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Antitrust and Patents: Government's Standing to Challenge Patents in Antitrust Actions Extended

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CASE COMMENTS

Antitrust and Patents: Government's Standing to Challenge Patents in Antitrust Actions Extended

Appellees, two British drug manufacturers and distributors, pooled their bulk and dosage form patents on the fungicide griseofulvin¹ and sublicensed three firms in the United States to practice the patents.² The pooling agreement contained a restrictive covenant which regulated the sales of griseofulvin in bulk form. The sublicensing agreements prohibited bulk sales or resales to third parties without the express consent of appellees. The United States sued to enjoin compliance with the patent pooling and sublicensing agreements as violations of section one of the Sherman Act³ and sought, as further relief, mandatory bulk form sales and compulsory licensing of the patents. In addition, the government attacked the validity of the dosage form patents. The district court held that the restrictions on bulk form sales of griseofulvin in the patent pooling and sublicensing agreements were per se violations of section one and enjoined their further use.⁴ However, the court denied the request for additional relief and held that the government did not have standing to challenge the validity of the patents since they were not relied upon as a defense to the antitrust action. On appeal the Supreme Court reversed the lower court's ruling on the patent validity issue, *holding* that where patents are directly involved in antitrust violations and the government presents a substantial case for relief in the form of modification of patent rights, the government has standing to challenge the validity of the patents even though they were not relied upon as a defense. The case was remanded to the lower court to consider the valid-

1. The specific patents at issue were the two patents held by appellees on the dosage form of griseofulvin, a drug administered to humans or animals for the treatment of external fungus infections. Imperial Chemical Industries Ltd. (ICI) holds a patent which covers "an effective amount of griseofulvin" in dosage form. Glaxo Group Ltd. (Glaxo) holds another patent which covers the finely ground or microsize dosage form of griseofulvin.

2. ICI sublicensed American Home Products Corp., and Glaxo sublicensed two companies, Schering Corp. and Johnson & Johnson.

3. 15 U.S.C. § 1 (1970).

4. *United States v. Glaxo Group Ltd.*, 302 F. Supp. 1 (D.D.C. 1969).

ity of the patents. *United States v. Glaxo Group Ltd.*, 410 U.S. 52 (1973).

Prior to *Glaxo* the government's standing to challenge a patent's validity was restricted to situations involving either fraud in procurement or an antitrust action in which the patent was asserted as a defense. Although Title 35⁵ does not specifically charge the government with the responsibility for challenging invalid patents, the Attorney General as head of the Justice Department has historically been held to be the protector of the public even in the absence of statutory mandates.⁶ The government's role in connection with fraudulently procured patents was first discussed in *Mowry v. Whitney*⁷ where dicta suggested that the government had standing to challenge patents procured by fraud. However, in the government's first attempt to cancel a fraudulently procured patent, *Attorney General ex rel. Hecker v. Rumford Chemical Works*,⁸ the court found the attack on the patent to be inappropriate because the Attorney General was not the proper party to such a suit. In dicta the

5. 35 U.S.C. § 1 *et seq.* (1970).

6. The power and duty of the Attorney General to institute suits in the public interest was established in *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-79 (1888), where the Court observed that:

There is no very specific statement of the general duties of the Attorney General, but it is seen from the whole chapter referred to [presently, 28 U.S.C. §§ 501-26 (1970)] that he has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States There is no express authority vested in him to authorize suits to be brought against the debtors of the government, or upon bonds, or to begin criminal prosecutions, or to institute proceedings in any of the numerous cases in which the United States is plaintiff; and yet he is invested with the general superintendence of all such suits And notwithstanding the want of any specific authority . . . we cannot believe that where a case exists in which this ought to be done it is not within the authority of that officer to cause such action to be instituted and prosecuted.

This decision was later relied upon in *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925), an action to enjoin diversion of water from Lake Michigan. The Court held that the Attorney General had the power to proceed "by virtue of his office." No statute was necessary to authorize the suit.

More recently, the Court has reached similar conclusions in *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), where the Court upheld the right of the Attorney General to seek an injunction against the filling of a navigable waterway, and in *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967), where the Court upheld the government's right to seek an injunction requiring removal of a sunken barge as an obstruction to navigation in the absence of specific congressional authorization.

7. 81 U.S. (14 Wall.) 434 (1871).

8. 32 F. 608 (C.C.D.R.I. 1876).

court strongly suggested that the government lacked any standing to file the suit. The issue reappeared in *United States v. Gunning*⁹ where the defendants demurred to the complaint, arguing that the government lacked any statutory authority to challenge a patent for fraud in procurement. The *Gunning* court, however, rejected the reasoning of *Hecker* and held that the government could sue in equity to cancel the patent.

Shortly thereafter, the United States Supreme Court reaffirmed the government's standing in a series of three decisions resulting from suits by the Justice Department against American Bell Telephone to set aside patents allegedly obtained by fraud on the Patent Office. In *Bell I*¹⁰ the Court relied on a series of land grant cases in holding that the government had standing to attack invention patents as well as land patents on the ground that they were obtained by fraud on the Patent Office. This holding was extended in *Bell II* to cases where the officials "may have erred as to their power or made mistakes in the instrument."¹¹ In *Bell III* the Court appeared to narrow the holdings of *Bell I* and *II* by ruling that the government could not sue to cancel patents for mere "error of judgment on the part of patent officials."¹² However, *Bell III* did not affect the government's standing to attack patents obtained by fraud. When a patent is obtained by deceiving the Patent Office as to the state of prior art or prior use or sale, the public is deprived of free access to a product which rightly belongs in the public domain.

In *United States v. United States Gypsum Co.*¹³ the government's standing to challenge a patent's validity was extended to a second situation. In *Gypsum* the Court held that the government had standing to allege patent invalidity as part of an anti-trust suit in which the patent was asserted as a defense, regardless of whether fraud in procurement was an issue. In arriving at its decision, the Court avoided the necessity of specifically overruling *Bell III* by carefully distinguishing the assertion of patent invalidity in *Gypsum* from an attempt to cancel a patent which *Bell III* had forbidden in cases lacking fraud in procurement.¹⁴ However, because in most cases the collateral estoppel

9. 18 F. 511 (C.C.S.D.N.Y. 1883).

10. *United States v. American Bell Tel. Co.*, 128 U.S. 315 (1888).

11. *United States v. American Bell Tel. Co.*, 159 U.S. 548, 555 (1895).

12. *United States v. American Bell Tel. Co.*, 167 U.S. 224, 269 (1897).

13. 333 U.S. 364 (1948).

14. *Id.* at 387. In making the distinction between invalidity and cancellation, the Court noted that:

effect of a finding of invalidity is functionally the same as cancellation, this distinction is of little practical significance.¹⁵

Glaxo effectively expands the *Gypsum* standing concept by eliminating a procedural barrier to the government's patent challenge in the antitrust context. Prior to *Glaxo* the defendant was able to choose whether to submit his patent to challenge by deciding whether to use it as a defense to the antitrust complaint. After *Glaxo* the decision is no longer the defendant's. The government may now elect to attack the validity of a patent if it is sufficiently related to an antitrust violation without waiting for it to be asserted as a defense.¹⁶

Unlike the situation in the instant case, most challenges to invalid patents have occurred in private litigation. As a result, the Court's concepts of patent policy have been developed primarily in this latter context. The right of the defendant in an infringement suit to attack the validity of the patent is well established.¹⁷ More recently, the Court abandoned the doctrine established in *Automatic Radio Mfg. Co. v. Hazeltine Research Inc.*¹⁸ that a licensee was estopped from challenging the validity of the patent he was licensed to practice. Cases following *Haz-*

The United States does not claim that the patents are invalid because they have been employed in violation of the Sherman Act and that a decree should issue canceling the patents; rather the government charges that the defendants have violated the Sherman Act because they granted licenses under patents which in fact were invalid. If the government were to succeed in showing that the patents were in fact invalid, such a finding would not in itself result in a judgment for cancellation of the patents.

15. Subsequent to *Blonder-Tongue Labs., Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971), a patent which has been held invalid is essentially worthless.

16. The Court in *Glaxo* makes no direct mention of the distinction between invalidity and cancellation. Inasmuch as the government only attacked the validity of the patents and did not seek cancellation, this essentially meaningless distinction apparently survives. See note 15 *supra* and accompanying text.

17. The courts generally recognize that an invalid patent cannot be infringed. *Bendix Corp. v. Balax, Inc.*, 421 F.2d 809, 816 (7th Cir.), *cert. denied*, 399 U.S. 911 (1970); *General Mills, Inc. v. Pillsbury Co.*, 378 F.2d 666, 671 (8th Cir. 1967); *Zero Mfg. Co. v. Mississippi Milk Producers Ass'n*, 358 F.2d 853, 854 (5th Cir.), *cert. denied*, 385 U.S. 841 (1966); *Ditto, Inc. v. Minnesota Mining & Mfg. Co.*, 336 F.2d 67, 69 (8th Cir. 1964); *Tinnerman Prods., Inc. v. George K. Garrett Co.*, 292 F.2d 137, 140 (3rd Cir.), *cert. denied*, 368 U.S. 833 (1961). When the patent is found to be invalid, the question of infringement becomes moot. Cf. *Flakice Corp. v. Liquid Freeze Corp.*, 130 F. Supp. 471 (N.D. Cal. 1955). Therefore the court must address itself to the defense of patent invalidity before dealing with the question of infringement.

18. 339 U.S. 827 (1950).

eltine had eroded the estoppel rule by finding exceptions to it while emphasizing the overriding importance of competition in ideas which do not merit patent protection.¹⁹ Finally, the Court specifically overruled *Hazeltine* in *Lear, Inc. v. Adkins*,²⁰ a decision which expressed the Court's broader concern with the impact of patent policy on competition.²¹ The public interest in competition recognized in these decisions was viewed by the Court in *Glaxo* as "sufficient authority for permitting the Government to raise and litigate the validity of the ICI-Glaxo patents in this antitrust case."²²

By making an additional group of patents susceptible to challenge, *Glaxo* reaffirms the public interest in freeing the economy from invalid patents and facilitates the implementation of this goal. This effect is especially important in those cases where reliance on private litigation alone to monitor the Patent Office may preclude challenges to patents involving products that do not warrant the financial risks of protracted litigation.²³ The

19. See, e.g., *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). The estoppel rule had originally been established in *Kinsman v. Parkhurst*, 59 U.S. (18 How.) 289 (1856), but had been eroded in a similar manner by subsequent cases until reaffirmed in *Hazeltine*.

20. 395 U.S. 653, 671 (1969).

21. The policies underlying both antitrust and patent law are based on a desire to reap economic benefits for society through the promotion of competition. *United States v. Parker-Rust-Proof Co.*, 61 F. Supp. 805 (E.D. Mich. 1945). While antitrust law works to promote competition by eliminating unreasonable restraints on interstate commerce, thereby affording more people an opportunity to supply goods and services, patent law encourages competition in the arts and sciences by providing incentive to invent and develop new products and processes. This latter function is accomplished by granting a 17-year monopoly to the patentee after he has complied with the requirements of Title 35. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). Because such grants work as an exception to the general rule against monopolies, the courts do not recognize patents that are not warranted by strict compliance with Title 35 and the policies which underlie it. *Sears, Roebuck & Co. v. Stiffel*, 376 U.S. 225 (1964). This bias is reinforced by the fact that a patent can create a residue of market power in the patentee which affects its industry long after the monopoly grant has expired. The problem is aggravated by administrative policies which favor granting of patents. *A Reconsideration of the Patent System as a Problem of Administrative Law*, 55 HARV. L. REV. 950 (1942). In fact, this is due to the Patent Office's inability to adequately research each patent because of budgetary constraints. See note 44 *infra*.

22. 410 U.S. at 58 (1973).

23. *Glaxo* serves as a good example of this type of case. Although the sales total of griseofulvin in the United States for 1956-1967 was well above 15 million dollars, this was not adequate to induce the lower priced generic or private label drug houses to challenge either the

case also demonstrates the importance of a civil antitrust suit which results in a more competitive market structure. As was stated in *International Salt Co. v. United States*:²⁴

In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively *pry open to competition* a market that has been closed by defendant's illegal restraints.²⁵

In addition, *Glaxo* has the deterrent effect of encouraging companies that are practicing marginally valid patents to avoid antitrust violations which could result in invalidation of their patents.

At the same time, however, the possibility of *Glaxo* having an adverse economic effect should also be taken into account. To some extent research and development is supported by the ability of a firm to write off these expenses against the monopoly profits subsequently derived from the patent grants which result from the research. If, as a result of *Glaxo*, a firm anticipates a decrease in the profitability of patent grants, it may reduce the number of marginally patentable projects which it will undertake. To the extent that such research is eliminated, certain products will be either delayed in their development or withdrawn from consideration entirely. In this manner, *Glaxo* may actually hinder "the Progress of Science and useful Arts."²⁶

Although on balance the decision in *Glaxo* finds strong support in the policies underlying both patent and antitrust law, there remains a definitional problem concerning the limits of the government's standing to challenge patents. The threshold criterion for standing pursuant to *Glaxo* is the existence of an antitrust suit in which a violation has been found. To satisfy the second criterion of providing "the appropriate predicate"²⁷

trade arrangements or the validity of the dosage patents. However, the savings to consumers could have been substantial if generic houses had been in competition with the brand name licensees. As Harold Snyder, President of Biocraft Laboratories, Inc., pointed out in his affidavit of Dec. 14, 1970, "in order to induce the retail druggist to carry a generic product of this type, he [the wholesale dealer] would have to quote the druggist a price no more than two-thirds of the price of the equivalent brand-name product." Appendix of Brief for Appellant at 220, *United States v. Glaxo Group Ltd.*, 410 U.S. 52 (1973). This allows the druggist to make as much or more profit from the generically labeled product while at the same time passing enough of a savings along to the customer to induce the purchase.

24. 332 U.S. 392 (1947).

25. *Id.* at 401 (emphasis added).

26. U.S. CONST. art. I, § 8. Of course, this primary goal of patent policy assumes patent validity.

27. 410 U.S. at 60.

for a consideration of its challenge to the validity of a patent, the government must present a substantial case for further relief which usually takes the form of a demand for patent modification such as mandatory sales or licensing.²⁸ However, other than denying that the government now has "a roving commission to question the validity of any patent lurking in the background of an antitrust case,"²⁹ the Court failed to define precisely the role which the patent must play in the violation to render it susceptible to challenge. Hence this role is subject to at least two distinct interpretations.

The first interpretation is that the patent must be the sine qua non of the violation. In stating that the patents "gave the appellees the economic leverage with which to insist upon and enforce bulk-sales restrictions imposed on the licensees"³⁰ and were "intimately associated with and contributed to effectuating"³¹ the violation, the Court found what could be termed a direct relationship between the patents and the violation. The Court thus appeared to have established the second criterion as the equivalent of an antitrust violation involving patent misuse. A patent is misused whenever the patentee or his licensee extends the patent monopoly beyond the scope permitted by the Constitution and the Congress.³² The test for patent misuse as established in *United States Plywood Corp. v. General Plywood Corp.* is whether the patent "is being employed for leverage to sell either other patents or other unpatented goods and services."³³ The Court's focus in *Glaxo* on the use of the patents for economic leverage indicates that it viewed the violation as involving patent misuse. Yet no specific mention was made of this concept. Instead, when the Court defined the second criterion, it relied on a series of cases which, although arguably involving patent misuse, have only a government request for patent modification in common.³⁴ Nevertheless, *Glaxo* can be interpreted as allowing

28. As used in this context "patent modification" indicates a change in the patentee's rights with respect to the patent, not a change in the patent itself.

29. 410 U.S. at 59.

30. *Id.* at 60-61.

31. *Id.* at 62.

32. *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488 (1942).

33. 370 F.2d 500, 507 (6th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967).

34. *Besser Mfg. Co. v. United States*, 343 U.S. 444 (1952); *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945).

a patent challenge only if the violation would not have occurred "but for" the patent.

A second and broader interpretation of *Glaxo* is, however, possible. By relating the government's standing to challenge patents to the presentation of a substantial case for patent modification, the Court left open the possibility of a patent challenge where invalidation would result in increased competition in the relevant market even though the patent is not the direct cause of the violation. *United States v. United Shoe Machinery Corp.*³⁵ may serve as an example of such a situation. There the court found defendants guilty of violating section two of the Sherman Act³⁶ and ordered mandatory licensing of United's patents. United's market control was found to be due to three factors: its original constitution, its superior product and, most importantly, its leasing arrangements and other business practices.³⁷ Thus, no patent misuse was involved because United's market control was found not to be the result of its patents. As the court specifically noted, "[United] is being required to reduce the monopoly power it has, not as a result of patents, but as a result of business practices."³⁸ Nevertheless, patent modification in the form of reasonable royalty licensing of the patents to other shoe machinery manufacturers and suppliers was ordered. It can be argued, of course, that the patents in such a situation are merely "lurking in the background" of the anti-trust violation and are thus not susceptible to challenge.³⁹ Yet in light of the Court's reliance in *Glaxo* on patent modification cases,⁴⁰ the possibility remains that a more attenuated relationship between the patents and the violation is sufficient to meet the second criterion.

Thus, future courts are apparently left with a choice between at least two distinct interpretations in determining when a patent is amendable to challenge. It is clear, however, that the policy of freeing the economy from invalid patents recognized in *Glaxo*⁴¹ favors the broader interpretation of a patent's necessary relation to the violation. By allowing the government

35. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

36. 15 U.S.C. § 2 (1970).

37. 110 F. Supp. at 297.

38. *Id.* at 351. See generally C. KAYSER, UNITED STATES V. UNITED SHOE MACHINERY CORP.: AN ECONOMIC ANALYSIS OF AN ANTI-TRUST CASE (1956).

39. See text accompanying note 29 *supra*.

40. See note 34 *supra* and accompanying text.

41. 410 U.S. at 57-58. See text accompanying note 22 *supra*.

to present only a substantial case for patent modification without showing the patent to be the direct cause of the violation, this interpretation supports an expanded scope of the government's standing to challenge patents and thereby more effectively promotes the recognized public interest.

If the United States is to continue to rely on a free market economy to reach its economic goals, it will be necessary to vigorously implement the policies which underlie our antitrust laws. "[T]he strong federal policy favoring free competition in ideas which do not merit patent protection" is one of the most important of these policies.⁴² Congress considered patent reform in its last session but has not yet acted.⁴³ If Congress takes the initiative to pass and adequately fund the needed reforms,⁴⁴ the Court may not need to further extend the government's standing to challenge patents because a comprehensive reform should result in the issuance of patents which more closely approximate the courts' standard of patentability.⁴⁵ Until such time, however, the courts should recognize that even without a specific congressional mandate the government has standing to protect the public interest expressed in the existing laws against unwarranted restraints of trade.⁴⁶

42. *Lear, Inc. v. Adkins*, 395 U.S. 653, 656 (1969).

43. S.1321, 93d Cong., 1st Sess. (1973). See note 44 *infra*.

44. Like any other administrative agency, the Patent Office is limited in its ability to perform its functions by the funding Congress appropriates. Presently, approximately 90,000-100,000 patent applications are filed each year. In order to keep the backlog of applications from growing, the Patent Office must process an equal number of applications. As Senator Hart observed recently when he introduced his patent reform bill, "[u]nder the present system, the average patent receives a total of about 15 hours of review." 119 Cong. Rec. S5378-79 (daily ed. Mar. 22, 1973). A look at the patent mortality rate in the courts indicates that substantially more time should be spent in examining applications. See note 45 *infra*. Much of this additional time would be spent to more carefully discover the state of pertinent prior art which bears on the uniqueness of the applicant's product.

45. The Patent Office is presently issuing many patents that the courts are unwilling to uphold. A recently published study of patents in the Circuit Courts of Appeal and Court of Claims by Horn and Epstein revealed that less than 40 percent of the patents litigated in those courts from 1961-1970 were upheld. Horn & Epstein, *Federal Courts' View of Patents—A Different View*, 55 J. PAT. OFF. SOC'Y 134 (1973).

46. A contrary conclusion can be based on the supposed superior expertise of the Patent Office in the granting of patents. See Sutton, *Glaxo: The New Role for the Justice Department*, 55 J. PAT. OFF. SOC'Y 478 (1973). Apart from policy considerations, such a conclusion ignores the Patent Office's apparent inability to adequately research patent applications as demonstrated by the courts' unwillingness to uphold many patents. See notes 44 and 45 *supra*.

Copyrights: States Allowed to Protect Works Not Copyrightable Under Federal Law

Appellants Goldstein, Koven and Koven pleaded *nolo contendere* to 10 counts of violating California Penal Code section 653h which prohibits the unauthorized duplication of sound recordings for commercial purposes.¹ On appeal they challenged the validity of the California statute² as being in conflict with both the copyright clause of the Constitution³ and the Federal Copyright Act.⁴ The Appellate Department of the Superior

1. Appellants Goldstein, Koven and Koven engaged in the unauthorized duplication of recorded performances of major musical artists, a practice commonly referred to as "record piracy." Appellants purchased single phonograph records or tapes of popular performances from retail distributors. The phonograph records or tapes were then used to manufacture duplicates on blank tapes for distribution and sale. Since appellants had a minimum initial investment and low recording costs, their tapes sold for less than the authorized sound recordings.

The economics of the recording industry are such that the authorized manufacturers of a sound recording undergo a substantial initial investment. For example, in *Tape Indus. Ass'n of America v. Younger*, 316 F. Supp. 340 (C.D. Calif. 1970), the controller of Warner Bros. Records testified that financial arrangements for the album "The Association" cost \$71,000 which included musicians' and arrangers' salaries and studio charges. In addition, \$88,000 was paid to the performing artists as well as \$12,000 to the American Federation of Musicians Pension and Trust Fund. Record pirates do not incur any of these costs. As a result of this cost differential, the pirates in *Capitol Records v. Greatest Records, Inc.*, 43 Misc. 2d 878, 252 N.Y.S.2d 553, (Sup. Ct. 1964), were able to duplicate Beatles records and sell the pirated recordings for \$2.99 while the authorized recordings sold for \$3.98.

2. California Penal Code section 653h provides that the unauthorized direct transference of sounds from one phonograph record or tape to blank phonograph records or tapes for commercial sale is a misdemeanor. The pertinent portion of section 653h provides:

- (a) Every person is guilty of a misdemeanor who:
- (1) Knowingly and willfully transfers or causes to be transferred any sounds recorded on a phonograph record, . . . tape, . . . or other article on which sounds are recorded, with intent to sell or cause to be sold, . . . such article on which such sounds are so transferred, without the consent of the owner.

CAL. PENAL CODE § 653h (West 1968).

3. The copyright clause provides protection to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. CONST. art. I, § 8, cl. 8.

4. 17 U.S.C. § 1 *et seq.* (1970). *Goldstein* discusses action of alleged record piracy arising prior to the adoption of the Sound Recording Amendment, section 5(n) of the Copyright Act. The question remained

Court of California upheld the validity of the statute. After granting certiorari the United States Supreme Court affirmed, *holding* that since neither the copyright clause of the United States Constitution nor the 1909 Federal Copyright Act established exclusive federal jurisdiction to grant copyright protection, states could exercise their residual power to protect sound recordings from record piracy. *Goldstein v. California*, 412 U.S. 546 (1973).

Since the copyright clause of the Constitution does not expressly grant exclusive jurisdiction to the federal government to "promote the progress of Science and useful Arts,"⁵ concurrent state and federal jurisdiction may be inferred.⁶ In implementing the constitutional mandate in the Copyright Act of 1909, Congress did not clearly indicate whether the Act was intended to preempt state action. However, the legislative history of the Act does not support federal preemption.⁷ Although sections 4 and 5 of the Act are ambiguous as to whether the states can protect categories of works not listed in section 5,⁸ section 2 of the Act

whether states could prohibit duplication of other works not specifically enumerated in section 5.

5. U.S. CONST. art. I, § 8, cl. 8.

6. This presumption is consonant with the rationale enunciated by Alexander Hamilton in *Federalist Paper No. 32* in construing the scope of state power. He stated:

[N]otwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the State to insert negative clauses prohibiting the exercise of them by the States.

THE FEDERALIST No. 32, at 210 (Arlington ed. 1966) (A. Hamilton). This rationale also seems to underlie the Court's construction of the copyright clause. See also *Kelly v. Washington*, 302 U.S. 1 (1937).

7. For a detailed discussion and analysis of the legislative history of the Copyright Act, see STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 86th Cong., 2d Sess., THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS, Study No. 26 (Comm. Print 1961) [hereinafter Study No. 26].

8. Section 4 provides: "The works for which copyright may be secured under this title shall include all the writings of an author." 17 U.S.C. § 4 (1970). Prior to the Sound Recording Amendment, section 5 provided:

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books . . .

(b) . . .

(m) Motion pictures other than photoplays.

The above specification shall not be held to limit the subject matter of copyright as defined in section 4 of this title. . . .

17 U.S.C. § 5 (1970) (emphasis added). Thus sections 4 and 5 did not indicate on their face whether Congress intended the enumeration of classes of copyrightable works in section 5 to be exclusive. However, the rules and regulations promulgated by the Register of Copyright pur-

supports the concurrent state and federal jurisdiction by conferring exclusive jurisdiction on the states to protect unpublished works at "common law or in equity."⁹

Since sound recordings were not included in section 5 until the adoption of section 5(n) as part of the Sound Recording Amendment of 1971,¹⁰ state and federal courts characterized them as being unpublished works protectible at common law. In order to justify the invocation of the state common law of copyright¹¹ or the common law unfair competition doctrine of misappropriation¹² to protect sound recordings from record piracy, courts concluded that sound recordings were not "copies" of copyrighted musical compositions¹³ and therefore constituted

suant to section 207 of the Copyright Act limit claims to copyright to the specific categories listed in section 5. See 37 C.F.R. § 202.3. Since sound recordings could not be characterized to fit into any of the 13 classes of writings, there was a question as to whether they were subject to federal protection.

9. 17 U.S.C. § 2 (1970).

10. 17 U.S.C. § 5(n) (Supp. I, 1972), amending 17 U.S.C. § 5 (1970).

11. A state common law copyright was available if a work met three conditions: (1) the expression of the work must be developed beyond the point of merely an abstract idea; (2) the work must be original with the author; and (3) the work must be unpublished. For an analysis of state common law copyright, see 1 NIMMER, ON COPYRIGHT, § 11.2 (1973 ed.).

12. An action for unfair competition was used to obtain civil remedies. Traditionally, three elements had to be established: (1) the plaintiff and the defendant must be engaged in competition with each other; (2) the defendant must have appropriated the plaintiff's product by acquiring the plaintiff's investment of skill, time and money which was embodied in it; and (3) the defendant must have fraudulently misrepresented that the appropriated product was the plaintiff's and thereby caused confusion as to its source.

However, in *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), the Supreme Court held that only misappropriation was necessary to assert a cause of action for unfair competition. The Court implied that misappropriation would include both the fraudulent misrepresentation of an appropriated work as the plaintiff's, as well as the wrongful acquisition of the plaintiff's work for sale and distribution without regard to the original source. The doctrine of misappropriation was first applied to sound recordings in *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Co.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), to enjoin piracy of operatic performances of the Metropolitan Opera by Wagner-Nichols Recorder Co. The Court held that Wagner-Nichols had misappropriated the investment of Capitol Records which had a contract to record opera performances of the Metropolitan Opera.

13. See *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1907), in which the plaintiff alleged that piano rolls were unauthorized copies of the recorded musical composition which was copyrighted pursuant to section 5(e) of the Copyright Act. The Supreme Court

a category of unpublished works. Furthermore, the courts held that the distribution and sale of sound recordings did not divest them of their common law protection.¹⁴

However, in 1964, two companion Supreme Court cases, *Sears, Roebuck & Co. v. Stiffel Co.*¹⁵ and *Compco Corp. v. Day-Brite Lighting, Inc.*,¹⁶ cast doubt on the validity of state common law protection of sound recordings. Both cases involved the duplication of inventions for which mechanical and design patents were invalidated. The Supreme Court held that states could not prevent "copying" of inventions that failed to meet federal patent standards by extending state protection under state unfair competition doctrines. The Court stated that the failure to meet federal patent standards negated the privilege of limited monopoly¹⁷ and allowed free public access to the products.¹⁸ Dicta in *Sears* and *Compco* indicated that this rationale also applied to uncopyrightable works.¹⁹ Despite this dicta, state and lower federal courts, with one exception,²⁰ did not apply the *Sears* and *Compco* doctrine to invalidate state common law protection of sound recordings. Instead, the "copying" in

held that mechanical reproductions such as piano rolls did not constitute "copies" that infringed the copyright privileges of the underlying musical composition.

14. See *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955) (a diversity action between two record companies over the distribution rights of certain records). In *Capitol Records*, the Court established that the sale of phonograph records did not constitute a publication. See also *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937), and *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926 (W.D.N.Y. 1912).

15. 376 U.S. 225 (1964).

16. 376 U.S. 234 (1964).

17. 35 U.S.C. § 154 (1970). A 17-year monopoly is granted to a patent holder.

18. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231-32 (1964).

19. *Id.* at 232. *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964).

Many commentators have suggested that *Sears* and *Compco* presented a theory of statutory preemption over state copyright protection. See Kurlantzick, *The Constitutionality of State Law Protection of Sound Recordings*, 5 CONN. L. REV. 204 (1972); Schrader, *Sound Recordings: Protection Under State Law and Under the Recent Amendment to the Copyright Code*, 14 ARIZ. L. REV. 689 (1972); Note, *The Sound Recording Act of 1971: An End to Piracy on the High Cs?*, 40 GEO. WASH. L. REV. 964 (1972).

20. *International Tape Mfrs' Ass'n v. Gerstein*, 344 F. Supp. 38 (S.D. Fla. 1972). Appellants successfully challenged the constitutionality of the Florida penal statute, FLA. STAT. § 543.041 (1972), which is similar to CAL. PENAL CODE § 653h (West 1968), as being in conflict with the Federal Copyright Act. The case arose under a fact situation similar to *Goldstein*.

Sears and *Compro* was distinguished from common law misappropriation. The courts held that copying was a process by which a "substantially identical" imitation of a product was independently developed by the copier.²¹ This was contrasted to misappropriation where an exact reproduction of a work was made by the odious act of stealing the actual investment of time, money, effort and skill embodied in the work.²² Underlying this rather strained distinction was a sense of injustice. The state and lower federal courts repeatedly maintained that the misappropriation of sound recordings under the *Sears* and *Compro* doctrine would sanction the theft of valuable and salable business assets²³ and would have the effect of discouraging sound recording manufacturers from expending money to search for and develop new sources of talent.²⁴

Goldstein has finally clarified the status of state protection by upholding the validity of state jurisdiction over writings not explicitly protected by the Copyright Act. The Court concluded that states were barred from protecting only those works specifically enumerated in section 5 of the Act. Since sound recordings fixed prior to February 15, 1972 were not so enumerated, the California statute was in conflict with neither the copyright clause nor the Federal Copyright Act.

Even after *Goldstein*, several problems remain with respect to the sound recording industry. First, the Court did not discuss the effect of state legislation which does not distinguish between piracy of sound recordings fixed prior to the effective date of the Sound Recordings Amendment and piracy of recordings fixed after that date. The language of *Goldstein* suggests that state prosecution of piracy of sound recordings fixed after February

21. 376 U.S. at 226.

22. For an excellent discussion of the copying—misappropriation dichotomy, see Note, *The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compro Pre-emption Doctrine*, 71 COLUM. L. REV. 1444 (1972).

23. See, e.g., *Tape Indus. Ass'ns of America v. Younger*, 316 F. Supp. 340 (C.D. Cal. 1970); *Liberty U/A, Inc. v. Eastern Tape Corp.*, 11 N.C. App. 20, 180 S.E.2d 414 (1971); *Capitol Records, Inc. v. Spies*, 130 Ill. App. 2d 429, 264 N.E.2d 874 (1970).

24. See cases cited in note 23 *supra*. However, in areas tangential to sound recordings, the state and lower federal courts have recognized the *Sears* and *Compro* doctrine as preempting state protection of uncopyrightable works. See, e.g., *Columbia Broadcasting Sys., Inc. v. DeCosta*, 377 F.2d 315 (1st Cir. 1967) (court held CBS did not copy plaintiff's public characterization of a Wild West personage in creating the show "Paladin"), and *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964) (community television receiving system did not appropriate television signals which were freely available to viewers).

15, 1972 would interfere with the congressional intent to limit the duration of copyright protection. Since the effect of most state anti-piracy statutes is not explicitly limited to sound recordings fixed prior to that date, they may be in conflict with the Copyright Act. If the state statutes are invalid, only state common law will be available to prevent record piracy of recordings fixed prior to the adoption of the Sound Recording Amendment.

Second, the question remains as to whether a sound recording re-released after February 15, 1972 constitutes a recording "fixed" subsequent to the effective date of the Sound Recording Amendment. Although the Court did not address this issue, presumably a re-release does not. The legislative history of the Sound Recording Amendment clearly indicates that Congress meant only to experiment with allowing sound recordings to be copyrighted. As adopted, the Amendment makes federal copyright protection available only to records fixed prior to January 1, 1975 and subsequent to February 15, 1972.²⁵ The House Judiciary Committee Report on the bill which became the Sound Recording Amendment states that the operative life of the Amendment was limited so that Congress would have the opportunity to reconsider alternative methods for resolving the problems of record piracy.²⁶ Thus, to allow recording manufacturers to copyright recordings fixed prior to February 15, 1972 merely by re-releasing them would frustrate the purpose of the effective date.

Although the holding in *Goldstein* directly affects only the validity of state protection of sound recordings, the broad policy issues discussed by the Court are important to other categories of works which are still not protected by section 5 of the Copyright Act. Prior to *Goldstein*, it was not clear whether *Sears* and *Compro* posited a doctrine of exclusive federal jurisdiction in the area of copyright law or whether it posited a narrower theory of statutory preemption that prohibited state protection only when state protection was in direct conflict with a specific provision of the Federal Copyright Act.²⁷ *Goldstein* suggests

25. Act of October 15, 1971, Pub. L. No. 92-140, § 3, 85 Stat. 391.

26. H.R. Rep. No. 487, 92d Cong., 1st Sess. 1-2 (1971).

27. *International Tape Mfrs.' Ass'n v. Gerstein*, 344 F. Supp. 38 (S.D. Fla. 1972). Most courts did not fully analyze the impact of the *Sears-Compro* preemption theory. See, e.g., *Tape Head Co. v. RCA Corp.*, 452 F.2d 816 (10th Cir. 1971) (court held that the Sound Recording Amendment was not retroactive and therefore did not preempt prior state common law protection of sound recordings); *Liberty U/A, Inc. v. Eastern Tape Corp.*, 11 N.C. App. 20, 180 S.E.2d 414 (1971) (court upheld prosecution of record piracy on the basis of misappropriation); *Capi-*

the latter and gives some evidence as to how the Supreme Court will approach state protection of other federally unprotected works.²⁸

First, in establishing the constitutionality of state power to grant copyright protection, the Court minimized the impact of state protection on interstate commerce. The Court stated that "a copyright granted by a particular state has effect only within its boundaries."²⁹ It implied that if the effect of a state granted copyright were so limited, the state interest in protecting a valuable industry and encouraging the dissemination of artistic works would supersede any burden imposed on interstate commerce. In reaching this conclusion, the Court seemed to rely on an analogy to state regulation of other areas of interstate commerce where, absent congressional action, the traditional test requires that the need for uniform national regulation be balanced against the state's local interest: "[I]f a case falls within an area of commerce thought to demand a uniform rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained."³⁰ However, in developing this local interest test to support state granted copyright, the Court focused on the subject matter of the unprotected work rather than on the nature of the industry which produced it.³¹ The Court hypothesized that some categories of works would appeal only to a limited local audience.³² This position disregards the fact that "copyright industries" as well as the industries of unprotected works are national in character and activity.³³ Even if the manufacturing process of an unprotected work is concentrated in one state, manufacturers will usually expect to distribute and sell their products in a national market. Furthermore, the technical advances in mass communication and means

tol Records, Inc. v. Spies, 130 Ill. App. 2d 429, 264 N.E.2d 874 (1970) (record piracy enjoined on the basis of misappropriation); Capitol Records v. Erickson, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1966) (in a fact situation similar to *Goldstein*, the court upheld the validity of a statutory violation using the rationale of misappropriation). Only in *International Tape Mfrs.' Ass'n v. Gerstein*, *supra*, did the court fully analyze the relationship between the copyright clause, the Copyright Act and the constitutionality of state copyright protection.

28. Examples of unprotected works include choreographic works, magnetic tapes and cable television.

29. 412 U.S. at 558.

30. *California v. Zook*, 336 U.S. 725, 728 (1948) (emphasis added).

31. 412 U.S. at 556-58.

32. *Id.*

33. 1 NIMMER, ON COPYRIGHT, § 9, at 27 (1963).

of distribution diminish the likelihood that an unprotected category of writing will appeal only to a local audience.

Second, the Court held that the "limited times" provision of the copyright clause is not applicable to state action.³⁴ The "limited times" provision was an attempt by the framers of the Constitution to limit the possibility that a national monopoly in copyrightable works would be created and at the same time to limit public access to the works in order to encourage creativity.³⁵ In construing the "limited times" provision to be applicable only to federal copyright protection, the Court assumed that because states could protect works only within their own boundaries, state copyright protection did not have a national effect.³⁶ However, the Court may have again overemphasized the allegedly local character of some copyrightable works and disregarded the fact that copyright industries are often national.³⁷ Since states are able to extend copyright protection for an unlimited time, public access to works which would eventually have become available under the Federal Copyright Act is permanently denied.

In validating state jurisdiction to grant copyright protection,

34. U.S. CONST. art. I, § 8, cl. 8.

35. Congress granted the copyright holder exclusive control of the right to "print, reprint, publish, copy and vend the copyrighted work . . . for 28 years." 17 U.S.C. §§ 1(a), 24 (1970).

36. 412 U.S. at 556, 558. See text accompanying note 26 *supra*.

37. For an analysis of the impact of state regulation of copyright on competition and the *Sears-Compco* doctrine, see Goldstein, *The Competitive Mandate: From Sears to Lear*, 59 CALIF. L. REV. 873 (1971). See generally 2 CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES, § 60 (3d ed. 1968).

The concentration ratios for the sound recording industry illustrate the potential for domination of a large national market by a small percentage of manufacturers of what, prior to the Sound Recording Amendment, was an unprotected work. In 1970, the four largest sound recording manufacturers controlled 62% of the market. The eight largest manufacturers controlled 73% of the market. The following table shows the trend of concentrating market power from 1947 to 1970:

Year	# Co.	Total Value (Millions)	% Controlled 4 Largest	% Controlled 8 Largest	% Controlled 20 Largest	% Controlled 50 Largest
1970	na	435.5	62	73	na	na
1967	306	276.4	58	67	81	92
1966	na	218.4	71	79	na	na
1963	128	180.2	69	75	85	94
1958	85	138.6	76	83	90	98
1954	135	84.7	70	80	88	na
1947	96	110.2	79	87	94	na

Data taken from the United States Bureau of Census, Annual Survey of Manufacturers, 1970, Value-of-Shipments Concentration Ratios, M70(AS)-9 (1972).

the Court in *Goldstein* acknowledged that the states can exercise jurisdiction over unprotected works with greater responsiveness and flexibility than the federal government. Although the Court discussed only state statutory protection, its reasoning inferentially validates state common law protection of federally unprotected works. Because Congress has dealt with copyright problems only sporadically,³⁸ the flexibility inherent in state common law remedies allows state courts to respond to problems arising from works that Congress did not anticipate.

However, the problems arising from congressional silence with respect to unprotected categories of works can better be solved by a comprehensive revision of the present copyright act.³⁹ Only Congress can alleviate problems arising from diverse state regulations by enacting uniform legislation that would more effectively deter piracy and thereby eliminate forum shopping for lenient laws.⁴⁰ But if Congress fails to revise the Copyright Act, *Goldstein* will at least allow states to afford some protection to categories of works omitted from section 5 of the Act.

38. Congress has only amended section 5 of the Copyright Act three times since its adoption in 1909: Once in 1912 to add section 5(l)-(m), once in 1939 to modify subsection K and once in 1971 to add section 5(n).

39. A general revision has been pending in Congress since 1967. In 1971, Senator McClellan introduced S.644 which raises possible solutions for unanticipated categories of works. Proposed section 102(a) would provide:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device

(emphasis added). This provision would alleviate the type of problem illustrated by *Goldstein*.

40. Presently, at least 11 states have enacted a variety of penal statutes which make the unauthorized manufacture or sale of sound recordings a crime. Comprehensive legislation would eliminate the range of penalties available under state statutes. See Kurlantzick, *The Constitutionality of State Law Protection of Sound Recordings*, 5 CONN. L. REV. 204, 297-98 (1972).

Criminal Procedure: Supreme Court Attempts to Clarify Limits of Entrapment Defense

Suspecting that the defendant and his confederates were engaging in the illegal manufacture and distribution of narcotics, an undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs approached him and offered to supply him with an essential ingredient in the manufacture of methamphetamine, a controlled substance, in exchange for one-half of the finished product. The defendant accepted the offer because the ingredient, phenyl-2-propanone, though not illegal in itself, was very difficult to obtain.¹ Although there was evidence that the defendant had previously and subsequently manufactured methamphetamine with phenyl-2-propanone obtained from other sources, defendant was indicted and convicted of manufacturing, processing, selling, and delivering methamphetamine manufactured with the phenyl-2-propanone supplied by the government agent.² The United States Court of Appeals for the Ninth Circuit reversed the conviction and dismissed the indictment, finding that the government's participation in the crime by supplying the essential ingredient for the manufacture of methamphetamine constituted entrapment as a matter of law.³ The United States Supreme Court reversed,⁴ *holding* that the actions of the government agent fell far short of violating the fundamental principles of due process. The Court also held that the

1. The only known use for phenyl-2-propanone is in the manufacture of methamphetamine. In response to the urging of the Bureau of Narcotics and Dangerous Drugs, many chemical distributors no longer sell the chemical. Further, it is necessary to obtain a manufacturer's license to buy phenyl-2-propanone. *United States v. Russell*, 459 F.2d 671, 672 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973). Many illegal manufacturers of methamphetamine are reluctant to buy phenyl-2-propanone from legitimate sources for fear that the retailers, being aware of the only use for the chemical, will inform government officials. Interview with illegal drug manufacturer and dealer in New York City, Aug., 1973.

2. See Act of July 15, 1965, Pub. L. No. 89-74, §§ 5, 511, 79 Stat. 226, 228, 232 (repealed 1970). The current statutory provisions governing controlled substances are found in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-966 (1970).

3. *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972).

4. Mr. Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger and Justices White, Blackmun and Powell joined. Mr. Justice Douglas filed a dissenting opinion in which Mr. Justice Brennan joined. Mr. Justice Stewart filed a dissenting opinion in which Justices Brennan and Marshall joined.

proper test for applying the entrapment defense was not satisfied because the facts of the case established that the defendant was predisposed to commit the crime. *United States v. Russell*, 411 U.S. 423 (1973).

Although the concept of entrapment is ancient, it was not mentioned in a federal criminal case until 1878,⁵ and was not used to acquit a defendant in a federal prosecution until 1915.⁶ However, following that decision and concomitant with the implementation of federal liquor and narcotics legislation, the defense was increasingly asserted.⁷

In 1932, the Supreme Court first gave entrapment careful consideration in *Sorrells v. United States*.⁸ The definition of entrapment associated with *Sorrells* was most clearly enunciated by Justice Roberts in his concurring opinion:

5. *United States v. Whittier*, 28 F. Cas. 591 (No. 16,688) (E.D. Mo. 1878) (decoy letters recognized as a proper detection technique). While recognized in earlier state court cases, the defense was looked upon with disfavor. See, e.g., *Comm'rs of Excise v. Backus*, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864), where the court stated:

[E]ven if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: "The serpent beguiled me and I did eat." That defendant was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment we pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will.

6. *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915) (defendant imported illegal aliens for labor at the urging of government agents).

7. See *O'Brien v. United States*, 51 F.2d 674, 678 n.1 (7th Cir. 1931); and Annot., 86 A.L.R. 263 (1933); Annot., 66 A.L.R. 478 (1930); Annot., 18 A.L.R. 146 (1922).

8. 287 U.S. 435 (1935). In *Sorrells*, a Prohibition agent, posing as a tourist and an old World War I army acquaintance, asked defendant to sell him some liquor. Although *Sorrells* initially refused, after an hour of talk and two more requests, he obtained some whiskey for the agent and was arrested. The trial court held that there was no entrapment as a matter of law and the court of appeals affirmed. *Sorrells v. United States*, 57 F.2d 973 (4th Cir. 1932). The Supreme Court reversed. A majority of five, in an opinion by Chief Justice Hughes, held that the issue should have been submitted to the jury. A minority, in an opinion by Justice Roberts, said that there was entrapment as a matter of law.

Prior to *Sorrells*, Justice Brandeis had advocated the defense in his dissent to *Casey v. United States*, 276 U.S. 413 (1928). Brandeis stated that:

[I]t does not follow that the court must suffer a detective-made criminal to be punished.

This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Govern-

Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.⁹

In the view of the majority, the focal point in determining whether the defense of entrapment should be available in a particular case was the determination of whether the intent to commit the crime originated in the mind of the defendant or that of a government agent. If the defendant were predisposed to commit the crime, he should not be allowed to raise the defense, which was intended for the protection of an "unwary innocent" lured into the act by an agent of the government. The minority argued that the proper focus should be on an examination of the behavior of the government agent rather than the defendant's predisposition.

The Court split along similar lines when it next dealt with the question in 1958 in *Sherman v. United States*.¹⁰ While the *Sorrells* Court had condemned improper solicitation of criminal activity by a government agent,¹¹ it had not adequately defined this concept. Consequently, vague instructions to the jury frequently resulted from the Court's suggestion that the entrapment defense would not be available where it appeared likely that the defendant would have committed the crime in the absence of solicitation.¹² The *Sherman* Court tried to clarify the concept by stating that:

Entrapment occurs only when the criminal conduct was "the product of the creative activity" of law enforcement officials [and that] . . . [t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.¹³

However, as evidenced by Justice Harlan's later attempt to restate the definition of entrapment in *Lopez v. United States*,¹⁴ the ambivalence inherent in the entrapment defense survived *Sherman*. Justice Harlan stated that:

[B]efore the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at

ment. To protect it from illegal conduct of its officers. To preserve the purity of its courts.
Id. at 423, 425 (dissenting opinion).

9. 287 U.S. at 454. The Court concluded that entrapment exists when the criminal design originates in the mind of the government agents and has been implanted in the mind of an innocent defendant in order to prosecute him. See generally Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942).

10. 356 U.S. 369 (1958).

11. 287 U.S. at 448.

12. *Id.* at 441.

13. 356 U.S. at 372 (emphasis in original).

14. 373 U.S. 427 (1963).

least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged.¹⁵

This test still offered a trial court no real guidance in differentiating between the government agent who induced an "unwary innocent" to commit a crime and the agent who merely provided the "unwary criminal" the opportunity to commit the crime he already desired to commit.¹⁶ As a result, many lower courts continued to hold that a defendant had been entrapped when they felt that justice had been perverted by the government's becoming too enmeshed in criminal activity.¹⁷

15. *Id.* at 434-35.

16. Abstractly, at least, the defense of entrapment as espoused by the majorities in *Sorrells* and *Sherman* has four constituent elements or conditions precedent to its invocation. First, the offense must be instigated by a government agent. There can be no entrapment if the defendant is induced to commit the crime by a private individual not working for or with the government, no matter how reprehensible the inducement. Second, the government agent must perform some act or acts constituting entrapment, though the ambit of these acts has not been established. Egregious fraud and trickery will be condemned as entrapment. *Sorrells v. United States*, 287 U.S. 435 (1932); *Sherman v. United States*, 356 U.S. 369 (1958); *U.S. v. McGrath*, 468 F.2d 1027 (7th Cir. 1972); *U.S. v. Gaines*, 353 F.2d 276 (6th Cir. 1965). Yet mere "stealth and stratagem" will generally be condoned. *Sherman v. United States*, *supra* at 372. Third, the inducement by the government agent must be the direct cause of the defendant's actions. If the inducement is not a *sine qua non* of the crime, the defendant cannot plead entrapment. *Lopez v. United States*, 373 U.S. 427 (1963); *Accardi v. United States*, 257 U.S. 168 (5th Cir. 1958). Fourth, the criminal intent must not arise in the mind of the defendant. *Sherman v. United States*, *supra*; *Sorrells v. United States*, *supra*; *Accardi v. United States*, *supra*; *Morei v. United States*, 127 F.2d 827 (6th Cir. 1942). The apparent order in these guidelines has proven to be deceptive, their vagueness lending them to great differences of interpretation by trial judges. The opinions in *Sorrells* and *Sherman* fail to describe exactly what constitutes sufficient entrapment, when a crime would not have been committed but for the entrapment, or how to determine in whose mind the criminal intent arose.

The MODEL PENAL CODE definition of entrapment is similarly ambiguous:

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962).

17. This, of course, was the position of the concurrences in *Sorrells* and *Sherman*. See *Greene v. United States*, 454 F.2d 783 (9th Cir. 1973)

The Court in *Russell* affirmed the view of entrapment espoused by the *Sorrells* and *Sherman* majorities in holding that the entrapment defense had been improperly broadened by the lower courts' tendency to interpret the defense as a means of controlling excessive police conduct.¹⁸ In reaching this result, the Court first rejected the contention that the defense of entrapment rests on the constitutional grounds that excessive government involvement in criminal activity violates fundamental principles of due process under the fifth and fourteenth amendments.¹⁹ The Court admitted that a situation might arise in which the particular facts would invoke a constitutional basis for a defense of entrapment,²⁰ but did not delineate what that situation might be. The Court also rejected as imperfect the analogy which the defendant attempted to draw between entrapment and the exclusionary rule as it is applied to illegal searches and seizures and confessions²¹ by pointing out that in the case of entrapment no independent constitutional right is violated.²²

In specifically declining both to broaden the non-constitutional basis of entrapment and to overrule its previous statements of the doctrine, the Court rejected the argument that the controlling issue should be the type and degree of government involvement rather than the defendant's predisposition. The

(supplying sugar, still, operator and acting as only buyer for bootlegger); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Calif. 1970) (sale of counterfeit money to defendant is entrapment even though the idea originated with the defendant); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971) (government agent sold drugs to defendant, who was arrested when he sold them to a second agent); *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972) (court held that offensiveness of police conduct can be independently measured, regardless of criminality of the defendant); *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972).

18. 411 U.S. at 435.

19. *Id.* at 430-31 (1973).

20. *Id.* at 431-32.

21. For a discussion of the exclusionary rule as applied to illegal searches and seizures, see, e.g., *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961). For the application of the rule to coerced confessions, see, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

22. The Court stated:

The analogy [between the exclusionary rule and entrapment] is imperfect in any event, for the principal reason behind the adoption of the exclusionary rule was the Government's "failure to observe its own laws." *Mapp v. Ohio*, [367 U.S.] at 659 the Government's conduct here violated no independent constitutional right of the respondent.

411 U.S. at 430.

Court noted that "[s]ince the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable."²³ It also pointed out that criticisms relating to the problems inherent in proving predisposition had already been raised unsuccessfully in both *Sorrells* and *Sherman*. Furthermore, the Court expressed concern for the needs of law enforcement and approved government involvement in criminal activity as a legitimate police technique,²⁴ especially in circumstances such as the illegal manufacture of drugs where it is difficult to obtain evidence by more conventional means. The Court also emphasized that since the defendant in *Russell* was able to obtain phenyl-2-propanone both before and after being supplied by the government agent, the government had only offered him an opportunity to commit a crime which he would have committed anyway.²⁵

Justice Stewart filed a strong dissent.²⁶ In it, he thoroughly examined whether Congress, in enacting laws making certain behavior illegal, intended that persons entrapped in the commission of an offense should be held to be outside the purview of the statute. He pointed out that the implied congressional intent rationale did not explain why only persons entrapped by a government agent, as opposed to a private individual, could assert the defense and concluded that since the defense was available only to a defendant entrapped by a government agent, the conduct of that agent was the only legitimate test for the defense.

23. 411 U.S. at 433 (footnote omitted).

The underlying policy basis or rationale for the entrapment defense espoused by the majorities in *Sorrells* and *Sherman* is essentially that Congress, in enacting the law making certain behavior illegal, did not intend that persons entrapped into the commission of the offense should be held to be within the purview of the statute. The *Sorrells* Court stated:

Fundamentally, the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose.

Sorrells v. United States, 287 U.S. 435, 452 (1935).

24. 411 U.S. at 432.

25. *Id.* at 431-32, 436. The Court made this finding despite the admission by the government agents themselves that phenyl-2-propanone is difficult to obtain, as well as the important fact that the indictments dealt solely with the batch of methamphetamine made with the phenyl-2-propanone supplied by the agent and that any methamphetamine made prior or subsequent to that batch was not at issue in the trial.

26. Justice Douglas also dissented. His opinion presented a brief reiteration of the minority opinions in *Sorrells* and *Sherman*.

He further argued that focusing on the predisposition of the defendant had the undesirable effect of allowing the introduction of hearsay and other types of prejudicial evidence which would otherwise be inadmissible. As a solution to these problems, Stewart proposed an objective test similar to that proposed by the minorities in *Sherman* and *Sorrells*, which made the availability of the defense rest on the conduct of the government agent rather than on the prior conduct or mental attitude of the defendant. It was Stewart's position that the determination of whether the police conduct fell short of the common standard was a question of law to be determined by the judge, not a subjective question for the jury.²⁷

Justice Stewart's objective test differs from the subjective test of the majority in two ways: it removes the distinction between the "unwary innocent" and the "unwary criminal," and it does not allow the introduction of evidence regarding the defendant's past record and reputation. Stewart believed that the pattern of police conduct in *Russell* constituted entrapment as a matter of law since the government itself had restricted the availability of phenyl-2-propanone, offered it to the unlicensed defendant through its agent and then prosecuted the defendant for producing methamphetamine, the only product for which the phenyl-2-propanone could be used. Although the fact that the defendant had also procured the ingredient elsewhere was crucial to the issue of his predisposition to commit the crime, it had little relevance under Stewart's test.

The decision in *Russell* adds little to the rather vague definition of entrapment which was enunciated in *Sorrells* and affirmed in *Sherman*. For the most part, the Court avoided discussing the policy basis for the defense by simply citing the former cases as authority. However, it may have further restricted the availability of the defense by suggesting that no amount of inducement is excessive if a person is sufficiently predisposed to commit a crime.²⁸ But again the Court made no ef-

27. Justice Stewart would have reversed the decision in the court of appeals solely on the ground that the question of entrapment had been submitted to the jury.

28. 411 U.S. 423, 434. The Court stated:

Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed.

411 U.S. at 434.

fort to define or delineate exactly what constituted sufficient predisposition. *Russell* suggests what *Sorrells* and *Sherman* left for interpolation: police conduct used to lure two defendants into committing the same or a similar crime could make the defense of entrapment available to one, but not to the other if the latter had a prior criminal record, or was considered suspicious or possessed any of the other uncertain parameters of predisposition.

In retaining the *Sorrells* and *Sherman* definitions of entrapment, the Court again failed to set clear guidelines for the application of the defense. By saying that the defendant would be entitled to an acquittal if his crime were conceived of and planned by a government agent *and* the defendant would not have been involved in the criminal activity *but for* the trickery and persuasiveness of the government agent, the Court failed to define what it meant by the predisposition of the defendant to commit a crime. If predisposition is defined to mean predisposition to commit the *exact* crime being tried, it will be almost impossible to prove predisposition because the crime is planned and conceived by the government agent in almost every case in which entrapment is an issue. The use of past convictions as evidence that the defendant was predisposed to commit the crime which raises the entrapment defense presupposes that evidence that a defendant once committed a crime is evidence that he intends to commit similar crimes in the future. If the government can establish predisposition by showing suspicion of a past and present pattern of similar criminal activity, the effect will be to allow into evidence materials which would be either inadmissible or inconclusive in a trial for the suspected crimes. If the evidence had originally been admissible and conclusive, it would not have been necessary to entrap the defendant into the crime for which he is being tried. Furthermore, as Justice Stewart suggests, to make predisposition an issue at all has the effect of allowing into evidence hearsay and gossip.²⁹ Despite instructions to the jury to consider such testimony only in relation to entrapment, this kind of evidence invariably affects the jury's determination of guilt or innocence. The minority view would alleviate this problem by considering entrapment as a matter of law to be determined by the judge.

29. 411 U.S. at 443. In *Sorrells v. United States*, 287 U.S. 435, 451 (1932), the Court stated: "[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue."

Furthermore, the majority's reliance on a presumed congressional intent to exclude defendants who are entrapped by government agents from the purview of criminal statutes is not compelling. First, it is difficult to read any criminal statute in a manner which does not presume that Congress has seen fit to make certain activities illegal, regardless of who masterminded the crime or what the perpetrator's predisposition was.³⁰ Second, reliance on congressional intent leaves open the question of why the defense is not available to someone claiming entrapment by a private individual. If Congress, in enacting federal criminal statutes, did not intend to penalize "innocents" who were lured into criminal activity, there is no reason to distinguish a person entrapped by a private individual from a similar person entrapped by a government agent.³¹ They are both equally innocent.

The minority view, however, also raises problems in that it is unclear what standards should be applied to determine objectionable police conduct. While the majority opinion indicated that there could exist circumstances where the nature of the police conduct would be determinative, it suggested a "shock the conscience" standard similar to that in *Rochin v. California*.³²

30. Mr. Justice Stewart stated:

I find it impossible to believe that the purpose of the defense is to effectuate some unexpressed congressional intent to exclude from its criminal statutes persons who committed a prohibited act, but would not have done so except for the Government's inducements. For as Mr. Justice Frankfurter put it, "the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged." *Sherman v. United States*, [356 U.S.] at 379.

411 U.S. at 441-42 (dissenting opinion).

31. In his dissent, Justice Stewart stated:

That he [the defendant] was induced, provoked, or tempted to do so by government agents does not make him any more innocent or any less predisposed than he would be if he had been induced, provoked, or tempted by a private person—which of course would not entitle him to cry "entrapment."

411 U.S. at 442 (dissenting opinion).

The MODEL PENAL CODE expresses a similar position:

The defendant whose crime results from an entrapment is neither more reprehensible or dangerous nor more reformable or deterrable than other defendants who are properly convicted. Defendants who are aided, deceived, or persuaded by police officials stand in the same moral position as those who are aided, deceived, or persuaded by other persons. It is the attempt to deter wrongful conduct on the part of the Government that provides justification for the defense of entrapment, not the innocence of the defendant.

MODEL PENAL CODE § 2.10, Comment 1, at 14-15 (Tent. Draft No. 9, 1959).

32. 342 U.S. 165 (1952).

Justice Stewart suggested a standard similar to that applied in fourth amendment cases.³³ However, excessively offensive police conduct may be no more conducive of definition than is predisposition. But where the determination is made by the judge, much of the danger inherent in the submission of such questions to the jury is removed.

The Court in *Russell* sought to stifle a trend in the lower courts of interpreting and expanding the entrapment defense "in order to bar prosecutions . . . for . . . 'overzealous law enforcement.'"³⁴ However, since the Court has again failed to set guidelines, the lower courts will probably remain divided as to the applicability of the entrapment defense.

33. 411 U.S. at 443. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

34. 411 U.S. at 435.

Labor Law: Union Racial Discrimination: A Liberalized Standard of Proof

Respondent Mansion House Center Management Corporation discharged its entire staff of eight painters shortly after they had begun to engage in union organizational activities¹ and subsequently refused to bargain with their duly designated bargaining representative. The National Labor Relations Board (NLRB), excluding evidence which supported the employer's defense that the union practiced racial discrimination in its membership policies,² found that the employer had violated the National Labor Relations Act,³ and ordered it to bargain collectively with the union.⁴ Upon application by the Board to enforce its order, the Court of Appeals for the Eighth Circuit ruled that the evidence as to the union's discriminatory practices should have been admitted. The Court denied enforcement of the bargaining order, *holding* that the remedial machinery of the Act cannot constitutionally be made available to a union which is unwilling to correct past practices of racial discrimination. *NLRB v. Mansion House Center Management Corp.*, 473 F.2d 471 (8th Cir. 1973).

Courts have traditionally treated labor unions in a class with other voluntary associations such as church groups and

1. The trial examiner found that two painters had been discharged for allegedly defective work, one for failure to call in sick when he missed a morning's work, and two for no specific reason. The remaining three were discharged shortly thereafter.

2. Mansion House (hereinafter referred to as "the employer") attempted to prove that the union's jurisdictional territory (the St. Louis metropolitan area) is 50 percent non-white, and that the only three black members of that union (out of 375 active members) had transferred from a former Negro local when it disbanded in 1968. The trial examiner, with whom the Board agreed, rejected the evidence, emphasizing that there was no restriction on membership in the union's bylaws or constitution. It felt that the evidence would have had to establish an actual practice of racial discrimination in order to be admissible.

3. 29 U.S.C. §§ 151-68 (1970). The Board found that the employer violated §§ 8(a)(3) and (1) of the Act, 29 U.S.C. §§ 158(a)(3) and (1) (1970), by discharging its entire complement of painting employees because of their union activity; and § 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1970), by refusing to bargain with the union.

4. The Board also ordered the discharged painters reinstated with back pay. This part of the Board's order had been enforced by the court in a prior opinion, *NLRB v. Mansion House Center Mgmt. Corp.*, 466 F.2d 1283 (8th Cir. 1972).

fraternal orders in that arbitrary denials of admission to membership have been regarded as private matters which could not be interfered with by the courts.⁵ However, certain limitations have been placed on this freedom. For example, a number of limitations have been imposed by statute. Title VII of the Civil Rights Act of 1964,⁶ recently amended to allow the Equal Employment Opportunity Commission to bring suit directly,⁷ provides that it is an unlawful employment practice for a labor organization to exclude any individual from membership because of race.⁸ An alternative remedy, allowing the aggrieved party to bring suit without first resorting to administrative processes,⁹ has been provided by a recent construction of the Civil Rights Act of 1866.¹⁰ It has also been suggested that a third federal statute, the National Labor Relations Act,¹¹ can be construed to require an exclusive bargaining representative to admit all the workers it represents into membership.¹² In addi-

5. See, e.g., *Walter v. McCarvel*, 309 Mass. 260, 34 N.E.2d 677 (1941); *Mayer v. Journeymen Stonecutters' Ass'n*, 47 N.J. Eq. 519, 20 A. 492 (Ch. 1890); *Miller v. Ruehl*, 166 Misc. 479, 2 N.Y.S.2d 394 (Sup. Ct. 1938); *Aaron & Komaroff, Statutory Regulation of Internal Union Affairs* pt. I, 44 ILL. L. REV. 425, 426 (1949); *Blumrosen, Legal Protection Against Exclusion from Union Activities*, 22 OHIO ST. L.J. 21 (1961); *Cox, The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 619 (1959); *Hewitt, The Right to Membership in a Labor Union*, 99 U. PA. L. REV. 919, 922, 926-28 (1951); 51 C.J.S. *Labor Relations* § 63 (1967).

6. 78 Stat. 253, 42 U.S.C. § 2000(e) *et seq.* (1970), *as amended* (Supp. II, 1972).

7. 86 Stat. 104 (1972), 42 U.S.C. § 2000(e)(5)(f)(1) (Supp. II, 1972).

8. 42 U.S.C. § 2000(e)(2)(c) (Supp. II, 1972).

9. See *Waters v. Wisconsin Steel Wks. of Int'l Harvester Co.*, 427 F.2d 476, 487 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). The court in *Waters* held, however, that there must be a "reasonable excuse" for failing first to pursue Title VII remedies; but other courts have not imposed such a requirement. See generally D. BELL, *RACE, RACISM AND AMERICAN LAW* 754-55 (1973). For application of this remedy to the employment area, see *Waters, supra* at 483; *James v. Ogilvie*, 310 F. Supp. 661, 663 (N.D. Ill. 1970); *Dobbins v. Local 212, Int'l Bhd. of Electrical Workers*, 292 F. Supp. 413, 442 (S.D. Ohio 1968).

10. 14 Stat. 27 (1866), reenacted 16 Stat. 144 (1870), 42 U.S.C. § 1981 (1970). For a concise history of this statute, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-36 (1968).

11. 29 U.S.C. §§ 151-68 (1970).

12. This argument is based on the duty of fair representation, which the United States Supreme Court has held is imposed upon a statutory bargaining representative by the Railway Labor Act in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), and by the National Labor Relations Act in *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944), and in *Syres v. Oil Workers Int'l Union*, 350 U.S. 892, *rev'g mem.* 223 F.2d 739 (5th Cir. 1955). Cf. *Ford Motor Co. v. Huffman*,

tion, anti-discrimination statutes of varying effectiveness¹³ have been enacted in many states.¹⁴

Another restriction on union membership practices has re-

345 U.S. 330 (1953). The duty of fair representation requires the statutory bargaining representative of a group of employees to protect their interests equally, whether they are union members or not. In 1962, the Board provided another forum for enforcing this duty by holding that a breach of the duty of fair representation was an unfair labor practice within its jurisdiction. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). Although enforcement of the Board's order in *Miranda* was denied, only one member of the court felt that a breach of the duty of fair representation was not an unfair labor practice; the other two did not reach the issue. The Board's position was later reaffirmed in its decision in *Independent Metal Workers Local No. 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964). Since that time, this position has been upheld by the courts. See *Locals 1367 & 1368, Int'l Longshoremen's Ass'n.*, 148 N.L.R.B. 897 (1964), *enforced*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Local No. 12, United Rubber Workers*, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967). Cf. *Vaca v. Sipes*, 386 U.S. 171 (1967).

To date, the duty of fair representation has been used only to require equal protection of the interests of union and non-union members, and has not been applied to compel a union to accept persons into membership. Several commentators have argued that this doctrine should be used to compel a union to admit blacks who have been discriminatorily denied membership, however. See *Cox, supra* note 5, at 620; *Hewitt, supra* note 5, at 936-39; *Jones, Equal Employment Opportunities: The Promises of the 60's—The Realities of the 70's*, 2 BLACK L.J. 5, 11 (1972); *Wellington, The Constitution, the Labor Union, and "Governmental Action"*, 70 YALE L.J. 345, 359 (1961). The line of reasoning which could be used to accomplish this is that a union which discriminates in its membership policies continues to discriminate in representation by not representing fairly those workers whom it has excluded from membership, and therefore, in order to guarantee fair representation, the statutory duty of fair representation should be interpreted to require unions acting as the statutory bargaining representative to admit black employees to membership. *But see Moynahan v. Pari-Mutuel Employees Guild*, 317 F.2d 209 (9th Cir.), *cert. denied*, 375 U.S. 911 (1963) (holding that the duty of fair representation does not limit a union's right to choose its members); *Rosen, Law and Racial Discrimination in Employment*, in *EMPLOYMENT, RACE, AND POVERTY* 487-90 (A. ROSS & H. HILL, eds. 1967) (a discussion of the weaknesses of this duty).

13. See, e.g., D. BELL, *supra* note 9, at 751-52; *Bonfield, An Institutional Analysis of the Agencies Administering Fair Employment Practices Laws* (pts. I-II), 42 N.Y.U.L. REV. 823, 1035 (1967); *Hill, Twenty Years of State Fair Employment Practice Commissions*, 14 BUFFALO L. REV. 22, 23-25 (1964).

14. See D. BELL, *supra* note 9, at 751. In Minnesota, such a remedy is available under MINN. STAT. § 363.03 (1971), and is enforceable by the Commissioner of Human Rights. See generally *Auerbach, The 1969 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioner's Model Anti-Discrimination Act: A Comparative Analysis and Evaluation*, 55 MINN. L. REV. 259 (1970).

sulted from the relation between unions and the NLRB. The United States Supreme Court has held that state action in support of private racial discrimination contravenes both the fifth and fourteenth amendments to the United States Constitution.¹⁵ Although no federal court has ruled directly on the applicability of this doctrine to Board action,¹⁶ the Board itself has held in *Independent Metal Workers Local No. 1 (Hughes Tool Co.)*¹⁷ that constitutional restraints prevent it from aiding union racial discrimination in any way, and that it must rescind the certification of any union which so discriminates. The effect of this ruling has been limited, however, since the Board has required that an actual practice of racial discrimination be shown before it would act under the *Hughes Tool* doctrine,¹⁸ thereby virtually

15. See *Shelley v. Kraemer*, 334 U.S. 1 (1948). Although the fifth amendment contains no equal protection clause, the fifth amendment's due process clause has been held to forbid discrimination that is "so unjustifiable as to be violative of due process." *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954). In this comment, "state action" will be used in a broad sense, encompassing the restrictions placed on the federal government by the fifth amendment as well as those placed on state governments by the fourteenth amendment.

16. Several opinions, however, have indicated that constitutional limitations would apply to Board action enforcing private racial discrimination. See *NLRB v. Pacific Am. Shipowners' Ass'n.*, 218 F.2d 913, 917 n.3 (9th Cir.) (separate opinion of Judge Pope), *cert. denied*, *National Union of Marine Cooks v. NLRB*, 349 U.S. 930 (1955); *Syres v. Oil Workers Local 23*, 223 F.2d 739, 745 (5th Cir.) (dissenting opinion of Judge Rives), *rev'd mem.*, 350 U.S. 892 (1955). In *Todd v. Joint Apprenticeship Comm. of Steel Workers*, 223 F. Supp. 12 (N.D. Ill. 1963), *remanded to be dismissed as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965), the court found that the actions of three public agencies supported and assisted the Steelworkers' union in its practice of racial discrimination in its membership policies in violation of the Constitution; but because the court ordered the union, and not the public agencies, to cease and desist from the discriminatory practices, it would appear that the actual holding was that the union was a quasi-governmental agency itself subject to constitutional restraints. See Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums*, 46 WASH. L. REV. 455, 482 (1971).

17. 147 N.L.R.B. 1573, 1577 (1964). Cf. *Pioneer Bus Co.*, 140 N.L.R.B. 54 (1962).

18. The trial examiner in *Mansion House Center Mgmt. Corp.*, 190 N.L.R.B. No. 78, at 14 (1969) held:

The proof so offered fails to establish that the union excludes non-whites from membership. . . . Respondent cannot make out a case of "de facto" segregation merely on the basis of the population division it refers to. Rather, Respondent would have to establish that in actual practice the union has received membership applications from blacks or other non-whites and has rejected them on racially discriminatory grounds. Respondent's offer of proof does not go this far and, obviously, such facts will not be assumed.

foreclosing use of this remedy.¹⁹

In *Mansion House*, the Eighth Circuit extended the *Hughes Tool* proscription to prohibit not only the certification of a discriminatory union but also the issuance of a bargaining order at the request of such a union.²⁰ Of greater significance, however, is the court's decision to require the Board to apply a more liberal standard of proof to allegations of racial discrimination. The standard proposed by the court is similar to the standard used in Title VII²¹ cases which consider statistical evidence or evidence of past discriminatory practices as sufficient to form a prima facie case of racial discrimination.²² Once a prima facie

Accord, *Nat Harrison Associates*, 177 N.L.R.B. 113, 120-21 (1969). Cf. *Sheraton Park Hotel & Motor Inn*, 199 N.L.R.B. No. 104 (1972); *American Mailing Corp.*, 197 N.L.R.B. No. 33 (1972) (both cases deal with sex discrimination).

19. In the eight years since the *Hughes Tool Co.* decision, the Board has found proof of racial discrimination sufficient in none of the relatively small number of cases in which the issue was raised. Supplemental Brief for Petitioner at 5, *NLRB v. Mansion House Center Mgmt. Corp.*, 473 F.2d 471 (8th Cir. 1973). See also Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 596 (1962).

20. The court quickly disposed of two arguments made against its extension of *Hughes Tool*. First, the union contended that section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A) (1970), which provides that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein," indicated a clear congressional policy in favor of noninterference with the membership requirements of labor unions. Such noninterference, in order to have any meaning, would require that unions who exclude blacks from membership nevertheless be able to use federal and administrative processes to compel an employer to bargain. The court quoted from the legislative history to support its decision that this proviso applied only to section 8(b)(1)(A) and had no effect on the issuance or withholding of a bargaining order. Thus, a union which excludes blacks may not be found in violation of section 8(b)(1)(A); however, this does not preclude the use of other remedies against the union based on other sections of the Act. See also *Hughes Tool*, 147 N.L.R.B. at 1601 (trial examiner's report); Blumrosen, *supra* note 5, at 28; Sovern, *supra* note 19, at 583 & n.80; Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 GEO. L.J. 457, 471-72 (1962).

The second argument raised was that the issue of racial discrimination had been brought up by the employer in bad faith, since it had not originally been mentioned to the union as the reason for the employer's refusal to bargain. The court replied that constitutional limitations on the Board's process require recognition of the charge nevertheless, but that the Board could develop procedures to insure in the future that such allegations are not pretextual. See Sovern, *supra* note 19, at 606.

21. See note 6 *supra*.

22. See *United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301, 307, 311-12 (8th Cir. 1972), *cert. denied*, *United Transp. Union v. United States*, 409 U.S. 1107 (1973); *United States v. United Bhd. of*

case is established, the party accused of the discrimination must either rebut the evidence presented or show some affirmative conduct²³ which he has instituted to conform his racial policy to the law. The court in *Mansion House* stated:

[S]tatistical evidence may well corroborate and establish that a union has been guilty of racial practices in the past. In face of such proof, passive attitudes of good faith are not sufficient to erase the continuing stigma which may pervade a union's segregated membership policies. . . . When evidence suggests discrimination of [sic] racial imbalance the Board should inquire whether the union has taken the initiative to affirmatively undo its discriminatory practices.²⁴

Presumably, the Board is then required to weigh the union's affirmative conduct against the evidence presented by the aggrieved party in order to reach a conclusion as to whether or not a sufficient residue of discrimination persists so as to prevent it from acting in support of that discrimination. At some point, the union's showing of affirmative conduct will be strong enough to overcome the statistical evidence presented against it, and the charge of discrimination will fail unless the accusing party has shown stronger evidence of discrimination (such

Carpenters Local 169, 457 F.2d 210, 214 (7th Cir.), cert. denied, 409 U.S. 851 (1972); Carter v. Gallagher, 452 F.2d 315, 323, 328 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 443 F.2d 544, 550-51 (9th Cir.), cert. denied, 404 U.S. 984 (1971); Marquez v. Omaha Dist. Sales Office, 440 F.2d 1157, 1161 (8th Cir. 1971); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426-27 (8th Cir. 1970); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 127-28 (8th Cir. 1969); Comment, *Civil Rights Act of 1964: Racial Discrimination and Union Membership*, 27 WASH. & LEE L. REV. 323 (1970).

23. The court cited *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), as supporting its conclusion that once past racial discrimination has been shown, "passive attitudes of good faith are not sufficient." 473 F.2d at 477. Thus, being neutral is not enough; some affirmative action to counteract the effects of past discrimination is required. *Griggs*, however, dealt with a specific procedure (testing) which resulted in perpetuation of the past discrimination.

In *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969), also cited by the court in *Mansion House*, the court agreed with the government's contention that "[Title VII] casts upon those subject to its provisions not merely the duty to follow racially neutral employment policies in the future but an obligation to correct or revise practices which would perpetuate racial discrimination." 416 F.2d at 127. The court in *Sheet Metal Workers* noted that the reputation of the local's previously discriminatory membership policies was enough to perpetuate the past discrimination even if a neutral policy were followed in the future. This would also appear to be true in the present case.

For a discussion of the effect of a statistical showing upon the defendant in Title VII cases, see Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 91-93 (1972).

24. 473 F.2d at 477.

as evidence of the kind which was required under the Board's stricter standard).²⁵

The Board's standard, which was rejected by the court in *Mansion House*, had possibly been borrowed from cases in which it was alleged that a union should be barred from representational rights because of a conflict of interest.²⁶ A strict standard of proof was considered appropriate in these cases because of the presence of a strong public policy favoring the free choice of a bargaining agent²⁷ which would be frustrated if the conflict of interest were shown. This reasoning is less clearly applicable where racial discrimination is asserted to bar representational rights. Although the same policy favoring the free choice of a bargaining agent is present, it is counterbalanced by an even stronger constitutionally-based public policy against racial discrimination.²⁸ Moreover, in the conflict of interest cases, the facts which make the union an inappropriate bargaining agent usually are obvious and susceptible of proof by direct evidence. Acts of racial discrimination, however, are often subtle and diffi-

25. In *United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301, 307 (8th Cir. 1972), *cert. denied*, *United Transp. Union v. United States*, 409 U.S. 1107 (1973), evidence of continuing discrimination was found in the parties' seniority policy which gave credit for service rendered during the period of discrimination; in *Marquez v. Omaha Dist. Sales Office*, 440 F.2d 1157, 1161-62 (8th Cir. 1971), such evidence was found in the company's failure to give an employee the necessary experience and promotions during the period of discrimination; in *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 426-27 (8th Cir. 1970), evidence of continuing discrimination was found in the employer's policy of hiring new workers through the recommendations of its existing and mostly white work force; and in *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123, 129 (8th Cir. 1969), the evidence was found in the union's referral system which gave priority to employees with experience gained during the discrimination period.

26. Cf. Supplemental Brief for Petitioner at 6, *NLRB v. Mansion House Center Mgmt. Corp.*, 473 F.2d 471 (8th Cir. 1973). Such a conflict of interest could occur, for example, when a union is operating a business in direct competition with the employer.

27. There is a strong public policy favoring the free choice of a bargaining agent by employees. This choice is not lightly to be frustrated. There is a considerable burden on a nonconsenting employer, in such a situation as this, to come forward with a showing that a danger of a conflict of interest interfering with the collective bargaining process is clear and present.

NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1st Cir. 1968). *Accord*, *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, 178 (8th Cir. 1969); *General Electric Co. v. NLRB*, 412 F.2d 512, 516-20 (2d Cir. 1969).

28. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring in part and dissenting in part); *United Packinghouse Workers Int'l Union v. NLRB*, 416 F.2d 1126, 1136-37 (D.C. Cir.), *cert. denied*, *Farmer's Cooperative Compress v. United Packinghouse Workers Int'l Union*, 396 U.S. 903 (1969).

cult to prove directly.²⁹ If direct proof is required, many injured parties or parties who will foreseeably be injured by the union's discriminatory practices will be left without a legal remedy.

Adoption of the more liberal Title VII standard gives recognition to the constitutional policy involved and provides a means of reaching subtle forms of discrimination. The standard does raise several problems, however. First, frivolous assertions of racial discrimination under the liberalized standard may benefit employers who wish to thwart or delay union organization. An unfounded charge of racial discrimination could delay a union's organizational drive long enough to cause it to lose momentum and fail, even if the union were finally adjudged innocent of the discrimination. In response to this danger, one commentator has argued that although this possibility exists, there are already numerous ways by which an employer may delay a union organizational campaign. In his opinion, the addition of one more method would not add to the union's burden.³⁰ But since one of the purposes of federal labor legislation is to protect the employees' right of self-organization and designation of representatives of their own choosing,³¹ the courts should attempt to reduce rather than increase the possible means of avoiding legitimate unionization. A better argument supporting the more liberal standard despite this danger is that, given the strong public policy and constitutional implications involved, it is better to risk some delay in unionization than to entrench a discriminatory union. The Eighth Circuit has indicated that the Board possesses authority to develop procedures to insure that the defense of union racial discrimination is not raised in bad faith.³² Such safeguards, if implemented, should suffice to eliminate most improper invocations of this defense.

A second problem raised by the court's adoption of the Title VII standard comes from its failure to define what exactly will

29. [U]nion racism generally . . . takes subtle forms virtually impossible of proof. Made-to-order opportunities for unprovable racism exist in the common union practice of conditioning jobs and job training upon satisfaction of discretionary criteria. The skilled construction trades unions in particular impose discretionary barriers at every critical juncture in the occupational life of one aspiring to or in the trade.

Boyce, *Racial Discrimination and the National Labor Relations Act*, 65 *Nw. U.L. Rev.* 232, 242 (1970). Cf. *Sovern*, *supra* note 19, at 598-99.

30. See *Sovern*, *supra* note 19, at 606.

31. 29 U.S.C. § 151 (1970).

32. 473 F.2d at 474-75. The court, however, did not indicate what the nature of those procedures should be.

be considered to be sufficient affirmative conduct on the part of the union so as to rebut the presumption raised by the statistical evidence that it does in fact discriminate. The court apparently felt that the transfer of three blacks from a defunct Negro local and the acceptance of a signed authorization card from another was not enough. A related question arises when the union has failed to rebut that presumption and has been found guilty of discrimination. It is not clear from the court's opinion in *Mansion House* what the union must now do in order to regain the protection of the National Labor Relations Act. Although the answers to both these questions will depend to a large extent on the facts of each particular case, some general guidelines would be desirable. It does appear, however, that the court has put a fairly heavy burden upon the union when it attempts to show affirmative conduct.

Despite these difficulties, the decision in *Mansion House* does effectively attack union racial discrimination by denying unions which practice this type of discrimination the support and protection of the National Labor Relations Act. Several writers have gone further, however, and advocated making the union itself subject to constitutional restraints³³ in order to affirma-

33. See Hewitt, *supra* note 5, at 939; Wellington, *supra* note 12, at 359. *But see* Cox, *supra* note 5, at 620.

Three theories have been espoused under which a labor union could be held subject to constitutional restraints. In the first place, unions are clothed with a great deal of power by the Act. For example, Board recognition of a union requires an employer to bargain with that union to the exclusion of any other. See, e.g., *North Elec. Mfg. Co. v. NLRB*, 123 F.2d 887 (6th Cir. 1941); *Texarkana Bus Co. v. NLRB*, 119 F.2d 480 (8th Cir. 1941). It strips individual employees of all powers to deal with the employer except through the recognized union. See, e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944). And once the recognized union wins a certification election and signs a contract with the employer, there may be a period of up to four years during which the union is protected by the Board from divestiture of its exclusive bargaining status. See Weiss, *supra* note 20, at 472. (Since Weiss wrote, the contract bar has been extended from two to three years, thus extending the total period of protection from three to four years.) It is argued that this power and protection given to the union makes it, in effect, a private government, subject to constitutional limitations. See A. MILLER, *PRIVATE GOVERNMENTS AND THE CONSTITUTION* (Occasional Paper for Center for the Study of Democratic Institutions, 1959); A. PEKELIS, *LAW AND SOCIAL ACTION* 91-128 (1950); Hewitt, *supra* note 5, at 923-25, 940; Wellington, *supra* note 12, at 359.

A second argument is that the union, operating with the sanction of the federal government behind it, has become an agency of the government, performing a delegated governmental function. See *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946); Cox, *supra* note 5, at 620; Hewitt, *supra* note 5, at 939. *Contra*, *Ross v. Ebert*, 275 Wis. 523,

tively require it to accept blacks into membership.³⁴ Because

82 N.W.2d 315 (1957); Wellington, *supra* note 12, at 357-58. This is the basis for the decisions in the "white primary" cases. Terry v. Adams, 345 U.S. 461 (1953); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Herndon, 273 U.S. 536 (1927). These cases held that a similar delegation of authority to administer the electoral process made the private groups to whom the authority was successively delegated subject to the state action provisions of the fourteenth and fifteenth amendments. However, since these cases dealt with the very basic right of voting, their applicability to membership in a labor union can be questioned. Cf. Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 22 (1961). Also, it has been argued that there is little transferability between the concepts of state action under the fourteenth and fifteenth amendments. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 22 (1959). The analogy made to the "white primary" cases, therefore, may not be valid insofar as they refer to the fifteenth amendment. More in point is the dissenting opinion of Mr. Justice Douglas in Black v. Cutter Laboratories, 351 U.S. 292, 302 (1956), which indicated that the constitutional limitations on state action are applicable to labor unions as agencies of the federal government. Cf. Todd v. Joint Apprenticeship Comm. of Steel Workers, 223 F. Supp. 12 (N.D. Ill. 1963), *remanded to be dismissed as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965) (discussed previously in note 16, *supra*). However, the majority in *Black*, having found no substantial federal question presented, dismissed the writ of certiorari and thus failed to reach the merits.

A final argument which could be made is that because of the elaborate scheme of protection and regulation of this area of society, the formerly private conduct of the labor union has become so entangled with government policies and so impregnated with government character as to become subject to the constitutional limitations placed on state action. See Hewitt, *supra* note 5, at 940; Wellington, *supra* note 12, at 358. This was the holding in Evans v. Newton, 382 U.S. 296 (1966), which involved management of a private park by a group of public officials, and in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), which held that a private restaurant operated inside a government-owned parking ramp could not constitutionally deny service to blacks. The district court in Ethridge v. Rhodes, 268 F. Supp. 83, 87-88 (S.D. Ohio 1967), suggested in dictum that because of the joint participation between the state and certain contractors, the provisions of the fourteenth amendment applied to both the private contractors and the state. However, since the court ordered only the state to refrain from acting in violation of the fourteenth amendment by entering into contracts with contractors who hired their workers only from union sources which discriminated against blacks, the actual decision did not rest on a finding that the private contractors had violated the Constitution. The strength of all these precedents may be somewhat diminished by the recent Supreme Court decision in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), which held that the actions of a private fraternal organization in denying service to a black guest of a member did not violate the Constitution, despite the presence of a pervasive system of state regulation of liquor-serving establishments.

34. This is not to say, of course, that the union could not exclude a black or a white from membership for good cause, such as a desire on the part of the applicant to destroy the union from within.

other remedies were incomplete,³⁵ this extension of the state action theory might have been highly desirable at one time. However, recent developments in statutory remedies³⁶ have made a major innovation in constitutional law unnecessary to remedy racial discrimination, and in several areas the courts have begun to use these expanded statutory alternatives in place of the state action theory.³⁷ But because the closest statutory substitute

35. Despite recent amendments to Title VII of the Civil Rights Act of 1964, *supra* note 7, which expand the power of the Equal Employment Opportunity Commission (EEOC) to deal with racial discrimination in this area, a more direct avenue of redress for an aggrieved party remains desirable. Private suit under Title VII can be brought only after the EEOC has been given an opportunity to settle the matter. *Watson v. Limbach Co.*, 333 F. Supp. 754, 762 (S.D. Ohio 1971). See also *Besser, Recent Developments in Equal Employment Opportunity Litigation*, 22 CLEVELAND STATE L. REV. 72, 87-89 (1973). The EEOC can initiate action only after state remedies have been pursued. *EEOC v. Union Bank*, 408 F.2d 867, 870 (9th Cir. 1968). See also *D. BELL, supra* note 9, at 752-55; *Besser, supra* at 92-94. In addition, certain records of the Commission's endeavors to reach a conciliation are inadmissible as evidence. 42 U.S.C. § 2000(e)(5)(b) (1972 Supp.). *But cf. Besser, supra* at 97-100. Finally, there is criticism that the EEOC operates inefficiently. See, e.g., *D. BELL, supra* note 9, at 754; *Levine & Montcalmo, The Equal Employment Opportunity Commission: Progress, Problems, Prospects*, 22 LAB. L.J. 771, 773-74 (1971).

The Civil Rights Act of 1866, *supra* note 10, does provide such a direct means of suit for an aggrieved party, but it was not until 1968 that this remedy was recognized in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Also, as noted in the text accompanying notes 38-39 *infra*, this statute applies only to racial discrimination, and so another remedy providing for immediate private suit to redress other types of discrimination may still be desirable.

Finally, as mentioned previously, the duty of fair representation has not yet been construed to prohibit discrimination in membership. See note 14 *supra*. State statutes, though enacted in many states, are not always effective. See note 13 *supra*.

36. Two major developments have recently taken away much of the pressure for expansion of the constitutional theory. One of these is the amendment of Title VII to allow the Equal Employment Opportunity Commission to bring suit in its own right against unions (and other private parties) who practice racial discrimination in violation of that Act. This provides a remedy for the worker who does not have the resources to bring suit in his own right. The second development is the resurrection of the Civil Rights Act of 1866. See note 10 *supra*. This alternative provides a remedy for those aggrieved parties who do not wish to first pursue administrative remedies under Title VII.

37. This has been most evident in the housing area under section 1982 of the Civil Rights Act of 1866, 42 U.S.C. § 1982. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968.) In both these cases the Supreme Court appears to have preferred the statutory solution provided by the Civil Rights Act for issues which could easily have been covered by the state action doctrine. *Cf. Sullivan, supra* at 236.

A similar development seems to be occurring in the employment

for such a constitutional development, the Civil Rights Act of 1866,³⁸ is applicable *only* to racial discrimination,³⁹ subjecting the union itself to constitutional restraints may yet be desirable to remedy other kinds of discrimination, such as discrimination on the basis of sex⁴⁰ or the discrimination against a white male which might result from a union nepotism policy.⁴¹ One result of imposing constitutional limitations on a labor union might be to require the union to accept *all* workers which it represents into membership,⁴² thereby shifting the ultimate burden of proof in all union discrimination cases. Thus, instead of an aggrieved worker being required to prove discrimination in order to force his own admission into a union, the union would be required to show good cause why the worker should not be admitted.

Mansion House, however, appears to have foreclosed further development along a constitutional line in the Eighth Circuit.

area. In *Waters v. Wisconsin Steel Wks. of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970), a class action was brought under section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, against both the employer and the union for allegedly together maintaining a discriminatory hiring policy. The court rejected the defendants' argument that *Jones* should be distinguished because the state action cases, such as *Shelley v. Kraemer*, 334 U.S. 1 (1948), had foreshadowed the use of section 1982, but that similar foreshadowing was not present under section 1981. The court replied:

If, by foreshadowing, the defendants mean that the state action concept has sometimes been employed in a flexible fashion to achieve just results, the cases upon which they rely foreshadow the demise of the requirement of state action under § 1981 as well. Furthermore, it is mistaken to suggest that courts have not used similar means to circumvent the requirement of state action in the area of employment contracts. See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 . . . (1944).

427 F.2d at 483 (emphasis added). Thus, the courts in the employment area have also perceived the Civil Rights Act of 1866 as a substitute for the state action doctrine. If this interpretation is correct, it can be expected that the same trend will be followed increasingly in all areas covered by this statute. Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

38. The Civil Rights Act of 1866 is the only statutory alternative which allows immediate private suit by the aggrieved party.

39. "All persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens* . . ." (emphasis added). 42 U.S.C. § 1981. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

40. Sex discrimination is prohibited by Title VII, but as noted in note 35 *supra*, that Act does not provide for immediate private suit by the aggrieved party.

41. None of the existing civil rights statutes would cover this situation.

42. This result could be reached by application of the due process clause of the fifth amendment. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The court observed in dictum that "[a]lthough the union itself is not a governmental instrumentality the National Labor Relations Board is."⁴³ This dictum was unnecessary to support the court's holding⁴⁴ and might better have been omitted so as to leave resolution of this question to a case which clearly raised the issue. The fact that it was included, however, may give this case a certain added significance beyond that of the decision alone.

On one level, therefore, the impact of the decision in *Mansion House* will be to allow the Board to tighten its procedures for dealing with unions (and certainly employers) which discriminate on the basis of race. Although the decision does not necessarily set Board policy,⁴⁵ it does provide an opportunity for the Board to change the standard it had been using. Given the increasing concern with racial discrimination, it is likely that the Board will adopt the court's view as to the standard of proof necessary to show discrimination, thereby making a number of sanctions more readily available. How much actual effect the reasoning of *Mansion House* will have on union racial discrimination is debatable,⁴⁶ but it does seem clear that it will have a

43. 473 F.2d at 473.

44. The Supreme Court case cited by the Eighth Circuit in support of this statement does not, in fact, support that portion which says that the union is not a "government instrumentality." In *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), the Supreme Court ruled that the National Labor Relations Board was a "federal agency"; the case did not consider the question of whether the union was one. The court in the present case possibly felt that the first part of their statement in question was obvious and needed no support. But this is not so clearly the case, as discussed in note 33 *supra*.

Inclusion of this dictum can probably be explained by the court's desire to disapprove the racial discrimination while at the same time getting the court involved in the internal affairs of a union as little as possible, and by the presence of an unfavorable precedent. The court may have felt constrained by *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959), where the Sixth Circuit refused to compel admission of a group of black railroad firemen into membership in a railroad union which was limited to whites only by its constitution. *Accord*, *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957).

Either of these objectives in including the dictum could have been reached equally well without it, however, since simply ignoring the issue would still have allowed the court to reach the same decision.

45. The Board could seek to obtain contrary decisions in other circuits, thereby setting the stage for possible review by the Supreme Court due to conflict among the circuits.

46. Compare *Sovern*, *supra* note 19, at 606-08, and *Herring*, *The "Fair Representation Doctrine: An Effective Weapon Against Union Racial Discrimination?"*, 24 *MD. L. REV.* 113, 162 (1964), with *Wellington*, *supra* note 12, at 372. Most international unions, however, do not now

significant effect at least in the case of economically weaker unions which need the power of the Board behind them in order to survive. It is noteworthy in this respect that the sanction established by this case is one which is, in effect, initiated by the employer rather than by the National Labor Relations Board. This may result in its more frequent use.

On another level, however, the inclusion of the dictum that a union is not a government instrumentality may pose an obstacle to further efforts to require exclusive bargaining representatives to admit all the employees they represent. The expansion of the state action doctrine to include the actions of a labor union would be an easily available theory on which to premise the protection of groups not covered by present anti-discrimination statutes, since it has received much attention from the courts and commentators.⁴⁷ Unless distinguished,⁴⁸ however, the dictum in *Mansion House* would seem to foreclose this possibility, at least in the Eighth Circuit. More importantly, it seems to indicate a reticence on the part of the Eighth Circuit to entertain further progress along constitutional lines. The result will probably be to stimulate activity toward establishing another theory by which similar results can be obtained.⁴⁹

favor discriminatory membership policies and may be prodded by this fresh handicap to their organizational efforts to bring recalcitrant locals into line. See Hewitt, *supra* note 5, at 921; Sovern, *supra* note 19, at 608.

47. See note 33 *supra*.

48. This case could be distinguished in this respect on the ground that, despite the fact that a union is not a governmental instrumentality, it can still be held subject to constitutional restraints on either the "power theory" or the "entanglement theory," both of which are discussed in note 33 *supra*.

49. One likely possibility would be expansion of the duty of fair representation to require a union to admit all the employees it represents. See note 12 *supra*. Such a result would probably shift the ultimate burden of proof in denial of membership cases: Instead of the excluded worker being required to prove discrimination, the union would probably be required to show good cause for exclusion.