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Case Comments

Antitrust: Limiting In Pari Delicto as a Defense to Treble Damage Actions

Plaintiffs were dealers operating muffler shops under franchise agreements\(^1\) granted by defendant corporation.\(^2\) They brought a treble damage action pursuant to section 4 of the Clayton Act\(^3\) charging defendants with conspiring to restrain trade in violation of section 1 of the Sherman Act,\(^4\) section 3 of the Clayton Act,\(^5\) and the Robinson-Patman Act.\(^6\) The district court granted defendant's motion for summary judgment\(^7\) on the ground that the claims were barred by the doctrine of in pari delicto. The Seventh Circuit affirmed the dismissal of the first two counts and remanded the third for further consideration.\(^8\) The Supreme Court reversed and remanded,\(^9\) holding,

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1. Among other things, the agreements prohibited dealers from purchasing from other suppliers, fixed retail prices and restricted sales territories.
2. The defendants included the parent corporation, three subsidiaries and six individuals, officers and agents of the corporations. International Parts was one of the subsidiary corporations.
3. 15 U.S.C. § 15 (1964) provides:
   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained.
4. 15 U.S.C. § 1 (1964) provides:
   Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal.
5. 15 U.S.C. § 14 (1964) declares it unlawful for a person engaged in commerce to condition a supply agreement on exclusiveness if the effect of such an agreement would be to “substantially lessen competition or tend to create a monopoly . . .”
7. Fed. R. Civ. P. 56(b). Counts 1 and 2 were dismissed on the basis of the in pari delicto doctrine. An alternative ground for dismissal of count 1 was that no conspiracy could exist between members of a single business entity. Count 3 was dismissed upon a finding of no actual price discrimination or restraint of free competition.
8. Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967). The district court's reasoning was upheld on the first two counts. Summary judgment on the third was held improper because (1) while no price discrimination existed before signing, the price-fixing agreements confined the dealers to the purchase of Midas brands and (2) a potential customer between franchise areas would be willing to patronize either. The court felt that the effect of these practices on competition could not properly be ascertained by use of the summary judgment procedure.
that the doctrine of \textit{in pari delicto} "with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."\textsuperscript{11} \textit{Perma Life Mufflers, Incorporated v. International Parts Corporation}, 392 U.S. 134 (1968).

\textit{In pari delicto} is a doctrine that denies recovery\textsuperscript{12} in either tort or contract to an active participant in an illegal or morally delinquent scheme. Literally translated as "in equal fault,"\textsuperscript{13} the doctrine has often been confused with \textit{particeps criminis},\textsuperscript{14} consent,\textsuperscript{15} or unclean hands.\textsuperscript{16} The doctrine is based on considerations of both private equity\textsuperscript{17} and public policy;\textsuperscript{18} the in-

\textsuperscript{10} The scope of this Comment will be limited to a discussion of the doctrine of \textit{in pari delicto}. The other primary issue in the case was the defendants' assertion, upheld by the Seventh Circuit as an alternative ground for dismissal, that since the parent and subsidiary corporations were commonly owned, they were entitled to cooperate without creating an illegal conspiracy in restraint of trade. The Supreme Court rejected this argument on the basis that they chose to do business as separate entities. 392 U.S. 134, 141-42 (1968).

\textsuperscript{11} Id. at 140.

\textsuperscript{12} "[N]o action arises . . . from an illegal contract . . . ." 2 J. POMEROY, \textit{Equity Jurisprudence} § 940 (1st ed. 1882).

\textsuperscript{13} \textit{Black's Law Dictionary} 898 (4th ed. 1951).

\textsuperscript{14} \textit{Particeps criminis} applies solely to criminal conduct. \textit{In pari delicto} invariably includes \textit{particeps criminis} but the reverse is not always true. See Ryan \textit{v. Motor Credit Co.}, 130 N.J. Eq. 531, 23 A.2d 607 (1941).

\textsuperscript{15} Consent is the mere knowledge that persons with whom the plaintiff is dealing are violating the antitrust laws, and is not active participation within the meaning of \textit{in pari delicto}. Note, \textit{In Pari Delicto and Consent as Defenses in Private Antitrust Suits}, 78 HARV. L. REV. 1241, 1247 (1965).

\textsuperscript{16} Unclean hands operates to bar recovery in much the same manner as \textit{in pari delicto} but there has generally been less insistence that the conduct be equally wrong. It is sufficient that the conduct have some effect on the equitable relationship of the parties. See \textit{Corning Glass Works v. Anchor-Hocking Glass Corp.}, 253 F. Supp. 461 (D. Del. 1966); \textit{Fritz v. Jungbluth}, 141 Neb. 770, 4 N.W.2d 911 (1942); \textit{Seaton v. Dye}, 37 Tenn. App. 322, 263 S.W.2d 544 (1953). \textit{In pari delicto} has generally been invoked only where the parties' guilt or wrongdoing has been approximately equal—where the \textit{delicto} is \textit{pari}. See \textit{Southwestern Greyhound Lines v. Crown Coach Co.}, 178 F.2d 628 (8th Cir. 1949) (proximate cause); \textit{Furman v. Furman}, 178 Misc. 582, 34 N.Y.S.2d 699 (1941); \textit{Waller v. Eanes' Adm'r}, 156 Va. 389, 157 S.E. 721 (1931).

\textsuperscript{17} \textit{E.g.}, \textit{Middlesboro Home Tel. Co. v. Louisville & N. Ry.} 214 Ky. 323, 284 S.W. 104 (1926); \textit{De Persia v. Merchants Mut. Cas. Co.}, 265 App. Div. 176, 49 N.Y.S.2d 324 (1944); \textit{Smith v. White}, L.R. 1 Eq. (1866) (lessee could not recover cost of improvements from sublessee when premises were used as a brothel).

\textsuperscript{18} In \textit{Holman v. Johnson}, 98 Eng. Rep. 1120, 1121 (K.B. 1775), Lord Mansfield, by way of dictum, stated that the defense of illegality "sounds . . . very ill in the mouth of the defendant" but that "general principles of policy" would occasionally allow the defense in furtherance of the state's welfare. \textit{See also Byers v. Byers}, 223 N.C. 85, 25 S.E.2d 466 (1943); \textit{Lewis v. Davis}, 145 Tex. 488, 199 S.W.2d 146 (1947).
individual should not benefit from his own wrongdoing, and the state should not be required to afford relief to one who has violated its laws. It is one of the many "maxims" of equity that has been assimilated into law and is currently applicable to actions which were traditionally considered either legal or equitable.\(^{19}\)

The defense was first raised in a treble damage antitrust action in federal court in 1900\(^ {20}\) and its applicability has been a source of constant disagreement ever since. The cases have been few enough in number and sufficiently diverse on their facts to insure a variance of rationales.\(^ {21}\) Early cases,\(^ {22}\) applying traditional rules of equity, were prone to allow the defense by stressing the benefits plaintiff had already received from the illegal venture and by noting the distastefulness of allowing him further profit.\(^ {23}\) Other courts refused to allow the defense on public policy grounds,\(^ {24}\) stating that the treble damage action was intended to further the public interest in enforcement of antitrust laws as well as to redress private injury. An additional ground for disallowing the defense has been the economic coercion theory which recognizes that in most restrictive agree-

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20. See Bishop v. American Preservers Co., 105 F. 845, 846 (N.D. Ill. 1900), where the court said:
   There is another ground which might well be considered as placing plaintiff without the provision of [the Sherman Act] to wit, the fact that plaintiff was himself a party to the unlawful combination, and was injured by reason of his illegal connection therewith.
23. The Blackmore court intimated a willingness to bar recovery by any participant, stating:
   It is fundamental that in the same conspiracy all participants are conspirators, whether the part they play be great or small. They cannot receive some of the fruits and then be held blameless for other acts which they may not have initiated but whose benefits they have received.
   Plaintiff is precisely the type of individual whom the Sherman Act seeks to protect from combinations fashioned by others and offered to such individual as the only feasible method by which he may do business. Considerations of public policy demand court intervention in behalf of such a person, even if technically he could be considered in pari delicto.
ments, one party is dominant and able to impose its terms as a condition of doing business. Thus, the subordinate party—plaintiff is not in equal fault within the meaning of the doctrine and the defense should not be good against him.

During this early period, the Supreme Court never allowed the doctrine to bar recovery in a civil antitrust action. In Kiefer-Stewart Company v. Joseph E. Seagram & Sons, Incorporated, the defense was before the Court under the title of "unclean hands." There, plaintiff liquor wholesaler was allowed to recover from manufacturers despite its participation in an alleged illegal price-fixing arrangement with wholesalers not party to the suit. In rejecting the defense, the Court held that defendants were liable to parties they injured, regardless of their relative moral culpability. The Court noted that the plaintiff's conduct could be deterred—even if he were allowed to recover from defendant—through government action or that of another injured private party. Some courts, and one commentator viewed Kiefer-Stewart as the demise of the defense in federal antitrust actions. Only two years later, however, the Fourth Circuit allowed the defense in Pennsylvania Water and Power Company v. Consolidated Gas Electric Light & Power Company. Kiefer-Stewart was distinguished on the ground


26. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) has been cited as generally approving the doctrine. Crest Auto Supplies, Inc. v. Ero Mfg. Co., 360 F.2d 896, 900 (7th Cir. 1966); Bushby, supra note 21, at 789. But see Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co., 209 F.2d 131, 134 n.2 (4th Cir. 1953). But in Eastman, the jury was instructed that if the plaintiff had entered into the agreement "knowingly and willingly" rather than out of economic necessity, it would be in pari delicto and could not recover. Since the jury found for plaintiff, the court did not have to decide the applicability of the defense under other circumstances and merely held that defendant had no cause to complain. 273 U.S. at 377–78.


30. 209 F.2d 131 (4th Cir. 1953).
that the plaintiff in that action was a participant in a different illegal combination from the one on which the suit was brought. The court was reluctant to repudiate the long-established doctrine of *in pari delicto* without a more specific directive than that offered by *Kiefer-Stewart*.

In 1964, the Supreme Court once again disallowed the defense, stressing economic coercion as the deciding factor. In *Simpson v. Union Oil Company*, the Court reversed the Ninth Circuit and appeared to redefine coercion as a "loss of an economic opportunity." Plaintiff's only real alternative to accepting the defendant's illegal terms was a refusal to deal at all, in which case defendant could have found other willing retailers.

In the instant case, the Seventh Circuit relied on both *Pennsylvania Water* and its own prior decisions in distinguishing *Kiefer-Stewart*. *Simpson* was not considered a mandate to "annihilate" the doctrine of *in pari delicto* and the court did not find the necessary amount of coercion to deny application of the doctrine.

The Supreme Court, speaking through Justice Black, disagreed, relying on both *Simpson* and *Kiefer-Stewart*. The Court, however, went beyond grounds of economic coercion. In recognizing the "inappropriateness" of common law doctrines in suits of a public nature, it noted that the treble damage action was designed to deter anyone contemplating violation of the anti-

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32. The Court also mentioned public policy as an additional ground for reversal, stating that "a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy." *Simpson v. Union Oil Co.*, 377 U.S. 13, 18 (1964).
41. 376 F.2d 692, 697-98 (1967).
42. Justice Black was joined by the Chief Justice and Justices Douglas and Brennan. Justices White, Fortas and Marshall concurred in separate opinions and Justices Stewart and Harlan concurred and dissented, preferring to remand for a proper application of *in pari delicto*. 
trust laws. The private equities of the parties were deemed irrelevant since "[a] more fastidious regard for [their] relative moral worth . . . would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement."43

In rejecting the doctrine by name, the Court left open the possibility of denying relief to plaintiffs in future cases on grounds wholly apart from in pari delicto—as where plaintiff was "actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation."44 Exercising judicial restraint, however, the Court chose not to adopt any particular test and merely pointed out that the factors present in the instant case would not be sufficient to bar a plaintiff's suit under any new test. In reaching its conclusion, the Court noted that many of the restrictive clauses in the agreement45 were undoubtedly detrimental to the best interests of plaintiff, and thus were conditions of doing business within the scope of the Simpson "loss of an economic opportunity" test.46 It was also deemed significant that plaintiffs attempted, without success, to renegotiate the restrictive clauses. It did agree, however, that the clauses inserted into the agreement at plaintiff's insistence47 could be considered in computing damages.48

In concurring, Justice White agreed that in pari delicto should be rejected as a defense to a treble damage action. He went further than the majority, however, and suggested a test by which courts could determine when plaintiff is precluded from suing. Since section 4 of the Clayton Act requires plaintiff to show that defendant caused the injury complained of,49

44. Id. at 140.
45. Among them were the closed source of supply, tying the sale of mufflers to the sale of other products in defendants' line of parts, and the fixed retail prices.
47. The Court does not specifically state whether the beneficial clauses must be inserted on plaintiff's insistence or whether they must merely prove to benefit him. It is possible that a clause may be insisted upon by defendant and yet benefit plaintiff—for example, an exclusive franchise area that defendant hopes will reduce inter-franchise strife caused by over-aggressive franchisees.
he would deny recovery where the two parties were equally responsible for the injury suffered by one of them.\textsuperscript{50}

Justice White's opinion, together with Justice Black's, make a majority of five willing to refute the doctrine by name. However, since White's opinion goes on to define causation as equal fault—"where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them"—he could also be considered the fifth of a majority willing to deny plaintiff recovery where the parties are equally at fault.\textsuperscript{51}

The most persuasive argument that proponents of \textit{in pari delicto} have urged upon the courts is the natural abhorrence of allowing a wrongdoer to profit from his own wrongdoing.\textsuperscript{52} The wrongdoing plaintiff, however, will not necessarily go free since he may open himself up to government action, treble damage suits by parties outside the illegal scheme, or a counterclaim by the defending party.\textsuperscript{53} It is also imperative to remember that

\begin{quote}
\end{quote}

\textsuperscript{50}... I would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permit recovery in favor of the one less responsible where one is more responsible than the other.

\textsuperscript{51}See the concurring opinions of Justices Fortas and Marshall and the opinion of Justice Harlan in which Justice Stewart joins, concurring in part and dissenting in part.

\textsuperscript{52}See \textit{generally} 48 Nw. U.L. Rev. 619 (1953). In Bluefields S.S. Co. v. United Fruit Co., 243 F. 1, 18 (3d Cir. 1917), the court stated "that where a criminal combination is made ..., the law will afford the injured party no redress but will leave him as it finds him."

\textsuperscript{53}The Supreme Court, in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951) stated:

\begin{quote}
If [plaintiffs] were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of [plaintiffs], however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.
\end{quote}

It could be contended that counterclaims by the defendant serve to offset gains made by the plaintiff, thus merely wasting the courts' time and the public's money. This argument loses its persuasiveness once it is realized that often one party is injured much more than the other, and that the latter may, in some instances, find it impossible to show any damages.
the "wrongdoing" plaintiff in most treble damage actions of this nature is not a gigantic corporate body but an individual dealer who has often formed a company for the sole purpose of accepting the defendant's offer to do business. He has not imposed his will on the defendant and can rarely be considered equally at fault. It is the superior bargaining power of the party implementing the scheme that is primarily responsible for the resultant public harm. Thus, while plaintiff's relative innocence is no defense to suits by third parties, solely upon considerations of deterrence, it should operate to allow him to sue as plaintiff.

It is questionable whether traditional rules of equity, formulated to deal with individual litigants, should have any bearing on actions affecting the interests of the public as a whole. The antitrust laws were intended to protect the public from harmful restraint of trade. The private treble damage action was enacted to further that end by assisting the Government in enforcing the provisions of the act. Its inclusion not only made available a vast army of quasi-public "prosecuters," but also threatened stiffer penalties to the violator than those the Government could impose. The injured parties, because of their participation, access to financial records, and knowledge of economic consequences, are in the best possible position to punish the perpetrator of the scheme. The Government, on the other hand, is either politically unable or unwilling to commit the financial or human resources required to deter the multitude of potential antitrust violators effectively.

Any fear that Perma Life will have the effect of encouraging a party to join an illegal scheme would be largely unfounded. The thought of joining on a "can't lose" basis—either garnering illegal profits or suing for treble damages—would be foreclosed.

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It is not a question of "unclean hands" for if plaintiff had been a victim of defendant's unlawful practices the fact that it had also been guilty of illegal conduct would not immunize defendant against liability. The antitrust laws are more concerned with the injury to the public than they are with the morals of the private litigants.

55. There is little legislative history with which to determine the specific intent of Congress with respect to the defense. However, a case might be made for asserting that Congress did not intend the defense to be allowed. See Lockhart, Violation of the Anti-trust Laws as a Defense in Civil Actions, 31 Minn. L. Rev. 507, 508-09, 512-15 (1947).

56. The penalties which may be imposed are: imprisonment for up to one year and a fine of up to $50,000 or both; court order enjoining the illegal conduct; or seizure and forfeiture of property owned by an illegal combination while it is in the course of interstate commerce.
by the difficulty and expense of antitrust litigation. In fact, the knowledge that a prospective member of an illegal conspiracy could subsequently turn on his fellow participants and institute a treble damage action might tend to deter the formulation of such conspiracies more than the threat of a suit by an outside party.

The major impact of the Court's decision should be to free lower courts from traditional equity concepts and enable them to formulate a test to determine when, if ever, plaintiff's participation in the illegal scheme should bar his recovery. In *Perma Life*, the Court went to some length in reiterating the *Simpson* test and pointing out the elements of economic coercion. Its reasoning suggests a misapplication of *in pari delicto* in antitrust actions rather than its total unavailability. The Court appeared exasperated by the lower courts' persistent refusals to follow the spirit of *Kiefer-Stewart* and *Simpson*, and it directed courts in subsequent cases to focus attention on the public nature of the treble damage action.

The desired result is to refuse recovery only when the two conspirators are on substantially equal footing in the formulation and promotion of the scheme. The tests offered by the various opinions: active support of the entire restrictive program;\(^57\) *delicto* approximately *pari*;\(^58\) substantially equal fault;\(^59\) and more substantial cause\(^60\) are all designed to reach this result. By any test, the controlling factor should be the presence of "power" in a business entity to impose an illegal scheme on less powerful entities and thus to inflict economic injury on the public. The formulation of such a test might be somewhat academic since it is doubtful that it would ever be used to deny a plaintiff recovery. A business entity with sufficient bargaining power to impose its illegal scheme would hesitate to sue, since the resultant publicity might lead to subsequent litigation with the Government or with another private party. Such a test would still be valuable, however, in allowing the smaller of two entities to sue since it is not as morally responsible for the injury to the public. The larger has the bargaining power to induce persons in the position of the former to join in the illegal scheme. If the smaller entity rejects participation, the larger can easily find substitute parties. Therefore, while the smaller entity may still be liable to third parties for its participation in the illegal

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\(^{57}\) 392 U.S. 134, 149 (1968).

\(^{58}\) *Id.* at 147 (Fortas, J., concurring). This is no more than a literal application of *in pari delicto*, "in equal fault." *Black's Law Dictionary* 898 (4th ed. 1951) (emphasis added).

\(^{59}\) 392 U.S. at 149 (Marshall, J., concurring).

\(^{60}\) *Id.* at 144 (White, J., concurring).
scheme, the nature of its participation should not preclude it from suing the moving force behind the scheme.

Perhaps the most appropriate test, because of ease of application and assurance of compliance with the mandate of antitrust laws, would be that of causation. Mr. Justice White's test, in treating causation as no more than the determination of "substantially equal responsibility," performs a valuable service even if he chose the term only to denote that point where he "felt" plaintiff should no longer recover. In pari delicto and unclean hands are tests that are apparently more susceptible to a reversion to "mere participation" as a ground for denial of relief. The Court, after Kiefer-Stewart and especially Simpson, was obviously unhappy with the lower courts' persistent denials of relief to mere participants. A new test, avoiding the old terms, should have the effect of focusing subsequent court attention on the dominant "power" behind the scheme—the party more responsible for the resultant injury to the public.

The immediate problem under any test is the measure of damages. One existing rule holds that the true measure of damages in an antitrust action is the amount the plaintiff could have obtained in a legally competitive market and not the profits he had obtained while participating in the illegal agreement. A proposed rule bars recovery during the period of participation but allows it after withdrawal. The reasoning underlying these rules is the natural reluctance to grant plaintiffs any more than they could have obtained had they been competing on an equal basis with others in their field. The injury and, hence, the cause of action, is that the defendant's conduct has harmed plaintiff by denying him a free and competitive market, and not that plaintiff has failed to secure the exorbitant profit the illegal scheme was designed to return.

Always somewhat speculative, the calculation of damages would be further complicated if the courts were required to measure multiple clauses in an agreement, decide which are legal and which are not, and then determine which party is responsible for each. The Court's opinion in Perma Life touches lightly on this problem by mentioning that beneficial by-products of the agreement may be considered in computing damages, but two concurring opinions dwell on the possible ramifications. Justice Fortas would deny recovery based on any clause that was inserted into the agreement at plaintiff's insistence or for his

benefit. The trier of fact would have to look at who formulated the scheme, who will benefit from the particular provision, who suggested its inclusion, and which of the parties had the stronger bargaining position. Justice Fortas does not specifically say that any gains from beneficial clauses must be subtracted from losses resulting from detrimental clauses, but such a result should be implicit in any “offset” theory. To ignore the beneficial aspects of plaintiff’s agreement totally would tend to overburden defendants and create large windfalls for plaintiffs.

Justice Marshall felt that an offset approach would overburden the courts with complicated factual evaluations, and is inferior to an approach based on the parties’ respective fault—namely a proper application of in pari delicto. Thus, he would use a moral test to deny any recovery if the parties had formulated the agreement through the barter of favorable clauses, regardless of the resultant economic balance.

It appears that both Justices Fortas and Marshall ignore the central issue of antitrust damages: what did plaintiff get compared to what he would have received in an open, competitive market? The Fortas test is concerned with what plaintiff received relative to what he gave away, and Justice Marshall is influenced by the notion that the “wrongdoer shall not benefit from his own wrongdoing.” Although Justice White does not specifically focus on the problem of damages, his causation test would perhaps be most effective in that area. To insure compliance with the aims and objectives of the antitrust acts, plaintiff would recover for all injuries—measured in relation to the free competitive market—caused by defendant. Such a test would be applied by awarding plaintiff the difference between the amount he actually received and that which he would have received in a free, competitive market. Clauses of the agreement beneficial to plaintiff would not have to be specifically evaluated since their effects would be included in the amount plaintiff had already received under the agreement. Thus, in a sense, the court would be “offsetting” the beneficial aspects of the agreement. The clauses would have to be specifically evaluated only in the event of a suit by third parties, in order to determine which party to the agreement was responsible for the harmful results.

63. If it could be shown that the two parties participated in the formulation of the entire agreement, trading off anticompetitive restraints on their own freedom of action . . . for anticompetitive restraints intended for their benefit . . . ., petitioners should be barred from seeking damages as to the agreement as a whole.

392 U.S. 134, 150 (1968) (concurring opinion).
Perma Life should do much to clear up the confusion that has surrounded the defense of in pari delicto in the antitrust context. The rejection of the doctrine by name will serve to focus attention away from the historical equity concept of the defense and towards the public nature of the treble damage action. The lower courts should now be free to concentrate their efforts on formulating a test to determine at what point the public interest would no longer be served by allowing the plaintiff to recover.

The most efficient replacement test appears to be that advocated by Justice White—causation. This would have the practical advantage of combining the two phases of the action—should plaintiff recover, and if so, how much—into one question. If defendant can be shown to have caused plaintiff's injury, he pays only the amount attributable to his acts, leaving third parties and the Government to offset any windfalls that might accrue to plaintiff. In the absence of causation—as where plaintiff had sufficient bargaining power to have obtained the benefits of the scheme legally and thus freely chose the illegal aspects—the suit would be dismissed.

Criminal Procedure: Selecting Jury to Determine Capital Punishment

In 1960 petitioner was convicted of murder and the jury assessed the death penalty. Pursuant to an Illinois statute allowing jurors to be challenged for cause if they have conscientious scruples against, or are otherwise opposed to capital punishment, the prosecutor successfully challenged 47 veniremen. Of the 47, 39 were excluded without any effort to determine whether their feelings would invariably compel them to vote against capital punishment. On appeal to the United States Supreme Court petitioner asserted that a jury so selected did not represent a cross section of the community and must necessarily be biased in favor of conviction. Petitioner cited studies which concluded that juries so selected are partial to the prosecution on the issue of guilt. The Court rejected this contention stating that it could not conclude from the record or by judicial notice that a jury so selected was more likely to return a verdict of guilty. However, the Court held that the

3. Id. at 517-18.
challenges for cause for conscientious scruples against capital punishment had rendered the jury unrepresentative for a determination of punishment and therefore petitioner was deprived of the trial by jury guaranteed him under the sixth and fourteenth amendments. Witherspoon v. Illinois, 391 U.S. 510 (1968).4

Jury selection usually begins when names of persons qualified to serve as jurors are compiled in accordance with appropriate statutes.5 From these names, the venire is selected at random. Such selectees are then questioned at an examination called voir dire to determine their qualifications to hear a particular case.6 Some veniremen are excused by challenges:7 Peremptory challenges, although limited in number, will excuse a venireman without cause; challenges for cause, unlimited in number, require the showing of a legally sufficient reason. Juror opposition to capital punishment has traditionally constituted sufficient cause for challenge. This challenge was used in early cases where capital punishment was mandatory,8 ostensibly to exclude jurors who were so opposed to capital punishment that they would never return a guilty verdict when that sanction was inevitable.9 Although the mandatory death sentence has been largely replaced by statutes allowing the jury to choose between life imprisonment or the death penalty, the challenge for cause has continued, producing what is referred to as a death-qualified jury.10

Jury selection for criminal trials in federal and state courts is limited by the sixth and fourteenth amendments.11

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6. See, e.g., id. at §§ 8, 12.

7. See, e.g., id. at § 14.

8. See, e.g., Gates v. Illinois, 14 Ill. 433 (1853).

9. In United States v. Hewson, 26 F. Cas. 303 (C.C.D.C. 1844), Circuit Justice Story noted that the challenge for cause for conscientious scruples as to a verdict of guilty in a capital case had been the practice in that court for the last 25 years, “ever since the escape of two of the most atrocious men . . . in Rhode Island, through the scruples of two jurymen.”


11. Prior to Duncan v. Louisiana, 391 U.S. 145 (1968), which was decided two weeks before Witherspoon, there was no United States constitutional guaranty to a jury trial in criminal cases in state courts. See Turner v. Louisiana, 379 U.S. 466, 471 (1965). However, Duncan held:

Because we believe that trial by jury in criminal cases is fun-
stitution has been said to require the jury to be a "body truly representative of the community," and not the organ of any special group or class because "[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."

Although the United States Supreme Court, prior to the instant case, had never specifically addressed itself to the constitutional limits on challenges for juror attitude toward capital punishment, at least two Supreme Court cases have touched on the issue. In Logan v. United States, a federal trial for conspiracy and murder, the federal statute provided that a defendant would be tried for felonies committed in the course of a conspiracy according to the law of the state—here Texas—where the offense was committed. Texas law allowed the jury to choose between the death penalty and life imprisonment. At voir dire jurors admitting to conscientious scruples against capital punishment were excused. On appeal, the Supreme Court stated, by way of dictum: "A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused . . . is not an impartial juror."

Significantly, the Court adopted the reasoning of earlier decisions where capital punishment was mandatory without inquiring whether a statute allowing the jury to choose between the life or death sentence required such a challenge. Stroud v. United States involved the propriety of overruling a challenge for cause in the case of a juror who "made it reasonably certain" he would vote for nothing but capital punishment in

damental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.

See also 53 Minn. L. Rev. 414 (1968).

14. 144 U.S. 263 (1892).
15. Id. at 264 n.1.
16. Id. at 264-65 n.1.
17. Id. at 298.
19. In United States v. Puff, 211 F.2d 171 (2d Cir.), cert. denied, 347 U.S. 963 (1954), the court rejected the argument that change from a statute requiring mandatory capital punishment, to a statute where it was optional, impliedly repealed the disqualification of jurors for conscientious scruples against capital punishment. See also Annot., 48 A.L.R. 2d 560 (1955).
20. 251 U.S. 380 (1920).
case of a first degree murder conviction. The Court held that the challenge should have been sustained but that failure to do so was not a prejudicial error because here the juror was excused by peremptory challenge.

The composite of Logan and Stroud suggests that persons irrevocably committed to either form of punishment may be properly challenged for cause. However, neither decision addressed itself to jurors between these extremes or to whether these criteria necessarily apply to both guilt and punishment determination.

As stated above, the Witherspoon Court rejected the defendant's argument that a death-qualified jury would be conviction prone; the Court simply held that there was insufficient support for such a contention. This same argument was made and rejected in the California case of People v. Ray, a case involving the bifurcated trial system where guilt and punishment in capital trials are determined at separate hearings. Because of the bifurcated trial system the Ray case arguably provided a more favorable climate in which to make such an argument; the guilt issue alone could have been decided by a nondeath-qualified jury. In spite of expert testimony in support, the appeals court affirmed the denial of the separate jury motion; it reasoned that if the guilt determining jury knows that the offense may be punished by death, persons on that jury who have conscientious scruples against capital punishment might vote for acquittal, even though they would not select the punishment.

In Witherspoon the Court reasoned that the jury has two distinct responsibilities: determination of guilt or innocence and determination of punishment. Although the Court concluded that petitioner had not shown the jury biased with respect to the guilt issue, "it [was] self-evident that, in its role as arbiter of the punishment" the jury had fallen short of the "impartiality to which petitioner was entitled under the Sixth and Fourteenth Amendments." The Court distinguished between the duty of a juror and the duty of the jury. While each juror in a death-qualified jury could make the discretionary judgment and thereby obey his oath, it is not possible for the death-qualified jury, as an entity, to speak for the community if it is composed only of members who hold the viewpoint of a

21. Id. at 381.
"dwindling minority"\textsuperscript{25} as to punishment. In this fully retroactive decision, the Court stated that a death sentence is not valid if imposed by a jury chosen by excluding for cause those with general objections to the death penalty, or those with conscientious or religious scruples against its use.\textsuperscript{26} Specifically, veniremen cannot be excluded for cause because there are some cases in which they would refuse to recommend capital punishment. Nor can a prospective juror be expected to say in advance of the trial whether he would vote for the death penalty in the case before him. The most that can be demanded is that a venireman be willing to consider all of the penalties provided, and that he not be irrevocably committed before trial to vote against the death penalty.\textsuperscript{27}

Capital punishment or life imprisonment is generally assessed without statutory or constitutional standards\textsuperscript{28} allowing for a variance in sanctions from defendant to defendant. In the absence of any standards, such variances are not subject to judicial review.\textsuperscript{29} The lack of standards is, of course, understandable, as the community split on punishment preference\textsuperscript{30} renders legislative action difficult. However, the lack of such substantive standards can result in like defendants being pun-

\begin{enumerate}
\item \textsuperscript{25} Id. at 520 n.16, citing 2 Polls, International Review on Public Opinion No. 3, at 84 (1967):
\begin{quote}
It appears that, in 1966, approximately 42\% of the American public favored capital punishment for convicted murderers, while 47\% opposed it and 11\% were undecided. . . . In 1960 [year of petitioner's trial], the comparable figures were 51\% in favor, 38\% opposed, and 13\% undecided.
\end{quote}
\item \textsuperscript{26} 391 U.S. at 522-23.
\item \textsuperscript{27} Id. at 522 n.21.
\item \textsuperscript{28} In Williams v. New York, 337 U.S. 241, 252 (1949), the Court approved substitution of the death penalty by the trial judge over a jury recommendation of life imprisonment, noting that "... no federal constitutional objection would have been possible . . . if the judge had sentenced him to death giving no reason at all."
\item \textsuperscript{29} In In re Jackson, 37 U.S.L.W. 2288 (Cal. Sup. Ct. Nov. 18, 1968), the California Supreme Court, with three dissenters, rejected the contention that the imposition of the death penalty without clear standards constituted cruel and unusual punishment. Further, the court determined that the fact that the sentencing jury has absolute discretion to impose the death penalty does not constitute denial of due process or equal protection of the law.
\item \textsuperscript{30} Between the first national poll on capital punishment in April, 1936, and the most recent one in July, 1966, public approval of the death penalty has dwindled from 62 percent to 38 percent, while abolition sentiment has increased from 33 percent to 47 percent.
\end{enumerate}

ished in an unlike manner, an objectionable result which Witherspoon does not alleviate.

While Witherspoon does not prescribe general substantive punishment selection standards, it does impose standards for the selection of the jury that determines capital punishment. Notwithstanding that most states do accord a jury determination of capital punishment, the rationale for these standards seems somewhat vulnerable since there is no explicit federal constitutional requirement that they do so.\textsuperscript{31} Thus the Constitution demands standards for a procedure it does not guaranty. Similarly, in Turner v. Louisiana\textsuperscript{32} the Court recognized that there was no federal right to a jury trial, but held that if a jury trial is accorded by the state it must meet due process standards.\textsuperscript{33}

While the Court's basic criterion for jury selection appears to be representativeness, it does not require that a jury in fact be representative in order to assess the death penalty. Rather, the Court specified that a jury cannot assess the death penalty if it is selected in a manner which would tend to destroy representativeness. This criterion is limited to allowing challenges against persons who would never vote for capital punishment.\textsuperscript{34} The advantage of this limitation is the reduced likelihood of an irreconcilable conflict among jurors which would inevitably preclude jury unanimity. Justice White suggested in dissent that the states could circumvent Witherspoon by allowing the death penalty to be imposed by a less than unanimous verdict on the sentence issue.\textsuperscript{35} Because there is no explicit federal guaranty that capital punishment be determined by a jury, a state could presumably remove that issue from it. However, if states allow the death penalty on a less than unanimous jury there is still the possibility the Constitution might require unanimity even in the absence of an explicit guaranty that capital punishment be a jury determination.\textsuperscript{36}

After the instant case, erroneous exclusion of a number of

\textsuperscript{31} Duncan v. Louisiana, 391 U.S. 145 (1968), which holds that a jury trial is guarantied under some circumstances, does not explicitly guaranty the right to have punishment determined by a jury.
\textsuperscript{32} 379 U.S. 466 (1965).
\textsuperscript{33} Id. at 471. More recently it has been held that the Constitution does in fact guaranty a jury trial in state criminal trials. Duncan v. Louisiana, 391 U.S. 145 (1968).
\textsuperscript{34} 391 U.S. at 522 n.21.
\textsuperscript{35} Id. at 542 n.2.
\textsuperscript{36} A unanimous jury verdict is required in sixth amendment federal trials for imposition of the death penalty. Andres v. United States, 333 U.S. 740, 748 (1948).
prospective jurors will render a death sentence unconstitutional; but what should the result be when only one or two jurors are challenged erroneously, or on a questionable basis? State v. Mathis,\(^{37}\) decided after and in consideration of the instant case, states that:

erroneous exclusion of a single juror... must [not] call for a reversal. Rather the question is whether the totality of the trial court's treatment of the subject operated to deprive the defendant of an opportunity for a jury of a representative quality.\(^{38}\)

The Mathis position seems reasonable since representation of those opposed to capital punishment—a group involving a substantial portion of the population—could not be destroyed by a single error. Moreover, it would allow the court greater latitude in questioning prospective jurors, a significant factor in view of the occasional necessity of rephrasing a question to be sure that it is understood by the juror.\(^{39}\)

In dissent Justice Black asserted, "If this Court is to hold capital punishment unconstitutional, I think it should do so forthrightly, not by making it impossible for States to get juries that will enforce the death penalty."\(^{40}\) In comparison with the substantive content of the challenge for cause in earlier decisions, Witherspoon hardly marks the giant stride denounced by Justice Black. In People v. Bandhauer,\(^{41}\) the California Supreme Court, per Justice Traynor, suggested a standard similar to Witherspoon allowing doubt about capital punishment providing the juror conscientiously believes that he could return a death penalty verdict in the proper case.\(^{42}\) The Supreme Court of Arizona in State v. Narten\(^{43}\) noted that mere opposition to capital punishment is not cause for challenge. While the substantive content of the challenge permitted under Witherspoon does not differ vastly from these decisions, it will restrict challenge criteria in some cases.\(^{44}\)


\(^{38}\) Id. at ___, 245 A.2d at 27.


\(^{40}\) 391 U.S. at 532. For over 70 years, from 1894 to 1965 when capital punishment was legislatively abolished, Iowa was without death qualification of capital juries; nevertheless 39 executions took place. Bedau, supra note 30, at 212.

\(^{41}\) 66 Cal. 2d 524, 426 P.2d 900, 58 Cal. Rptr. 332 (1967).

\(^{42}\) Id. at 531, 426 P.2d at 905, 58 Cal. Rptr. at 337.


\(^{44}\) See, e.g., Turberville v. United States, 303 F.2d 411, 418 (D.C. Cir. 1962) (jurors dismissed for opposition to capital punishment without
In contrast with earlier attacks on the capacity of a death-qualified jury to decide the issue of guilt or innocence, the instant case rests on the capacity of such a jury to decide punishment properly. With respect to future trials this holding will have substantially the same effect as a holding on the guilt ground. This results from the fact that generally the same jury decides both issues at a single hearing, hence a prohibition of a death-qualified jury on the penalty issue renders moot the theory that such juries are conviction prone. The choice of this decisional ground in Witherspoon bears directly on its full retroactivity. Treating this issue, the Court reasoned that jury selection procedures in the instant case undermined "the very integrity of the . . . process." It appears that at the time Witherspoon was argued, about four hundred prisoners were under sentence of death, all of whom will be affected by the full retroactivity. While judicial reconsideration of these cases will be no small effort, it will be considerably less than that required had the decision rested on the ground that a death-qualified jury could not properly decide the issue of guilt. Under Witherspoon, defendants tried for a capital offense by a death-qualified jury, but not sentenced to capital punishment, will not be affected.

Witherspoon can be viewed as a threshold case applying federal constitutional standards in the area of punishment determination. A defendant's punishment in a capital case will be determined by a jury selected pursuant to procedures with constitutional safeguards. Yet, juries will still determine punish-

45. Numerous authorities have asserted that people who believe in capital punishment are more likely to be prosecution-prone on the issues of guilt and penalty: F. Goldberg, ATTITUDE TOWARD CAPITAL PUNISHMENT AND BEHAVIOR AS A JUROR IN SIMULATED CAPITAL CASES (portions reproduced in Petitioner's Brief, app. 66-68); W. Wilson, BELIEF IN CAPITAL PUNISHMENT AND JURY PERFORMANCE (portions reproduced in Petitioner's Brief, app. 60-66); Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545 (1961). But see, Osser and Bernstein, Death Oriented Jury Shall Live, 1 U. San Fern. Val. L. Rev. 210 (1968).

46. 391 U.S. at 523 n.22.

47. NATIONAL PRISONER STATISTICS, EXECUTIONS, 1966, Figure D., at 4 (reproduced in Reply Brief of Amici Curiae, American Friends Service Committee, et al., at 6). Bedau, supra, note 30, at 223 n.93: "A group called 'Californians Against Legal Murder' reports in its newsletter (May 1968) that a total of 472 persons are currently under sentence of death in the United States."

48. See note 29 supra.
ment without the benefit of any substantive standards. In the future, assessment of capital punishment without the use of such standards by either a judge or a jury may also become subject to constitutional challenge.

Evidence: Hearsay Exception in Civil Action Against State for Testimony by State Witness in Prior Criminal Action

Plaintiff was accosted by a trio of teenage boys, one of whom shot him in the head, causing total blindness. The youth who fired the shot was a parolee who had not been expeditiously arrested after a prior violation of his parole conditions. Plaintiff brought suit against the State of New York for negligence in dealing with an incorrigible. The boy testified for the state at the criminal trial of his two companions as to the identity of the assault weapon and how he had obtained it. Later the youth was sent to a reformatory where he was murdered before plaintiff commenced the present action. The parolee's testimony at the prior criminal trial was admitted over a hearsay objection and recovery was granted. Wasserstein v. New York, 56 Misc. 2d 225, 288 N.Y.S.2d 274 (Ct. Cl. 1968).

Many different definitions of the hearsay rule have been advanced. Perhaps the broadest states that testimony, oral or

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1. N.Y. JUDICIARY LAW § 8 (McKinney 1963):
The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

Section 9 provides that “[T]he court shall have jurisdiction: . . . (2) To hear and determine a claim of any person . . . against the state . . . for the torts of its . . . employees while acting as such . . . .”

2. An interesting question raised by the case but not discussed in this Comment is the court's view of proximate cause. Only three days elapsed between the youth's parole violation and his arrest. In the interim he caused the injury to plaintiff. The court does not explain its view that three days is an unreasonably long delay, or attempt to show that the state had the opportunity to act sooner.

written, can not be admitted if its credibility depends upon some person other than the testifying witness.\textsuperscript{5} While many reasons have been advanced in support of the rule,\textsuperscript{6} its basic purpose is to protect the party against whom the hearsay is offered;\textsuperscript{7} this is done by shielding him from statements of persons, not subject to cross-examination,\textsuperscript{8} whose demeanor cannot be observed by the trier of fact.\textsuperscript{9}

The right of cross-examination is basic to the adversary system, which is founded on the notion that only through the presentation of both sides can truth be uncovered.\textsuperscript{10} The adversary system presumes that direct examination alone does not produce all the facts within a witness' knowledge.\textsuperscript{11} More important, however, cross-examination serves the function of casting doubt on the credibility of a person's testimony.\textsuperscript{12} Thus, cross-examination


6. See, e.g., Donnelly v. United States, 228 U.S. 243 (1913) (no opportunity to observe demeanor); Rossville Salvage Corp. v. S.E. Graham Co., 319 F.2d 391 (3d Cir. 1963) (witness not under oath and not subject to cross-examination); NLRB v. Imparato Stevedoring Corp., 250 F.2d 297 (3d Cir. 1957) (testimony not subject to cross-examination); United States v. National Homes Corp., 196 F. Supp. 370 (N.D. Ind. 1961) (party against whom statement is made has no opportunity to confront the person making it); Miami v. Fletcher, 167 So. 2d 638 (Fla. Dist. Ct. App. 1961) (prevents unreliable testimony). See also Wheaton, supra note 5. The validity of a number of these reasons has been questioned. See 5 J. WIGMORE, supra note 3, at § 1363.


12. Traditionally, there have been six main lines of attack on the credibility of a witness by means of cross-examination. They are: (1) proof that the witness has made prior statements inconsistent with his present testimony; (2) specific contradiction; (3) proof that the witness is biased by reason of emotional influences or pecuniary reasons;
nation is considered essential whether or not the evidence in question is hearsay. The lack of opportunity to discover additional qualifying testimony and to cast doubt on the speaker's reliability increases the danger of admitting half-truths or outright lies into evidence.

The hearsay rule, however, has become riddled with exceptions, and some suggestion has been made that it is of little value as it exists today. Underlying most of the exceptions are two factors: the necessity of using the evidence in hearsay form and its reliability. To fulfill the requirement of reliability, the courts usually insist that something in the evidence act as a substitute for cross-examination. For example, official reports compiled in the line of duty and open to public scrutiny have been admitted by some courts on the theory that public officials are presumed to take their responsibilities seriously and the availability of public evaluation is equivalent to cross-examination.

The courts have consistently held that records of other judicial proceedings are inadmissible hearsay unless they fall within an exception to the rule. While it is true that a prior judg-

(4) attack on the character of the witness; (5) proof of a defect in the witness' sensory or mental capacity; and (6) proof of a lack of religious belief, which casts doubt on the effect of the oath. This last ground no longer carries weight. See C. McCormick, Cases On Evidence 72 (3d ed. 1956).


18. E.g., In re Estate of Monticelli, 107 Cal. App. 2d 90, 236 P.2d 661 (1951) (statements of family history by family member viewed as trustworthy); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945) (statements against own interest not likely to be false); People v. Kraft, 148 N.Y. 631, 43 N.E. 80 (1896) (solemnity of dying declaration).


20. See 5 J. Wigmore, supra note 3, at § 1388.
ment between the same parties on the same issues has a res
judicata effect. The situation is obviously different when the
parties change. Accordingly, the courts have held that before
prior testimony can be admitted under an exception to the hear-
say rule, there must be an identity of parties and issues. In
addition, as with other exceptions to the rule, prior testimony
will not be allowed into evidence unless a showing of necessity
can be made.

The cases in this area have followed two lines of authority.
The minority rule, as expressed in McInturff v. Insurance Com-
pany of North America, is that the parties must remain exactly
the same. The court felt that to hold otherwise would expand
the principle to a dangerous extreme and result in consequences
which the court could not sanction. The majority rule, on the
other hand, does not require a precise identity of parties, but only
that the party against whom the evidence is used was also the
party against whom it was used at the earlier trial. The rea-
soning behind this approach is that as long as the issues remain
substantially the same, the party will have had meaningful
opportunity to cross-examine at the earlier trial, and his interests
will have been protected.

21. The Minnesota rule as stated in Lustik v. Rankila, 269 Minn.
515, 131 N.W.2d 741 (1964), is different. That case held that a stranger to
the first action can invoke the doctrine of estoppel by verdict against an
adversary who appears in identical capacities in both suits. Conse-
quently, it would be illogical to require that the prior testimony ex-
ception in Minnesota should have stricter mutuality of parties require-
ments than estoppel by verdict.

22. See C. McCormick, supra note 5, at § 295:
The judgments of the courts determining issues of fact, though
they are in some sense the reports of the findings of official
investigations, have not been received as a general practice as
evidence in other suits of the facts so found. Their use in
court has been guided by a different principle, that of res judi-
cata, and in consequence the findings are received only where
the parties to the earlier suit are the same as in the present, or
where the present parties are claiming under them. . . .
2d 740 (1942); Feldstein v. Harrington, 4 Wis. 2d 380, 90 N.W.2d 566
(1958).

24. 248 Ill. 92, 93 N.E. 369 (1910).
25. Id. at 98, 93 N.E. at 371:

. . . in an action against a carrier by a passenger for a personal
injury the testimony of a witness since deceased would be ad-
missible against the same carrier for an injury sustained in the
same accident by another passenger, . . . simply because the
carrier against whom the testimony was offered had on the
former trial an opportunity to cross-examine the witness.

2d 740 (1942); State v. Logan, 344 Mo. 351, 126 S.W.2d 256 (1939).
In the Wasserstein case, the court allowed into evidence portions of the trial transcript from the criminal trial of the parolee's two associates. At that trial, the parolee had testified as to ownership of the assault weapon and how he had obtained possession of it. The court based its decision to admit the record of this testimony on what it felt was the liberal policy behind the prior testimony exception to the hearsay rule as expressed by the New York legislature. The statute states:

... if a witness' testimony is not available because of ... death, ... his testimony ... may be introduced in evidence by any party upon any trial of the same subject-matter in ... another action between the same parties or their representatives...  

While the parties in the second action changed, the court equated the interests of the parolee at the earlier criminal trial to the state's interest in the later civil action brought by Wasserstein.

The judge pointed out that both cases were concerned with the same act and that the parolee was represented by counsel and was afforded the right to cross-examine. In addition, the Wasserstein court recognized that strict application of the hearsay rule is breaking down, and that disallowance of the prior testimony would only hamper the search for truth. The court professed to follow a trend expressed in Fleury v. Edwards that exceptions to the hearsay rule are being expanded in scope to meet the needs of modern litigation. The judge in Wasserstein felt this policy should be continued, and that a reasonable interpretation of the prior testimony exception justified admission of the parolee's former statements.

In reaching this conclusion, the Wasserstein court loosely applied the requirements of the exception. In enacting the statute, the legislature felt that to forbid the use of such prior testimony would seriously endanger the administration of justice in

28. The court would have a better argument if it equated the interest of the defendants at the criminal trial and the state in the civil action, for it is not at all clear why the interest of the parolee, who was not on trial, was similar to that of the state at the second trial.
30. Id. at 226, 277.
32. Id. at 341, 200 N.E.2d at 554, 251 N.Y.S.2d at 653.

The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation. Exceptions to the hearsay rules are being broadened and created where necessary. Absent some strong public policy or a clear act of pre-emption by the Legis-
certain cases. While almost no one would argue with the policy expressed by the legislature and Fluery v. Edwards, the Wasserstein court may have extended the exception far beyond its intended scope by losing sight of the requirements established by the statute.

The statute appears to be a codification of the common law prior testimony exception, and seems to require the strict identity of parties necessary under the minority rule. This identity was not present in Wasserstein. Although the plaintiff was in no way a party to the earlier criminal trial, the court believed his interest was identical to that of the state at the earlier trial. The state, although a party to the first action, found itself in an entirely different role in the present case. In the criminal trial the state was prosecutor, and as such, its task was quite different from that of defendant in the later civil suit. The court relied on the fact that the parolee in the earlier action was represented by counsel and was afforded a right to cross-examine. Apparently, the court believed the state's interest in the Wasserstein case was identical to the parolee's interest in the criminal action. Thus, the court must have thought that the parolee's counsel represented the state's interest at the earlier trial.

By straining to find a correlation of interests, the court ignored a better reason for admitting the testimony—that it was originally offered by the state, which in a sense vouched for its reliability. If the state, as the introducing party, had any qualms about the credibility of the testimony, it could have chosen not to introduce it. Thus, the state, in the later civil action, should not be allowed to complain that it did not have an opportunity to cross-examine the witness.

By adopting a correlation-of-interests test, the Wasserstein court created an unnecessary and indefinite rationale for admitting prior testimony. It effectively eliminated the prior testimony exception's identity-of-parties requirement, opening the way for admitting prior testimony against a party who neither

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33. See J. Weinstein, H. Korn, & A. Miller, New York Civil Practice § 4517.24 (1965) [hereinafter cited as Weinstein].
34. Id. ¶ 4517.12.
36. The only instance in which it could not be said that the state had vouched for the reliability of the testimony would be where the witness changed his story on the stand, and in such a case the state could claim surprise and cross-examine its own witness. See People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916).
introduced nor had an opportunity to cross-examine the testimony at the earlier proceeding. Suppose, for example, that the state had sought to introduce against Wasserstein certain damaging testimony which had been offered by the defendants in the earlier criminal proceeding. As long as the witness is unavailable, it seems that the testimony would be admissible if one accepts the court's rationale. The state's interest at the criminal proceeding was to prove that the defendants had assaulted and robbed Wasserstein, and Wasserstein's interest in the civil action was to prove that the delinquent parolee and the defendants assaulted and robbed him. Thus, it seems that the Wasserstein court would hold that the interests of the state and Wasserstein were sufficiently similar to support a finding that the state's cross-examination at the earlier criminal action had protected Wasserstein's interests. It should be noted that the better reason for the result of the case at bar would not apply to many logical extensions of the court's rationale.

By stretching an intelligently liberal doctrine, the Wasserstein court lost sight of the intention of the hearsay rule. As expressed above, the primary reasons for excluding hearsay testimony are its immunity from cross-examination and its consequent lack of reliability. Even the common law's prior testimony exception recognized as essential the right to a prior cross-examination. This should not mean cross-examination by some third party at an earlier trial, but by the person against whom the testimony is being offered.

Although strict application of the hearsay rule is often unjust, and the flexible policy expressed in Fluery is desirable, the rule is not without merit. While some would abolish the rule completely, the New York legislature felt it desirable to lib-

38. Atwood v. Atwood, 86 Conn. 579, 86 A. 29 (1913).
40. See WEINSTEIN at ¶ 4517.28:
Prior testimony given without opportunity to cross-examine is not made admissible by CPLR 4517, since "the examination of a witness consists not alone of the direct, but also of the cross, and a party cannot be deprived of the right to cross-examine his adversary's witness.
41. See Smith, supra note 15, at 235:
Any rule, I submit, requiring thirty-two exceptions to explain its operation is not a rule at all but a nonexistent Eudoxian universe. The idea behind the hearsay rule is valid enough, and
eralize it by placing more discretion in the courts to admit hearsay of probative value. The statute sought to change the rule from an absolute to a flexible one whose boundaries were to be sketched according to already existing exceptions.

The confusion evidenced by *Wasserstein* underscores the need for clarification of the rule and its exceptions. The courts should concentrate more on adherence to the policy behind the rule than on its strict application. If the hearsay does not really prejudice one side's right to cross-examination, if it is reasonably reliable and if a necessity for using the testimony in that form exists, then there is little reason why it should be excluded. If these characteristics are absent, then admission of hearsay violates the fundamental tenets of our judicial system.

Free Press: Newspaper Discretion to Refuse Advertising in Monopoly Situation

The only daily newspaper in town refused to accept the advertisements of a theater which showed "adult" motion pictures. The theater owner, contending compliance with the law and all reasonable rules of the newspaper as to the character of its advertising, sought damages and an order compelling publication of his ads. Defendant newspaper's motion for summary judgment was granted by the trial court and upheld by the Michigan Court of Appeals. In affirming, the Michigan Supreme Court, one Justice dissenting, held that the business of publishing a newspaper is a strictly private enterprise and the publisher thereof is under no legal obligation to sell advertising.

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1. See *Weinstein* at ¶ 4517.23:
   Much wider discretion should be vouchsafed the court to admit hearsay of high and assessable probative force. Exercise of discretion rather than mechanical rules requires more thought and consideration of such factors as surprise, possible prejudice through over-estimation of... other evidence more easily assessed.

42. See also *Weinstein* at ¶ 4517.23:
   Excessively detailed exceptions of the present rule will become guidelines for the exercise of discretion. What is here suggested is not abolition of the hearsay rule but its conversion... from a rule of exclusion to one of discretion... . . .


It is well established that a person engaged in a private enterprise may refuse to deal with another without offering justification, unless the refusal is part of a concerted restraint of trade or in furtherance of an illegal monopoly. However, one engaged in a business commonly characterized as a public utility has a duty to serve without discrimination and on proper terms all who request his service.

At common law the businessmen considered to be engaged in public activity included operators of grist mills, proprietors of inns, wharfingers, and those engaged in common carriage, such as ferrymen and cabmen. Since then, American courts have permitted legislatures to add a wide variety of enterprises to this list of businesses obligated to serve without discrimination. The

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2. *Restatement of Torts* § 762 (1939):
One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm. . . .


6. For a discussion of some of the theories which have been advanced to explain the origins of the public utility concept, see F. Hall, *The Concept of a Business Affected with a Public Interest* 7-16 (1940) [hereinafter cited as Hall].

7. Among the businesses which have been placed in either the public utility or common carrier category are railroads, motor buses and trucks, telephone and telegraph systems, suppliers of gas, electricity, steam and water, warehouses, stockyards, grain elevators, and cotton gins. Hall at 17-55.

The terms "public utility" and "common carrier" refer to businesses which are invariably obligated to serve without discrimination. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 535 (1923). A business "affected with a public interest" is a broader term which includes public utilities and common carriers as well as businesses which might only be subjected to less extensive economic regulation such as licensing requirements and price controls. If a business affected with the public interest holds itself out to serve the public, then the courts might say it is operating as a public utility or common carrier. Hall, 101-03.

The reason for the extension of the number of enterprises considered public is that at one time it was thought that certain forms of legislative regulation could not be imposed on businesses unless that business was "affected with the public interest." E.g., Tyson & Bro.
most important factors considered by the courts in determining
the public nature of an enterprise include the degree of monopoly
in the industry, whether the industry holds itself out to serve
the public indiscriminately, the public necessity for the enter-
priose and whether the state has granted to the concern powers
of eminent domain or special use of roads. 8

If a business is neither declared a public utility by the legis-
lature, nor so classified at common law, there is some question
as to whether a court may declare the business public. Although
the general rule has precluded the courts from such declarations
in the absence of the legislative enactment, 9 American courts, on
their own initiative, have occasionally placed new businesses in
the public category. 10 The judicial rationale used to justify such
action is that a business does not become public because the
legislature has impressed the public interest upon it, but rather
because the very characteristics of the business render it in-
herently public. 11

However, only two cases have clearly held that courts may
take complete initiative in including enterprises in the public

v. Banton, 273 U.S. 418 (1927). However, the use of this concept as the
test of the constitutional validity of such legislation has been dis-
avowed by the Supreme Court and replaced with notions of due proc-
concept of a business “affected with the public interest” has lost most
of its original significance.

8. See Hall at 90-145 for an analysis of the weight which the
courts have given these and other factors.

cf. State ex rel. Star Publishing Co. v. Associated Press, 159 Mo. 410, 60
S.W. 91 (1901). The reason for the rule is that:

apart from the consideration that the extension and application
of even existing rules of law to subjects not heretofore within
their [the courts’] purview is legislative in its nature, the de-
termination by the courts as to the precise point at which a
mere private business reaches that stage of growth and expan-
sion which is sufficient to render it juris publici would be
surrounded with very great difficulties, and would present
questions for which the courts, unaided by legislation, would
be able to find no just or satisfactory criterion or test. But
when the legislature, acting upon a competent state of facts,
has interposed and declared the business to be juris publici, all
difficulty is removed.

American Live-stock Comm’n Co. v. Chicago Live-stock Exch., 143 Ill.
210, 238-39, 32 N.E. 274, 282 (1892).

10. Hall at 90; Y. Smith, N. Dowling & R. Hale, Cases on the
Law of Public Utilities 6 (1936).

33 (1909). It should be noted, however, that the rationale expressed by
this case predated Nebbia, which replaced inquiries into the abstract
character of the business when reviewing legislation with the test of
due process.
utility category. Other opinions often cited in support of the proposition are not conclusive as they appear influenced by such factors as the "spirit" of a legislative enactment, the existence of legislation which already extensively regulated the business, a charter provision in which the state had granted the business powers of eminent domain or the fact that the industry grew out of new technology and closely resembled the historic common carrier.

As for the newspaper industry, the courts generally have not interfered with the publisher's right to reject material which he does not wish to publish. Newspapers are not required to publish delinquent tax lists or other public proceedings. Similarly, newspapers may refuse publication of legal notices, regardless of motive, even though a statute requires publication in a particular town with only one newspaper. Statutes imposing a penalty on newspapers for refusal to accept certain advertisements have been held invalid as an impairment of the right to

12. New York & Chicago Grain & Stock Exch. v. Chicago Bd. of Trade, 127 Ill. 153, 19 N.E. 855 (1889); Uhlman v. Sherman, 22 Ohio N.P. (n.s.) 225, 31 Ohio Dec. 54 (1919). But cf. American Live-stock Comm'n Co. v. Chicago Live-stock Exch., 143 Ill. 210, 32 N.E. 274 (1892), in which the court held that the mere fact that the livestock market, which was owned by a private corporation, had become so large as to influence the commerce of a large section of the country, does not give the courts power to declare the market impressed with a public interest. The court said only the legislature had that power. Stock Exchange was distinguished on the ground that in that case the Board of Trade had for several years devoted its service to the public use and supplied market quotations to all members of the public who desired to obtain them and thereby caused the public to rely on the service.

13. Tallassee Oil & Fertilizer Co. v. Holloway, 200 Ala. 492, 76 So. 434 (1917) (imposition on a cotton gin of a duty to serve without discrimination held to be within the spirit of legislation prohibiting price discrimination between customers who sell and those who do not sell cotton to the ginner).  
15. Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N.E. 822 (1900); cf. State ex rel. Star Publishing Co. v. Associated Press, 159 Mo. 410, 60 S.W. 91 (1901) (obligation not imposed when business had no power of eminent domain).  
16. State ex rel. Webster v. Nebraska Tel. Co., 17 Neb. 126, 22 N.W. 237 (1885) (telephone company is a common carrier of news, the same as a telegraph company).  
contract. 20 With the exception of an Ohio lower court decision, 21 the argument that newspapers, in some respects, ought to be considered public has been uniformly rejected and courts have refused to impose liability for refusal to deal with certain advertisers. 22 Three reasons have been advanced in support of these decisions: First, the newspaper does not resemble other businesses which have been found to be public utilities; 23 second, the legislature, not the courts, is responsible for declaring a business a public utility; 24 and third, imposition of a duty to serve all advertisers violates the first amendment. 25

The Bloss court was content to rest its decision on the overwhelming weight of authority cited by the Michigan Court of Appeals, 26 without undertaking to re-examine the issues. Therefore, it is necessary to analyze Bloss in the context or reasons given elsewhere in support of the proposition that newspapers are not of a public nature, which would preclude their refusal of any advertising they choose, regardless of motive.

Because of the above discussed tendency to view the problem as merely placing a newspaper in its appropriate category, either private or public, the opinions fail to isolate those instances in which a newspaper's refusal to deal with advertisers has particular effect on the public interest and which might justify an application of the public utility theory to certain aspects of newspaper advertising. To ask whether the business is

23. See cases cited note 22 supra.
public or private, without evaluating the interests at stake, clearly begs the question.27

The public has a strong interest in preserving its access to information concerning competing goods and services. In the case of political advertising, a daily newspaper can be particularly crucial to the public, as well as the candidate.28 On the other hand, since this same power can be used to protect the consumer from misleading advertisements and harmful or inferior products, some rights to refusal perhaps should be preserved. Also, there is an interest in the quality and style of the advertising published.

It is common practice for newspaper publishers to exercise a degree of censorship over the types of products advertised and the content of the ads presented in order to shield the unwary consumer and protect the public health and morals.29 These censorship practices, usually based on the legitimate desire to maintain reader confidence in the reliability of its advertisers and in the reputation of the publication itself, often represent business judgments in addition to satisfying the newspaper's sense of social obligation. These above considerations suggest the difficulty in conclusively demonstrating that public interest demands categorizing newspaper advertising as a public utility.30

27. The concept that certain businesses are public has no significance in the abstract. Its only significance arises from the notion that the state has a special interest in controlling or regulating certain businesses and imposing upon them certain obligations.

HALL at 7.

28. According to one advertising executive:
Daily newspapers enjoy a unique advantage that enables them to usually receive more of the political advertising dollar than any other medium. This advantage is time. When money rolls in in large volume at the end of a campaign, when hysteria is at its height, there does not remain enough time to pick and choose among media. Television schedules are full. Radio stations can't squeeze in a desirable minute on already overloaded schedules. Billboard printing takes ten days and scheduling is done months in advance. Even the weekly newspapers must be serviced a week before runnings, and they come out on Thursdays. Elections are on Tuesdays, so this means about a two-week lag from preparation to pre-election publication. But the daily newspaper, the large metropolitan dailies, will run any amount of advertising as if it had been in their hands for weeks instead of hours. This accounts for the preponderance of final-week newspaper advertising.


29. For detailed examples of the censorship policies of several leading newspapers, see F. THAYER, LEGAL CONTROL OF THE PRESS 652-67 (1982).

30. But for an argument in support of a broad right of access to the press, see Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).
The second reason advanced for allowing newspaper refusal to undesired advertising is that the legislatures, not the courts, are responsible for declaring a business impressed with the public interest.\textsuperscript{31} In making this assertion, the judiciary fails to discuss those cases in which the courts appear to have imposed such an interest in the absence of legislation.\textsuperscript{32} Nevertheless, to allow the courts the initiative in the regulation of newspaper advertising would seem to allow a greater degree of judicial initiative than previously exercised.\textsuperscript{33} None of the mass media have historically been regarded as common carriers and here there are no special circumstances, such as extensive and related pre-existing legislative control of newspaper advertising policy, nor the granting of special state powers, such as eminent domain, to newspapers. Nor would this case seem to come under the rule that emerged from two old Illinois cases which appeared to permit judicial initiative in those circumstances in which the public has come to rely heavily on the service of the business in question.\textsuperscript{34} It is not sufficient that a business affects the public interest because of its control over a large market—it must affirmatively create and devote an interest to the public.\textsuperscript{35} Thus, only if the court in Bloss chose to ignore the factual circumstances of those cases in which courts have imposed a duty to serve, without express legislative authority, would there be precedent to support the imposition of such a duty on newspaper publishers.

Moreover, the justification for allowing judicial initiative in this case appears especially weak when one considers the reason for deferring such judgments to the legislature. Presumably the legislature is in a superior position to determine where the public interest lies and to fashion a regulatory scheme accordingly. The formulation of consistent standards for the implementation of a right of access beyond the prevention of the more arbitrary abuses of monopoly power would be quite difficult, especially in light of the case-by-case process.\textsuperscript{36}

However, the outline of these standards is perhaps not as difficult. In order to accommodate the reasonable economic, professional and social interests of the publisher as well as the in-

\begin{itemize}
\item \textsuperscript{31} See cases cited note 23 supra.
\item \textsuperscript{32} See notes 10-16 supra, and accompanying text.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} See note 12 supra, and accompanying text.
\item \textsuperscript{35} See note 12 supra.
\item \textsuperscript{36} See Commission on the Freedom of the Press, Government and Mass Communications 624-50 (1947).
\end{itemize}
terests of the consumer it has been recognized that, even under the public utility theory, publishers should be allowed to develop their own individual classification system.\textsuperscript{37} Under such a system they can reject advertisements for specific classes of products and retain the right to insist upon certain standards of truthfulness and taste. This system permits the publisher to exclude products which either he or his readers might consider socially undesirable, such as liquor, firearms or certain drugs, without upsetting the competitive balance among merchants of those products. However, finer distinctions might have to be drawn. As in the instant case, is it a reasonable classification to accept advertisements of movies in general but to decline ads for "adult" movies? It can be questioned whether, at this point, the courts are competent to make a decision without a clear conception of what the public desires.\textsuperscript{38}

The third reason advanced in support of allowing newspapers the right of refusal is that to do otherwise would violate the publisher's first amendment rights to choose the content of the publication.\textsuperscript{39} Since purely commercial advertisements have been held not to be within this freedom of choice,\textsuperscript{40} the first

\begin{itemize}
\item \textsuperscript{37} Uhlman v. Sherman, 22 Ohio N.P. (n.s.) 225, 234-35, 31 Ohio Dec. 54, 63-64 (1919), suggested a rough outline of the types of discrimination which might be permitted:

\begin{quote}
We do not intend to hold that a newspaper company may not reject some class or classes of advertising entirely, or that it may not use reasonable discretion in determining whether or not an advertisement presented is a proper one... We are of the opinion, however, that the rules should be reasonable and applicable to all persons in the same class.
\end{quote}

\item \textsuperscript{38} Arguably there is legislation presently existing which could be employed as a remedy by similarly situated plaintiffs. Section 5(a)(6) of the Federal Trade Commission Act empowers and directs the Commission "to prevent persons, partnerships or corporations... from using unfair methods of competition in commerce." 15 U.S.C. § 45(a)(6) (1964). This provision gives the Commission broad power to declare trade practices unfair, particularly those practices which conflict with the basic policies of the Sherman and Clayton Acts, even though these Acts are not actually violated. FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966). Thus in LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966), the court affirmed a finding of unfair practices when a lawful monopolist adopted price strategy which resulted in competitive injury to a class of customers. Though petitioner's motive may have been reasonable, this was considered irrelevant as long as the practice had an adverse effect on competition. Id. at 120-21. Since it is generally the monopolistic characteristic of a newspaper which gives rise to the injustice, perhaps the antitrust laws provide a more appropriate vehicle for approaching the problem.

\item \textsuperscript{39} See cases cited note 25 supra.

\item \textsuperscript{40} Valentine v. Chrestensen, 316 U.S. 52 (1942). The court in that case never made it clear why the distinction between commercial and noncommercial advertising should be drawn. For a discussion of this
amendment perhaps should not bar governmental regulation of a newspaper's commercial advertising. However, the distinction between commercial and noncommercial speech, which was not recognized in the decisions relied upon in Bloss, may not be applicable in this situation. If it were demonstrated that the ad was rejected because of the publisher's objection to the content of the movies shown by the theater, this motive would be non-commercial. Just as "editorial advertisements" published by a newspaper are within the publisher's freedom of choice, even though the newspaper is paid for printing the ad, so it would seem that the first amendment should also protect the publisher refusing to publish an ad for noncommercial reasons, even though the ad itself might be of a commercial nature. Obviously, the first amendment rights of the newspaper could prevent state regulation even in the event a public utility is found.

One writer has argued that Government limitations on the use of private economic power to deny access to the press

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41. The following excerpt from Shuck v. Carroll Daily Herald, 215 Iowa 1276, 1281, 247 N.W. 813, 815 (1933), which was quoted in Approved Personnel, Inc. v. Tribune Co., 177 So. 2d 704, 706 (Fla. 1965), and by the Michigan Court of Appeals, 5 Mich. App. 74, 80, 145 N.W.2d 800, 804 (1966), indicates that the courts did not see the distinction:

If a newspaper were required to accept an advertisement, it could be compelled to publish a news item. If some good lady gave a tea, and submitted to the newspaper a proper account of the tea, and the editor of the newspaper, believing that it had no news value, refused to publish it, she, it seems to us, would have as much right to compel the newspaper to publish the account as would a person engaged in business to compel a newspaper to publish an advertisement of the business that person is conducting.


43. One might even argue on the basis of Sullivan, that movie advertisements should be considered noncommercial speech since the movies sought to be advertised might contain some ideas of social significance. If the reason for the rule in that case was that:

any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press,

Id. at 266, it should perhaps make no difference whether the idea is expressed in the advertisement itself or announces the time and place where the idea might be heard.
would promote a wider dissemination of ideas and would thus be consistent with the central purpose of the first amendment.\textsuperscript{44} Though much dicta can be found to support this proposition,\textsuperscript{45} there are no cases which so hold.

While it is generally true that Government controls over the content of the press are inconsistent with the first amendment,\textsuperscript{46} the broadcasting industry has been subjected to a number of controls imposed by the Federal Communications Commission. The requirement that a licensee tailor his programming to the needs of the local community has been held not to constitute censorship.\textsuperscript{47} The FCC's "fairness doctrine" which goes beyond general programming regulation, imposes a duty on broadcasters to make a reasonable effort to present opposing viewpoints on controversial issues.\textsuperscript{48} In \textit{Red Lion Broadcasting Company v. FCC}\textsuperscript{49} the constitutionality of the fairness doctrine was upheld against the claim that that part of the doctrine which requires broadcasters to provide opportunity for a reply to personal attacks violated the first amendment. Since \textit{Red Lion}, the Seventh Circuit has held that the FCC's formalized personal attack rules\textsuperscript{50} violate the first amendment.\textsuperscript{51} Though the court did not rule on the fairness doctrine itself, \textit{Red Lion} was here criticized. However, more recently, the most radical extension of the fairness doctrine—an FCC ruling requiring radio and television

\textsuperscript{44} Barron, supra note 30.

\textsuperscript{45} \textit{E.g.}, from the opinion of Justice Black in \textit{Associated Press v. United States}, 326 U.S. 1 (1945), which upheld an antitrust conviction against Associated Press for attempting to exclude competitors from membership and access to the AP wire service:

[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. ... Freedom to publish is guaranteed by the constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

\textit{Id.} at 20.

\textsuperscript{46} \textit{E.g.}, \textit{Near v. Minnesota}, 283 U.S. 697 (1931).


\textsuperscript{49} \textit{381 F.2d} 805 (D.C. Cir.), \textit{cert. granted}, 399 U.S. 968 (1967).

\textsuperscript{50} \textit{See Fairness Doctrine Rules}, 10 P&F Radio Reg. 2d 1901 (1967) for the codification of the personal attack rules.

\textsuperscript{51} \textit{Radio Television News Directors Ass'n v. United States}, 400 F.2d 1002 (1968).
stations which carry cigarette advertising to make time available for presentation of anti-smoking information—was upheld in *Banzhof v. FCC*.

The *Red Lion* and *Banzhof* rationale, however, does not do away with the constitutional difficulties posed by the instant case. First, the degree of previous restraint permitted in these cases was less than would result from a contrary holding in *Bloss*. In *Banzhof* the court used the technique of measuring the value of the speech which might be inhibited and the extent to which the ruling would in fact inhibit such speech, against the first amendment gain in terms of promoting greater debate on a public issue. Since the court viewed cigarette advertising as "marginal speech" which makes little contribution to public debate and did not think the volume of such advertising would be significantly affected, the FCC ruling was upheld. In the instant case, however, the speech which the plaintiff sought to promote seems equally as marginal as that which might be inhibited and the question of reaching a result which might make a positive contribution to public debate was not involved. Second, the *Banzhof* court suggested that a greater amount of governmental control should be permitted in the broadcasting industry than in the newspaper industry.

Despite an inadequate analysis of the issues presented, the result in *Bloss* is understandable. Though the public does have a strong interest in newspaper advertising policy, it would be difficult for a court to recognize precisely what regulations would satisfy that interest and to develop a consistent set of standards to define the impermissible forms of publisher discrimination. More important, the imposition of any regulation on the behavior of newspaper publishers by the courts would constitute a significant departure from the well-established principle that the initiation of economic regulation is more properly the responsibility of the legislature. Furthermore, even if the court were prepared to take such a step, the first amendment seems to bar relief, unless, perhaps, the monopoly power can cause a shift in emphasis when focusing on potential injustice.

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52. 14 P&F Radio Reg. 2d 2061 (D.C. Cir. 1968).
53. Id. at 2087-90.
54. The reasons which the court advances for distinguishing newspapers from broadcasting are all reasons which explain why there is a greater need to regulate broadcasting stations. Newspapers are more likely to incorporate diverse viewpoints in the absence of regulation in order to promote greater access. However, these reasons do not provide a basis for distinguishing newspapers from broadcasting stations when a denial of access has occurred.
Free Speech: Dismissal of Teacher for Public Statements

Plaintiff was dismissed from his teaching position for writing and having published in a local newspaper a letter criticizing the manner in which the Board of Education and the District Superintendent of Schools had handled past bond issue and tax increase proposals for public school support. At a hearing following the dismissal, the school board found the letter "detrimental to the efficient operation and administration of the schools of the district" and concluded that dismissal was in the "interests of the school." Plaintiff appealed to the circuit court, which affirmed on a finding that the board's action was supported by substantial evidence and that the interests of the schools outweighed the plaintiff's first amendment rights. The Supreme Court of Illinois affirmed. The Supreme Court of the United States reversed the Illinois Supreme Court, holding that public statements by teachers cannot be cited as grounds for dismissal unless made with actual malice as shown by knowledge of their falsity or a reckless disregard for their truth or falsity.1 Pickering v. Board of Education, 391 U.S. 563 (1968).

The Supreme Court has said that the importance of free speech requires close scrutiny of any attempt to restrict its free exercise.2 Even inaccurate or erroneous statements will be protected.3 Free speech, however, is not an absolute right,4 and in

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Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.

certain instances, as when a "compelling state interest" is involved,\(^5\) state limitation has been permitted.\(^6\)

Conflict between public and private interests frequently arises when the state seeks to condition the grant of a privilege or benefit on the surrender of a constitutional right.\(^7\) Conditional grants have traditionally been supported by the argument that the power to withhold the grant of a privilege absolutely implies existence of the power to condition the circumstances under which the privilege will be granted.\(^8\) With the development of the doctrine of unconstitutional conditions, the Court eventually rejected this argument.\(^9\) The broadest state-

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\(^7\) There is no limitation on the exercise of state power to induce the surrender of personal rights not protected by the Constitution. Hale, \textit{Unconstitutional Conditions and Constitutional Rights}, 35 \textit{Colum. L. Rev.} 321, 323 (1935).

\(^8\) Davis v. Massachusetts, 167 U.S. 43, 48 (1897):

\begin{quote}
The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.
\end{quote}


\(^9\) The question whether the state can impose conditions on its grants of privileges arose when states sought to condition the privilege of foreign corporations to do business in the state on a waiver of the right to diversity jurisdiction in federal court. The early decisions upheld such conditions. \textit{E.g.}, Security Mutual Life Ins. Co. v. Prewitt, 202 U.S. 246 (1906); Doyle v. Continental Ins. Co., 94 U.S. 535 (1877). These two cases were overruled by Terral v. Burke Constr. Co., 257 U.S. 529, 532 (1922) in which the Court said:

\begin{quote}
[A] State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because its exercise of such right, whether waived in advance or not.
\end{quote}

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 598
ment of that doctrine was made in *Frost & Frost Trucking Company v. Railroad Commission*, where the Court held that a state cannot, as a condition of the receipt of a benefit or privilege, require the surrender of constitutional rights. Before this doctrine was formulated, the Court had allowed such conditions by distinguishing rights from privileges. It was felt that since a "privilege" is by definition not required or guaranteed by the Constitution, its withholding cannot constitute the denial of any "right." The prospective recipient of the benefit need only reject the privilege to preserve his constitutional rights.

The right-privilege dichotomy is no longer controlling today, as the Court has come to recognize that in cases of conflict between conditions sought to be imposed and individual freedoms there may be a vital state interest which the restriction is designed to protect. In light of this realization, the Court has adopted the practice of weighing the state interest against the individual interest. As a result, the fact that a constitutionally guaranteed right has been surrendered under a condition imposed by the state is no longer considered as conclusive evidence of the misuse of state power. Today conditional grants of benefits are viewed as an alternative means of regulating conduct which threatens a vital state interest. Thus, the modern doctrine of unconstitutional conditions represents a narrowing of the Court's

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10. 271 U.S. 583, 593–94 (1926):

[A]s a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of United States may thus be manipulated out of existence.


11. The Court made reference to this dichotomy in upholding the condition on the basis of the traditional argument in *Packard v. Banton*, 264 U.S. 140 (1924).


broad holding in *Frost*. It states that the enjoyment of a governmental benefit or privilege may not be conditioned upon the waiver of a constitutional right where there is no overriding state interest requiring such relinquishment. The Court further requires that the condition be reasonably and substantially related to the state interest, and that the state show there is no alternative means of regulation available which would avoid the restriction of constitutional guarantees.\(^\text{14}\)

In the past, the Court viewed public employment as a privilege and consequently held that no one had a right to be free from conditions on such employment.\(^\text{15}\) The doctrine of unconstitutional conditions, however, placed the right-privilege dichotomy in doubt and brought with it the recognition that in many instances the grant of a privilege may involve an individual interest substantial enough to merit protection.\(^\text{16}\) The validity of this realization is supported by the dilemma which faces the prospective public employee whose employment is conditioned on the waiver of first amendment rights. He is forced to choose between the free exercise of these rights and the achievement of personal economic well-being.\(^\text{17}\) In this context the exercise of


\(^{15}\) Justice Holmes' statement in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), is generally thought to be the first reference to this idea: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Since *McAuliffe*, courts have frequently made reference to this notion. See, e.g., Adler v. Board of Educ., 342 U.S. 485, 492 (1952); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); Swailey v. United States, 376 F.2d 857 (Ct. Cl. 1967); Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd, 341 U.S. 918 (1951).


state power is more accurately viewed as a coercive force to induce surrender of these rights than as an offer of voluntary choice.\textsuperscript{18}

The Court has stated that surrender of constitutional rights as a precondition to public employment may not be achieved by a vaguely drawn statute.\textsuperscript{19} The statute must be clear and specific in its provisions and must bear a direct relation to a vital state interest which has been shown to exist. The Court has recognized the fitness of public school teachers as such an interest.\textsuperscript{20} Thus, it is the duty of the teacher to conduct himself, both in and out of the classroom, in a manner that maintains the integrity of the schools.\textsuperscript{21} Accordingly, inquiries into the fitness of a teacher may be extended beyond his classroom activities to those not directly related to his teaching.\textsuperscript{22} In these circumstances the Court also demands specificity in the statutory regulation of teachers to guard against the case of the conscientious teacher foregoing the exercise of rights not actually subject to regulation under the statute in an effort to stay within the bounds of vaguely drawn statutory requirements.\textsuperscript{23}

Apparently in an effort to insure that teachers meet their responsibilities, many state statutes grant broad discretionary power to local school boards to discipline or dismiss teachers.\textsuperscript{24} The courts have shown a marked reluctance to interfere with ex-

\textsuperscript{18} Note, Judicial Acquiescence, supra note 16, at 538.
\textsuperscript{22} Id. at 406; accord, Shelton v. Tucker, 364 U.S. 479 (1960). For a treatment of the kind of conduct that has been used as the basis for dismissal of teachers, see Behling, The Legal Gravity of Specific Acts in Cases of Teacher Dismissal, 43 N.D.L. REV. 753 (1967); Punke, Insubordination in Teacher Dismissal, 45 Mich. S.B.J. 51 (Aug. 1966).
\textsuperscript{24} E.g., CAL. EDUC. CODE § 13403 (West 1968); ILL. REV. STAT. ch. 122, § 10-22.4 (1965); IND. ANN. STAT. § 28-4308 (1968); MASS. GEN. ANN. LAWS ch. 71, § 42 (Supp. 1968); MINN. STAT. § 125.17 (1967). Where the statutory language with respect to a board's discretionary power is not all-inclusive, the courts will often construe it so as to achieve the same effect as a broadly drawn statute. E.g., Horosko v. Mount Pleasant School Dist., 335 Pa. 369, 6 A.2d 866 (1939), where the Pennsylvania Supreme Court interpreted "incompetency" to include conduct beyond that bearing on the teacher's specific ability as a teacher.
ercises of discretion by local boards, provided that actions do not appear to be "arbitrary."25

There is little case law dealing with disciplinary actions against teachers for statements criticizing educational administrations. One notable attempt to define the limits of critical speech outside the classroom was undertaken by the California District Court of Appeal.26 The California statute provides for dismissal when the teacher engages in "unprofessional conduct."27 The California court held that this includes statements made in letters that are critical of the school board when they are found to be either disruptive to the discipline or harmful to the teaching process of the school. While other courts have developed similar tests for reviewing board action resulting in teacher dismissal,28 California is the only state to apply this kind of test to critical speech outside the classroom.

The Pickering Court held that absent a showing that the statement was made with actual malice, as evidenced by knowledge of its falsity or reckless disregard of its truth or falsity, the best interests of the school cannot be the sole determinant in teacher dismissal proceedings. Instead, the court saw the problem as requiring a balancing of the teacher’s right as a private citizen to speak freely on public issues against the state’s interest in promoting the efficiency of the public school system by controlling the conduct of its employees.29 The Pickering Court struck the balance in favor of the teacher’s first amendment rights.30

25. Rinaldo v. School Comm., 294 Mass. 167, 169, 1 N.E.2d 37, 38 (1936); Finch v. Fractional School Dist., 225 Mich. 674, 196 N.W. 532 (1924); Gillan v. Board of Regents of Normal Schools, 88 Wisc. 7, 58 N.W. 1042 (1894). One court, in construing a broadly drawn statute, went so far as to declare that it is for the board, and not the court, to determine what constitutes grounds for dismissal. Faxon v. School Comm., 331 Mass. 531, 120 N.E.2d 772 (1954). However, the Supreme Court has held that while the responsibility for supervision of the public school systems rests with the states, it will not permit interference with federal constitutional provisions protected from state action. Cooper v. Aaron, 358 U.S. 1, 19 (1958).


27. CAL. EDUC. CODE, § 13403 (a) (West 1968).


29. 391 U.S. at 568.

30. In so holding, the Court did not reach the plaintiff’s challenge to the statute’s validity on vagueness grounds. 391 U.S. at 565 n.1.
The Court found that Pickering's letter regarding the proposed tax increase, and the administration's conduct with reference to it, involved public issues on which wide discussion should be encouraged.\textsuperscript{31} On such issues the teacher could be expected to have an informed opinion which should be made available to the general public.\textsuperscript{32} The Court also found that neither plaintiff's speech nor his conduct had been shown to have interfered with his classroom duties or the routine operation of the school.\textsuperscript{33} Reasoning that the letter was addressed to a matter of public concern—money spent on athletics by the school administration—and that no evidence had been introduced to support the board members' charge that it damaged their professional reputations, the Court concluded that the statements were not "per se detrimental to the district's schools."\textsuperscript{34} The Court equated the teacher's conduct with that of other members of the general public who might have criticized the board's action, and whom the state could not regulate, and concluded that such public statements could not serve as grounds for dismissal.\textsuperscript{35} In so holding, the Court reaffirmed its prior decision that teachers may not be compelled, as a condition of their employment, to waive their rights as citizens to comment on matters of public

\begin{itemize}
\item \textsuperscript{31} 391 U.S. at 571-72.
\item \textsuperscript{32} It has been noted that a government employee, by virtue of his position as a servant of the people, may be under a "moral duty" to make recommendations to improve the public service. Brickman v. New Orleans Aviation Bd., 236 La. 143, 107 So. 2d 422 (1958). The Supreme Court has placed particular emphasis on this with regard to elected officials. Wood v. Georgia, 370 U.S. 375 (1962); cf. United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).
\item \textsuperscript{33} 391 U.S. at 572-73.
\item \textsuperscript{34} Id. at 571. The Court noted that the board could only have reached its decision that the letter was detrimental by equating its members' interests with those of the school system as a whole. It reasoned that the statement regarding what Pickering thought to be a disproportionate expenditure for athletics should be viewed as a mere difference of opinion between Pickering and the administration on a matter of public interest. While the Court felt that such a statement could not of itself harm the school, that is not necessarily true. Nor is it true that equating the board members' interests with those of the school does not serve the educational function. While it may be argued that the board's interest in its policies to implement the educational function of the schools is different from the state's interest in that function, it is also true that the board's interest may be in service to the school. For example, the case where the high school achieves a greater part of its public support, including a public willingness to follow board bond issue proposals because of the athletic success of the school, which is attributable to the board's generous policy with regard to expenditures for athletic purposes.
\item \textsuperscript{35} 391 U.S. at 574.
\end{itemize}
concern relating to the schools.\textsuperscript{36}

While protecting the teachers' right to comment on public issues, the Court clearly denies any intent to establish a broad immunity applicable to all critical utterances by teachers.\textsuperscript{37} Indeed, the opinion contains several references to special circumstances which might tip the balance in favor of the state interest. The Court indicates that its standard might not be appropriate in cases involving a need for confidentiality in connection with public employment;\textsuperscript{38} when a close occupational relationship exists between the teacher and the person criticized;\textsuperscript{39} when established procedures for raising grievances are available which have not been employed by the teacher;\textsuperscript{40} or when the statements are so false that they place in doubt the teacher's fitness for his position.\textsuperscript{41} In addition, it may be inferred that the Court might withhold the immunity if the statement were particularly difficult to rebut,\textsuperscript{42} or if it resulted in a direct interference with classroom duties or the day-to-day operation of the school system.\textsuperscript{43}

The \textit{Pickering} Court demonstrated a willingness to go beyond considerations of procedural due process and engage in an examination of the substantive grounds for dismissal used in specific cases by local school boards.\textsuperscript{44} Compared with the courts' prior reluctance to interfere with exercises of school board discretion,\textsuperscript{45} this represents a significant development in the protection of teachers' freedom of speech.\textsuperscript{46} However, the decision does not

\textsuperscript{36} Keyishian v. Board of Regents, 385 U.S. 589 (1967). This standard represents the culmination of a series of cases which date back to Adler v. Board of Educ., 342 U.S. 485 (1952), where a restrictive statutory scheme was upheld but the Court indicated that unreasonable conditions might not be permitted. See also Wieman v. Updegraff, 344 U.S. 183 (1952).

\textsuperscript{37} 381 U.S. at 569.

\textsuperscript{38} Id. at 570 n.3.

\textsuperscript{39} Id. at 569, 570 n.3.

\textsuperscript{40} Id. at 572 n.4.

\textsuperscript{41} Id. at 573 n.5.

\textsuperscript{42} Id. at 572.

\textsuperscript{43} Id. at 572-73. For a discussion of the inappropriateness of allowing any of these special circumstances, standing alone, to provide the basis for an exception to the \textit{Pickering} standard, see Note, The First Amendment and Public Employees: Times Marches On, 57 Geo. L.J. 134, 150-56 (1968).

\textsuperscript{44} The Court has previously shown a willingness to extend the New York Times standard where free speech is threatened but where there is no charge of civil libel as in Garrison v. Louisiana, 379 U.S. 64 (1964) (criminal libel).

\textsuperscript{45} See note 25 supra, and accompanying text.

\textsuperscript{46} Accord, Note, supra note 43, at 148.
lend itself to the broad application that is suggested at first blush. The Court does not establish clear substantive guidelines for judging school board action in future dismissal cases. The decision may, in fact, be limited to what appeared to the Court to be an obvious abuse of the discretionary power of the school board.

The Court made no reference to the "disruptive harm" test as applied by the California court. Instead, the Court chose to emphasize the public nature of the controversy dealt with in the letter. Thus, although statements by teachers on matters of public concern appear to be protected in certain circumstances, it is not clear what effect harm or disruption to the school system would have on the outcome of future cases. The special circumstances which the Court mentioned or alluded to involve situations in which harm to the school system could result. In addition, the Court holds open the possibility that true statements as well as negligently false ones might be subject to limitation if special circumstances involving harmful consequences were presented.

The Pickering Court noted that since the letter was published after both school bond issues and the subsequent tax increase proposals had been rejected by the voters, it could not have had any effect on the outcome of the referendum. This fact, coupled with the Court's observation that most of the statements in the letter were substantially correct, and in any event could easily have been rebutted by the board, suggests that the apparent lack of harm to the functioning of the school may have had more impact on the Court's decision than appears on the face of the opinion. At the very least, the Court left room for limitation of a teacher's speech when, in special circumstances, it could harm the school system.

In Pickering, the Court struck a delicate balance between

47. Id. at 150.
49. The Court's emphasis on the fact that Pickering's statement did not have any harmful impact has been severely criticized. Note, supra note 43, at 155.
50. 391 U.S. at 570 n.3.
51. The letters to the editor and the Court's analysis of them are set out in the appendix to the opinion. The Court found that many of the statements were substantially true and condemned any notion that these could be cited as grounds for dismissal solely because the school board disapproved of them. Where the statements were found to be false the Court applied the New York Times standard to determine whether they could properly be used as grounds for dismissal.
public and private interests which have been vigilantly protected when standing alone. Certainly, this contributed to the Court's cautious opinion on the facts presented. While understandable, this caution leaves a major problem unresolved. The Court seems to hold that a teacher acting as a citizen must be protected in the exercise of constitutional rights guaranteed to all citizens. Unfortunately, the opinion offers few guidelines for determining when a teacher speaks as teacher rather than citizen. The Court does not make clear whether the bare fact that a statement concerns a public issue classifies the teacher as a private citizen or as a teacher. Moreover, the Court fails to consider whether a teacher, speaking as a teacher, can be limited in his exercise of first amendment rights even in the absence of special circumstances. Such uncertainty leaves undiminished in these situations the "chilling effect" which the Court has condemned.

The Court should make clear at its first opportunity that harm resulting from statements of teachers on public issues can not be determinative in teacher dismissal proceedings. Rather, the Court should adopt the standard that any negligently false statement made with reference to such issues by a teacher is made by him as a private citizen and in the absence of a showing of "compelling state interest" is to be afforded equivalent first amendment protection.

Free Speech: Peaceful Picketing on Quasi-Public Property

A food employees union peacefully picketed a nonunion supermarket situated in a large shopping center. Confining their patrolling to the porch and parcel pickup zone of the supermarket

52. See notes 5 & 20 supra.
53. A separate problem raised by this decision is referred to by Justice White in his opinion. This is the question of whether the Court is now ready to withdraw from its position in Garrison v. Louisiana, 379 U.S. 64 (1964), and reconsider the question of whether a statement that was knowingly or recklessly false but without harmful effect should be afforded first amendment protection. Justice White argues that the harmful impact or lack thereof in critical statements which are recklessly made would have no effect on the Court's deliberation in such cases.
and the shopping center's adjacent parking lot, the pickets carried placards publicizing the nonunion wages and benefits received by the supermarket employees. None of the supermarket's employees took part in the picketing. The owners of the supermarket and shopping center obtained an injunction against the union activity from a Pennsylvania trial court on the grounds that it constituted a trespass on private property and was conducted for an unlawful purpose. The Pennsylvania Supreme Court affirmed on the sole ground of trespass. Reversing, the United States Supreme Court held that the first and fourteenth amendments forbid the prohibition of peaceful picketing solely because it occurred on privately owned property if the property served the community as a business block which was open and accessible to the public. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Incorporated, 391 U.S. 308 (1968).

Picketing has not always enjoyed judicial approval as legitimate labor activity. Well into the twentieth century it continued to be regarded by some courts as inherently coercive and, therefore, unlawful regardless of the manner in which it was actually conducted. This view was not unanimous, however, and following the Clayton Act of 1914, which proscribed the use of restraining orders to prohibit any person from "peacefully persuading" others to "abstain from working," the prevailing

1. Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union Local 590, 425 Pa. 382, 227 A.2d 874 (1967). (In the unofficial reporter just cited, the union is mistakenly referred to as "Local 509" in the Table of Cases, at xi, and in the title of the case, at 874.)
2. Hereinafter cited as Amalgamated.
4. The following oft-quoted statement sums up the view of such courts: "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." Atchison, T. & S.F. Ry. v. Gee, 139 F. 582, 584 (S.D. Iowa 1905). Similarly, in overturning 42 years of precedent holding picketing to be illegal per se the Michigan Supreme Court said, "Any form of picketing was abhorrent to the common law." Book Tower Garage, Inc. v. Local 415, 295 Mich. 580, 583; 295 N.W. 320, 321 (1940).
For early federal court holdings questioning the legality of picketing per se, see Sona v. Aluminum Castings Co., 214 F. 936 (6th Cir. 1914); Kolley v. Robinson, 187 F. 415 (8th Cir. 1911); Southern Ry. v. Machinists Local Union, 111 F. 49 (W.D. Tenn. 1901); Otis Steel Co. v. Local Union, 110 F. 698 (N.D. Ohio 1901). See also note 3 supra.
5. For a jurisdiction-by-jurisdiction listing of early twentieth century court holdings which permitted peaceful picketing in conjunction with a lawful strike, see L. TELLER, supra note 3, at § 111, n.43.
judicial attitude was significantly altered. Nevertheless, picketing did not receive broad constitutional protection until 1940 when declared, in *Thornhill v. Alabama*, to be a form of free speech shielded by the first and fourteenth amendments.

But such protection was never intended to be unlimited or absolute. The *Thornhill* Court indicated that picketing could be restricted to at least the same extent as free speech, while later decisions have allowed even greater restrictions under some circumstances. This was because picketing was recognized to involve elements of conduct, such as patrolling, as well as elements of speech. The Supreme Court has, for example, upheld the restriction of picketing when conducted in an obstructing manner. Similarly, picketing which has the effect of coercing persons not to deal with another, in violation of a valid state restraint of trade statute, may be enjoined. The Court, however, has never accepted the proposition that the nonspeech aspect of peaceful picketing is so great as to deny it constitutional protection altogether.

One of the factors weighed in determining the extent to which the right of peaceful picketing ought be protected has been the *ownership* of the property involved. In *Thornhill*

7. Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937) (held a state statute permitting peaceful picketing constitutional); American Steel Found. Co. v. Tri-City Central Trades Council, 237 U.S. 184 (1919) (listed conditions under which peaceful picketing would be held legal).
9. The *Thornhill* Court said it would allow restriction of the right to picket “where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.” Id. at 104-05.
10. As stated by Justice Frankfurter: “It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.” Hughes v. Superior Court, 339 U.S. 460, 465 (1950). See also Cameron v. Johnson, 390 U.S. 611 (1968); International Bhd. of Teamsters v. Vogt, 354 U.S. 284 (1957).
13. Amalgamated at 313.
14. The Court has also taken into account: (1) the manner in which the picketing was conducted, *Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 237 (1941); *Traux v. Corrigan*, 257 U.S. 312 (1921); (2) the purpose for which the picketing was conducted, *Local 10, United Ass'n of Jmn. Plumbers v. Graham*, 345 U.S. 192 (1953) (cannot conflict with valid state right-to-work legislation); *Building Serv. Employees Local 262 v. Gazzam*, 339 U.S. 532 (1950) (cannot conflict with valid state antitrust legislation); *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950) (cannot conflict with valid state protection of small business legislation).
the picketing was conducted on public streets which the Court approved as "natural and proper places for the dissemination of information and opinion..." Similarly, peaceful picketing on highways, avenues, sidewalks, and city park boardwalks has been permitted. This is due to the traditional association which has come to exist between public property and the exercise of first amendment freedoms. So strong is this association that municipal licensing ordinances have been struck down which placed an inconvenience in the path of free speech related activities such as handbilling and religious speeches.

Picketing on private property, on the other hand, has proved to be much less sanctified. The consistency with which state courts have given unqualified support to private property interests has driven one commentator to declare that, "[t]he traditional notion would seem to be that the concept [of private ownership] suffices as an absolute defense against those who would engage in union activity." Placed into this setting Marsh v. Alabama, which involved a Jehovah's Witness desiring to distribute religious literature on the business district sidewalks of a company-owned town, re-

As to the person doing the picketing, the Court has held that there is no distinction between employees and non-employees. AFL v. Swing, 312 U.S. 321 (1941).
17. NLRB v. Local 50, Bakery Workers, 245 F.2d 542, 544 (2d Cir. 1957).
20. Amalgamated at 315.
21. But see Cox v. New Hampshire, 312 U.S. 569 (1941) (parading could be regulated because it was not considered informative in nature).
resulted in the first real instance of private property rights giving way to those of free speech. Reasoning that handbilling was constitutionally protected in a regular municipality,\(^\text{27}\) the Marsh Court saw no reason for not protecting it in a company-owned town which had all the characteristics of a regular municipality.\(^\text{28}\) In response to the contention that private ownership demanded a different result, the Court declared:

> Ownership does not always mean absolute dominion. The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the . . . constitutional rights of those who use it.\(^\text{29}\)

Thus, the Court broadened its focus to consider not only the **ownership** of the property, but also its **use** and **characteristics**.

When the locus of the conflict turned to shopping centers, however, courts applied the Marsh doctrine inconsistently, depending on which aspect they deemed important. In Moreland Corporation v. Retail Store Employees Local 444,\(^\text{30}\) for example, the Wisconsin Supreme Court relied only on the “open-for-public-use” aspect of Marsh to label shopping center property as quasi-public, thus protecting the picketing. Similarly, a Maryland court sustained the picketing of a shopping center drug-store,\(^\text{31}\) declaring irrelevant the fact that the shopping center was distinguishable from the property in Marsh because it lacked the characteristics of an inhabited town.\(^\text{32}\) An Ohio court\(^\text{33}\) rejected both the use aspect of the doctrine—stating that store owners only open up their property for use by “potential customers” rather than the general public\(^\text{34}\)—and the characteristics aspect—noting that “[t]he resemblance of private property to public property, however great, does not ipso facto convert it to the public use.”\(^\text{35}\) Still other decisions have ignored Marsh entirely.\(^\text{36}\) While the lower courts groped for a discernable con-

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27. Id. at 504-05.
28. Id. at 502-03.
29. Id. at 506 (emphasis added).
30. 16 Wis. 2d 499, 114 N.W.2d 876 (1962).
32. Id. at 2362.
34. Id. at 194, 235 N.E.2d at 147.
35. Id. at 198, 235 N.E.2d at 149. See also Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963) (dissenting opinion) (declaring that a shopping center was “not a town in any sense of the word”).
36. Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union Local 590, 425 Pa. 382, 227 A.2d 874 (1967) (the dissent, however,
stitional standard, the Supreme Court, prior to *Amalgamated*, postponed settling the issue through denials of certiorari and narrow holdings.

The majority opinion in *Amalgamated* begins from the premise that peaceful picketing on public property is protected by the first amendment. It then narrows the issue to whether this otherwise constitutionally protected right could be denied simply because the property involved was privately rather than publicly owned. In this context, the majority is unwilling to consider only ownership as the relevant factor. Therefore, the physical characteristics of the shopping center are scrutinized and compared to those of the company town in *Marsh*, revealing striking similarities between the *Marsh* "business block" and the Logan Valley shopping center. The center's roadways, parking areas, and sidewalks are reasoned to be the functional equivalents of those found in *Marsh* or any other

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37. "When the colors do not match, when the references in the index fail, when there is no decisive precedent the judge has no clear mandate. . . ." South Discount Foods, Inc. v. Local 1552, 14 Ohio Misc. 188, 192, 235 N.E.2d 143, 146 (1968).


39. "Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort [on quasi-public property] is a question that is not here." *Amalgamated Meat Cutters Local 427 v. Fairlawn Meats*, Inc., 353 U.S. 20, 24 (1957).

Several labor law decisions have, however, attempted to settle the conflict between property rights of employers and the statutory rights of employees to organize. See, e.g., NLRB v. Babcock & Wilson Co., 351 U.S. 105 (1956) (nonemployees desiring to distribute union literature could be excluded from a company parking lot if where no discrimination was involved and where other reasonable means of communication were available); NLRB v. Le Tourneau Co., 324 U.S. 793 (1945) (employees could not be denied the right to distribute union literature on a company parking lot during nonworking hours).

But since the emphasis in these cases is upon labor-management relations with respect to property rights, rather than free speech and quasi-public property, it would be dangerous to apply inferences drawn from these cases unequivocally to the quasi-public property problem. 25 Wash. & Lee L. Rev. 53, 54 n.9.

40. The majority opinion, written by Justice Marshal, attracted four other votes; Justice Douglas wrote a concurring opinion, while Justices White, Harlan, and Black dissented.

41. *Amalgamated* at 313. This is true even if the picketing is being conducted by nonemployees. *AFL v. Swing*, 312 U.S. 321 (1941).

42. *Amalgamated* at 315.

43. *Id.* at 317-18.
municipality. Since handbilling is protected in these locations, the majority finds it inconsistent to disallow picketing in a shopping center.

But the majority does not rely solely on the shopping center's physical similarity to a municipality; it considers the commercial nature of the property as well. They agree with Marsh that when a businessman voluntarily opens his property for public use to his commercial benefit, he can not claim the same protection of his privacy as he could have when using the property as a domicile. The majority also cites statistical studies showing the change in commercial orientation from municipal business districts to suburban shopping centers. Therefore, protection of the modern-day shoppers' and workers' right to publicize their ideas concerning various commercial enterprises necessitates a change in the traditional categorization of property for first amendment purposes.

In separate dissenting opinions Justices Black and White strongly criticized the majority for extending Marsh beyond its actual holding. They argued that in Marsh first amendment rights are protected not because the property is a business district, but because it is a town. Therefore, Marsh is only relevant when all the characteristics of a town are present. They would not characterize as a town the Logan Valley shopping center because it lacked such essentials as residential buildings, a sewage disposal plant, and a post office. While both dissenters indicate they think it appropriate to require the private owners of a town to guarantee the exercise of first amendment freedoms in traditional locations, neither gives countenance to forcing this responsibility on a businessman operating a store within the context of a shopping center. But what they seem to fear most is the inability to draw a line, after Amalgamated, limiting the

44. Id.
45. The Court indicated that for the purposes of discussing the relationship between free speech and private property, there is little relevant distinction between handbilling and picketing, since they both involve communication plus conduct. Id. at 315-16.
46. Id. at 319.
47. Id. at 325.
48. Id. at 324-25.
49. Id. at 327, 337. Also dissenting was Justice Harlan who felt that the state court had no jurisdiction over this case in the first place because of the "pre-emption doctrine." Id. at 333. For discussions of the pre-emption doctrine as related to these types of problems, see Gould, supra note 24, at 533; Note, Shopping Centers and Labor Relations Law, 10 STAN. L. REV. 694, 706 (1958); 5 HOUSTON L. REV. 193 n.5 (1968).
free speech activity exercised in shopping centers or individual stores.\textsuperscript{50}

Such criticism is overly technical, however, for it fails to consider the policy aspects of the \textit{Marsh} doctrine. That a shopping center does not contain \textit{all} the physical characteristics of a company town is obvious, but this alone does not vitiate the decision in \textit{Amalgamated}. The policy behind \textit{Marsh} is based on a desire for continued protection of individual free speech rights despite a structural change in municipal ownership.\textsuperscript{51} Similarly, \textit{Amalgamated} reflects the desire to preserve such rights in a society experiencing extensive change in its commercial setting.\textsuperscript{52} To have ignored these changes would, perhaps, have been the easier alternative. Then the law would remain simply that protection of first amendment rights would be dependent upon the ownership of the locus. But old classifications often fail in solving new problems. To disallow patrons or workers the right to protest against the policies of a particular enterprise situated in a shopping center, while allowing it in any other municipal business district, is absurd so long as congestion can, in both circumstances, be kept to a minimum by other reasonable restrictions. In light of such a sound basis in public policy, the criticism that \textit{Amalgamated} is factually distinguishable from \textit{Marsh} is negligible at most.

The dissenters were accurate, however, in stating that the majority fails to clarify the extent to which its rationale can be used to justify opening up shopping center property generally to other free speech activities such as parades, political rallies or religious speeches. Although the majority specifically refuses to answer this question,\textsuperscript{53} they do provide some guidelines by saying that they would only permit activities conducted “in a man-

\textsuperscript{50} Justice White went so far as to set out a parade of absurdities which he claimed were the logical result of the majority's reasoning. These included: compelling shopping centers “to permit picketing on its property for other communicative purposes” and allowing pickets to quietly enter the store and march around with messages on front and back. \textit{Id}. at 339. But the majority gave more of an answer to this than Justice White seems willing to admit. \textit{See} notes 54-58 \textit{infra}, and accompanying text.

\textsuperscript{51} In \textit{Marsh v. Alabama}, 326 U.S. 501, 508 n.8 (1946), Justice Black pointed out:

In the bituminous coal industry alone, approximately one-half of the miners in the United States lived in company-owned houses in the period from 1922-23. The percentage varied from 9 per cent in Illinois and Indiana and 64 per cent in Kentucky, to almost 80 per cent in West Virginia.

\textsuperscript{52} \textit{Amalgamated} at 324-25.

\textsuperscript{53} \textit{Id}. at 319-20. (emphasis added).
ner and for a purpose generally consonant” with the actual use of the property. This language, however, could arguably be interpreted in opposing ways. It could mean, for example, that only those activities will be permissible which attempt to present information and opinion concerning a particular store. Such an interpretation is supported somewhat by the listing of several types of activity which the majority was interested in protecting—workers seeking to challenge substandard working conditions, consumers protesting shoddy or over priced merchandise, and minority groups seeking nondiscriminatory hiring policies. This limiting language could easily be ignored, however, by courts deciding future cases. They could look solely to the “generally consonant with use” language, taking it to mean that when property is used as a “business district,” free speech activities could not be restricted any more than in a regular municipal business district. Thus, religious handbilling and general speech making would have to be allowed even though the opinions expressed were unrelated to the policies and practices of the shopping center stores. This broader interpretation would be unfortunate for while it seems reasonable to encumber the businessman with the responsibilities commensurate with the privileges and advantages of conducting a shopping center business, it does not follow that he should provide a general public forum. In this context the distinctions drawn by Justices Black and White between the company town of Marsh and the shopping center property, have considerable merit. In the company town all of the traditional locations for free speech activity are on privately owned property. But in Amalgamated, nearby schools, parks and other traditional sites for speech making probably existed. Therefore, the necessity for protecting free speech of all types is not present in the shopping center situation. In light of this distinction the narrower application of Amalgamated to quasi-public property cases seems preferable in that it would allow the relative importance of the free speech and property right interests to be properly balanced in each situation.

The decision also fails to give an adequate definition of “shopping center.” At the time the injunction was issued the Logan Valley Plaza consisted of only two enterprises, although fifteen more were to follow. True, some large shopping centers

54. Id. at 320 n.9.
55. Id. at 324.
56. See cases cited note 21 supra.
57. Amalgamated at 327, 337.
58. Id. at 317-18.
are so omnipresent in a community as effectively to replace a
town center. But smaller neighborhood clusters of stores do
not. Since, in the latter situation, the public streets and side-
walks are usually near enough to a target store so as not to
diminish the effect of the communication,\textsuperscript{59} picketing could, con-
sistent with \textit{Amalgamated}, be prohibited from the owner's prop-
erty.\textsuperscript{60}

Claiming that the issue was not before them,\textsuperscript{61} the Court set
no specific geographical or physical limitations on picketing other
than that it can not be totally proscribed. This should not be
viewed as an unqualified granting of a picketing privilege, how-
ever, since the Court indicated that reasonable regulation might
yet be permissible, at least to the same extent as it would be in a
regular municipality. Thus, the state is not without the power
to restrict the picketing reasonably as to time, place, manner, or
number.\textsuperscript{62} Since it is the desire of the pickets to focus patron
attention on a particular enterprise, there seems to be no reason
to extend their protection beyond the area immediately to the
front of the store, beyond the hours that the store is open, or
beyond the number necessary to convey the message with mini-
mal obstruction or congestion.

\textit{Amalgamated} is indeed a timely decision in that it provides
an equitable solution to a new type of free speech problem created
by a recognizable change in the commercial structure of society.
But its value as such will be greatly diminished if its rationale
is used to open shopping centers and other quasi-public property
to free speech activities of every type and purpose. It must be
remembered that quasi-public property is also quasi-private and
that the Constitution protects property rights as well as those of
free speech. Anything other than a test which requires a re-
lationship between the purpose of the speech and the actual use
of the property ignores this distinction.

\begin{itemize}
\item \textsuperscript{59} In \textit{Amalgamated} the property owners argued that forcing the
pickets to move their activity beyond the parking lot to the "grassy
berms" separating the shopping center and the public highways was
not a prohibition but rather a reasonable regulation. The Court re-
jected this argument because the size of the parking lot would have
diminished the effect of the picketing. \textit{Id. at} 321-23.
\item \textsuperscript{60} \textit{See} People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385 (1961).
\item \textsuperscript{61} \textit{Amalgamated} \textit{at} 321.
\item \textsuperscript{62} \textit{Id. at} 319-20.
\end{itemize}
Juvenile Procedure: "Beyond a Reasonable Doubt" Standard of Proof Extended to Juveniles

Robert Urbasek, a juvenile, was held delinquent by the Juvenile division of the Cook County Circuit Court on the basis of a finding that a preponderance of the evidence supported the conclusion that Robert had murdered an eleven-year-old playmate. An appeal was taken to the First Division of the Illinois Appellate Court, where the Juvenile Court's findings were affirmed. The court found that the adjudicatory hearing had measured up "to the essentials of due process and fair treatment," and held that the "beyond a reasonable doubt" standard of proof did not apply. The juvenile appealed to the Illinois Supreme Court, where he contended that continued use of the preponderance of the evidence rule violated the United States Constitution. The Illinois Supreme Court held that the standard of proof which is used in criminal cases is constitutionally required at the adjudicatory stage of juvenile delinquency hearings whenever the child is charged with misconduct which would be criminal if an adult were involved. In re Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

Prior to 1899, children over seven years of age and adults were similarly treated by the criminal law of the several states. Juveniles were given long prison sentences, were incarcerated with adult criminals, and were encumbered for life with the social and economic stigma of a criminal record. Moreover, they

   (a) any boy who prior to his 17th birthday or girl who prior to her 18th birthday has violated or attempted to violate, regardless of where the act occurred, any federal or state law or municipal ordinance; and (b) any minor who has violated a lawful court order made under this Act.

2. Juvenile Court Act of 1965, 37 Ill. St. Ann. §§ 701-4, 704-6 (Smith-Hurd 1967). Section 701-4 is a definition of an adjudicatory hearing; § 704-6 provides that "no finding of delinquency may be made unless supported by a preponderance of the evidence, and that such a finding may not be based solely upon extra-judicial admissions or confessions."

4. Id. at 383.
5. At common law, children under seven were conclusively presumed incapable of entertaining criminal intent. People v. Fields, 174 Misc. 309, 20 N.Y.S.2d 702 (King's Cty. Ct. 1940). See also In re Gault, 387 U.S. 1 (1967).
were afforded no more opportunity than adult convicts for social or moral reform and re-education.\(^6\)

At the end of the nineteenth century, legal reformers began to recognize that the criminal law as applied to juveniles was both harsh and ineffective; it had failed either to deter misconduct or to reform juvenile lawbreakers.\(^7\) In an attempt to provide solutions to these problems, states enacted statutes creating special juvenile court systems. Under these statutes, juvenile courts, as surrogates for the states, were to assume the role of \textit{parens patriae}—state guardians of those citizens unable to fend for themselves.\(^8\) Their function was to identify and analyze the juvenile wrongdoer's problems and needs, and to prescribe treatment for him in a special, non-criminal procedure.\(^9\) Their purpose was not to determine guilt and punish the wrongdoer, but to take the place of the juvenile's real parents in shaping his lawful development.\(^10\) Moreover, because the courts were not try-


\(^7\) Id. at 169:

A criminal law based upon [deterrence and retribution] had failed to suppress crime and was cruel to individuals because of its failure to individualize treatment. Certainly such a harsh, poorly conceived system should no longer be applied to children. \textit{See also} Mack, \textit{The Juvenile Court}, 23 \textit{Harv. L. Rev.} 104 (1909).

\(^8\) For a statement of the \textit{parens patriae} rationale, see Cinque v. Boyd, 99 Conn. 70, 121 A. 678 (1923), where the court notes that the practice of providing safeguards and care for helpless persons long has been a part of the common law, probably first exercised by courts of chancery in dealing with minors left without parents or guardians, but with property of some sort. Since that time English and American courts have enlarged the scope of their protective care for minors, and legislatures have made special provisions for judicial care by enacting juvenile court acts.


\(^10\) To effectuate the court's role as \textit{parens patriae}, investigational and social services were put at its disposal. When a juvenile was brought before a juvenile court, these services were used to study his background, environment, personality and education. On the basis of these studies, a recommendation for treatment would be made to the court. Justice Douglas commented that

The juvenile court was to be a clinic not a court; the judge and all of the attendants were to be visualized as white-coated experts there to supervise, enlighten, and cure—not to punish. . . . This new agency—which stood in the shoes of the parent or guardian—was to draw on all the medical, psychological, and psychiatric knowledge of the day and transform the delinquent. \textit{Douglas, Juvenile Courts and Due Process of Law}, 19 \textit{Juv. Ct. Judges J.} 9-11 (1968). \textit{See generally} Mack, supra note 7.
ing the juvenile as a criminal, but merely dealing with him as parents, juvenile court proceedings were termed "civil" rather than "criminal." As a consequence, procedural safeguards afforded adults as a matter of constitutional right were held inapplicable and unnecessary in juvenile courts.11

Despite high expectations for this system of juvenile adjudication,12 the results of its operation have been less than satisfactory in two ways. First, the procedural attitudes of juvenile court judges have not always been paternal or benevolent. While speaking in terms of "treatment," courts have nevertheless seemed inclined to dispose of juvenile offenders by incarceration in "reform" schools.13 Second, it has become apparent that reform schools are little better for juveniles than prisons.14

11. See People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905). In Fisher, the court said:

In pressing the objection that the appellant was not taken into custody by due process of law, the assumption [is] that the proceedings of [the Juvenile Court] are of a criminal nature. . . . But . . . the constitutional guaranty is that no one charged with a criminal offense shall be deprived of life, liberty or property without due process of law. To save a child from becoming a criminal, . . . the legislature surely may provide for salvation of such a child . . . by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled, as parens patriae, to take the place of the father for the same purpose, required to adopt any process. . . .


13. In his opinion in In Re Gault, 387 U.S. 1 (1967), Justice Fortas noted that the results of the system as practiced . . . have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.

Id. at 18. See also Kent v. United States, 383 U.S. 541, 556 (1966), quoting from Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7:

There is evidence, in fact, that there may be grounds for concern that the child . . . gets neither the protections accorded to adults nor the solicitous care and regenerative treatment posited for children.


14. Handler, supra note 13, at 12-13:

The most blatant discrepancy between theory and practice probably occurs in the character of the custodial or treatment institutions. It is charged that most reform schools are little
Despite these shortcomings, courts have adhered to the notion that juvenile proceedings are "civil" rather than "criminal" and have persisted in withholding the procedural rights guaranteed by the Constitution. Thus, many due process safeguards have been consistently denied to juvenile offenders by various courts. When procedural rights have been extended to juveniles, it has not been on constitutional grounds, but as a matter of fair treatment.

See also In re Gault, 387 U.S. 1, 27 (1967); A. Deutsch, Our Rejected Children (1950); P. Tappan, Juvenile Delinquency 369-471 (1949).

15. E.g., People v. Lewis, 260 N.Y. 171, 177, 183 N.E. 353, 355 (1932): "Since the proceeding was not a criminal one, there was neither right to nor necessity for the procedural safeguards prescribed by constitution and statute in criminal cases." See also In re Wylie, 231 A.2d 81 (D.C. App. 1967).


17. See, e.g., People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932), where the court held that a juvenile's guilt need not be proved in the same way as that of an adult. The court in dictum set certain standards:

There must be a reasonably definite charge. The customary rules of evidence shown by long experience as essential to getting at the truth with reasonable certainty in civil trials must be adhered to. The finding of fact must rest on the preponderance of evidence. . . . Hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feeling, the hopes and fears of social workers, are all sources of error and have no more place in Children's Courts than in any other court.
In 1966, however, the Supreme Court reviewed a case arising under the juvenile court statute of the District of Columbia and signalled its dissatisfaction with the treatment of children in juvenile courts. In that case, *Kent v. United States,* the issue was whether, under a statute requiring a "full investigation" by the juvenile court as a condition to certifying a juvenile offender for trial by the district court, a minor's rights had been infringed by the judge's refusal to hold a hearing on the matter and his failure to allow the minor's counsel to examine the social service file. The Supreme Court held that the statute's provisions for investigation must be read "in the context of constitutional principles relating to due process and the assistance of counsel." Reading the statute in this light, the Court found that it required, as a condition to valid certification to adult court, provision for a hearing, access by counsel to social records and probation reports considered by the court, and a statement of reasons for the court's decision. The Court mentioned but did not reach the constitutional issue of denial of due process. This first indication that certain constitutional rights might be required in juvenile court systems was carefully tempered, however, by an affirmation of the value of the special rights and immunities afforded the juvenile by non-criminal procedure.

Three months after announcing its decision in *Kent,* the Court granted certiorari to review *In re Gault,* which squarely presented the question of the applicability of adult criminal due process rights to juveniles. The *Gault* Court held

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22. Id.
23. 383 U.S. at 552.
24. The court noted five "special rights and immunities" that the juvenile courts provide:
   (1) protection from publicity and public scrutiny;
   (2) confinement separate from adult convicts;
   (3) a limit on the maximum sentence (until 21 years of age);
   (4) a stated preference for release in the custody of parents; and
   (5) exemption from loss of civil rights and from other consequences of an adult conviction. 383 U.S. at 556-57.
27. The appeal contended that six rights secured by the Constitution had been denied: (1) notice of the charges; (2) right to counsel; (3) right to confrontation and cross-examination; (4) privilege against
that, in delinquency proceedings which could result in incarceration, the Due Process Clause of the fourteenth amendment requires (1) that the child and his parents or guardian be afforded adequate written notice in advance of the specific charges; (2) that the child and guardian be apprised of their right to counsel; (3) that the juvenile have a right to confrontation and cross-examination; and (4) that the juvenile be afforded the privilege to remain silent.

The Illinois Supreme Court in Urbasek went beyond Gault by requiring that juveniles be proven guilty beyond a reasonable doubt. Reiterating the rationale of Kent and Gault that the child may not be benefitting from the present system and that certain rights are not for adults alone, the court emphasized the "recurrent theme of the majority in Gault which equated many aspects of delinquency adjudication with criminal conviction." It concluded that

[when we eschew legal fictions and adopt a realistic view of the consequences that attach to a determination of delinquency and a commitment to a juvenile detention home . . . we can neither truthfully nor fairly say that such an institution is devoid of penal characteristics.]

In light of this conclusion, the Illinois court reasoned that "the language of the Gault opinion exhibits a spirit that transcends

self-incrimination; (5) right to a transcript of the proceedings; and (6) right to an appellate review. Id. at 10.

28. The Court specifically excluded from consideration prejudicial and post-adjudication processes, confining itself to proceedings at which a "delinquency" determination may result in commitment to a state institution. Id. at 13.

29. Id. at 33-57. In light of the fact that it was reversing the Arizona Supreme Court's ruling for the reasons enumerated in the text, the Supreme Court chose not to rule on two issues urged by the appellants: that Gerald Gault had been denied the right to a transcript of the proceedings, and that he had been denied the right to appellate review. Id. at 57-58.


31. 38 Ill. at 540, 232 N.E.2d at 719.

32. Id. at 541, 232 N.E.2d at 719-20. The court based this statement on its observation that adjudications of delinquency often result in confinement for periods as long or longer than adult sentences for equivalent conduct.
the specific issues there involved," and that it would not be constitutionally permissible, as a matter of either due process or equal protection, to apply a less stringent standard of proof to juvenile cases than to adult proceedings. The court expressly exempted from the scope of its holding juvenile proceedings not involving the possibility of incarceration.

The right of an accused to have this criminal guilt proved beyond a reasonable doubt is not guaranteed by the Constitution. It is, however, an "ancient and salutory doctrine" with roots preceeding the advent of the common law. The doctrine was expressly stated in the common law as early as 1802, and has been a basic precept often codified in state statutes ever since. Although the Supreme Court has intimated that the right is of constitutional stature, it has not as yet held that the right is required by the Constitution. Thus the Illinois court's rationale in deciding that it is constitutionally impermissible not to afford that standard to juveniles is of interest.

Unfortunately, the rationale in Urbasek suffers from the court's failure to explain clearly the reasons behind its constitutional holding. That holding was based on both the due process and equal protection clauses:

We believe . . . that the language of Gault exhibits a spirit that transcends the specific issues there involved, and that, in view thereof, it would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, while depriving those rights of their full efficacy by allowing a

33. Id. at 541, 232 N.E.2d at 719.
34. Id.
35. Id. at 541, 232 N.E.2d at 720.
38. Id.
39. See, e.g., Iowa Code § 785.3 (1966); Okla. Stat. tit. 22, § 836 (1961): "Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to acquittal."
40. Speiser v. Randall, 357 U.S. 513, 525-26 (1958). The Court noted that where a person is charged with a crime, the prosecution is assigned the burden of proving his guilt beyond a reasonable doubt. It then commented that due process requires that no man lose his liberty unless the government has convinced the fact-finder of his guilt. It might be inferred from this language that the Court felt that due process requires proof of criminal guilt beyond a reasonable doubt. See also Coffin v. United States, 156 U.S. 432 (1895); Brooks v. United States, 164 F.2d 142, 143 (5th Cir. 1947).
41. See, e.g., Michael & Cunningham, From Gault to Urbasek: For the Young the Best of Both Worlds, 49 Chi. Bar Rec. 162, 166 (1968).
That the court does not pursue this statement further is somewhat mystifying since it is clear that the reason behind the court's holding is its view that juvenile court adjudications and criminal convictions result in substantially identical dispositions. Since such similarity was the factual basis for Gault's reliance on the Due Process Clause, it is curious that the Illinois court chose not to limit its constitutional holding to that clause.

There may have been two reasons for the court's conduct in this regard. First, the fact that the Constitution does not expressly require the reasonable doubt standard, and that the Supreme Court has not yet held it to be implied, may have contributed to the Illinois court's hesitation to rely on a single clause. By citing both provisions the court's rationale stands a better chance of conforming with future Supreme Court decisions, if those decisions hold the standard to be constitutionally required. A second reason for the opinion's dual reliance may simply be that the court felt that both clauses supported its holding. Use of due process was dictated by the court's reliance on Gault, which was based on that clause. However, the facts cited in Gault and Urbasek, which led to the conclusion that juvenile and criminal incarceration are similar, might also compel a holding that equal protection requires that the guilt of adults and juveniles be proved to the same degree.

Because of the widely different ramifications of the Due Process and Equal Protection Clauses, it seems unwise to rely on

42. 38 Ill. 2d at 541, 232 N.E.2d at 719.
44. The Supreme Court granted certiorari to review a case which raised an issue of the applicability of the reasonable doubt standard to juvenile proceedings. In re Whittington, 13 Ohio App. 2d 11, 233 N.E.2d 333 (1967), cert. granted, 389 U.S. 819 (1968). The Court subsequently vacated per curiam and remanded to the Ohio Court of Appeals for reconsideration in light of Gault. 391 U.S. 341 (1968).
45. Cf. Louisville Gas Co. v. Coleman, 277 U.S. 32 (1927), where the Court stated:

The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. . . . Certain general principles, however, have been established. . . . In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, [citations omitted] and that it applies to the exercise of all the powers of the state which can affect the individual . . . [citations omitted].

Id. at 37. It is interesting to note that another post-Gault case which was decided after Urbasek followed the Urbasek rationale. Santana v. State, 431 S.W.2d 558 (Tex. Civ. App. 1968).
both for the *Urbasek* holding.\textsuperscript{46} Use of the Equal Protection Clause would imply that juvenile courts must provide all the protections and procedures of the criminal process regardless of whether these protections and procedures are constitutionally required. This result follows because the Equal Protection Clause demands that persons in similar circumstances be similarly treated.\textsuperscript{47} This, in turn, would tend to negate the special rights and immunities afforded juveniles by the juvenile court system. The Due Process Clause, on the other hand, provides a more desirable basis for the *Urbasek* holding. “Due process” constitutes that fair play which is consonant with our traditional concepts of liberty and justice.\textsuperscript{48} Its use would not require that the juvenile system be made identical to the adult system. Thus, reliance on due process would allow courts to deal selectively with questions of juvenile rights while maintaining separate juvenile procedures. In addition, such an approach would have conformed precisely to the Supreme Court’s rationale in *Gault*.

Apart from these considerations, courts and commentators have long differed on the propriety of incursions into juvenile procedures. It has been argued that modification of the juvenile court systems would impair the value of the special rights and immunities afforded juveniles and would nullify the benefits derived from their non-criminal treatment.\textsuperscript{49} On the other hand, there has been considerable support, both before\textsuperscript{50} and after\textsuperscript{51} The two clauses may, however, overlap with regard to certain rights, because there are substantial elements of equal protection inherent in the concept of “due process.” See *Truax v. Corrigan*, 257 U.S. 312, 331–32 (1921); *Port of N.Y. Auth. v. Heming*, 34 N.J. 144, 165, 167 A.2d 609, 620 (1961) (Proctor, J., dissenting).

\textsuperscript{49} See *In re Wylie*, 231 A.2d 81 (D.C. App. 1967). The court in *Wylie* held that, because *Gault* did not consider the issue of the applicability of the reasonable doubt standard, the court would adhere to its prior decision in *In re Bigesby*, 202 A.2d 785 (D.C. App. 1964), that the standard is not constitutionally required. See also Young, *Due Process and the Rights of Children*, 18 Juv. Ct. Judges J. 102 (1967).
\textsuperscript{50} Pre-*Gault* cases in New York and Virginia held that juveniles are entitled to have their guilt proved beyond a reasonable doubt. *In re Madik*, 233 App. Div. 12, 251 N.Y.S. 765 (1931); *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946). A New Jersey case, *In re Lewis*, 11 N.J. 217, 94 A.2d 328 (1953), allowed use of the reasonable doubt standard in a juvenile proceeding when the state had not objected. These cases did not, however, hold that proof of guilt beyond a reasonable doubt was a constitutional necessity. *In re Madik* is in opposition to the later, more fully reasoned case of *People v. Lewis*, 290 N.Y. 171,
Gault, for an extension of the reasonable doubt standard to juvenile proceedings. It is difficult to see how extension of this standard would impair the benefits sought to be afforded juveniles. Because juvenile proceedings can result in severe curtailment of freedom it seems important to ensure every possible safeguard. A balancing of interests indicates that the juvenile should have his guilt proved by more than a preponderance of the evidence. Some have suggested that a standard of "clear and convincing proof" be adopted, but the problem of accurately applying or even defining such a standard seems to outweigh any benefit its adoption could produce.

The court in Urbasek did not attempt to go beyond the single issue before it by outlining a general formula for determining the scope of juvenile rights. Except for the court's reliance on both the Equal Protection and Due Process Clauses, this approach is in no way novel since the Supreme Court has dealt with juvenile rights in the same manner. Thus in Gault the Court carefully limited its holding to the requirement, as a matter of due process, of only four specific procedural rights at the adjudicatory stage of certain juvenile proceedings. This case-by-case approach allows the judiciary to avoid both extensive policy making and potential interference with the beneficial

183 N.E. 353 (1932), but was not mentioned in that case and therefore may represent a parallel line of authority in New York. See Comment, 55 CAL. L. REV. 1294 (1967). For the reaction of commentators, see Polow, The Juvenile Court: Effective Justice or Benevolent Despotism?, 53 A.B.A.J. 31 (1967). Judge Polow comments that:

In view of the great power of the juvenile judge to deprive a youngster of privileges and freedom, the reasonable doubt test is appropriate and should be applied.

Id. at 34. See also Note, supra note 13, at 795 nn.109-10.


52. The Advisory Council of Judges of the National Council on Crime and Delinquency so recommended. ADVISORY COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, PROCEDURE AND EVIDENCE IN THE JUVENILE COURT 68 (1962). This standard also appears in the Council's Model Rules for Juvenile Courts § 26 (Proposed Final Draft, May, 1968), and the Uniform Juvenile Court Act permits either the reasonable doubt or "clear and convincing evidence" standard, but suggests that Urbasek may not be followed by the Supreme Court. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM JUVENILE COURT ACT § 29 (Final Draft, August, 1968) and comment thereto. See also Rules Committee of the Minnesota Juvenile Judges Association, Rules of Procedure for Juvenile Court Proceedings in the Minnesota Probate-Juvenile Courts (effective March 1, 1969). The Minnesota rules provide that the reasonable doubt standard must be used in delinquency cases. Rule 5-4(b) (i), (ii).

53. J. WIGMORE, EVIDENCE § 2497 (3d ed. 1940).

54. Cf. note 29 supra.
procedures of the juvenile court system, while permitting it to compel respect for those rights it feels cannot be denied the juvenile offender.

The approach taken by the Supreme Court and roughly followed by Urbasek might, however, be criticized as inadequate because it could inhibit the Court in dealing with the special nature of juvenile procedures. Gault viewed the juvenile court acts as creating procedures which differed from those afforded by criminal law but to which specific criminal guarantees applied. This could mean that the Court was limiting itself to working from the "norm" of adult criminal procedure, thus restricting its ability to accept or create innovative, non-criminal, but nevertheless "fair" juvenile procedures. The Court would be better advised to approach the problem by formulating standards concerned with the overall quality of juvenile court procedures, rather than by basing its decisions on comparisons with the requirements of adult criminal procedure. This would more fully accord with the intent of juvenile court statutes to provide non-criminal methods of dealing with juvenile offenders.

On balance, however, this criticism ignores the fact that the Supreme Court has been concerned with the quality of the procedure, and has not interfered with the essentially non-criminal nature of juvenile proceedings. The holding in Gault was carefully limited to four crucial rights, thereby leaving the Court free to deal with future problems as they arise. Moreover, the Court established certain guidelines which it apparently intends to observe in applying criminal rights to the juvenile court system. These guidelines, which were announced in Kent and reiterated in Gault, simply require that juvenile procedure contain those rights which are in fact essential to fair treatment of juveniles:

We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

56. Id. at 33.
57. Id.
58. Kent v. United States, 383 U.S. 541, 555 (1966). See also In re Gault, 387 U.S. 1 at 31 n.48, where the Court noted:

The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process.
Urbasek has extended the holding in Gault to require the proof of a juvenile’s guilt beyond a reasonable doubt. Because the court’s rationale recognizes the burdens of incarceration in “reform schools,” and because the standard of proof used in adjudicatory hearings is a vital element in the process of determining guilt, it seems clear that the Urbasek holding is correct. It is only unfortunate that the court in Urbasek chose not to rely solely on the Due Process Clause; such reliance would have avoided the possible unfavorable ramifications of the present decision.