The Eighth Circuit: 1971-1972

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Note: The Eighth Circuit: 1971-1972

The Note which follows presents a collection of comments upon decisions of the Eighth Circuit during the 1971-72 term. Although it is intended to complement the annual Minnesota Supreme Court Note, the selection and format differ somewhat. Rather than attempting to present a survey of all decided cases during the past year, we have chosen to focus primarily upon decisions of some significance in announcing, clarifying, or modifying the law in the Eighth Circuit and to analyze those in greater depth. We hope that the following pages will provide a useful reference for practitioners within the Eighth Circuit as well as for other readers.*

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* See also the case comment on Cargill v. Hardin, 452 F.2d 1154 (8th Cir. 1971), cert. denied, 92 S. Ct. 1170 (1972), 57 Minn. L. Rev. 1243 (1973).
Antitrust Law: Measure of Damages in Private Action Under Section 1 of the Sherman Act

When plaintiff, an independent newspaper carrier, refused to adhere to the St. Louis Globe-Democrat's suggested maximum retail selling price, the newspaper hired a company to solicit subscribers away from him and another carrier to deliver papers to those subscribers. The plaintiff was forced to sell his route and subsequently brought a private treble damage action against the newspaper. A jury found that the defendant had not violated
Section 1 of the Sherman Act and the Eighth Circuit affirmed. The Supreme Court reversed, holding that the newspaper, the soliciting company, and the other carrier had illegally combined to fix prices. The decision broadened the concept of an "illegal combination" under Section 1 and was widely recognized as a major case in antitrust law. The Court remanded the case for determination of damages.

The district court submitted three separate elements of damages to the jury for consideration: (1) the amount of operating profits lost by the plaintiff because of the Globe-Democrat's competition prior to the sale; (2) the difference between the actual price received and the fair market value of the plaintiff's business at the time of sale absent the defendants' illegal interference; and (3) the loss of future profits following the forced sale. The jury returned a verdict for plaintiff on all three items in the respective amounts of $2,000, $12,000, and $57,000. The district court reduced the award for loss of profits prior to sale to $1,313, allowed the award of $12,000, and reduced the award for loss of future profits to $14,768. Judgment was entered for treble damages totaling $82,243 plus attorney's fees. Both parties appealed. Plaintiff argued that the jury's award of $57,000 for loss of future profits should be reinstated. Defendant contended that the award of damages for loss of future profits duplicated damages awarded for the diminution of the market value of the business. The Eighth Circuit agreed with defendant and reversed the district court's award for loss of future profits, holding that the prospect of future earnings is included in computing the market value of a business. Albrecht v. Herald Co., 452 F.2d 124 (8th Cir. 1971).

There are two basic methods for measuring the amount of damages to be awarded to an antitrust plaintiff who has been forced out of business. The diminished market value method calculates damages based on the difference between what the

1. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), provides: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."
6. Id. at 100-101.
plaintiff would have received for his business "but for" the defendant's antitrust violation and the actual sale price. The "but for" market value is, in effect, the going concern value of the business. The "loss of future profits" method calculates damages by capitalizing and discounting to present value the estimated future profits of the business. In addition to an award based on either of these methods, a plaintiff may receive damages for loss of profits while he still owned and operated the business. However, because one factor in computing the "but for" market value of a business is the prospect of future profits, a further award of damages for the loss of future profits clearly duplicates losses already considered. As the First Circuit said in rejecting such a claim, "The Clayton Act gives treble damages, but it does not contemplate that damages will be sextupled."

The Eighth Circuit distinguished four cases relied upon by plaintiff on the ground that they involved either the award of future profits instead of going concern value or the award of

7. "Going concern" is generally used to describe the value of a business over and above the value of its tangible assets. It has been described as the advantage or benefit, which is acquired by an establishment, beyond the mere value of its capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities, or prejudices.


8. In Standard Oil Co. v. Moore, 251 F.2d 188, 219 (9th Cir. 1958), the court set forth two factors as appropriate in measuring the going concern value of a business:

(1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner? (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation?

See also Greenwald, Capitalized Pricing of Injury to Capital in Treble Damage Suits, 45 Cornell L.Q. 84 (1959); Note, 36 Albany L. Rev. 773, 779 (1972).


10. Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964); Osborn v. Sinclair Refining Co., 324 F.2d 566 (4th Cir. 1963); Twentieth Century Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846 (8th Cir. 1952).
lost profits while the plaintiff was still operating the business.\textsuperscript{11} The court concluded that while loss of future profits is an acceptable method for calculating damages to the value of a business under some circumstances, the diminished market value method is preferable where there is "clear proof in the record of the value of plaintiff's business as a going concern . . . ."\textsuperscript{12}

Had there been serious dispute over the "but for" market value of the plaintiff's business, the decision to award damages for diminished market value instead of loss of future profits would have been less compelling. Estimating future profits involves many uncertainties, such as duration of the business, fluctuating economic conditions, entry of new competitors, technological developments, and changing consumer attitudes. Determining diminished market value also involves difficult estimates and projections including the estimation of lost future profits. Thus, it is only because the parties in \textit{Albrecht} had agreed upon the "but for" value that the use of this method was clearly preferred in this case.

Even where diminution of value can be reliably estimated, however, it is possible that a particular plaintiff's loss of future profits will not be accurately reflected in the "but for" market value because of his superior skill, managerial talents, or other desirable personal attributes which affect profits and cannot be transferred to a purchaser.\textsuperscript{13} In holding that an antitrust injury occurs to the business and not to the individual proprietor, \textit{Albrecht} excludes consideration of such individual characteristics in measuring damages. Excluding consideration of personal characteristics and the actual loss to the individual plaintiff has been appropriately criticized on the basis that "[m]ore complete compensation is provided a plaintiff by making the measure of damages the profits he lost due to the violation rather than the market value to someone else of the chance to try to make them."\textsuperscript{14} This method of valuing damage to a business which

\textsuperscript{12} 452 F.2d at 129.
\textsuperscript{13} The \textit{Albrecht} court approvingly quoted the Ninth Circuit's decision in Standard Oil Co. v. Moore, 251 F.2d 188, 220 (9th Cir. 1958), that
\texttt{[t]he special value which the business might have to Moore [the plaintiff], or the profit potential of the business beyond that which would be transferable to a purchaser, would have no effect on the market value of the business.}
\textsuperscript{14} Note, \textit{Private Treble Damage Antitrust Suits: Measure of Dam-
the owner has been forced to sell or abandon has apparently evolved from eminent domain cases,15 but it is questionable whether the same policy considerations for limiting compensation should control under antitrust statutes intended to “punish” wrongdoers. Certainly there is a difference between losing property “for the public good” and losing property because another person has violated the law.

Albrecht correctly decided the narrow question presented—that an award for diminished market value includes the present value of expected future profits. It leaves for future consideration the larger issues of when damage awards should be based upon direct measurement of future profits instead of diminished market value, and whether making awards on the basis of damage to a business rather than to the individual affected will always provide the satisfactory compensation intended by the antitrust laws. In most cases, there will probably be little difference between the dollar amounts of awards based on one method rather than the other. Even if damages were to be based upon the loss to an individual instead of to a business, the individual’s duty to mitigate16 would frequently reduce the award to an amount similar to that resulting from a diminished market value measurement. Nonetheless, courts should carefully consider whether awards for diminished market value of a business will in every instance provide satisfactory compensation for those whom antitrust violators drive out of the marketplace.

15. Id. at 1581 n.80.
16. Id. at 1578.
Civil Procedure: Discovery Orders Claimed to Violate Attorney-Client Privilege Reviewable by Mandamus

Certain drug companies were defendants in a number of consolidated damage suits. During pretrial proceedings, defendants resisted attempts to discover documents which they claimed were protected by the attorney-client privilege. However, the district court adopted the finding of the masters that many of the documents were involved in the perpetration of a fraud on the Patent Office or a violation of the Sherman Anti-Trust Act and issued a discovery order. When the district court refused to certify the question for interlocutory appeal, defendants brought the present action in the Court of Appeals for the Eighth Circuit requesting that a writ of mandamus issue to vacate and rescind the discovery order. The petition was premised on the grounds that use of the attorney-client privilege had not been connected with the perpetration of fraud and that, in any case, there was lack of a separate evidentiary basis for the findings with respect to some of the papers. The Eighth Circuit held that mandamus was an appropriate vehicle for review because the privilege claim was an extraordinary question for which later review was an inadequate remedy. It directed the district court to vacate the discovery order as to some of the petitioners for lack of a prima facie showing of fraud, but held that in general the fraud exception to the attorney-client privilege had been properly applied below.

1. The companies were Pfizer, Inc., American Cyanamid, Bristol-Meyers Company, Squibb Corporation, and the Upjohn Company.
2. The certification procedure is provided in 28 U.S.C. § 1292(b) (1970):
   When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order. . . .
3. Bristol-Meyers Company, Squibb Corporation, and the Upjohn Company. The district court was directed, along with the masters, to carry out its own order with respect to the other petitioners, Pfizer, Inc. and American Cyanamid.
4. The Eighth Circuit held that the masters and district court "clearly were aware of the state of the law", 456 F.2d at 549, and correctly found that documents involved in the furtherance of a crime or tort are not privileged by the attorney-client relationship. See Clark
The writ of mandamus is one of several extraordinary writs which federal courts are empowered to issue under the All Writs Act and has frequently been used for review of discovery orders. The Supreme Court has held that a court may issue such writs at any stage of a case where it could properly entertain appeals. However, even with such jurisdiction, a court may abuse its discretion in issuing a writ. The exercise of such discretion is limited to “extraordinary circumstances,” such as confining “an inferior court to a lawful exercise of its prescribed jurisdiction, compelling it to exercise its authority when it is its duty to do so,” and correcting a lower court’s “abuse of discretion.”

The passage of 28 U.S.C. § 1292(b) in 1958, allowing interlocutory appeals upon certification by the district judge and acceptance by the court of appeals, provided an alternative to mandamus for certain rulings. With such an alternative available, the Supreme Court held in 1967 in Will v. United States that extraordinary writs, including mandamus, were to be restrictively issued. Before mandamus may issue to modify a


In regard to an allegation of “overbreadth” of the order, the court found that the masters had sufficiently segregated the documents but directed the district court and masters to continue to guard the privilege of the petitioners by reviewing all contested documents and ordering the production of only those documents individually found to have been prepared in perpetration or furtherance of fraudulent activity.

5. The All Writs Act, 28 U.S.C. § 1651(a) (1970), provides:
   The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

6. The Supreme Court indicated in La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957), that courts of appeals had such “naked power”, although such power would not authorize “indiscriminate use of prerogative writs as a means of reviewing interlocutory orders.” Such a jurisdictional statement has been viewed as an expansion of the traditional role of the courts of appeals. See, e.g., United States v. Hughes, 413 F.2d 1144 n.10 (6th Cir. 1969); Comment, Mandamus Proceedings in the Federal Courts of Appeals: A Compromise with Finality, 52 Calif. L. Rev. 1036, 1040 (1964).


10. See note 2 supra.


12. According to the Court, mandamus “is not to control the decision of the trial court, but rather merely to confine the lower court to
discovery order, the Supreme Court has required a showing of either an abuse of discretion by the district court judge or a lack of jurisdiction. The courts of appeals, although ostensibly adhering to this standard, have at times not required a very strong showing.

In the instant case, the Eighth Circuit found the writ of mandamus available without a specific finding that the district court had abused its discretion or gone beyond its jurisdiction. Rather, it held that the extraordinary nature of the case and the impact of the discovery order were sufficient in themselves to render mandamus an appropriate means of review. In so holding, the court distinguished Will and went further in using mandamus as a tool for review of discovery orders than most courts of appeals.

The issues raised in the instant case illustrate the tension between the need for finality and the need for review of certain interlocutory rulings. Federal law incorporates a strong policy favoring review only of final judgments and disfavoring any

the sphere of its discretionary power. See 389 U.S. at 104. However, the courts of appeals have read Will narrowly and have continued to frequently find extraordinary circumstances justifying the issuance of such writs. See, e.g., Investment Properties Int'l, Ltd. v. IOS, Ltd., 459 F.2d 705 (2d Cir. 1972); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971); United States v. Hughes, 388 F.2d 236, 413 F.2d 1244 (5th Cir. 1969). These courts of appeals have emphasized the Supreme Court's language in Will dealing with the fact that Will involved a criminal case and that the government would not normally be entitled to an appeal.


15. The Seventh Circuit, in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971), appears to be the only other court of appeals which has not clearly required a showing of abuse of discretion or action beyond jurisdiction by a district court judge. The Ninth Circuit Court of Appeals, in Lampman v. United States District Court, 418 F.2d 215 (9th Cir. 1969), Southern Calif. Theatre Owners Ass'n v. United States District Court, 430 F.2d 955 (9th Cir. 1970), and most recently in City of Los Angeles v. Williams, 438 F.2d 522 (9th Cir. 1971), has adhered to the standards set out in Will. Similarly, the Second Circuit in Investment Properties International, Ltd. v. IOS, Ltd., 459 F.2d 705 (2d Cir. 1972), has looked to the standards in Will for abuse of discretion before issuing mandamus.

policy that will lead to piecemeal litigation and prolonged trials. However, the needs of litigants who will be severely harmed by a nonreviewable order which remains in effect throughout the course of the litigation have prompted alternative remedies.\textsuperscript{17}

This conflict in basic policies appears to have fostered several closely related but apparently varying standards for the use of writs of mandamus.

Never available as merely a substitute for appeal\textsuperscript{18} or as a means of overturning error,\textsuperscript{19} mandamus has been viewed by the Supreme Court as an extraordinary remedy available to courts of appeal to confine lower courts to their proper sphere of power or to prevent abuse of discretion and usurpation of power. If the actions of the lower court did not fall within this arena, mandamus would not lie. This oft-repeated standard forms the basis of Supreme Court and federal appellate decisions today.\textsuperscript{20}

A second interpretation of the role of mandamus, appearing at times to fit within the first, at other times to be a slight variant of the first, allows the court of appeals to use mandamus in its “supervisory” capacity over district courts. This supervisory function was invoked by the Supreme Court in \textit{La Buy v. Howes Leather Company},\textsuperscript{21} and used as a rationale in \textit{Schlagenhauf v. Holder},\textsuperscript{22} in which the Court noted the unusual nature

\textsuperscript{17} See 28 U.S.C. § 1292(b) (1970), and the All Writs Act, 28 U.S.C. § 1651(a) (1970). While Comment, \textit{Effect of Mandamus on the Final Decision Rule}, 57 Nw. U.L. Rev. 709 (1962), concludes that the two remedies were intended to apply in basically similar circumstances, and that it is unlikely a question would be inappropriate for interlocutory appeal and appropriate for mandamus, 9 J. Moore & B. Ward, Moore's \textit{Federal Practice} § 110.22(5) (1972) suggests, more accurately, that their functions are separate: that, for example, rulings which may have no controlling question of law involved may be appropriate for mandamus while not for interlocutory review under 28 U.S.C. § 1292(b) (1970).


\textsuperscript{19} In Will v. United States, 389 U.S. 90, 104 (1967), the Supreme Court said: “Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors,'” quoting from \textit{Bankers Life & Casualty Company v. Holland}, 346 U.S. 379, 382 (1953).


\textsuperscript{21} 352 U.S. 249 (1957).

\textsuperscript{22} 379 U.S. 104 (1964).
of the question and the need for a ruling on an issue of first impression. Even in Will, the most restrictive Supreme Court mandamus decision, the Court spoke of the writ as serving a "vital corrective and didactic function." Will held that, even in that case, the writ might be appropriate if the evidence had demonstrated the circumstances were of an extraordinary nature. The area of overlap between the traditional standard for mandamus and this supervisory power is not clear. But some courts of appeals and commentators view these recent cases as indicative of an expansion of the traditional scope of mandamus discretion of the courts of appeals to review questions of first impression and to settle questions on which district court judges differ.

Beyond the traditional and the supervisory standards for the use of mandamus, a few courts have recently indicated that other "extraordinary circumstances" will be sufficient in themselves to justify the issuance of the writ. In Harper & Row Publishers, Inc. v. Decker, the Seventh Circuit held that:

[B]ecause maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure is an inadequate remedy, the extraordinary remedy of mandamus is appropriate.

This decision was upheld without opinion by an equally divided Supreme Court. In the instant case, the Eighth Circuit relied on Harper & Row and held that, since review on appeal might prove an inadequate remedy, mandamus was an appropriate vehicle for review of the question before it.

The policies behind the traditional standards are clear: judicial economy requires that the finality rule be observed and that the courts of appeals review only the work of a judge en-

23. Id. at 111.
25. The Court stated: "What might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals, we cannot and do not say." Id.
26. See United States v. Hughes, 388 F.2d 236, 413 F.2d 1244 (5th Cir. 1968), in which the court stated: "Several recent cases point to an expansion of the scope of mandamus in the exercise of 'supervisory control of the District Courts by the Courts of Appeals.'" 413 F.2d at 1247 n.10. See also 9 J. Moore & B. Ward, Moore's Federal Practice § 110.28 (1971).
27. 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971).
28. Id. at 492.
gaged in a frolic\textsuperscript{30} or addressing a question of first impression. The problems raised by certain rulings on discovery issues, however, present difficulties to the court system and litigants that will not be solved by such standards. Often outside of traditional mandamus and interlocutory review, yet demanding some remedy before the continuation of litigation, certain discovery orders involving truly extraordinary circumstances may arise and may require a review before time of appeal. Cases involving discovery of information claimed to be privileged present the most potential dangers, for an erroneous ruling will be virtually uncorrectable on appeal, and the party forced to disclose such documents may be effectively foreclosed from any right to meaningful appeal after disclosure.

The writ of mandamus, as utilized by the court in \textit{Pfizer}, provides an ideal vehicle for the litigant who believes himself severely damaged by a district court’s discovery ruling. While availability of mandamus review may present dangers of spurious claims of privilege, similar dangers of spurious claims of abuse of discretion have been present in traditional mandamus standards, and courts which reserve such mandamus review for the case involving “extraordinary circumstances” should be inviting no more spurious claims than in the past. Several courts of appeals have now recognized mandamus discretion to be broad enough to encompass such review of discovery, and the Eighth Circuit’s opinion in \textit{Pfizer, Inc. v. Lord} strengthens this position.

\section*{Civil Rights: Parallel Remedy for Private Discrimination In Employment Provided by 42 U.S.C. § 1981}

Plaintiff alleged that defendant Bristol-Meyers had discharged her because of her race and sought declaratory and injunctive relief as well as the recovery of back wages. Federal jurisdiction was asserted under Title VII of the Civil Rights Act of 1964\textsuperscript{1} and 42 U.S.C. § 1981, a civil rights statute enacted in 1866.\textsuperscript{2} Title VII explicitly proscribes racial discrimination in

\textsuperscript{30} 9 J. Moore & B. Ward, Moore’s \textit{Federal Practice} § 110.28 (1971).


\textsuperscript{2} 42 U.S.C. § 1981 (1970) provides:
employment, while section 1981 provides in part: "All persons . . . shall have the same right to make and enforce contracts . . . ." The district court granted summary judgment for Bristol-Meyers, holding that the action was time-barred under Title VII of the Civil Rights Act of 1964 and that section 1981 did not reach purely private discriminatory employment practices. The Eighth Circuit reversed and remanded, holding that section 1981 does apply to private actions and that enactment of Title VII of the Civil Rights Act of 1964 did not preempt or repeal by implication the rights granted under section 1981. Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972).

In rejecting defendant's argument that section 1981 did not encompass private discrimination, the court relied on Jones v. Alfred H. Mayer. The Supreme Court held in Jones that 42 U.S.C. § 1982, a companion to section 1981 dealing with the right to "inherit, purchase, lease, sell, hold, and convey" real and personal property, applied to private discrimination. After extensive analysis of the statutory language of section 1982 and the legislative history, the Supreme Court concluded that the Act was intended to apply to all racially motivated acts, both public and private, in the sale and rental of property. The Jones Court also found that Congress had the power to enact section 1982 pursuant to the thirteenth amendment.

The Jones opinion suggested that its holding would apply to section 1981 as well. Subsequently, the Seventh Circuit Court of Appeals in Waters v. Wisconsin Steel Works of International Harvester held that since section 1981 and section 1982 were derived directly from section 1 of the 1866 Civil Rights Act, private acts were within section 1981 under the Jones rationale.

The Brady court also rejected defendant's argument that the 1964 Civil Rights Act had preempted existing rights under section 1981. The court noted that Title VII of the 1964 Civil

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4. Id. at 422 & n.28, 442 n.78.
5. 427 F.2d 476, 482 (7th Cir.), cert. denied, 400 U.S. 911 (1970).
6. Id.
Rights Act was far broader than section 1981, since it applies to discrimination based on race, religion, sex and national origin, while section 1981 applies only to racial discrimination. Further, the court indicated that its attention had been directed to nothing in the legislative history or decisions under Title VII supporting the preemption theory. The court concluded that Title VII is a parallel federal prohibition against racial discrimination in employment in the private sector and as such does not detract from rights under section 1981.

There is ample precedent for the court’s conclusion. In Sullivan v. Little Hunting Park, Inc., the United States Supreme Court again dealt with section 1982. The Court there noted: Section 1982 derived from the 1866 Act is plainly “not inconsistent” with the 1964 Act, which has been construed as not “pre-empting every other mode of protecting a federal ‘right’ or as granting immunity” to those who had long been subject to federal law. [Citations omitted]

The Sullivan reasoning was applied to section 1981 in both Waters and Sanders v. Dobbs Houses, Inc. Both decisions, noting the absence of explicit repeal, reviewed the requirements for repeal by implication set out by the Supreme Court in Posadas v. National City Bank: an irreconcilable conflict between provisions in the two acts and a clear and manifest legislative intent to repeal the earlier act. The Waters court reasoned that, although there were numerous areas of possible conflict between section 1981 and Title VII, the statutes were not irreconcilable since the conflicts could be resolved on a case-by-case basis. Thus, it was necessary for the court to harmonize the two statutes. The plaintiff in Waters had not sought relief through the conciliation procedures of the Equal Employment Opportunities Commission before filing suit under section 1981. The court pointed out that Congress had placed strong emphasis on conciliation in establishing the E.E.O.C. and its procedures and for that reason concluded that “aggrieved persons should [not] be allowed intentionally to by-pass the Commission without good reason.” It found “good reason” on the facts before it,

8. Id.
10. Id. at 238.
11. See text accompanying note 5 supra.
14. 427 F.2d at 487.
15. In the Waters case E.E.O.C. action had been instituted against the defendant company but not against defendant local union. The court noted that the primary charge of racial discrimination made by the plaintiffs was based on an amendment to a collective bargaining
and did not generalize further as to what constitutes “good reason.”

In Young v. International Telephone and Telegraph Co., the court likewise reviewed the differences between section 1981 and Title VII, including the Title VII emphasis on conciliation. The defendant in Young argued that the Waters holding required an exhaustion of E.E.O.C. remedies or a justifiable excuse for failure to do so. The Young court concluded that there was nothing in Title VII to suggest such a requirement, although it stated somewhat cryptically that “due regard to the conciliation jurisdiction of the E.E.O.C. [could] be afforded by the District Courts short of the erection of a jurisdictional bar.” It nonetheless found that the availability of conciliation remedies under Title VII did not create irreconcilable conflict with section 1981.

The Eighth Circuit’s opinion in Brady made no specific mention of exhaustion or excuse requirements and did not reveal whether there was “good reason” for plaintiff’s failure to seek E.E.O.C. remedies or whether plaintiff actually had sought such remedies. Further, the court did not consider whether plaintiff was justified in failing to bring suit under Title VII before such an action was time-barred. The absence of discussion of available E.E.O.C. remedies together with the reference to the Waters and Young opinions suggests that exhaustion of such remedies or justifiable excuse will not be required. Although the court failed to make this matter entirely clear, the decision does extend significant employment protection to racial minorities within the jurisdiction of the Eighth Circuit. While Title VII of the 1964 Act will probably continue to provide the main statutory tool in this area, section 1981 will be useful in circumstances where Title VII is not applicable.

17. 438 F.2d at 763.
Civil Rights: Private Conspiracy in Deprivation of First Amendment Rights Reached By 42 U.S.C. § 1985(3)

Action, a predominantly black human rights organization, staged a series of demonstrations at a church whose predominantly white parishioners were warned that these "Black Sunday" demonstrations would continue for six months unless a number of "demands" made by the demonstrators were met. Each demonstration resulted in the disruption of church services. Following the fourth demonstration, the pastor, parishioners, and the Archbishop of the diocese in which the church was located, sought injunctive relief in federal district court.

The district court granted a permanent injunction against the defendants1 "because defendants will continue to disrupt . . . the worship services and meetings of the Cathedral parish . . . and will deprive the plaintiffs and parishioners . . . of their Constitutional and civil rights . . . enjoyed by other citizens of the United States . . . unless restrained by order of this Court . . . ."2 On appeal, the Eighth Circuit affirmed, holding that 42 U.S.C. § 1985(3) reached wholly private conspiracies, that sections one and five of the fourteenth amendment provided a constitutional source of congressional power to reach the private conspiracy present in the instant case, and that injunctive relief was available under section 1985(3). Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971).3

The Eighth Circuit's decision that the section five enforcement clause of the fourteenth amendment4 can be used as the constitutional basis for congressional power to reach private conspiracies is a bold departure from long established constitutional principles. If the rationale of Action is accepted by other federal courts, section five can be used as a basis for protecting from wholly private interference all civil rights previously found to be incorporated in the fourteenth amendment.

1. Another black organization was also enjoined since it knew of, took part in and helped plan many demonstrations against churches in the area, although it did not directly participate in the demonstrations involved in this lawsuit.
4. U.S. CONST. amend. XIV, § 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
Section 1985(3) was originally enacted as part of the sweeping Reconstruction civil rights legislation designed to eradicate "the badges and the incidents of slavery." However, the broad scope of section 1985(3) has not been effectuated until recently. Instead, the statute has suffered from the restrictive judicial interpretation associated with other Reconstruction civil rights legislation.

In United States v. Harris, the Supreme Court held the exact criminal counterpart of section 1985(3) applicable to private conspiracies in deprivation of fourteenth amendment rights. However, the Court then found the statute to be unconstitutional since the scope of congressional power under the fourteenth amendment was not thought to extend to private conduct. This position was reaffirmed one year later in the famous Civil Rights Cases. Probably as a result of the doubts raised as to its constitutionality by Harris and the Civil Rights Cases, section 1985(3) lay dormant for many years.

However, when suit was brought under section 1985(3) in Collins v. Hardymon against private citizens who had disrupted the plaintiff's political meetings, the Court avoided the constitutional question raised by Harris by holding that the complaint did not state a cause of action. Applying the theory developed in the Civil Rights Cases, the Court reasoned that wholly private acts could not deprive others of "equal protection of the law" or "equal privileges and immunities under the law."

Such private discrimination is not inequality before the

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5. 42 U.S.C. § 1985(3) (1970) [hereinafter cited as § 1985(3)] provides in relevant part:

"If two or more persons . . . conspire or go . . . in disguise on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . . ."


8. 106 U.S. 629 (1883).


10. 109 U.S. 3 (1883).

11. From the date of its enactment until 1920, there were no reported cases involving section 1985(3). Comment, The Civil Rights Act: Emergence of an Adequate Civil Remedy?, 26 Ind. L.J. 361, 363 (1951).

law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so.\textsuperscript{13} In other words, without some “manipulation of the law or its agencies,” the conspiracy victim’s “rights under the laws . . . remain untouched . . .”\textsuperscript{14} In effect, the Collins Court found that the phrases “equal protection” and “equal privileges” of the law inherently included a state action requirement, and thus a “color of law” requirement was read into section 1985(3) even though the statute did not contain the phrase. While the Court in Collins emphasized that it was merely construing the language of the statute,\textsuperscript{15} it was nevertheless obvious that the Court was influenced by constitutional considerations:

It is apparent that, if this complaint meets the requirements of [the] Act, it raises constitutional problems of the first magnitude . . . .\textsuperscript{16} Thus, by reading into the statute a state action requirement, Collins avoided these constitutional issues.

The “color of law” or state action requirement imposed in Collins was, with few exceptions, followed by the lower federal courts.\textsuperscript{17} However, as Supreme Court cases continued to erode and dilute the state action concept,\textsuperscript{18} the validity of retaining a state action requirement in section 1985(3) seemed doubtful. In Griffin v. Breckinridge\textsuperscript{10} the “color of law” limitation placed on section 1985(3) by Collins was removed. In Griffin, the plaintiffs, black citizens of Mississippi, charged that the defendants, white citizens of Mississippi, had conspired to deprive them of the equal protection of the laws and equal privileges and immunities under the laws. Defendants had allegedly stopped the plaintiffs on public highways, held them at bay with firearms and severely beat them. Seeking compensatory and punitive

\begin{itemize}
  \item \textsuperscript{13} Id. at 661.
  \item \textsuperscript{14} Id. (emphasis in original).
  \item \textsuperscript{15} Id. at 662.
  \item \textsuperscript{16} Id. at 659.
  \item \textsuperscript{17} See, e.g., Erlich v. Van Epps, 428 F.2d 363 (7th Cir. 1970); Wallach v. Cannon, 357 F.2d 557 (8th Cir. 1966); Hoffman v. Haldsen, 268 F.2d 280 (9th Cir. 1959). But see Miles v. Armstrong, 207 F.2d 284 (7th Cir. 1953).
  \item \textsuperscript{18} The Supreme Court found “state action” present in each of the following cases: Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional amendment by public referendum permitting individuals to sell or rent property to whomever they choose); Evans v. Newton, 382 U.S. 296 (1966) (municipality's management of park given in trust for whites only); Shelley v. Kraemer, 334 U.S. 1 (1948) (state court enforcement of a private covenant prohibiting the sale of property to blacks); Marsh v. Alabama, 326 U.S. 501 (1946) (delegation by state of public function to privately incorporated town).
  \item \textsuperscript{19} 403 U.S. 88 (1971).
\end{itemize}
damages, plaintiffs sought relief in federal court, but both the district and circuit courts, relying on *Collins*, dismissed the suit for failure to state a cause of action.\textsuperscript{20}

In the Supreme Court, however, the decision was reversed. Noting that since *Collins* did not consider constitutional issues, there was no need to determine whether it was correctly decided on its own facts, the Court went on to demonstrate convincingly that the apparent meaning of section 1985(3), its structural relationship to other similar civil rights legislation, and the statute’s legislative history “all . . . point unwaveringly to § 1985(3)’s coverage of private conspiracies.”\textsuperscript{21} But the Court also stated that section 1985(3) did not reach all private conspiracies, but rather only those where there was “some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.”\textsuperscript{22} The Court had no doubt that racial, invidiously discriminatory animus was present in the case before it.\textsuperscript{23} As to the constitutionality of the statute, the Court stated:

\begin{quote}
That § 1985(3) reaches private conspiracies . . . cause[s] no doubts of its constitutionality. It has long been settled that 18 U.S.C. § 241 . . . reaches wholly private conspiracies and is constitutional. Our inquiry, therefore, need go only to identifying a source of congressional power [to reach the private conspiracy alleged] in this case.\textsuperscript{24}
\end{quote}

It is significant that the Court found this source of congressional power under section 2 of the thirteenth amendment since “there has never been any doubt of the power of Congress to impose liability on private persons under § 2 of that amendment.”\textsuperscript{25}

In *Action* the defendant’s main contention, that section 1985(3) could not be the basis of an injunction because it does not apply to private conspiracies, had already been resolved by *Griffin*. Clearly, according to *Griffin*, certain private conspiracies could be reached by section 1985(3). For section 1985(3) to apply, the Eighth Circuit had only to determine whether the private conspiracy present in *Action* was a private conspiracy motivated by a “racial, or perhaps otherwise class-based, invidiously discriminatory animus.”\textsuperscript{26} Because *Action* purport-

\begin{itemize}
\item \textsuperscript{20} Griffin v. Breckenridge, 410 F.2d 817 (5th Cir. 1969).
\item \textsuperscript{21} 403 U.S. at 101.
\item \textsuperscript{22} Id. at 102.
\item \textsuperscript{23} Id. at 103.
\item \textsuperscript{24} Id. at 104 (citations omitted; emphasis added).
\item \textsuperscript{25} Id. at 105.
\item \textsuperscript{26} Id. at 102.
\end{itemize}
edly acted on behalf of the black citizens of St. Louis, there is little doubt that the court's conclusion that "the defendants were stimulated to disrupt the church services by racial... motives"27 was correct. However, the court's determination that the private conspiracy present in Action was of the type covered by the terms of section 1985(3) still did not resolve the question of whether section 1985 can be constitutionally applied to the facts of the case. Following the rationale of Griffin, the Eighth Circuit still had to find a constitutional source of congressional power to reach the private conspiracy present in Action.

First, the court determined that the plaintiff's first amendment rights of freedom of assembly and worship were protected from state action by the fourteenth amendment,28 a decision supported by the great weight of authority on the issue.29 However, the court then departed from established constitutional principles by concluding that section five of the fourteenth amendment gave Congress the power to protect the first amendment rights of freedom of assembly and worship from private action. In reaching that conclusion, the court relied heavily on two sources: the concurring opinions of Justices Clark and Brennan in United States v. Guest30 and the history surrounding the drafting and adoption of the fourteenth amendment.

In Guest the defendants were six private individuals who were indicted under the criminal counterpart of section 1985(3)31 for conspiring to deprive black citizens of equal access

27. 450 F.2d at 1232.
28. Id. at 1235.
   If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
   If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
   They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.
to state facilities. The opinion of the Court did not reach the state action limitation generally placed on section five of the fourteenth amendment, but instead upheld the indictment on the ground that additional allegations indicated the defendants may have been aided by state officials. However, in separate concurring opinions, a majority of the Court subscribed to the view that section five of the fourteenth amendment authorized Congress to legislate against all conspiracies which interfere with rights protected by the amendment.  

Apparently, the Eighth Circuit has interpreted the Guest decision as eliminating the state action limitation placed on congressional power under section five of the fourteenth amendment despite other elements of Guest that undermine the broad language used in the concurring opinions. First, both opinions refer to a fact situation involving the use of state facilities. As one commentator has noted:  

[T]hough both Justices Clark and Brennan explicitly rejected the traditional "state action" concept to the extent that a finding of positive state participation in discriminatory activity should no longer be required in order to invoke federal legislation designed to protect the enjoyment of fourteenth amendment rights, neither suggested that affirmative state action is no longer essential for the creation of those rights.  

Thus, both opinions can be interpreted to mean that once the state has affirmatively acted by creating public facilities, it then has an affirmative duty to see that all citizens have equal access to those facilities. While this more limited interpretation of the concurring opinions characterizes them as mere modifications of earlier definitions of the state action concept, it is the one accepted by most commentators on the Guest case. Moreover, this view is supported by other evidence, such as Justice Brennan's repeated references to state facilities and Justice Clark's joining in the majority opinion of United States v. Price, decided on the same day as Guest, which recognized a state action requirement.  

The second basis of support for the court's conclusion in Action that the fourteenth amendment could be used as a source of congressional power to reach private conspiracies is the history surrounding the framing and adoption of that amendment. The court noted that:

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32. 383 U.S. at 762, 782.
according to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state Legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by States.30

The court then concluded that the framers of the fourteenth amendment intended Congress to have the power to regulate private discriminatory conduct.37

Two objections can be made to the Eighth Circuit's use of the history surrounding the adoption of the fourteenth amendment. First, an equally plausible argument, that the framers did not intend Congress to have the power to reach private conduct, can be made. Indeed,

any theory based on the congressional debates is inconclusive due to the fact that there were two and possibly three factions debating the amendment's scope and, as a result, the intent of the framers was not clearly expressed in the course of the discussion.38

Second, the controversy surrounding the history of the adoption of the fourteenth amendment is not a new phenomenon. Presumably, arguments based on such history have been presented to the Supreme Court many times. Since such arguments have apparently not compelled the Supreme Court to eliminate the state action requirement, it is difficult to see why the Eighth Circuit should do so.

Thus, the Eighth Circuit's conclusion that the fourteenth amendment can be used as a source of congressional power to reach private conspiracies was not compelled, nor perhaps proper, under established constitutional principles. Even if it is assumed that the court in Action is correct in surmising that Congress has the power to reach private conspiracies under the fourteenth amendment, section 1985(3) certainly is not clear authority for the proposition that Congress has exercised that power. In Griffin, the Supreme Court upheld the statute's power to reach private conspiracies under the thirteenth amendment because both the statute and the thirteenth amendment were intended to protect blacks in the exercise of their newly acquired rights. However, Action has potentially created an entirely new set of substantive civil rights. In the past, certain rights, such as the fourth amendment guarantee that "the right of the people to be secure . . . against unreasonable searches

37. 450 F.2d at 1237.
38. Comment, supra note 34, at 529.
and seizures," were thought to be protected solely from governmental interference. \footnote{39} Other rights, such as those guaranteed by the thirteenth amendment and the right to interstate travel, were protected from both private and governmental interference. \footnote{40} Under the Action rationale there is no reason why all rights guaranteed by the bill of rights that have been held applicable against the states should not also be protected from private interference under section 1985(3). Although it may be desirable for civil rights to be protected from private action, it is presumably the function of state law to guard those rights not protected from private interference by the Constitution directly, or by federal statute authorized by the Constitution. It can be argued that state law is not fulfilling its function, and federal regulation of private discriminatory conduct is necessary. Even so, it is questionable whether the remedy furnished by Action is appropriate. By interpreting section 1985(3) to allow federal regulation of private conduct, previously solely regulated by the states, the Eighth Circuit has modified the very framework of federal government—the division of powers between the national and state governments. This modification was accomplished without any clear authority for the proposition that Congress is constitutionally permitted to regulate in this area, and without any indication that, even if it had the constitutional power to do so, Congress desired to act in such a manner. Thus, the desirability of the result in Action is far from clear.

Civil Rights: Seniority System Discrimination Remedied By Allowance of 50% Seniority Rights

Prior to enactment of Title VII of the 1964 Civil Rights Act, defendants, the Frisco Railroad and the Brotherhood of Railroad Trainmen (later succeeded by the United Transportation Union), had excluded blacks from the job of railroad brakeman. In order to offset the discrimination, black porters, who had lost their jobs in 1967 when Frisco eliminated passenger service, were given preference in hiring for new positions. However, blacks were not given credit for time served as porters in determining their

seniority. This practice had the effect of giving white brakemen a competitive advantage in the bidding for higher echelon brakeman's jobs.

The Government brought suit to force Frisco and the union to reclassify the former porters as brakemen and to merge the two crafts to allow blacks to claim seniority accumulated as train porters in their new classification. It argued that porters had been deprived of the opportunity to acquire seniority as brakemen by pre-1964 discriminatory exclusion. The trial court denied the request principally on the ground that a seniority system based on business necessity escapes Title VII proscription, and a panel of the Eighth Circuit affirmed. Upon rehearing en banc, however, the court reversed and remanded, holding (1) that Frisco and the union had overtly discriminated against blacks prior to enactment of the Civil Rights Act of 1964; (2) that the continuing effect of the past discrimination perpetuated itself in Frisco's refusal to award the train porters any seniority; and (3) that awarding the porters 50 per cent seniority credit for their past service was consistent with adequate safeguards for safety and efficiency, and hence was not barred by the business necessity doctrine. United States v. St. Louis-S.F. Ry., 464 F.2d 301 (8th Cir. 1972).

While brakemen on passenger trains were able to use seniority accumulated in passenger service to bid on vacancies in freight service after the discontinuance of passenger service in 1967. On the other hand, black train porters were not permitted to transfer any portion of their seniority to bid for openings in any other craft, in spite of the fact that they performed many of the same services as brakemen. As noted above, this lack of seniority also impinged on the ability of a black, once hired as a brakeman, to bid successfully for higher echelon jobs.

Relying on Griggs v. Duke Power Co., the Court held that this practice, though neutral on its face, in effect continued prior discriminatory employment practices and hence was violative of

3. The court rested its finding of pre-1964 discrimination on the existence from 1928 to 1949 of a written agreement between Frisco and the union which absolutely precluded the hiring of black brakemen by Frisco, and from the fact that from 1949 to 1966 only one of 750 newly hired brakemen was black. United States v. St. Louis-S.F. Ry., 464 F.2d 301, 307 (8th Cir. 1972).
the 1964 Act. It had been argued that since Title VII was not intended to apply retroactively to reach past discrimination, an employment practice neutral as to race was not in violation of the act even though it perpetuated past discrimination.\(^5\) In Griggs, however, the Supreme Court held that practices neutral on their face are nonetheless in violation of the act if they perpetuate the discriminatory effect of pre-1964 conduct.\(^6\)

Section 703 of Title VII\(^7\) prohibits an employer from discriminating against an employee "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race" or from "uniting, segregating, or classifying an employee in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race."

Prior Eighth Circuit opinions interpreting Title VII fore-shadowed the result in Frisco. In United States v. Sheet Metal Workers, Local 36,\(^8\) a union allowed blacks to join for the first time in 1967, but continued its referral system of recommending members for employment based upon length of industry experience, even though union membership was a prerequisite to such experience. The system was found to be in violation of Title VII:

Because the plans carry forward the effects of former discriminatory practices, they result in present and future discrimination and are violative of Title VII of the Act.\(^9\)

The issue was all but foreclosed in United States v. National Lead Co.\(^10\) Although the defendant in that case abolished separate black and white departments in 1962, vacancies in depart-

\(^5\) Id. at 428.

\(^6\) Id. at 430.

\(^7\) 42 U.S.C. § 2000e-2(a) (1970). An important proviso to this section is contained in section 703(h), 42 U.S.C. § 2000e-2(h) (1970): it shall not be an unlawful employment practice for an employer to apply different . . . terms [or] conditions . . . of employment pursuant to a bona fide seniority system provided that such differences are not the result of an intention to discriminate because of race . . . .

Although not mentioned by the court in Frisco, this proviso has been interpreted by other courts as not applicable in a situation such as that in Frisco because (1) a seniority system based on earlier discriminatory job assignments is not bona fide and (2) because the discriminatory effect of a seniority system such as Frisco's is the "result of an intention to discriminate because of race"—here a pre-1964 intention. See Quarles v. Philips Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

\(^8\) 416 F.2d 123 (8th Cir. 1969).

\(^9\) Id. at 131.

\(^10\) 438 F.2d 935 (8th Cir. 1971).
ments continued to be filled according to departmental rather than plant-wide seniority. The court held that although this practice appeared racially neutral, it built "upon pre-Title VII bias to produce present discrimination . . . ."11 Numerous decisions in other jurisdictions, both before and after Griggs, have reached the same result as Frisco.12

Defendants' principal contention in Frisco was that a seniority system necessary to business efficiency and safety was not in violation of Title VII. The business necessity doctrine originated in Quarles v. Phillip Morris, Inc.,13 where it was held that a discriminatory practice comported with Title VII only when conceived out of business necessity. Griggs substantially increased the burden of showing business necessity:

The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job preference, the practice is prohibited.14 Decisions subsequent to Griggs have imposed a further requirement of essentiality. Thus the employer must show that there is no other method of achieving approximately the same job efficiency and safety that has less discriminatory effect.15

Relying on these decisions, the Frisco court concluded that there was no showing that the seniority system was essential to job efficiency and safety. Several findings led the court to believe that experience and seniority as a brakeman were not essential to the porters' adequate performance in any of the brakeman positions.16 Although the court denied the Government's request for merger of the crafts of porter and brakeman, it gave each former porter seniority credit as a brakeman for

11. Id. at 937.
12. See, e.g., United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969).
14. 401 U.S. at 431.
16. First, train porters who did transfer to duties as brakemen, without seniority, were not given any special training; their student runs were waived and they immediately started their new freight braking duties. Second, the train porters had performed many braking functions while working as porters. Third, the train porters were apparently capable of learning any additional duties the brakeman craft entailed. Finally, the court noted that under Frisco's procedures it was unnecessary for a brakeman to perform one type of braking service before bidding on another type, so long as he had enough total seniority as a brakeman. 464 F.2d at 308.
50 per cent of his experience as a porter. Frisco was required to implement a training program for the porters, but it was not required to accept any porter as a brakeman if he was not found qualified according to reasonable safety-related standards.

A correct application of the business necessity doctrine begins with the assumption that whenever a worker has suffered discrimination, he is entitled to be put in the position he would have occupied absent discrimination. Only where this remedy would diminish efficiency and safety is this relief unwarranted. The business necessity doctrine had been one of total preclusion of remedy, addressed to the issue of liability rather than to the determination of remedy. The Frisco court, however, used the doctrine to measure the appropriate amount of relief, quite apart from the initial question of liability.

The court's decision to award only partial seniority credit was based upon its determination that some of the train porters would not have chosen to become brakemen prior to 1964 even in the absence of discriminatory exclusion, and upon a finding that the porter-brakeman jobs did not involve entirely similar tasks. As such, the court's approach amounts to an application of a "partial necessity" doctrine. Since the two jobs were not functionally identical, it could not be assumed, for example, that a porter with 12 years experience was fully qualified to assume a brakeman's position that required 12 years seniority as a brakeman. In some measure, experience as a brakeman was found necessary for higher order brakeman positions. However, this reasoning seems contrary to the court's own finding that there was no evidence that a porter could not perform as adequately as a brakeman with the same number of years employment. In fact, its holding that no unqualified worker need be promoted seems to preclude any occurrence of incompetence.

Finally, the court's refusal to award back wages does not comport with decisions in other circuits. The relief provision in Title VII empowers the court to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative actions as may be appropriate, which may include

17. The employee must be given training before he is measured for efficiency and safety. See, e.g., United States v. Jacksonville Terminal Co., 451 F.2d 418, 459 (5th Cir. 1971).
18. 464 F.2d at 308.
reinstatement or hiring of employees, with or without back pay . . . .”

It was generally understood that relief under Title VII was to place the injured worker where he would have been absent discrimination. The majority in Frisco, however, makes the test one of intent—if overt post-1964 discriminatory intent exists, back pay is warranted, but otherwise it is not. Such a test was specifically rejected by the Fourth Circuit in Robinson v. Lorillard Corp.

The Frisco decision creates a virtual affirmative duty on the part of employers to fashion some form of remedy for past discrimination where present policies perpetuate that discrimination. Present neutral intent is no defense, nor is the fact that the practice is conceived out of business necessity a defense. It was principally for these reasons that three judges dissented, arguing that a seniority system is valid if “conceived out of business necessity and not out of racial discrimination.”

That view seems inconsistent with the mandate laid down by the Supreme Court in Griggs, which focuses upon the discriminatory effects rather than intent.

The decision, however, also creates problems for plaintiffs. Although the burden of showing overriding business necessity will shift to the employer upon a showing that a practice perpetuates past discrimination, the plaintiff will have to demonstrate a lack of business necessity in order to avoid a reduction in requested relief due to the application of the “partial necessity” approach adopted by the Frisco court. Plaintiffs must also demonstrate present discriminatory intent in order to recover back wages.

While the holding in Frisco on the issue of continuing effects of past discrimination is in line with precedent, its handling of the remedial issues is based in part on internally inconsistent reasoning and provides less than satisfactory guidance for future cases.

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21. 444 F.2d 791 (4th Cir. 1971).
22. 464 F.2d at 314.
23. Id.
24. It was on this point that Judge Heany dissented in part from the majority opinion. 464 F.2d at 313.
Constitutional Law: Due Process Violated by Mid-Term Dismissal Of Teacher Without Notice or Hearing

Plaintiff, a black, had been a teacher in a junior high school for over eleven years and was engaged in extensive extramural work, including "moonlighting" as a minister and juvenile probation officer, and in conducting youth, civil rights, and political activities. Believing these activities to be interfering with the performance of his classroom duties, the Superintendent of Schools held several meetings to encourage him to curtail them. In response, plaintiff denied taking part in any activities which adversely affected the operation of the school but agreed to refrain from holding late evening meetings when young children were in attendance. In a letter to the Superintendent, he expressed resentment at what he considered to be unreasonable attempts to restrict his civic activities and stated that:

I will not meet with you again on these matters unless my Principal has been notified, and my accuser present.1

The Superintendent presented the letter to the School Board and indicated that it would be difficult for him to work with plaintiff in the future. Upon instruction of the Board, the Superintendent summarily discharged plaintiff without notice or a hearing.

Without requesting a hearing, plaintiff brought an action pursuant to 42 U.S.C. § 1983, requesting an injunction requiring his reinstatement and back pay for the period between his termination and the end of the academic year. The district court dismissed the complaint on the merits, determining that the termination was for good cause.2 On appeal, the Eighth Circuit vacated the judgment, holding that a peremptory, mid-term dismissal without notice and an opportunity to respond violates procedural rights under the due process clause of the fourteenth amendment. Cooley v. Board of Education, 453 F.2d 282 (8th Cir. 1972).

Many rationales may be advanced to protect against an abuse of discretion in cases involving termination from public employment. For example, the void-for-vagueness and overbreadth principles3 have been applied to invalidate the general

dismissal provisions of the tenure laws. The ninth amendment may include a right to be free from arbitrary government action as a right “retained by the people”; and the equal protection clause may prevent an arbitrary dismissal when one member of the class of public employees receives discriminatory treatment. However, these arguments have ordinarily been rejected by the courts in favor of those available under the due process clause.

Possible modes of analysis under the due process clause include the right to teach, a right to public employment, and a general due process right. Although some courts have recognized a right to teach as a “liberty” within the scope of the fourteenth amendment, the right to teach has not been readily accepted by most courts as a right of constitutional dimensions. Similarly, the argument that public employment is a protected property right has largely been rejected by the courts.

Rather, in dealing with dismissal cases most courts have employed a general due process right to be free from arbitrary and capricious action by the state. In doing so, the courts have practically avoided the requirement of a “life, liberty, or property” right by shifting the focus of inquiry to whether the government has an obligation within the particular factual circumstances to act fairly. This shift is accomplished by the use of a balancing test initially prescribed by Cafeteria Workers v.

4. The same arguments used under the due process clauses may be used under the ninth amendment because it has been suggested that “there would appear to be no significant difference between judicially created substantive rights under the Fifth Amendment and the open-ended use of the Ninth and Tenth Amendments to achieve the same results.” Note, Dismissal of Federal Employees—the Emerging Judicial Role, 66 Colo. L. Rev. 719 (1966).

5. Even though it may be found that no one has a right to public employment, in determining whom to admit and whom to retain, the government cannot establish a criterion or basis of classification that is arbitrary or discriminatory. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).


McElroy, where the interests of the government were weighed against the interests of the individual employee. This balancing test has proven very flexible in that it affords the possibility of prescribing due process requirements according to the equities of specific fact situations. Because it focuses on "interests" rather than "rights" or "privileges," it avoids the right-privilege controversy.

In the most recent decision involving the termination of a public employee, however, the right-privilege distinction may have been revitalized. In Board of Regents v. Roth the contract of a non-tenured teacher was not renewed for the next academic year. The district court ruled in favor of the teacher, balancing the interest of the state in ridding itself of inadequate teachers against the economic and professional interests of the teacher. The Seventh Circuit Court of Appeals affirmed, but the Supreme Court reversed. The Court held that the requirements of procedural due process apply only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property:

A weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake [citation omitted]. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

Finding that Roth had not shown that a "liberty" or "property" right had been invaded in the refusal to rehire him, the Court held that Roth was not entitled to a hearing upon termination. The general due process right and the balancing test to determine whether due process requirements apply in the first instance were rejected.

In Cooley, however, the Eighth Circuit applied a balancing test to find a general due process right to be free from arbitrary dismissal. The court stated:

10. 367 U.S. 886 (1961). In Cafeteria Workers the generalized governmental interest in the national security was balanced against the particularized interest of an individual excluded from working on a specified military base.
13. 446 F.2d 806 (7th Cir. 1971).
15. Id. at 570-71.
We think . . . that as a matter of procedural Due Process the interest of a public school teacher in his continued employment until the natural expiration of the academic years is, in the absence of a countervailing state interest of paramount significance, sufficiently fundamental to prohibit his mid-term discharge without an explication of the reasons which underlie termination and the opportunity meaningfully to be heard with regard thereto.\textsuperscript{16}

In applying this test, the court was especially influenced by the fact that Cooley was dismissed in the middle of a school term. Although the court explicitly emphasized the hardship of a mid-year discharge, other factors were no doubt considered.

On the one hand, there are many state interests involved in a claim for virtually unrestricted power to dismiss.\textsuperscript{17} The educational process may be jeopardized by internal conflict over the dismissal of a teacher and by the retention of dissident and inadequate faculty members.\textsuperscript{18} Moreover, the necessity of upholding procedural requirements in dismissing a teacher may divert funds committed to an educational program and affect the quality of instruction. Hearing requirements may also seriously affect hiring practices by preventing the hiring of instructors for experimental programs, perpetuating teachers in positions for which they are not suited, and restricting the employment of innovative teachers. Finally, the hearing requirement may affect the overall operating efficiency of the school system.

On the other hand, numerous interests of the individual teacher must be considered. A termination of employment deprives the instructor of his present source of livelihood; it may require him to relocate and thereby cause disruption of his life as well as financial hardship. Dismissal may stigmatize the teacher, thereby jeopardizing his chances for future employment and professional advancement. The threat of unrestricted termination power may also inhibit the judicially recognized "freedom to inquire, study and evaluate," which is an essential element of academic freedom.\textsuperscript{19} Finally, specific constitutional

\textsuperscript{16} 453 F.2d at 286–87.


guarantees, such as the freedom of speech, may be affected under the guise of dismissal for cause where termination proceedings are virtually nonreviewable and the state is free to act arbitrarily.20

The weighing of these equities favors recognizing due process limitations on the dismissal power "in the absence of a countervailing state interest of paramount significance."21 The requirement of a hearing would not substantially disrupt the operating efficiency of the school system since the form of hearing may be adapted to the particular circumstances. For example, where publicity threatens to disrupt school activities an in camera proceeding may be used,22 and where a full trial type hearing would impose a financial or administrative burden on the school system, a simplified procedure may be sufficient.23 Furthermore, several factors make the individual teacher's arguments especially persuasive. The interest in protecting academic freedom weighs strongly in favor of a hearing, and the difficulty in securing employment during the school term when most teachers are hired for a full school year make midyear termination especially onerous.

The decision in Cooley successfully protects the interests involved. The only question with respect to the handling of dismissal cases within the Eighth Circuit is the effect of Roth upon the future determinations of the court. Since Roth rejected the use of the balancing test unless a liberty or property right is found, the court might apply another mode of analysis to reach the same result. Although a court could rely upon a right to teach or a right to employment to find a "liberty" or "property" interest, these theories have gained only limited judicial support. It is more likely that under the particular circumstances of a mid-term dismissal, the court would distinguish Roth as a year-end dismissal case and find a protected "property" interest in the form of a contract right. Therefore, it does not appear that Roth will be a substantial obstacle in other mid-term dismissal cases.


Plaintiff employees of several state hospitals and correctional schools had never been paid overtime compensation. Although the Fair Labor Standards Act of 1938 (FLSA),\(^1\) did not originally cover state employees, the Act was amended in 1966 to include them in its coverage.\(^2\) However, when the employees sued the Missouri Department of Public Health and Welfare for unpaid overtime, the suit was dismissed by the federal district court. The Eighth Circuit affirmed and, in denying plaintiffs the right to sue for unpaid overtime, held that Missouri had not waived its defense of sovereign immunity by continuing to operate its hospitals and training schools subsequent to the adoption of the 1966 amendment to the FLSA. To resolve the conflict between the instant case and a similar one in which the Tenth Circuit held that the employees did have a cause of action,\(^3\) the Supreme Court granted certiorari. *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare,* 452 F.2d 820 (8th Cir. 1971), *cert. granted,* 405 U.S. 1016 (1972).

The central issue presented is whether the state employees' right of action, created by federal legislation enacted under the commerce clause, survives when it clashes directly with the state's immunity from suit in federal court by its own citizens. Such immunity is usually held to arise under the eleventh amendment,\(^4\) although it is also said to be based on common law.\(^5\) If only a common law immunity is involved, Congress clearly has the power to carve out exceptions to the doctrine. In the *Employees* case, however, the court treated the defense of sovereign immunity as one of constitutional dimensions.

The eleventh amendment expressly prohibits federal courts only from hearing a suit against a state by a citizen of another

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\(^1\) Ch. 676, §§ 3(d), 7(a) (1), 52 Stat. 1060, 1063.


\(^5\) See *Hans v. Louisiana,* 134 U.S. 1, 15-18 (1890).
state, but in *Hans v. Louisiana* the Supreme Court held that an individual plaintiff could not sue his own state because of the doctrine of sovereign immunity. Although *Hans* is generally read as extending the eleventh amendment's bar to include suits against a state by one of its own citizens, the state's immunity from such suits has also been said to be based upon common law. In addition, sovereign immunity has been thought to radiate from "the entire judicial power granted by the Constitution."

In the *Employees* case, the court did not rely on any one theory. Instead it concluded that:

[A] state is immune from a suit brought against it by its citizens on the basis of a reasonable interpretation of the original Constitution and additionally upon the basis of the Eleventh Amendment. Moreover, the court reasoned that:

To the extent that any inconsistency exists between the powers granted by the Commerce Clause and the Eleventh Amendment, the Eleventh Amendment as the more recent expression of the will of the people should prevail. This conclusion, which assumes that the eleventh amendment applies to the situation even though suits against a state by its own citizens are not expressly encompassed within the language of that amendment, appears clearly correct in light of *Hans*.

On the other hand, it can be argued that the defense of sovereign immunity should be abolished or strictly limited. A state can commit wrongs as easily as a private individual. Moreover, it is in a good position to spread the risk of loss to compensate those who are injured by its operation. Nevertheless, in light of *Hans*, courts will be ill-disposed to dispense with the defense of sovereign immunity without further guidance from the Supreme Court.

Even where sovereign immunity exists, the question arises whether the state may be said to have waived the defense. Such

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6. 134 U.S. 1 (1890).
10. 452 F.2d at 823.
11. Id. at 825.
a waiver may be implied. In *Parden v. Terminal Ry.*,\(^1\)
for example, Alabama had undertaken operation of a railroad, an area
clearly covered by the Federal Employers' Liability Act. *Parden*
held the state subject to suit on the theory that the state's un-
tertaking of the railroad business amounted to an implied waiver
of sovereign immunity. In this context, "waiver" is a somewhat
fictionalized device, and *Parden* can be interpreted as suggesting
that states ought to be subject to suit upon a cause of action
based on rights expressly created by Congress.

The majority in *Employees* sought to distinguish *Parden* on
several grounds. The court reasoned that if the private right
of action in *Parden* had been denied there would have been no
other remedies, whereas in the situation presented by *Employees*
the Secretary of Labor might have brought suit\(^1\)\(^4\) or the em-
ployees could have sought injunctive relief against the state offic-
ials in their individual capacities.\(^1\)\(^5\) The court also emphasized
that the remedy sought in *Parden* did not include double dam-
ages as did the remedy sought in the instant case. Moreover,
*Parden* involved a proprietary rather than a governmental func-
tion, since in undertaking operation of a railroad the state placed
itself in a position analogous to that of a private enterprise. Fi-
nally, the court noted that the state activity sought to be regu-
lated in *Parden* was initiated after the appropriate legislation
was in effect, while in the instant case the hospitals were in op-
eration long before the FLSA was made applicable to them.

On the other hand, the dissenting opinion concluded that
*Parden* was squarely in point, and would have held that there
had been an implied waiver.\(^1\)\(^6\) The dissent argued that the other
remedies available to plaintiffs were illusory and that double
damages were entirely within the trial court's discretion, and
unlikely to be awarded in the present case. Furthermore, the
dissent contended, the governmental-proprietary dichotomy has
never been recognized as significant in the cases\(^1\)\(^7\) and Missouri

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13. Id.
15. As the court noted, "[s]uits by state employees for injunctive
    relief may be available against state officials in their individual capaci-
    ties under Ex parte Young, 209 U.S. 123 . . . ." 452 F.2d at 826.
16. 452 F.2d at 830-32.
    Court noted:
    
    [T]he clear that the Federal Government, when acting
    within a delegated power, may override countervailing state
    interests whether these be described as "governmental" or
    "proprietary" in character.
continued operating the hospitals after the 1966 amendment with full knowledge of the applicability of the FLSA.

Perhaps the most plausible policy considerations supporting the holding reached by the majority are those underlying its attempt to distinguish governmental from proprietary functions. The court was clearly concerned about federal impediments to the state's ability to carry out essential governmental functions, the argument being that the increased costs necessitated by federal legislation might lead to the curtailment or termination of essential state services. There is certainly room for concern that no private enterprise would step in to operate hospitals and correctional schools. On the other hand, the court's suggestion that Missouri would simply terminate such facilities is somewhat unrealistic. To meet the requirements of the FLSA, the state might have to curtail services, raise taxes, or divert money from other programs to meet the increased costs. Of course, it is also possible that a state would have to decrease staff at some institutions in order to pay the remaining staff more adequately, but it is at least arguable that the improved pay might then attract more competent employees and partially offset the effects of the smaller staff.

Although the advisability of federal wage and hour legislation may be disputed, the constitutionality of such legislation has been specifically upheld, even as applied to state employees. Yet, the Eighth Circuit's decision in Employees leads to an awkward result. State employees have a right to be paid overtime compensation, but they have no private cause of action to enforce their claims. This conflict will presumably be rectified by the Supreme Court's review of the Employees decision.

18. 452 F.2d at 826.
19. Id.
20. In fact, Missouri has now begun to pay overtime, and it appears that the state will have to pay it retroactively as well. Hodgson v. Missouri, 340 F. Supp. 1188 (1972).
22. In Hodgson v. Missouri, 340 F. Supp. 1188 (1972), it was held that the Secretary of Labor could properly maintain an action for an order restraining the state from continuing to withhold unpaid overtime due from past work, but injunctive relief against future violations was denied, since the state had begun to pay overtime wages and there was no reason to suspect further violations. Although sovereign immunity was not involved in this case, it would seem to come close to making appeal in Employees moot.
Criminal Law: Affirmative Moral Beliefs Legally Insufficient to Establish Defense Of Necessity or Justification

Defendants were arrested while illegally removing draft registration cards from a Selective Service office. The F.B.I. had been informed in advance of the break-in, which was intended to protest the Vietnam war, and its agents apprehended defendants in the office. At trial, defendants admitted their intent to willfully hinder and interfere with the administration of the Selective Service Act and were convicted of that crime. On appeal, the Eighth Circuit affirmed the convictions, holding that affirmative moral beliefs which “compel” one to commit criminal acts premised on those beliefs are legally insufficient to establish the defenses of justification and necessity. United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972).

Defendants in Kroncke advanced two discrete but closely related defenses, that of necessity or compulsion and that of justifiable civil disobedience. The latter defense involves the longstanding philosophical question of whether one who finds a law morally repugnant is legally or ethically justified in violating that law. This controversy has most recently stirred public debate in the United States in the areas of civil rights and antiwar protest. Although philosophers have condoned and even praised civil disobedience premised on moral conviction, they have also suggested that those who practice civil disobedience must accept the legal consequences of their actions.

The Kroncke court accepted this resolution of the issue and rejected defendants' contention that the dictates of conscience constitute a valid defense to criminal activity. That is, the moral precepts held by defendants, which were antagonistic to the purpose and effect of the Selective Service Act and to the conduct of the war in Indochina, could not legally excuse their admit-
tedly willful interference with that Act. The court's rejection of the defense of justifiable civil disobedience seems clearly appropriate. As the court noted:

[S]ociety cannot tolerate the means they [defendants] chose to register their opposition to the war.

... [O]ur democratic society is fragile, ... there are broad opportunities for peaceful and legal dissent, ... the power of the ballot, if used, is great. Peaceful and constant progress under the Constitution remains ... the best hope for a just society.

The second defense advanced in Kroncke, that of necessity or compulsion, was similarly founded upon defendants' fundamental belief in the immorality of the Vietnam war. This defense, as propounded by defendants, posits certain moral imperatives which in essence deprived them of free choice and compelled them to violate the law. It thus is distinguishable from their asserted defense of justified civil disobedience, which assumes freely-determined action.

The defense of necessity has long been recognized in the criminal law. It has been explained as follows:

The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is justified in violating it. Under such circumstances he is said to have the defense of necessity, and he is not guilty of the crime in question ...

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4. 459 F.2d at 704.
5. Id. The court also relied on United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970), in which a similar "justification" theory was advanced by the Berrigan brothers as a defense to their prosecution for destruction of public records and interference with the administration of the Selective Service Act. In Moylan, the proffered defense of justification was rejected on essentially the same grounds as in Kroncke:

To encourage individuals to make their own determination as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, ... but inevitably anarchic.

417 F.2d at 1009.
6. One defendant in particular asserted at trial that he was compelled by his religious convictions to perform the act in order to bring the evils of the Vietnam War to the attention of the public and Congress.
459 F.2d at 699 (emphasis added).
7. W. LaFAVE, HANDBOOK ON CRIMINAL LAW 381 (1972) (hereinafter}
The defense of necessity typically includes three basic elements:  

1. The harm avoided must in fact be greater than the harm which would result from compliance with the law;  
2. The action taken must cause the least possible harm, and any other alternative, whether lawful or unlawful, which would cause a lesser harm than the alternative chosen will make the defense unavailable; and finally  
3. The defendant must have acted with the intention of avoiding the greater harm.  

A fourth requirement, that the action taken must occur in the context of imminent peril, is also sometimes mentioned by the courts. This requirement of immediate danger might simply mean that until the threatened harm is imminent, defendant generally will have other, lawful, options available.

Prior cases on the necessity defense, including those cited to the court by defendants, involved situations clearly distinguishable, both in kind and degree, from Kroncke. Generally, the pressures which caused defendants to violate the law in previous cases were the result of either natural physical forces or actions by other persons, rather than abstract notions of morality or religious convictions. Moreover, in those cases which allowed the defense, the threatened danger posed a greater and more immediate consequence to the defendant personally.

For example, in The William Gray, a ship violated federal embargo laws when it entered a foreign harbor to seek refuge from a severe storm which threatened the safety of the vessel, its crew and cargo. A libel action against the ship was unsuccessful on the basis that the defense of necessity was applicable. A more common situation is that in which defendant argues that coercion by another person compelled his criminal conduct. For cited as LaFave). Where the pressure which caused defendant to violate the criminal law is exerted by other humans rather than natural physical forces, the defense is more properly termed "duress." However, the essential elements of each are the same and the defenses of duress and necessity may correctly be viewed simply as subcategories of a more general defense called "justification" or "excuse." Id.

8. See LaFave at 385-86.
9. The determination of the relative harmfulness of the available alternative courses of action necessarily is made by the court rather than the defendant. LaFave at 386.
11. See LaFave at 388. See also R.I. Recreation Center v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949).
12. See note 7 supra.
13. 29 F. Cas. 1300 (No. 17,694) (C.C.N.Y. 1810).
example, in *D'Aquino v. United States*, a Japanese-American was convicted of treason for her work as a wartime radio announcer and script writer for the Japanese government. On appeal, the Ninth Circuit stated that for treason to be excused under the necessity defense the defendant "must manifest a determination to resist commands and orders until such time as he is faced with the alternative of immediate injury or death." In *Browning v. State*, the defendant had been lawfully driving his car and only drove "recklessly" in an attempt to escape after police officers ambushed him and began shooting. The court reversed his conviction for reckless driving on the basis of the necessity defense:

> The person committing the crime must be a free agent, and not subject to actual force at the time the act is done; ... bona fide ... [acquiescence to compulsion] is a legitimate defense. ... Whatever it is necessary for a man to do to save his life is, in general to be considered as compelled.

After reviewing the necessity cases, the *Kroncke* court concluded that the defense was inapplicable. The court noted that the case law demonstrated that for the defense to operate a defendant must prove his action was necessary in order "to protect his life or health, or the life or health of others, from a direct and immediate peril ... [and not merely] to effect a change in governmental policies which, according to the actor, may in turn result in a future saving of lives." The court also felt that even the Model Penal Code, which has a necessity defense broader in scope than that of the case law, did not reach the defendants' situation.

The result in *Kroncke*, based on common law precedent, seems to have been inescapable. First, defendants were not per-

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14. 192 F.2d 338 (9th Cir. 1951).
15. Id. at 359.
16. 31 Ala. App. 137, 13 So. 2d 54 (1943).
17. Id. at 56 (quoting with approval from Arp v. State, 97 Ala. 5, 12 So. 2d 301, 302 (1892)).
18. 459 F.2d at 701.
19. A.L.A. Model Penal Code, Proposed Official Draft (1962), § 3.02 provides:

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
personally threatened by any immediate peril. Second, there were constitutionally protected alternatives to defendants' criminal conduct which arguably would have been at least as effective as their criminal acts, such as voting, petitioning the government for redress and speaking against the war. Finally, moral imperatives have never been recognized in the cases as sufficient to invoke the necessity defense.

Apart from precedent, there exist several persuasive arguments for rejecting the necessity defense in cases like Kroncke. First, a complication particularly inherent in the war protest area is the difficulty of proof by objective evidence of defendants' motive and the degree of coercion they actually experienced because of their moral convictions. Second, the defense is considered inapplicable where preempted by a legislative determination that it should not obtain. Arguably such a determination is implicit in the Selective Service Act. Third, defendants' actions were, standing alone, largely ineffective in promoting their avowed purpose. That is, in terms of the efficacy of defendants' criminal conduct, there existed only a highly attenuated relationship between that conduct and defendants' stated purpose of ending the war in Vietnam. Finally, as the court argued with respect to civil disobedience, a democratic society cannot easily waive compliance with its laws and still expect to preserve an ordered system of law and government. Kroncke thus constitutes persuasive precedent for the proposition that affirmative moral beliefs alone cannot excuse conduct that violates the criminal law.

Criminal Law: Model Penal Code Standard of Insanity Adopted by Eighth Circuit

Defendant was charged with three counts of assault. He had previously been confined in mental institutions on several occasions for long periods and each time was diagnosed as a chronic paranoid schizophrenic. At his last discharge, a psy-

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20. See LaFave at 382. See also Model Penal Code section 3.02(1)(c) in note 19 supra.
21. On this issue, the Kroncke court simply stated that:
We hesitate to say that Congress did not intend the statute to be applied to those who violated it for the express purpose of challenging our nation's foreign policies.
459 F.2d at 701.
EIGHTH CIRCUIT

chiatrist recommended that long term hospitalization be considered and that he continue the use of a major tranquilizer. At trial the defendant raised the defense of insanity. The trial court instructed the jury on the traditional M'Naghten rule supplemented by the irresistible impulse test. The jury returned a verdict of guilty on all three counts. On appeal, the court reversed and ordered a retrial in which the defendant’s plea of insanity was to be determined under the Model Penal Code instruction. United States v. Frazier, 458 F.2d 911 (8th Cir. 1972).

The premise of the M'Naghten rule is that the ability of a person to conform to the law is governed exclusively by his mental capacity to discern right from wrong. It has been said that this approach views the mind as composed of separate, individual compartments, and assumes that the capability of one part of the mind to discern right from wrong is uninfluenced by the condition of other parts of the mind. In rejecting the M'Naghten-irresistible impulse standard, the Eighth Circuit has joined in the nearly unanimous repudiation of the rule by the federal courts of appeal in favor of the Model Penal Code instruction.

The movement away from M'Naghten is based on the belief that the defendant's cognitive ability to distinguish right from wrong should not be the exclusive basis for determining criminal

1. First, that at the time of the commission of the offense charged, the defendant had the mental capacity and reason to distinguish between right and wrong as to each of the three offenses charged. Second, that at the time of the commission of the offense charged, the defendant had sufficient mental capacity and reason to understand the nature and character thereof, and the consequences of such offense. Third, that he did not commit the offense charged by reason of uncontrollable or irresistible impulse.

2. 458 F.2d at 912.
4. See note 1 supra.
6. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Chandler, 383 F.2d 920 (4th Cir. 1968); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); Wion v. United States, 325 F.2d 420 (10th Cir. 1963), cert. denied, 377 U.S. 946 (1964); United States v. Currens, 290 F.2d 751 (3d Cir. 1961). The First Circuit Court of Appeals is an exception. About thirty states still retain the M'Naghten rule as the sole test of insanity as a criminal defense. A. Goldstein & J. Goldstein, Crime, Law and Society (1971).
responsibility. The Frazier court recognized that a defendant's ability to control his behavior is a necessary factor in determining criminal responsibility and suggested that a lack of self-control negates the existence of the necessary mens rea to constitute the act a crime. In this regard, the court's ultimate concern was that the attachment of criminal responsibility to the behavior of those who cannot control their acts precludes those defendants from receiving proper treatment for their mental condition. Upon release from penal confinement such persons still lack an ability to control their behavior and remain a danger to the public.

The court rejected the supplementary irresistible impulse standard as a proper measure of a person's ability to control himself. The supplementary standard refers only to momentary and spontaneous acts in determining the actor's lack of control. The fact that violent misconduct resulting from sustained psychic compulsion occurs much more frequently than violent misconduct from sudden, spontaneous actions demonstrates the inadequacy of the standard. The court also objected to the irresistible impulse standard because of its reliance on the concept of complete destruction of the defendant's will. The court felt that to avoid this overly narrow and unrealistic concept the criterion of substantial inability to control oneself should instead be used. In contrast to the M'Naghten standard, section 4.01 of the Model Penal Code provides:

(1) A defendant is insane within the meaning of these instructions if, at the time of the alleged criminal conduct, as a result of mental disease or defect he lacks substantial capacity to ap-

7. At the Annual Judicial Circuit of the United States, John Biggs, Jr., Chief Judge of the Third Circuit Court of Appeals, stated that the M'Naghten formula is an irrelevancy, because asylums are full of people who know right from wrong, but who are insane under modern psychiatric standards. 37 F.R.D. 364, 380 (1964).
8. 458 F.2d at 916.
9. 458 F.2d at 914 n.1. See also United States v. Currens, 290 F.2d 751 (3d Cir. 1961).
10. 458 F.2d at 916. It should be noted that the court thus assumes persons confined in mental institutions will receive psychiatric treatment, while those confined in penal institutions will not. Although this assumption may be theoretically sound, it is questionable whether the former necessarily or generally provides a significantly superior therapeutic milieu.
11. See note 1 supra.
12. 458 F.2d at 916.
14. 458 F.2d at 917.
preciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include any abnormality manifested only by repeated criminal or anti-social conduct.

Although the Model Penal Code includes a right-wrong cognition test, it is in a form much different from that found in the M'Naghten rule. Under this new test the ability to appreciate the wrongfulness of conduct need only be substantially, not totally, impaired. In addition, the new standard provides a basis for finding insanity independent of cognitive incapacity when there is substantial inability to conform one's conduct to the requirements of law.

The second paragraph of the Model Penal Code section excludes abnormalities "manifested only by prior criminal or anti-social acts" from being considered a mental disease or defect for the purpose of applying the test. This, in effect, does not allow offenders whose mental condition has been manifested only by prior criminal acts to be found insane. As a result, such offenders are imprisoned, do not receive the treatment necessary to cure their condition and upon release, re-enter society with the same inability to control their potentially criminal behavior. Although these offenders may well be those from whom society most needs protection, the paragraph two standard precludes such offenders from receiving treatment that might cure their condition and ultimately alleviate the danger they pose to the public. Consequently, a defect of the M'Naghten instruction sought to be cured in Frazier may be inadvertently perpetuated if the Model Penal Code standard is adopted in its entirety.

The second paragraph of the Model Penal Code standard has also been criticized on the ground that it discriminates against those offenders who cannot afford the expense of a full and complete psychiatric examination. A skilled and interested psychiatrist is often required to discover the exculpatory mental aberrations found in many habitual criminals. A court-appointed psychiatrist, the only one available to most offenders, is generally unable to devote sufficient time to uncover these

15. Two circuit courts have rejected this aspect of the instruction. Wade v. United States, 426 F.2d 64 (9th Cir. 1970); United States v. Smith, 404 F.2d 720 (6th Cir. 1968).

16. See generally Wade v. United States, 426 F.2d 64 (9th Cir. 1970).

exculpating traits. The cost of the privately retained psychiatrist who will make an exhaustive diagnosis is prohibitive for most criminal offenders.

A further problem arises because the new test requires the existence of a "mental disease or defect" without adequately defining the conditions that constitute mental disease or defect. The Group for the Advancement of Psychiatry has defined mental disease as "an illness which so lessens the capacity of a person to use his judgment, discretion, and control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution." This definition does not resolve the problem, however, because it creates the need for a measure of impairment to the conduct of affairs and social relations.

The absence of standards to guide the trier of fact may leave it free to decide the issue by an intuitive judgment. That result may be deemed adequate by those who feel that criminal law need only reflect the societal sense of justice. But the absence of standards may also mean that the fortuity of personalities which compose a jury will determine when the defense is valid and when it is not. It can be argued that a definition should be supplied by a psychiatrist who participates in the trial as an expert witness. However, his definition would be more likely to accord with medical principles than with the supposed legislative policies underlying the test. Moreover, this procedure might simply have the effect of replacing the intuitive judgment of the trier of fact with that of the expert. The expert could bring the defendant within the ambit of the defense merely by labeling his behavioral disorder as a mental disease. Although the Model Penal Code standard provides a more flexible and realistic approach to the insanity defense, its failure to deal with the factors discussed above points to the need for further legislative or judicial refinement.

18. GAP REPORT No. 26, CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY 8 (1954).

19. In Blocker v. United States, 274 F.2d 572 (D.C. Cir. 1959), the expert witness had testified at trial that sociopathy was merely a personality disturbance and not a mental disease. Subsequently, the staff at St. Elizabeth's hospital relabeled sociopathy as a mental disease. As a consequence, the trial court ordered a new trial. See generally Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961). See also Livermore & Meehl, The Virtues of M'Naghten, 51 MINN. L. REV. 789, 833 (1967).
Criminal Procedure: Admissibility of Videotape Recording of Confession Upheld

Defendant was charged with first degree murder. Among the evidence presented in support of the state's case was a videotape recording of his confession to police officers and the prosecuting attorney. After a hearing outside the presence of the jury, the trial court ruled the tape admissible. Subsequently, defendant was convicted of murder in the first degree and sentenced to life imprisonment. After the Missouri Supreme Court affirmed the conviction and sentence, he petitioned in federal district court for a writ of habeas corpus. In an unreported opinion, the writ was denied without a hearing. Defendant appealed to the Eighth Circuit, primarily on the ground that the trial court erroneously admitted the videotape recording of his confession, thereby depriving him of his constitutional right against self-incrimination. The court affirmed the denial of the writ of habeas corpus, one judge dissenting, concluding that videotaped confessions were actually an advancement in the field of criminal procedure that protected the rights of the accused. Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972).

When motion pictures were a relative novelty, courts were reluctant to admit them into evidence. Several early decisions based their objections on the ground that the admission of motion pictures into evidence violated the established rules of evidence, even though the relevancy and authenticity of the pictures were clearly established. Thus, in Feeney v. Young the trial court refused to admit a motion picture on the ground that it was not the best evidence available. Similarly, in Gibson v.

2. Appellant also claimed that (1) the state had failed to establish beyond a reasonable doubt an essential element of the crime, and (2) his statements and confession to the police were the product of mental and physical coercion. Hendricks v. Swenson, 456 F.2d 503, 504 (8th Cir. 1972). In rejecting these contentions, the court did not deal with them at length. Id. at 504-05.
3. Hendricks v. Swenson, 456 F.2d 503, 507-08 (8th Cir. 1972) (Heaney, J., dissenting). Judge Heaney stated that although he felt the oral and videotaped statements were not freely and voluntarily given, even if the confession was voluntary, he would have still ruled the videotaped statement inadmissible because (1) it was not a faithful reproduction of the entire transaction, and (2) there was no showing that Hendricks fully understood the implications of the use of his videotaped confession.
Gunn, motion pictures were characterized as hearsay evidence, and therefore incompetent and inadmissible. In Pandolfo v. United States, the trial court was sustained in refusing to admit a motion picture which defendant offered to exhibit to the jury, the reviewing court stating that "the question of permitting the moving picture to be displayed before the jury was so far within the discretion of the court that while it might not have been error to have received it, it was not error to exclude it."

However, in 1930 the restrictive trend toward refusing to admit motion pictures into evidence was reversed in Commonwealth v. Roller. In that case, the defendant was indicted for larceny. After his arrest, his confession to various burglaries was recorded by a "talking motion picture machine." The film of the confession was offered into evidence and admitted by the trial court over the defendant's objection. On appeal, the Pennsylvania Superior Court sustained the decision of the trial court, holding that the film was sufficiently authenticated to make it admissible in evidence. Concerning the general admissibility of motion pictures into evidence, the court noted that

the movietone is . . . in basic characteristics, no different, on the one hand, from ordinary photography, in regard to the visual picture reproduced, and, on the other hand, from phonographic records, in regard to the auditory recording of sound. The principles that underlie their admissibility into evidence, therefore, differ in no way from those governing the admissibility of still pictures and phonographic records.

There is virtually universal accord that, once a proper foundation is laid for a sound recording or a photograph, it may

6. 286 F. 8 (7th Cir. 1922).
7. Id. at 16. A similar result was reached in De Camp v. United States, 10 F.2d 984 (D.C. Cir. 1925), where it was held that it was for the trial court to determine whether the motion picture offered into evidence was sufficiently verified to be admitted.
9. Id. at 131.
10. Id. at 127.
12. See Hall v. State, 78 Fla. 420, 83 So. 513, 8 A.L.R. 1034 (1910); Baston v. Shelton, 152 Fla. 879, 13 So. 2d 453 (1943); Mardorff v. State,
be placed in evidence. On the rationale that motion pictures or videotapes are merely an elaborate combination of the two, they too should be admitted. Therefore, many courts in criminal trials admit a motion picture or videotape of the defendant's confession, re-enactment of the crime or of behavior during or following the crime. Many of the original objections to the admission of motion pictures have been rejected. A motion picture has been held not to be subject to the objection that it was hearsay or that it violated the best evidence rule or that it was secondary evidence. Moreover, the exclusion of motion pictures which were properly authenticated and relevant has been held, at least in civil cases, to be an abuse of discretion and reversible error.

The widespread acceptance by the judiciary of motion pictures as evidence, in both civil and criminal trials, has resulted in a much larger use of film in criminal cases to record defendants' confessions, re-enactments of the crime and behavior during booking. In *People v. Hayes,* for example, a motion picture of defendant's confession was received in evidence despite the defendant's objections that the admission of the picture denied him the right to confront in court the witnesses against him, the right to cross-examine the witnesses who testified against him and the right against self-incrimination. The reviewing court upheld the trial court's decision, stating that a motion picture of the confession "stands on the same basis as the presentation . . . of a confession through any orthodox mechanical medium . . . ." In *People v. Dabb* the admission into evi-

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dence of a motion picture depicting the artificial re-enactment of the crime by the defendants was upheld. While the court recognized that "the artificial re-creation of an event may unduly accentuate certain phases of the happening," it concluded that "when the events...photographed consist of a voluntary re-enactment by the accused...there is little, if any, danger of misleading emphasis..." And in *Housewright v. State*, a motion picture of the defendant's behavior after his arrest for driving while intoxicated was admitted into evidence even though the defendant clearly did not consent to the taking of the motion picture.

The above cases provide abundant precedent for the majority position in *Hendricks* that a videotaped recording of the defendant's confession is admissible into evidence. However, these cases failed to recognize all of the conflicting policy questions present when a motion picture or videotape of the defendant's confession or re-enactment of the crime or behavior during arrest is offered into evidence.

First, it must be remembered that determining whether a motion picture or videotape of a defendant's confession should be admitted into evidence is not the same as deciding whether the confession itself should be admitted. Clearly other means of presenting the confession are available, e.g., a sound recording, a written statement, or the testimony of witnesses. Therefore, before a film of the confession is accepted into evidence, there should be a demonstration that a motion picture or videotape presentation of the confession promotes justice better than, or at least as well as, these other means of presentation.

The main argument raised in support of the majority position in *Hendricks* is that the videotape, by presenting a more "complete" picture of the facts surrounding the confession, protects the rights of the accused. Thus, the majority stated:

[A] video tape is protection for the accused. If he is hesitant, uncertain or faltering, such facts will appear. If he has been worn out by interrogation, physically abused, or in other

2d 855 (Fla. 1969); State v. Hall, 253 La. 425, 218 So. 2d 320 (1969); State v. Lusk, 452 S.W.2d 219 (Mo. 1970).
22. 32 Cal. 2d 491, 197 P.2d 1 (1948).
23. Id. at 495, 197 P.2d at 5.
24. Id. Accord, Grant v. State, 171 So. 2d 361 (Fla. 1965).
25. See cases cited in note 15 supra.
27. According to Judge Heany, dissenting in *Hendricks*, "the cases holding that videotaped confessions are admissible failed to sufficiently analyze the problems presented." 456 F.2d at 508.
respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not. Instead of denying a defendant his rights, we believe it is a modern technique to protect a defendant's rights.28

Several factors not discussed by the majority opinion render this conclusion somewhat doubtful. First, under Hendricks there is no requirement that all confessions be videotaped. This permits the police to decide when to use that means of recording the confession and to present only the "good shows" to the jury. Second, as Judge Heaney noted in his dissent,29 since Hendricks does not require that the entire transaction between the police and the defendant be videotaped, the police may choose what portion of the interrogation to videotape. Third, the police photographer who films the confession will have a great deal of discretion in determining how the confession should be videotaped. It is not too extreme to assume that the photographer may select the most dramatic and emotional portrayal of the confession. In his treatise on photographic evidence Scott advises police photographers:

The motion picture of a confession should show not only the party making the confession but also the officers who are present. A zoom lens will be helpful because by its use the confession can start out showing all parties present and then zoom in to a close-up of the person who is confessing. Here as always, however, do not make too much use of the variable potentialities of the zoom lens for overuse is annoying and distracting.30

Moreover, as Judge Heaney stated, the defendant has probably never seen himself on television and, as a result, has no way of evaluating how he will look and what the impact of his appearance, demeanor, and mannerisms will be.31 In all probability, "the videotape will tend to make the defendant look 'rougher' than he is in the flesh. The videotape camera will emphasize scars, blemishes, or a heavy beard. . . . The . . . camera will pick out and magnify unpleasant mannerisms."32 Thus, it is virtually impossible for a defendant to make a knowing waiver of his rights when he consents to a videotaped confession.

But perhaps the most persuasive objection to videotaped confessions is that "a videotaped confession is . . . a totally differ-

28. Id. at 506.
29. Id. at 508.
31. 456 F.2d at 509.
32. Id. at 508.
ent form of communication which requires different sensory responses . . . ." Judge Heaney elaborated further on the differences between film communication and other means of communication by quoting extensively from the work of Marshall McLuhan. A shorthand interpretation of both Judge Heaney's comments and McLuhan's description of the medium is that a film presentation of a confession has a much more powerful emotional impact on the jury than other means of presentation. In another context, the Wisconsin Supreme Court criticized the admission of a motion picture into evidence:

Doubtless the show was highly entertaining to the jury, but entertainment of the jury is no function of a trial. And why all this fuss to prove a fact susceptible of easy, exact and undisputable demonstration . . . ?

The reason for "all this fuss" over the admission of motion pictures is that a filmed reproduction of an event is the best available means of emotionally influencing a jury as to the facts surrounding that event. Thus, the prosecution's unstated reason for desiring to use videotaped confessions becomes clear. However, in the context of Hendricks, this added emotional impact may be achieved only at the expense of defendant's constitutional rights.

Because of this strong appeal to the senses and the quality of "liveness" in a videotaped confession, . . . the use of such a confession comes dangerously close to requiring the defendant to incriminate himself. In terms of effect upon the jury, the playing of a defendant's videotaped confession at trial is the functional equivalent of requiring him to take the stand and testify against himself.

On the other hand, with the proper safeguards, the admission of videotaped confessions into evidence could be constitutionally permissible. In his dissenting opinion, Judge Heaney suggested three minimal standards videotaped confessions should satisfy before they can properly be admitted. Those standards are (1) that the entire transaction between the police and the defendant, including all interrogations, be videotaped; (2) that the defendant be advised of his constitutional rights in accordance with Miranda and also be thoroughly advised of the use to be made of the videotaped interrogation, and these warnings also be videotaped; (3) that the defendant be given a copy

33. Id.
34. Id. at 508-09, quoting M. McLuhan, The Medium is The Message 125-28 (1967).
36. 456 F.2d at 509.
of the videotaped confessions to be retained by him until his appellate remedies are exhausted. Two further requirements might also be suggested. The conditions surrounding the filming of the confession, such as lighting, the speed of the camera, the use of close-up, should be strictly scrutinized and regulated. Further, unless the police in the jurisdiction in question habitually film confessions, the prosecution should be required to explain why the confession in the case at hand was chosen to be filmed.

All of these requirements protect the constitutional rights of the accused by reducing the opportunity for police "discretion" in the use of videotaped statements. If they are met, videotaped confessions might be correctly described as "an advancement in the field of criminal procedure." However, if they are not complied with, the benefits gained from using videotaped confessions do not justify the possible invasion of constitutional rights.

Criminal Procedure: Warning of Fourth Amendment Rights Necessary Prior to In-Custody Request for Handwriting Exemplars, But Unneeded if Not In-Custody

In two actions consolidated for appeal, the Eighth Circuit dealt with the question of the admissibility of handwriting exemplars taken without prior warning of fourth amendment or Miranda rights. United States v. Harris involved an exemplar taken from a juvenile in his home in the presence of his parents. In United States v. Long, the defendant voluntarily provided an exemplar while in custody. In each case, the trial court suppressed the exemplar evidence. The Eighth Circuit reversed in Harris but affirmed in Long, holding that taking a handwriting exemplar is a search and seizure within the fourth amendment and as such requires a warrant absent valid consent. The court further held that such consent is valid if given without a prior warning of fourth amendment rights, absent a Miranda warning, only if the defendant is not in custody. United States v. Harris, 453 F.2d 1317 (8th Cir. 1972).

37. Id.
38. Another safeguard which would go even further in protecting a defendant would be to require his written consent to use of the videotape after viewing it.
39. Id. at 506.
The fourth amendment generally prohibits unreasonable searches and seizures and provides that warrants shall issue only upon probable cause. With few exceptions, courts have held warrantless searches unreasonable per se.\(^1\) However, the constitutional protection against warrantless searches may be waived by valid consent.

Even though a waiver of the right against self-incrimination and the right to counsel by a defendant in custody requires a prior warning,\(^2\) the Supreme Court has never determined whether a warning of fourth amendment rights must be given prior to a warrantless search founded upon consent. The lower courts have divided, but the majority rule is that no warning of any kind is needed for a noncustodial\(^3\) consent, and that a *Miranda* warning, although not specifically apprising the defendant of his fourth amendment rights, is sufficient to validate a consent given by a defendant in custody.\(^4\)

In the instant case, no warnings of any kind were given prior to the taking of either exemplar, and thus the sufficiency of a *Miranda* warning alone was not in issue. Rather, the court determined the applicability of the fourth amendment to compelled handwriting exemplars, the need for a warrant, and the extent to which fourth amendment rights can be waived without prior warning.

The court first held that the taking of handwriting exemplars is a search and seizure within the fourth amendment. The court reasoned that a search is an examination of premises or persons in an attempt to discover incriminating evidence. In *Schmerber v. California*\(^5\) the Supreme Court held the taking of blood samples to be within the fourth amendment. The *Harris* court found the taking of handwriting exemplars to be analo-

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4. See *United States v. Goosbey*, 419 F.2d 818 (6th Cir. 1970); *Virgin Islands v. Berne*, 412 F.2d 1055 (3d Cir. 1969), cert. denied, 396 U.S. 837 (1969); *Gorman v. United States*, 360 F.2d 158 (1st Cir. 1967). The principal rationale offered for justifying the sufficiency of a *Miranda* warning is that if the accused is warned of his fifth amendment right to silence he knows he may remain silent. It is argued that therefore he would know he need not give a consent.
gous, even though exemplars do not involve intrusions into the
defendant's body, since "the search is still for evidence of guilt,
the evidence must be obtained from the person of the suspect
himself, and it involves some intrusion into the privacy of the
person."6

In terms of the fourth amendment policy of protecting in-
dividual privacy,7 blood samples and handwriting exemplars
seem equally deserving of constitutional protection. Blood sam-
pies involve intrusions into the person of a defendant, but the
procedure is nevertheless a passive one. Handwriting exemplars,
though seemingly innocuous, require the active, willful cooper-
ation of the defendant. In each case, a detention is a prerequisite
to obtaining the evidence, which in itself constitutes a "seizure"
within the fourth amendment protection. For both handwrit-
ing exemplars and blood samples, then, a warrant of some type
appears constitutionally required. Thus any significant distinc-
tion between blood samples and handwriting exemplars seems
more properly relevant to the quantum of evidence necessary to
procure a warrant for each procedure, rather than to their char-
acterization as searches or seizures.8

Although the court did not discuss the quantum of evidence
issue, it did determine the procedural protections required
by the fourth amendment. Relying on Davis v. Mississippi9 and
Schmerber, the court held that absent a valid consent a reason-
able "seizure" of handwriting samples requires a warrant. The
extraction of blood samples without a warrant was held constit-
tutional in Schmerber because of the rapidity with which the
alcohol content in blood diminishes. This "special circumstance"
excepted the blood sample there taken from the warrant re-
quirement because it would have been impossible to obtain a
warrant in time to make an effective blood-alcohol analysis.10
This factor, in conjunction with the relatively more serious na-
ture of the intrusion, lessens the persuasiveness of the Schmer-
ber analogy, even though Schmerber stated in dicta that absent
exigent circumstances a warrant would have been required.

Although handwriting exemplars appear more analogous to
fingerprint specimens, the reliance on Davis similarly appears
not entirely apposite. Petitioner in Davis was detained for fin-

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6. 453 F.2d at 1320.
8. See text accompanying notes 13-15 infra.
10. 384 U.S. at 770-71.
gerprinting purposes during a mass roundup of suspects; his detention clearly was not supported by probable cause. The fingerprint evidence thus obtained was held inadmissible because of the illegality of the detention itself rather than because of the failure to obtain a warrant to authorize fingerprinting.\(^9\)

Davis more persuasively argues for the proposition that procedures such as fingerprinting represent a special category for fourth amendment purposes. While the Court there held the particular detention illegal, it also suggested that detention for fingerprinting might be permissible in “narrowly defined circumstances” even absent probable cause as traditionally defined because fingerprinting:

involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harrass any individual, since the police need only one set of each person’s prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than identifications or confessions and is not subject to such abuses as the improper line-up and the third degree. Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time.\(^10\)

The truly significant distinction in Davis, however, involves not only this less than probable cause standard, but also the type of “warrant” thought necessary to validate a seizure for fingerprinting purposes. Although the Davis court would require prior judicial authorization for fingerprinting without exception, it rather carefully refrained from specifically requiring that such authorization take the form of the traditional warrant.\(^11\) As a result of this suggestion, a new rule of federal criminal procedure has been proposed that would allow the taking upon less than probable cause grounds of certain nontestimonial identification procedures, including fingerprints and handwriting exemplars, pursuant to a court order enforceable by the contempt sanction.\(^12\) Indeed, a federal district court in the Eighth Circuit has adopted this proposed rule expressly for the purpose of obtaining handwriting exemplars upon less than

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9. 394 U.S. at 728.
10. Id. at 727. Indeed, Justice Harlan suggested in his concurring opinion that compelled fingerprinting without a warrant might be permissible in certain unspecified, exigent circumstances. Id. at 728-29.
11. Id.
probable cause grounds. It remains open to question, however, whether this suggested procedure will satisfy the criteria set forth in Davis or the warrant requirement of the instant case.

Since the Harris court determined that a warrant is required for obtaining exemplars, the only possible basis for admitting the exemplar evidence was that the defendants had waived their fourth amendment rights by a valid consent. In determining the validity of consent given prior to a warning of fourth amendment rights, the court reasoned by analogy to the rules for determining when a Miranda warning is required. A Miranda warning is required only if the defendant is interrogated while in custody, since the presumption that interrogation is coerced does not exist in the noncustodial situation. Thus, the court held that a fourth amendment warning is not required to validate an otherwise uncoerced, intelligent consent to the taking of a handwriting exemplar given by a person not in custody. Since the fifth amendment affords an absolute protection against self-incrimination and the fourth amendment only protects against unreasonable searches, the Harris court's reasoning that no stricter requirements are necessary for a valid waiver of fourth amendment rights than for waiver of fifth amendment rights seems correct.

The court also found the Miranda analogy persuasive with respect to the need for a fourth amendment warning to a defendant in custody. On the basis of the Miranda rationale, the court held that absent a warning of fourth amendment rights, an in-custody consent is involuntary as a matter of law and thus constitutionally invalid. Since no warrant was obtained in Long, a valid consent in that case was necessary to preclude application of the exclusionary rule. Defendant Long's arrest and incarceration in a local jail were based on a state warrant

15. The Federal District Court sitting in St. Paul, Minnesota, adopted the following rule on December 13, 1971:

It is ordered that the magistrates at St. Paul and Minneapolis are authorized to issue orders requiring the furnishing of handwriting exemplars under the terms and conditions specified in Proposed Rule 41.1 of the Federal Rules of Criminal Procedure.

This order apparently is still effective, notwithstanding the decision in the instant cases. Interview with Clerk of Federal District Court, April 18, 1973.

17. Weeks v. United States, 232 U.S. 383 (1914), held that evidence which is the product of an illegal search and seizure is inadmissible in federal prosecutions. This exclusionary rule was extended to state prosecutions under the due process clause of the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643 (1961).
procured by local police. But the Eighth Circuit affirmed the lower court's determination that because federal agents accompanied the local police during the arrest, the defendant legally was under federal detention as well. Since the federal government conceded the lack of probable cause to arrest and detain defendant or to obtain a warrant, and since no fourth amendment warning was given, the exemplar evidence was held inadmissible.

Requiring a fourth amendment warning to validate an in-custody consent seems desirable. Absent such a warning, the defendant often might be in no position to make an intelligent waiver of his fourth amendment rights. Moreover, the Miranda analogy is persuasive since, as the Supreme Court has long recognized, "the fourth and fifth amendments run almost into each other." Both amendments are intended to protect citizens against arbitrary and coercive intrusions by the government into their legitimate rights to privacy and personal security.

**Criminal Procedure: Wiretap Provisions of Omnibus Crime Control Act Held to Meet Fourth Amendment Requirements**

Defendants were convicted in federal district court of conspiring to violate 21 U.S.C. sections 173 and 174, which proscribe trafficking in a narcotic drug knowing it to have been illegally trafficked. But the Eighth Circuit affirmed the lower court's determination that because federal agents accompanied the local police during the arrest, the defendant legally was under federal detention as well. Since the federal government conceded the lack of probable cause to arrest and detain defendant or to obtain a warrant, and since no fourth amendment warning was given, the exemplar evidence was held inadmissible.

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19. Cf. Miranda v. Arizona, 384 U.S. 436 (1966). If the need for the exemplar is related to the charge for which the defendant is formally detained, however, the probable cause supporting such detention would readily support a warrant for an exemplar. If a preliminary hearing has already occurred, such that the arrest and detention are supported by a magistrate’s determination of probable cause, there seems less need for judicial authorization for the exemplar or for a warning. Nevertheless, requiring such prior authorization would insure that procuring such exemplars would be relevant, material, and necessary to the prosecution of the alleged crime. As a practical matter, if an individual is detained with probable cause, a warrant to take an exemplar could easily be obtained. If probable cause is lacking, however, then under the exclusionary rule such evidence is inadmissible regardless of consent. Finally, it should be noted that concern with in-custody consent is perhaps of little practical interest to the defendant since even though the particular exemplar in dispute was held inadmissible, the court intimated that its decision would not bar admission of exemplars later validly taken from the defendant. 453 F.2d at 132 n.3.
imported. Much of the evidence admitted at trial against the defendants was procured through the use of a wiretap authorized pursuant to the provisions of the Omnibus Crime Control Act of 1968.¹ On appeal to the Eighth Circuit, defendants' main contentions were that the wiretap was illegal and invalid because wiretapping and electronic eavesdropping are inherently unconstitutional and that even if wiretapping can be constitutionally effectuated, Title III of the Omnibus Crime Control Act does not contain the procedural safeguards necessary to achieve such a result. The Eighth Circuit found that some forms of eavesdropping are constitutional when accompanied by appropriate procedural safeguards and that Title III contained the necessary safeguards. Therefore, the court held the wiretap in question to be valid and affirmed the conviction. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972).

The fourth amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"² by providing that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."³ However, in deciding the first wiretap case in 1928, the Supreme Court held that the amendment applied only to tangible matter seized during an actual physical trespass.⁴ Later cases rejected the view that a conversation passing over a telephone wire did not come within the fourth amendment's enumeration of "persons, houses, papers, and effects"⁵ but retained the doctrine that a wiretap could not invade fourth amendment rights unless it was accompanied by a physical trespass upon the person or property of the defendant.⁶ In a series of cases decided since 1966, the Court fi-

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². U.S. Const. amend. IV.
³. Id.
⁵. In Silverman v. United States, 365 U.S. 505 (1961), conversations overheard by a "spike mike" were suppressed, thus explicitly establishing the proposition that conversations may be the subject of a "search and seizure." The Court found it unnecessary, however, to re-examine the "trespass doctrine" since it found that the spike had penetrated the defendant's premises.
⁶. In Goldman v. United States, 316 U.S. 129 (1941), the Court adhered to the trespass doctrine of Olmstead, ruling that the use of an electronic "bugging" device could not be condemned where there was no trespass upon the premises of the objecting party. Accord, Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952).
nally rejected the artificial distinction between trespassing and non-trespassing wiretaps and instead focused upon the procedural safeguards that must necessarily be present for a wiretap to be constitutionally valid.  

In Osborn v. United States, the Supreme Court affirmed a conviction for attempted bribery of a member of the jury panel in a prospective federal criminal trial. The conviction was based on recorded conversations between the defendant and an individual cooperating with federal agents. The use of the electronic recording device had been authorized by two federal judges. In holding that the use of the recording device was permissible and that the evidence was properly admitted, the Court stressed two factors: that the use of the device was authorized by federal judges in response to a detailed affidavit alleging the commission of a specific criminal offense and that the recording was made for "the narrow and particularized purpose" of determining the truth of the affidavit's allegations.

In Berger v. New York, the Supreme Court declared a New York eavesdrop statute unconstitutional on its face. The statute permitted a judge to issue a warrant authorizing electronic surveillance for a period of up to four months upon the oath of specified public officials that there was reasonable grounds to believe that evidence of a crime may be obtained. While the statute was held to satisfy the fourth amendment's command that a neutral and detached authority be interposed between the police and the public, the Court found it to be fatally deficient in several other respects. The enumeration of these deficiencies provides a check-list of requirements which other eavesdrop statutes must satisfy to be found constitutional. According to Berger, an order authorizing a wiretap must name, if possible, the person whose communication is to be seized, state the specific offense committed, particularly describe the communication to be seized and provide that the search end when the desired communication is seized. The order must also

9. Id. at 330. As the Court noted: There could hardly be a clearer example of "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" as "a precondition of lawful electronic surveillance".
12. 388 U.S. at 54.
13. Id. at 69, 60.
be executed with dispatch and require a return on it, showing the manner of execution and the materials seized. Finally, there must be a showing of exigent circumstances in order to avoid the requirement of notice to the subject of the search. In his dissenting opinion, Justice Black expressed the fear that these standards would create obstacles that would make the enactment of valid eavesdropping statutes by either the state or federal governments impossible. The majority, however, refused to allow the need for effective law enforcement to override the requirements of the fourth amendment.

One year later, in *Katz v. United States*, the Supreme Court affirmed the *Osborn* and *Berger* rationales while overturning a conviction obtained with the aid of evidence secured by an eavesdropping device fastened to the top of a telephone booth. Despite the lack of a warrant, the government contended that probable cause and the limitation in the scope and duration of the search resulted in sufficient compliance with constitutional safeguards. While the Court recognized that the search was narrow enough so that a court, upon a showing of probable cause, could have constitutionally authorized it, it considered the failure to obtain authorization by a judge a fatal defect. The Court reasoned that no matter how carefully the police restrain themselves, the judiciary must be interposed between the police and the public for an interception to be valid.

In the instant case, the Eighth Circuit quickly dismissed appellant's contention that wiretapping and electronic eavesdropping are inherently unconstitutional, citing *Osborn* and *Katz* for the proposition that some forms of eavesdropping are constitutional when accompanied by appropriate procedural safeguards. But more importantly, the Eighth Circuit recognized that the *Osborn, Berger* and *Katz* opinions provide the basic framework and guidelines that any eavesdropping statute must meet if it is to be found constitutional. The Eighth Circuit has interpreted those opinions to require:

1. that the applicant procure "[from] a neutral and detached authority" ... an order permitting the wiretap; 
2. that to procure the order ... the applicant must show probable cause that an offense has been or is being committed and must

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14. Id.  
15. Id.  
17. Id. at 353.  
18. Id. at 354.  
19. Id.  
20. 462 F.2d at 1302.
state with particularity (3) the offense being investigated, (4)
the place being searched . . . (5) the things (conversations)
to be seized; (6) that the order must be executed with dispatch;
(7) that it must not continue beyond the procurement of the
conversation sought . . . (8) that it overcome the lack of notice
by requiring a showing of exigent circumstances as a precondi-
tion to the order; and (9) that it require a return on the war-
rant.21

The Eighth Circuit concluded that Title III of the Omnibus
Crime Control Act met these requirements.22 A review of that
statute indicates that this conclusion is probably correct.

Title III represents the first comprehensive federal legisla-
tion in the area of wiretapping and electronic surveillance. Its
dual purpose is “(1) protecting the privacy of wire and oral
communications, and (2) delineating on a uniform basis the cir-
cumstances and conditions under which the interception of wire
and oral communications may be authorized.”23

Under Title III vigorous judicial supervision of the entire
surveillance process is required.24 First, under section 2518 a
written application must be submitted to a judge containing a
“full and complete statement of the facts and circumstances re-
lied upon by the applicant,” including:

(i) details as to the particular offense that has been, is being,
or is about to be committed,
(ii) a particular description of the nature and location of the
facilities from which or the place where the communication is
to be intercepted,
(iii) a particular description of the type of communications
sought to be intercepted,
(iv) the identity of the person, if known, committing the of-
fense whose communications are to be intercepted.25

21. Id. at 1302-03.
22. Id. The Eighth Circuit emphasized that it was “concerned only
with the basic thrust of the Act’s wiretap provisions”. Id. at 1302.
Specifically, Cox did not involve evidence of a crime other than that
for which the wiretap order was procured, nor an emergency wiretap
consummated prior to judicial authorization. See 18 U.S.C. §§ 2517(5),
2518(7). Serious questions have been raised concerning the constitu-
tionalitity of these provisions of the Act. See Spritzer, Electronic Sur-
veillance By Leave of the Magistrate: The Case In Opposition, 118 U.
Pa. L. Rev. 169 (1989); Note, Eavesdropping Provisions of the Omnibus
Crime Control and Safe Streets Act of 1968: How Do They Stand In Light
of Recent Supreme Court Decisions?, 3 Valparaiso U.L. Rev. 89, 94, 100
(1968). But see United States v. Cox, 449 F.2d 679 (10th Cir. 1971)
(upholding constitutionality of section 2517(5)). However, a discuss-
ion of these provisions is beyond the scope of the Cox opinion and this
Comment.
It should be noted that while section 2518 requires only a description of the type of conversation sought, Berger speaks in terms of describing the particular conversations sought. However, the statutory interpretation of the Berger requirement appears reasonable. As noted in *United States v. Skarloff*,

[i]t is sufficient for the order to show a finding of probable cause that conversations will be overheard implicating the suspect in . . . criminal conduct, without describing the specific content of the anticipated conversations. It would be virtually impossible for the applicant . . . to predict . . . the exact language. . . . To impose such an absolute requirement . . . would render Title III totally ineffective.

Section 2518(3) further requires that before any authorization of interception is issued, the court must find the allegations of the application supported by probable cause, including findings that:

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense . . . ;

(b) there is probable cause for the belief that particular communications concerning that offense will be obtained through such interception.

In addition, the application must contain a showing of exigent circumstances to overcome the lack of notice to the persons whose communications are to be intercepted. Exigent circumstances have generally been considered established if there is a showing that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous . . . ."

Even if the court determines the application sufficient and authorizes surveillance, the surveillance may not extend "for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days." Moreover, the court may still retain control of subsequent events though the application is approved. Section 2518(6) allows the authorizing court to require progress reports at intervals it deems appropriate. Upon conclusion of the interception, the court receives the results of the surveillance, which can be sealed at the court's discretion, and determines on whom an inven-

29. Id.
tory shall be served and under what conditions.\textsuperscript{33} Therefore, judicial supervision of the electronic surveillance process is present from the outset of the search until its conclusion.

Even with these numerous procedural safeguards, some commentators have adopted the view that electronic surveillance is inherently unconstitutional, and thus still argue that Title III is unconstitutional.\textsuperscript{34} However, this argument has seemingly been rejected by the Supreme Court in the \textit{Osborn, Berger} and \textit{Katz} opinions, all of which imply that electronic eavesdropping, and therefore an electronic eavesdropping authorization statute, can be constitutional. Assuming this to be the case, the Eighth Circuit correctly concluded in \textit{Cox} that Title III is constitutional, for if any statute meets the requirement imposed on electronic surveillance by the recent Supreme Court cases, Title III certainly does.

\textbf{Immigration Law: Immigrant Convicted of Statutory Rape Subject to Deportation for Commission of Crime Involving Moral Turpitude}

Petitioner Marciano, a citizen of Morocco and Israel, had entered the United States on an immigration visa. Within a year after entry, he was arrested and charged with the crime of statutory rape,\textsuperscript{1} to which he pleaded guilty. On appeal to the Minnesota Supreme Court, his conviction was affirmed.\textsuperscript{2} Subsequently he was granted an evidentiary hearing on a petition for postconviction relief, and the court made certain findings of fact concerning the circumstances of the crime and conclusions of

\begin{itemize}
\item \textsuperscript{33} 18 U.S.C. § 2518(8) (d), (10) (a) (1970).
\end{itemize}

\begin{itemize}
\item 1. MINN. STAT. § 609.295(4) (1971) reads in pertinent part:
Whoever has sexual intercourse with a female child under the age of 18 years and not his spouse may be sentenced as follows:

\begin{itemize}
\item (4) If the child is 16 years of age, but under the age of 18 years and the offender is 21 years of age or older, by imprisonment for not more than three years.
\end{itemize}

Criminal intent is specifically excluded as an element of the offense under MINN. STAT. § 609.02(9) (6) (1971), which provides:

Criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question.

\end{itemize}
law pertaining to the guilty plea. The Immigration and Naturalization Service (INS) then initiated proceedings to deport Marciano because of his conviction for a crime involving moral turpitude. The Special Inquiry Officer determined that petitioner was convicted of a crime involving moral turpitude and should be deported, and the Board of Immigration Appeals affirmed. Reviewing the order pursuant to 8 U.S.C. § 1105a (a), the Eighth Circuit, over a vigorous dissent, affirmed, holding that statutory rape was a crime involving moral turpitude. 


The first use of the concept of “moral turpitude” in the United States immigration laws came in 1891, although barriers against the entry of persons convicted of crime were introduced in 1875. The Immigration Act of 1917 introduced the use of deportation for criminal activities in the United States, and the 1952 revision retained and strengthened the procedures.

Currently 8 U.S.C. § 1251 (a) (4) provides, in pertinent part:

(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial . . . .

Thus, an alien is subject to deportation if he commits a crime involving moral turpitude within five years after entry or if he commits two such crimes at any time after entry. The policy behind the statute is obvious. Congress clearly wanted to pre-

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4. Petitioner had also contended that the phrase “crime involving moral turpitude” was unconstitutionally vague under the due process clause of the fifth amendment. The court held that it was foreclosed from consideration of that issue under Jordan v. De George, 341 U.S. 223 (1951).


7. 1 C. Gordon & H. Rosenfield, supra note 6, § 4.12a.

8. However, certain factors, such as pardon and judicial recommendation, render the deportation provisions inapplicable. 8 U.S.C. § 1251 (b) (1970). See generally 1 C. Gordon & H. Rosenfield, supra note 6, § 4.15.
vent "undesirables" from entering the country and to rid the country of those aliens who evidence their "undesirability" after entry. 9

A critical analysis of the concept of "moral turpitude" as applied in deportation cases requires a discussion of the interplay of both definitional and procedural aspects of the term. As pointed out in the major treatise in the area, "[a]ttempts to arrive at a workable definition of moral turpitude never have yielded entire satisfaction." 10 Legislative history of the term is at best murky. 11 Of the judicially enunciated definitions, perhaps the most commonly cited is that which refers to a deed of moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." 12 The viability of such a definition must be questioned, however, when it appears that theft of a dozen golf balls has fallen within the orbit of crimes involving moral turpitude. 13 Recourse to the dictionaries, "the last resort of the baffled judge," 14 provides little additional elucidation. 15 A search of the cases for guiding principles which might emerge as common denominators leads, unfortunately, to the conclusion that the "chief impression from the cases is the caprice of the judgments." 16 Additionally, examination of judicial treatment of various "classes" of crimes provides little guidance. 17

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10. 1 C. GORDON & H. ROSENFIELD, supra note 6, § 4.13a at 4-99.
16. Jordan v. De George, 341 U.S. 223, 239 (1951) (dissenting opinion). In a footnote, Justice Jackson compared three pairs of cases illustrating the capriciousness of the outcomes. Id. at 239-40 n.13.
17. A good overview of some specific applications of the moral turpitude standard to specific crimes can be found in C. GORDON & H. ROSENFIELD, supra note 6, § 4.14. Of crimes against the person, murder, voluntary manslaughter, kidnapping, and various types of aggravated assault have been held to be crimes involving moral turpitude, while involuntary manslaughter, various types of simple assault, attempted suicide, riot, and carrying concealed weapons have been held not to involve moral turpitude. Id. § 4.14b and cases cited therein. With re-
Procedural aspects also play an important part in understanding the use of the concept of moral turpitude. Of vital importance is the rule enunciated in United States ex rel. Mylius v. Uhl to the effect that the determination of the existence of moral turpitude must be based solely on the judgment of conviction rather than on testimony adduced at the trial, and, inferentially, not on any independent findings of fact. Hence, the state statute and conviction record control, despite the fact that the appraisal of turpitude is always a federal question.

The interplay of the definitional and procedural aspects of the moral turpitude concept has led to two basic judicial approaches, and a suggestion for a third, which has yet to carry the majority of any court. The Mylius case enunciated what is now the majority rule:

[T]he law must be administered upon broad, general lines and if a crime does not in its essence involve moral turpitude, a person found guilty of such a crime cannot be excluded because he is shown, aliunde the record, to be a depraved person.

spect to sexual crimes and crimes involving family relationship, common law and statutory rape, adultery, abortion, bigamy, prostitution and lewdness have been held to involve moral turpitude, while bastardy, vagrancy, maintaining a nuisance, fornication, and mailing an obscene letter have been held not to involve moral turpitude. Id. § 4.14c and cases cited therein. However, certain crimes, such as gross indecency, contributing to the delinquency of a minor, disorderly conduct, abandonment of a minor child, and incest have required investigation into the record of the conviction or the nature of the statute. Id. Of crimes against property, those involving fraud, and major crimes such as arson, blackmail, robbery, and other forms of theft have been held to involve moral turpitude, while similar crimes of a lesser degree have been held not to involve moral turpitude. Id. § 4.14d and cases cited therein.

18. 210 F. 860 (2d Cir. 1914).
20. United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939); Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929).
21. Wyngaard v. Rogers, 187 F. Supp. 527, 528 (D.D.C. 1960), aff'd per curiam sub nom., Wyngaard v. Kennedy, 295 F.2d 184 (D.C. Cir.), cert. denied, 368 U.S. 926 (1961). See also I C. Gordon & H. Rosenfield, supra note 6, § 4.13b. It is interesting to note, however, that the question of what is a “crime” also appears to be treated as a federal question. See United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956), where the court held that violation of a statute which has authoritatively been interpreted by state courts to constitute an “offense” rather than a “crime” was nevertheless a “crime” for the purposes of deportation.
Thus, the INS and the reviewing courts must determine whether all criminal conduct under a particular statute must necessarily involve moral turpitude. Although it has been suggested that this view evolved at a time when the prevailing concept of the permissible fact-finding discretion of administrative agencies was quite restrictive, this rule is currently followed in the Courts of the Second, Fifth, Seventh, Ninth and District of Columbia Circuits.

The minority view was first enunciated in the decision of the First Circuit in Pino v. Nicolls:

If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity.

In requiring examination of only the general nature of the crime and its classification in common usage, the First Circuit departed from the approach taken by the majority of courts. It did, however, adhere to the procedural rule of avoiding the “oppressive burden” of independent fact finding.

The third approach which has been suggested would involve a “three-classification” rule. This view was enunciated by Judge Anderson, dissenting in Tillinghast v. Edmead, quoting from the trial court's opinion:

Whether any particular conviction involves moral turpitude under this test may be a question of fact. Some crimes are of such character as necessarily to involve this element; others... do not; and still others might involve it or might not. As to this last class the circumstances must be regarded to determine whether moral turpitude was shown.

This standard departs from both of the previously examined rules in that it recognizes a third category: one encompassing crimes which might or might not involve moral turpitude.

24. Rassano v. Immigration & Nat. Serv., 377 F.2d 971 (7th Cir. 1966); Wadman v. Immigration & Nat. Serv., 329 F.2d 812 (9th Cir. 1964); Ablett v. Brownell, 240 F.2d 625 (D.C. Cir. 1957); United States ex rel. McKenzie v. Savoretti, 200 F.2d 546 (5th Cir. 1952); United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939).
26. 31 F.2d 81, 84 (1st Cir. 1929) (dissenting opinion), citing Ex parte Edmead, 27 F.2d 435, 439 (D. Mass. 1928).
ther, it departs from the procedural approaches of prior cases by allowing independent determinations of fact in those cases where moral turpitude might or might not be involved. This third approach is the one advocated by the dissenting judge in *Marciano*.

After a rather extensive examination of the statute in question,27 the Minnesota Supreme Court opinion in the criminal case,28 and the findings of the trial court at the postconviction evidentiary hearing,29 the majority in *Marciano* concluded that Marciano's guilty plea was voluntarily and intelligently made, that he was represented by competent counsel, that he had been the "aggressor" and had knowledge of the age of the victim.30 The opinion went on to note that federal courts had consistently held statutory rape to be a crime involving moral turpitude.31 The court accordingly held that Marciano was properly ordered deported.

Judge Eisele, dissenting, engaged in a lengthy examination of the majority and minority rules and their underlying policies.32 Rejecting both of the established rules, he argued vigorously for the adoption of the "three-classification" rule.33 Turning to the facts of the case, Judge Eisele found that statutory rape did not fit either of the "black and white" categories of the three-classification rule, and concluded that the record was insufficient to determine, as a matter of federal law, whether Marciano's conduct involved moral turpitude, and that the case should be remanded for such a factual determination.34

In light of existing precedent, it is difficult to fault the decision of the majority, since statutory rape has, apparently without exception, been held to be a crime involving moral turpitude. Furthermore, there was a fact determination indicating

30. Id.
32. 450 F.2d at 1026-28. See text accompanying notes 22-25 supra.
33. Id. at 1028-29. See text accompanying note 26 supra.
34. Id. at 1029-31.
that Marciano was the aggressor. The majority opinion is, however, subject to criticism for its failure to state which standard was employed in reaching the decision.35 Also, by merely citing the statutory rape cases36 the court missed an opportunity to examine rationales behind the standards. If it is true, for example, that Congress intended moral turpitude to be a flexible concept, subject to the shifting societal mores,37 a 1969 conviction for statutory rape might well be held subject to a different standard from that applied to convictions in 1927 and 1931.38 Furthermore, it is noteworthy that some of the cases holding statutory rape to be a crime involving moral turpitude came out of circuits subscribing to the majority view that a crime must "of necessity" involve moral turpitude.39 Considering the technical nature of the crime of statutory rape,40 courts should be hesitant to conclude that such a crime would "of necessity" involve moral turpitude. Hence, the authority of the cited cases might be questioned.

It is from the dissent, however, that the Marciano decision derives its importance. Aside from any other factor, the dissent is important for its perceptive analysis, classification, and conceptualization. All too frequently in the past courts have dealt with the moral turpitude concept without stating their standards of decision or recognizing the different approaches. The Marciano dissent is a valuable contribution for that reason alone. Beyond its level of conceptualization, however, the Marciano dissent is valuable for its examination of the policies behind the various rules. Furthermore, evaluation of the various policies involved makes the dissent's conclusions regarding the relative desirability of the various rules compelling. For example, a recurring justification for the procedural rule which forbids independent fact determination is that such a task would be an "oppressive burden."41 The dissent would suggest that the magnitude of the burden be evaluated with such threshold questions

35. The dissent asserted that the majority opinion implicitly rejected the traditional majority view, since statutory rape does not "of necessity" involve moral turpitude. Id. at 1027 & n.4.
36. See cases cited in note 31 supra.
38. See cases cited in note 31 supra.
39. Compare the cases cited in notes 24 & 31 supra.
40. See Marciano v. Immigration & Nat. Serv., 450 F.2d 1022, 1029 n.6 (8th Cir. 1971) (dissenting opinion), cert. denied, 405 U.S. 997 (1972).
as how many deportation proceedings for crimes involving moral turpitude take place annually. But beyond that point, under the scheme proposed in the dissent in which such fact determinations would be made only where moral turpitude might or might not be involved, it would appear clear that there would be no potential for the dreaded “oppressive burden” of fact finding. Such fact determinations would be restricted to a very few cases.

The dissent further noted major deficiencies with each of the existing rules. The restrictive test of the traditional rule which limits analysis to the abstract “essence” of the crime is subject to criticism since it undoubtedly permits significant numbers of aliens guilty of crimes involving moral turpitude to remain in the United States. Likewise the “general nature” test of Pino v. Nicolls could easily err in the opposite direction. Unquestionably, one of the strongest arguments in favor of the “three-classification” rule is that it could go far toward eliminating the inequities inherent in the other rules, since it would permit the INS and reviewing courts to examine the particular facts of an individual case in light of the purpose of the deportation statute.

Another argument in favor of adopting the rule advocated by the dissent in Marciano relates to a recognition of the inconsistency and capriciousness inherent in the application of the other rules: “How many aliens have been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess.” The inconsistency of the laws from state to state is also a factor. The dissent pointed out that the conduct punished as statutory rape in Minnesota would not be subject to prosecution for statutory rape in any one of 27 other states. The “three-classification” rule would alleviate at least some of the inequity which inheres in the present application of the law since it permits both the INS and reviewing courts somewhat greater latitude in analyzing the conduct of a particular alien whose deportation is in question, rather than

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42. 450 F.2d at 1027. See, e.g., United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939) (possession of jimmy not “necessarily” or “inherently” immoral).
43. 450 F.2d at 1028. See, e.g., the hypotheticals cited in dissent in Tillinghast v. Edmead, 31 F.2d 81, 84 (1st Cir. 1929) (dissenting opinion).
45. 450 F.2d at 1026 n.1 (dissenting opinion).
restricting such authorities to an examination of convictions under differing state criminal codes.

In sum, the Marciano court cannot be faulted for the outcome alone. It did, however, pass up an opportunity to engage in creative application of the law. The argument presented in the Marciano dissent calling for a different application of the moral turpitude standard is compelling, and it contains a sound proposal for the future direction of the development of the law in this area.

**Patents: Obviousness to be Determined as a Matter of Law, Subject to Factual Inquiry**

Plaintiff Alpana, holder of a patent relating to a thermally insulated frame designed for use in metal windows or doors, sued defendant Flour City for patent infringement. In consolidated suits between Alpana and Flour City, the district court in an unreported opinion held the patent invalid on the ground of obviousness of the subject matter under 35 U.S.C. § 103 and therefore determined that there had been no infringement. On appeal, Alpana contended that the trial court’s finding of obviousness was clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure; Flour City argued that the finding was not clearly erroneous. Thus, both parties on appeal treated the issue of obviousness as a question of fact. In affirming the district court’s decision, the Eighth Circuit held that the ultimate determination of obviousness of the subject matter of a patent was to be made as a matter of law, based upon several factual inquiries. *Flour City Architectural Metals v. Alpana Aluminum Products, Inc.*, 454 F.2d 98 (8th Cir. 1972).

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1. 35 U.S.C. § 103 (1970) provides:
   A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

2. The district court also held the patent invalid for reasons of specificity, but the court of appeals did not reach that issue.

3. Federal Rule of Civil Procedure 52(a) reads in pertinent part: Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .
The legal concept of "obviousness" originated as a judicially created requirement for patentability called "invention" which was developed as a gloss on the existing statutory requirements of utility and novelty. Most authorities credit Hotchkiss v. Greenwood with the first statement of this concept. Although Hotchkiss developed the concept of obviousness, it gave no indication of the standard to be employed in reviewing determinations applying the concept.

The early Supreme Court cases disagreed as to whether the standard for invention was a question of fact or a question of law, a conflict that still divides courts. The controversy was framed in Mahn v. Harwood, where the Court in dictum stated that "whether the thing patented amounts to a patentable invention" is a question of law, and in Keyes v. Grant, which held that the standard of invention was a question of fact. Subsequently in Graver Manufacturing Co. v. Linde Co., a case particularly conducive to treatment of the obviousness question as one of fact, the Supreme Court made repeated reference to the advantages possessed by the trial court in fact finding. It held that regardless of whether the trial court upheld or invalidated the patent before it, review by the appellate court was limited by the "clearly erroneous" standard. Although the opin-

6. Harris, Section 103 Revisited, 9 IDEA 617, 618 (1965-66).
7. 52 U.S. (11 How.) 248 (1850). In invalidating a patent relating to ceramic doorknobs, the court articulated the following standard:

8. The Hotchkiss Court apparently did not reach the scope of appellate review issue since it would have resolved the obviousness question as had the trier of fact below.

10. 112 U.S. 354 (1884).
11. Id. at 355.
14. The Court concluded that "to no type of case is this last clause [of Rule 52(a)] more appropriately applicable than to the one before us...." 336 U.S. at 274. The patent itself was complex, and the trial lasted for three weeks, involving a number of expert witnesses, movies and demonstrations.
ion rested heavily on the complexity of the facts involved, this case has been accepted as unequivocal authority that invention and validity are questions of fact.\textsuperscript{15}

Considerable doubts were cast upon this entire line of precedent two years after \textit{Graver} by the \textit{Great A \& P Tea Co. v. Supermarket Co.}\textsuperscript{16} decision. In the \textit{A \& P} case the Supreme Court, although stating that it was setting aside "no finding of fact as to invention," made an independent review of the trial court record, thereby undercutting the question of fact rule.\textsuperscript{17} The concurring opinion of Justice Douglas stated explicitly what the majority opinion left to inference. In essence, Justice Douglas maintained that the standard of invention "goes back to a Constitutional standard," and controls when patent validity is at issue, and that the validity of a patent is, therefore, a question of law.\textsuperscript{18}

The \textit{A \& P} case and a per curiam decision\textsuperscript{19} the following year would appear to indicate that the question of invention is a freely reviewable question of law.\textsuperscript{20} On closer analysis, however, the decision, while not explicitly holding that invention is a question of law, leaves the status of the question of fact rule seriously in doubt.

The passage of the Patent Act of 1952,\textsuperscript{21} which includes an obviousness standard codified in 35 U.S.C. § 103, accompanied by a committee report emphasizing the need for uniformity,\textsuperscript{22} did little to alleviate the uncertainty surrounding the question of fact standard. The first Supreme Court decision interpreting § 103 was \textit{Graham V. John Deere Co.}\textsuperscript{23} in which the Court stated:

\begin{quote}
The emphasis on nonobviousness . . . comports with the constitutional strictures.
While the ultimate question of patent validity is one of law, the § 103 condition . . . lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are
\end{quote}

\textsuperscript{15} See, e.g., Comment, 29 U. Chi. L. Rev. 185 (1961).
\textsuperscript{16} 340 U.S. 147 (1950).
\textsuperscript{17} A comparison of the standard used by the trial court with a so-called "required" standard and a review of the record independent of any clearly erroneous findings by the trial court allow an inference that there is a correct statutorily-based method to decide a case and that the question is therefore one of law.
\textsuperscript{18} \textit{Great A \& P Tea Co. v. Supermarket Corp.}, 340 U.S. 147, 155-56 (1950).
\textsuperscript{20} Note, \textit{Appellate Review of Finding of Invention}, 20 Geo. Wash. L. Rev. 605 (1952).
\textsuperscript{22} S. REP. No. 1979, 82d Cong., 2d Sess. 6 (1952); H.R. REP. No. 1923, 82d Cong., 2d Sess. 7 (1952).
\textsuperscript{23} 383 U.S. 1 (1966).
to be determined; differences between the prior art and the
claims at issue are to be ascertained; and the level of ordinary
skill in the pertinent art resolved. Against this background,
the obviousness or nonobviousness of the subject matter is de-
termined.

This is not to say, however, that there will not be diffi-
culties in applying the nonobviousness test. What is obvious
is not a question upon which there is likely to be uniformity of
thought in every given factual context. The difficulties, how-
ever, are comparable to those encountered daily by the courts in
such frames of reference as negligence and scienter, and should
be amenable to a case-by-case development. We believe that
strict observance of the requirements laid down here will result
in that uniformity and definiteness which Congress called for
in the 1952 Act.24

In thus specifying the factual inquiries to be made, the Court
was presumably motivated by a desire for uniformity. Never-
thless, the decision has been cited to support both the propo-
sition that obviousness is a question of fact25 and the proposi-
tion that it is a question of law.26 Some courts, disregarding the
obviousness language, cite Graham only for the three factual in-
quiries.27 Since there has been no Supreme Court development
of the issue since Graham,28 the Court has left the fact-law con-
troversy apparently at a point at which patent validity is a ques-
tion of law, while obviousness involves several factual ques-
tions. Although it can be inferred that the determination of
obviousness is a question of law, the issue is not yet settled.

In the period between A & P and Graham, the Eighth Cir-
cuit's rule was a comfortable synthesis of Graver and A & P. The
court held simply that the question of obviousness was a ques-
tion of fact, but where an improper standard had been applied
to the facts in making the obviousness decision, the matter be-
came a question of law29 or was reversible as clearly errone-
ous.30 Substantively, either alternative permits the same scope
of review.

24. Id. at 17-18 (citations omitted).
415 F.2d 719 (1st Cir. 1969); Eimco Corp. v. Peterson Filters & Eng'r Co., 406 F.2d 431 (10th Cir. 1968); cert. denied, 395 U.S. 963 (1969).
26. See Lemelson v. Topper Corp., 450 F.2d 845 (2d Cir. 1971); cert. denied, 405 U.S. 989 (1972); Hensley Equip. Co. v. Esco Corp., 375 F.2d 432 (9th Cir. 1967).
The first cases decided after *Graham* in 1966 continued to rely on the lower court's application of an improper standard to gain review but increased the allowable breadth of that review.\(^{31}\) They also began to hedge on the fact-law quality of obviousness.\(^{32}\) In that same year the court first stated that obviousness was a question of law.\(^{33}\) From that point until the 1971 *Flour City* decision, the majority of cases at least implied that obviousness was a question of law, while two cases held that it was a question of fact.\(^{34}\)

Even within the cases considering obviousness a question of law, there was a good deal of variation in opinion as to the scope of appellate review. A number of decisions made an independent review of nearly all the facts in a case, ignoring any of the trial court findings which *Graham* denominated to be factual inquiries.\(^{35}\) Another large group of cases relied substantially upon the factual determinations made by the trial courts and then inquired as to the application of a proper standard by the lower court.\(^{36}\) Thus, although there was a trend in the Eighth Circuit toward looking at obviousness as a question of law while giving intermediate findings of the trial court fact treatment, this trend was not unanimous, and there was substantial disagreement as to how much respect intermediate findings were to be given.

After reviewing the conflicting post-*Graham* Eighth Circuit decisions, the *Flour City* court analyzed *Graham* and noted its shortcomings in failing to "articulate with particularity" a

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36. See Ralston Purina Co. v. General Goods Corp., 442 F.2d 389 (8th Cir. 1971) (per curiam); University of Ill. Foundation v. Winegard Co., 402 F.2d 125 (8th Cir. 1968), cert. denied, 394 U.S. 917 (1969); Gerner v. Moog Indus., Inc., 383 F.2d 56 (8th Cir. 1967); Greening Nursery Co. v. J & R Tool and Mfg. Co., 376 F.2d 738 (8th Cir. 1967). In these cases the appellate court seemed to limit its review more when it respected the district judge's opinion and when affirming the district court's opinion.
standard of review and to expressly overrule prior conflicting authority, most notably Graver. The court then attempted to eliminate both of these shortcomings. It declared that "the ultimate question of obviousness vel non" is "a matter of law, not fact." The court based this rule on the concurring opinion of Justices Douglas and Black in A & P, which construed the majority opinion therein as a rejection of the rule in Graver. Further support for this holding was found in the "independent review of the record" made in Graham. Flour City thus eliminates any doubt about the nature of the obviousness question in the Eighth Circuit.

The only remaining uncertainty in the Eighth Circuit was the breadth of available review. In this regard, the court stated that the factual inquiries underlying the obviousness determination were subject to the constraints of Rule 52(a). As enumerated by the Eighth Circuit, these inquiries include determination of the scope and content of the prior art, ascertainment of the differences between the prior art and the patent claims at issue and resolution of the level of ordinary skill in the pertinent art. As a result, the Eighth Circuit will no longer reverse the fact findings of a trial court unless they are clearly erroneous.

Flour City has placed the Eighth Circuit among those jurisdictions employing a mixed fact and law rule. Under this rule:

[the issue of obviousness is a hybrid question involving both fact and law. The clearest explanation of the question might be to consider it one of law which turns upon the facts. . . . Obviousness is based upon the facts, but ultimately is a question of law.]

By accepting the mixed fact-law rule, the Eighth Circuit has joined the plurality circuit opinion and made it the majority opinion. At present, six circuits follow a mixed fact-law rule:

37. 454 F.2d at 106.
38. Id.
39. The court seemed to depart from its own rule by making independent findings as to ordinary skill. Although it did make its own findings, it probably was not rejecting the findings of the district court. See also Hadfield v. Ryan Equipt. Co., 456 F.2d 1218 (8th Cir. 1972).
40. Sherman, supra note 9, at 557.
two circuits are clear question of law jurisdictions, and two circuits are uncertain in their rule but appear to be leaning toward the mixed rule.

A mixed fact-law rule is preferable in the sense that it combines the best of each of the other rules, even though its application in a particular case may not always be exceedingly clear. By making the final application of the standard a question of law, the rule allows the appellate court a scope of review broad enough to ensure uniformity of results. Since the final decision


42. These are: The Second Circuit [See Shaw v. E.B. & A.C. Whiting Co., 417 F.2d 1097 (2d Cir. 1969), cert. denied, 397 U.S. 1076 (1970); Gross v. J.F.D. Mfg. Co., 314 F.2d 196 (2d Cir. 1963). These cases state a rule of mixed review but actually their review is very broad. In Lemelson v. Topper Corp., 450 F.2d 845 (2d Cir. 1971), cert. denied, 405 U.S. 989 (1972), this circuit may be approaching the mixed rule]; and the Third Circuit [See Packwood v. Briggs & Stratton Corp., 195 F.2d 971 (3d Cir. 1952), cert. denied, 344 U.S. 844 (1952). This is the only case in this circuit and it was decided before § 103 was enacted. It held that a judgment notwithstanding the verdict was proper, thus indicating a strong question of law orientation very early.

43. These are: the First Circuit [See Contour Saws, Inc. v. L.S. Starre H. Co., 444 F.2d 1331 (1st Cir. 1971); Nashua Corp. v. RCA Corp., 431 F.2d 220 (1st Cir. 1970); Columbia Broadcasting Sys. v. Sylvania Elec. Prod., Inc., 415 F.2d 719 (1st Cir., 1969), cert. denied, 396 U.S. 1061 (1970); Koppers Co. v. Foster Grant Co., 396 F.2d 370 (1st Cir. 1968). If read in consecutive order, this series of decisions indicates a trend toward a mixed fact-law rule. It is possible, however, to interpret the cases as indicating a fact-rule. Since all four decisions are affirmances of trial court decisions, it could be that this circuit will use any appropriate theory to support an affirmation, thus giving the trial court decision ultimate weight. This review is even more strict than that required by Fed. R. Civ. P. 52(a).]; and the Tenth Circuit [See Continental Can Co. v. Crown Cork & Seal Co., 415 F.2d 601 (3d Cir. 1969), cert. denied, 397 U.S. 914 (1970); Eimco Corp. v. Peterson Filters & Engr. Co., 406 F.2d 431 (10th Cir. 1968), cert. denied, 395 U.S. 963 (1969); Griswold v. Oil Capital Value Co., 375 F.2d 532 (10th Cir. 1967). These decisions are spotty but Continental Can did review the record when an erroneous standard was used by the district court.]
of obviousness necessitates a consideration of the policies underlying the statute, uniformity of decisional standards is desirable.\textsuperscript{44} The courts of appeal can provide such uniformity more readily than can the district courts.\textsuperscript{45}

An additional desirable result of the standard enunciated in \textit{Flour City} is greater predictability of results. Such predictability may be particularly encouraging to small inventors since they can least afford the expense of protracted and unpredictable litigation.

The restrictions imposed upon intermediate findings by the question of fact test also benefit the patent system. The rule takes into consideration the fact that the trier's determination rests upon the ability to see the witnesses, both expert and non-expert, and to hear their testimony.\textsuperscript{46} Judicial resources are conserved, and possibly a more just decision is ensured, if the findings of fact are conclusive at the trial court level. In addition, the relegation of a portion of the final decision to the trial court permits avoidance of certain detrimental aspects of appellate review. Since a major portion of a decision is resolved at the trial level, there will be fewer specious appeals in which a party nevertheless attempts to secure broad review. As a result, the lag between invention and patent is decreased. This decrease is particularly valuable to the small patent holder who can afford neither the costs of appeals nor the unavailability of his assets during the time spent in the appeal process.\textsuperscript{47}

Thus the mixed fact-law rule provides a preferable standard for appellate review of questions of patentability. It offers most of the benefits of both approaches while minimizing their detriments. In expressly adopting the mixed rule, the Eighth Circuit has not only clarified the rule in the circuit but also selected the optimal rule.

\textsuperscript{44} See, e.g., Harris, supra note 6, at 625; Comment, supra note 15, at 197.

\textsuperscript{45} It has been said to be an “inescapable solipsism that subjects patent applications to the test of as many different standards of patentability as there are district judges.” Gross v. JFD Mfg. Co., 207 F. Supp. 631 (E.D.N.Y. 1962), rev'd, 314 F.2d 196 (2d Cir. 1963), cert. denied, 374 U.S. 832 (1963).

\textsuperscript{46} Comment, supra note 15, at 195.

\textsuperscript{47} Note, supra note 20, at 606.
Sales: Estoppel Defense Available in Suit by Carrier Against Consignee for Freight Charges Notwithstanding Section 6 (7) of the Interstate Commerce Act

Plaintiff Southern Pacific Transport Company, the carrier, delivered to defendant Campbell Soup Company, the consignee, four separate shipments under uniform straight bills of lading. Each bill noted that the freight charges were to be prepaid. Upon receipt of each shipment, Campbell paid the consignor the cost of the merchandise plus freight charges. After unsuccessfully attempting to collect the freight charges from the consignor, Southern Pacific sued Campbell for the unpaid freight bills. Campbell pleaded the defense of estoppel and, after the district court entered summary judgment for Southern Pacific, Campbell appealed. The Eighth Circuit held that where a carrier delivers shipments to a consignee under prepaid bills of lading and the consignee in reliance on such notation reimburses the consignor, the consignee is entitled to raise the defense of estoppel since under the circumstances the defense is not violative of the anti-discrimination section of the Interstate Commerce Act.2 Southern Pacific Transportation Co. v. Campbell Soup Co., 455 F.2d 1219 (8th Cir. 1972).

The Interstate Commerce Act provides that railroads are required to collect the full charges set out in the various tariffs established by the Interstate Commerce Commission and that failure to collect is discriminatory.3 In order to assure that this anti-discrimination provision not be violated, the Supreme Court in Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Fink4 held that a consignee is relieved from liability only when

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1. See In re Bills of Lading, 52 I.C.C. 671, 740 (1919), for the law pertinent to a Uniform Bill of Lading.
3. 49 U.S.C. § 6(7) (1970) provides in pertinent part:
   No carrier . . . shall . . . charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.
   By this wording, unintentional as well as intentional rebates fall within the statutory prohibition.
he has paid the legally required rate to the carrier. In *Fink* the carrier had mistakenly misrepresented the shipping charges, undercharging the consignee. Although the consignee relied upon the lower cost in fixing the sales price of his goods, the court held he could not set up the defense of estoppel against a claim for the amount by which he was mistakenly undercharged.5 The Eighth Circuit applied the *Fink* holding in *Central Warehouse Co. v. Chicago, R.I. & P. Ry. Co.*,6 a case in which the carrier mistakenly marked the bill of lading prepaid although the term of shipment was collect on delivery. Thus the consignee had not paid for the freight. The court held that an estoppel defense by the consignee7 would not lie in the carrier's suit for freight charges because it would violate the anti-discrimination clause of the Interstate Commerce Act.8

Since the *Central Warehouse* case, the Eighth Circuit has not considered the availability to a consignee of the defense of estoppel in a suit by a carrier to collect freight charges. The issue in *Southern Pacific*, therefore, was whether the anti-discrimination clause required that a consignee be absolutely liable to the carrier for freight charges upon acceptance of the goods.

Most of the court's opinion was devoted to a discussion of the *Fink*9 and *Central Warehouse*10 cases. The court first detailed the facts of *Central Warehouse*, noting that it presented a "slightly different factual question"11 from the *Fink* decision, while acknowledging that the *Central Warehouse* court fully

5. Id.
6. 20 F.2d 828 (8th Cir. 1927), aff'g 14 F.2d 123 (D. Minn. 1926).
7. More precisely, the consignee's defense was that he had relied upon the representations of prepayment by the carrier in remitting the proceeds of the sale, less his commission, to the consignor. 20 F.2d at 828.
8. The following language explains the court's view of how the estoppel defense contravenes the anti-discrimination provision of 49 U.S.C. § 6(7) (1970):

   The duty imposed upon the carrier by the act applicable to interstate shipments was to collect the lawful rate. This obligation was not only in its own interest, but in the interest of the public. It is not permitted to escape its duty by an oversight and thereby effect a discrimination. It is not within its power to so conduct itself that the plain terms of the statute will amount to nothing. The unintentional act of the carrier does not estop it from demanding payment of the lawful charge.

   Id. at 829-30.
9. See text accompanying notes 4-5, supra.
10. See text accompanying notes 6-8, supra.
adopted the rationale of Fink. The court stated that neither opinion precluded the consignee from asserting the estoppel defense in all circumstances. The court then adopted a case by case approach to determine whether the estoppel doctrine would, on the facts of a particular case, contravene the anti-discrimination purposes of the Act. Citing cases arising in other circuits, the court concluded that on the facts of Southern Pacific there was no contravention of the Act's purposes in allowing the estoppel.

The court's reasoning was inadequate to clarify its view on when an estoppel defense will lie against a carrier in a suit to recover freight charges. Although a case by case approach certainly allows maximum flexibility in balancing the public interest embodied in the anti-discrimination provisions of the Interstate Commerce Act against the equities of a consignee, such an ad hoc approach does little to clarify this aspect of commercial law. There are several rationales the court could have adopted in reaching its decision which would have imparted greater certainty and predictability to the area.

One clear rationale for the decision, not specifically adopted by the court, is that the Central Warehouse facts and therefore its rationale are inapplicable where the consignee has already paid the consignor. The consignee's argument in Central Warehouse was merely that the carrier was estopped by its mistake in marking the bill prepaid. The only possible detrimental reliance to the consignee in Central Warehouse was that he would have to pay an unexpected freight charge, not a second freight charge as Campbell would have been required to pay if the estoppel defense had been held inapplicable. Thus the equities more clearly favored the consignee in Southern Pacific.

A second rationale the court could have adopted is that on the facts of Southern Pacific the public policy underlying the

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13. The court did not specifically note the most obvious difference between the two fact situations: the consignee in Central Warehouse had not yet paid any freight, while the consignee in Southern Pacific would have been subject to a double payment if the estoppel defense had not been permitted. For a court that did note such a difference see Missouri Pacific R.R. v. National Milling Co., 276 F. Supp. 367, 372 (D.N.J. 1967).
anti-discrimination provisions had been satisfied. In *Fink* and its progeny,\(^{14}\) the issue of discrimination in rate making arose in the context of a mistake by the carrier which led to the consignee receiving an unwarranted preference. Since the statute\(^ {15}\) does not expressly confine its coverage to intentional rebates or discounts, these cases found the unintended preferences to be equally violative of the Act. In *Southern Pacific*, however, there was no mistake; the bill was to be prepaid and the consignor contracted liability for payment. In effect, the carrier extended credit to the consignor. Because the consignee had already forwarded the shipping charges to the consignor, he neither sought nor received any preferential rate; the public policy embodied in the Act was thus never jeopardized since the consignee had done exactly what was required of him by statute.\(^ {16}\) Further, had the court held the estoppel defense inapplicable, the consignee would have become an insurer for the credit business of the carrier.\(^ {17}\)

A third basis for distinguishing the instant case from the result in the *Fink* line of decisions is based upon the theory on which that case was decided. In *Fink*, the court was considering an undercharge situation. The court's decision was based upon the theory that the consignee could not rely upon the estoppel defense because as a matter of law the parties are held to know the publicly listed standard rates.\(^ {18}\) Here, however, the essential knowledge was whether the shipment was prepaid or collect. This fact is not a matter of public knowledge; in fact, the carrier who takes the shipment terms from the consignor is in a better position to know these terms than the consignee. It follows that the consignee should be entitled to rely on the carrier's representations concerning these terms.\(^ {19}\) However, it must be noted that the *Southern Pacific* court impliedly rejected this

\(^{14}\) See Annot., 88 A.L.R.2d at 1378-83 (1963).

\(^{15}\) See note 3 supra.

\(^{16}\) This argument was accepted by the court in Missouri Pacific R.R. Co. v. National Milling Co., 276 F. Supp. 367, 371 (D.N.J. 1967), a case with an identical factual pattern to the instant case, and in Consolidated Freightways Corp. v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971).


\(^{18}\) 250 U.S. at 581-82.

\(^{19}\) This theory has been adopted in United States v. Mason & Dixon Lines, 222 F.2d 646 (6th Cir. 1955), and Consolidated Freightways Corp. v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971).
rationale by failing to overrule the *Central Warehouse* holding denying the estoppel defense in the case of a carrier's mistaken prepayment notation.

Although the court reached the only fair result, the fact that it did not explicate the rationale of its holding leaves the law uncertain as to when an estoppel defense will be recognized in suits by carriers against consignees where the bill of lading has been mistakenly marked prepaid. Thus, the court postponed the decision whether lack of payment by the consignee to the shipper or mistake by the carrier in marking the bill prepaid was the decisive factor in determining the availability of the estoppel defense. Thus for the time being, consignees within the jurisdiction of the Eighth Circuit must prepay their bills to the consignor—and hope that their carrier made no mistake.

### Secured Transactions: Surety's Subrogation Rights Not A Security Interest Within Article 9 of the U.C.C.

The J. V. Gleason Co. [Gleason] entered into five construction contracts with the State of Minnesota and local governmental units thereof, insuring its performance with both payment and performance bonds purchased from a surety. Each contract provided for partial payment as the work progressed with a percentage of the contract price to be withheld until completion. When Gleason defaulted, the surety completed construction at a cost far in excess of the percentages of the contract prices retained by the project owners. In an action to determine who was entitled to the retained percentages, the district court held that the surety was subrogated to the project owners' interest in the funds and thus had rights superior to those of Gleason’s trustee in bankruptcy.¹ The only issue presented on appeal was whether the lien created by the doctrine of subrogation was a security interest and thus subject to the filing requirements of the Minnesota Uniform Commercial Code [U.C.C.].² In affirming the judgment of the district court, the Eighth Circuit held that Article 9 of the U.C.C. was intended to apply only to "consensual" security agreements. Because the surety's interest in the retained percentages arose by operation

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¹ A trustee in bankruptcy has the status of a lien creditor. Minn. Stat. § 336.9-301 (1971).
of law independent of any contractual assignment, the filing provisions of Article 9 were not applicable. \textit{In re Gleason Co.}, 452 F.2d 1219 (8th Cir. 1971).

Under the doctrine of subrogation, a surety on a construction contract who fulfills the obligations of its defaulting principal "stands in the shoes" of three parties: the contractor insofar as there are accounts receivable due it,\(^3\) laborers and materialmen to the extent the surety has satisfied their claims against the contractor,\(^4\) and the owner of the construction project to the extent that the owner has retained a percentage of the contract price to insure completion.\(^5\) The surety's accession to the rights of the creditors of its principal has been said to amount to an equitable assignment whereby the surety is to be treated "as though he were an assignee of the creditor ... entitled to all priorities and immunities enjoyed by the creditor."\(^6\) Prior to the adoption of the U.C.C. it was well established in the United States generally,\(^7\) and in Minnesota specifically,\(^8\) that a surety who had actually completed, or had removed liens against, a construction project was subrogated to the project owner's right to use any retained percentages to complete construction. The effect of the subrogation was that the surety obtained rights to the retained funds superior to any rights of the contractor's creditors because the contractor himself had no right to the funds until the project owner accepted the construction as completed.

The basic question presented in \textit{Gleason} was whether the doctrine of subrogation survived the enactment of the U.C.C. in Minnesota.\(^9\) The position of the Eighth Circuit, which is in accord with the almost unanimous authority of other jurisdictions,\(^10\) is based upon a two-step analysis of the U.C.C.

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\(^6\) L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP § 47 at 206 (1950).

\(^7\) See, e.g., cases cited in note 5 supra.


\(^9\) Although the Eighth Circuit applied Minnesota law, the uniformity envisioned when the Uniform Commercial Code was promulgated makes its interpretation of more than local importance.

section 1-103 provides that any existing principle of law or equity not specifically displaced by the Code is to be read as supplementary to its provisions. The court reasoned that a surety's subrogation to a project owner's rights survived the Code's adoption, unless the lien created by the rule is a security interest within the meaning of section 9-102. Second, in analyzing section 9-102, the court held that the section should be read in the light of the official comment to section 9-101, which suggests that "[t]he aim of [Article 9] is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty." Citing an earlier First Circuit case for the proposition that the "unique accumulation of subrogation rights serves to induce a function that is neither ordinary insurance nor ordinary financing," the court concluded that the surety's position was quite different from "that of the commercial lender, who [was] obviously the primary target of Article 9," and that therefore there was no reason to assume that the provisions of the Article were applicable to the suretyship situation. The court also focused on the official comment to section 9-102 of the Code, which describes


15. The First Circuit went on to distinguish between the credit offered by the surety and that offered by a commercial lender by observing that "while the surety extends its credit to the owner . . . . as the ultimate guarantee that the job will be done, this is a credit that may either never have to be drawn upon or, if it is drawn upon at all, will in all likelihood be overdrawn." 411 F.2d at 843.
16. 352 F.2d at 1122.
the purpose of the section as that of including "all consensual security interests in personal property and fixtures" within the scope of the Code. In light of the comment, the court agreed with the Pennsylvania Supreme Court, which had held that

[r]ights of subrogation, although growing out of a contractual setting . . . do not depend for their existence on a grant in the contract, but are created by law to avoid injustice . . . .17

The court concluded that because rights of subrogation were not consensual, they were not security interests within the meaning of Article 9.

It is likely that the question whether a surety's right of subrogation survived the adoption of the U.C.C. has now been completely settled. Although the position which the Eighth Circuit has adopted has been severely criticized by student commentators,18 the criticism has been directed mainly toward considerations of symmetry. If the purpose of Article 9 of the U.C.C. was to provide a single "simple and unified structure" for securing transactions, it would be desirable to include rights arising under the doctrine of subrogation within that structure. From a more functional perspective, however, there is no reason to read "security interest" to include a surety's right to subrogation. As the Eighth Circuit pointed out,19 the purpose of the filing provisions of Article 9 was to protect creditors who might advance credit secured by property upon which there were prior liens. The percentage of the contract price retained by the owner of a construction project, on the other hand, would not be available to the contractor's general creditors until the contractor successfully completed the project. Thus, there is no reason to require the surety to file a financing statement, since it would have no interest in the retained funds until any interest the contractor's creditors might have had was already cut off by the contractor's default.20

19. 452 F.2d at 1123.
Pursuant to an order of the probate court, plaintiff received distributions from her husband’s estate which were, in effect, partial advances to her as sole residuary legatee. However, the advances were subject to recall if needed to pay expenses, debts or taxes of the estate. The plaintiff did not report as income any amount attributable to the advance despite the existence of distributable net income in the estate for the year. The Commissioner assessed a deficiency. Plaintiff paid the amount of the deficiency and instituted a suit for refund. The district court found that plaintiff had not realized any income by virtue of the estate’s distributions to her and the government appealed. The Eighth Circuit held that the advance was not income to plaintiff, since the payments were subject to recall by the probate court to meet other estate obligations and were therefore not “amounts properly paid” within the meaning of Internal Revenue Code of 1954, Section 662(a)(2). Bohan v. United States, 456 F.2d 851 (8th Cir. 1972).

An estate is allowed a deduction in computing its taxable income for the year for certain distributions to beneficiaries. I.R.C. section 661 provides in relevant part:

(a) Deduction.—In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate...

(2) any other amounts properly paid or credited or required to be distributed for such taxable year.

Whenever an estate is allowed a deduction under section 661, that amount is taxed to the recipients pursuant to section 662:

1. Mo. Rev. Stat. § 473.613 (1949) provides that on approval of the probate court, specific personal property may be distributed to a distributee prior to a decree of final distribution subject to recall by that court.


3. The Internal Revenue Service has announced its intention not to follow Bohan and to continue to litigate cases involving substantially similar facts. Rev. Rul. 72-396, 1972 Int. Rev. Bull. No. 34, at 26.


5. DNI of the estate defines the maximum deduction permitted the estate and the maximum amount taxed to all beneficiaries as a group. I.R.C. §§ 661(a), 662(a). Where more than one beneficiary receives a taxable distribution from the estate during the year, and the
(a) Inclusion.—[T]here shall be included in the gross income of a beneficiary to whom an amount specified in section 661(a) is paid, credited, or required to be distributed . . .

(2) All other amounts properly paid, credited, or required to be distributed to such beneficiary for the taxable year. . . .

Neither the Code nor regulations define an “amount properly paid” by the estate such that the recipient will be taxed thereon. Most courts that have considered the question have stated that in order to be deemed “properly paid” the amount must have been irrevocably and unconditionally distributed to the beneficiary. At least one court, however, has stated that the requirement means “rightly paid, with legal justification.” In either case, state law and the terms of the will are relevant factors in determining whether an amount has been properly paid.

Total of all such distributions exceeds the estate's DNI, the DNI is apportioned among the recipients to determine the amount taxable to each. I.R.C. § 662(a) (2). Since plaintiff was the sole recipient of distributions from the estate during 1957 and those distributions exceeded the estate's DNI for that year, if any amount is taxable to her, it is an amount equal to the estate's DNI.

6. I.R.C. § 662(a). While, under state law, the distributions to plaintiff were made from corpus, any distribution within the terms of Section 662(a) (2) is conclusively presumed to be one from DNI to the extent thereof. 6 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 36.72 (1967) [hereinafter cited as MERTENS].


Reliance on state law and the terms of the will is justified in that the meaning of “required to be distributed currently,” as used in Sections 661(a) (1) and 662(a) (1), is the same as the definition of that language for purposes of Section 652 (relating to taxation of trusts which are required to distribute all income currently, and their beneficiaries). Treas. Reg. § 1.661(a)-2(b) (1960). Regulations to Section 651 indicate that the determination of whether trust income is required to be distributed currently depends upon the terms of the trust instrument and the applicable local law. Treas. Reg. § 1.651(a)-2(b) (1960). Since Sections 661(a) (1) and (a) (2) and Sections 662(a) (1) and (a) (2) are respectively in pari materia, it is appropriate to consult state law and the terms of the will to determine under Sections 661(a) (2) and 662(a) (2) whether amounts are “required to be distributed.” Arguably, it follows that resort to state law and the terms of the will should be made in a determination of “properly paid or credited,” terms which are also in Sections 661(a) (2) and 662(a) (2) as coequal and closely related to “required to be distributed.”
Bohan is the first decision to hold that a conditional advance distribution is not an amount properly paid because a court may require it to be returned to meet estate obligations. The Eighth Circuit summarily approved the district court's reasoning that since the distribution was subject to recall it was not irrevocably and unconditionally placed at the disposal of the beneficiary, and hence was not "properly paid." Many of the cases cited by the district court as supporting this standard turned on whether a credit to the account of a beneficiary gave him rights sufficiently extensive to tax him on the amount of the funds so credited. In the situation presented by those cases, it was necessary to determine if the beneficiary had such economic use and benefit of the funds that it would be equitable to tax him. Since some person or entity had to be taxed on the estate's income, the question was who had control of the fund against which the tax was to be charged.

The above cases suggest several reasons why Bohan should have been decided in favor of the Commissioner. First, if control of the fund is the dispositive consideration, then when an estate actually distributes funds, the beneficiary has the use and benefit thereof so that it is appropriate for him to bear the burden of the tax. Second, and necessarily tied to the first, since the beneficiary has control over the distributed funds in fact, even though legally he may have to return them at some later date, he has a source for the payment of the tax. Third, the assertion that since the distributions are subject to recall the funds are not really within the control of the recipient is not justified by the realities of estate administration. When the time has passed for estate creditors to file claims, the debts, expenses and taxes of the estate can be reliably estimated, and the amount that can be distributed safely in advance of final settlement can be determined easily. Seldom will an executor make a distribution unless the possibility that the amounts so paid will be recalled is remote, since in most jurisdictions if an executor makes partial distributions in advance of final approval of his accounts, he becomes personally liable if the funds he retains

10. 456 F.2d at 852. See text accompanying notes 7-9 supra.
12. See cases cited in note 11 supra. See also C.R. Hubbard Estate, 41 B.T.A. 628 (1940).
prove insufficient to meet the estate's obligations.\textsuperscript{14} Recall is even less likely when partial payments must be approved by a court before being made\textsuperscript{15} or are in fact approved after payment.\textsuperscript{16} In addition, there is no indication that when beneficiaries receive partial estate distributions they do not exercise the normal incidents of ownership for fear of being required to return some part or all of such amount. Therefore, while an intermediate payment of a bequest or legacy may not be legally conclusive of the rights to such funds, there is no reason for the tax law to ignore the realities and cause tax results to vary because of remote contingencies.

The government further asserted on appeal that the amounts received by plaintiff from the estate were properly paid under section 662, and hence includible by her as income, because received under a claim of right.\textsuperscript{17} The court properly rejected the direct application of the doctrine as unwarranted by the facts since the taxpayer did not assert a superior right but instead acknowledged a possibility of recall by the estate.\textsuperscript{18} The court further noted that the claim of right invocation is merely a bootstrap argument by which the Government assumes the conclusion which is at issue here—namely, whether the distributions to the taxpayer were taxable to her as income.

\textsuperscript{14} See, e.g., Mo. Rev. Stat. § 473.613(2) (1949). See generally Harris v. United States, 370 F.2d 887 (4th Cir. 1966); Estate of Robert W. Harwood, 3 T.C. 1104 (1944). See also A.J. Casner, ESTATE PLANNING 167 (Supp. 1972) [hereinafter cited as CASNER].

\textsuperscript{15} A probate court in Missouri must approve any partial distributions prior to their payment. Mo. Rev. Stat. § 473.613 (1949). In Bohan, such an approval was obtained by plaintiff acting in her capacity as executrix. Bohan v. United States, 326 F. Supp. 1356, 1357 (W.D. Mo. 1971).

\textsuperscript{16} See Proctor v. White, 28 F. Supp. 161 (D. Mass. 1939). In Estate of Robert W. Harwood, 3 T.C. 1104 (1944), court approval of the executor's accounts or "the probability of such approval" was deemed a relevant factor in determining whether intermediate distributions were properly paid. Id. at 1107.

\textsuperscript{17} 456 F.2d at 852-53. The court considered the contention on its merits, even though it was not argued in the district court. Id.

\textsuperscript{18} 456 F.2d at 853. For the rule to apply, the taxpayer must have received income to which he asserts a claim of right superior to the rights of any other person, and without restriction as to its disposition, although his right to retain such income is disputed and he may subsequently have to return it. North American Oil v. Burnet, 286 U.S. 417 (1932). However, the claim of right doctrine, in application, has not always required the presence of all the theoretical elements. 2 MERTENS, supra note 6, § 12.103 at 420-21.

\textsuperscript{19} 456 F.2d at 853. The court further noted that the claim of
However, as a practical matter, there would appear to be no reason for treating the beneficiary of an advance distribution any differently than a taxpayer subject to the claim of right doctrine. As noted above,20 when all the parties conduct themselves as if the partial distribution gave the recipient absolute ownership of the funds paid, and the possibility of recall is negligible,21 it is proper that the beneficiary be required to pay an appropriate income tax with regard to the distribution. Then, if at some subsequent time repayment of the distributed sums is required, a readjustment of taxable income between the beneficiary and the estate for the prior tax year can be effected.22

One author has noted that if Bohan prevails, then:

In view of the fact that partial estate distributions in all states would be subject to recall if in excess of what the distributee is ultimately entitled to, the result of this case . . . would appear to force taxability of estate income to the estate until a definitive final distribution can be made.23

Prior to the year of termination of the estate, the partial distribution will not be deemed "properly paid" to the beneficiary because of the contingent claims of the estate. Therefore, the amount taxed to the beneficiary will not be determined by the amount of DNI in any year other than the estate's final tax year, and no tax consequences will arise until that year. Since the amount of a distribution taxed to a beneficiary is limited by the DNI of the estate's distribution year, these tax consequences can be minimized by minimizing DNI in the final year, either by deliberate timing of income items and deductions or by use of a short final year.

Thus, Bohan introduces new possibilities for tax manipulation. Because of these possibilities the IRS has refused to acquiesce in Bohan and will continue to litigate in similar fact situations.24

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right doctrine:
is used to determine when income is taxable rather than whether a receipt is taxable income, and if so, to whom it is taxable.

Id. See generally 2 MERTENS, supra note 6, § 12.103.
20. See text accompanying notes 13-16 supra.
22. Professor Casner considers this the sounder view "in light of the structure of the Code." CASNER, supra note 14, at 167. Where the claim of right doctrine applies, the adjustment is accomplished under the procedures of I.R.C. § 1341.
23. CASNER, supra note 14, at 167.
24. See note 3 supra.
Taxation: Loss Deduction Disallowed Where Demolition Permitted in Lease

Plaintiff-taxpayer attempted to lease property to a municipal parking authority for a monthly rental of $500, but the negotiations broke down when she refused to agree to demolition of a building on the property. Subsequently, the property was leased to a bank for a monthly rental of $750 with a clause permitting the lessee to demolish the building. The bank exercised the right to demolish and subsequently made improvements which, under the terms of the lease, were to become the property of the lessor upon termination of the lease. Plaintiff sought a loss deduction for the adjusted basis of the building in the year of demolition and sued for a refund after paying the full tax when the IRS denied the loss. In reversing the district court, the Eighth Circuit held that where the demolition is "wanted, needed, or called for" in the lease, and particularly where a portion of the rent is apparently intended to compensate the lessor for such demolition, no loss deduction is allowed. Foltz v. United States, 458 F.2d 600 (8th Cir. 1972).

Section 165(a) of the Internal Revenue Code of 1954 allows a deduction for "any loss sustained during the taxable year and not compensated for by insurance or otherwise." A regulation proposed initially under this section disallowed the deduction in cases of demolition of structures "pursuant to the terms of a lease." As finally promulgated, however, Treasury Regulation section 1.165-3(b)(2) disallowed the deduction only in cases where the demolition occurred "pursuant to the requirements of a lease or the requirements of an agreement which resulted in a lease." The predictable result of this wording was that taxpayers invariably used permissive demolition clauses and claimed the deduction by arguing that the demolition was not pursuant to the "requirements" of the lease.

One of the first cases to test such a clause was Feldman v. Wood. There the buildings were demolished several years after the commencement of the lease term pursuant to a clause in the lease which gave the lessee the right to do so. In allowing the deduction, the court reasoned that since the property de-

2. Treas. Reg. § 1.165-3(b)(2).
3. 335 F.2d 264 (9th Cir. 1964).
molished had been used by the taxpayer either in his trade or business or for the production of income, the destruction necessarily resulted in a deductible loss. Moreover, the court suggested, the taxpayer had complied with the language of the Commissioner's own regulation so he was entitled to the deduction. Despite the language of the regulation, however, the Commissioner continued to contest such loss deductions.

In Holder v. United States, the Fifth Circuit disallowed a similar deduction claimed by the taxpayer. In Holder, the parties stipulated that at the time of the execution of the lease the lessee had no definite plans to demolish the buildings. Moreover, the terms of the lease were permissive as to demolition, rather than mandatory. On the other hand, the lease provided that if the lessee exercised his right to demolish the existing structure, it would have to erect a replacement meeting certain specifications. The court reasoned that since the lease provided a compensatory quid pro quo for demolition, the taxpayer suffered no loss under section 165. It was therefore unnecessary, the court said, to discuss either Feldman or the language of the regulation. The Fifth Circuit later allowed the deduction in a case where the lessor was not clearly compensated for the loss of the building.

Finally, in Landerman v. Commissioner, the Seventh Circuit disallowed a deduction where the building was destroyed pursuant to a permissive clause. The court attempted to avoid Feldman by construing the word "requirements" in the regulation to mean "wanted, needed, or called for," thus bringing the situation within the prohibition of the regulation. This interpretation probably was not intended by the draftsmen since the regulation as originally proposed had been amended to include the word "requirements." More persuasively, the court reasoned that the dispositive question regarding deductibility is not whether the clause is mandatory or permissive, but, rather, whether the parties intended to raze the existing structure at the time the lease was signed. Since the lower court had found that demolition was an underlying condition of the lease, the court concluded that the deduction should be disallowed.

In a sense, Foltz presented a more difficult case than had been encountered in the earlier decisions. Unlike Holder, the lease ostensibly provided the lessor no additional benefits in the

4. 444 F.2d 1297 (5th Cir. 1971).
6. 454 F.2d 338 (7th Cir. 1971).
7. 54 T.C. 1042 (1970).
event of demolition. Moreover, the trial court had found that "neither party . . . intended or contemplated that the office building would necessarily be demolished," and thus the court could not use the Landerman reasoning that a loss is inappropriate where demolition is an underlying condition of the lease.

Nevertheless, the court disallowed the deduction. It relied initially on the Landerman argument that Treasury Regulation section 1.165-3(b)(2) disallowed the deduction where the demolition was merely "wanted, needed, or called for" in the lease. More realistically, however, it denied the deduction because the general statutory prerequisite of an uncompensated loss had not been proved. This conclusion was supported, in the court's view, by the fact that whereas the taxpayer had refused to include a demolition clause with rentals of $500 per month, she had agreed to such a clause in a lease requiring monthly rentals of $750. This increase in rent, the court concluded, represented compensation for the possibility of demolition. In this respect, the court's analysis was similar to that of the Holder court, except that the compensation for demolition to the Foltz lessor was not explicitly denominated as such in the lease, but was instead inferred from the circumstances by the court.

Analytically, at least, the deduction should have been disallowed in all of these cases. Despite the contrary inference that arises from the use of the word "requirements" in Treasury Regulation section 1.165-3(b)(2), the question is not whether the demolition was required or merely permitted by the lease. Rather, the dispositive consideration is whether the parties intended to permit or require the demolition during the tenancy. If so, the lessor was presumably compensated, by higher rentals, by the right to improvements at the termination of the lease, or otherwise. In such a situation, no loss has been suffered. Where, on the other hand, demolition is not contemplated at the time of the execution of the lease, an immediate deduction of the undepreciated value of the building is appropriate. In such case, no benefit to the lessor stipulated in the lease is attributable to the lessor's relinquishment of his right to receive the building at the end of the term. Thus the demolition is uncompensated and a loss deduction is proper.

Authority for this analysis is found in Treasury Regulations sections 1.165-3(a) and (b). Under Treasury Regulation section 1.165-3(a)(1), if the purchase of realty in the course of a trade or business or for profit is made with the intention of demolishing existing structures, no deduction is allowed on account
of the demolition, and the entire basis of the property is allo-
cated to the land, except that some basis may be allocated to
buildings which will be used prior to demolition. On the other
hand, the adjusted basis of property demolished pursuant to a
plan formed subsequent to the acquisition of the building is al-
lowed as a loss. By analogy, therefore, the intention to demolish
at the time of the execution of a lease should be dispositive of
the question whether a loss deduction is allowable to a lessor
under section 165(a).

Furthermore, if this analysis represents a proper resolution
of the question, then Treasury Regulation section 1.165-3(b)(2)
need not be read as conclusively authorizing a deduction where
the demolition was not strictly required by the terms of the lease,
despite the expressio unius, exclusio alterius interpretation of
the regulation given by the Feldman court.8 That is, since sec-
tion 1.165-3(b)(1) allows the deduction when the plan of demoli-
tion is formed subsequent to the acquisition, section 1.165-3(b)(2)
need not be read to allow the deduction where, although the lease
is merely permissive in terms, the actual decision to permit the
demolition occurs prior to the execution thereof. Under this in-
terpretation, the deduction is disallowed both in cases where the
lease specifically requires demolition and in other cases where
the intention to permit demolition existed prior to the transfer
of the property. Although this interpretation of the regulations
is far from obvious, it is less tortured than the Landerman con-
struction of the word “requirements”9 and more consistent with
the statutory requirement of an uncompensated loss.

To obviate further problems in this area the Commissioner
has proposed to clarify the existing regulation by amending it to
deny the deduction where a building demolition is “required or
permitted by a lease or by an agreement which resulted in a
lease.”10 Since regulations are upheld unless unreasonable or
plainly inconsistent with the statute, the amendment would ap-
pear to be not only valid but dispositive of the issue. Neverthe-
less, promulgation of the amendment would not obviate the need
for a resolution of the conflict among the Circuits by the Su-
preme Court, since even if the regulation is limited to prospec-
tive effectiveness, taxpayers can reasonably argue that reliance
on the preclarification wording requires that their claimed de-
ductions be allowed.

8. See text following note 3 supra.
9. See text following note 6 supra.