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Citizenship: Expatriation of Naturalized Citizen for Three-Year Residence in Native Land Constitutional

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Case Comments

Citizenship: Expatriation of Naturalized Citizen for Three-Year Residence in Native Land Constitutional

Plaintiff emigrated from Germany in 1939 and became a naturalized United States citizen in 1950. Since 1956 she has resided with her husband, a German national, in Germany. In 1959 the United States Consulate at Dusseldorf refused to extend plaintiff's passport on the basis of section 352(a)(1) of the McCarran-Walter Act,[1] which provides that naturalized United States citizens lose their citizenship if they reside continuously for three years in the country of their origin. The Board of Review on the Loss of Nationality in the State Department approved the Consulate's decision. Plaintiff brought an action alleging that she had been deprived of her citizenship in violation of her constitutional rights.[2] A three-judge court was convened.[3] The court affirmed the action of the State Department, *holding* that the expatriation of naturalized citizens residing continuously for three years in the country of their birth is a constitutional exercise by

1. 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(1) (1958):

> (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . .

See also McCarran-Walter Act § 352(a)(2), 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(2) (1958), which provides that a naturalized citizen may be expatriated for residing in any foreign nation for a period of five years.

2. In 1960 plaintiff's motion to convene a three-judge court to hear her case and declare her a United States citizen was denied by the District Court for the District of Columbia (unreported), which decided that plaintiff had raised no substantial constitutional issues; this action was affirmed by the court of appeals (likewise unreported). The Supreme Court reversed and remanded for a trial on the merits. Schneider v. Rusk, 372 U.S. 224 (1963).

3. Under 28 U.S.C. § 2282 (1958) and 28 U.S.C. § 2284 (Supp. IV, 1962) plaintiff is required to bring her case before a three-judge district court where she seeks to enjoin the enforcement of an act of Congress on constitutional grounds.

Congress of its power to regulate foreign affairs. *Schneider v. Rusk*, 218 F. Supp. 302 (D.D.C. 1963).[4]

The fourteenth amendment secures citizenship to all persons born or naturalized in the United States;[5] but the Constitution makes no provision for the loss of citizenship.[6] Congress, however, has traditionally recognized an individual's right to renounce allegiance to any nation and has given legal significance to such renunciation.[7] Congress has also felt compelled to withdraw citizenship from individuals engaging in courses of action deemed inconsistent with allegiance to the United States or likely to cause international frictions and embarrassments.[8] Early legislation provided that certain conduct gave rise to a presumption of voluntary repudiation of citizenship for the duration of such conduct.[9] Subsequent legislation,[10] in the interest of administrative efficiency and because of a feeling that those who refuse the obligations of citizenship should not be entitled to hold indefinitely the privileges of such status,[11] has provided for an automatic and

4. *Cert. granted*, 375 U.S. 893 (1963).

5. U.S. CONST. amend. XIV, § 1.

6. See United States v. Wong Kim Ark, 169 U.S. 649, 703 (1897); Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 827 (1824).

7. This traditional policy was formally enacted by Congress in 1868. REV. STAT. § 1999 (1875). This legislation was originally undertaken to protect persons coming to the United States who wished to break former ties with nations who refused to recognize American naturalization. Following this, Congress concluded a number of treaties with other nations for reciprocal recognition of naturalization powers. See generally Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALBANY L. REV. 151, 158–63 (1962).

8. See McCarran-Walter Act §§ 349–57, 66 Stat. 267–72 (1952), 8 U.S.C. §§ 1481–89 (1958).

9. The first such act was the Nationality Act of 1907, 34 Stat. 1228. The presumption of renunciation of citizenship by a naturalized citizen for residence in a foreign nation was rebutted, under this statute, upon return to residence in the United States. See generally Roche, *Loss of American Nationality — The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 38–40 (1950). For a discussion of the merits of returning to the procedure of the Act of 1907, see *id.* at 71; Comment, *Involuntary Loss of Citizenship by Naturalized Citizens Residing Abroad*, 49 CORNELL L.Q. 52, 78–79 (1963).

10. The Nationality Act of 1940, 54 Stat. 1137–74, which, with some amendments not pertinent to the present discussion, was incorporated into the Immigration and Nationality Act of 1952 (McCarran-Walter Act), 66 Stat. 163, 8 U.S.C. §§ 1101–503 (1958), as amended, 8 U.S.C. §§ 1101–503 (Supp. IV, 1962).

11. Such intents were expressed by the committee whose report formed the basis of the later legislation. UNITED STATES COMMITTEE TO REVIEW THE NATIONALITY LAWS, 76TH CONG., 1ST SESS., NATIONALITY LAWS OF THE UNITED STATES at 70–71 (Comm. Print 1939) [hereinafter cited as NATIONALITY LAWS].

irrebuttable presumption of permanent expatriation. Congress has also expanded the list of activities that constitute voluntary repudiation of citizenship.[12] The Supreme Court has upheld such legislation in limited instances;[13] where expatriation has been viewed as a penalty, however, the Court, using the cruel and unusual punishment proviso, has found it to be unconstitutional.[14]

In the leading case of *Perez v. Brownell*,[15] decided in 1958, a sharply divided Supreme Court upheld the constitutionality of a statute that expatriated citizens who voted in a foreign election.[16] A majority of five, speaking through Mr. Justice Frankfurter, framed the issue to be whether expatriation for voting in a foreign election was reasonable in the context of Congress' power to regulate foreign affairs. The Court found that Congress might reasonably conclude that participation by United States' citizens in foreign elections would have an adverse effect on foreign affairs and that therefore the legislation did not violate due process.

12. *Compare* McCarran-Walter Act §§ 349–54, 66 Stat. 267–72 (1952), *and* The Nationality Act of 1940, § 401, 54 Stat. 1168–69, *with* The Nationality Act of 1907, §§ 2–4, 34 Stat. 1228–29. For a discussion of the historical view of the concept of "voluntary expatriation," see Boudin, *Involuntary Loss of American Nationality*, 73 Harv. L. Rev. 1510, 1511–16 (1960).

13. See Perez v. Brownell, 356 U.S. 44 (1958); Savorgnan v. United States, 338 U.S. 491 (1950); Mackenzie v. Hare, 239 U.S. 299 (1915). In *Mackenzie* the somewhat outmoded concept of the legal identity of husband and wife influenced the Court's decision that the wife had assumed the nationality of her husband, even though they continued to reside in the United States. In *Savorgnan*, while an oath was the specific act causing expatriation, it was somewhat a formality in legalizing a marriage to a foreigner. Perhaps the significance of marriage to a foreigner no longer carries the implication of renunciation by the wife of her identity or her nationality. The Court in these cases more or less assumed the constitutional validity of expatriation legislation without any thorough analysis of the basis of the congressional power. See Maxey, *supra* note 7, at 171–72.

14. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and Trop v. Dulles, 356 U.S. 86 (1958), establish the rule that if expatriation is imposed as a penalty, it constitutes cruel and unusual punishment. In these cases expatriation statutes were construed as primarily penal in nature since they were intended to punish and deter individual conduct thereby to compel military service; this was the manifest legislative intent in the absence of any other legitimate governmental purpose. Such an argument cannot prevail in the instant case since the primary legislative intent was not punishment but the regulation of foreign affairs — hence, the statute is not penal in nature. In the present case the intent is not to control various modes of conduct by certain individuals because Congress is not concerned with which course the individual pursues but wishes only to protect foreign relations from the possible consequences of the various acts.

15. 356 U.S. 44 (1958).

16. McCarran-Walter Act § 349(a)(5), 66 Stat. 268 (1952), 8 U.S.C. § 1481(a)(5) (1958).

For the majority in *Perez*, neither subjective intent nor individual action implying a voluntary renunciation of citizenship was necessary. Voluntariness was required only to the extent that the individual must have acted of his own volition without duress;[17] his desires were immaterial if Congress could reasonably have believed that under the circumstances expatriation was necessary to implement the conduct of foreign affairs.[18]

In sharp contrast to the approach of the majority in *Perez*, Chief Justice Warren, speaking for three of the dissenting Justices, argued that Congress was without power to use denationalization to implement the exercize of its general powers and without power to deprive citizens of their status. To the dissenters in *Perez*, Congress' power to expatriate is constitutionally confined to acts that manifest allegiance to a foreign state so inconsistent with the retention of American citizenship that such acts in themselves demonstrate a voluntary abandonment by the individual of his citizenship. Thus, for the dissenters, the test is whether the acts upon which expatriation turns can reasonably be said to evidence a repudiation of citizenship. The dissenters reasoned that citizenship is so fundamental a right — "the right to have rights"[19] — that it cannot be taken away without consent. Applying that test to the facts before them in *Perez*, they concluded that the statute was unconstitutional because such a broad classification of conduct as voting in a foreign political election could not reasonably be said to constitute a voluntary abandonment of citizenship without a consideration of the circumstances surrounding the particular act.

The court in the instant case subscribed to the reasoning of the majority in *Perez* and decided that there was a "reasonably

17. See, *e.g.*, Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953) (no expatriation where service in a foreign army coerced); Nakashima v. Acheson, 98 F. Supp. 11 (S.D. Cal. 1951) (no expatriation where vote in a foreign election coerced); see Maxey, *supra* note 7, at 173.

18. Perez v. Brownell, 356 U.S. 44, 57–62 (1958). There is substantial authority for the *Perez* majority's test of constitutionality in other areas. *E.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (not arbitrary to exclude women from jury duty); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (public policy may interfere with individual freedom to contract); Nebbia v. New York, 291 U.S. 502 (1934) (fixing prices as a regulation of interstate commerce). Mr. Justice Whittaker, dissenting in *Perez*, claimed agreement with the premise of the majority, but felt that voting in a foreign political election open to aliens could not reasonably be said to constitute an abandonment of allegiance to the United States or to be a cause of international embarrassments. Perez v. Brownell, *supra* at 84–85. Whether such a view supports the majority's theory or is more akin to the reasoning of the dissenting justices is questionable.

19. 356 U.S. at 64.

conceivable relation" between expatriation of a naturalized citizen residing three years in the country of her origin and the international embarrassments and frictions that Congress may seek to avoid in its regulation of foreign affairs.[20] The court seems to be saying that mere residence abroad for a prolonged period could as reasonably be conceived by Congress to be a cause of international friction as could participation in a foreign political election. Whether residence by a naturalized citizen in the country of her origin is likely to give rise to international frictions and conflicts, especially at this point in history, is at best doubtful.[21]

Perhaps the instant court failed to distinguish factually acts that might result in expatriation under the present statute from acts, such as voting in a foreign political election, that might be construed as seeking to influence the affairs of another country. In seeking to establish the minimal relationship to foreign affairs of the due process test, the *Perez* majority recognizes that it is "not insignificant" that the conduct interpreted by Congress as working expatriation not only imports less than complete allegiance to the United States, but some measure of allegiance to a foreign nation that is inconsistent with United States citizenship.[22] The committee report forming the basis of the Nationality Act of 1940 also indicates an intent to provide for regulation of foreign affairs designed to affect only those with a real attachment to another country and not to the United States.[23] Since residence abroad, in itself, does not give rise to such "dual nationality," there is little fear that two nations will make conflicting claims on the same individual.[24] Likewise, by mere residence

20. Instant case at 312–15.

21. *Compare* Boudin, *supra* note 12, at 1524–28, *with* NATIONALITY LAWS 70–71. The problems caused by naturalized citizens living abroad have been described as being severe or, on the other hand, as being *de minimis*. Boudin suggests that expatriation which leaves a person or many persons stateless may give rise to its own serious problems. Maxey, *supra* note 7, at 182 states that there is no evidence that the United States government has ever been seriously embarrassed except in the cases of dual nationals. Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1173–78 (1955), seems to agree that dual nationality is the only situation giving rise to a reasonable cause for expatriation — not saying, however, that such expatriation is constitutional.

22. Perez v. Brownell, 356 U.S. 44, 60–61 (1958). One lower court decision since *Perez*, Jalbuena v. Dulles, 254 F.2d 879 (3rd Cir. 1958), seems to support such a dual standard. The court ruled that a dual national by an act declaratory of one nationality should not thereby be deemed to have renounced the other nationality. Language similar to that mentioned by the majority is found in Mr. Justice Douglas' dissent in *Perez*. 356 U.S. at 80.

23. NATIONALITY LAWS 70.

24. However, if in addition to residence abroad the country of origin refuses to recognize United States naturalization, the possibility of conflict

abroad individuals do not necessarily seek to obtain the citizenship of two nations to claim the advantages of and avoid the obligations to both; nor are they always without contacts and loyalties to the United States. Rather, the statute is so broad that it seeks to denationalize persons such as the plaintiff in the instant case who have not acquired dual nationality, who wish to retain their American citizenship, who obtained United States citizenship with a valid intent to reside here permanently, and who have expressed political allegiance to the United States and to no other country.[25] Arguably, mere foreign residence, without any accompanying circumstances demonstrating a lack of allegiance to the United States and an allegiance to another country, is insufficient to base fears of international embroilments.

This is so even though the statute in question is applicable only to naturalized citizens who return to the country of their origin and not to native-born citizens. Arguably, naturalized citizens returning to their native countries are the most likely to establish or reestablish contacts with a foreign land. Nevertheless, there appears to be no reason why either naturalized or native-born American citizens residing abroad would be prone to cause the feared international conflicts by residence unaccompanied by complicating circumstances.[26]

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may increase due to the existence of dual nationality. The McCarran-Walter Act § 352(a)(1), however, is not limited to the above situation; it is far broader in that it extends to mere residence abroad without the aggravating circumstance of dual nationality.

25. See Brief for Petitioner, pp. 15–17.

26. The plaintiff in the instant case also contended that the statute in question violated due process because it applied only to naturalized and not to native-born citizens, thus establishing an unconstitutional classification of citizens. The statutes considered in the earlier cases, on which the Supreme Court had relied in remanding for trial, were applicable equally to naturalized and native-born citizens. Although the more specific safeguard of "equal protection" under the fourteenth amendment is not applicable to the federal government, unjustifiable discrimination is banned by the Supreme Court's construction of due process under the fifth amendment. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The two phrases might not be interchangeable, but unreasonable discrimination is banned by either concept.

There is a strong tradition that the United States shall have only one class of citizens and that no distinctions shall be drawn between naturalized and native-born citizens. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Luria v. United States, 231 U.S. 9 (1913). Congress seeks to justify this statute on the ground that it has been demonstrated that naturalized citizens returning to reside in their native countries have given rise to the greatest number of embarrassments and problems in the handling of foreign affairs. NATIONALITY LAWS 71. In Lapides v. Clark, 176 F.2d 619 (D.C. Cir.), *cert. denied*, 338 U.S. 860 (1949), the same appellate court that affirmed the instant case went even further than it did in the

Because of recent changes in personnel on the Supreme Court, it is not unlikely that the minority position in *Perez* will be adopted in determining the constitutionality of expatriation legislation.[27] Under that approach the statute at issue in the instant case seems clearly unconstitutional.[28] While some acts, such as acquiring foreign nationality, may ordinarily be construed as evidencing a voluntary renunciation by the individual of his citi-

present case by upholding a companion provision of the Act of 1940, § 404(c), 54 Stat. 1170, now The Act of 1952, § 352(a), 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(2) (1958), which states that any naturalized citizen may be expatriated for residing in any foreign nation for a period of five years. There seems to be even less basis for discriminating between naturalized and native-born citizens when residing in countries in which neither have any prior connections. See *Developments in the Law—Immigration and Nationality,* 66 HARV. L. REV. 643, 741-42 (1953). The Supreme Court's grant of certiorari in the instant case makes *Lapides* doubtful authority until the present case is decided.

The resolution of this issue will likely turn on the outcome of the basic due process question. Unless some special status is given to the right of citizenship, due process is not offended so long as classifications made by Congress have a rational basis—such will probably be found to exist if the expatriation itself is found to be sufficiently reasonable under whatever theory the Court decides to apply. If the sanction itself proves to be reasonable, it appears to be equally reasonable to say that persons returning to nations with which they have prior contacts are more likely to become involved in situations compromising their obligations to the United States. Likewise, if the Court decides that citizenship is to be accorded a preferred status, analogous to the first amendment rights, a more stringent test would be applied to any classification Congress seeks to make since such preferred rights cannot be denied to certain classified individuals except where necessary to prevent immediate and grave problems. See Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Hirabayashi v. United States, 320 U.S. 81 (1943); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638-39 (1943). Thus, depending on which test the Court applies to citizenship, the plaintiff will likely prevail on both the due process issue and the classification issue, or—if the Court feels it necessary to reach this latter issue—on neither.

For the view that no such distinction between native-born and naturalized citizens can be included in expatriation statutes without violating the Constitution, see Comment, *Involuntary Loss of Citizenship by Naturalized Citizens Residing Abroad,* 49 CORNELL L.Q. 52 (1963).

27. Besides the new Justices present in this case who were not on the Court at the time of the *Perez* decision, it is significant that Justice Brennan, who joined the majority in *Perez,* stated in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 187 (1963), that he has felt doubts concerning the decision in the former case.

28. The relatively short consideration given to the due process issue by Mr. Chief Justice Warren in his majority opinion in Trop v. Dulles, 356 U.S. 86 (1958), has been interpreted, even by the dissent in the instant case, as indicating an acceptance of the majority position in *Perez.* See Comment, *The Expatriation Act of 1954,* 64 YALE L.J. 1164, 1186 (1955). But, rather, it ap-

zenship;[29] under the *Perez* dissent's theory Congress cannot implement its regulatory powers by expatriation, as was its clear intent here, nor can it deem broad categories of acts evidence of voluntary expatriation unless it is reasonable that such acts invariably demonstrate sufficient dilution and division of allegiance to the United States.[30]

The statute considered in the instant case imposes expatriation for even more equivocal and neutral acts than voting in a foreign political election, which was deemed by the *Perez* dissenters to be too broad a classification of conduct and too ambiguous in nature to be reasonably construed as evidence of voluntary renunciation of citizenship.[31] Even if the statute in the instant case were not so broad, so that a consideration of the plaintiff's individual situation was required; if such a statute arguably evidenced a violation of the *Perez* majority's due process test of constitutionality, it is very unlikely that it would survive what would certainly be a more stringent test by the *Perez* dissenters.

If the Supreme Court were to adopt such a characterization of citizenship, they might employ the restriction applied in the protection of other basic individual rights:[32] that Congress cannot abridge or infringe on such rights except in the face of compelling subordinating policies.[33] In light of the circumstances of the instant case, that such compelling policies are sufficiently present to warrant the automatic application of such broad legislation is doubtful.

Even if the right of citizenship is never accorded the sanctity of the first amendment rights, it seems more just that such a fundamental right, traditionally and constitutionally recognized,

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pears that even a passing mention of Warren's theory in *Trop*, which was decided solely on the cruel and unusual punishment issue, indicates that the due process issue is not dead; it merely indicates that because of the disagreement of the majority Justices of *Perez*, the *Trop* case had to rest on the cruel and unusual punishment issue.

29. Perez v. Brownell, 356 U.S. 44, 68 (1958).

30. *Id.* at 75–77.

31. *Ibid.*

32. Justices Black and Douglas, in a separate dissent in *Perez*, specifically group citizenship with the first amendment rights in view of its fundamental character and its express constitutional guarantee. 356 U.S. at 82–84. Mr. Chief Justice Warren likewise speaks of the basic nature of such a right as citizenship, which the courts are duty bound to protect from unreasonable abridgment. 356 U.S. at 64–66, 78. Other cases speak of the fundamental character of the right of citizenship. *E.g.*, Trop v. Dulles, 356 U.S. 86 (1958); Knauer v. United States, 328 U.S. 654, 677 (1946) (Rutledge, J., dissenting); Schneiderman v. United States, 320 U.S. 118, 167 (1943) (Rutledge, J., concurring).

33. Thomas v. Collins, 323 U.S. 516 (1944).

be not abridged without a more compelling reason than is found in the act of mere residence abroad with no consideration given to the individual circumstances, intents and purposes surrounding that residence.

Conscription: "Supreme Being" Test for Conscientious Objector Exemption Violates First Amendment

Defendant Seeger sought exemption from military service on the ground that he was conscientiously opposed to participation in war, but he did not indicate that his philosophy was based on belief in a Supreme Being, a requisite of the exemption statute.[1] The government, although it stipulated that Seeger's abhorrence of war was both sincere and "by reason of religious training and belief,"[2] denied him exemption and indicted him when he failed to submit to induction.[3] At his trial, defendant argued[4] that the exemption statute unconstitutionally favored objectors believing in a Supreme Being over those objectors whose convictions were either nonreligious in origin or were based on training and belief in a nondeistic religion; a federal district court rejected this argument and upheld the exemption statute.[5] On appeal, the Court of Ap-

1.
> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. . . .

Universal Military Training and Service Act § 6(j), 62 Stat. 612-13 (1948), as amended, 50 U.S.C. App. § 456(j) (1958).

2. Seeger's beliefs were stipulated to be within the definition of "religious training and belief" adopted by the Second Circuit in United States v. Kauten, 133 F.2d 703 (2d Cir. 1943). See notes 14 & 28 *infra*.

3. Defendant was indicted under the Universal Military Training and Service Act § 12, 62 Stat. 622, 50 U.S.C. App. § 462 (1958), for knowingly failing to submit to induction.

4. Defendant argued that he had been wrongfully drafted. It is settled that the validity of a registrant's classification may be raised as a defense in such a case. Witmer v. United States, 348 U.S. 375, 377 (1955); Estep v. United States, 327 U.S. 114 (1946).

5. United States v. Seeger, 216 F. Supp. 516 (S.D.N.Y. 1963), 50 VA. L. REV. 178 (1964).

peals for the Second Circuit reversed and *held* that Congress may not consistently with the first and fifth amendments limit the exemption to persons whose convictions arise from a belief in a Supreme Being. *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964).

Congress has traditionally sought to resolve the conflict that compulsory military service presents for conscientious objectors by exempting such persons from the operation of the conscription laws.[6] Although the statutory provisions designed for this purpose have not expressly mentioned the word "sincerity," they have implicitly exempted from military service only those persons who claim in good faith that they are conscientiously opposed to participation in war in any form[7] — administration of the exemption has been aptly characterized as a "search for sincerity."[8]

In addition to requiring sincerity, Congress has always limited the conscientious objector classification to persons whose objection to participation in war arises from religious belief or conviction. Although Congress has experimented with the scope of this limitation, nonreligious objectors have never been exempt.[9] The Draft Act of 1917,[10] for example, limited exemption to members of well-recognized sects whose religious convictions accorded with the pacifist teachings of their sect. The Selective Training and Service Act of 1940,[11] however, eliminated the requirement of membership in a pacifist sect, replacing the objective[12] religious test of the earlier act with a subjective standard — whether an individual's conviction arose "out of religious training and belief."

6. For a discussion of the historical development of conscientious objector provisions in the United States, see Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 256–63 (1963); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 412–29 (1952); Smith & Bell, *The Conscientious-Objector Program — A Search for Sincerity*, 19 U. PITT. L. REV. 695, 696–98 (1958); Note, *Conscientious Objectors*, 36 MINN. L. REV. 65, 70–74 (1951).

7. Smith & Bell, *supra* note 6, at 706.

8. Smith & Bell, *supra* note 6.

9. See Conklin, *supra* note 6, at 252.

10. 40 Stat. 78.

11. 54 Stat. 889.

12. The provisions of the 1917 act were "objective" to the extent that they allowed an exemption upon a showing of membership in a recognized pacifist sect. To the extent that exemption was dependent upon a finding that an individual's beliefs were in accord with those taught by the sect to which he was affiliated, the test must be characterized as "subjective." Obviously, the exemption provisions of the 1917 act were easily administered. See Mittlebeeler, *Law and the Conscientious Objector*, 20 ORE. L. REV. 301, 306 n.23 (1941).

Under this standard, draft boards were required to decide whether a particular applicant's beliefs were "religious"; membership in an organized sect was not required.

In *United States v. Kauten*[13] the Second Circuit defined the 1940 act's requirement of a "religious belief" broadly to embrace any sincere objection to participation in war, whether that objection stemmed from a conventional religious belief or from a personal moral code.[14] Subsequently the Second Circuit applied the *Kauten* definition of "religious belief" to permit exemption for objectors who based their conviction on general humanitarian concepts.[15] The Ninth Circuit, in contrast, adopted a narrower test of the religious condition imposed by the act — "religious belief" presupposed a belief in a Supreme Being.[16]

In providing for the exemption of conscientious objectors under the Selective Service Act of 1948,[17] Congress rejected the *Kauten* construction of religious belief and, limiting the exemption, specified that "religious training and belief" meant "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation . . . ."[18] Congress expressly excluded from the definition of religious belief "essentially political, sociological, or philosophical views or a

13. 133 F.2d 703 (2d Cir. 1943).

14.

> There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.

133 F.2d at 708.

15. United States *ex rel.* Reel v. Badt, 141 F.2d 845 (2d Cir. 1944); United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (2d Cir. 1943).

16.

> It is our opinion that the expression "by reason of religious training and belief" is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.

Berman v. United States, 156 F.2d 377, 380 (9th Cir. 1946); see Waite, *Section 5(g) of the Selective Service Act, as Amended by the Court*, 29 MINN. L. REV. 22 (1944).

17. 62 Stat. 604 (1948), as amended, 50 U.S.C. App. §§ 453–73 (1958).

18. 62 Stat. 612 (1948), as amended, 50 U.S.C. App. § 456(j) (1958).

merely personal moral code."[19] That Congress intended to exclude Buddhist or Taoist pacifists by employing the Supreme Being test is unlikely;[20] Congress probably failed to anticipate conscientious objectors of those religious faiths. What Congress did intend to achieve through the test is clear: It sought to exclude from the conscientious objector classification persons, such as those exempted in *United States ex rel. Phillips v. Downer*[21] and *United States ex rel. Reel v. Badt*,[22] who based their objection to war solely on moral grounds.[23] The Supreme Being test has not always been read literally,[24] but, perhaps because of these broad readings, it has until now withstood constitutional attack.

In the instant case the Second Circuit, squarely facing the constitutional challenge, found that the Supreme Being requirement unconstitutionally deprived sincere conscientious objectors such as Seeger of the exemption.[25] The precise grounds for the court's decision are unclear, but, reading the instant opinion in

19. *Ibid.*

20. Buddhism and Taoism are examples of well-recognized religions that do not teach what would generally be considered a belief in the existence of God. See authorities cited in Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961). As such, they are often cited to support the proposition that the Supreme Being test discriminates against the substantial number of adherents to such religions. See, *e.g.*, 50 VA. L. REV. 178, 182–83 (1964). Absent a showing that some Buddhists and Taoists are conscientious objectors, the argument has little merit. Moreover, in light of Congress' clear purpose in adopting the Supreme Being test, it would not seem unreasonable for the courts to disregard, or at least modify, the test when faced with a sincere Buddhist or Taoist conscientious objector. *Cf.* Conklin, *supra* note 6, at 277–78.

21. 135 F.2d 521 (2d Cir. 1943); see note 15 *supra* and accompanying text.

22. 141 F.2d 845 (2d Cir. 1944); see note 15 *supra* and accompanying text.

23. See Note, *Conscientious Objectors*, 36 MINN. L. REV. 65, 72 (1951).

24. In United States v. Jakobson, 325 F.2d 409 (2d Cir. 1963), the same court that decided the instant case held that in order to avoid "grave and doubtful constitutional questions," the Supreme Being test could not be read narrowly to embrace only those who believed in the existence of a divine personality, but must also include those who believe in "a supreme power" of any kind. Since defendant Jakobson recognized "an ultimate cause or creator of all existence which he terms 'Godness,'" *id.* at 412, his beliefs were found to be within the limits set by the Supreme Being test. *But see* Peter v. United States, 324 F.2d 173 (9th Cir. 1963).

25. The court apparently found only the Supreme Being requirement, rather than the exemption as a whole, unconstitutional; a result that extended the exemption privilege to a class that Congress explicitly sought to exclude. See text accompanying notes 21–23 *supra*. To have declared the entire exemption void, however, would have denied the exemption privilege to all objectors, which seems even less desirable. *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

For a discussion of the question of "standing" raised by the posture of the instant case, see 50 VA. L. REV. 178, 179 n.2 (1964).

light of the court's earlier opinion in *Jakobson v. United States*,[26] it appears that the court viewed the Supreme Being test as drawing an impermissible line between different religious beliefs, preferring "externally compelled" over "internally derived" beliefs.[27]

The court assumed that Congress possessed the power to implement the free exercise clause of the first amendment by allowing all religious objectors an exemption, but that Congress could not exercise that power so as to "prefer" some religious objectors over others.[28] In reaching this conclusion the court relied on *Torcaso v. Watkins*,[29] a case in which the Supreme Court invalidated a section of the Maryland Constitution requiring prospective public officeholders in that state to declare their belief in God as a condition to assuming office. In *Torcaso*, delimiting what the state and federal governments can constitutionally do, the Supreme Court stated that neither can

> pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[30]

Although the language of *Torcaso* and other recent Supreme Court decisions[31] goes far toward precluding the classification of individuals for any purpose on the basis of religious belief, to use absolutely the standard suggested by the *Torcaso* language in the

26. 325 F.2d 409 (2d Cir. 1963); see note 24 *supra*.

27. "[U]nder present day thinking as to the First Amendment, a statute could scarcely be defended on this score [implementation of the free exercise clause] if it protected 'the free exercise' of only a few favored religions or preferred some religions over others without reasonable basis for doing so." United States v. Jakobson, 325 F.2d 409, 415 (2d Cir. 1963). In the instant case, the court quoted the above language from *Jakobson* and then proceeded to find that a distinction, consistent with the due process clause of the fifth amendment, could not be drawn between Jakobson's "Godness" and Seeger's "goodness."

28. The court did not consider whether an exemption to all religious conscientious objectors would unconstitutionally "prefer" believers over nonbelievers. Indeed, under the court's concept of the variety of belief embraced by the word "religion" as used in the first amendment, such an inquiry would be unnecessary. To the court, conviction arising from "conscience" is equivalent to conviction arising from "religious belief." Since a conscientious objector is one whose conscience restrains him from performing military service, see Mittlebeeler, *supra* note 12, at 801, all conscientious objectors are, by definition, "religious."

29. 367 U.S. 488 (1961).

30. 367 U.S. at 495.

31. See School Dist. v. Schempp, 374 U.S. 203 (1963), discussed in Pollak, *Public Prayers in Public Schools*, 77 HARV. L. REV. 62 (1963).

context of exemption from military service seems unwise.[32] Such an approach would require Congress to exempt all conscientious objectors or to exempt none.[33] This seems unduly restrictive in light of an apparent congressional desire to implement the free exercise clause of the first amendment by accommodating the religious convictions of at least some objectors. Although there would seem to be no justification for conditioning the right to hold public office on particular beliefs, a classification based on the nature of religious belief or affiliation may be necessary to accomplish the exemption statute's "nonreligious" purpose[34] — the accommodation of minority religious beliefs. That Congress hesitates to extend the exemption to all sincere objectors, or to all sincere "religious" objectors, for fear that so broad a provision would be subject to abuse[35] should not be a fatal defect; narrow limits on an exemption of this kind may be necessary.[36] Since pacifism often arises from religious beliefs, a workable method for ascertaining sincerity may have to be couched in terms of those beliefs. Such a test should be permissible, even though it may theoretically "prefer"[37] some sincere conscientious objectors over others, if it reasonably advances the statute's nonreligious purpose by aiding local draft boards in administering the act. For example,

32. See Conklin, *supra* note 6, at 281, 282–83. See generally Griswold, *Absolute Is in the Dark — A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963).

33. See note 28 *supra*.

34. Since Congress has manifested a vital interest in providing an atmosphere of freedom for individual religious belief and practice in conformity with the underlying policies, if not the letter, of the free exercise clause, measures that are adopted to accommodate the free exercise of religion have a "nonreligious" or secular, rather than a religious, purpose. See Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 395 n.436, 400–02 (1963).

35. "In attempting to obtain a workable formula which will protect the religious liberty of the sincere conscientious objector, the major concern of Congress has been to enact a law liberal enough to achieve this objective, but strict enough to discourage the coward and the shirker." Conklin, *supra* note 6, at 252.

36. Public support and cooperation would seem to be necessary to the maintenance of a program of universal military training. Evidence that a large number of insincere registrants were taking advantage of the conscientious objector exemption might lead to dissatisfaction with the system as a whole.

37. Most implementation of the free exercise clause theoretically "prefers" some beliefs over others. Exempting sabbatarians from the requirement of an unemployment compensation statute that all recipients be available for Saturday work, obviously "prefers" such persons over those who must be available. See Sherbert v. Verner, 374 U.S. 398 (1963). See generally Kauper, Book Review, 41 TEXAS L. REV. 467 (1962).

since membership in an organized pacifist sect may be better evidence[38] of sincerity than the mere assertion of pacificist beliefs, a requirement to that effect should be permissible.[39]

It does not follow, however, that the Supreme Being test is valid. That test serves no legitimate purpose in accommodating the rights of the minority with the need for a program of compulsory military service. The test is subjective[40] in nature and offers no barrier to the insincere objector, for he merely indicates his belief and the matter is closed.[41] The persons excluded by such religious test requirements are the sincere objectors, such as Seeger, who refuse to compromise their belief and acknowledge the existence of a Supreme Being in order to obtain the desired classification.

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38. Such evidence is "better" in two respects: First, there would seem to be more likelihood that a person associated over a period of time with a pacifist sect is sincere in his objection to military service. Second, such evidence is easier to present and to evaluate. Although ascertaining whether a particular individual is a "member," or is "affiliated with," a pacifist sect might raise some problems, those problems should be less difficult of resolution than the question whether a particular registrant should be believed. In addition, a panel of pacifist clergymen might be assembled to pass upon "membership" claims. *Cf.* Eagles v. United States *ex rel.* Samuels, 329 U.S. 304 (1946) (use of theological panels serving in an advisory capacity).

39. This is not to say, however, that such a limited exemption is necessarily wise. Experience with a similar exemption during World War I proved quite unsatisfactory. See Smith & Bell, *supra* note 6, at 696-97. *But cf.* Mittlebeeler, *supra* note 12, at 306 n.23.

40. See Torcaso v. Watkins, 367 U.S. 488, 494 n.9 (1961). *But see* Conklin, *supra* note 6, at 279:

> [T]he "Supreme Being Clause," as a test of sincerity in the Selective Service Act, does not appear to be . . . intrinsically arbitrary or unreasonable. It appears to be based on a solid and workable foundation. Congress employed this test for its *objective attributes* with the intention of avoiding an unrealistic, and unworkable, purely subjective test.

(Emphasis added.) Father Conklin, writing in support of the Supreme Being test, becomes its severest critic by failing to recognize that such a test is inherently subjective and that an insincere objector would have no qualms about misrepresenting the nature of his religious belief.

> The first of these alternatives [the formulation of a new conscientious objector exemption requiring only a subjective inquiry into the genuineness of the claimant's objections], however, seems patently unworkable. Absent an extrasensory perception on the part of the Selective Service examiners, a subjective test would be incapable of detecting and thwarting an attempted avoidance of military service by those whose objection arises only out of a desire to avoid the dangers of combat.

Id. at 281.

41. No reported case has been found where a registrant was thought to have misrepresented his belief in a Supreme Being. Indeed, such an inquiry might be improper. *Cf.* United States v. Ballard, 322 U.S. 78 (1944).

The Supreme Being test, like the religious test clause at issue in *Torcaso*, cannot be justified as effecting any legitimate goal of the statute. It is unfortunate, however, that in finding it invalid the Second Circuit suggested that Congress either exempt all conscientious objectors, regardless of the nature of their belief or affiliation, or exempt none. Although an exemption for all sincere conscientious objectors would seem to be just as workable as the present test,[42] Congress may be unwilling to go that far.[43] And, if Congress were to eliminate the exemption completely, at least some persons holding minority beliefs would be unnecessarily denied the religious freedom assured by the first amendment.

Federal Jurisdiction: Final Judgment Rule Does Not Bar Supreme Court Review of Interlocutory Order

Plaintiff, the receiver for an insurance company in liquidation, brought an action in a state district court in Travis County, Texas against two national banks. The banks filed a plea of privilege asserting that they were located in Dallas County, Texas and were therefore immune from suit in Travis County under a federal venue law.[1] The trial court denied the banks' plea. On appeal from this order, the Texas Court of Civil Appeals reversed;[2] the Texas Supreme Court reversed again, denying the plea.[3] The United States Supreme Court reversed, three Justices dissenting,[4] and *held* that the state court judgment was appealable although the merits of the main controversy had not yet been litigated. *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963).

42. The difficult determination under both the 1940 provisions and the present one is the determination of personal sincerity. The Supreme Being test does not aid draft boards in making this determination. See notes 40 & 41 *supra* and accompanying text.

43. See text accompanying notes 21–23 *supra*.

1. REV. STAT. § 5198 (1875), 12 U.S.C. § 94 (1958), provides: "Actions and proceedings against any [national bank] . . . may be had in any . . . State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

2. Mercantile Nat'l Bank v. Langdeau, 331 S.W.2d 349 (Tex. Civ. App. 1959).

3. Langdeau v. Republic Nat'l Bank, 161 Tex. 349, 341 S.W.2d 161 (1960).

4. Only Mr. Justice Harlan dissented on the jurisdiction aspect of the case. Mr. Justice Black and Mr. Justice Douglas dissented without opinion on the venue issue.

The Supreme Court's power of appellate review over state court[5] and federal district court[6] decisions has been limited by statute, the former since 1789,[7] to "final judgments or decrees." A judgment or decree is not generally final unless there has been "an effective termination of litigation,"[8] with nothing remaining to be done at the trial level except ministerial acts[9] or the execution of judgment.[10] This requirement of finality avoids piecemeal review that would often increase the expense and time of litigation.[11] It also restrains the Court from rendering an opinion on questions of law divorced from the specific factual setting that a final disposition of the case discloses.[12] In addition, the finality requirement avoids having the Supreme Court pass on constitutional questions that might be mooted by the final outcome of a case[13] and, where the appeal is from a state court decision, this rule furthers the policy of minimizing potential federal-state conflicts.[14]

In two closely related lines of cases the Supreme Court,[15] rec-

5. 28 U.S.C. § 1257 (1958):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . . . by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the . . . laws of the United States, and the decision is in favor of its validity.

6. 28 U.S.C. § 1291 (1958).

7. Judiciary Act § 25, 1 Stat. 85 (1789). See generally Boskey, *Finality of State Court Judgments Under the Federal Judicial Code*, 43 COLUM. L. REV. 1002 (1943); Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

8. Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 72 (1946); see St. Clair County v. Lovingston, 85 U.S. (18 Wall.) 628 (1873).

9. Gospel Army v. Los Angeles, 331 U.S. 543 (1947).

10. Catlin v. United States, 324 U.S. 229, 233 (1945).

11. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

12. See Boskey, *supra* note 7, at 1002.

13. See Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67 (1948).

14. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

15. The Court rather than Congress has in fact developed the guidelines that have given meaning to the finality rule; Congress in 1948 merely codified what was the then existing practice. The Senate Committee report noted that "the purpose of the bill is to codify and revise [in the sense of streamlining] the laws relating to the Federal judiciary and judicial procedure." S. REP. No. 1559, 80th Cong., 2d Sess. 1 (1948). The corresponding House report has words of similar import. H.R. REP. No. 308, 80th Cong., 1st Sess. 1 (1948). Moreover, at the time the Judiciary Act was passed in 1789, there was no recorded discussion concerning the "final judgment or decree" clause. See Warren, *History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 104–05 (1923).

ognizing that under some circumstances irreparable harm might occur in the absence of interlocutory appeal, has disregarded the strict statutory requisite of finality.[16] The early case of *Forgay v. Conrad*[17] accorded "finality" to what was in fact an interlocutory forfeiture and sale of property order. Although such an order could be appealed once final judgment was entered, the Court recognized that the appellant might suffer irreparable harm if the property were sold in the meantime.[18] A second interlocutory order that the Court has cognizanced is an appeal under the "collateral order" doctrine. This exception to the finality requirement allows an immediate appeal from the denial of a claimed personal right that is preliminary and collateral to the main cause of action where that right would not merge in the final judgment. If immediate review were postponed on such collateral orders, the right to appeal would be forever lost and parties to the litigation might suffer irreparable injury.[19]

In the instant case the Court seems to have carved another exception out of the language of the finality statute. Clearly there was no "final judgment or decree" before the Court under a literal reading of that phrase.[20] Moreover, neither of the limited exceptions, in their traditional sense, applied: Here, review of the lower court's determination of venue, a preliminary order, could have been had after final judgment on the merits with no irreparable injury, in the form of a permanent loss of a personal or property right,[21] to the litigants.

16. See 6 MOORE, FEDERAL PRACTICE ¶¶ 54.12–.15 (2d ed. 1953) for a detailed discussion of exceptions to the finality doctrine both on appeals from the state courts and from the federal district courts.

17. 47 U.S. (6 How.) 201 (1848).

18. The *Forgay* case involved a decree ordering the sale or delivery of certain physical property while at the same time ordering an accounting. Failure to allow an appeal on the sale or delivery order because the accounting was not completed could have caused irreparable injury. *Accord,* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) (where an order was issued providing for the immediate transfer of a radio station); Thomson v. Dean, 74 U.S. (7 Wall.) 342 (1868); Kasishke v. Baker, 144 F.2d 384 (10th Cir. 1944), *cert. denied,* 325 U.S. 856 (1945).

19. See, *e.g.,* Stack v. Boyle, 342 U.S. 1 (1951) (order denying motion to reduce bail); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (order denying request to make plaintiff post a statutory bond to cover attorney's fees and court costs of defendant if plaintiff should lose the case).

20. A final judgment is "one that puts an end to a suit or action." BLACK, LAW DICTIONARY (4th ed. 1951). Traditionally, finality requires that all aspects of the case have merged in a judgment rendered at the end of the trial. See cases cited note 19 *supra.* The venue question in the instant case was only one aspect of the current controversy and was certainly not "final" for purposes of appeal.

The Court based its finding of jurisdiction, in part, on the authority of *Local 438, Constr. Union v. Curry*,[22] a companion case decided on the same day. In *Curry*, certiorari to review a temporary state injunction against picketing was granted because there was an alleged violation of the National Labor Relations Act. Mr. Justice White, writing for the majority in that case, allowed immediate review on three grounds: First, petitioner had only one defense to the injunction, that federal law had pre-empted state court action; since this single defense had already been denied at the time the temporary injunction was issued, and since petitioner had no further defense to the issuance of a permanent injunction, the temporary injunction was, in fact, a final and appealable determination of litigation.[23] This reasoning clearly can not apply to the instant case, for the merits of the dispute had not yet been litigated. Second, the Court suggested that *Curry* involved a collateral order.[24] The instant case cannot be justified under the traditional collateral order doctrine, however, because there has been no injury to a personal or property right. Third, the Court reasoned in *Curry* that the disputed point presented a "substantial claim,"[25] tending to uphold the position taken by the appealing party.[26]

21. Although the banks might be inconvenienced by being denied an immediate change of venue, an injury of this nature does not fit the traditional collateral order exception. The right to appeal this point would not be lost forever; it would merge in the final judgment and could be appealed at that time.

22. 371 U.S. 542 (1963). Here an employer sought injunctive relief against picketing claimed to be in violation of the Georgia right-to-work law.

23. *Accord*, Pope v. Atlantic Coast Line R.R., 345 U.S. 379 (1953). Mr. Justice Harlan, who concurred in *Curry* but dissented in the instant case, develops this point. 371 U.S. at 554.

24. Mr. Justice Harlan, in his concurring opinion, emphasized that the collateral order doctrine was inapplicable in *Curry* because the issue involved would merge in the final judgment and could be appealed at that time. 371 U.S. at 553.

25. 371 U.S. at 552.

26. This reasoning conflicts with Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952), which also dealt with an appeal from a temporary injunction against picketing in a labor dispute. The Supreme Court in *Ledbetter* stated that in certain situations a temporary injunction might be as effective as a permanent injunction and, because of this, appeals from interlocutory orders had been authorized by Congress and state legislatures in some situations; in the absence of such authorization, however, the Court could not take jurisdiction. In *Curry*, the majority stated that

> to the extent that *Ledbetter* may be said to prohibit our review of a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute when a substantial claim is

The language of the instant case indicates the adoption of the "substantial claim" test[27] as a major premise for hearing an interlocutory appeal. The Court apparently determined subjectively that the decision below was probably wrong. Since the major trial activity had yet to occur, the Court probably felt it could save time and expense for both the courts and the parties by correcting the error at this point in the proceeding, avoiding the chance of reversal after a lengthy trial.[28] If the Court continues to use this approach,[29] there will be a major problem in making the "substantial claim" subjective guidelines, as developed by the Court, known to litigants who are faced with the problem of determining the most economical way to press their claims.

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made that the jurisdiction of a state court is pre-empted by federal law . . . we decline to follow it.

371 U.S. at 552.

27. Mr. Justice White stated that "nonetheless, a substantial claim appealable under state law, is made . . . ." Instant case at 558. The Court's reference to "appealable under state law" raises a problem: If the state from which the appeal comes does not allow interlocutory appeal in those circumstances, is the Court prohibited from hearing it? It would seem unreasonable that the Supreme Court's appellate jurisdiction should depend on state law. Under 28 U.S.C. § 1257 (1958) final judgments or decrees to be appealable must "be rendered by the highest court of a state in which a decision could be had . . . ." The analogous denial of a preliminary or interlocutory motion at the trial court level would be the highest state court "in which a decision could be had" giving the Supreme Court jurisdiction. *Cf.* Thompson v. Louisville, 362 U.S. 199, 202–04 (1960).

28. The Court stated:

> [W]e believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Instant case at 558.

The Court also said "this is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Ibid.* Some argue that this language provided a mechanical test of the availability of interlocutory review. See Note, *The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts*, 73 YALE L.J. 515, 528 (1964). At least, such considerations are an element in the Court's suggested calculus of the most expeditious way to proceed.

29. In the recent case of Brown Shoe Co. v. United States, 370 U.S. 294 (1962), a finality requirement was circumvented by the Court in hearing an interlocutory appeal in an antitrust suit before the formulation of a final divestiture plan. The relevant statute was the Expediting Act § 2, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1958), which provides for appeal from "the final judgment of the district court" only. Although that case, like

The Court in the instant case failed to discuss all of the policies that underlie the finality doctrine, some of which seem to conflict with the instant result.[30] The Supreme Court has traditionally sought to avoid unnecessary interference with state judicial and internal matters so as to avoid federal-state conflicts.[31] Here there seems to be a direct federal-state confrontation — the Court interfered with the exercise of jurisdiction by a state court. If this case had been allowed to come to final judgment, the result might have mooted the Court's need to interfere.[32] More important, however, is the fact that the Court has apparently accepted the onerous task of deciding in every interlocutory appeal whether a "substantial claim" has been presented that should be decided immediately in order to save time, effort, and expense for the parties.

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the instant one, may be considered a further attack on the finality doctrine, there are several distinguishing features that tend to weaken any effect *Brown Shoe* might have. First, implementing a plan of divestiture might readily be construed as merely a ministerial act; the fact that divestiture was ordered is the important point of that litigation. Second, in *Brown Shoe* both parties wanted an immediate appeal, the point of finality having been raised by the Court itself. 370 U.S. at 305. Third, different statutes were involved in the two cases: 28 U.S.C. § 1257 (1958), involved in the instant case, is the older finality statute and it is backed with almost two hundred years of solid precedent. Fourth, the fact situations are entirely different in the two cases: In *Brown Shoe* the appeal came after most of the litigation had ended; in the instant case the litigation had just commenced at the time of appeal. Finally, it should be noted that the appellants in *Brown Shoe* lost their appeal in a 6 to 1 decision. This does not indicate a very "substantial claim," a basis of the decision in the instant case.

30. These countervailing policies are not discussed in the majority opinion and they are only sketchily presented in Mr. Justice Harlan's dissent. They are not raised in the briefs presented by the litigants in this case. The Court must have been aware of them, however, since they were at least raised by Mr. Justice Harlan, and one can only conclude that the Court has chosen not to give them much weight. It should also be noted that the Court avoided a ready precedent to reach a contrary result that would have been in line with past policy. Cincinnati Street Ry. v. Snell, 179 U.S. 395 (1900) also involved an appeal from a denial for a change of venue. The Supreme Court of Ohio, reversing a state circuit court judgment, held that venue should have been changed. Snell v. Cincinnati Street Ry., 60 Ohio St. 256, 54 N.E. 270 (1899). On appeal to the United States Supreme Court it was alleged that the state venue statute was unconstitutional. The Court unanimously held, in declining to hear the appeal, that there is scarcely an order imaginable that does not finally dispose of some particular point arising in a case, "but that does not justify a review of such order, until the action itself has been finally disposed of." 179 U.S. at 397.

31. See instant case at 572 (Harlan, J., dissenting).

32. This would have been the situation if final judgment had been awarded to the appellants.

Although also not mentioned by the Court, the instant case may be justified on the ground that a refusal to review the trial court's determination would force a national bank to appear at a trial in a distant county.[33] Arguably Congress intended to prevent the interruption of a daily bank business through the inconvenience of sending bank's records to a distant county. This right to avoid inconvenience would be lost forever in the instant case, even though the venue question would merge in the final judgment, if the banks' only remedy is to take part in the trial and appeal from an adverse judgment. Such a reading of the case only slightly expands the traditional scope of the collateral order exception to the finality rule.[34]

Nevertheless, by allowing an interlocutory appeal in the instant case, the Court disregarded the express wording of the finality statute and, perhaps, adopted a "substantial claim" test. Contrary to its oft-repeated function, the Court seems to be legislating new rules in respect to hearing interlocutory appeals.[35] Although the finality statute is by no means dead or overruled, as a practical matter the Court has certainly provided an opening through which that doctrine's effectiveness could be severely limited. The Court is at somewhat of a crossroads at this point. Perhaps the Court will view this case merely as a slight extension of the collateral order doctrine and treat it in a restrictive

33. An early Supreme Court case established that even though a national bank is subject to the concurrent jurisdiction of both the state and federal government, the bank had to be sued at its location for purposes of necessary convenience. As stated by that Court, the reason for the statute is to "prevent interruption in their [the bank's] business that might result from their books being sent to distant counties in obedience to process from state courts." First Nat'l Bank v. Morgan, 132 U.S. 141, 145 (1889). However, even if the instant Court were concerned merely with the policies underlying the venue statute, it is difficult to justify this decision on the basis of inconvenience to the banks. With modern methods to reproduce copies of records and with improved travel conditions, banks are not significantly inconvenienced when required to go from one county to another within a state. But this might be a problem for the legislature and not for the Court. On this point see the concurring opinion of Mr. Justice Black in Michigan Nat'l Bank v. Robertson, 372 U.S. 591, 594 (1963).

34. Mr. Justice White, in the majority opinion, calls the federal venue statute "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Instant case at 558. Technically speaking, however, there cannot be a "collateral order" exception absent a failure to merge with the final judgment. Here the disputed venue order would have merged with the final judgment had the case proceeded that far.

35. As Justice Frankfurter has said:

the troublesome phase of construction is the determination of the ex-

way.[36] Perhaps if there is a "substantial claim" test, as seems quite likely, this will result in only another limited exception to the finality doctrine. However, the instant case could leave the decision on when to hear an interlocutory appeal almost entirely to the discretion of the Court. Acting on individual cases, the Court may well be in a better position than the legislature to determine the most appropriate time for appeal. If the Court recognizes the drawbacks of its doctrine, judicious use of the interlocutory appeal might prove to be a milestone in avoiding the rigidity of the finality statute.

Federal Jurisdiction:
Appointment of Foreign Administrator
To Create Diversity Not Improper or Collusive

Plaintiff, a Pennsylvania domiciliary appointed administrator of the estate of a Connecticut decedent, instituted a wrongful death action in a federal district court against the defendants, all of whom were Connecticut citizens.[1] Defendants argued that the court lacked judisdiction because, under section 1359 of the Judicial Code,[2] the plaintiff had been "improperly and collusively" appointed to invoke the jurisdiction of the federal court. Plaintiff, admitting that he had been appointed primarily to create diversity jurisdiction,[3] moved to strike the defense. The court granted

tent to which . . . external circumstances may be allowed to infiltrate the [statutory] text on the theory that they were part of it, written in ink discernible to the judicial eye.

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947); see Lyon, *Old Statutes and New Constitution*, 44 COLUM. L. REV. 599 (1944). Certainly the Court has become increasingly "less formal in the matter of final judgments." Gospel Army v. Los Angeles, 331 U.S. 543, 546 (1947).

36. See text accompanying notes 33 & 34 *supra*.

1. Decedent sustained fatal injuries when a bulldozer backed over him. The vehicle was owned by defendant Elm City Construction Co. which had leased it to defendant Savin Brothers, Inc., whose employee was operating it. A death action accrued within CONN. GEN. STAT. REV. § 52-555 (1958), which allows an executor or administrator to recover from the party legally at fault.

2. 28 U.S.C. § 1359 (1958).

3. The decedent's mother, a Connecticut domiciliary, was originally appointed administratrix but she resigned and plaintiff was substituted in her stead. Plaintiff-administrator had no personal relationship with the decedent, nor with the decedent's family, nor with any of the beneficiaries. Counsel for the heirs of decedent advised the substitution of plaintiff because of his foreign citizenship. Plaintiff candidly explained that the primary motive was to obtain the requisite diversity to invoke the jurisdiction of the federal court.

plaintiff's motion and *held* that the appointment of a foreign administrator in order to create diversity is neither improper nor collusive within the meaning of section 1359. *Lang v. Elm City Constr. Co.*, 217 F. Supp. 873 (D. Conn. 1963).[4]

Congress has provided that controversies between citizens of different states that involve more than $10,000 are cognizable in the federal courts.[5] In determining whether a controversy is between citizens of different states, the federal court looks to the citizenship of the real party in interest[6] — the person who, under the applicable state law, has both a judicially enforceable right and control of the action.[7] In the instant case, under Connecticut law, plaintiff-administrator was the proper person to seek judicial relief in his own name and he was in control of the action.[8] His citizenship, therefore, was controlling for purposes of diversity.[9]

Diversity jurisdiction of the federal courts is limited, however, by section 1359 of the present Judicial Code, which provides that there shall be no federal jurisdiction of a case in which a person

4. *Aff'd per curiam*, 324 F.2d 235 (2d Cir. 1963).

5. 28 U.S.C. § 1332 (1958).

6. Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931); County of Todd v. Loegering, 297 F.2d 470 (8th Cir. 1961); O'Donnell v. Hayden Truck Lines, Inc., 61 F. Supp. 823 (D. Conn. 1945); see 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 482, at 31 (Rules ed. 1961); 3 MOORE, FEDERAL PRACTICE ¶ 17.04 (2d ed. 1963).

Not every federal court has looked to the citizenship of the real party in interest. See Corabi v. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959); Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1955); Meehan v. Central R.R., 181 F. Supp. 594 (S.D.N.Y. 1960); 8 STAN. L. REV. 469 (1956). Diversity jurisdiction can, on this authority, be found if a party with the "capacity to sue" is diverse. For example, a nondiverse incompetent rather than his foreign guardian may be regarded as the real party in interest. Nevertheless, diversity could be sustained on the guardian's citizenship if he has the capacity to sue.

7. See Gross v. Heckert, 120 Wis. 314, 97 N.W. 952 (1904); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 564 (1937); Simes, *The Real Party in Interest*, 10 KY. L.J. 60, 61 (1921). See generally 2 BARRON & HOLTZOFF, *op. cit. supra* note 6, § 482; 3 MOORE, *op. cit. supra* note 6, ¶ 17.02; Clark & Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259 (1924).

The real party is not necessarily a person for whose ultimate benefit the action is allowed. See Clark & Moore, *A New Federal Civil Procedure: II Pleading and Parties*, 44 YALE L.J. 1291, 1310–12 (1935). Not every interested person, nor necessarily the person having the legal title, is a real party in interest. Simes, *supra* at 61.

8. See O'Donnell v. Hayden Truck Lines, Inc., 61 F. Supp. 823 (D. Conn. 1945); Hartford & N.H.R.R. v. Andrews, 36 Conn. 213 (1869); Prates v. Sears, Roebuck & Co., 19 Conn. Supp. 487, 118 A.2d 633 (Super. Ct. 1956); CONN. GEN. STAT. REV. §§ 52–555, 52–106 (1958).

9. See 2 BARRON & HOLTZOFF, *op. cit. supra* note 6, § 482; HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 917 (1953); MOORE, *op.*

has been "improperly or collusively" made a party to invoke the jurisdiction of the court.[10] The language of section 1359 is substantially the same[11] as that used in the corresponding section of the 1940 Judicial Code, section 80.[12] As construed by the courts, section 80 did not prohibit all attempts to create diversity by maneuvers of the parties. Thus, reincorporation of a nondiverse corporation in a foreign state to create diversity succeeded in that purpose if the local corporation was dissolved.[13] Section 80 was only applied to withhold federal jurisdiction where the creation of diversity was feigned, fraudulent, or colorable.[14] Thus, reincorporation in a foreign state failed to create diversity where the former corporation remained to control the new one and to demand the judgment proceeds.[15] Under section 80 the crucial issue was not motive, rather it was whether diversity of citizenship in fact resulted from the maneuver of the parties or whether the alleged diversity was feigned.[16]

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cit. supra note 6, at 1313 & n.8; Cohan & Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives*, 1 VILL. L. REV. 201, 212–13 & nn.67 & 68 (1956); *cf.* Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1870); Childress v. Emory, 17 U.S. (8 Wheat.) 642, 669 (1823); Chappedelaine v. Dechenaux, 8 U.S. (4 Cranch) 306 (1808).

10. 28 U.S.C. § 1359 (1958): "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

11. See Steinberg v. Toro, 95 F. Supp. 791, 794 (D.P.R. 1951); *Revisor's Notes*, H.R. REP. No. 308, 80th Cong., 1st Sess. § 1359 (1947) [hereinafter cited as *Revisor's Notes*]; HART & WECHSLER, *op. cit. supra* note 9, at 918.

12. Act of March 3, 1875, ch. 137, § 5, 18 Stat. 472; reenacted as Act of March 3, 1911, ch. 231, § 37, 36 Stat. 1098 (then codified as 28 U.S.C. § 80 (1940)). The relevant provisions are:

> If in any suit . . . in a district court . . . it shall appear . . . that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purposes of creating a case cognizable . . . said district court shall proceed no further therein, but shall dismiss . . . .

13. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928).

14. French v. Jeffries, 149 F.2d 555 (7th Cir. 1945); Ikeler v. Detroit Trust Co., 39 F. Supp. 371 (E.D. Mich. 1941). The terms "feigned" and "colorable" were used in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 524 (1928).

15. See Miller & Lux, Inc. v. East Side Canal & Irr. Co., 211 U.S. 293 (1908); Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327 (1895).

16. *Compare* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928), *with* Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327 (1895). *Compare* Williamson v. Osenton, 232 U.S. 619 (1914), *with* Morris v. Gilmer, 129 U.S. 315 (1889). *But see* Cerri v. Akron-People's Tel. Co., 219 Fed. 285 (N.D. Ohio 1914) (appointment of a foreign

By substantially readopting the language of former section 80, Congress apparently intended that section 1359 should restrict diversity jurisdiction in the same manner as section 80.[17] Section 1359 does not, therefore, withhold federal jurisdiction where, as a matter of strategy, diversity is intentionally created, if the maneuver in fact makes the controversy one between citizens of different states;[18] the intention to create diversity does not alone render the appointment of a foreign administrator improper or collusive in violation of section 1359.[19] On this interpretation the court in the instant case correctly decided that plaintiff's appointment was not collusive or improper within section 1359 because, as a result of the appointment, the controversy was in fact between citizens of different states.[20]

The result in the instant case, however, raises the question whether section 1359 sufficiently limits diversity jurisdiction. Where diversity of citizenship is created solely for the purpose of invoking the federal judiciary, no reason or need can be advanced for federal jurisdiction.[21] Traditionally, diversity has been de-

administrator to create diversity held collusive). It seems, however, that such later cases as Bullard v. City of Cisco, 290 U.S. 179 (1933), Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928), and Harrison v. Love, 81 F.2d 115 (6th Cir. 1936) limit the *Cerri* case to its facts. See HART & WECHSLER, *op. cit. supra* note 9, at 918–19. Moore asserts, based on the *Cerri* case, that the prohibition of collusion and impropriety prevents founding diversity on a manipulation of the real party in interest. 3 MOORE, *op. cit. supra* note 6, ¶ 17.05. This interpretation was rebutted by Jaffe v. Philadelphia & W.R.R., 180 F.2d 1010 (3d Cir. 1950).

17. See authorities cited note 11 *supra*.

18. See HART & WECHSLER, *op. cit. supra* note 9, at 918–19.

19. McCoy v. Blakely, 217 F.2d 227 (8th Cir. 1954).

20. See County of Todd v. Loegering, 297 F.2d 470, 473 (8th Cir. 1961); Corabi v. Auto Racing, Inc., 264 F.2d 784, 787 (3d Cir. 1959).

21. See HART & WECHSLER, *op. cit. supra* note 9, at 896–97. In the instant case, plaintiff expressed the reasons for creating diversity as follows:

> [It is] in the best interests of the decedent's estate . . . because of the enlightened rules of practice in the Federal Courts, because of the uniform excellence of the judiciary in this district and circuit, and, finally, because the jury selection system used in this court has resulted consistently in the seating of intelligent jury panels.

Instant case at 875 n.4. See also 3 ELLIOTT, CONSTITUTIONAL DEBATES 533 (1901) (comments of James Madison); 7 HAMILTON, WORKS 764 (1851); Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 27 & n.27 (1948). The plaintiff's argument, that the federal courts are more capable of administering justice, is an insufficient reason for removing a category of cases arising under state law to a collateral court system. See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 239–40 (1948). Instead, attempts should be made to improve state judicial deficiencies. Compare Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 60 (1954) (concurring opinion). *But see* Frank, *For Main-*

fended on the ground that foreigners need protection from prejudice in state courts.[22] Federal cognizance of the instant case cannot be supported on that ground, however, since in the absence of federal diversity jurisdiction there would not have been a diverse party involved in the controversy.[23] In addition, the foreign administrator did not need federal protection, for only the beneficiaries and the defendants, all of whom were local, could be financially prejudiced.[24]

Also supporting the withholding of federal jurisdiction is the argument that the appointment of a diverse administrator in a wrongful death action is more analogous to other types of controversies excluded by the policy of section 1359 than to those not excluded. For example, if a local corporation purposely dissolves and reincorporates in a foreign state or if a person intentionally changes his domicile, federal diversity jurisdiction is created;[25] but if the owners of a local corporation merely give a cause of action to a foreign corporation that they control or if a person merely changes residence intending to return, diversity is feigned.[26] In other than wrongful death actions, this dis-

taining Diversity Jurisdiction, 73 YALE L.J. 7 (1963). The author argues that diversity jurisdiction should not be "drastically cut" because it serves to dispose of many cases and it has educational value in experimentation between the two systems. However, these benefits could still exist even if diversity were defined with the sole objective of protecting foreigners in state courts.

22. This theory was advanced by Chief Justice Marshall in Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 36–44 (Tent. Draft No. 1, 1963); HART & WECHSLER, *op. cit. supra* note 9, at 892–93; Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 22–28 (1948); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923).

23. "Devices both for obtaining and avoiding the diversity jurisdiction are to be condemned as opening and shutting the federal courts on grounds entirely unrelated to the basis of the doctrine . . . ." 44 HARV. L. REV. 97, 100 (1930).

24. Although the administrator may recover damages for injuries resulting in death, CONN. GEN. STAT. REV. § 52–555 (1958), he is acting in a representative capacity only, since the damages are ultimately for the benefit of decedent's heirs, CONN. GEN. STAT. REV. § 45–280 (1958); it is the heirs, not the administrator, who could be prejudiced.

25. See Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 524 (1928); Williamson v. Osenton, 232 U.S. 619 (1914); Curb & Gutter Dist. No. 37 v. Parrish, 110 F.2d 902, 906 (8th Cir. 1940).

26. See Miller & Lux, Inc. v. East Side Canal & Irr. Co., 211 U.S. 293 (1908); Lehigh Mining & Mfg. v. Kelly, 160 U.S. 327 (1895); Morris v. Gilmer, 129 U.S. 315 (1889). See also Steinberg v. Toro, 95 F. Supp. 791 (D.P.R. 1951); Ikeler v. Detroit Trust Co., 39 F. Supp. 371 (E.D. Mich. 1941).

tinction seems to have been applied to exclude cases in which persons have sought advantage by creating federal jurisdiction while maintaining their right as local citizens to receive the award from the federal court.[27] Creation of diversity in a wrongful death action, by appointment of a foreign administrator, is equally abusive of federal jurisdiction even though in form the parties are diverse. Looking beyond the mere form of the action, determinable local beneficiaries are seeking diversity and yet remaining as ultimate recipients of the award.[28] Even though the foreign administrator is in fact the real party, such a maneuver is analogous to the feigned and collusive cases.

A solution to this problem is not easily formulated. Although the federal courts might alter the application of the "improperly or collusively" clause so as to exclude cases in which diversity has been intentionally created,[29] such an interpretation would be contrary to the legislative intent. Congress, however, could withhold jurisdiction of any civil action in which a party attempts to intentionally create federal diversity jurisdiction.[30] This proposal would withdraw federal jurisdiction of cases, such as the instant case, for which no valid reason can be given for granting jurisdiction. Since it is the motive to create diversity that seems abusive of federal jurisdiction, such an intent test would require the federal courts to inquire into the motive, in the facts of the

27. See *id.* at 372.

28. Under Connecticut law, the administrator is the proper party to enforce the substantive right, O'Donnell v. Hayden Truck Lines, Inc., 61 F. Supp. 823 (D. Conn. 1945), and he may sue the persons at fault without joining the beneficiaries, CONN. GEN. STAT. REV. § 52-555 (1958). Notwithstanding this, the award from a wrongful death action is not an asset of decedent's estate, Harris v. Barone, 147 Conn. 233, 158 A.2d 855 (1960), but is destined for the statutory heirs of decedent whether the administrator is local or foreign, CONN. GEN. STAT. REV. § 45-280 (1958).

29. See Cerri v. Akron-People's Tel. Co., 219 Fed. 285 (N.D. Ohio 1914); 3 MOORE, *op. cit. supra* note 6, ¶ 17.05 ("the real party in interest rule may not be manipulated for the purpose of founding jurisdiction"). Moore reaches this conclusion by reasoning that 28 U.S.C. § 1359 (1958) does not preclude inquiry into motive and that it should be improper or collusive, within that provision, to make or join a party for the purpose of invoking federal jurisdiction. See also Cohan & Tate, *supra* note 9, at 215-16, 244.

30. Compare H.R. REP. No. 2832, 88th Cong., 1st Sess., (1963), printed at 109 CONG. REC. 1108 (daily ed. Jan. 28, 1963). This bill, introduced by Congressman Celler, Chairman of the Judiciary Committee, is designed "to withdraw from the district courts jurisdiction of suits brought by fiduciaries who have been appointed for the purpose of creating diversity of citizenship." See also the proposal by Cohan & Tate, *supra* note 9, at 245: "The District Court shall not have jurisdiction of a Civil Action in which any party, by assignment, appointment or otherwise, has been made a party for the purpose of invoking the jurisdiction of such court."

instant case, for the appointment of an administrator.[31] Such an inquiry would cause difficulties in proof and administration and thereby renders this proposal somewhat impractical.[32]

Another possible solution to this problem would be for Congress, with respect to wrongful death actions, to replace the real party in interest test. Under that test the citizenship of the representative is determinative.[33] Arguably, it is the ease with which a foreign administrator may be appointed that has fostered the intentional creation of federal jurisdiction.[34] If the determinative citizenship for purposes of diversity were that of the beneficiaries, it would be more difficult to create diversity.[35] This proposal has other merit. If the rationale of possible prejudice against foreigners in state courts is accepted as the basis for diversity jurisdiction,[36] then that jurisdiction should be defined in terms of the citizenship of persons who might be prejudiced. It should be recognized that the administrator will not be injured by prejudice because, although he is bringing the action, it is not for his benefit.[37] Similarly, the "citizenship" of the estate or the decedent should not be relevant since the award is not for either's benefit.[38]

31. In the instant case the administrator admitted the motive; in the face of a federal policy against intentionally creating diversity, however, it may be supposed that adroit counsel would not admit that motive. *Cf. In re* Kaufman's Estate, 87 Pa. D. & C. 401 (Phil. County Orphans' Ct. 1954), 130 LEGAL INTELLIGENCER 529.

32. It seems likely that the difficulty in proving motive is one reason the federal courts refuse to examine collaterally the motive for the appointment of a representative. Consider, for example, Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931) and authorities cited notes 19 & 20 *supra*.

33. See authorities cited note 9 *supra*.

34. See AMERICAN LAW INSTITUTE, *op. cit. supra* note 22, at 47; Annot., 75 A.L.R.2d 718 (1961).

35. For diversity to exist, none of the beneficiaries can be a citizen of the same state as any of the defendants. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Nevertheless, a beneficiary could change his citizenship or assign his interest, but this would not be as easy as the appointment of a foreign representative.

36. See authorities cited note 22 *supra*.

37. In the instant case, the three defendants and the ultimate beneficiaries were all Connecticut citizens. In looking beyond the form of the action to the facts and events essential to the controversy, it seems that these persons are the primary and essential persons in the case. The defendants and the beneficiaries, not the administrator, are financially affected by the judgment.

38. The proceeds of the action will not be assets of the estate. Harris v. Barone, 147 Conn. 233, 158 A.2d 855 (1960). They are destined for the heirs of decedent. CONN. GEN. STAT. REV. § 45-280 (1958); *cf.* Luck v. Minneapolis St. Ry., 191 Minn. 503, 254 N.W. 609 (1934). Compare 30 MICH. L. REV. 1341 (1931).

The AMERICAN LAW INSTITUTE, *op. cit. supra* note 22, §§ 1301(c), 1302(d) recognizes that the major basis for diversity jurisdiction is the possibility of

A wrongful death action is for the ultimate compensation of injured statutory beneficiaries. Therefore, since they are the parties who might be prejudiced, their citizenships should be determinative.[39]

Criminal Law: Confession After Illegal Arrest Not Excluded by Fourteenth Amendment

Appellant was illegally arrested[1] at 2:30 a.m. and held by the police for six hours prior to being questioned concerning a clothing store burglary. After a half hour of interrogation, appellant signed a transcript of his verbal confession admitting the burglary. At trial he conceded that his confession was voluntary[2] but objected to its admission into evidence because it was obtained during a period of detention following his illegal arrest. On appeal from his conviction for burglary and grand larceny, the Mary-

prejudice against, or inferior justice for, foreigners in state courts. It proposes that diversity should not be withdrawn in areas where this possibility still exists. Its solution to the problem of intentional creation of diversity, however, is to impute the citizenship of the decedent to the representative. *Id.* § 1301(c). The ALI also provides that a representative may not sue if the individual represented could not have sued at the time the events occurred. *Id.* § 1301(d). This solution to the problem does not seem to be responsive to the basic policy underlying diversity. In the instant case the award for wrongful death did not become an asset of the estate. See authorities cited *supra*. If the basis for diversity is the possibility of fairer or more just adjudication for out-of-staters in a federal court, then that jurisdiction ought to be defined in terms of those who may be prejudiced. In a wrongful death action this would seem to be the statutory beneficiaries, not the estate.

39. It could be argued that in a situation in which the statutory beneficiaries were defined as the heirs of decedent, the proposal would require the federal courts to hear an issue within the forbidden area of probate and administration. If this argument has merit, a standard could be adopted whereby only the jurisdictional question is determined; that is, the beneficiaries need only to be determined to a "legal certainty," not conclusively. *Cf.* Bell v. Preferred Life Assur. Soc'y, 320 U.S. 238 (1943).

1. The court apparently wanted to reach the issue of the admissibility of a voluntary confession following an illegal arrest. On appeal the prosecution argued at length that the appellant's arrest was legal. Nevertheless the court, without deciding the issue on its merits, held the arrest illegal on the basis of an admission by the prosecutor not appearing on the trial record. See Brief for Appellee, pp. 3–7, Prescoe v. State, 191 A.2d 226 (Md. 1963).

2. By this concession appellant undoubtedly waived his right to object to its admission on grounds of involuntariness; that one represented by competent counsel can waive constitutional objections to the introduction of evidence is settled. See Emspak v. United States, 349 U.S. 190, 196 (1955); Martelly v. State, 231 Md. 341, 348, 187 A.2d 105, 108–09 (1963); 9 WIGMORE, EVIDENCE §§ 2588–92 (3d ed. 1940).

land Court of Appeals *held* that the fourth and fourteenth amendments do not require that a voluntary confession made during a period of detention following an illegal arrest be excluded from evidence. *Prescoe v. State*, 191 A.2d 226 (Md. 1963).

That the fourth and fourteenth amendments require state and federal courts to exclude tangible evidence obtained through an illegal search, seizure, or arrest is now well-established.[3] By withdrawing the evidentiary usefulness of illegally obtained evidence, the exclusionary rules are intended to deter the police from future misconduct as well as to protect the individual's right to privacy.[4]

3. Mapp v. Ohio, 367 U.S. 643 (1961); Henry v. United States, 361 U.S. 98 (1959); Weeks v. United States, 232 U.S. 383 (1914).

Common-law evidentiary rules do not permit objection to evidence on the ground that it was illegally obtained, because those rules are based on the reliability of evidence and the illegal acquisition of evidence does not necessarily weaken its reliability. See McCormick, Evidence 291 (1954); 8 Wigmore, Evidence § 2183 (3d ed. 1940). In order to safeguard the fourth amendment's individual guarantee against police intrusion, see note 4 *infra*, the Supreme Court, in Weeks v. United States, *supra*, excluded evidence obtained through unconstitutional police activity; the Court later expanded this rule to exclude derivative as well as direct physical products of an illegal search, seizure, or arrest. Henry v. United States, 361 U.S. 98, 100–01 (1959); Nardone v. United States, 308 U.S. 338, 341 (1939).

Notwithstanding the fourth amendment exclusionary rule, the states continued to admit illegally obtained evidence. See Elkins v. United States, 364 U.S. 206, 224–32 (App.) (1960); 8 Wigmore, Evidence § 2181 n.1. The Supreme Court had recognized in 1949 that "the security of one's privacy against arbitrary intrusion by the police—which is the core of the Fourth Amendment" is implicit in fourteenth amendment due process and binding on the states, Wolf v. Colorado, 338 U.S. 25, 27 (1949); but more than a decade was to elapse before the Court held that due process also required state court exclusion of evidence obtained as a result of a violation of this protection, Mapp v. Ohio, *supra*. See generally Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, in 1961 Supreme Court Review 1 (Kurland ed.); Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 Neb. L. Rev. 185 (1961); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 Minn. L. Rev. 1083 (1959).

4. It has been said that the "core of the right to privacy is the protection of the integrity of the individual, and if the home is to be inviolate against unreasonable searches, it is because this is one way of protecting that integrity. No one stays in his home all or even most of the time, and one does not leave one's right of privacy behind merely because one steps out of doors." Foote, *Safeguards in the Law of Arrest*, 52 Nw. U.L. Rev. 16, 41–42 (1957). The fourth amendment confers, "as against the Government, the right [of the individual] to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See also Giordenello v. United States, 357 U.S. 480, 485–86 (1958); Albrecht v. United States, 273 U.S. 1, 5 (1927); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, in 1960 Supreme Court Review 46, 47 (Kurland ed.); Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. Ill. L.F. 78, 91.

These rules, by abrogating judicial sanction of constitutionally violative evidence, also preserve and enhance respect for the judicial system and the law.[5]

In applying the constitutional exclusionary rule, however, courts have distinguished between physical and verbal evidence, excluding the former but admitting the latter where obtained through a fourth amendment violation.[6] Admissibility of verbal evidence, such as a confession, has been determined solely under the time-honored "voluntariness" test,[7] regardless of whether it

5. Beyond the principal reasons for the rules discussed in the accompanying text, the courts have suggested that the rules protected the offended individual and prohibited the government from benefiting from its own wrong. *E.g.*, Wong Sun v. United States, 371 U.S. 471, 485–86 (1963); see Kamisar, *supra* note 4, at 92–93; 57 COLUM. L. REV. 1159, 1164–70 (1957). *But see* Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 n.49 (1964).

6. The great weight of state and federal authority has made this distinction. Kamisar, *supra* note 4, at 91.

Three decisions, relied on by the Supreme Court in *Wong Sun v. United States*, see notes 14–20 *infra* and accompanying text, illustrate exceptions from the general refusal to apply the constitutional rule to the verbal products of an illegal search or arrest:

In Neuslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940), the court excluded testimony of officers concerning incriminating statements of the defendant made to them after they had illegally entered his home. However, the reception of this early expansion of the exclusionary rule to verbal evidence was cool, and the case was "not seldom distinguished." MAGUIRE, EVIDENCE OF GUILT 188 n.24 (1959).

In McGinnis v. United States, 227 F.2d 598 (1st Cir. 1955) the court excluded oral testimony regarding physical objects seen in the course of an illegal search, finding no basis of distinguishing between such verbal evidence and the introduction of the objects themselves.

The Supreme Court, in Silverman v. United States, 365 U.S. 505 (1961), excluded testimony concerning defendants' incriminating conversations overheard by the testifying officer who had illegally entered defendants' home and installed a secret microphone.

Unlike the majority of state courts, the New York courts could see no difference between physical and verbal evidence resultant from fourth amendment violations, and they excluded confessions of the defendant as the fruit of the poisonous tree. The New York Court of Appeals excluded defendant's confession made after he was confronted with objects illegally seized from his home in People v. Rodriguez, 11 N.Y.2d 279, 286, 183 N.E.2d 651, 655, 299 N.Y.S.2d 353, 357 (1962). In People v. Chazanoff, 238 N.Y.S.2d 991 (2d Dept. 1963), the defendant was illegally arrested; at the same time papers were illegally seized from his shop. The court excluded his admission made at the time of the arrest and seizure as "the product of the unlawful search and seizure" without specifically stating whether the illegal arrest and/or the confrontation with the illegally seized papers was the operative cause of exclusion. *Id.* at 994.

7. Because confessions were considered inherently untrustworthy, the common law developed the voluntariness test to weigh their admissibility.

followed a fourth amendment violation. In determining whether a particular confession was "voluntary," the courts have considered, along with other factors, an illegal arrest and subsequent unauthorized detention, but absent more abusive police techniques such misconduct has not rendered the statements inadmissible.[8]

Inasmuch as the fourth amendment addresses itself to tangibles, "persons, houses, papers, and effects," it is understandable why this would not be a basis for excluding intangible verbal evidence.[9] Another and more sophisticated basis for admitting confessions that follow an illegal arrest is that the causal chain or essential connection between the illegality and the verbal evidence was broken by the voluntary act of the accused who, in effect, waived his right to object to the invasion of his privacy.[10] As one commentator has described it:

> The unlawfully arrested suspect could keep his mouth shut but could do nothing about the seizure of items on his person or in his presence.

See, *e.g.*, Culombe v. Connecticut, 367 U.S. 568, 583 (1961); Adams v. New York, 192 U.S. 585 (1904); McCORMICK, EVIDENCE 231 (1954); 3 WIGMORE, EVIDENCE §§ 822, 823(b), (3d ed. 1940); Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogations and Confessions*, 17 RUTGERS L. REV. 728, 742–43 (1963). Today, "abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320–21 (1959); see Rogers v. Richmond, 365 U.S. 534, 544 (1961); Blackburn v. Alabama, 361 U.S. 199, 206 (1960); Lisenba v. California, 314 U.S. 219, 236 (1941).

Although to be admissible as "voluntary" a confession must be "the product of an essentially free and unconstrained choice by its maker," it need not be an outpouring of his conscience but only free from physical or psychological coercion and overpersuasion by the police. Culombe v. Connecticut, 367 U.S. 568, 602 (1961); see, *e.g.*, MAGUIRE, EVIDENCE OF GUILT 121–33 (1959); McCORMICK, EVIDENCE 231–32 (1954); 3 WIGMORE, EVIDENCE § 838 (3d ed. 1940).

8. Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944); Ward v. Texas, 316 U.S. 547, 552 (1942); Chambers v. Florida, 309 U.S. 227, 238 (1940); see Kamisar, *supra* note 7, at 737.

9.

> The Amendment itself shows that the search is to be of material things — the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.

Olmstead v. United States, 277 U.S. 438, 464 (1928) (dictum); see MAGUIRE, EVIDENCE OF GUILT 188–89 (1959); Kamisar, *supra* note 4, at 124–28.

10. See Rogers v. Superior Court, 46 Cal. 2d 3, 291 P.2d 929 (1955) (en banc); Kamisar, *supra* note 4, at 128–38.

> And if he chose involuntarily to blab it was his fault, not that of the arresting officers.[11]

The Supreme Court in *Olmstead v. United States*[12] introduced a further refinement when it held admissible intangible verbal evidence obtained by an unwarranted seizure of a telephone conversation; this evidence was admissible because it was not preceded by a trespass and because it was intangible. The *Olmstead* doctrine was, as a result of the courts' failure to recognize that there was no precedent trespass in *Olmstead*,[13] extended to all confessions that followed an illegal search and seizure.

In the recent case of *Wong Sun v. United States*[14] the Supreme Court departed from the traditional physical-verbal distinction and excluded oral statements, regardless of their voluntariness, when made closely following an illegal entry and arrest.[15] In that case federal narcotics officers at an early morning hour entered the home of James Toy, chased him into his bedroom and illegally arrested him. At that time Toy made self-incriminating statements. He also made statements that led to the illegal arrest of Wong Sun, who made no incriminating statements when arrested. Several days after being told at proper arraignment of his right to withhold information and to obtain counsel, Wong Sun, of his own volition, returned to the officers and confessed to his part in the narcotics violation under investigation. Although both confessions were preceded by an illegal arrest, the Supreme Court, reversing the Ninth Circuit,[16] excluded that of Toy and admitted that of Wong Sun. The Supreme Court's opinion contains strong language[17] indicating that the distinction between physical and verbal evidence is no longer sound. Dwelling on the "oppressive circumstances" surrounding Toy's arrest and confession, the early morning forceful entry and chase into his bedroom,[18] the Court excluded his statements at least because they were not "sufficiently an act of free will to purge the primary taint of the un-

11. Broeder, *Wong Sun—A Study in Faith and Hope*, 42 NEB. L. REV. 483, 519 (1963).

12. 277 U.S. 438 (1928).

13. See Kamisar, *supra* note 4, at 123–28.

14. 371 U.S. 471 (1963).

15. *Id.* at 485–86. See the opinion of Mr. Justice Brennan, author of the *Wong Sun* majority opinion, in Lopez v. United States, 373 U.S. 427, 460 (1963) (dissenting), reaffirming application of the exclusionary rule to verbal evidence. See also Broeder, *supra* note 11, at 519; 31 GEO. WASH. L. REV. 851, 851–52 (1963).

16. Wong Sun v. United States, 288 F.2d 366 (9th Cir. 1961).

17. 371 U.S. 471, 485–86 (1963).

18. *Id.* at 486 n.12.

lawful invasion."[19] Since the Court was not required to resolve the more difficult question — whether a confession should be excluded absent oppressive circumstances — its opinion is limited to situations involving "oppressive circumstances." Emphasizing that Wong Sun had been away from the police for several days on his own recognizance and had been informed of his legal rights at his arraignment, the Court admitted his confession because "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint [of illegality]'."[20]

The majority in the instant case too readily assumed that *Wong Sun* left state laws dealing with illegal arrests unaltered.[21] The Supreme Court in *Wong Sun* based its decision on the fourth amendment; that decision is therefore binding on the states through fourteenth amendment due process.[22] The absence of reference to the "voluntariness" rule eliminates that test as the basis for the exclusion in *Wong Sun*. One passage in *Wong Sun* suggests by implication that the exclusionary rule therein rests with the Court's supervisory power over the federal judiciary,[23] but other statements of the Court outweigh it. For ex-

19. *Id.* at 486.

20. *Id.* at 491, quoting Nardone v. United States, 308 U.S. 338, 341 (1939).

21. Instant case at 231.

Because the instant court assumed the arrest of the appellant was contrary to Maryland law and unconstitutional, it avoided the interesting question of what, if any, freedom the states have within the constitutional exclusionary rule to set standards of illegality of search and arrest. The Supreme Court in the recent case of Ker v. California, 374 U.S. 23 (1963) intimated that although the states are not bound by federal statutes they are, at least, bound by the minimum "fundamental criteria" of the fourth and fourteenth amendments as spelled out by the Court. This would leave the states free to set more stringent standards of legality but would bind them to the Supreme Court's minimum. This result was anticipated by several state courts and writers. *E.g.*, Belton v. State, 228 Md. 17, 178 A.2d 409 (1962); Commonwealth v. Spofford, 180 N.E.2d 673 (Mass. 1962); People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961); Allen, *supra* note 3, at 46; Broeder, *supra* note 11, at 205; Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 503 (1961). Before *Ker*, several states concluded they had freedom to set standards within the rule. See, *e.g.*, Leveson v. State, 138 So. 2d 361 (Fla. 1962); Wyatt v. State, 77 Nev. 490, 367 P.2d 104 (1961); State v. Chance, 71 N.J. Super. 77, 176 A.2d 307 (Sup. Ct. 1961). This position was supported by several writers. *E.g.*, Collings, *Toward Workable Rules of Search and Seizure — An Amicus Curiae Brief*, 50 CALIF. L. REV. 421, 442 (1962); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 327; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MT. L. REV. 150 (1962).

22. See note 3 *supra*.

23. In support of its conclusion, *supra* note 15, that the policies of the exclusionary rule do not justify a verbal-physical evidence distinction, the

ample, the Court's decision to exclude Toy's statements begins by emphasizing the traditional physical-verbal evidentiary distinction under the fourth amendment exclusionary rule.[24] In addition, by relying on the same decisions that it earlier used to ground the rule in *Mapp v. Ohio* on the Constitution,[25] the Court affirmatively suggested that it was the fourth amendment exclusionary rule that required the abolition of the distinction between physical and verbal evidence. Furthermore, by emphasizing the non-constitutional basis of the *McNabb-Mallory* exclusionary rule[26] when it contrasted that rule with the abrogation of the physical-verbal evidentiary distinction, the Court negatively

Court spoke in terms of the federal system and relied on two cases resting on the Court's supervisory power over the federal judiciary and not on the Constitution:

> Either in terms of deterring lawless conduct by *federal* officers, *Rea v. United States*, 350 U.S. 214, or of closing the doors of the *federal* courts to any use of evidence unconstitutionally obtained, *Elkins v. United States*, 364 U.S. 206 . . . .

371 U.S. at 486. (Emphasis added.) However, it must be remembered that *Wong Sun* itself was a federal prosecution.

24. 371 U.S. at 485.

25. *Wong Sun* relied on the following cases: Silverman v. United States, 365 U.S. 505 (1960); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1885) (predecessor of *Weeks*). *Mapp*, in turn, relied on Silverthorne Lumber Co. v. United States, *supra*; Weeks v. United States, *supra*; Boyd v. United States, *supra*. 367 U.S. at 646–48. See Broeder, *supra* note 11, at 558.

26. McNabb v. United States, 318 U.S. 332, 340–41 (1943); Mallory v. United States, 354 U.S. 449, 452–53 (1957).

Rule 5(a) of the Federal Rules of Criminal Procedure requires that an accused be brought before a United States Commissioner "without unnecessary delay."

> (a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner . . . .

FED. R. CRIM. P. 5(a). The rules themselves provide no sanction against violation of the prompt arraignment protection, and they often were abused before the Supreme Court in *McNabb-Mallory* required exclusion of any evidence obtained during detainment made illegal by failure to arraign promptly. The *McNabb-Mallory* exclusionary rule explicitly rests on the Court's supervisory power over the federal judiciary rather than on the Constitution. Gallegos v. Nebraska, 342 U.S. 55, 63–64 (1951); Lyons v. Oklahoma, 322 U.S. 596, 597 n.2 (1944); McNabb v. United States, 318 U.S. 332, 340–41 (1943). See also Culombe v. Connecticut, 367 U.S. 568, 600–01 (1961); Fikes v. Alabama, 352 U.S. 191 (1957). Although the rule is not a constitutional requisite, the Michigan Supreme Court adopted it per se to implement a similar state prompt arraignment statute in People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960).

implied that the abrogation of this distinction was constitutionally based.[27]

Although neither the voluntariness test nor the constitutional exclusionary rule required exclusion of an otherwise voluntary confession simply because it followed a fourth amendment violation,[28] *Wong Sun* expanded the constitutional rule to make some such confessions inadmissible. Since *Wong Sun* dealt with the polar situations of a confession contemporaneous with the invasion of privacy and one made several days after the invasion with an interim of freedom, it did not specifically reach the situation presented by the instant case. Even though the line drawn by *Wong Sun* is unclear,[29] the instant court should have excluded Prescoe's confession. To the extent that *Wong Sun* rests on coercive pressure, the illegal entry into Prescoe's home exerted upon him a relatively strong pressure to confess.[30] Of course, Prescoe's

27. 371 U.S. at 486 n.12:

> Even in the absence of such oppressive circumstances, and where an exclusionary rule rests primarily on non-constitutional grounds [the *McNabb-Mallory* rule], we have sometimes . . . .

28. See notes 6 & 8 *supra* and accompanying text.

29. See Kamisar, Book Review, 76 HARV. L. REV. 1502, 1509 (1963). *Wong Sun* may go all the way and require exclusion of all statements of the accused following his illegal arrest before his release from custody. See Broeder, *supra* note 11, at 526–32. It may require exclusion of statements made following an illegal arrest before the accused has consulted with counsel or before he has been informed of his right to remain silent. See Kamisar, *supra* note 4, at 138. It may require exclusion only until the illegality ceases "to be an operative and effective cause of the confession." Instant case at 237 (dissent). Or it may require only exclusion of statements made before the "oppressive circumstances" surrounding the illegal invasion have ceased. See Broeder, *supra* note 11, at 521–24.

The instant case illustrates the hesitancy with which the *Wong Sun* case broadened individual protection at the expense of police power will be received by the courts. See also State v. Keating, 61 Wash. 452, 378 P.2d 703 (1963). Compare the hesitancy with which state courts adopted the original rule excluding physical evidence. Note 3 *supra*. The development of the *McNabb-Mallory* rule, see note 26 *supra*, provides a more dramatic example of a trial court's hostility toward any expansion of the protection of the accused. Lower federal courts seized language in *McNabb* qualifying its general rule excluding oral admissions made during detention illegal because of unreasonable delay in arraignment and, in effect, rendered the rule without substance. The Supreme Court reinstated the rule with *Mallory*, but litigation over its limiting language continues. See Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale & Rescue*, 47 GEO. L.J. 1, 5–6, 17–20 (1961).

The nation's prosecutors resist more emphatically such an expansion of the rights of the accused. Consider this view as represented by INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962).

30. A man is much more likely to confess after being confronted with illegally seized physical evidence than he is after being illegally arrested. Simi-

six-hour stay in jail lessened the probable causal relation between the illegality and the confession;[31] unlike Wong Sun, however, in the longer period between his illegal arrest and confession Prescoe was not notified of his right to remain silent, was unable to consult with counsel, and was unable to consider his actions out of custody. The absence of affirmative ameliorating official conduct that would have insured Prescoe's "freely and intelligently given"[32] waiver of objection to the prior illegal arrest suggests that the mere passage of time in jail was insufficient to make the confession admissible.

Furthermore, admission would frustrate and exclusion would further the policy considerations underlying the exclusionary rule.[33] By admitting petitioner's confession the instant court sanctioned his illegal arrest and missed an opportunity to remove one incentive for making such arrests[34] — the hope of procuring a confession.[35]

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larly, he is more likely to confess if his illegal arrest is accompanied by an unauthorized and forceful entry into his home than if he is peacefully but illegally arrested. See Broeder, *supra* note 11, at 529.

31. The federal prosecutor charged with enforcement in the nation's capitol, who bears the brunt of *McNabb-Mallory*, has said that "in some very high percentage of the cases a confession is made if it is going to be made at all, within an hour or two, perhaps three hours after arrest." *Hearings on H.R. 7525, S. 486 Before the Senate Committee on the District of Columbia*, 88th Cong., 1st Sess. 443 (1964). Therefore, to the extent that an illegal arrest in oppressive circumstances draws out a confession, its causal effect is dissipated considerably during the six hours that followed arrest in the instant case. On the other hand, it is ridiculous to argue that mere passage of time would purge the illegality because that would encourage further police illegality and achieve the anomolous result of helping the police with further illegality. Rather, in order to purge their illegality the police must adopt a positive approach by informing the prisoner of his right to counsel and of his right to remain silent and by arraigning him. Moreover, since most interrogations are initiated upon arrest and in the instant case appellant was held incommunicado for six hours and confessed within a half hour after interrogation, it would seem that his confession would fall within the time indicated by the federal prosecutor for the District of Columbia.

32. Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951); see Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also Fay v. Noia, 372 U.S. 391, 439 (1963); Emspak v. United States, 349 U.S. 190, 197–98 (1955); Aetna Ins. Co. v. Kennedy *ex rel.* Bogash, 301 U.S. 389, 393 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882).

33. See note 5 *supra* and accompanying text.

34. For reasons other than the formal conviction of offenders underlying police arrests which would remain unaffected by an exclusionary rule, see Allen, *supra* note 3, at 37–38.

35. Although arrests on mere suspicion without probable cause are unconstitutional, great numbers of arrests are made on this basis in the hope of obtaining incriminating statements during the illegal detention. See Douglas,

Criminal Law: Defendant Allocated Burden of Persuasion on Entrapment

Defendants, having been indicted for bribing[1] and for conspiring to bribe[2] an internal revenue agent, defended on the ground that they had been entrapped by the government. At trial, defendants objected to the judge's instruction to the jury that the burden of proving governmental inducement was on the defendants and that the prosecution could rebut such evidence by proving beyond a reasonable doubt that the defendants had been predisposed to commit the crime.[3] On appeal from their conviction, the Court of Appeals for the First Circuit reversed and *held* that it was prejudicial error to instruct the jury that the defendants had the burden of proof on inducement without specifying the quantum of proof required; the defendants needed only to prove inducement by a preponderance of the evidence. *Gorin v. United States*, 313 F.2d 641 (2d Cir. 1963).[4]

Entrapment is a relatively new criminal defense[5] that at least partially reflects the attitude that a person encouraged to commit a crime by enforcement officials should not be punished.[6] Quite

Vagrancy and Arrest on Suspicion, 70 YALE L.J. 1, 12–13 (1960); Kamisar, Book Review, 76 HARV. L. REV. 1502, 1506–07 (1963).

1. 18 U.S.C. § 201 (1958), as amended, 18 U.S.C. § 201(d) (Supp. IV, 1963).

2. 18 U.S.C. § 371 (1958).

3. The defendants contended that entrapment is analogous to insanity: that while the government need not offer evidence to dispute entrapment in its case in chief, once the defendants come forward with substantial evidence of entrapment, the burden is on the government to disprove the defense beyond a reasonable doubt. See text accompanying note 20 *infra*.

4. *Cert. denied*, 374 U.S. 829 (1963).

5. The first federal case discussing the defense was United States v. Whittier, 28 Fed. Cas. 591 (No. 16688) (C.C.E.D. Mo. 1878). However, the defense was not successfully asserted in a federal court until 1915. Woo Wai v. United States, 223 Fed. 412 (9th Cir. 1915).

The question of instigation of crime by enforcement officials has not squarely arisen in England. WILLIAMS, CRIMINAL LAW § 256 (2d ed. 1961).

6. See, *e.g.*, Saunders v. People, 38 Mich. 218, 222 (1878): "Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation." See also Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 263 (1942).

There has been little discussion concerning a test for determining who is a government agent, although paid informers and persons acting under a promise of immunity have usually been treated as such. See Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1109 (1951).

naturally, the assertion of entrapment as a defense increased markedly in the early decades of this century after the passage of liquor and narcotics control laws, which required greater dependence on undercover techniques because of the lack of complaining victims.[7] Although appellate courts often recognized the doctrine of entrapment, they failed to agree on a rationale: Some decisions were attributed to "estoppel"[8] or public policy;[9] but most courts simply found entrapment if government officials had brought about the commission of the crime, unless the officials had some grounds for believing that the defendant was predisposed to violate the law and had merely presented him with another opportunity to do so.[10]

The Supreme Court did not formally accept the doctrine of entrapment until 1932 in *Sorrells v. United States*;[11] even then a split in the Court as to the rationale underlying the entrapment defense prevented clarification of the "test." A majority of the Court in *Sorrells* conceded that the government may afford an opportunity for the commission of a crime, but thought that the government may not induce an "otherwise innocent" person to commit a crime. The Court, rejecting public policy as a basis for entrapment, rested the defense on the judicial power to avoid unjust results foreign to a statute's purpose. Under the majority test, evidence of the defendant's past behavior would be admissible to show that he had been predisposed to commit the crime.[12]

7. See Sorrells v. United States, 287 U.S. 435, 453 (1932).

8. *E.g.*, O'Brien v. United States, 51 F.2d 674 (7th Cir. 1931), where prohibition agents originated a conspiracy to violate the National Prohibition Act and the court held that the evidence conclusively established an estoppel against the government.

9. *E.g.*, Strader v. United States, 72 F.2d 589, 591 (10th Cir. 1934); Butts v. United States, 273 Fed. 35 (8th Cir. 1921). In *Butts* the court reversed a conviction for refusal to instruct on entrapment and described the conviction as "unconscionable, contrary to public policy, and to the established law of the land . . . ." *Id.* at 38.

10. See, *e.g.*, De Mayo v. United States, 32 F.2d 472 (8th Cir. 1929); United States v. Wray, 8 F.2d 429 (N.D. Ga. 1925); De Long v. United States, 4 F.2d 244 (8th Cir. 1925). For recent consideration of this question, see Whiting v. United States, 321 F.2d 72, 76 (1st Cir. 1963); United States v. Clarke, 224 F. Supp. 647, 658–60 (E.D. Pa. 1963).

11. 287 U.S. 435 (1932). A federal prohibition agent posing as a tourist visited the defendant in his home along with three area residents. The agent learned that he and the defendant were veterans of the same World War I division, and they reminisced about war experiences. During the conversation the agent asked the defendant if he could get some liquor; after three requests the defendant left and returned shortly with one-half gallon, was paid $5.00 by the agent, and was arrested.

12. The majority test has been criticized on the ground that it allows inducement of those not "otherwise innocent" and that it undervalues the

In contrast, the concurring minority in *Sorrells* contended that the foundation of entrapment is not statutory construction, but the duty of the courts to protect the "purity" of the judicial process by refusing to sanction unconscionable governmental conduct that creates crime to secure convictions. They believed that the focus belongs on trickery or fraud by enforcement officials and that evidence of predisposition should be irrelevant.

In 1958 the Court divided along the same lines in *Sherman v. United States*.[13] The majority supported jury decision of the entrapment issue and reiterated the view that the defendant should only be acquitted if the criminal act arose from creative activity of the government rather than the predisposition of the defendant. The separate opinion of the minority contended that the reasonableness of police suspicions and the predisposition of the accused are irrelevant, because permissible enforcement activity does not vary with the defendant or police suspicions.

Regardless of the rationale used,[14] the test enunciated by the majorities in *Sorrells* and *Sherman* still applies. For a defendant the most important questions concerning the test are, first, whether entrapment will be decided by a jury that will hear prejudicial evidence on predisposition[15] and, second, the allocation of the bur-

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fact that exoneration is allowed because government agents led the person from his innocence. MODEL PENAL CODE § 2.10, comment (Tent. Draft No. 9, 1959); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 897–903 (1963). The test has also been assailed as an inadequate control on police methods because police might view it as a trial defense only. Rotenberg, *supra* at 899. The most prevalent disagreement with the majority position is that if predisposition may be shown by past crimes and reputation, the court and not the jury should be the trier of fact on the issue because it is less likely to be led from the issues or prejudiced by such evidence. See Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 J. CRIM. L., C. & P.S. 447, 452 (1959); Donnelly, *supra* note 6, at 1108; Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399, 411, 417 (1960). *But see* Note, 73 HARV. L. REV. 1333, 1343–44 (1960).

13. 356 U.S. 369 (1958).

14. The entrapment defense in practice is justified in terms of public policy; the federal courts have ignored the majority basis of statutory construction, unless an implied exception to the particular statute is tacitly assumed by the courts. See Donnelly, *supra* note 6, at 1110. The minority rationale has not been expressly accepted, but the cases seem to describe the availability of the defense in terms much closer to that position.

15. Accardi v. United States, 257 F.2d 168, 171 (5th Cir. 1958) states that "'predisposition' means something more than 'disposition' and is intended to refer to the character and intentions of the accused as an 'unwary innocent' (if the conviction is reversed) or as an 'unwary criminal' (if conviction is affirmed)." Before submitting the issue to the jury, however, courts examine both predisposition and police conduct to determine if there was

den of proof.[16] As to the second question, Judge Learned Hand laid down a commonly used formulation of the *Sorrells* test: The accused has the burden of showing that he was induced by an agent to commit the offense, and the government has the burden of showing that the accused was ready and willing without persuasion and was awaiting any propitious opportunity to commit the crime.[17]

Judge Hand's allocation of the "burden of proof" did not settle the question of whether the defendant's burden was that of production or persuasion or both.[18] Nor, if the defendant has the

entrapment as a matter of law. Walker v. United States, 285 F.2d 52 (5th Cir. 1960); Washington v. United States, 275 F.2d 687 (5th Cir. 1960). Entrapment can be found as a matter of law "where the evidence points to only one conclusion . . . just as any other factual issue admitting of only one conclusion," United States v. Klosterman, 248 F.2d 191, 195 (3d Cir. 1957), and it has been so found where government officials used tactics which offended "common concepts of decency," Badon v. United States, 269 F.2d 75, 80 (5th Cir. 1959), or which were "inordinate inducements," Sherman v. United States, 356 U.S. 369, 383 (1958), or "extraordinary temptations," Hamilton v. United States, 221 F.2d 611, 614 (5th Cir. 1955).

16. The instant court stated that the defendant may admit his crime or require the government to prove beyond a reasonable doubt that he committed it and in either case invoke the entrapment defense. Instant case at 654. See also note 27 *infra*. This choice may not, in practice, be available if the jury also decides the entrapment issue. It would often be immaterial, where considering probable prejudice, whether the defendant has just the burden of introduction or must also prove inducement by a preponderance because in either case he probably will have to take the stand and subject himself to impeachment by evidence of any prior convictions. See McCORMICK, EVIDENCE § 157 (1954). Even if the defense can produce the requisite evidence without putting the defendant on the stand or if the prosecution raises the issue by its evidence, the prosecution still may present the defendant's prior convictions to show predisposition. If the defendant is to have the aforementioned choice, unless the judge decides the issue or the inquiry is limited entirely to the asserted impermissible police conduct, it would seem to be necessary first to require the jury to find that the prosecution has proved the commission of the crime, and if it did, only then to hear the evidence on predisposition after the entrapment defense is invoked.

17. United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952).

18. Many cases say only that the defendant must prove inducement. See, *e.g.*, Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); Kivette v. United States, 230 F.2d 749 (5th Cir. 1956), *cert. denied*, 355 U.S. 935 (1958). One district court, however, construed the defendant's burden to mean that of going forward with the evidence while the government retained the burden of proving guilt beyond a reasonable doubt. United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959). See also Johnson v. United States, 317 F.2d 127 (D.C. Cir. 1963).

Stating that the accused has the burden on inducement does not indicate whether inducement means the objective invitation or the subjective effect on the accused. See Note, 73 HARV. L. REV. 1333, 1344 (1960). A recent case,

burden of persuasion on inducement under the *Sorrells* test, did it decide whether the burden must be overcome by a preponderance of the evidence, by clear and convincing evidence, or by proof beyond a reasonable doubt.[19] Judge Hand's formulation of the *Sorrells* test is helpful, however, in that it indicates that inducement (police conduct) and predisposition (defendant's character and prior record) are both considered in determining whether the defendant is responsible for the crime. Since evidence of predisposition is in rebuttal of the claim of inducement, it seems clear that there is actually only one issue and one burden of persuasion. While it is undisputed that the defendant has the burden of introduction on inducement and the prosecution has it on predisposition, the allocation of the burden of persuasion is not apparent.

In the instant case, the defendants argued that it was error to place the burden of persuasion as to inducement on them, contending that, as in the case of insanity, they had only to introduce substantial evidence of entrapment. In addition, the defendants argued that even if they did have the burden of persuasion on inducement, the instruction given was prejudicial because the only measure mentioned was too heavy. The court agreed with the appellants that they had the burden of going forward with evidence on entrapment. The court, however, believed that the location of the burden of persuasion for an insanity defense is different from that for entrapment because entrapment does not negate an essential element of the crime, but requires acquittal only by reason of an overriding policy against instigation of crime by enforcement officials.[20] According to the court, although the prosecution must prove all essential elements of a crime, a person seeking relief on the grounds of entrapment should be required to prove the inducement justifying his acquittal by a preponder-

citing *Accardi*, see note 15 *supra*, stated that once governmental inducement has been shown, the government must establish that its conduct was not shocking or offensive per se and that the defendant had not, in fact, been corrupted by the inducement. Whiting v. United States, 321 F.2d 72, 76 (1st Cir. 1963).

19. These measures are best defined in terms of probabilities. See McCORMICK, *op. cit. supra* note 16, §§ 319, 320; McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944); McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 64–68 (1933).

20. This treatment of entrapment is common. The test applied is that of the *Sorrells* majority, but the statutory construction argument that the defendant had not committed a crime is ignored, apparently in favor of the *Sorrells* minority's public policy rationale. See Donnelly, *supra* note 6, at 1110.

ance of the evidence.[21] Therefore, the instant court held that the trial court's failure to designate the quantum of the burden on inducement was prejudicial error because the only measure mentioned was that of "beyond a reasonable doubt."

If the majority rationale for the test in *Sorrells* is the law, "non-entrapment" probably should be considered an essential element of the crime;[22] the burden of persuasion would then be on the prosecution since in federal criminal cases the government must prove every essential element of the crime charged beyond a reasonable doubt.[23] Following this view, the instant court's allocation of the burden of persuasion on inducement to the defendant would be erroneous. If the minority rationale for the *Sorrells* test is the law, however, the prosecution would not necessarily have the burden of persuasion on entrapment, because under that rationale the defense is regarded as being based on facts extraneous to the actual guilt of the defendant.[24] The instant court clearly followed the apparent trend toward acceptance of the minority basis for the *Sorrells* test,[25] which would not require

21. See MODEL PENAL CODE § 2.13(2) (Proposed Official Draft 1962); *id.* § 2.10, comment at 20–21 (Tent. Draft No. 9, 1959).

22. The *Sorrells* majority noted that the practice had been to view the defendant as not guilty if entrapped; it rejected the view that the defense was analogous to a plea of pardon, *i.e.*, that the accused was not denying his guilt, but setting up special facts in bar. 287 U.S. at 452. On the other hand, the words "otherwise innocent" of the majority test seem to indicate that the invocation of the defense presupposes the commission of an act ordinarily a crime. The federal courts often state that the defense assumes the crime charged was committed. *E.g.*, Marko v. United States, 314 F.2d 595 (5th Cir. 1963); Ramirez v. United States, 294 F.2d 277 (9th Cir. 1961) (dicta); Rodriguez v. United States, 227 F.2d 912 (5th Cir. 1955).

23. United States v. McKenzie, 301 F.2d 880 (6th Cir. 1962). The higher measure required in criminal prosecutions is justified by the fact that consequences to the life, liberty and reputation of the defendant may be more serious from a criminal than from a civil conviction. MCCORMICK, *op. cit. supra* note 16, § 321. The requirement of a "presumption of innocence" is just another method of expressing the measure of the prosecution's burden of persuasion on the entire case, although it hopefully serves as a caution to the jury to consider only the evidence. 9 WIGMORE, EVIDENCE § 2511 (3d ed. 1940). The same is true in most state criminal cases. See MCCORMICK, *op. cit. supra* note 16, § 318; 9 WIGMORE, *op. cit. supra* § 2512. *But see* note 26 *infra*.

24. See Sorrells v. United States, 287 U.S. 435, 453 (1932). Even if the prosecution were given the burden of persuasion under the minority rationale, proof beyond a reasonable doubt would not necessarily be required because "non-entrapment" would not be an essential element of the crime.

25. See note 14 *supra*. The MODEL PENAL CODE § 2.10 (Tent. Draft No. 9, 1959) listed what was essentially the minority view as the alternative formulation of the definition of entrapment; the MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962) now defines entrapment in accordance with what previously was the alternative formulation.

the allocation of the burden of persuasion to the prosecution. For instance, the court rejected the defendant's analogy to the insanity defense on the ground that sanity is an essential element in a federal criminal case,[26] while entrapment assumes that the crime charged was committed[27] and justifies acquittal despite that fact.

In considering the allocation of the burden of persuasion on collateral issues in criminal cases, it may be helpful to resort to a consideration of civil cases because in most criminal cases the courts merely give a cautionary statement that the prosecution has the burden of proving guilt by the criminal standard. In civil proceedings the party having the burden of pleading a fact usually has the burden of first producing evidence and the burden of persuasion.[28] This is true because it is usually fair to require one who seeks to change the *status quo* to show justification.[29] But there

26. Satterwhite v. United States, 267 F.2d 675 (D.C. Cir. 1959). This is not true in many state courts. In Leland v. Oregon, 343 U.S. 790 (1952), the Supreme Court held that a statute requiring the defendant to prove his insanity beyond a reasonable doubt did not violate due process. Only Oregon requires this, but some twenty states require the accused to prove his insanity by a preponderance of the evidence. *Id.* at 798. This requirement is allegedly because the insanity defense is disfavored on policy grounds; the entrapment defense, however, at least under the minority view, is available precisely because it is favored on policy grounds.

27. *E.g.*, Marko v. United States, 314 F.2d 595, 597 (5th Cir. 1963); Ramirez v. United States, 294 F.2d 277, 283 (9th Cir. 1961) (dicta). This does not mean that the defendant cannot plead inconsistently, for this has ordinarily been permitted in criminal as well as in civil proceedings. See Love v. State, 16 Ala. App. 44, 75 So. 189 (1917) (alibi and absence of requisite intent); Stalling v. State, 90 Tex. Crim. 310, 234 S.W. 914 (1921) (alibi and commission of act while unaware of the circumstances). Also, it does not mean that a denial of the crime and the assertion that if some acts were found to have been committed, they were the result of entrapment are necessarily inconsistent. Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962) (two-fold defense that defendant did not make the sale of narcotics, but if sale did occur there was an entrapment, not inconsistent). See Henderson v. United States, 237 F.2d 169 (5th Cir. 1956); United States v. Washington, 20 F.2d 160 (D.C. Neb. 1927). *But cf.* Coronado v. United States, 266 F.2d 719, 721 (5th Cir. 1959). There may be an appearance of inconsistency, but the better view is to allow both claims because the defendant should not be required to forego his right to have the prosecution prove the commission of the acts charged in order to assert the entrapment defense. See Note, 73 HARV. L. REV. 1333, 1343 (1960); 70 HARV. L. REV. 1302, 1303 (1957). There is not even an apparent inconsistency if one says that the trier of fact must first find that the crime charged was proved by the criminal standard. If the trier of fact does so find, then entrapment exonerates the accused even though the crime charged was committed.

28. MCCORMICK, *op. cit. supra* note 16, §§ 307, 318.

29. Morgan, *supra* note 19, at 81. One writer maintains that it is a funda-

is no general rule for allocation of the burden of persuasion in civil cases except that of fairness.[30] Such a rule should be equally applicable to collateral issues in criminal cases. When requesting that he be relieved of the consequences of his act because of police inducement,[31] the defendant is in the position of a plaintiff in a civil action,[32] and he should be required to prove his assertion to justify his acquittal.[33] A balance must be struck between the requirements of law enforcement and the rights of the individual; the government cannot be allowed to manufacture crime in order to enforce the law, but enforcement must be possible in practical terms.[34] Therefore, assuming the minority rationale for the *Sorrells* test is followed, the allocation of the burden of persuasion on entrapment to the defendant appears to be desirable.

Corporations: Nominal First-Option Agreement on Closely Held Shares a Reasonable Restraint

Plaintiff was a party to a family stock-transfer agreement which provided that in the event one of the parties died or desired to sell his stock, the other parties had a first option to purchase it at a price of one dollar per share.[1] Following the death of one of the parties, plaintiff-optionee tendered the decedent's execu-

mental requirement of any judicial system that a person who desires a court to take action must prove his case to its satisfaction. CROSS, EVIDENCE 74 (1958).

30. MCCORMICK, *op. cit. supra* note 18, § 318; 9 WIGMORE, *op. cit. supra* note 23, § 2486.

31. Had the "entrapper" been a private individual, there is little question that the defendant would be guilty and the entrapment defense would not be available to him. See Donnelly, *supra* note 6, at 1108–09.

32. See MODEL PENAL CODE § 2.10, comment at 20–21 (Tent. Draft. No. 9, 1959).

33. Professor Williams indicates that the reason the burden of persuasion sometimes is shifted to the defendant is the idea that on certain issues it is impossible for the prosecution to give wholly convincing evidence, so that it is fair for the accused to be required to give evidence on these issues if he is to derive a benefit. This does not always mean that the burden of persuasion on the issue passes to the accused. WILLIAMS, THE PROOF OF GUILT 153 (2d ed. 1958).

34. The dilemma exists because the laws that inherently result in violations generating no complaints by witnesses or victims are within the criminal law and must be enforced. One writer, advocating prosecution of entrapping officials, rejected the "necessary to enforcement" argument as one formerly used to justify torture. Mikell, *supra* note 6, at 264.

1. Plaintiff was one of four family members who had incorporated a business and divided the issued stock among themselves. They subsequently entered into this agreement, which replaced an earlier agreement stipulating a price of $50 per share.

tors the stipulated dollar per share. When the tender was refused,[2] he sought and was granted specific performance of the agreement. On appeal, the Pennsylvania Supreme Court affirmed and *held* that the agreement did not create an absolute and unreasonable restraint on alienation and it therefore would be specifically enforced. *Mather Estate,* 410 Pa. 361, 189 A.2d 586 (1963).

The most common restraints on stock transferability are "first-option" restrictions, which provide that upon the holder's death or his decision to sell, either the corporation or other shareholders have a preemptive right to purchase his shares.[3] Such restrictions have become an almost indispensable feature of close corporations.[4] American law with respect to the validity, and enforceability, of first options, however, has developed upon the presupposition of a public policy against restraints on stock alienation.[5] The policy assumes that the maximum beneficial use of property is possible only where property is freely alienable.[6] In some situations, however, free alienability tends to frustrate the maximum productivity of closely held shares,[7] therefore, restrictions deemed to be "reasonable" are valid.[8] The "reasonableness" test

2. At the time of defendant's refusal the stock's book value exceeded $400 per share and its stipulated actual value exceeded $1,000 per share.

3. O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning & Drafting,* 65 HARV. L. REV. 773, 780 (1952). Such restrictions may be placed in articles of incorporation, in by-laws, or in restrictive agreements among the shareholders or between them and the corporation. By the weight of authority, reasonable by-law restrictions are, if invalid as by-laws, enforceable as valid contracts between the corporation and shareholders who acquired shares with knowledge of the by-laws or otherwise assented to them. Palmer v. Chamberlin, 191 F.2d 532, 536 (5th Cir. 1951); Doss v. Yingling, 95 Ind. App. 494, 500–01, 172 N.E. 801, 803 (1930). See also ROHRLICH, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES 117 (3d ed. 1958); 44 CORNELL L.Q. 133, 135 (1958).

4. See 2 O'NEAL, CLOSE CORPORATIONS § 7.02 (1958); Cataldo, *Stock Transfer Restrictions and the Closed Corporation,* 37 VA. L. REV. 229, 252 (1951); O'Neal, *supra* note 3; Painter, *Stock Transfer Restrictions: Continuing Uncertainties and a Legislative Proposal,* 6 VILL. L. REV. 48 (1960); *Symposium—The Close Corporation,* 52 NW. U.L. REV. 345, 382 (1957).

5. See 2 O'NEAL, *op. cit. supra* note 4, § 7.06; Painter, *supra* note 4, at 48–54 & 49 n.3; *cf.* 44 CORNELL L.Q. 133, 134 (1958).

6. See 26 VA. L. REV. 354, 361 (1940).

7. See, *e.g.,* People *ex rel.* Rudaitis v. Galskis, 233 Ill. App. 414, 420 (1924); Mason v. Mallard Tel. Co., 213 Iowa 1076, 240 N.W. 671 (1932); Moses v. Soule, 63 Misc. 203, 118 N.Y. Supp. 410 (Sup. Ct. 1909); 2 O'NEAL, *op. cit. supra* note 4, § 7.02; O'Neal, *supra* note 3, at 773–75; 26 VA. L. REV. 354, 361–62 (1940). See also *Symposium—The Close Corporation,* 52 NW. U.L. REV. 345 (1957).

8. See 2 O'NEAL, *op. cit. supra* note 4, § 7.06 & n.18. In permitting the restraint, courts have generally reasoned that such arrangements do not pre-

in effect requires a showing that the facts of a particular case justify overriding the policy against restraints.[9]

Despite the large volume of litigation over first-option restrictions,[10] the effect of a nominal first-option price has not been examined.[11] It has long been recognized in regard to real property that the practical degree of restraint on alienation of a first-

vent the ultimate alienation of the stock but merely pose an initial step in a contemplated sale, that of offering the shares to the optionees for the stipulated price. See, *e.g.*, Lawson v. Household Fin. Corp., 17 Del. Ch. 343, 152 Atl. 723 (Sup. Ct. 1930); Searles v. Bar Harbor Banking & Trust Co., 128 Me. 34, 38, 145 Atl. 391, 393 (1929).

The enforceability of the option restraint, assuming it is valid, also depends on a number of variables: whether it appears in the by-laws, articles, or shareholders' contract, the identity of the optionees, the terms of the option, compliance with the Uniform Stock Transfer Act, and the knowledge of transferees. See 12 FLETCHER, CYCLOPEDIA OF CORPORATIONS § 5457.1 (rev. ed. 1957); 44 CORNELL L.Q. 133, 139–42 (1958).

9. 12 FLETCHER, *op. cit. supra* note 8, §§ 5455–57; 2 O'NEAL, *op. cit. supra* note 4, § 7.06; Cataldo, *supra* note 4, at 235–45; O'Neal, *supra* note 3, at 779; 87 U. PA. L. REV. 482, 483 (1939). Professor Painter has stated:

> reasonableness as a criterion [of validity] seems to be little more than a judicial determination to resolve each new situation in terms of prevailing equities and, in view of the almost endless variety of possible restrictions and the infinite number of situations in which they may be applied, there is little to guide an attorney in advising his client concerning the validity of particular restrictions.

Painter, *supra* note 4, at 60.

In the determination of reasonableness the following criterion have been considered significant: (1) size of the corporation, People *ex rel.* Rudaitis v. Galskis, 233 Ill. App. 414, 420 (1924); (2) degree of restraint, People *ex rel.* Malcolm v. Lake Sand Corp., 351 Ill. App. 499, 504 (1929); (3) duration of restraint, Tracey v. Franklin, 30 Del. Ch. 407, 61 A.2d 780 (Ch. 1948), *aff'd*, 31 Del. Ch. 477, 67 A.2d 56 (Sup. Ct. 1949); (4) method of determining option price, Security Life & Acc. Ins. Co. v. Carlovitz, 251 Ala. 508, 510, 38 So. 2d 274, 276 (1949); (5) expeditious to attaining corporate objectives, Lawson v. Household Fin. Corp., 17 Del. Ch. 343, 352, 152 Atl. 723, 727 (Sup. Ct. 1930); (6) possibility that hostile shareholders would injure corporation, People *ex rel.* Rudaitis v. Galskis, *supra* at 420; (7) purpose and duration, Citizens Fid. Bank & Trust Co. v. United States, 210 F. Supp. 254 (W.D. Ky. 1962).

10. See Annot., 61 A.L.R.2d 1318 (1958); Annot., 138 A.L.R. 647 (1942); Annot., 65 A.L.R. 1159 (1930).

11. Several price standards have been upheld, including book value, par value, appraisal value, original issue price, an arbitrary figure agreeable to the parties, and an outsider's offer price. See, *e.g.*, Palmer v. Chamberlin, 191 F.2d 532 (5th Cir. 1951) (intricate formula); Evans v. Dennis, 203 Ga. 232, 46 S.E.2d 122 (1948) (par value plus 10%); Hollister v. Fiedler, 30 N.J. Super. 203, 104 A.2d 61 (App. Div. 1954) (book value); Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957) (original issue price). For discussions of valuation methods and the advantages and disadvantages of each, see 2 O'NEAL, *op. cit. supra* note 4, § 7.24; Page, *Setting the*

option agreement varies inversely with price, the lower the price below actual value the greater the restraint.[12] A few cases and commentators have stated that this reasoning is equally applicable to shares of stock.[13] The holding of the instant case, that a nominal option price agreement is valid and enforceable, may have significant implications on this question.[14]

The instant court directed its attention to the maturity and familial relationship of the parties, the fact that the stock was closely held, and the clear and lawful purpose of the agreement,[15] particularly stressing the absence of fraud or overreaching. The only consideration given to the nominal price was the court's rejection of the defendant's "fair and flexible" price contention[16] and the court's ruling that the restriction was not absolute but limited, for the stock could be sold publicly without restrictions if the optionees rejected the offer.

Price in a Close Corporation Buy-Sell Agreement, 57 MICH. L. REV. 655 (1959); Stern, *Determination of Price in Close Corporation Stock Purchase Arrangements*, 13 RUTGERS L. REV. 293 (1958).

12. See 6 AMERICAN LAW OF PROPERTY §§ 26.65, .67 (Casner ed. 1952); POWELL, LAW OF REAL PROPERTY § 842 (1958); Sparks, *Future Interests*, 32 N.Y.U.L. REV. 1434, 1440 (1957); *cf.* Kershner v. Hurlburt, 277 S.W.2d 619 (Mo. 1955); Missouri State Highway Comm'n v. Stone, 311 S.W.2d 588 (Mo. Ct. App. 1958).

13. See Page, *supra* note 11. See also Greene v. E. H. Rollins & Sons, Inc., 22 Del. Ch. 394, 2 A.2d 249 (Ch. 1938) where the court stated that "no distinction is to be drawn in this matter of unreasonable restraints upon alienation, between real estate and personalty." *Id.* at 403, 2 A.2d at 253.

14. The court found no Pennsylvania precedent other than cases recognizing the validity and enforceability of first-option agreements. See, *e.g.*, Garrett v. Philadelphia Lawn Mower Co., 39 Pa. Super. 78 (1909). Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957), furnished the court's only direct authority. That case granted specific performance of a first-option restriction stipulating that the option price equal the original issue price. Against the claim that the price was unfair and that the restraint therefore was unreasonable and void, the court declared that "the validity of the restriction on transfer does not rest on any abstract notion of intrinsic fairness of price. To be invalid, more than mere disparity between option price and current value . . . must be shown." *Id.* at 543, 141 N.E.2d at 817, 161 N.Y.S.2d at 424. It was then held that where parties agree on a suitable price and make a provision freeing the stock for outside sale if the option is refused, the restriction is reasonable and valid. For a criticism of the *Allen* case as "weak precedent," see Sparks, *supra* note 12, at 1440, 1441.

15. Several Pennsylvania cases have held that restrictions on stock transfer serve "useful, lawful and enforceable purposes." See, *e.g.*, Garvin's Estate, 335 Pa. 542, 6 A.2d 796 (1939); Garrett v. Philadelphia Lawn Mower Co., 39 Pa. Super. 78 (1909).

16. Appellant argued that typical first-option agreements attempt at least roughly to reflect the value of the shares and that fixed prices must be variable to allow for changes in value over time. Where the price is both unvary-

In finding the restriction limited, the court ignored the actual effect of the nominal option price. To reason that an agreement requiring stock to be offered for a minute fraction of its value is limited because the stock may be publicly sold if the offer is rejected, unrealistically ignores that the nominal price insures that the offer will probably not be made and that if made, never rejected. Certainly the right to sell property at a small percentage of its value is no practical alternative to its continued retention. Under these circumstances, the effect of the agreement was that no stock could be sold during the lives of the parties without an immediate forfeiture of a high percentage of its value.[17]

That a nominal option price agreement effects an almost absolute restraint does not dispose of its validity; the issue still unresolved is whether such a restriction on closely held stock is reasonable. Ultimately, that determination depends on whether the public policies allowing restrictions on close corporate stock and respecting the freedom to contract outweigh the policy against restrictions on alienation. In balancing these conflicting considerations, the Pennsylvania court in the instant case stressed the absence of fraud or overreaching. Although such a limited inquiry arguably ignores the policy against restraints on alienation,[18] the standard applied seems consistent with current judicial attitudes towards such arrangements.[19] Although the argument that a nom-

ing and nominal, he argued, the arrangement is invalid. If this argument is "unrealistic and utterly devoid of merit," as the court contended, the reason must be that price need not be closely related to the stock value. If an option price were required to reflect accurately current stock value, flexibility would be indispensable. The court, in sustaining the validity of the one dollar price agreement on $50 shares and enforcing it when they were worth (by stipulation) over $1,000, must have concluded that actual value was irrelevant.

17. Justice Cohen, in dissent, maintained that the nominal price agreement created an absolute and unreasonable restraint because it provided for a price that was unvariable and unconscionably nominal in relation to the value of the shares at the time the arrangement was made. Instant case at 372, 189 A.2d at 592. The usefulness of this analysis is questionable in light of cases that uphold unvariable price formulas such as par value, original stock value, and arbitrary fixed values. See cases cited note 11 *supra*. Since the issue in these cases is whether the existence of a price disparity effects an unreasonable restraint, when the price disparity arises does not seem important. *But see* 49 VA. L. REV. 1211, 1215 (1963).

18. See 49 VA. L. REV. 1211, 1215 (1963).

19. See, *e.g.*, Palmer v. Chamberlin, 191 F.2d 532, 539–41 (1951), in which the court, in granting specific performance of a first-option stock agreement, rejected defendant's unfair price contentions, announcing that utmost freedom of contract must not be lightly interfered with. The court held that where there exists a disparity between option price and current value of the stock, that "difference must be so great as to lead to a reasonable conclusion

inal option price works a forefeiture is appealing, it would not seem particularly necessary or desirable for courts to "protect" closely held shareholders or their heirs by determining that, as a matter of law, a fair or reasonable price is an essential element to the validity of an option agreement. Courts are in no better position than good faith parties to establish "fair" price terms. And, since closely held shares rarely have any ascertainable market value, almost every option contract would be open to litigation on the validity of the agreed-upon price. This, in effect, would frustrate one of the objectives of the option agreement, the elimination of future price controversies.[20] The same considerations that underlie the courts' adamant refusal to examine the wisdom or adequacy of consideration for promises in other buy-sell contracts compel a similar approach to first-option agreements concerning closely held shares.[21]

Sound business reasons motivate close corporations and their shareholders to impose transfer restrictions on their stock. By definition the number of stockholders is few; they are usually intimately identified with management and carry on little if any public trading of their stock. These shareholders generally receive their investment return through salaries in remuneration for their active participation as corporate officers and directors. Since they are active, the success or failure of the venture usually depends on their personal business acumen. Hence, restrictions are most frequently employed to confine ownership of the corporation, and the management which results from ownership, to a select few talented persons, friendly to the existing policies and purposes of the corporation.[22] Where the death or withdrawal of a stockholder is likely to have a disruptive effect on the business of a close corporation, the corporation or shareholders may wish to reduce the possibly prohibitive burden of paying a fair price for the decedent's shares by providing for a nominal first-option price. By so

of fraud, mistake, or concealment in the nature of fraud" in order to render the agreement unenforceable. *Id.* at 541. See also Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957) (validity of such restrictions does not rest on intrinsic fairness of price).

20. Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957). See also 2 O'NEAL, *op. cit. supra* note 4, § 7.24.

21. A less liberal approach seems desirable for widely held shares, however, since free alienation is fundamental to their profitability. An option price even slightly below the market value destroys the stock appreciation-investment incentive, notwithstanding the fact that the imposition of option formalities on a holder's right to sell is time consuming. See text accompanying notes 25-27 *infra*.

22. See authorities cited note 4 *supra*.

providing, the enterprise insures its capacity to control its stock and eliminates the possibility that paying the actual value of the shares will cause severe financial stress.[23]

That the policy against restraints is of relatively minimal value in regard to closely held shares may not be an unreasonable contention.[24] Investors in such ventures usually receive their return through salaries while the investment incentives for widely held enterprises are dividends and stock appreciation.[25] As a result, since widely held shares are marketed according to a rapidly fluctuating market price, their profitability depends on the holder's capacity to shift his investments quickly according to market conditions. On the other hand, closely held stock has no equivalent market; nor does its profitability as a rule depend on its holder's ability to liquidate and reinvest.[26] Hence a restriction on the alienability of widely held stock impairs an incident of ownership fundamental to its investment value, whereas a similar restraint on closely held shares has little or no such significance.[27]

23. The financial stability of the corporation may fluctuate rapidly. Therefore it would not be wise for a business to contract to incur a future obligation equal to the fair value of a large block of shares. The existence and common use of life insurance on the lives of the shareholders mitigates to some extent the rigors of paying the actual value for the decedent's interest; but the expense of such insurance may make it unavailable to close corporations. See Stern, *supra* note 11, at 302–05. On the other hand, the practical advantages to be derived from an inexpensive "buy out" may be offset in some cases by the severity of the restraint imposed. A recognized goal of restrictions on closely held shares is the confinement of share ownership to select talented persons on the theory that since close corporate shareholders are usually active in management, the success of the venture depends on their business skill. Yet, the dissident director-shareholder, faced with the choice of offering his stock for a nominal price if he wishes to liquidate his investment, will probably remain with the business. In such a case a nominal option arrangement causes a dissatisfied, possibly hostile shareholder within the enterprise, frustrating the restriction's purpose.

24. See 87 U. PA. L. REV. 482, 483 (1938); *cf.* Note, 68 YALE L.J. 773, 777 n.26 (1959) (theoretically the employee could contract away all his rights as a shareholder); 44 CORNELL L.Q. 133, 134 (1958) (restrictions on stock might be more severe than those with respect to other personal property and yet should not be as broad as permissible restrictions on assignment of contract rights).

25. See *Symposium — The Close Corporation*, 52 NW. U.L. REV. 345, 346–47 (1957).

26. *Ibid.*

27. Because of the lack of a ready market, a holder's capacity to transfer closely held shares is minimal. Since closely held ventures are managed by their shareholders, however, a dissatisfied investor possessing an offsetting measure of control has an alternative other than the liquidation of his interest and reinvestment elsewhere — he may seek to enhance his return through his management position. See 87 U. PA. L. REV. 482, 483 (1938). His oppor-

However, since little less than the absolute prohibition on alienation invariably condemned as against public policy may be created by a nominal option agreement, its validity is at best a close question and should be decided with particular attention to the facts of each case.

Federal Taxation: Contestant Not Taxable on Prize Where Contest Rules Required Assignment

Petitioner entered a scholarship contest[1] and designated his daughter as the recipient of any prize awarded his entry. The contest rules limited prize recipients to children under 17 years one month old.[2] Petitioner's entry won an annuity that was payable without restriction on its use when the designated recipient attained age 18. The Commissioner of Internal Revenue assessed petitioner for income taxes on the present value of the annuity because he had "earned" it by writing the winning essay. The Tax Court *held*, seven judges dissenting,[3] that the prize did not constitute income to petitioner because he had no right to receive it. *Paul A. Teschner*, 38 T.C. 1003 (1962).

Prior to the enactment of section 74 of the Internal Revenue Code of 1954, the taxability of prizes and awards was somewhat uncertain. If the taxpayer's efforts won the contest prize, it was taxable income;[4] if winning was fortuitous, the prize was con-

tunity for such "self-help" is of particular value where he possesses a veto power through a unanimous or high-vote requirement for board of director action. See *Symposium — The Close Corporation*, 52 NW. U.L. REV. 345, 380–86, 401–02 (1957).

1. The contest was the "Annual Youth Scholarship Contest" sponsored by Johnson & Johnson, Inc., and consisted of writing an essay of not more than fifty words on "A good education is important because . . . ." The fourth-place prize won by the taxpayer's entry was a $1500 annuity payable when the recipient attained age 18. The Commissioner contended that the present value of the annuity ($1287.12) should be included in the petitioner's income.

2. Rule 4 of the contest provided:

> Only persons under age 17 years and 1 month (as of May 14, 1957) are eligible to receive the policies for education. A contestant over that age must designate a person below the age 17 years 1 month to receive the policy for education. In naming somebody else, name, address and age of both contestant and designee *must* be filled in on entry blank.

3. The Tax Court split eight to seven, with two concurring judges included in the majority.

4. Robertson v. United States, 343 U.S. 711 (1952) (prize for best unpublished symphonic work); United States v. Amirikian, 197 F.2d 442 (4th Cir. 1952) (best workable idea in arc welding); Herbert Stein, 14 T.C. 494 (1950) (best detailed plan for postwar employment).

sidered a nontaxable gift to the contestant.[5] Section 74 expressly includes these items within the definition of gross income[6] in section 61(a) of the 1954 Code. Since section 74 does not provide guidelines for determining who should be taxed when prizes or awards are assigned, presumably the judicially established standards governing the assignment of income should be utilized.

Courts have traditionally scrutinized intra-family assignments of income to prevent tax avoidance.[7] In *Lucas v. Earl*[8] the Supreme Court declared that the import of the tax code was to "tax

5. Glenn v. Bates, 217 F.2d 535 (6th Cir. 1954) (car giveaway); McDermott v. Commissioner, 150 F.2d 585 (D.C. Cir. 1945) (essay contest); Ray W. Campeau, 24 T.C. 370 (1955) (phone contest). See generally Rapp, *Some Recent Developments in the Concept of Taxable Income*, 11 TAX L. REV. 329, 336–38 (1956); Soll, *Essay Competitions and Income Tax Contests*, 6 TAX L. REV. 109 (1950).

6. INT. REV. CODE OF 1954, § 74 provides:

> (a) GENERAL RULE — Except as provided in subsection (b) and in section 117 (relating to scholarships and fellowship grants), gross income includes amounts received as prizes and awards.
>
> (b) EXCEPTION — Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement. . . .

Treas. Reg. § 1.74–1(a) (1955) specifically covers the scholarship contest in the instant case by providing that amounts received "from radio and television giveaway shows, door prizes, and awards in contests of all types," are includible in gross income.

7. The minimization of family taxes is normally achieved by a transfer of income from a family member in a high tax bracket to one in a lower bracket. In Helvering v. Clifford, 309 U.S. 331, 335 (1940), the Supreme Court reasoned that intra-family transactions must be closely scrutinized "lest what is in reality but one economic unit be multiplied into two or more by devices which . . . are not conclusive as far as . . . [§ 61(a)] is concerned." *Accord*, Commissioner v. Sunnen, 333 U.S. 591 (1947); Commissioner v. Tower, 327 U.S. 280 (1946); Anderson v. Commissioner, 164 F.2d 870 (7th Cir. 1948); Ray Harroun, 4 CCH Tax Ct. Mem. 780 (1945). For a general discussion of the problem of intra-family assignments for tax purposes, see 2 MERTENS, LAW OF FEDERAL INCOME TAXATION § 18.02 (rev. ed. 1961); Rice, *Judicial Trends in Gratuitous Assignments To Avoid Federal Income Taxes*, 64 YALE L.J. 991 (1955).

8. 281 U.S. 111 (1930). The *Lucas* case was decided before the enactment of INT. REV. CODE OF 1954, § 6013 which allows a husband and wife to file a joint return on all family income. The enactment of § 6013 made it unnecessary for a taxpayer to assign anything to his wife to escape taxation. However, income-splitting arrangements with other members of the taxpayer's family are still objectionable. See, *e.g.*, Helvering v. Horst, 311 U.S. 112 (1940); Doyle v. Commissioner, 147 F.2d 769 (4th Cir. 1945).

In Helvering v. Eubank, 311 U.S. 122 (1940), the Supreme Court held the assignor taxable on life insurance contract renewal premiums that he had assigned to his wife, thus rejecting the idea that *Lucas* applied only to assignments of future income. Rice, *supra* note 7, at 991.

salaries to those who earned them."[9] In order to give effect to that purpose, the courts have experimented with a number of tests designed to identify situations that do not warrant recognition of intra-family assignments for tax purposes. The difficulty with which these tests are applied to differing situations, however, has limited the predictability of income tax consequences of intra-family assignments.

Among the tests that courts have utilized is the "flow of satisfactions"[10] test, which justifies the imposition of the income tax where the taxpayer retains a material, or even a nonmaterial, satisfaction after a transfer of his right to income.[11] The difficulty in applying this test is illustrated by the Supreme Court's rejection of the Commissioner's argument, based on this test, in *Helvering v. Stuart*.[12] In *Stuart* the taxpayer placed money in a trust

9. The language of Mr. Justice Holmes, articulating this position, has become the basic statement of policy in this area:

> But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that *no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.*

Lucas v. Earl, 281 U.S. 111, 114–15 (1930). (Emphasis added.) This language formed almost the entire basis for the dissenting opinion in the instant case. Interestingly, the italicized phrase was the basis for one commentator's pronouncement that: "the metaphor has been substituted for rational analysis by courts and commentators to the point where a critic in this area frequently cannot see the forest for the fruit trees." Rice, *supra* note 7, at 991.

10. See Helvering v. Horst, 311 U.S. 112 (1940).

11. The Court in Helvering v. Horst stated:

> The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires whether he collects and uses the income to procure those satisfactions, or whether he disposes of his right to collect it as the means of procuring them. . . .
>
> Such a use of his economic gain, the right to receive income, to procure a satisfaction . . . would seem to be the enjoyment of the income whether the satisfaction is the purchase of goods at the corner grocery, the payment of his debt there, or such nonmaterial satisfactions as may result from the payment of a campaign or community chest contribution, or a gift to his favorite son . . . . The enjoyment of the economic benefit accruing to him by virtue of his acquisition of the coupons is realized as completely as it would have been if he had collected the interest in dollars and expended them for any of the purposes named.

Id. at 117.

12. 317 U.S. 154 (1942).

for his son, and the Commissioner sought to tax the trust income to the taxpayer, arguing that the trust satisfied the normal desire of a parent to provide for his child. Although the Court rejected this argument, a strict interpretation of the "flow of satisfactions" test supports the Commissioner's position. The Court's failure in *Stuart* to distinguish adequately the "flow of satisfactions" test hinders predictability regarding its application.[13] For example, application of this test to the instant case would require that the petitioner be taxed, for he enjoyed the satisfaction of providing his daughter with the opportunity to receive an annuity. Indeed, wherever an assignment is made some satisfaction probably flows to the assignor; otherwise, the transfer would not likely have occurred. Thus, although this test occasionally has been used,[14] its broad scope virtually destroys its utility.

Another test invoked by the courts to determine whether to tax the assignor of an interest characterizes that interest as either nontaxable "property"[15] or taxable "income."[16] This test is easily applied where, for example, the property interests assigned are real estate[17] and the income interests are wages,[18] but between

13. See Rice, *supra* note 7, at 994–95.

14. See, *e.g.*, Byers v. Commissioner, 199 F.2d 273 (8th Cir. 1952); Acer Realty Co. v. Commissioner, 132 F.2d 512 (8th Cir. 1942).

15. The Supreme Court, in Blair v. Commissioner, 300 U.S. 5 (1937), held that an assignor of property was not liable for income taxes on income accruing from the property subsequent to the assignment, since he was not the owner of the property when the income accrued. The property in that case was a portion of the income interest of a trust. Using the *Blair* case as support, the courts have upheld assignments of many kinds of property, including: stock, Estate of Bertha May Holmes, 1 T.C. 508 (1943); annuities, Pearce v. Commissioner, 315 U.S. 543 (1942); trust rights, Commissioner v. Bateman, 127 F.2d 266 (1st Cir. 1942); Herbert L. Dillon, 32 B.T.A. 1254 (1935); H. C. Priester, 33 B.T.A. 230 (1935); Emil Frank, 27 B.T.A. 1158 (1933); personal property, Visintainer v. Commissioner, 187 F.2d 519 (10th Cir. 1951); and royalty rights, Julius E. Lilienfeld, 35 B.T.A. 391 (1937); John F. Canning, 29 B.T.A. 99 (1933).

16. In 2 MERTENS, *op. cit. supra* note 7, § 18.02, the rule is stated that

> It should be noted that in the Horst case the Court emphasized the distinction between income *subsequently earned* on property previously acquired by the assignee, such as rent from a lease or a crop raised on a farm after the leasehold or the farm had been transferred, and the separate transfer of the right to interest or wages *previously accrued or earned*. . . .

See Doyle v. Commissioner, 147 F.2d 769 (4th Cir. 1945); United States v. Pierce, 137 F.2d 428 (8th Cir. 1943); Julius E. Lilienfeld, 35 B.T.A. 391 (1937); Beck, *Assignments of Income From Inventions: Tax Minimization*, 2 RUTGERS L. REV. 221 (1948).

17. See Doyle v. Commissioner, 147 F.2d 769, 771 (4th Cir. 1945).

18. See Strauss v. Commissioner, 168 F.2d 441 (2d Cir. 1948); Lewis v.

these extremes it is almost unworkable.[19] In the instant case the property-income test logically could have yielded either of two results, depending upon the starting point. If the right to receive income from the contest entry had been defined to be "property," which some courts have done with patent and copyright licenses,[20] petitioner should not have been taxed because he relinquished his entire interest. Since his daughter possessed the sole right to receive the prize she should have been taxed as the owner of income-producing property. On the other hand, if the right to receive the prize had been viewed as a right to compensation for the contestant's services, similar to a chose in action, then this should have been considered an assignment of income, rendering petitioner taxable on the annuity received by his daughter.[21]

A third test utilized by the courts in intra-family assignment cases is taxation of the "earner"; this was the Commissioner's theory in the instant case.[22] The Commissioner argued that the prize should constitute taxable income to the petitioner because

Rothensies, 61 F. Supp. 862 (E.D. Pa. 1944), *aff'd*, 150 F.2d 959 (3d Cir. 1945); Ray Harroun, 4 CCH Tax Ct. Mem. 780 (1945); W. L. Shore, 26 B.T.A. 389 (1932); Beck, *supra* note 16.

19. The cases upholding assignments of property are based on the idea that the taxpayer has divested himself of all rights in the property in question including the right to receive income. See Julius E. Lilienfeld, 35 B.T.A. 391 (1937); *cf.* Rev. Rul. 599, 1954-2 CUM. BULL. 52; Beck, *supra* note 16. In order for the assignment to be effective, however, the taxpayer must completely divest himself of control over the particular right in question. See Henry J. Taylor, 6 CCH Tax Ct. Mem. 843 (1947); Ray Harroun, 4 CCH Tax Ct. Mem. 780 (1945). Using this reasoning, the courts have upheld assignments of royalties, Julius E. Lilienfeld, 35 B.T.A. 391 (1937), and copyrights, John F. Canning, 29 B.T.A. 99 (1933). This test makes it very difficult to predict the result of a particular assignment. Two cases involving assignments of rights in stories written by P. G. Wodehouse are illustrative. In both cases the taxpayer assigned rights in stories that he had written before he had sold them to the publisher. In the first case the Second Circuit held that since he completely assigned these rights before he had the right to receive income, the assignment should be given effect for tax purposes. Wodehouse v. Commissioner, 177 F.2d 881 (2d Cir. 1949). However, the Fourth Circuit, in a case involving identical assignments of different stories, held that the assignments could not be given effect for tax purposes since the stories merely represented the taxpayer's right to compensation for work that he had performed. Wodehouse v. Commissioner, 178 F.2d 987 (4th Cir. 1949).

20. See, *e.g.*, Byrnes v. Commissioner, 89 F.2d 243 (3d Cir. 1937); Morris Cohen, 15 T.C. 261 (1950); Rice, *supra* note 7, at 1002-03.

21. Compare the majority and dissenting opinions in Helvering v. Eubank, 311 U.S. 122 (1940).

22. The Commissioner proposed the rule that whenever *A* receives something of value attributable to services performed by *B*, the earner, *B*, is the proper taxpayer. This rule was formulated in Rev. Rul. 127, 1958-1 CUM.

he wrote the winning entry and he also had the power to designate the beneficiary. The majority of the Tax Court, by basing their decision on the definition of "earn" and on the fact that petitioner had no "right" to receive the annuity, failed to meet the Commissioner's argument. That the petitioner earned the prize, in the sense that his efforts produced the income, seems clear. Nevertheless, the question presented is whether his assignment of that income was effective to shift the tax burden.

From a factual viewpoint,[23] the instant court, even though couching its decision in terms of "earnings," reached the correct result. Nonrecognition of intra-family assignments is primarily to prevent tax avoidance.[24] Arguably, since the contest rules required all contestants over 17 years old to designate a recipient, no device or scheme to avoid taxes was involved in the instant case.[25] Even though the effect of not taxing petitioner undoubtedly results in a lower tax on the prize, that petitioner's motive in entering the contest was tax avoidance is doubtful. Unlike the usual situation where the taxpayer is assured of producing income from his efforts, petitioner had only a remote pos-

BULL. 42, in which a taxpayer was held liable in a situation identical to the instant case. See instant case at 1007.

23. Actually, an equitable factual analysis has been the basis of decision in many intra-family assignment cases, with the traditional tests merely providing labels for the result. See, *e.g.*, Commissioner v. P. G. Lake, Inc., 356 U.S. 260 (1958); Commissioner v. Tower, 327 U.S. 280 (1946); Harrison v. Schaffner, 312 U.S. 579 (1941); Helvering v. Clifford, 309 U.S. 331 (1940); Winters v. Dallman, 238 F.2d 912 (7th Cir. 1956).

24. Mr. Justice Stone's statement of this reasoning has become a touchstone for determining the validity of intra-family assignments for tax purposes:

> The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires whether he collects and uses the income to procure those satisfactions, or whether he disposes of his right to collect it as the means of procuring them.

Helvering v. Horst, 311 U.S. 112, 117 (1940).

Good motives are not necessary to uphold an assignment for tax purposes. See Cold Metal Process Co. v. Commissioner, 247 F.2d 864, 871 (6th Cir. 1957). However, the taxpayer's motives have been a factor considered by the courts in determining the validity of assignments. In Commissioner v. Bateman, 127 F.2d 266 (1st Cir. 1942) the court cited, in holding the settlor not taxable on trust income, the fact that the taxpayer's motive could not possibly have been tax avoidance since the trust was established in 1904, well before the enactment of the sixteenth amendment. See also Visintainer v. Commissioner, 187 F.2d 519 (10th Cir. 1951).

25. The petitioner was required by the contest rules to assign the prize. See note 2 *supra*. In addition, the remote possibility of a particular individual winning the contest virtually eliminates the assignment as a "gimmick" by the sponsors to encourage entries.

sibility of submitting a winning entry. Therefore, it is more probable that he never considered the tax consequences of his entry.

Besides being cast in terms of the "earnings" test, another criticism of the instant decision is that the Tax Court's language[26] supports nontaxability of an assignor merely because he was never entitled to receive compensation for his services.[27] This result should obviously not be permitted, because of the ease with which an employee could evade income taxes simply by directing his employer to pay future earnings to a member of the employee's family.[28] The implications of the instant case, however, would perhaps be better viewed as nontaxability of the assignor where an independent third party instigates the bar to the assignor's receipt of the prize.[29] Since the petitioner had no part in drafting the contest rules and since presumably the rule that required petitioner to assign did not induce him to enter this particular contest, a third-party test is satisfied. Moreover, this standard is, at least arguably, supported by prior Supreme Court decisions.[30]

26.

> Certainly, it was [petitioner's] effort that generated the income, to whomever it is to be attributed. However, as we have found, he could not under any circumstances whatsoever receive the income so generated himself. He had no right to either its receipt or its enjoyment. He could only designate another individual to be the beneficiary of that right.

Instant case at 1006.

27. See 1962 U. ILL. L.F. 663, 667.

28. A similar arrangement was successfully challenged by the Commissioner in J. H. McEwen, 6 T.C. 1018 (1946). The Tax Court rejected a scheme whereby part of the taxpayer's salary was paid to a trust for his family. The court reasoned that this was simply another form of compensation since the arrangement was made at the request and under the direction of the taxpayer.

29. One problem with this proposed standard is the effect to be given to a third party's setting up the arrangement as an inducement to the assignor to act in a manner beneficial to the third party. For example, an employer who, without any suggestion from the employee, requires that part of the employee's wages be paid to a member of the employee's family could point out to the employee that this arrangement would result in less taxes, increasing the disposable income of the employee's family. Such an involuntary assignment should be recognized for tax purposes only upon a showing of a minimal tax motive, relative to the non-tax reasons for the employer's setting up such an arrangement. This would prevent an employer from using such a plan to induce an employee to work for him, rather than some other employer, based on tax considerations.

30. In Poe v. Seaborn, 282 U.S. 101 (1930) the Supreme Court held that the taxpayer's income should be treated as the joint income of him and his wife because of their residence in a community property state. Thus, in

In similar cases the courts have allowed taxpayers to assign interests in lottery tickets to family members without the assignor incurring tax liability on the assignee's subsequent receipt of a prize.[31] Generally, in lottery cases the Commissioner has attacked the validity of the assignment, rather than its effectiveness for tax purposes, since the slight value of the ticket makes a tax-avoidance use of these assignments unlikely. The upholding of these assignments, based on meager evidence of an assignment actually having been made,[32] renders these situations more susceptible to manipulation for tax purposes than the facts of the instant case. Thus, the seemingly well-established law in the lottery-ticket assignment cases provides a strong argument in favor of the result reached in the instant case.

Seaborn, even though the taxpayer made the decision to live in such a state, and in the instant case, where the taxpayer decided to enter the contest, the income-splitting effect was the result of something independent of the taxpayer; the law of the state in *Seaborn*, and the sponsor's contest rule in the instant case.

31. Freda Dowling, 18 CCH Tax Ct. Mem. 737 (1959); William Chelius, 17 CCH Tax Ct. Mem. 121 (1958); Max Silver, 42 B.T.A. 461 (1940); Samuel L. Huntington, 35 B.T.A. 835 (1937); Christian H. Droge, 35 B.T.A. 829 (1937); A. L. Voyer, 4 B.T.A. 1192 (1926); *accord*, Rev. Rul. 638, 1955-2 CUM. BULL. 35.

32. In William Chelius, 17 CCH Tax Ct. Mem. 121 (1958), proof of the transfer was based on oral statements made by the assignor that a share of the ticket belonged to her children and on a formal assignment drawn up after the taxpayer was entitled to a sweepstakes prize. *But see* Harry J. Riebe, 41 B.T.A. 935 (1940), *aff'd*, 124 F.2d 399 (6th Cir. 1941) in which the court refused to limit the taxpayer's liability since the evidence did not show a valid transfer. See also Freda Dowling, 18 CCH Tax Ct. Mem. 737 (1959).