frankfurter called section 2283 "continuing evidence of [Congress'] confidence in the state courts . . . to recognize the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction."[90] State-

only reaffirmed, but extended after the *Atlantic Coast Line* decision. NLRB v. Nash-Finch Co., 404 U.S. 138 (1971); *see* note 65 *supra*.

84. *See* note 22 and accompanying text *supra*.

85. *See* note 29 *supra*. *See also* Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145, 1169 (1932). The authors concluded that at the time they were writing, the Anti-Injunction Act provided no more protection to state court independence than did recognized principles of comity and federalism. They evidenced no sense of alarm or impropriety at this state of affairs.

86. *See* note 29 *supra*.

87. *See* text accompanying notes 47-53 *supra*.

88. Between 1793 and 1941 the federal courts found it necessary to except only six federal statutes from the prohibition. *See* note 23 and accompanying text *supra*.

89. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225 (1972); Younger v. Harris, 401 U.S. 37 (1971); Response of Carolina v. Leasco Response, Inc., 498 F.2d 314 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974); Red Rock Cola Co. v. Red Rock Bottlers, Inc., 195 F.2d 406 (5th Cir. 1952); Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950).

90. Amalgamated Clothing Workers of Am. v. Richman Bros. Co., 348 U.S. at 518-19.

federal relations would have been spared the confines of the strained construction of section 2283 if Congress had evidenced the same confidence in the federal courts.

MARY BROOKE LAMSON

Prisoners' Rights—*Bowring v. Godwin*: The Limited Right of State Prisoners to Psychological and Psychiatric Treatment

According to statistics compiled by the American Correctional Association, between fifteen and twenty percent of the prisoner population in the United States suffers from a diagnosable emotional or mental disturbance, including neuroses, personality and behavioral disorders, and various pre-psychotic and psychotic conditions.[1] And yet, historically, the vast majority of these prisoners have remained untreated due to an inadequacy of staff and facilities,[2] as well as a general apathy towards the mental health of convicted criminals.[3] In *Bowring v. Godwin*,[4] the United States Court of Appeals for the Fourth Circuit expressly held that in certain narrowly defined situations there is a definite nexus between the constitutional right of a prisoner to be spared from cruel and unusual punishment[5] and his right to receive psychological and/or psychiatric treatment.[6] According to the court, however, not

1. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 441 (3d ed. 1966). *See also* Newman v. Alabama, 503 F.2d 1320, 1324 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Alexander, *The Captive Patient: The Treatment of Health Problems in American Prisons*, 6 CLEARINGHOUSE REV. 16 (1972) (persons entering the federal prison system have a 5% chance of severe psychiatric disturbance and 15% chance of serious emotional disability).

2. *See, e.g.*, AMERICAN MEDICAL ASSOCIATION, MEDICAL CARE IN U.S. JAILS (1972), *reprinted in* ABA COMM. ON CORRECTIONAL FACILITIES AND SERVICES, MEDICAL AND HEALTH CARE IN JAILS, PRISONS, AND OTHER CORRECTIONAL FACILITIES 67 (3d ed. 1974); ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972); SOUTH CAROLINA DEP'T OF CORRECTIONS, SUMMARY OF SYSTEM AND ARRANGEMENTS FOR DELIVERY OF MEDICAL SERVICES IN SOUTH CAROLINA CORRECTIONAL SYSTEM (1974), *reprinted in* ABA COMM. ON CORRECTIONAL FACILITIES AND SERVICES, *supra* at 263.

3. *See* Morris, *"Criminality" and the Right to Treatment*, 36 U. CHI. L. REV. 784 (1969); Prettyman, *The Indeterminate Sentence and the Right to Treatment*, 11 AM. CRIM. L. REV. 7 (1972). Behavior modification has received the most attention in recent years as a form of treatment. This treatment is intended to conform behavior patterns to a socially acceptable norm, not to discover and combat the root causes of mental illness. *See* O'Brien, *Tokens and Tiers in Corrections: An Analysis of Legal Issues in Behavior Modification*, 3 NEW ENGLAND J. PRISON L. 15 (1976).

4. 551 F.2d 44 (4th Cir. 1977).

5. U.S. CONST. amend. VIII in pertinent part provides: "[N]or [shall] cruel and unusual punishments [be] inflicted."

6. 551 F.2d at 47-48.

every deprivation of such treatment rises to the level of a constitutional violation.[7] As a result of this qualification, the role of the federal courts in alleviating the mental health problems among state prisoners remains somewhat limited.[8]

Plaintiff Bowring, an inmate in the Virginia State Prison System, asserted a constitutional right to receive psychological diagnosis and treatment in light of the fact that his application for parole was denied at least partially because of the results of a psychological evaluation indicating that "Bowring would not successfully complete a parole period."[9] Bowring maintained that the state must provide him with appropriate treatment with the aim that he be cured of the mental aberration that rendered him ineligible for parole. He based this assertion on a claim that the denial of such treatment constituted "cruel and unusual punishment" in violation of the eighth amendment and "a denial of due process of law" in violation of the fourteenth amendment.[10]

The district court construed Bowring's petition for relief as an action under 42 U.S.C. § 1983,[11] but summarily dismissed the action on the ground that he had failed to allege a denial of any constitutional right.[12] The court of appeals reversed the district court's ruling and remanded the case for an evidentiary hearing to determine whether Bowring's constitutional right to essential medical care had been violated by the prison officials' refusal to grant his request for psychological treatment. The court found no reason for distinguishing "between the right to medical care for physical ills and its psychological or psychiatric counterpart,"[13] and, accordingly, ruled that the complaint should not have been dismissed without first determining whether Bowring was, in fact, suffering from a "qualified" mental illness and therefore entitled to treatment.[14]

Specifically, the court held that every prison inmate is entitled to psychological and/or psychiatric treatment

7. *Id.* at 48; *accord*, Russell v. Sheffer, 528 F.2d 318 (4th Cir. 1975) (per curiam) (mistreatment or nontreatment must be characterized as cruel and unusual punishment in order to raise a constitutional question).

8. *See* Comment, *The Rights of Prisoners to Medical Care and the Implications for Drug-Dependent Prisoners and Pre-Trial Detainees*, 42 U. CHI. L. REV. 705, 712-18 (1975).

9. 551 F.2d at 46. The exact nature of Bowring's illness is not evident from the record.

10. *Id.*

11. 42 U.S.C. § 1983 (1970) states:

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

12. 551 F.2d at 46.

13. *Id.* at 47.

14. *Id.* at 49.

> if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial.[15]

The court went on to hold, however, that the deprivation of appropriate treatment for such a "qualified" mental illness will not always give rise to a complaint actionable under section 1983. First, the denial of treatment will not be actionable unless it is the direct result of deliberate indifference on the part of prison officials.[16] Second, the denial of treatment may be justified in certain situations because of the unreasonable costs involved or the disproportionate amount of time that would be required to complete a particular course of treatment.[17] In addition, the court further limited the scope of the prisoner's right to treatment by expressly disavowing any attempt to "second-guess" the propriety or adequacy of the type of treatment the prison medical officer might choose to prescribe.[18]

The court based this limited right to treatment primarily on the eighth amendment's prohibition against cruel and unusual punishment, recognizing that deliberate indifference to the serious medical needs of prisoners results in an unnecessary and wanton infliction of pain and suffering that is totally divorced from any legitimate penal interest.[19] The court also noted that its holding was premised upon the notion that psychological treatment is an integral part of the rehabilitation process.[20]

Though this standard for invoking the right to psychological and/or psychiatric treatment may seem excessively restrictive, it is for the most part consistent with the standards that have developed in the general area of medical care for prisoners. It is now well established that a prisoner's access to the federal courts for the protection of his constitutional rights is not foreclosed by the mere fact of his incarceration.[21] Nevertheless, the vestiges of the old "hands-off" doctrine[22] are still evident in the efforts of the courts

15. *Id.* at 47.
16. *Id.* at 48.
17. *Id.*
18. *Id.*
19. *Id.* (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).
20. *Id.* at 48 n.2 (citing Pell v. Procunier, 417 U.S. 817 (1974)). The Court in *Pell* noted that rehabilitation is one of the legitimate penological objectives of the corrections system, the others being deterrence, protection of society and the internal security of the corrections facilities themselves. 417 U.S. at 823.
21. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 821-22 (1977); *Ex parte* Hull, 312 U.S. 546 (1940); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).
22. The "hands off" doctrine refers to the general reluctance of federal courts to intervene in the internal affairs of state prisons. *See, e.g.*, Banning v. Looney, 213 F.2d 771 (10th Cir.) (per curiam), *cert. denied*, 348 U.S. 859 (1954).

to limit that accessibility by defining narrowly the circumstances under which a denial of treatment will be considered a constitutional violation. The Supreme Court[23] and all of the circuits[24] are in essential agreement that state prison officials possess broad discretion in determining the nature of the medical care afforded inmates[25] and that intervention by the federal courts is warranted only when there has been either a deliberate denial of essential treatment for serious illnesses and injuries[26] or such drastically insufficient or inappropriate care as to be the equivalent of intentional mistreatment.[27] Complaints alleging mere negligence[28] or the inefficacy of a particular course of treatment[29] do not, by contrast, raise an issue of constitutional dimension and, therefore, are not cognizable under section 1983. In short, if it appears that the prison officials have made a good faith effort to deal with the medical problems of the prisoner, the constitutional requirements have been satisfied.[30]

The United States Supreme Court's holding in *Estelle v. Gamble*[31] is representative of the result that ensues when this medical care standard is applied. Plaintiff in *Estelle* filed suit against prison officials after being denied proper medical treatment for a back injury. He had persisted for three months in asking for proper diagnosis and treatment, but during that time the medical personnel refused to prescribe any treatment other than pain pills and muscle relaxants.[32] Nevertheless, the Supreme Court affirmed the dismissal of the complaint on the ground that plaintiff had failed to allege a violation of his constitutional rights. The Court emphasized that plaintiff had seen various medical personnel on seventeen occasions during the three-month period and that he had not been denied "treatment" for his ailment.[33] Though acknowledging that plaintiff might have an action in tort for medical

23. Estelle v. Gamble, 429 U.S. 97 (1976); *see* text accompanying notes 31-34 *infra*.

24. *See* United States v. Fitzgerald, 466 F.2d 377, 380 (D.C. Cir. 1972); Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974); Gittlemacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970); Russell v. Sheffer, 528 F.2d 318, 319 (4th Cir. 1975) (per curiam); Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir.), *vacated and remanded*, 419 U.S. 813, *cert. denied*, 419 U.S. 879 (1974); Wibron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975); Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970); Dewell v. Lawson, 489 F.2d 877, 881-82 (10th Cir. 1974).

25. *See, e.g.*, Ross v. Bounds, 373 F. Supp. 450, 452-53 (E.D.N.C. 1974).

26. *See, e.g.*, Stokes v. Hurdle, 393 F. Supp. 757, 761 (D. Md. 1975).

27. *See, e.g.*, Thomas v. Pate, 493 F.2d 151, 158 (7th Cir.), *vacated and remanded*, 419 U.S. 813, *cert. denied*, 419 U.S. 879 (1974); Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970).

28. *See, e.g.*, Jones v. Lockhart, 484 F.2d 1192, 1193 (8th Cir. 1973); Swain v. Garribrant, 354 F. Supp. 631, 633 (E.D.N.C. 1973).

29. *E.g.*, Martinez v. Mancusi, 443 F.2d 921, 923 (2d Cir. 1970).

30. *See, e.g.*, Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972).

31. 429 U.S. 97 (1976).

32. *Id.* at 107.

33. *See id.* The Court did not disagree with plaintiff's contention that the seriousness of his back injury may have warranted further diagnosis and treatment. Rather, the Court maintained that this was a question of medical judgment and, therefore, a matter of medical malpractice and not cruel and unusual punishment.

malpractice, the Court refused to classify the treatment provided by prison medical personnel as "deliberate indifference."[34]

The standards that evolved in the area of medical care have been applied in the past to specific cases involving the alleged denial of psychological and psychiatric treatment.[35] For instance, in *Greear v. Loving*,[36] plaintiff alleged that he had never been afforded the opportunity to see a psychiatrist to determine if any treatment was available for his emotional problems. The district court ordered a psychiatric evaluation in which it was determined that he was, indeed, suffering from emotional instability, immaturity and impulsivity. The examining psychiatrist concluded, however, that there was no need for any treatment at that time.[37] The court then dismissed the complaint on the ground that plaintiff had already been afforded sufficient medical care for his essential needs.[38] In *Davis v. Schmidt*,[39] plaintiff was examined by a psychiatrist on several occasions, but the only treatment that he received was medication intended to neutralize temporarily the manifested symptoms of the mental illness.[40] Plaintiff's petition requesting actual psychiatric treatment was denied on the ground that he had alleged only a disagreement with the psychiatrist over the propriety of the medically acceptable course of treatment that had been prescribed for him.[41]

Greear and *Davis* are representative of the results that a prisoner requesting treatment for mental health problems might expect. Often, it will be determined that the prisoner's mental or emotional problem is not serious enough to warrant treatment.[42] In the case of those prisoners whose illnesses cannot be ignored because of the threat posed to the orderly administration of the correctional institution, the treatment prescribed may be intended merely to eliminate the threat by directly combating the symptoms of the mental illness rather than attacking the cause.[43]

The most significant developments in the field of prisoner health care have occurred in cases in which federal courts have ordered systematic improvements in the conditions under which prisoners are confined.[44]

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34. *Id.* at 106.

35. *See, e.g.*, Flint v. Wainwright, 433 F.2d 961 (5th Cir. 1970); Bishop v. Cox, 320 F. Supp. 1031 (W.D. Va. 1970).

36. 391 F. Supp. 1269 (W.D. Va. 1975).

37. *Id.* at 1271.

38. *Id.*

39. 57 F.R.D. 37 (W.D. Wis. 1972).

40. *Id.* at 40. Tranquilizers were the medication prescribed. Plaintiff was also placed on a waiting list for group therapy.

41. *Id.* at 41; *see* text accompanying notes 29 & 30 *supra*.

42. *See* text accompanying note 26 *supra*.

43. All too frequently the treatment imposed on seriously disturbed inmates is directed at pacification only. For a general overview of the treatment provided for prisoners, see Morris, *supra* note 3; Prettyman, *supra* note 3.

44. *See, e.g.*, Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S.

Though allowing for the necessity that prison officials retain some discretion in the administration of medical resources, these courts have held that an unreasonable deficiency in staff and facilities is tantamount to deliberate indifference to the predictable health care needs of the prisoners.[45] Yet even these cases have stopped short of setting forth either the degree of care that would satisfy the minimum constitutional requirements or the applicable standards to be followed in determining under what circumstances psychological and/or psychiatric treatment is mandated.[46] There has been no systematic attempt to provide mental health programs for the general inmate population, even though such programs will assuredly be necessary to deal effectively with a problem that is so prevalent in the prison systems.[47] In essence, the right to treatment recognized in these cases does very little to remove the obstacles that stand in the way of the individual inmate who desires therapeutic treatment for his mental and emotional problems.[48]

In *Bowring v. Godwin*,[49] the court declined to extend the right of prisoners to receive psychological and/or psychiatric treatment beyond the generally accepted limits exemplified by *Greear, Davis* and similar cases. If anything, the court in *Bowring* established an even more restrictive standard for invoking the right to treatment. Aside from the typical medical care requirements that a *serious* disease or injury be involved and that the requested treatment be a matter of medical necessity and not merely desirable, the court restricted the right to treatment by excluding those prisoners whose illnesses are incurable or incapable of being substantially alleviated[50] and by not requiring any treatment that might be considered too costly or too time-consuming.[51]

It is indeed reasonable that prison officials should not be charged with

948 (1975) (court ordered hiring of additional medical personnel); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (court ordered hiring of additional medical personnel, compliance with American Correctional Association standards relating to medical services for prisoners and compliance with state licensing requirements for hospital and infirmary); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (court ordered prompt action to protect lives, safety and health of prisoners without dealing specifically with improvements in health care).

45. *E.g.*, Bishop v. Stoneman, 508 F.2d 1224, 1226 (2d Cir. 1974).

46. *See, e.g.*, Newman v. Alabama, 503 F.2d 1320, 1332 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). The court found that the medical care available in the Alabama prison system was barbarous and shocking to the conscience. *Id.* at 1330 & n.14. One factor that contributed to this conclusion was the lack of care provided for mentally disturbed inmates. Despite the seriousness of the situation, the state provided the services of only a single part-time clinical psychologist. The court found such inadequate care to be unconstitutional. *Id.* at 1333. The court, however, went no further than to order the prison officials to hire additional medical personnel.

47. *See* Comment, *supra* note 8.

48. *See* text accompanying notes 42 & 43 *supra*.

49. 551 F.2d 44 (4th Cir. 1977).

50. *Id.* at 47.

51. *Id.* at 48. Apparently, these determinations are to be left to the discretion of prison officials.

the obligation of treating the untreatable.[52] It is, however, certainly not unreasonable to require them to provide such other rudimentary care as may be needed.[53] The Supreme Court has recognized that the eighth amendment's prohibition against cruel and unusual punishment is intended to protect prisoners from the unnecessary infliction of pain and suffering.[54] If such pain and suffering is the result of an untreated medical ailment and can be alleviated in whole or part, it should be irrelevant whether that ailment is ultimately incurable. Moreover, when mental illness is involved, the incurable illness exception to the right to treatment makes it far too easy to discriminate unfairly against unfavored inmates by labeling them "untreatable."[55] Without some check on this power to arbitrarily refuse to treat, the prisoner's right to mental health care may be converted into a privilege that must be earned by compliance with the regulations of the prison system.

The court's decision limiting the right to treatment on a cost and time basis is inconsistent with better reasoned prior case law. It has become an axiom of constitutional law that constitutional rights cannot be withheld due to a lack of economic resources.[56] For example, in *Holt v. Sarver*,[57] the district court rejected the argument that wholesale improvements in prison conditions were impossible until the legislatures appropriate more funds. Instead, it held that the minimum constitutional requirements must be unconditionally satisfied.[58] It follows, then, that the right to treatment should not be conditioned on the length of time required or the cost involved. As the court in *Bowring* noted, "[T]he essential test is one of medical necessity."[59] If the illness in question qualifies as a medical necessity, the appropriate treatment should be provided regardless of whether that treatment consists of first-aid or long term chemotherapy. This restriction on the right to treatment is especially critical in the area of mental health care where a substantial amount of time is usually required for any treatment to be effective.

Perhaps the most restrictive aspect of the court's holding is the express refusal to entertain any complaints regarding the adequacy of a particular

52. With the continuing advances being made in medical science, it may be irresponsible to label any mental illness "incurable" or "untreatable."

53. Hutchens v. Alabama, 466 F.2d 507 (5th Cir. 1972) (terminally ill inmate alleged a lack of medical attention and medication needed to relieve temporarily his pain and suffering).

54. Estelle v. Gamble, 429 U.S. at 104.

55. *See* Stokes v. Institutional Bd. of Patuxent, 357 F. Supp. 701, 705 (D. Md. 1973) (plaintiff returned to the regular prison system after being diagnosed as untreatable).

56. *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526, 537 (1963); Rouse v. Cameron, 373 F.2d 451, 457-58 (D.C. Cir. 1966); Martarella v. Kelley, 359 F. Supp. 478, 481 (S.D.N.Y. 1973).

57. 309 F. Supp. 362 (E.D. Ark. 1970).

58. *Id.* at 379.

59. 551 F.2d at 48. A medical necessity is just that, a necessity. The type of treatment required should not determine whether that necessity will go untreated.

course of treatment.[60] According to the court, the Constitution requires that only the barest minimums be satisfied.[61] The actual quality of the treatment prescribed is not subject to attack. Only such intentional deprivations as would be shocking to the conscience are unconstitutional.[62] Under this standard, a prisoner is entitled to *some*, but not the best or even an effective, treatment.[63] For all practical purposes, even the most rudimentary medical care facilities will meet the constitutional minimums.[64] Once again, the net effect of this limitation on the right to treatment may be to allow prison officials to abuse their discretion by treating truly adequate mental health care as a privilege rather than a right.

Admittedly, there are good reasons for limiting access to the federal courts in regard to alleged denials of prisoners' rights to psychological and/or psychiatric treatment. Courts are naturally unwilling to presume that prison officials intentionally mistreat the inmates in their charge. Without some prior indication of bad faith, they are understandably reluctant to undertake the difficult task of examining prisoners' complaints regarding conditions of confinement.[65] Moreover, the federal courts generally do not wish to intervene in the affairs of a state prison when the only issue involves a difference of opinion between a prisoner and a presumably qualified medical officer.[66] This reluctance has probably been accentuated by the many frivolous complaints with which the courts have been deluged.[67] Nevertheless, it must be recognized that the major effect of these limitations is to entrust the prisoners' constitutional right to all types of medical care to the nearly unreviewable discretion of a few prison officials.[68] Though courts

60. *Id.*

61. *Id.*; *see, e.g.*, McCray v. Burrell, 516 F.2d 357, 368 (4th Cir. 1975) (confinement in a primitive isolation cell was insufficient *treatment* for mentally disturbed inmate); Newman v. Alabama, 503 F.2d 1320, 1333 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (more than one part-time psychologist is required for a prison population as large as that of Alabama).

62. 551 F.2d at 48; *see, e.g.*, Thomas v. Pate, 493 F.2d 151, 158 (7th Cir.), *vacated and remanded*, 419 U.S. 813, *cert. denied*, 419 U.S. 879 (1974); Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970). The treatment must be within the realm of legitimate medical judgment.

63. *See, e.g.*, Rouse v. Cameron, 373 F.2d 451, 456 (D.C. Cir. 1966) (hospital need not show that the treatment will cure or even improve involuntarily committed mental patient's condition, but only that there is a bona fide effort to do so); Stokes v. Institutional Bd. of Patuxent, 357 F. Supp. 701, 705 (D. Md. 1973).

64. *See* Lake v. Lee, 329 F. Supp. 196 (S.D. Ala. 1971).

65. *See, e.g.*, Skinner v. Spellman, 480 F.2d 539 (4th Cir. 1973); Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970).

66. Russell v. Sheffer, 528 F.2d 318, 319 (4th Cir. 1975) (per curiam) (citing Shields v. Kunkel, 442 F.2d 409 (9th Cir. 1971)).

67. *See, e.g.*, Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970); United States *ex rel.* Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970).

68. At least one commentator has suggested that this problem of excessive discretion could be eliminated by court-appointed medical review boards composed of qualified physicians or by permitting inmates to be examined by privately retained physicians. This last suggestion, however, may be subject to criticism as a denial of equal protection insofar as some inmates would not be able to afford private care. *See* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, THE EMERGING RIGHTS OF THE CONFINED (1972).

may not wish to assume that that discretion is being abused, the incontrovertible fact is that the quality of health care provided in the correctional institutions of this country is "shockingly substandard."[69]

The only effective means of dealing with the various mental and emotional problems that are so widespread among prisoners is to develop a systematic mental health care program within the prison system. Certainly such a program would be consistent with the goal of rehabilitation that served as one of the premises for the *Bowring* court's recognition of the right to treatment.[70] Given that rehabilitation is one of the avowed purposes of incarceration[71] and that prisoners are constitutionally entitled to essential medical care,[72] it would seem both logical and practical that they should be entitled to the type of long term psychological and/or psychiatric treatment that may be necessary to help them cope with the pressures of society when they are released from prison.[73] Indeed, it is difficult to identify the point at which psychological treatment ceases to be concerned with the limited goal of *curing* a particular mental or emotional disturbance and begins to be concerned with general rehabilitation.[74] Unfortunately, the federal courts have consistently adhered to the view that the failure of prison officials to provide inmates with rehabilitative programs does not, in itself, constitute cruel and unusual punishment.[75]

Despite the Supreme Court's holding in *Trop v. Dulles*[76] that the eighth amendment's prohibition against cruel and unusual punishment must be interpreted in light of "the evolving standards of decency that mark the progress of a maturing society,"[77] it is doubtful that the constitutional standards for mental health care will ever evolve beyond the minimum

69. KRANTZ, THE LAW OF CORRECTIONS AND PRISONER'S RIGHTS IN A NUTSHELL 180 (1976). For example, while the warden of North Carolina's Central Prison, Sam P. Garrison, believes that the prison hospital "is one of the finest in a prison in the United States," the prison system's chief of health and food services, Richard A. Keil, acknowledges that the facilities do not come close to meeting the state's own hospital licensing standards. Nichols, *Health Care Behind Bars: A Diagnosis*, Raleigh, N.C., News & Observer, Mar. 20, 1977, § IV, at 1, col. 1.

Efforts are, however, being made to rectify this situation. In November 1977, the Division of Mental Health Services of the North Carolina Department of Human Resources entered into a preliminary agreement with the Department of Corrections to assist in formulating an effective plan for the delivery of mental health care to the inmate population. Memorandum of Understanding Between North Carolina Department of Corrections and North Carolina Department of Human Resources (Nov. 29, 1977) (copy on file in office of *North Carolina Law Review*).

70. 551 F.2d at 48.

71. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 823 (1974); Williams v. New York, 337 U.S. 241, 248 (1949); Taylor v. Sterrett, 344 F. Supp. 411, 420 (N.D. Tex. 1972).

72. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976).

73. *See* Comment, *supra* note 8.

74. *Id.* at 720.

75. *See, e.g.*, Lunsford v. Reynolds, 376 F. Supp. 526, 528 (W.D. Va. 1974).

76. 356 U.S. 86 (1958).

77. *Id.* at 101.

guidelines enunciated in *Bowring v. Godwin*.[78] As for now, the best hope of implementing a meaningful right to psychological and/or psychiatric diagnosis and treatment appears to be suits under state administrative procedure acts to compel compliance with the state correctional statutes that recognize, in varying degrees, the general rehabilitative aim of incarceration.[79] Until such time as some effective means is found to implement such a right to treatment, the general mental health problems of state prisoners are likely to be ignored.[80]

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78. *But see* James v. Wallace, 382 F. Supp. 1177, 1179 (M.D. Ala. 1974) (because of this evolving standard of decency from which the eighth amendment draws its meaning, a federal court may rule on whether lack of rehabilitative programs constitutes cruel and unusual punishment even though other courts have previously ruled that it did not); Holt v. Sarver, 309 F. Supp. at 379 ("This Court knows that a sociological theory or idea may ripen into constitutional law.").

79. *See* Comment, *A Statutory Right to Treatment for Prisoners: Society's Right of Self-Defense*, 50 NEB. L. REV. 543 (1971). Though most states have enacted legislation defining the general standard of medical care to be provided in the state's prisons, *e.g.*, N.C. GEN. STAT. § 148-36 (Cum. Supp. 1977), the coverage is frequently incomplete and the wording vague.

80. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 753-54 (1969) ("We may soon realize that the necessities of life are a matter of personal right and societal duty, and not a bounty at all. Mental health is the most basic of these necessities. We owe it to every man.").