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Case Comments

Constitutional Law: Congressional Preemption Held to Prevent State from Enforcing Stricter Pollution Standards Against Nuclear Electrical Power Plant

The Atomic Energy Commission (AEC) issued Northern States Power Company (NSP), plaintiff, a permit authorizing NSP to proceed with construction of a nuclear electrical power generating plant near Monticello, Minnesota.[1] The regulations under which that permit was issued, and under which an operating license was later issued,[2] set standards limiting the amounts of radioactive materials which plaintiff was permitted to release into the air and water as a byproduct of plant operation.[3] Pursuant to a Minnesota statute[4] the Minnesota Pollution Control Agency (PCA) issued plaintiff a permit to discharge cooling water and liquid waste into the Mississippi River but conditioned the permit on compliance with radioactive waste discharge standards more restrictive than those of the AEC. NSP brought a declaratory judgment action alleging that Minnesota was without authority to regulate the discharge of radioactive wastes because this field of regulation had been preempted by the federal government. Defendants, the State of Minnesota and the Minnesota Pollution Control Agency, denied that Minnesota was without such authority and asserted that Minnesota has the right under the tenth amendment[5] to protect the health of its citizens and to regulate and prevent pollution within its borders. The United States District Court, District of Minnesota, *held* that Congress has preempted the disputed field of regulation and that the State of Minnesota is without authority to regulate the release of radioactive materials from plaintiff's Monticello nuclear power plant. *Northern States Power Co. v. Minnesota,* 320 F Supp. 172 (D. Minn. 1970).

The court based its decision upon a finding of express congressional intent to preempt the field of regulation of radioactive releases by nuclear power plants.[6] The PCA argued that the

1. 2 CCH ATOMIC ENERGY L. REP. ¶ 11,264 (1967).
2. Jan. 19, 1971. At the time of the decision the operating license for the plant had not been issued (Stipulation nos. 17, 24, 44).
3. *See* 10 C.F.R. pt. 20 (1970).
4. MINN. STAT. § 115.03 (1969).
5. U.S. CONST. amend. X.
6. 320 F. Supp. at 175.

regulation of radioactive waste releases into the environment fell squarely within the traditional concept of the state police power[7] and that Minnesota had the right under the tenth amendment to protect the health of its citizens and to regulate and prevent pollution within its borders.[8] The court applied the rule announced in *Rice v. Santa Fe Elevator Corp.*[9] which requires that before a state regulation falling within the exercise of the historic police powers of the states will be preempted by an act of Congress, the court must find a clear and manifest expression of congressional intent or design to preempt the field of regulation at issue. The court in the instant case found such a clear and manifest assertion of congressional intent to preempt in the 1959 Amendment[10] to the Atomic Energy Act of 1954[11] and in the committee reports accompanying the passage of the 1959 Amendment.[12]

On the assumption that doubt existed as to the express intent of Congress, the court also found implied congressional intent to preempt the field of regulation. Without elaboration the court cited the pervasiveness of the federal regulatory scheme; Congress' mandate, and not mere authorization, to the AEC to regulate; the fact that diverse state laws would frustrate the congressional purpose to achieve uniformity, and concluded, on these bases, that the state regulation was an obstacle to the accomplishment of the full purposes of Congress in enacting the Atomic Energy Act and, therefore, that Congress intended to preempt the field.[13]

Preemption is a doctrine of statutory construction. The power of Congress to preempt a field of regulation is derived from the supremacy clause of the United States Constitution.[14] A court must first find that Congress has acted pursuant to a power delegated to Congress by the Constitution.[15] If the act is

7. *Id.* at 177.
8. *Id.*
9. 331 U.S. 218 (1947)
10. 42 U.S.C. § 2021 (1964).
11. 68 Stat. 921-61 (1954), 42 U.S.C. §§ 2011-296 (1964)
12. S. REP. No. 870, 86th Cong., 1st Sess. 11 (1959)
13. 320 F. Supp. at 178.
14. U.S. CONST. art. VI, cl. 2. "This Constitution, and the laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land "
15. The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-296 (1964) was enacted by Congress pursuant to its powers to regulate interstate commerce (U.S. CONST. art. I, § 8, cl. 3), to provide for the common defense and security (U.S. CONST. art. I, § 8, cls. 11-14) and with respect to United States property and territory (U.S. CONST. art. IV, § 3, cl. 4) There is little doubt that these powers provide a sufficient basis for the

constitutional, then the basic inquiry of the court is directed towards a finding of express or implied congressional intent to preempt the disputed field of regulation. To this end the Supreme Court has employed various tests.

Where the state regulation "conflicts" with a federal regulation, the state regulation will be preempted. Conflict may be of two kinds. The first requires preemption "where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."[16] The second and more usual kind of conflict arises only in certain factual circumstances, "where Congress has chosen to 'circumscribe its regulation and occupy only a limited field,' while State regulation is 'outside that limited field,' and yet an inference of negation of State action is sought to be drawn."[17]

The basic test of preemption, which is applied in nearly all cases, is found in *Hines v. Davidowitz*.[18] Preemption will be found where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[19] The Supreme Court in *Florida Lime and Avocado Growers, Inc. v. Paul*[20] restated the test as "whether both regulations can be enforced without impairing the federal superintendence of the field,"[21] with the primary principle being that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[22]

The likelihood that the Court will find the state regulation an obstacle to the accomplishment of the objectives of Congress depends upon the subject matter of the disputed field of regulation. The Court will infer a congressional intent to preempt where the

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regulatory scheme enacted by Congress. *See* Estep & Adelman, *State Control of Radiation: An Inter-Governmental Relations Problem*, 60 MICH. L. REV. 41, 44-50 (1961).

16. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

17. California v. Zook, 336 U.S. 725, 740 (1941) (dissenting opinion citing Kelly v. Washington, 302 U.S. 1, 10 (1937)), *see also* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960), and Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

18. 312 U.S. 52 (1941).

19. *Id.* at 67.

20. 373 U.S. 132 (1963).

21. *Id.* at 142.

22. *Id.*

subject matter by its nature demands exclusive federal regulation in order to achieve uniformity vital to national interests.[23] The Court readily finds preemption in cases under the commerce clause on the basis of the need for uniformity of regulation.[24] In the field of interstate commerce, however, where there has been a compelling state interest in public order and safety, the Court has sustained the state regulation in the absence of a clearly expressed congressional intent to the contrary [25]

The Court has also inferred a congressional intent to preempt where Congress has authorized a pervasive regulatory scheme.[26] But the usefulness of this test has been left in doubt by the decision in *Florida Lime and Avocado Growers, Inc. v. Paul*,[27] where the majority opinion dismissed the issue while the four dissenting justices vigorously argued the existence of "a comprehensive and pervasive regulatory scheme."[28] This may, however, show no more than the Court's willingness to pick and choose among alternative characterizations.

A court may find that Congress, more or less expressly, intended that the federal regulation preempt the field without finding conflict, a need for uniformity or pervasiveness of federal regulation. The Supreme Court has in various ways stated the test for finding an express congressional intent to preempt. The general statement of the test is that preemption requires an "explicit declaration of congressional design to displace state regulation."[29] Where a state has exercised its traditional and historic police powers, however, the rule is that such "historic police powers of the States [are] not to be superseded unless that [is] the clear and manifest purpose of Congress,"[30] or that there

23. *See* Pennsylvania v. Nelson, 350 U.S. 497 (1956), Hines v. Davidowitz, 312 U.S. 52 (1941)

24. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), Southern Pac. Ry v. Arizona, 325 U.S. 761 (1945), Pennsylvania R.R. v. Public Serv. Comm'n, 250 U.S. 566 (1919)

25. *See* International Union, United Automobile, Aircraft and Agricultural Implement Workers v. Russell, 356 U.S. 634 (1958) (tort recovery allowed to employee for malicious union conduct), Youngdahl v Rainfair, Inc., 355 U.S. 131 (1957) (state allowed to enjoin violent conduct by striking employees)

26. *See* Hines v. Davidowitz, 312 U.S. 52, 74 (1941), Pennsylvania v. Nelson, 350 U.S. 497, 502 (1956)

27. 373 U.S. 132 (1963)

28. *Id.* at 166.

29. *Id.* at 143.

30. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), *see also* Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963)

is "an unambiguous congressional mandate to that effect."[31] The language manifesting express congressional intent may be found in either the statutory language or, if necessary, its legislative history.[32] Where Congress manifests its design expressly, rather than inferentially, the Court will give effect to that design, even though the state regulation could otherwise stand beside the federal regulation on the bases of the other tests, and even where the state regulation falls within the traditional scope of police powers of the states.[33]

The finding of a clear and manifest expression of congressional intent to preempt the field of regulation of radioactive waste releases by nuclear power plants is derived from the 1959 Amendment[34] to the Atomic Energy Act of 1954[35] and from the committee reports accompanying the 1959 Amendment.[36] In particular, the court in the instant case relied upon the purpose of the 1959 Amendment which was:

> to clarify the respective responsibilities of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials
> [and]
> to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials.[37]

In Section 274(b) of the 1959 Amendment, now 42 U.S.C. § 2021(b) (1964), Congress provided that the AEC may enter into "turnover" agreements with the states, ceding specific authority to the states,[38] but in Section 2021(c) Congress provided that "no

31. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 147 (1963).

32. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (legislative history), Campbell v. Hussey, 368 U.S. 297 (1961) (statutory language).

33. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 231-32 (1947), where the Supreme Court illustrates a plausible argument whereby the state and federal regulations could otherwise stand together.

34. 42 U.S.C. § 2021 (1964).

35. 68 Stat. 921-61 (1954), 42 U.S.C. §§ 2011-296 (1964).

36. S. REP. No. 870, 86th Cong., 1st Sess. (1959).

37. 42 U.S.C. § 2021 (a) (1) & (3) (1964)

38. Under an agreement the AEC may give states authority over (1) byproduct material, (2) source material and (3) special nuclear material in quantitites not sufficient to form a critical mass; but, under 42 U.S.C. § 2021(c) (1964), the AEC must retain regulatory power over (1) the construction and operation of any production or utilization facility, (2) the export or import of byproduct, source and special nuclear materials, (3) the disposal into the ocean of the same materials and (4) the disposal of the same materials which the AEC determines to be especially hazardous. 42 U.S.C. § 2021(j) (1964) authorizes the AEC to terminate agreements if necessary to protect the public health and safety.

agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to construction and operation of any production or utilization facility" The committee report which accompanied the bill said:

> (b) *Licensing and regulation of more dangerous activities —such as nuclear reactors—will remain the exclusive responsibility of the Commission.*
> 3. It is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source or special nuclear materials.
>
> 5. The Joint Committee believes it important to emphasize that the radiation standards adopted by States under the agreements of this bill should either be identical or compatible with those of the Federal Government. The committee recognizes the importance of the testimony before it by numerous witnesses of the dangers of conflicting, overlapping, and inconsistent standards in different jurisdictions, to the hinderance of industry and jeopardy of public safety [39]

In further support of its finding of express congressional intent to preempt, the court in the instant case cited an AEC regulation asserting that the AEC shall have sole authority to regulate discharges[40] and relied upon decisions of the Supreme Court permitting administrative interpretation in preemption cases to be given great weight.[41] The court also cited lower state court decisions in California and New York which held that the AEC had exclusive authority to regulate the disposal of radioactive wastes.[42] The court concluded with its summary finding of implied congressional intent to preempt.

The court certainly was not unreasonable in finding a "clear and manifest" assertion by Congress of its intent to preempt the field of regulation at issue.[43] The evidence, however, upon which it relied as establishing a clear and manifest assertion of

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39. S. REP. No. 870, 86th Cong., 1st Sess. 11 (emphasis added)
40. 10 C.F.R. § 8.4 (1970)
41. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942), Mintz v Baldwin, 289 U.S. 346 (1933)
42. 320 F. Supp. at 176.
43. The court is supported in its decision by a well-reasoned article, upon which the court relies (*Id.* at 177), which concludes that "unless a state executes an agreement with the AEC, the state is constitutionally precluded from imposing general health and safety regulations upon users of source, special nuclear and by-product materials." Estep & Adelman, *supra* note 15, at 63. The authors base their conclusion on almost the same evidence of congressional intent as the court based its decision. *Id.* at 58-63. *See also* Cavers, *State Responsibility in the Regulation of Atomic Reactors*, 50 KY. L.J. 29, 29-32 (1961), where the same conclusion is reached on the same evidence.

congressional preemptive intent is not so conclusive so as to preclude a contrary finding. First, Congress expressly rejected a proposal to include in the 1959 Amendment a statement granting the AEC sole authority over certain defined areas.[44] Instead, Congress adopted the language in 42 U.S.C. § 2021(c) (1964) that "the Commission shall retain authority and responsibility with respect to the regulation of [enumerated subjects] " The AEC endorsed the language Congress adopted. Mr. Lowenstein, who represented the AEC, said in the committee hearings:

> We thought that this act without saying in so many words did make clear that there is preemption here, but we have tried to avoid defining the precise extent of that preemption, feeling that it is better to leave these kinds of detailed questions perhaps up to the courts later to be resolved.[45]

From this defendants in the instant case argued that Congress, having foreseen a federal-state conflict, balked, and that the court should not now find an "implied" intent where Congress declined to declare its "express" intent to preempt.[46]

There is merit to defendants' basic contention. Since the position of the AEC, which was reflected in the final legislative enactment, was that the courts should be left to define the boundaries of preemption, the inference arises that some subjects of regulation, possibly some within the scope of the Act, were not preempted, just as some subjects of regulation were preempted. Defendants argued that the Act was not intended to reach the regulation of wastes,[47] unless the definition of "wastes" is included within the meaning of byproduct materials, which the AEC has clear authority to regulate under 42 U.S.C. §§ 2111-12 (1964). Those sections imply that byproduct materials must be capable of "use," and defendants asserted that wastes were not capable of any use and were outside the scope of the Act. Regulation of waste discharge, by this view, would be susceptible to PCA regulation.

The court completely failed to discuss these issues, except with respect to the AEC regulation asserting that the AEC has sole authority to regulate wastes.[48] Defendants' contention as to "wastes," however, has little merit. 42 U.S.C. § 2014(e) (1964), the

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44. *Hearings on Federal-State Relations Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. 307-08 (1959) (hereinafter cited as *1959 Hearings.*)

45. *Id.* at 308.

46. Brief for Defendants at 67, Northern States Power Co. v. Minnesota, 320 F. Supp. 172 (D. Minn. 1970).

47. *Id.* at 71-73.

48. 10 C.F.R. § 8.4 (1970).

definitional section of the Act, provides that "[t]he term 'byproduct material' means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material." "Waste" would appear to fall naturally within this definition and thus be subject to AEC regulation under 42 U.S.C. §§ 2111-12(1964) Also, 42 U.S.C. § 2012(d) (1964) provides that the "processing and utilization of source, byproduct and special nuclear material must be regulated in the national interest. " "Processing" is broader in meaning than "use," and the processing of wastes would appear to be within the scope of the Act and subject to AEC regulation. The Fifth Circuit Court of Appeals[49] and the District of Columbia Court of Appeals[50] have held that "waste" is within the statutory meaning of "byproduct." Furthermore, 42 U.S.C. § 2021(c) (1) (1964) provides that the AEC "shall retain authority and responsibility with respect to regulation of the construction and operation of any production or utilization facility" The AEC felt that the regulation of wastes was directly related to construction and design of nuclear reactors and that regulation could not be separated from the regulatory control over construction and operation which the AEC was expressly ordered to retain.[51] The court in the instant case did not refer to this persuasive AEC argument.

In attributing "great weight" to the AEC regulation asserting that the AEC has sole authority to regulate wastes, absent an agreement, the court placed undue reliance on the two Supreme Court decisions it cites.[52]

In *Cloverleaf Butter Co. v. Patterson*,[53] a case involving the regulation of renovated butter, the Supreme Court found the state law preempted because it was in conflict with the federal statute. The only language which might be interpreted to support the *Northern States Power Co.* decision is where the Court says: "The views of the Solicitors of Agriculture have long been in accord with our conclusion. Opinion No. 2829, October 18, 1940."[54] That statement is not directed toward the finding of preemption in *Cloverleaf*, but rather to the opening sentence in the paragraph in which the Court agrees with respond-

49. Harris County v. A.E.C., 292 F.2d 370 (5th Cir. 1961).
50. New Britain v. A.E.C., 308 F.2d 648 (D.C. Cir. 1962)
51. *1959 Hearings, supra* note 44, at 306.
52. 320 F Supp. at 176.
53. 315 U.S. 148 (1942)
54. *Id.* at 164.

ent that the federal government cannot confiscate or condemn materials under the renovated butter act.[55]

In *Mintz v. Baldwin*,[56] the U.S. Department of Agriculture regulated under the Cattle Contagious Diseases Act shipments of cattle from quarantined districts established by the Secretary while New York regulated shipments of cattle into New York from non-quarantined districts. The shipment of cattle at issue was not made from a quarantined district. The Act expressly prohibited state regulation only where the federal government had acted, "strongly [suggesting] that Congress intended not otherwise to trammel the enforcement of state quarantine measures."[57] The Department of Agriculture did not regulate the particular disease involved, its policy being to leave control of the disease to the states.[58] The Court, in holding that the state regulation was not preempted, said that "much weight" was to be given to the Department of Agriculture's "acquiescence in the enforcement of state measures."[59] This case did not involve an agency determination that state regulation was precluded. In the instant case the court attributed "great weight" to the determination of the AEC without stating its basis for doing so. The court did not cite any purpose of the Atomic Energy Act which would be thwarted should the PCA have concurrent power to regulate wastes.

The court's finding of an implied congressional intent to preempt the field is especially weak, for it states the issues as conclusions without expressing any rationale therefor. The parties vigorously argued the issues of the need for uniformity, of conflict, of pervasiveness of the federal regulatory scheme and of the dominance of the federal interest. A persuasive argument has been made that these factors would not compel preemption.[60]

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55. *Id.* at 163.
56. 289 U.S. 346 (1933).
57. *Id.* at 351.
58. *Id.* at 349.
59. *Id.* at 351.
60. Note, *Federal Pre-emption and State Regulation of Radioactive Air Pollution: Who Is the Master of the Atomic Genie?*, 68 MICH. L. REV. 1294, 1306-14 (1970). The writer argues that although the states may lack resources to regulate the whole field effectively, they might effectively concentrate their resources on specific problem areas; that states might be more effective regulators on balance, because the AEC may be doing more promoting than regulating (a "captured agency"), that the state interest in pollution abatement (defendants in the *Northern States Power Co.* case argued that the only purpose of its regulaton was to prevent pollution) as a local problem is paramount, and that the cost of state regulation would not be unduly burdensome.

The court concludes, however, that these factors would establish preemption.[61]

The decision does not entirely preclude state police power regulation of atomic energy It operates only to prohibit the states from setting radioactive discharge standards, an area whose control the court felt Congress had preempted. The 1959 Amendment itself provides for "turnover" agreements which would permit states to regulate specified areas so long as the state regulations are compatible with the federal regulations.[62] This provision provides a broad framework for state regulation. Minnesota has not entered into any such agreement. Nor are states prohibited from regulating non-radiation hazards related to the construction and operation of nuclear reactors.[63] Hazards which may be regulated by local building codes include plumbing, electrical wiring and construction design and materials. Such regulations, however, are permissible only to the extent that compliance with their terms does not engender conflict with the supervening federal regulations.[64] States also retain their traditional power over land use control, which presumably extends to the site selection for a federal licensed nuclear facility [65] Within the traditional police power the states have power to regulate thermal pollution by nuclear power plants, as the AEC has no power in this field of regulation.[66] Likewise, states may exercise broad regulatory power with respect to state-owned facilities, like highways and sewage systems, unless the federal government asserts its power over these facilities through use of the power of eminent domain.[67] Although Minnesota did not do so here,[68] states have the opportunity to intervene in the federal licensing procedure.[69]

Although the evidence upon which the court relies in making its finding of express congressional intent to preempt may

61. 320 F Supp. at 178.
62. 42 U.S.C. § 2021(b) (1964).
63. 42 U.S.C. § 2021(k) (1964)
64. Preemption might be based on "conflict." *See* Estep & Adelman, *supra* note 15, at 60-61.
65. *See id.* at 61.
66. *See* New Hampshire v A.E.C., 406 F.2d 170 (5th Cir. 1969)
67. *See* Estep & Adelman, *State Control of Radiation. An Inter-Governmental Relations Problem,* 60 MICH. L. REV. 41, 56-57 (1961)
68. Minnesota did make a limited appearance to offer evidence and testimony and to advise the Commission as provided in 10 C.F.R. § 2.715 (1970) 2 CCH ATOMIC ENERGY L. REP. ¶ 11,264 (1967)
69. 42 U.S.C. § 2021(i) (1964), 10 C.F.R. § 2.715 (1970) For example, the location of the Monticello nuclear plant on the Mississippi River upstream from the point where Minneapolis draws its water supply might

not be preclusive, it is substantial and convincing, and it might be expected that on appeal the decision would be affirmed on this basis. Should the appellate court find that no express declaration of congressional intent to preempt was made, it would have to determine the existence of implied congressional intent to preempt. Defendants would then have to show that the state interest in regulation of atomic waste pollution overbalances the national interest in uniformity of criteria and in promotion of nuclear electric power. This would not be an impossible burden to sustain, but it would be difficult, and the court, notwithstanding the state interest, could sustain the existence of an implied congressional intent to preempt.

have been changed. NSP was authorized to use the river water for cooling purposes and was also authorized to discharge radioactive wastes into the river. This is a chief reason why the PCA attempted to enforce more strict discharge standards than those imposed by the AEC.

Constitutional Law· Intentional Discriminatory Enforcement of Criminal Statute Held to Violate the Fifth Amendment

The United States prosecuted a private investigator for the alleged wiretap interception and divulgence of private telephone conversations, in violation of section 605 of the Communications Act of 1934.[1] After the jury returned a verdict of guilty, the defendant filed a motion for judgment of acquittal on the ground that the government had engaged in a systematic and intentional policy of discrimination in its enforcement of the statute, in violation of the due process clause of the fifth amendment. The trial court granted the motion and acquitted the defendant, *holding* that the Government should not be allowed to prosecute private individuals so long as its own agents are free to practice unlawful wiretapping with impunity *United States v. Robinson*, 311 F Supp. 1063 (W.D Mo. 1969)

There is no explicit mention made in the Constitution of a right to nondiscriminatory law enforcement. Nevertheless, in 1886 the Supreme Court in *Yick Wo v. Hopkins*[2] held that the discriminatory enforcement of a state law by state officials was a violation of the equal protection clause of the fourteenth amendment. In *Yick Wo*, a San Francisco county ordinance made unlawful the operation of a laundry without the consent of the county board of supervisors, except in a brick or stone building. The parties stipulated that 310 laundries were operating in buildings made of wood in San Francisco, over 200 of which were owned by Chinese aliens. It was also admitted that "petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception were granted."[3] In holding that Yick Wo's conviction for carrying on an unlawful business was a denial of equal protection, the Court reasoned:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public au-

1. 47 U.S.C. § 605 (1964) reads in part: "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person."
2. 118 U.S. 356 (1886)
3. *Id.* at 359.

> thority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[4]

The Court in *Yick Wo* established a basic corollary to the equal protection principle embodied in the fourteenth amendment which has since been included, by a process of reverse incorporation, in the fifth amendment's due process clause.[5] The rationale of this corollary is that a government which is prohibited from enacting statutes which unjustly discriminate against citizens of a certain class should not be able to accomplish the same result by enforcing otherwise valid laws in a discriminatory fashion.

The courts are split, however, as to whether the equal protection prohibition against discriminatory enforcement should be applied to cases in which a *criminal* statute was discriminatorily enforced.[6] Yick Wo's criminal prosecution for operation of an

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4. *Id.* at 373-74.

5. Though the fifth amendment contains no equal protection clause, such a requirement would now probably be read into the due process clause. Since the Supreme Court cautiously announced in Bolling v. Sharpe, 347 U.S. 497, 499 (1954), that "discrimination may be so unjustifiable as to be violative of due process," the courts have invariably held that state discrimination which offends the fourteenth amendment's equal protection clause is equally offensive to the fifth amendment when conducted by federal officials. *See, e.g.*, Nielson v. Secretary of Treasury, 424 F.2d 833 (D.C. Cir. 1970), in which the court announced: "The courts stand ready to invoke the equal protection clause of the Fourteenth Amendment as to actions by states, or the due process clause of the Fifth Amendment which provides equivalent safeguards against unreasonable action by the Federal Government." *Id.* at 846.

6. In support of the proposition that no constitutional guarantee of equal enforcement attaches in the area of criminal law *see* People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943) (perjury in election registration affidavit), People v. Montgomery, 47 Cal. App. 2d 1, 117 P.2d 437 (1941) (conspiracy to commit pandering), Jackie Cab Co. v. Chicago Park Dist., 366 Ill. 474, 9 N.E.2d 213 (1949) (taxi cab regulation statute), Society of Good Neighbors v. Mayor of Detroit, 324 Mich. 22, 36 N.W.2d 308 (1949) (lottery law), Bailleaux v. Gladden, 230 Ore. 606, 370 P.2d 722, *cert. denied*, 371 U.S. 848 (1962) (habitual criminal statute).

For decisions holding that the equal protection clause of the fourteenth amendment forbids intentional discrimination in the enforcement of penal statutes *see* Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963) (Sunday closing law), Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947) (action by liquor control commission), People v. Harris, 182 Cal. App. 2d 837, 5 Cal. Rptr. 852 (1960) (state and municipal gambling law), Wade v. City and County of San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (1947) (anti-magazine solicitation ordinance), People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128, (1962) (Sunday closing law), People v. Walker, 14 N.Y.2d 901, 200 N.E. 2d 779, 252 N.Y.S.2d 96 (1964) (multiple dwelling statute)

For excellent discussions of this subject *see* Note, *Discriminatory*

unlawful business was the result of the discriminatory administration of a regulatory ordinance respecting laundry permits.[7] Presumably, the criminal sanctions were uniformly invoked against anyone who violated the laundry ordinance. Many courts have concluded that this should distinguish *Yick Wo* from those cases in which it is the criminal statute itself which is discriminatorily enforced. In *People v. Montgomery*,[8] for example, the court refused to apply the *Yick Wo* doctrine to a case involving the discriminatory enforcement of a pandering statute. Such application, the court reasoned, would undermine effective administration of the state police power[9] and "protect a criminal in the commission of his crime."[10] The court found an obvious distinction between extending protection to persons engaged in the "harmless and somewhat necessary business of laundering," and the extension of a like protection to those engaged in "vicious social evil."[11] Similarly, in *Society of Good Neighbors v. Mayor of Detroit*,[12] the court argued that the ordinance in *Yick Wo* was intended to be administered according to the discretion of the city officials, who then abused that discretion, whereas criminal statutes represent an absolute mandate, from which courts must refrain from interfering.[13]

Law Enforcement and Equal Protection From the Law, 59 YALE L.J. 354 (1950) and Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961)

7. *See* text accompanying note 3 *supra*.

8. 47 Cal. App. 2d 1, 117 P.2d 437 (1941).

9. Such a contention is specifically rejected in Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947)

> The ruling of the District Court can not be sustained on the principle that the regulation of the liquor traffic by the State is in the exercise of its police power and therefore not subject to the constitutional restrictions referred to, although there are state decisions to that effect. It is well settled under the decisions of the U.S. Supreme Court that a state police regulation is, like any other law, subject to the equal protection clause of the Fourteenth Amendment.

Id. at 100.

10. 47 Cal. App. 2d at 14, 117 P.2d at 446.

11. *Id.* Present here is the familiar distinction between *malum in se* and *malum prohibitum*. Accordingly, a distinction is made between activity not intrinsically dangerous (*i.e.*, laundering) and activity which is inherently criminal and deleterious to society (*i.e.*, pandering, gambling, perjury, etc.) "[T]he needs of society demand that persons perpetrating intrinsically harmful acts be punished whenever apprehended, even if the punishment is the product of unequal enforcement, while the needs of society do not require that acts not harmful in themselves be punished if discriminatory enforcement is involved." Comment, *supra* note 6, at 1103, 1107. *See also* Saunders v. Lowry, 58 F.2d 158 (5th Cir. 1932), People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943)

12. 324 Mich. 22, 36 N.W.2d 308 (1949).

13. *Id.* at 27, 36 N.W.2d at 310. This view loses credence when it

Sustaining this position is a belief held by many courts[14] that application of the *Yick Wo* doctrine to criminal prosecutions might result in the effective nullification of many statutes and the wholesale freeing of criminals:

> It would be unconscionable, for instance, to excuse a defendant guilty of murder because others have murdered with impunity. The remedy for unequal enforcement of the law in such instances does not lie in the exoneration of the guilty at the expense of society.[15]

A similar view was expressed in *People v. Darcy*,[16] where the court held that to allow an accused perjurer to defend on grounds of discriminatory enforcement "could easily lead to a rule that if some guilty persons escape, others who are apprehended should not be prosecuted."[17]

A number of courts have reached the opposite result, finding the equal protection guarantee against intentionally discriminatory enforcement of the law applicable to the enforcement of penal statutes.[18] Although the language of these opinions is often quite broad, the cases fequently involve minor crimes lacking any significant moral dimension.[19] For example, in *People v. Utica Daw's Drug Co.*,[20] the charge against a defendant accused of violating a Sunday closing law was dismissed on grounds of

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is considered that (1) the issue would never have arisen without some exercise of discretion on the part of law enforcement officials, and (2) in practical fact, the American penal system contemplates the exercise of discretion on the part of law enforcement officials in determining whom to prosecute. 42 AM. JUR. *Prosecuting Attorneys* § 14 (1942)

14. *See* People v. Darcy, 59 Cal. App. 2d 342, 353, 139 P.2d 118, 125 (1943), People v. Montgomery, 47 Cal. App. 2d 1, 14, 117 P.2d 437, 446 (1941), Society of Good Neighbors v. Mayor of Detroit, 324 Mich. 22, 27, 36 N.W.2d 308, 310 (1949).

15. People v. Montgomery, 47 Cal. App. 2d 1, 14, 117 P.2d 437, 446 (1941). Such a proposition may fail to recognize that without the existence of the acquittal remedy, society would lack its most effective way of raising the issue of the propriety of discriminatory enforcement.

16. 59 Cal. App. 2d 342, 139 P.2d 118 (1943).

17. *Id.* at 353, 139 P.2d at 125. This fear is well rebutted in the *Darcy* dissent:

> It is, of course, the law that a person committing a crime cannot claim an unlawful discrimination upon a mere showing that other persons or classes of persons have committed the same offense and have not been prosecuted therefor. But where that fact is shown plus an arbitrary, intentional and deliberate discriminatory intent on the part of the law enforcement officers, a different problem is presented. In such case, an accused has made out a case of denial of equal protection.

Id. at 358-59, 139 P.2d at 128.

18. *See* note 6 *supra*.

19. *Id.* For a more complete listing *see* Comment, *supra* note 6, at 1106-07 n. 12.

20. 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962).

unconstitutionally discriminatory enforcement. The court noted that "the burden [of proof] resting upon the defendant is a heavy one."[21] Showing "mere laxity" of enforcement is insufficient;[22] the defendant must demonstrate the existence of intentional selectivity of enforcement which is not based upon a "rational pattern."[23] When "the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others,"[24] a violation of equal protection will be found.

Some judges fear that discriminatory enforcement may be used as a technique of harassment or persecution. In *People v. Darcy*,[25] the defendant, an avowed communist, was convicted of perjury on grounds that he had sworn to a false name in his voter registration affidavit. His conviction was affirmed on appeal, although the evidence showed that there were thousands of affidavits containing similar false statements, none of which had ever led to criminal prosecution since the usual remedy was a postcard informing the affiant to come in to correct the error. Four judges dissented, saying:

> The basic principle of our system of government is that all people, including the weak, the outnumbered and the nonconformist, stand before the courts on a basis of equality with all other litigants. If the criminal processes can be deliberately and intentionally abused to prosecute a particular individual because he is a Communist, not because of what he has done, but because of his beliefs, the fundamental cause for which we are now fighting a great war becomes a hollow mockery [26]

Courts and commentators urging application of the *Yick Wo* doctrine in criminal cases emphasize that purposeful discrimination against the defendant as an individual or representative of

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21. *Id.* at 20-21, 225 N.Y.S.2d at 136.

22. Mere "laxity" of enforcement, though it may result in the unequal application of the law, is never considered sufficient to shield a defendant from prosecution. Wade v. City and County of San Francisco, 82 Cal. App. 2d 337, 339, 186 P.2d 181, 182 (1947), People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 15, 225 N.Y.S.2d 128, 131 (1962)

23. [E]ven if the enforcement of a particular law is selective, it does not necessarily follow that it is unconstitutionally discriminatory Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary

16 App. Div. 2d at 21, 225 N.Y.S.2d at 136.

24. *Id.*

25. 59 Cal. App. 2d 342, 139 P.2d 118 (1943)

26. *Id.* at 359, 139 P.2d at 129 (dissenting opinion)

a particular class is directly contrary to significant public interests. Such action directly undermines the purpose of the legislature, since the law, vitiated to the extent of its nonenforcement, ceases to exert any significant influence on the pattern of community behavior.[27] Nor can it be justified because of insufficiency of police resources; such shortages would justify only a careful allocation, based upon some rational pattern of selectivity.[28] Furthermore, the fear that application of the *Yick Wo* doctrine to criminal prosecutions might unduly hamper state police efforts is considered unrealistic. As the *Utica Daw's Drug* case indicates, the burden resting upon the defendant is a heavy one, and even if he succeeds in sustaining it, he will not be immune from a new prosecution in the event public authorities undertake a generalized enforcement of the law.[29]

It was against this background that *United States v. Robinson* was decided. *Robinson* holds that the intentionally discriminatory enforcement by Government officials of a federal *criminal* statute violates the fifth amendment. To support its finding of discriminatory enforcement, the court found that (1) Government law enforcement agents were engaged in extensive wiretapping, (2) such wiretapping violated section 605 and (3) although these facts were known, the Department of Justice had systematically refused to prosecute. With these findings, and citing *Yick Wo* as primary authority, the court acquitted the defendant on grounds of unconstitutionally discriminatory enforcement. There was no discussion of whether the criminal nature of defendant's activity should have distinguished the case from the basic model established in *Yick Wo*.

Little argument can be had with the court's finding of Government wiretapping. The evidence that, at least prior to 1968,[30] the FBI engaged in substantial wiretapping activity in violation of section 605 is now irrefutable.[31] In addition to the cases cited by the court,[32] two recent studies give thorough documentation

27. *See* Note, *supra* note 6, at 354 n.4.

28. *Id.* at 357.

29. People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 20-21, 225 N.Y.S.2d 128, 136 (1962); 4 A.L.R. 3d 393, 402. This statement, of course, is true only if the statute of limitations has not yet run.

30. On June 16, 1967, the Office of the Attorney General issued a directive prohibiting wiretapping by federal agents. F. REMINGTON, CRIMINAL JUSTICE ADMINISTRATION 108-09 (1969).

31. *See* notes 34 & 35 *infra*.

32. Alderman v. United States, 394 U.S. 165 (1969), Desist v. United States, 394 U.S. 244 (1969), Katz v. United States, 389 U.S. 347 (1967), Olmstead v. United States, 277 U.S. 438 (1928). These cases all involve the admissability of evidence acquired by federal wiretapping.

to the court's conclusion that both federal and state authorities were engaging in extensive wiretapping.[33] These reports show a pattern of surveillance being carried on with total immunity from the threat of prosecution.[34]

The *Robinson* court found such wiretapping to be an obvious violation of the statute.[35] In light of the statutory language, this determination seems correct. Section 605 states that "no person" —a term consistently interpreted to comprehend federal agents[36] —shall "intercept and divulge or publish" information secured by a wiretap.[37] The Department of Justice, in attempting to justify its wiretapping activity, had traditionally taken the position that the *intra*departmental use of intercepted material did not constitute "divulgence" within the meaning of the statute.[38] This argument, even if accepted, would probably not have removed the FBI's efforts from the purview of section 605, because of the additional language in the statute prohibiting the "use"[39] of intercepted communications for anyone's benefit.[40]

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33. E. LONG, THE INTRUDERS (1967), S. DASH, R. KNOWLTON & R. SCHWARTZ, THE EAVESDROPPERS (1959)

34. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act setting out the mechanics by which the FBI may wiretap and yet comply with statutory and constitutional safeguards. It seems likely that this development, together with the decision in *Robinson*, will persuade federal agents to stay within legal limits in their wiretapping activity If the Government decides it is unwilling or unable fully to comply with the new legislation, it may choose to continue its policy of discriminatory enforcement of section 605, or, in light of the *Robinson* ban, may decide to prosecute no one. If this latter alternative is selected, it would mark the effective demise of section 605, pointing up the fact that, as a long range solution to the problem of governmental wiretapping, the *Robinson* holding is clearly unsatisfactory This is the clearest weakness of the *Robinson* decision, and once again states the issue of whether the remedy for discriminatory enforcement lies "in the exoneration of the guilty at the expense of society"

35. 311 F Supp. at 1064.

36. *See* Benanti v. United States, 355 U.S. 96 (1957), Nardone v. United States, 302 U.S. 379 (1937)

37. 47 U.S.C. § 605 (1964)

38. [T]he only offense under the present law [section 605] is to intercept any communication and divulge or publish the same. Any person, with no risk of penalty, may tap telephone wires and act upon what he hears or make any use of it that does not involve divulging or publication.

Hearings on H.R. 2266 and H.R. 3099 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 77th Cong., 1st Sess. 18 (1941) (statement by Attorney General Jackson).

39. "No person having received any intercepted communication shall use [the same] or any information therein contained for his own benefit or for the benefit of another not entitled thereto." 47 U.S.C. § 605 (1964)

40. As one commentator points out: "Obviously, without either di-

Even so, the court rejected the Government's definition of "divulgence" as "unsound," finding no basis for such an interpretation in the statute.[41] Possibly unknown to the court, the Justice Department had already reversed itself and taken a similar position.[42]

The court also rejected the Government's further argument that its wiretapping activity was required by the public interest.[43] The court apparently believed that such a contention was somewhat beside the point in view of the unambiguous language of the statute.[44]

The crucial issue in *Robinson* was whether a finding of discriminatory enforcement of the statute should necessarily have interdicted prosecution of the defendant. An analysis of the cases in which a defense of discriminatory enforcement has been raised suggests that application of the *Yick Wo* rule would not seriously jeopardize valid law enforcement activity nor endanger significant elements of society As one commentator points out:

> The principal objection to recognizing the right [against discriminatory enforcement]—that society may suffer if criminals go free merely because others are not punished—seems adequately answered by the experience reflected in the cases in which the claim has been raised. Serious crimes are almost never involved; more frequently discrimination is alleged in the enforcement of a minor municipal ordinance. It would appear that the pressure of social necessity effectively prevents discrimination in enforcement against major offenses [45]

If this is so, the danger of significant social injury may be sub-

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vulging or using, wire tapping would be just an idle pastime." Donnelly, *Comments and Caveats on the Wiretapping Controversy*, 63 YALE L.J. 799, 801 (1954). It is possible, of course, that "use" would be interpreted only to mean "for private use."

41. 311 F. Supp. at 1065.

42. On June 16, 1967, the Office of the Attorney General issued a Memorandum which stated:

> 1. Section 605 prohibits the interception and divulgence or use of telephone communications and is applicable to federal law enforcement agents.
>
> 2. Interception is prohibited whether or not the information which may be acquired is intended to be used in any way or to be subsequently divulged outside the agency involved.

F. REMINGTON, *supra* note 30, at 108-09.

43. 311 F. Supp. at 1065.

44. The court dismissed the Government's argument in one sentence, saying: "While the Government attempts to justify its wire tapping operations in the paramount interests of public safety. , the statute in question contains no such exceptions." 311 F. Supp. at 1065.

45. Comment, *supra* note 6, at 1140-41.

stantially less than some courts have imagined. To raise the chimera of the freed murderer[46] as an objection to recognizing the right against discriminatory enforcement, therefore, may be unrealistic.

On the other hand, when equality under law is upset by intentionally discriminatory enforcement, some public injury seems likely to result. The difficult issue is whether the *Yick Wo* doctrine was intended to protect against such injury In *Yick Wo*, the discriminatory application of the ordinance against the defendant was the result of racial prejudice against the Chinese. In *Robinson*, enforcement of the statute was an attempt, albeit discriminatory, to further partially the purposes of the statute. Defendant was prosecuted only because he had violated the law, and not because of any ill will felt toward him by public officials.

Whether this distinction is valid depends upon the scope of *Yick Wo*. Implicit in the *Robinson* decision is the belief that presence of an invidious motive for prosecution is not required for a finding of discriminatory enforcement. The absence of a proper justification for not fully enforcing the statute makes any partial enforcement discriminatory Though this seems to expand *Yick Wo*, it is probably justified. It reflects a feeling that in a democratic society, one man's bundle of legally approved activities should be no smaller than another's, where their circumstances are the same.

Supporting this rationale may be the belief that courts must have some effective method of censuring intentionally discriminatory enforcement. Though seldom articulated by the courts, the discriminatory enforcement doctrine as applied to the enforcement of criminal statutes may be shorthand for a rationale much like that which justifies the exclusionary rule in cases where evidence is seized in violation of the fourth amendment.[47]

On the particular facts of *Robinson*, this rationale may be especially appropriate. In *Robinson*, the Department of Justice sought to prosecute the defendant for a practice engaged in by its

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46. *See* note 15 *supra*.

47. As Mr. Justice Clark stated in Mapp v. Ohio:

> There are those who say that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable blundered." In some cases this will undoubtedly be the result. But, as we said in *Elkins*, "there is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws

367 U.S. 643, 659 (1961).

own agents. Although charged with responsibility for full and fair enforcement, it abused that power not only by enforcing the statute discriminatorily, but by seeking to shelter its own agents from prosecution. Failure strongly to censure discriminatory enforcement in such circumstances would likely breed greater disrespect for the law. The need for such action is all the more important where, as in the case of wiretapping, alternative methods of ensuring nondiscriminatory enforcement would probably be ineffective.[48]

In the final analysis, a court's acceptance of the defendant's plea of discriminatory enforcement may be attributable not so much to a perception of actual wrong to the defendant, as to a feeling that the upholding of such arbitrary prosecution would be a wrong against the court itself, and the system of laws for which it stands. As one court recently stated:

> The claim of discriminatory enforcement does not go to the question of the guilt or innocence of the defendant The wrong sought to be prevented is a wrong by the public authorities [A]rbitrary and discriminatory enforcement of a generally disregarded law is a power frequently invoked in countries ruled by a dictator but wholly out of harmony with the principle of equal justice under law prevailing in democratic societies.[49]

48. An action for mandamus would not be successful. United States v. Cox, 342 F.2d 167 (5th Cir. 1965), Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965). Other factors suggesting that any form of direct prosecution of Government wiretappers would be ineffective include: (1) the widespread use of wiretapping at all levels of government, both state and federal (*see* S. DASH, *supra* note 33), and (2) the inherently secretive and self-concealing nature of wiretapping, making discovery of violations difficult.

49. People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 17-18, 225 N.Y.S.2d 128, 133 (1962).

Consumer Law· Revolving Charge Account Rates Held to Violate State Usury Law

The State of Wisconsin brought suit in the Circuit Court of Dane County[1] against the J. C. Penney Company seeking an injunction against alleged violations of the state's usury statute[2] and provisions of the Wisconsin Small Loan Act.[3] The trial court found that the defendant's revolving charge account agreement which assessed a one and one-half percent monthly charge on the declining unpaid balance of the customer's account (a total maximum charge of 18 percent per annum) to be an exaction of a greater sum for the "forbearance"[4] of money than is allowed by law, making the transaction usurious.[5] The trial court concluded, however, that standing to sue under the state's usury statute extended only to those who personally contracted with the defendant company and that the matter did not create any

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1. State v J. C. Penney Co., No. 125-287 (Cir. Ct. Wis., Nov. 13, 1969)

2. WIS. STAT. ANN. § 138.05(1)(a) (Supp. 1970)

> (1) Except as authorized by other statutes, no person shall, directly or indirectly, contract for, take or receive in money, goods or things in action, or in any other way, any greater sum or any greater value, for the loan or forbearance of money, goods or things in action, than:
>
> (a) At the rate of $12 upon $100 for one year computed upon the declining principal balance of the loan or forbearance.

WIS. STAT. ANN. § 138.09(9)(a) (Supp. 1970) states:

> No person except as authorized by statutes shall directly or indirectly charge, contract for or receive any interest or consideration greater than allowed in § 138.05 upon the loan, use or forbearance of money, goods or things in action, or upon the loan, use or sale of credit. The foregoing prohibition shall apply to any person who by any device or pretence of charging for his services or otherwise seeks to obtain a greater compensation than is authorized by this section.

3. WIS. STAT. ANN. § 214.01(3) (1957) states:

> "Small loan" means the loan, use or forbearance of money, goods or things in action of the amount or value of three hundred dollars or less, or the loan, use or sale of credit of the amount or value of three hundred dollars or less.

WIS. STAT. ANN. § 214.20 (1957) states:

> No person other than a licensee shall engage in the business of making small loans and, directly or indirectly, charge, contract for or receive a greater rate of interest or consideration upon any such loan than he is permitted by law to charge, contract for or receive without being licensed under this chapter.

4. BLACK'S LAW DICTIONARY 773 (Rev 4th ed. 1968) says:

> Within usury law, [forbearance] signified contractual obligation of lender or creditor to refrain, during given period of time, from requiring borrower or debtor to repay loan or debt then due and payable.

5. State v. J. C. Penney Co., 48 Wis. 2d 125, 130, 179 N.W.2d 641, 643 (1970)

common nuisance requiring an injunction at the instance of the state.[6]

On appeal, the Wisconsin Supreme Court similarly held the one and one-half percent monthly charge on the declining unpaid balance to constitute an excessive charge for a forbearance within the Wisconsin usury statute and thereby illegal; however, the court went further and *held* that the violation of the statute constituted a public nuisance which could be enjoined at the instance of the state. *State v. J C. Penney Co.*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970)

The prohibition against usury has been recognized for centuries.[7] The Old Testament prohibition against demanding interest on a loan of money or food was a moral injunction against growing rich by a brother's misfortune.[8] The emergence, in eleventh and twelfth century Europe, of widespread commercial transactions, however, shifted attention from protection of the necessitous individual borrower to the economic requirements of a competitive commercial market. While this resulted in some modification of the restrictions of earlier centuries, it never completely eliminated them.[9] Usury laws following the European pattern were introduced into the United States with its first colonists and, at present, exist in statutory form in all but one state.[10]

As a result of the conflict between the historical moral in-

6. WIS. STAT. ANN. § 280.02 (1957) states, "An action to enjoin a public nuisance may be commenced and prosecuted in the name of the state . by the attorney-general upon his own information. " The trial court in the *J. C. Penney* case found it unnecessary to consider the application of WIS. STAT. ANN. § 138.09(9)(a), quoted at note 2 *supra* or the provisions of the Small Loan Act, quoted at note 3 *supra*.

7. For a thorough recounting *see generally* S. HOMER, A HISTORY OF INTEREST RATES (1963), B. NELSON, THE IDEA OF USURY (1969).

8. *Exodus* 22:25 says, "If you lend money to one of your poor neighbors among my people, you shall not act like an extortioner toward him by demanding interest from him."

9. *See* Johnson, *Interest and Usury*, in THE REALITIES OF MAXIMUM CEILINGS ON INTEREST AND FINANCING CHARGES 5 (The Conference on Personal Finance Law 1969).

10. Benfield, *Money, Mortgages, and Migraine—The Usury Headache*, 19 CASE W RES. L. REV. 819, 824, 835 (1968) *See also* 1 CCH CONSUMER CREDIT GUIDE ¶ 510 (1970). At present New Hampshire is the only state which has not fixed a statutory usury rate on contractual agreements. Previously, Massachusetts had no fixed rate but in August, 1970 the legislature passed MASS. LAWS 1970 ch. 826, putting a ceiling of 20 percent per annum on interest unless a higher rate is permitted by statute or the lender notifies the attorney general of his intention to charge a higher rate and maintains records of his transactions. MASS. ANN. LAWS ch. 271, § 49 (Supp. 1970).

junction against usury and the need for a market place free from its restrictions,[11] various legislative and judicial exceptions to the general usury laws have developed. Among the legislative exceptions which allow for rates in excess of those provided for by the general usury statutes are small loan acts, industrial loan laws and credit union acts.[12] In addition, legislatures have enacted exemptions from general usury statutes for loans to corporations, loans which are insured by the Federal Housing Administration, loans by savings and loan associations and occasionally loans made by banks or for business purposes.[13] The major judicial development has been the *time price* exception. This was based on the notion that the prohibition against usury was limited to (1) loans of money or personal property repayable in kind and (2) forbearances to require payment on a loan or debt *then due*.[14] This effectively extricated sales of land and goods on time from the jaws of the economically restrictive usury laws, since the time price doctrine rested on the theory that, first, such a transaction was merely a sale of goods and not a loan of money and second, there was no forbearance because the debt was based on a future price and not on an amount then due.[15]

The widespread growth of consumer credit transactions in this country has served to promote the enactment of additional legislative exceptions to the general usury laws while encouraging the judicial paring of the time price exception.[16] The increased demand for credit on all levels and by all types of borrowers has put growing pressure on many lenders, who often must deal with rigid statutory rates, to cease extending credit to

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11. *See* Johnson, *supra* note 9, at 10.

12. *See* Benfield, *supra* note 10, at 835. *See also* 1 CCH CONSUMER CREDIT GUIDE ¶ 520 (retail installment sales acts), ¶ 540 (small loan laws), ¶ 560 (industrial loan laws) and ¶ 570 (installment loan laws.)

13. *See* Benfield, *supra* note 10, at 835.

14. For the time price exception in its early development *see* Beete v Bidgood, 108 Eng. Rep. 792 (K.B. 1827)

15. The classic formulaton of the doctrine in the United States is set out in Hogg v. Ruffner, 66 U.S. (1 Black) 115, 118-19 (1861)

> But it is manifest that if A propose to sell to B a tract of land for $10,000 in cash, or for $20,000 payable in ten annual installments, and if B prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer $100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit. Such a contract has none of the characteristics of usury; it is not for the loan of money, or forbearance of a debt.

16. B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 15 (1965) provides a detailed discussion of the effect of credit transactions on usury legislation. *See also id.* at 83 for a discussion of the effects of credit transactions on the time price doctrine.

the high-risk borrower.[17] As a result, a growing number of legislatures have begun to realize the need for rate flexibility in the area of consumer credit and have enacted special rate ceilings for retail installment sales and consumer loans.[18] At the same time, a flourishing consumer society has forced most buyers of goods into the position of the necessitous borrower,[19] thus qualifying one of the underlying assumptions of the time price doctrine, *i.e.*, equality of bargaining power between lender and borrower.[20] In addition, courts have found that as a practical matter there is very little distinction to be made between the consumer installment loan and the consumer installment sales transaction, although theoretically the one was thought to be a loan of money and thus subject to general usury statutes while the other was considered a sale of goods on time and thus within the time price exception.[21] The courts of two states have chosen to eliminate the difference in treatment by placing credit sales within the scope of the usury statute, essentially depriving the time price doctrine of its effectiveness.[22] Thus changes in the nature of credit transaction in our consumer society have forced courts and legislatures to take a new look at usury statutes and the application of the time price doctrine.

The modern revolving charge account presents a unique form of consumer credit transaction.[23] Under the typical revolv-

17. Malcolm, *The New Maximum Charges*, in THE REALITIES OF MAXIMUM CEILINGS ON INTEREST AND FINANCE CHARGES 23 (The Conference on Personal Finance Law 1969).

18. *See* B. CURRAN, *supra* note 16, at 65. *See also* note 12 *supra*.

19. *See* Benfield, *supra* note 10, at 838.

20. Under the earlier assumption of equality of bargaining power, it was felt that a purchaser was not, like the needy borrower, a victim of the rapacious lender, since he could refrain from the purchase if he did not choose to pay the price asked by the seller. General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 78, 262 S.W 425, 428 (1924).

21. *See* B. CURRAN, *supra* note 16, at 83. Curran notes:

> [T]he consumer installment sale arrangement in which a security interest in the goods sold is retained by the seller and which is immediately thereafter transferred to a credit institution, such as a bank or sales finance company, is in many respects very similar to the purchase money consumer installment loan arrangement in which a security interest in goods purchased is acquired by the lender.

22. *See* Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 308 S.W.2d 802 (1957) and Lloyd v. Gutgsell, 175 Neb. 775, 124 N.W.2d 198 (1963) which was overruled by NEB. REV. STAT. § 45-338 (1968) which provides generally for a time price differential on installment sales contracts not to exceed nine dollars per one hundred dollars per year add-on on the first thousand dollars.

23. For a brief history of the revolving charge account *see* NATIONAL RETAIL MERCHANTS ASSOCIATION, ECONOMIC CHARACTERISTICS OF DEPARTMENT STORE CREDIT 7 (1969).

ing charge account, the customer enters into a written agreement with the merchant, which usually allows him to purchase merchandise for which he may pay the cash price at any time within 30 days without incurring any additional charges. If, however, he has not paid the full amount within 30 days, the store assesses a monthly charge, usually between one and two percent on the unpaid balance, and states a minimum amount which the customer must pay before the next billing date, generally about ten percent of the entire balance. Each additional sale is merged into the unpaid balance of the account after expiration of the 30 day grace period. Each time the customer makes a purchase and decides to charge it, he is required to sign a sales slip, thus agreeing that the terms of the original contract shall apply to this sale. Revolving charge accounts differ from other credit transactions in that they operate for an indefinite period of time, allow the customer several consecutive purchases on one account, and provide a single monthly billing with a charge on the entire unpaid balance.

Prior to the instant case, the only court to deal specifically with the problem of the revolving charge account in relation to usury was the Tennessee Supreme Court in *Dennis v. Sears, Roebuck and Company*.[24] The court in the *Dennis* case was faced with a Tennessee statute[25] which specifically allowed a *one and one-half percent monthly charge* on a revolving charge account despite an apparent constitutional prohibition against fixing a rate of interest of more than ten percent per annum.[26] Noting that there was a strong presumption in favor of the constitutionality of the acts of the Tennessee legislature, the court declined to hold the revolving charge account legislation unconstitutional.[27] While simply presuming that a revolving charge account transaction was like any other credit sale at common law and thus within the time price exception, the court concluded that if any changes were to be made in the application of the time price doctrine, for social or economic reasons, *i.e.*, widespread use of present day credit sales differing from the nature of sales transactions when the time price exception evolved or the unusually necessitous condition of a majority of today's credit buyers, the changes were questions of policy to be determined by the legislature and not the court.[28]

24. — Tenn. —, 446 S.W.2d 260 (1969)
25. TENN. CODE ANN. § 47-11-104 (1964)
26. TENN. CONST. art XI, § 7.
27. Dennis v. Sears, Roebuck & Co., — Tenn. at —, 446 S.W.2d at 263.
28. *Id.* at —, 446 S.W.2d at 265.

Unlike Tennessee, the Wisconsin usury law is statutory rather than constitutional.[29] Though solidly rooted in the traditional moral prohibition against usury, the statute has seen many changes over its 120 year history as a result of varying political and economic pressures at work within the state. During the nineteenth century, for example, periods of economic growth brought a clamor for easy credit and tended to force the legislature to raise the rate ceiling. Economic recession, on the other hand, made it more difficult for people to pay off their existing debts and public opinion forced the rates down again.[30] In an effort to alleviate some of the pressures of the usury statute itself by allowing higher rates for certain types of loan transactions, the Wisconsin Legislature has, within the last 50 years, enacted several new regulatory statutes. These include the Credit Union Act of 1923,[31] the Small Loan Act of 1933,[32] and the Motor Vehicle Installment Sales Act of 1935,[33] which gives the time price doctrine express statutory recognition in Wisconsin. In addition, the legislature has created exemptions from the usury laws for loans to corporations and Federal Housing Administration loans.[34]

The Wisconsin court in the *J C. Penney* case was faced with determining whether the revolving charge account fell within the state's usury statute prohibiting the taking of interest on the loan or forbearance of money in excess of 12 percent per annum.[35] It having been agreed by the parties that the transac-

29. WIS. STAT. ANN. § 138.05(1)(a) (Supp. 1970), quoted at note 2 *supra.*

30. Freidman, *The Usury Laws of Wisconsin: A Study in Legal and Social History,* 1963 WIS. L. REV. 515, 536.

31. WIS. STAT. ANN. § 186.09(1) (Supp. 1970) says: "The credit union may make loans to members for such purpose and upon such terms as the credit committee approves, at rates of interest not to exceed one percent per month on the unpaid balance."

32. WIS. STAT. ANN. § 214.19 (1957) provides:

> No licensee shall, directly or indirectly, charge, contract for or receive a greater rate of interest or consideration than is fixed as a maximum by the department under authority of section 214.07, upon any small loan, but every licensee may loan any sum of money not exceeding 300 dollars in amount and upon any such loan may charge, contract for and receive a rate of interest or consideration which does not exceed the said fixed maximum rate of charge.

33. WIS. STAT. ANN. § 218.01 (1957) provides for a time price differential between 7 percent and 12 percent per annum on retail installment sales of motor vehicles depending on the age of the vehicle.

34. WIS. STAT. ANN. § 138.05(5) (Supp. 1970) provides an exemption for loans made to corporations and WIS. STAT. ANN. § 219.03 (1957) provides for exemptions for FHA loans.

35. For a general discussion of the case *see* Note, *Usury and the Time*

tion was not an actual loan, the court then had to determine whether the revolving charge account transaction was a "forbearance" within the meaning of the statute or whether it fit within the time price exception.

The court first reasoned that the transaction was, indeed, a "forbearance" in that there was an agreement to refrain from collecting an existing debt as set forth in the traditional definition of a forbearance. While the original agreement appeared to make the amount *due and payable* at a future date, the court noted that a debt did, in fact, arise at the time the purchase was made, after which the actual forbearance occurred.[36] The court argued further that if it were concluded that the Wisconsin Legislature by adopting the New York usury statute in 1851 also adopted all constructions by the New York courts of the word "forbearance" to that date as well as all subsequent constructions, then the word "forbearance" should be interpreted to apply to sales of personal property [37]

Prior to the adoption of the New York usury statute by the Wisconsin Legislature, the New York court in *Dry Dock Bank v. American Life Ins. & Trust Co.*[38] had decided that where the substance is usury, there need not be an actual loan of money, since a loan of money will be presumed for so much of the purchase money as is equivalent to the cash value of the commodity, and the excess of price over the just value is a premium for the forbearance of the debt. Later, in *London v. Toney*,[39] the court reiterated its position saying that the forbearance of money need not be preceded by an actual loan. Finally, in *Universal Credit Co., Inc. v. Lowell*[40] involving the sale of an automobile under a conditional sales contract, the court held that a "forbearance" within the meaning of the New York usury statute did apply to sales of personal property on credit.

While acknowledging the historic validity of the time price exception as set forth in *Hogg v. Ruffner*,[41] the court emphasized that the doctrine was limited by the "spirit and intent of the law against usury "[42] The court reiterated several times that it

Price Exception—Revolving Charge Accounts—Enjoining Usury as a Public Nuisance, 1971 WIS. L. REV. 296.

36. 48 Wis. 2d at 135, 179 N.W.2d at 646.
37. *Id.* at 138, 179 N.W.2d at 647.
38. 3 N.Y. 344, 358 (1850).
39. 263 N.Y. 439, 446, 189 N.E. 485, 488 (1934)
40. 166 Misc. 15, 2 N.Y.S.2d 743 (1938)
41. 66 U.S. (1 Black) 115 (1861) *See* note 15 *supra.*
42. 48 Wis. 2d at 141, 179 N.W.2d at 650, quoting Otto v. Durege, 14 Wis. 621 (1861).

would look behind the mere form of the transaction to its substance.[43] The court then applied several indicia of a true time price sale to the revolving charge account to determine whether the real substance of the transaction was subject to the state's usury statute. The court first noted the absence of the quotation of two prices to the customer. The only price at which the goods were actually offered was the cash price, the time price being neither calculated nor quoted. There was no opportunity presented to the customer to choose between a cash and a quoted time price.[44] In addition, the Wisconsin court pointed out that the charges themselves were computed by applying certain schedules of charges to the cash price. The use of such a formula, the court stated, was merely another indication that a real time price had not been quoted and that the addition to the cash price by such a formula was merely a financing plan for the extension of credit.[45] The court noticed also that the sales tax was computed on the cash price, the company thereby taking advantage of the statutory tax exemption for interest or financing charges[46] because of the impossibility of determining a time price on which to base a tax.[47] Finally, the court observed that the transaction did not fall within the classic time price doctrine because (1) it covered more than one sale[48] and (2) because there was an option of lowering the alleged time price even after the services had begun to run.[49] The court noted that there have been no cases which have held that a contract covering more than a single sale is a true time price sale and that the classic formulation of the doctrine as posed in *Hogg v. Ruffner*[50] did not include the option of lowering the time price. In addition, the charge was not permissible as merely a penalty since it was not, in fact, used to compel payment. On the contrary, the revolving charge was designed to encourage the customer to delay payment.[51] Nor, con-

43. Compare the court's comment in Beete v. Bidgood, 108 Eng. Rep. 792, 793 (K.B. 1827), where the court initiated the time price exception by upholding a contract for the sale of land which appeared to exact a usurious rate of interest, saying that it is the court's duty to look, not at the form of words, but at the substance of the transaction.

44. 48 Wis. 2d at 145, 179 N.W.2d at 653.

45. *Id.* at 147, 179 N.W.2d at 653.

46. WIS. STAT. ANN. § 77.54 (8) (Supp. 1970) provides an exemption from the sales tax for charges for interest, financing or insurance where such charges are separately set forth upon the invoice given by the seller to the purchaser.

47. 48 Wis. 2d at 149, 179 N.W.2d at 654.

48. *Id.* at 145, 179 N.W.2d at 653.

49. *Id.* at 144, 179 N.W.2d at 651.

50. 66 U.S. (1 Black) 115 (1861).

51. 48 Wis. 2d at 149, 179 N.W.2d at 654.

cluded the court, can it be contended that this was a mere "service charge" since there had been no evidence introduced to prove that the actual cost of the service bore any relation to the charge.[52]

A final prerequisite to finding an agreement usurious under Wisconsin law was an intent to avoid the statute.[53] On this point the court upheld the trial court's finding, in light of all the facts, that the agreement was usurious on its face. It was not felt to be unreasonable for the trial court to hold that evidence that an agreement is not, in fact, a time price sale may also be symtomatic of an attempt to evade the usury laws.[54]

Unlike the trial court, which held in favor of the defendant J. C. Penney on the grounds that the right to assert violation of the state's usury statute was a right personal to those who contracted with the defendant,[55] the supreme court on appeal granted an injunction against the respondent as a public nuisance. The court reasoned that although there was a specific remedy for the borrower under the statute, the small amount in controversy was prohibitive in consumer actions. Further, since the statute was enacted for the benefit of the public generally, and there was no criminal sanction which the state could seek to impose in the public's behalf, the court would allow equity to relieve where the law was inadequate.[56]

The effect of the *J C. Penney* decision has been interpreted narrowly to restrict the time price exception in retail transactions in Wisconsin. The fact the court would hand down such a far-reaching decision suggests that perhaps something more was operating than appears on the face of the opinion. Two elements of the opinion suggest what may have been the undisclosed consideration. First, there was nothing present in the Wisconsin common law up to that point that would have forced the court ultimately to such a decision; rather, in formulating its list of indicia, the court drew heavily on Nebraska and Arkansas where like decisions had evolved more gradually [57] Moreover, in attempting to

52. *Id.* at 147, 179 N.W.2d at 654.
53. *Id.* at 150, 179 N.W.2d at 654.
54. *Id.* at 151, 179 N.W.2d at 655.
55. *Id.* at 152, 179 N.W.2d at 655.
56. *Id.* at 153, 179 N.W.2d at 655.
57. *See* B. CURRAN, *supra* note 16, at 87. Arkansas has a constitutional prohibition against usury and at the time of each of the following decisions there was no special vendor-credit sales legislation in force in Arkansas. Ford v. Hancock, 36 Ark. 248 (1880) held that it was a question for the jury whether a particular contract was a bona fide credit sale and not subject to usury or merely a device to conceal usury. Hare v.

mold the opinion into a cohesive force, the court repeatedly urged attention to substance rather than form.[58] Herein lies the second element, suggesting that the court is interested in a result which comes closer to the original "spirit and intent" of the laws of usury than one might come by merely fitting the agreement into a particular legal niche. The court appears to have taken note of the fact that the forces of our credit economy have placed the consumer in the position of the necessitous borrower with unequal bargaining power, and has thus retreated to a moral interpretation of the usury statute to effect a measure of consumer protection.[59]

Such an interpretation is not without its justification in a society which has, up to now, been primarily creditor oriented. Yet the decision perhaps ignores the economic realities of consumer credit.[60] While it is difficult to determine what the actual costs and revenues of a revolving charge account are in fact, there is some evidence that even in large department stores revolving charge accounts may not be supporting their own costs.[61] If this is indeed true, however, then there are three major effects which the forcible lowering of the allowable rate might have. First, it may induce merchants to shift the additional cost onto the cash buyer, forcing the cash buyer in effect to subsidize the

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General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952) held that a conditional installment sales contract which was transferred by credit arrangement to a third party sales finance company fell within the constitutional prohibition. A number of later cases reaffirmed this position. Then, in Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 308 S.W.2d 802 (1957), the court applied the usury law to a direct sale of goods on credit.

In Nebraska, the court in Elder v. Doerr, 175 Neb. 483, 122 N.W.2d 528 (1963) declared that charges in a retail installment sales contract for a motor vehicle were interest and that the provisions of the act authorizing the charges were in violation of the Nebraska constitution which prohibited special laws regulating the interest on money. After the *Doerr* decision, the legislature reenacted essentially the same statute which the court struck down again in Stanton v. Mattson, 175 Neb. 767, 123 N.W.2d 844 (1963). Also, in Lloyd v. Gutgsell, 175 Neb. 775, 124 N.W.2d 198 (1963), the court declared that when a time sale price is computed by applying a certain schedule of rates and charges to the cash price, the resulting product is interest. Finally, in 1964, the legislature amended the constitution to say that the legislature shall have authority to separately define and classify loans and installment sales. NEB. CONST. art. III, § 18.

58. 48 Wis. 2d at 138, 142-43, 179 N.W.2d at 647, 650-51.

59. For a discussion of moral usury *see* F. RYAN, USURY AND USURY LAWS 10-17 (1924).

60. *See* Benfield, *supra* note 10, at 838. *See also* B. CURRAN, *supra* note 16, at 66.

61. *See* NATIONAL RETAIL MERCHANTS ASSOCIATION, *supra* note 23, at 50.

credit buyer.[62] Second, it may cause merchants to reduce the amount of credit which they offer, thereby barring the high-risk, and possibly more necessitous consumer from the credit market.[63] Third, such a lowering of allowable rates could, at its worst, drive smaller, more marginal retailers out of business.[64] It is open to speculation whether any of these possibilities will, in fact, occur in Wisconsin where the rate ceiling is moderately high compared to other states.[65] But should they occur, they will affect consumer and merchant alike.

In conclusion, usury laws have had a long and varied history, often changing with the economic pressures of a particular period. The widespread growth of consumer credit transactions has provided yet another economic setting in which to view these laws and their effects on both borrower and lender. The revolving charge account presents a unique form of credit transaction whose ever increasing use suggests the need for a comprehensive examination of the treatment desired for such transactions in relation to general usury laws. The possible economic impact of holding the revolving charge account subject to general usury statutes only serves to emphasize the desirability of special legislative consideration of alternative treatment of the type suggested in a variety of retail instalment sales acts and in the Uniform Consumer Credit Code. The outcome of such a decision is of too much importance to both merchants and consumers to be overlooked by the legislature.[66]

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62. *Id.* at 30.

63. *See* Malcom, *supra* note 17.

64. *See* NATIONAL RETAIL MERCHANTS ASSOCIATION, *supra* note 23, at 30.

65. 1 CCH CONSUMER CREDIT GUIDE ¶ 510 (1970) Only twelve states have interest rates greater than Wisconsin's. They are: Colorado, Connecticut, Hawaii, Maine, Massachusetts, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, Utah and Washington.

66. At present, there are suits pending in about a dozen states to adjudicate the issues presented by the instant case. The Wall Street Journal, March 4, 1971, at 1, col. 6. Recently, a Minnesota district court held a revolving charge account transaction similar to the one in *J C. Penney* to be in violation of MINN. STAT. § 334.01 (1969), prohibiting the taking of interest on the loan or forbearance of money in excess of eight percent per annum. Montgomery Ward & Co. v. O'Neill, No. 373670 (Dist. Ct. Minn., Apr. 2, 1971), State v. Montgomery Ward & Co., No. 373678 (Dist. Ct. Minn., Apr. 2, 1971)

Criminal Law: Unreasonable Visual Observation Held to Violate Fourth Amendment

Testimony of observations during a continuous clandestine surveillance of a public restroom led to appellant's conviction for consensual sodomy [1] The security supervisor of a large department store had notice that a hole about 2-1/2 inches in diameter had been cut in the partition separating two stalls in the men's restroom. He and the store manager suspected illegal homosexual activity With the aid of the St. Paul police they devised a system whereby the toilet stalls could be observed through a ventilator in the ceiling of the restroom. From this vantage point the defendant was observed in the act of oral sodomy The sole issue appealed was the admissibility of the evidence.[2] With three justices dissenting, the Minnesota Supreme Court reversed the lower court conviction and *held* the evidence obtained by this secret surveillance was obtained in violation of the constitutional rights of those using the restroom facilities and was therefore inadmissible. *State v. Bryant,* 287 Minn. 205, 177 N.W 2d 800 (1970).

The right to be secure from governmental search and seizure has been defined by the courts primarily through interpretation of the fourth amendment.[3] The interest protected is that of the individual in maintaining a certain degree of privacy with regard to his person and effects.[4] The fourth amendment was held binding upon the states by incorporation into the fourteenth amendment,[5] and is implemented in the courts by the "exclusionary rule"[6] made applicable to the states in the leading case of *Mapp*

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1. MINN. STAT. § 609.293, subd. 5 (1969).
2. State v. Bryant, 287 Minn. 205, 206, 177 N.W.2d 800, 801 (1970).
3. U.S. CONST. amend. IV It has been suggested that this interest may enjoy overlapping protection from the provisions of the first and fifth amendments as well. With respect to the first amendment, *see* Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection,* 43 N.Y.U.L. REV. 968, 980 (1968), where the possibility is discussed and ultimately rejected. As to the fifth amendment, *see* Boyd v. United States, 116 U.S. 616, 633 (1866), which recognized the fifth amendment implications of the forced disclosure of incriminating evidence.
4. *See* the famous early English case, Entick v. Carrington, C.P 1765, 19 How. St. Tr. 1029, indicative of how deeply rooted in Anglo-Saxon common law are these interests now protected by the fourth amendment.
5. Wolf v. Colorado, 338 U.S. 25, 27 (1949). *See also* Terry v. Ohio, 392 U.S. 1 (1968), Ker v. California, 374 U.S. 23 (1963).
6. This rule provides simply that evidence obtained in an illegal

v. Ohio.[7] Constitutional provisions similar to the fourth amendment have been widely enacted by the states,[8] and prior to *Mapp* many states had voluntarily adopted the exclusionary rule.[9]

Since the fourth amendment speaks in terms of the reasonableness of the search, all decisions in this area necessarily involve a determination of the reasonableness of the challenged search,[10] in light of the particular facts and circumstances of the case.[11] The analysis generally has entailed a decision first, whether the area in question was constitutionally protected; second, whether a search had in fact taken place, and third, whether that search was unreasonable.

Some fundamental changes have recently modified traditional rules pertaining to the first question—the nature of a constitutionally protected area. Because the fourth amendment spoke of houses, early cases confined the scope of the amendment to places analogous to houses and enclosed spaces. Gradually this protection was extended to garages,[12] hotel rooms,[13] offices,[14] business establishments,[15] taxis[16] and desks.[17] Until quite recently, no case explored the possibility of an extension of this protection to areas temporarily privately occupied but otherwise of an entirely public nature.[18]

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search or seizure is thereafter inadmissible. This is the "right arm" of the fourth amendment. After examining the alternatives, the Supreme Court determined the exclusionary rule provided the only effective protection of fourth amendment rights. Mapp v. Ohio, 367 U.S. 643 (1961).

7. 367 U.S. 643 (1961)

8. *See, e.g.*, MINN. CONST. art. I, § 10; WIS. CONST. art. I, § 11, CAL. CONST. art. I, § 19; N.Y. CONST. art. I, § 12.

9. *E.g.*, California had adopted the rule on its own. People v. Gahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) Minnesota, however, had not, holding such illegally obtained evidence to be admissible. State v. Siporen, 215 Minn. 438, 10 N.W.2d 353 (1943). *See also* State v. Richter, 270 Minn. 307, 133 N.W.2d 537 (1965), wherein Minnesota refused to apply the *Mapp* rule retroactively

10. "The fundamental requirement of the Fourth Amendment is reasonableness." State v. Romeo, 43 N.J. 188, 203, 203 A.2d 23, 32 (1964)

11. Ker v. California, 374 U.S. 23 (1963), Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) *See also* State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577, *cert. denied*, 384 U.S. 909 (1965), State v. Harris, 265 Minn. 260, 121 N.W.2d 327, *cert. denied*, 375 U.S. 867 (1963).

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

13. Hoffa v. United States, 385 U.S. 293 (1966), Stoner v. California, 376 U.S. 483 (1964).

14. Mancusi v. DeForte, 392 U.S. 364 (1968).

15. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)

16. Rios v. United States, 364 U.S. 253 (1960)

17. United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951).

18. It is interesting to note that prior to Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962), the author of Com-

Traditionally, a search was defined solely in terms of physical intrusion into the protected area. Evidence obtained by the senses, artificially magnified or not, without physical intrusion did not fall within the prohibition of the fourth amendment.[19] The advent of sophisticated electronic methods of surveillance made apparent the inequities of the "physical intrusion" doctrine. Supreme Court decisions on this point produced the *Olmstead-Goldman* rule holding electronic eavesdropping not to be a search within the meaning of the fourth amendment if there was no trespass.[20] The strength of this rule became gradually attenuated in a number of cases which came to recognize that petty technicalities were controlling case outcomes, with no rational basis for differences.[21]

The landmark decision of *Katz v. United States*[22] completely overhauled the test for determining the admissibility of evidence obtained through such search and seizure.[23] In holding inadmissible evidence obtained in the electronic surveillance of a conversation in a public telephone booth, the Court explicitly overruled *Goldman* and *Olmstead*.[24] Mr. Justice Stewart, writing

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ment, *Clandestine Police Surveillance of Public Toilet Booth Held to be Unreasonable Search*, 63 COLUM. L. REV. 955, 957 (1963) lamented that no such cases could be found.

19. Comment, *supra* note 18, at 957 & nn.28, 29 & 30.

20. Olmstead v. United States, 277 U.S. 438 (1928) (neither fourth nor fifth amendment held to bar admission of wire-tap evidence) (Brandeis, J. dissenting), Goldman v. United States, 316 U.S. 129 (1942) (evidence obtained from use of "detectaphone" placed against but not into a wall held admissible).

21. In Silverman v. United States, 365 U.S. 505 (1961), evidence obtained through the use of a "spike-mike" driven into the wall was held inadmissible. Clearly the logic becomes strained when the controlling distinction is solely the difference between placing a microphone against the wall or placing it into the wall. It became apparent that the existence of a violation of a constitutional right could not turn on the nuances of local trespass law. Stoner v. United States, 376 U.S. 483 (1964). The concept that a conversation simply could not be the subject of a search within the context of the fourth amendment finally gave way in Berger v. New York, 388 U.S. 41 (1967), but that case declined to do away explicitly with the *Olmstead-Goldman* rule. *But cf.* Mr. Justice Black's dissent in Katz v. United States, 389 U.S. 347, 364 (1967), demonstrating that the narrow reading of the fourth amendment regarding conversations is not completely dead. "A conversation overheard by eavesdroppings, whether plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of words, can neither be searched nor seized." 389 U.S. at 365.

22. 389 U.S. 347 (1967).

23. "In *Katz v. United States*, the Supreme Court purported to clean house on outmoded Fourth Amendment principles." Note, *supra* note 3, at 975.

24. 389 U.S. 347, 353 (1967).

for the majority, concluded, "The Fourth Amendment protects people not places."[25] This oft-quoted statement expresses a complete rejection of the outmoded, simplistic requirement that trespass is an indispensable condition to the finding of an unreasonable search. The principal contribution of *Katz* is its recognition that the fourth amendment protects a positive right of personal privacy from unwarranted governmental intrusion.[26] Under the new rule, the elements of an unreasonable search are the justifiable reliance of the defendant upon his privacy and a search violating that privacy.[27] *Katz* has adopted the principle that even public areas can temporarily become private for purposes of the fourth amendment.[28]

A distinct group of cases, principally from California, has dealt with the specific problem of secret surveillance of public restrooms for the purpose of discovering homosexual activity.[29] The premise is that evidence of criminal homosexual activity is admissible if the offense was directly observable by the public in the normal usage of the facility.[30] The user has no right to expect privacy if, for example, there was no door on the stall.[31] The more difficult case has arisen where police set up a secret

25. *Id.* at 351.

26. The *Katz* court was careful, however, to stop short of declaring that the fourth amendment created a general right of privacy. 389 U.S. at 350. That right is protected only with respect to unreasonable government intrusions within the prohibitions of the fourth amendment. Note, *supra* note 3, at 981.

27. 389 U.S. at 353.

28. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." 389 U.S. at 351 (footnotes omitted). "The point is not that the booth is 'accessible to the public' at other times but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable." *Id.* at 361. *See also* Rios v. United States, 364 U.S. 253 (1960) (Harlan, J. concurring).

Following the *Katz* decision, federal legislation was enacted embodying these principles for the regulation of electronic eavesdropping. *See* Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2510(2) (Supp. IV 1969). Similar state statutes have been enacted. *See, e.g.*, MINN. STAT. ch. 626A (1969).

29. *See, e.g.*, Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962), Britt v. Superior Court, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962).

30. Poore v. Ohio, 243 F. Supp. 777 (N.D. Ohio 1965), People v. Young, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492 (1963), People v. Norton, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676 (1962), State v. Coyle, 181 So. 2d 671 (Fla. App. 1966).

31. State v. Bryant, 287 Minn. 205, 177 N.W.2d 800 (1970).

vantage point, as in the instant case, from which all activity in the stalls can be observed. Three cases prior to *Bryant* have dealt with this precise problem. *Bielicki v. Superior Court*[32] and *Britt v. Superior Court*[33] both held that evidence obtained in such a manner was inadmissible, anticipating *Katz* in their rationale. Yet the ninth circuit in 1966 reached the opposite conclusion on virtually identical facts in *Smayda v. United States.*[34] The degree to which the rationale of *Bielicki* and *Britt* anticipates *Katz*, decided almost five years later, is extraordinary Although somewhat less articulate, their premise is a basic abhorrence of this kind of invasion of privacy[35] *Britt* announced a test virtually identical to that offered by Mr. Justice Harlan's concurring opinion in *Katz.*[36] Each concluded that the ability to observe secretly that which is public is clearly distinct from a license to invade the "protected right of personal privacy of persons in private places."[37]

These pre-*Katz* attempts to establish a fourth amendment right to privacy were only partially successful.[38] The Supreme Court of the United States articulated the controlling principle that the defendant should enjoy a right to a personal zone of privacy when he "justifiably relies" thereon.[39] Justice Harlan interpreted this rule as a two-fold requirement—1) that the defendant exhibit a subjective expectation of privacy and 2) that society be prepared to recognize that expectation as reasonable.[40] This test is a combination of objective and subjective criteria.[41]

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32. 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962).
33. 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962).
34. 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).
35. Britt v. Superior Court, 58 Cal. 2d 469, 472, 374 P.2d 817, 819, 24 Cal. Rptr. 849, 851 (1962). "Apparently underlying the court's decision is a recognition that a broad gloss pervades the constitutional language and that the proscription against unreasonable searches is aimed not exclusively or principally at protecting property interests, but primarily at safeguarding the freedom of individuals from unwarranted governmental intrusion into their privacy." Comment, *Clandestine Police Surveillance of Public Toilet Held to Be Unreasonable Search*, 63 COLUM. L. REV. 955, 960 (1963).
36. *See* text accompanying note 40 *infra.*
37. Britt v. Superior Court, 58 Cal. 2d at 472, 374 P.2d at 819, 24 Cal. Rptr. at 851.
38. *See, e.g.*, discussion of *Smayda v. United States* at text accompanying note 47 *infra.*
39. Katz v. United States, 389 U.S. 347, 353 (1967). For an effective analysis of this rephrasing of the *Katz* test and its implications, *see* Note, *supra* note 3, at 982.
40. 389 U.S. at 361.
41. The subjective features of this test are inherent in the *Bryant* opinion. "We think that those using the facilities would have been

State v. Bryant is the first post-*Katz* decision on this question, the first non-California case with these particular facts and a case of first impression in Minnesota. Chief Justice Knutson's majority opinion adopted the *Katz* rationale regarding personal zones of privacy, and expressly recognized *Katz* as controlling the instant case. In addition, *Bielicki* and *Britt* are quoted at length and held to be indistinguishable from the instant case.[42]

The *Bryant* court also deals perfunctorily with the issue of "third party consent." A line of cases has held that in certain circumstances a third party can consent to a search or invasion of another's privacy.[43] This position was properly rejected in the instant case since the department store manager was not in exclusive control of the area searched, the toilet stall itself,[44] and was therefore incapable of validly consenting to a search.

The *Bryant* opinion has weaknesses. It cites *Smayda v. United States*,[45] a pre-*Katz* rejection of the *Bielicki-Britt* approach, yet fails to distinguish that case explicitly. The *Smayda* decision has been described as "bizarre"[46] and "unsound"[47] due to its disregard of the compelling logic of the two previous California decisions.[48] The case has been consistently criticized and

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quite shocked to know they were under surveillance." 287 Minn. at 211, 177 N.W.2d at 804. This evinces a concern with the subjective awareness of the individual. As a practical matter, query: How does a defendant exhibit an expectation of privacy?

42. State v. Bryant, 287 Minn. 205, 177 N.W.2d 800, 801 (1970).

43. *See generally* Note, *Third Party Consent to Search and Seizure: The Need for a New Evaluation*, 41 ST. JOHN'S L. REV. 82 (1966), Note, *Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12 (1967), Comment, 33 U. CHI. L. REV. 797 (1966).

44. Minnesota has adopted the rule that to consent validly the third party must be in exclusive control of the area to be searched. State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965). California, on the other hand, has adopted the "*Gorg* rule" which provides that if the officer reasonably relied on the apparent authority of the owner to search the premises the search is lawful. People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955). Nevertheless, the application of this rule in the *Bielicki* case was considered and rejected. 57 Cal. 2d at 607, 371 P.2d at 291, 21 Cal. Rptr. at 555 (1962).

45. 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

46. Note, *supra* note 3, at 974.

47. Comment, *Fourth Amendment Application to Semi-Public Areas: Smayda v. United States*, 17 HAST. L. REV. 835, 842 (1966).

48. An interesting case that examines both the *Smayda* opinion and the *Bielicki-Britt* doctrine is State v. Coyle, 181 So. 2d 671 (Fla. App. 1966). It held the evidence admissible, however, following the line of cases dealing with directly observable acts. *See* text accompanying note 30 *supra*.

because of its anomalous result has generated more commentary than it probably deserved.[49] The *Bryant* court does indicate inferentially that *Smayda* has little value as precedent through its principal reliance upon the subsequent *Katz* decision. The court also cites *Brown v. State*,[50] which employed the precise language of *Smayda*, yet reached a diametrically opposite result. Both *Brown* and *Smayda* recognized that "a modicum of privacy" is available to an individual in a toilet stall. *Smayda* found that interest insufficient to counterbalance society's interest in law enforcement, while *Brown* found it fully sufficient to outweigh the police interest.[51]

Justice Sheran's dissent in *Bryant* urged a standard of privacy which would turn on whether the defendant's acts subverted "the owner's intention."[52] That is, toilet stalls are private except when unlawful activities occur there. This is a wholly circular argument. Such reasoning would allow authorities to search any area of suspected criminal activity without further justification than their suspicion. Apparently the dissent simply was not persuaded that toilet stalls should be considered private areas immune from unreasonable searches.

A much more difficult problem is that raised by Justice Otis' dissenting opinion. That opinion questioned what alternatives are available to the department store and the police in the exercise of their reasonable interest "to prevent legitimate customers and their children from being exposed to defendant's revolting deviant behavior?"[53] The prosecution of homosexual offenses in these cases arises more in an effort to combat the nuisance to the customer generated by these acts than a desire to eradicate the substantive criminal behavior. Even among those who believe private consensual homosexual activity should not be of concern to the criminal law, most will admit that elimination of the nuisance factor is a legitimate interest of those providing public restroom facilities.

Justice Knutson's majority opinion attempts to offer some workable alternatives in answer to Justice Otis' objections in this

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49. *See* Comment, *supra* note 47; Comment, *Constitutional Law—Clandestine Surveillance of Public Toilet—Not an Unreasonable Search*, 19 VAND. L. REV. 945 (1966), Comment, *Police Surveillance of Public Toilets*, 23 WASH. & LEE L. REV. 423 (1966).

50. 3 Md. App. 90, 238 A.2d 147 (1968).

51. *Compare id.* at 94, 238 A.2d at 149 *with* Smayda v. United States, 352 F.2d 251, 257 (9th Cir. 1965).

52. 287 Minn. at 212, 177 N.W.2d at 804.

53. *Id.* at 213, 177 N.W.2d at 805.

regard, such as sealing the hole between the stalls, removing the doors or posting signs warning of police surveillance.[54] The first would probably discourage homosexual activity only temporarily The latter two suggestions seem to be wholly inconsistent with the store's goal of providing secluded, respectable restroom facilities to its customers. The average customer would hardly prefer a doorless stall, and surely would be deterred from entering a restroom outside which warning signs advised of the possibility of frequent overhead surveillance.

One possible solution would be to attempt to legitimize such surveillance through the use of a warrant procedure. Justice Otis' remark that "it would *never* be possible to secure a search warrant in situations of this kind"[55] may be an overstatement. Given an egregious fact situation, it is at least arguable that a warrant should issue. Undoubtedly Justice Otis is referring to the virtual impossibility that any such surveillance warrant could meet the constitutional requirements of specificity and probable cause.[56] At present, electrical surveillance warrant procedures have been established by the Omnibus Crime Control and Safe Streets Act of 1968[57] and by similar state statutes.[58] The analogy of wiretaps to visual observation, however, is problematic. If a warrant for such surveillance were to issue, its basis would be a rough analogy to such statutory authorization, yet real doubts exist as to the constitutional sufficiency of the specificity requirements of the Safe Streets Act itself.[59] There are, moreover, factual distinctions between this kind of visual observation and wiretapping. The major and perhaps de-

54. *Id.* at 211, 177 N.W.2d at 804.

55. *Id.* at 213, 177 N.W.2d at 805 (emphasis added)

56. Federal warrants are governed by F. R. CRIM. P Rule 41 implementing the fourth amendment; Minnesota has parallel provisions, MINN. STAT. §§ 626.01-.04 (1969).

57. 18 U.S.C. §§ 2510-20 (Supp. IV, 1968)

58. *E.g.*, MINN. STAT. §§ 626A.06-.25 (1969) (Privacy of Communications Act)

59. *See* Linzer, *Federal Procedure for Court Ordered Electronic Surveillance: Does it Meet the Standards of Berger and Katz?*, 60 J. CRIM. L.C.&P.S. 203 (1969), concluding that the specificity requirements of 18 U.S.C. § 2518 may be too liberal in light of the policies of *Berger* and *Katz*, depending perhaps on the responsibility exercised in the administration of this warrant procedure. "Police abuse of the provisions of Section 2518 could lead the Court to establish more rigid and severe requirements for eavesdropping, a development that could spell the end of electronic surveillance as an effective law enforcement tool." *Id.* at 214. *See also* Mascolo, *Specificity Requirements for Warrants under the Fourth Amendment: Defining the Zone of Privacy*, 73 DICK. L. REV. 1 (1968), wherein it is felt that there will be inevitable abuse under the

terminative difference is that a much larger number of innocent parties are likely to have their privacy invaded. A phone tap focuses the thrust of the investigation on the prime suspect, and while every such search involves some probing of the conversation of third parties, their number is small and the intrinsic offensiveness of the intrusion is relatively slight in comparison to that of the *Bryant*-style surveillance. Nevertheless, in a case where the nuisance factor is particularly involved, thereby satisfying the probable cause requirement, it is at least arguable that a surveillance warrant should issue, providing it is drafted to conform to strictly regulated procedures and is limited in length of permissible observation. At this time such a procedure lies at the outer edge of the limits of constitutionality, yet it is perhaps the only effective control of nuisance homosexuality

The *Bryant* court arrived at the correct conclusion for the correct reasons, but avoided the opportunity, if not the responsibility, to define a more workable rule for delineating a protected zone of privacy The court seems carefully to avoid specifying any test or standard beyond the skeletal and ambiguous criteria specified in *Katz* to determine whether a person has or should have a "reasonable expectation of privacy" Although the correlative question of the reasonableness of a search is a factual one dependent upon the particular circumstances of each case, certain identifiable factors can be considered in each such fact situation in an effort to narrow the inquiry into reasonableness.

For example, determination as to whether the area in question is or is not constitutionally protected is necessary It is a mistake to view *Katz* as eliminating the latter possibility[60]—all *Katz* dispensed with was slavish adherence to the technicalities of state trespass law.[61] Structural characteristics therefore are not irrelevant and the opinion in the instant case devotes full attention to the dimensions of the stalls in its recitation of facts. Just as the Harlan test emphasizes,[62] it is not enough that the de-

Safe Streets Act, yet at present it seems the Supreme Court is willing to "pay this price for the continued use of a claimed effective law enforcement tool . . " *Id.* at 38.

60. "As the Court's opinion states, 'the Fourth Amendment protects people not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

61. This distinction is well drawn in Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 983 (1968).

62. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

fendant rely on his privacy on the basis of a "high probability of freedom from intrusion,"[63] but society also must be willing to recognize that expectation of privacy as reasonable. In the latter condition is hidden the true test. There must be a balancing to determine whether society is prepared to acknowledge a right of privacy in certain circumstances, thereby sacrificing some of its control over the criminal activities that thereby may escape detection.[64]

Another factor that necessarily influences this equation is the nature of the police conduct. If the manner of police surveillance is shocking, the likelihood of the evidence so obtained being admitted is diminished. Thus, if police use artificial means of observation to view that which is not normally visible to the public, the intrusion ordinarily will be found unreasonable.[65] The severity of the crime is also a factor to be considered.[66] In this regard much can be said for the proposition that consensual homosexuality does not present a threat to an ordered society sufficient to justify the extreme measures of warrantless search.[67] It is not wholly irresponsible to suggest that such conduct simply be ignored when the offense is actually accomplished in a private area. Acts that could be observed by the public could be detected lawfully by police through visual observation from a non-artificial vantage point. This argument assumes the objectionable conduct will not in any way annoy or interfere with third parties. For nuisance homosexuality the

63. Note, *supra* note 61, at 983.

64. "In general, it may be said that a search is considered 'unreasonable' when the interests of society in suppressing crime and maintaining the community's health are deemed outweighed by the interests of the individual in his property and privacy." Comment, *supra* note 35, at 957, 958 (citations omitted)

65. *See, e.g.*, People v. Berutko, 71 Cal. 2d 84, 453 P.2d 721, 77 Cal. Rptr. 217 (1969), where the court reviewed the relevant cases and distinguished between three different degrees of reasonableness in police conduct: 1) a vantage point gained by trespass but natural observation; 2) a vantage point gained without trespass but artificial observation (spy holes, etc.), and 3) non-trespassory non-artificial observation—activities visible due to defendant's own carelessness. The first two are generally found unreasonable; the latter is permitted. The fourth amendment will not draw the defendant's blinds.

66. "The seriousness of the criminal conduct may affect the degree to which people will tolerate intrusive detection techniques." F REMINGTON, CRIMINAL JUSTICE ADMINISTRATION 73 (1969)

67. Much has been written proposing a total end to governmental concern over private consensual sexual relations between adults. *See, e.g.*, Note, *The Bedroom Should Not Be within the Province of the Law*, 4 CALIF. WEST L. REV. 115 (1968), Note, *Private Consensual Homosexual Behavior· The Crime and its Enforcement*, 70 YALE L.J. 623 (1961)

use of the surveillance warrant is arguably the only effective preventive measure.[68] Ultimately the question is the extent to which society is prepared to recognize a right of privacy in particular public areas. That there is a vague and indistinct constitutional right of privacy has been established.[69] Yet more specifically, within the fourth amendment, there is a right of privacy only to the extent that the *Katz* test protects a defendant. Certainly the nature of the area in question in the instant case is one which ordinarily commands a great deal of privacy in our society.[70] Its inclusion in the protected zone of privacy would seem to be *a fortiori* after the telephone booth in *Katz*. The test suggested in Justice Sheran's dissent that the zone of privacy should be protected only when put to the intended use ignores the existence of any such positive right of privacy as announced in *Katz*.

These factors may not be wholly determinative. Yet the *Bryant* court made no attempt to express the precise bases of its decision. Here was an opportunity to set out in detail the post-*Katz* standards more clearly to aid in future litigation on this particular question. Traditionally it has been the function of the appellate court to formulate more useful tests to aid in the application and administration of the broad policies and rules of law established by the United States Supreme Court. The *Bryant* court reaches a laudable decision and the case indubitably will prove to be an influential decision, but for that very reason it is unfortunate that a more detailed elaboration of the appropriate factors, standards and alternatives was not provided.

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68. *See* text accompanying note 56 *supra*.

69. Griswold v. Connecticut, 381 U.S. 479 (1965). There is also redress for tortious intrusions on privacy; *see* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960), Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See also* Note, *supra* note 61, at 979, 980 for an excellent, brief treatment of the various categories within the concept of privacy, emphasizing the limited right of privacy defined by post-*Katz* fourth amendment doctrine. For a forceful appeal for further safeguards on the right of privacy in this specific context, see Osborn v. United States, 385 U.S. 323, 340 (1966) (separate opinion of Douglas, J.).

70. Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968), where the author considers the social and psychological values placed on certain activities in our culture. We demand extreme privacy surrounding the excretory and sexual functions. Fried considers this role of privacy as essential to social order.

Torts: Burden of Proof—Concurrent Tortfeasors Given Burden of Apportioning Damages

Although much has been written concerning the imposition of joint and several liability[1] in multiple tortfeasor situations,[2] the equitable and public policy considerations implicit in the decision to hold each defendant liable for the total damage has new relevance today The areas of highway chain collisions and of environmental and property damage caused by multiple industrial and commercial polluters provide a setting of growing public concern for the application of joint and several liability concepts.

The substantive development of joint and several liability has been slow because of a failure to separate the procedural aspects of joining defendants in multiple tortfeasor situations from the substantive consideration of where the responsibility for damage should be placed. The failure of early courts to recognize this distinction is due in part to the strict common law rules of joinder of parties. In the earliest cases where such joinder was permitted the English courts required concert of action, characterized by a common purpose and mutual aid in carrying out the act.[3] Given the concert of action, the plaintiff was viewed as having but one cause of action and the jury was not allowed to apportion the damages.[4] Where no concert of action was shown,

1. Joint and several liability will hereinafter mean that each tortfeasor is liable for the total amount of the damage suffered by plaintiff.

2. *See generally* Wigmore, *Joint Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress,* 17 MICH. L. REV. 458 (1923), Gendel, *Concurrent But Independent Wrongdoers: Joint Liability for Entire Damages,* 19 CALIF. L. REV. 630 (1931), Prosser, *Joint Torts and Several Liability,* 25 CALIF. L. REV. 413 (1937), Comment, *Independent Tortfeasors—Joint and Several Liability,* 31 N.C. L. REV. 237 (1953), Comment, *Automobiles—Separate Acts of Negligence Causing Separate Injuries—Joint and Several Liability,* 14 ALA. L. REV. 120 (1961), Comment, *Contributory Negligence as a Matter of Law,* 41 N.C. L. REV. 512, 514-18 (1963), Note, *Successive Automobile Collisions—Joint and Several Liability,* 44 N.C. L. REV. 249 (1965), Comment, *Allocation of Loss Among Joint Tortfeasors,* 41 S. CAL. L. REV. 728 (1968), Comment, *Joinder of Consecutive Tortfeasors,* 52 MARQ. L. REV. 568 (1969)

3. In Sir John Heydon's case, 77 E.R. 1150 (K.B. 1613), the English court found each of three defendants guilty jointly for the entire damage caused by an assault on the plaintiff. The court reasoned that since the defendants came together to do an unlawful act, the act of any one of them was attributable to them all. *See also* Smithson v. Garth, 83 E.R. 711 (K.B. 1691), where defendants were held jointly liable for plaintiff's injuries although one beat him, another imprisoned him and a third stole his silver buttons.

4. *See* Prosser, *Joint Torts and Several Liability,* 25 CALIF. L. REV. 413, 414 (1937) and early English cases cited therein.

this narrow interpretation of joint and several liability meant that to recover fully a plaintiff had to bring separate suits and prove the damages attributable to each defendant. Even where the defendants committed identical acts resulting in a single injury, unless concert of action was shown the courts refused to allow joinder.[5]

The liberalization of pleading introduced by the adoption of the Field Code in New York in 1848, and similar codes in other states, produced some relaxation of the rigid principles of joinder in cases involving multiple tortfeasors.[6] As the procedural problems diminished and plaintiffs had greater flexibility in joining defendants, the substantive considerations of joint and several liability came into sharper focus.

The inequity of leaving an innocent plaintiff without recovery because of his inability to establish which of two equally culpable defendants caused his injury produced the first movement toward extending joint and several liability to additional multiple tortfeasor situations. To encompass the many factual contexts in which such equitable considerations arise, various tests of "jointness" have been devised: the existence of the same cause of action against two or more defendants;[7] the existence of a common duty;[8] whether the same evidence will support an action against each;[9] the single indivisible nature of the injury to the plaintiff;[10] similarity of the facts as to time, place and result;[11] whether the injury is direct and immediate rather than consequential.[12]

One of the most troublesome situations has been that in which the independent but concurrent actions of the defendants have combined to injure the plaintiff.[13] Factually, the cases

5. *See* Chamberlain v. White and Goodwin, 79 E.R. 558 (K.B. 1617), where two persons who had uttered the same slanderous words could not be joined; Nicoll v. Glennie, 105 E.R. 220 (K.B. 1817), where successive converters could not be joined.

6. *See* C. CLARK, CODE PLEADING §§ 6-8 (2d ed. 1947) for a general discussion of the pleading reform in England and the United States.

7. J. CLERK & W. LINDSELL, TORTS 112 (13th ed. 1969).

8. J. COOLEY, TORTS § 86, at 277 (4th ed. 1932).

9. Brunsden v. Humphrey (1884) 14 Q.B.D. 141, 147.

10. Flaherty v. Minneapolis & St. Louis Ry. Co., 39 Minn. 328, 40 N.W. 160 (1888).

11. Petcoff v. St. Paul City Ry. Co., 124 Minn. 531, 144 N.W 44 (1913).

12. Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S.E. 265 (1920).

13. Concurrently need not mean simultaneously. *See* Maddux v. Donaldson, 362 Mich. 425, 434, 108 N.W.2d 33, 38 (1960) where the court

dealing with this situation can be divided into two categories. The first is where the act of each independent tortfeasor is conceptually sufficient to produce the total harm. Thus, in an early Massachusetts case, the court found joint and several liability where the plaintiff's horses were frightened by the noise of two motorized cycles passing simultaneously on both sides of his wagon.[14] In such cases neither wrongdoer has cause to complain in being charged with the whole damage since his liability would have been the same even if the other defendant had not been involved. A similar example is found in a more recent case where defendants fired simultaneous shot gun blasts in the direction of the plaintiff and a single pellet struck plaintiff in the eye causing injury The California Supreme Court found the defendants jointly and severally liable.[15]

A second, and more complex, situation is presented where the acts of independent tortfeasors result in a single indivisible injury, but no one act is sufficient to produce the resultant harm. For example, where one defendant maintained a rotten pole and the other negligently felled a tree into it, the defendants were held jointly and severally liable though neither defendant's act standing alone would have caused the damage.[16] Similarly, where one defendant furnished an unseaworthy barge and the other negligently loaded it, the defendants were held jointly and severally liable for the resultant loss.[17] Today, this situation is

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stated:

> It is pointed out, also, that one impact took place some 30 seconds after the other. The fact that one wrong takes place a few seconds after the other is without legal significance. What is significant is that the injury is indivisible. The reason for the rule as to joint liability for damages was the indivisibility of the injuries, not the timing of the various blows. The conclusion seems inescapable unless we take the position that "concurrent" actually means "simultaneous," a position for which there is no well-reasoned authority.

See also G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 2 (1951), where it is stated with reference to concurrent tortfeasors: " 'Concurrence' has no reference to time, except that both torts must precede the damage."

14. Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902), *See also* Oulighan v. Butler, 189 Mass. 287, 75 N.E. 726 (1905) (separate explosions, either capable of causing the death of the plaintiff's decedent)

15. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) This situation is distinguishable since only a single pellet struck the victim; thus one of the two defendants is being held for damage to which he did not contribute at all. *See also* Anderson v. Minneapolis, St.P & S.S.M. RR., 146 Minn. 430, 179 N.W 45 (1920) where defendant's fire combined with the fire of no responsibile origin and the Minnesota court held the defendant railroad accountable for the total damage.

16. Pacific T. & T. Co. v. Parmenter, 170 F 140 (9th Cir. 1909)

17. Strauhal v. Asiatic S.S. Co., 48 Ore. 100, 85 Pac. 230 (1906)

typified by the modern highway chain collision which results in unapportionable damage to one or more persons or automobiles.[18] In these cases, while the occurrence of separate acts provides a theoretical basis for apportioning the damages, in practice a reasonable division of the damages is frequently impossible.[19] The question is then to determine on whom the burden of showing indivisibility should fall. Once it has been established that the defendants' concurrent actions caused the injury, should the plaintiff be compelled to demonstrate not only the injury itself but also the unapportionability of that injury, or should the defendants be required to prove divisibility of the damages to escape the imposition of joint and several liability?

The Minnesota Supreme Court recently addressed itself to these questions in *Mathews v. Mills*.[20] Plaintiffs, Mr. and Mrs. Mathews, were injured when their car was involved in two successive but nearly simultaneous collisions. A single action was commenced against the drivers of the other two cars. In a special verdict the jury found each defendant guilty of causing his respective collision with the plaintiffs. Damages were not apportioned between the defendants and each defendant was awarded 50 percent contribution from the other. On appeal by one defendant, the Minnesota Supreme Court specifically adopted the single indivisible injury rule, that is, where plaintiff suffers injuries, incapable of any reasonable division, as a result of concurrent accidents caused by independent tortfeasors, each tortfeasor is liable for the full amount of damage sustained.[21] However, the Minnesota court clarified the single indivisible injury

18. *See* cases collected at 100 A.L.R.2d 17; *see generally* W. PROSSER, LAW OF TORTS § 42 (3d ed. 1964), 38 AM. JUR. *Negligence* § 257 (1941).

19. Of course, where a reasonable basis for apportionment exists, the courts quite uniformly hold that each wrongdoer is only responsible for his portion of the damages. *See* Glen v. Chenowith, 71 ARIZ. 271, 226 P.2d 165 (1951), Garret v. Garret, 228 N.C. 530, 46 S.E.2d 302 (1948), Rice v. McAdams, 149 N.C. 29, 62 S.E. 774 (1908), Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S.W. 93 (1905). *See generally* W PROSSER, LAW OF TORTS § 42, at 248 (3d ed. 1964), Annot., 100 A.L.R. 2d 17.

20. — Minn. —, 178 N.W.2d 841 (1970).

21. In so holding, the court explicitly adopted the reasoning of the Iowa Supreme Court in Rudd v. Grimm, 252 Iowa 1266, 110 N.W.2d 321 (1961). In that decision, the Iowa court had characterized the single indivisible injury rule as:

> [W]here two or more persons acting independently are guilty of consecutive acts of negligence closely related in point of time, and cause damage to another under circumstances where the damage is indivisible, i.e., it is not reasonably possible to make a division of damage caused by the separate acts of negligence, the negligent actors are jointly and severally liable.

Id. at 1272, 110 N.W.2d at 324.

rule by answering the intermediate question of who has the burden of proving the apportionability of the damages. The court placed the burden squarely on the defendants.[22]

Earlier Minnesota cases had failed to reach the question of who should bear the burden of apportioning the damages, although they recognized that defendants could be held jointly and severally liable when their independent acts combined to cause a single injury to the plaintiff.[23] Thus, as the court in *Mathews* noted, in the abstract its conclusion added nothing to the existing law of the state with regard to the joint and several liability of concurrent tortfeasors.[24] However, the *Mathews* court recognized that the single indivisible injury rule becomes viable only when the burden of proof as to the capability of apportionment of damages is assigned. In holding that the defendants bear the burden of showing that the apportionment of damages is possible, the court followed the *Restatement (Second) of Torts* section 433 B (2) which states:

> Where the tortious conduct of two or more actors has been combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.[25]

The *Mathews* court was strongly affected in reaching its conclusion on apportionment by the reasoning in two cases from other jurisdictions.[26] In *Maddux v. Donaldson*[27] the Michigan Supreme Court considered the problem of damages when the

22. In *Rudd v. Grimm,* the Iowa court had concluded its statement of the single indivisible injury rule by stating that "[T]he damage is indivisible when the triers of fact decide that they cannot make a division or apportionment thereof among the negligent actors." 252 Iowa at 1272, 110 N.W.2d at 324. Thus, the court failed to make clear who would bear the burden of showing that the damages were capable of apportionment.

23. *See* Judd v. Landin, 211 Minn. 465, 1 N.W.2d 861 (1942), Twitchell v. Glenwood-Inglewood Co., 131 Minn. 375, 155 N.W 621 (1915), Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N.W 930 (1913) *See also* Kruchowski v. St. Paul City Ry. Co., 191 Minn. 454, 254 N.W 587 (1934)

24. — Minn. at —, 178 N.W.2d at 844. The court's citation to Doyle v St. Paul Union Depot Co., 134 Minn. 461, 159 N.W 1081 (1916) is confusing since the holding there was confined to the propriety of joinder of concurrent tortfeasors in a single action. However, the *Doyle* court did conclude in dictum that joint and several liability for concurrent tortfeasors is the settled law of the state. *See* cases cited in note 23 *supra. See also* DeCock v. O'Connell, 188 Minn. 228, 246 N.W 885 (1933)

25. RESTATEMENT (SECOND) OF TORTS § 433 B (1965).

26. — Minn. at —, 178 N.W.2d at 845.

27. 362 Mich. 425, 108 N.W.2d 33 (1960)

car in which the plaintiffs were riding was struck first by one automobile and then, almost simultaneously, by another. The court noted that, however defensible it may have been in an agrarian society to place the burden of apportioning damages upon the plaintiffs, it has no place as precedent governing the liability of automobile owners in chain collisions on today's highways. In *Copley v. Putter*[28] the California court was faced with similar facts. There, after the first defendant's car had moved into the plaintiff's lane of travel and collided with the plaintiff, the second defendant collided with plaintiff's car from the rear. The court held that each negligent defendant must absolve himself by proving his own innocence or limited liability, believing that to prevent a plaintiff from recovering because he could not show which of two negligent tortfeasors had caused his injury would be to obstruct justice.

The Minnesota court stated that placing the burden of proof on the defendants to apportion the damages between them is the result of a choice made as to where the loss due to a failure of proof should fall—on an innocent plaintiff or on defendants who are clearly proved to have been at fault. If it placed the burden of apportioning the damages on the plaintiff, the court felt it would be expressing a policy that it is better that a plaintiff injured through no fault of his own take nothing than that a wrongdoer pay more than his theoretical share of the damages.[29] In the opinion of the justices, "[T]his placement of the burden of proof is justified by considerations of fairness."[30]

Having fixed the burden of apportioning the damages on the defendants, the court went on to state that it is a question of law for the trial court to determine if the damages are capable of ap-

28. 93 Cal. App. 2d 453, 207 P.2d 876 (1949), *see also* Cummings v. Kendall, 41 Cal. App. 2d 549, 107 P.2d 282 (1940).

29. — Minn. at —, 178 N.W.2d at 845. The reasoning of the court is based on the proposition that it must relieve the plaintiff of the entire burden of proof (beyond a prima facie showing of negligence and resulting damage) to avoid the inequity of requiring a plaintiff to apportion damages or take nothing. An intermediate position could have been adopted regarding the burden of proof by giving the plaintiff the burden of invoking the rule by showing an "indivisible injury" and then shifting the burden of proof to the defendants to apportion the damage between them. While the court's failure to articulate this alternative formulation represents a "jump" in the logical development of its reasoning, the alternative has little practical merit. Proof introduced by a plaintiff to show an "indivisible injury" would not likely go beyond a showing of the nature and extent of his injuries, a showing which he must already make to establish a cause of action against the defendant.

30. *Id.*

portionment between the defendants. In reaching this conclusion the court relied on the California court's decision in *Apocada v. Haworth*.[31] In that case the court recognized that absent any evidence to support limiting either defendant's liability, any apportionment made by the jury would be a result of unsubstantiated speculation and would amount to little more than judicially sanctioned guesswork.[32]

The decision in *Mathews* has clarified Minnesota law as to the joint and several liability of concurrent tortfeasors in the highway chain collision situation. However, the court did fail to define clearly the scope of the rule announced in other multiple tortfeasor situations. While the cases relied upon by the court in reaching its decision were confined to highway accident situations similar to that in the instant case, the broad equitable principles announced as the rationale for the decision would have application in a wider range of multiple tortfeasor situations. Further, the specific reliance placed on section 433 B of the *Restatement (Second) of Torts*, which clearly emphasizes a wide range of multiple tortfeasor situations, indicates that the court was aware of the potential sweep of the rule announced.

The primary difficulty with a general extension of the rule is that as the number of potential defendants contributing to the damage increases, the plaintiff's inability to define the scope of damages attributable to each defendant becomes a greater obstacle to his recovery.[33] On the other hand, the equities are not as clearly in favor of the plaintiff where each defendant has contributed only fractionally, though demonstrably, to the total damage. In fact, when faced with the problem of many defendants concurrently contributing to the damage suffered by the plaintiff, the courts have used various techniques to distinguish the situation and thereby to avoid imposing joint and several liability.[34]

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31. 206 Cal. App. 2d 209, 23 Cal. Rptr. 461 (Dist. Ct. App. 1962)

32. This is also the position adopted by the RESTATEMENT (SECOND) OF TORTS § 434(1)(b) (1965)

§ 434(1) It is the function of the court to determine
(b) Whether the harm to the plaintiff is capable of apportionment among two or more causes.

33. *See* RESTATEMENT (SECOND) OF TORTS § 433B Comments *d* and *e* (1965). In Comment *e* it is noted that thus far the cases that have applied the rule have involved two or three tortfeasors. The possibility exists that there may be so large a number of actors, each of whom contribute a small and insignificant part to the total harm, that the rule would work a disproportionate hardship on defendants. This problem has not arisen, possibly because in such cases some evidence limiting liability has always been available.

34. *See, e.g.*, Farley v. Crystal Coal & Coke Co., 85 W Va. 595,

An increasingly significant situation in which this problem will have to be faced in the future is the instance of multiple polluters. Where each polluter has contributed only a fraction of the total pollution causing the damage, an extension of the single indivisible injury rule would seem to work a disproportionate hardship on the defendants.[35] Apparently recognizing this consideration, the Minnesota Supreme Court has been reluctant to find joint liability at law for damages caused by multiple polluters.[36] Nevertheless, where an individual industrial or commercial source can be identified as a substantial pollution contributor, and where the damage incurred can be sufficiently related to the pollutant source, the hardship of joint and several

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102 S.E. 265 (1920), where the West Virginia court refused to impose joint and several liability on concurrent polluters of a stream, stating that where the resultant injury is the *consequential* rather than direct and immediate result of the tortfeasors' action, joint liability will not be imposed. The problem in such a case is to articulate a realistic distinction between "direct" and "consequential." Further, when a party could foresee the possibility of damage resulting from the merging of several tortious acts, why not hold him jointly and severally liable? *See* note 36 *infra,* citing a case wherein the Minnesota court distinguished imposing joint and several liability in nuisance cases from that in negligence actions, stating that a nuisance does not rest on the degree of care exercised by the defendant. However, it hardly follows that this distinction in culpability should preclude plaintiff from recovering damages proximately caused by a defendant.

35. The weight of authority holds that where the acts of independent polluters combine to cause harm, the individual contributors cannot be held jointly and severally liable. Slater v. Pacific Am. Oil Co. 63 Cal. App. 660, 292 P 651 (1930), *reversed in part,* 81 Cal. 858, 300 P 31 (1931), Farley v. Crystal Coal & Coke Co. 85 W Va. 595, 102 S.E. 265 (1920), Miller v. Highland Ditch Co. 87 Cal. 430, 25 P 550 (1891). *See also* Dooley v. 17,500 Head of Sheep, 4 Cal. 479, 35 P 1011 (1894), holding that a joint action will not lie against the several owners of trespassing animals. *See generally* 9 A.L.R. 939 (1920), supplemented at 35 A.L.R. 409 (1925) and 91 A.L.R. 759 (1934)

36. Johnson v. City of Fairmont, 188 Minn. 451, 247 N.W 572 (1933). Sewage dumped by the City of Fairmont into a stream that flowed through the plaintiff's farm and waste from a canning factory that overflowed into the same stream mingled to create offensive odors that constituted a nuisance on plaintiff's farm. The court refused to sustain the joint and several liability of the defendants. It distinguished the nuisance situation from that involved in negligence actions, stating that a nuisance does not rest on the degree of care exercised by defendants. The court noted that the torts were separate and individual and did not become joint because their consequences mingled to cause damage to the plaintiff's farm. *But see* Shuster v. City of Chisholm, 203 Minn. 518, 282 N.W. 135 (1938), Huber v. City of Blue Earth, 213 Minn. 319, 6 N.W.2d 471 (1942). In both cases the court sustained a verdict against the city on the basis of its pollution of a stream running through plaintiff's land, even though there was evidence that other concurrent polluters had contributed to the damage suffered by the plaintiff.

liability could more justifiably be imposed. In such a case the equitable considerations relied on by the *Mathews* court would suggest placing the burden of proof on the defendant polluter to limit his own liability or, in the alternative, hold him liable for the total damage.

In light of the confusion and the present flux of the law in the area of pollution, the court's reluctance to announce a broad general rule of tort liability applicable to all indivisible injury situations is understandable. The extension of joint and several liability to other multiple tortfeasor situations is primarily a question of developing social policies to overcome traditional barriers that prohibit imposing liability on a defendant for more damage than he actually caused. As such, the parameters of the single indivisible injury rule adopted by the *Mathews* court are better reached through the probing and stretching process of subsequent litigation which can mold the contours of the rule to accommodate variations in economic and social factors that would make a wholesale extension of joint and several liability impractical.[37] It seems most likely that extension of the single indivisible injury rule beyond the automobile chain collision setting will come in cases where the plaintiff can readily identify a definite group of defendants, each of whom is responsible as a substantial contributor to the damage suffered.

37. The presence of automobile liability insurance, which permits distribution of the loss over all automobile drivers, mitigates any inequity caused by requiring a defendant to pay more than his share of the damage caused in an automobile accident. This broad-based insurance coverage against tort liability is generally lacking in other areas, such as liability for pollution damage, to which the single indivisible injury rule could be extended, and this may be a pertinent factor in considering such extensions.